

Reference: RGL 83-01

Subject: NATIONWIDE PERMIT-GENERAL

Title: NATIONWIDE PERMITS, GENERAL ISSUES

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Originator: DAEN-CWO-N

Description: GENERAL POLICIES ON DISCRETIONARY AUTHORITY, 401 CERTIFICATION, REGIONAL CONDITIONING, AND MEANING OF SPECIFIC NATIONWIDE PERMITS.

1. The nationwide permit program is one of our fundamental tools for reducing unnecessary paperwork and duplication and is proving itself successful in accomplishing these goals. The program should not be viewed or administered as a means of skirting the Section 404 permit program, but rather as a means of concentrating our limited resources in the most important areas. The Corps retains regulatory control over activities authorized by nationwide permits. The discretionary authority provisions of the Interim Final Regulations should be used as necessary and where appropriate to adapt the nationwide permits to address significant regional concerns for the aquatic environment.

2. State Water Quality and CZM Certification.

a. A number of states have responded to the 22 July 1982 regulations with denials of or concerns over 401 or CZM certification for some or all of the nationwide permits: (1) 401 Certification - Alaska, California, Florida, Illinois, Michigan, Minnesota, Missouri, Pennsylvania, Rhode Island, and Vermont; and (2) CZM Certification - Alaska, Massachusetts, Michigan, and North Carolina. However, by that time waiver had already occurred based on the certification waiver assumption as published on 19 September 1980 in the proposed rules. Therefore, the nationwide permits are in effect everywhere except in Wisconsin as specified in the interim final regulation. While some of the states indicated their intent to reserve their certification decision until final rules were issued, there is no provision in Section 401 of the Clean Water Act (CWA) or in the CZM Act for this action. Those states which objected to the proposed nationwide permits have been informed that regional conditioning authority was incorporated into the rules specifically to address their concerns and that they should contact the appropriate district engineer to discuss the development of appropriate conditions.

b. All states are being afforded an opportunity to update their position on 401 and/or CZM certification in response to proposed rules to be published early this year. Changes to certification actions taken by any state before the final regulations are published will

be applied to the reissued nation- wide permits. In the interim, districts and divisions may commence or continue negotiations with the appropriate state agencies in an effort to reduce their concerns through appropriate regional conditioning.

3. Discretionary Authority. In addition to requiring an individual permit on a case-by-case basis, division engineers can modify nationwide permits through either regional or individual conditions.

a. Division engineers are not authorized to add regional conditions which, in effect, would override the basic coverage of the nationwide permits. In cases where the division engineer believes that the activity or area should be regulated on a case-by-case basis, the procedures of 330.7(b) should be followed. For example: Part 330.5(a)(18) authorizes the discharge of 10 cubic yards of dredged or fill material into waters of the United States. A regional condition to prevent the discharges authorized under (18) during a critical fish migration period would be within the division engineer's authority. However, conditioning to preclude the activity completely for a stream or river basin or to reduce the quantity to 5 cubic yards would require CDR USACE approval.

b. Division engineers may add conditions for an individual activity covered by a nationwide permit consistent with 33 CFR 330.7.

c. There is no requirement within Section 330.7(b) for the issuance of a public notice prior to, during, or following a district engineer's deliberations on whether or not to exert discretionary authority on a case-by-case basis. In fact, such a notice could defeat the fundamental intent of the regulation which relies upon the best judgment of the district engineer after concurrence by the division engineer to make decisions concerning local factors which cannot be adequately addressed in a nationwide perspective. Once a decision is made to require an individual application, all standard regulatory requirements must be fulfilled.

4. General Procedures. There are several General points of clarification that are considered necessary.

a. When an individual permit has been denied either through standard procedures or after assumption of discretionary authority to require individual permits, and a nationwide permit is then reissued authorizing the activity, the denial stands.

b. If a person proposing to conduct an activity covered by a general permit specifically requests that the activity be regulated on an individual permit basis in lieu of the general permit, the district engineer will remove the activity from the general permit coverage and accept and process the application for an individual permit if the reasons cited by the applicant are adequate to support the request.

5. Guidance on Specific Nationwide Permits.

a. Survey Activities. The nationwide permit at 33 CFR 330.5(a)(6) does not authorize exploratory-type bore holes for oil and gas exploratory drilling. However, the plugging of such holes is authorized.

b. Outfall Structures, Intake Structures, and Utility Lines. The nationwide permit at 33 CFR 330.5(a)(7) is applicable to Section 10 waters only. Part 33 CFR.330.5(e)(12) applies to 404 only. The requirement for Section 10 permits must be met by processing of an individual permit or by compliance with 33 CFR 330.5(a)(7).

c. Structures on the Outer Continental Shelf. 33 CFR 330.5(a)(8) authorizes structures for the exploration, production, and transport of oil, gas, and minerals on the Outer Continental Shelf. This nationwide permit is a Section 10 authorization only, since jurisdiction under the Clean Water Act extends only three miles into the oceans, not on the Outer Continental Shelf.

d. Bulkheads. Bulkheads and backfill are authorized under 33 CFR 330.5(a)(18) so long as the purpose is bank stabilization and all other conditions are satisfied.

e. Ten Cubic Yard Discharges. The nationwide permit described at 33 CFR 330.5(a)(18) is applicable to both Section 10 and Section 404 waters.

f. Discharges Associated with Surface Coal Mining. 33 CFR 330.5(a)(21) authorizes structures, work, and discharges associated with surface coal mining. Surface coal mining regulations are found at 33 CFR 773.13. Following completion of their review, district commanders should provide a brief written statement to the Office of Surface Mining or the state indicating their final determination. This nationwide permit does not apply to open-water coal dredging. When Corps FOA's receive applications for coal dredging, the public notice shall be furnished to the Office of Surface Mining and/or the appropriate state agency.

g. Section 10 Permits When a State is Administering its own 404 Permit Program. Sections 404 (g)-(1) authorize states with approved programs to administer the 404 program except in waters that are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce (including adjacent wetlands). The 404 transfer would thus include those waters that are designated as navigable waters of the United States based on historical use only. When a state develops an acceptable permit program to assume the Section 404 program, the nationwide permit at 33 CFR 330.5(a)(24) would be the Section 10 permit for discharges of dredged or fill material in navigable waters of the United States that were based on historical use only.

6. Districts and divisions are reminded of the requirements in Section 330.7 for notifying DAEN-CWO-N when discretionary authority is exerted either through regional conditioning or by requiring an individual permit application. Notification of denial of a request for discretionary authority should also be forwarded to this office. In order to satisfy a request from the Assistant Secretary of the Army, your submittal should include

a brief fact sheet on each case. Your cooperation and timely compliance with these requirements are especially important during this period of intense interest in this aspect of the regulatory program.

FOR THE COMMANDER: