

Reference: RGL 84-10

Subject: NATIONWIDE PERMIT DISCRETIONARY AUTHORITY

Title: CONSIDERATIONS OF FAIRNESS & EQUITY IN IMPLEMENTING THE DISCRETIONARY AUTHORITY UNDER 330.7

Issued: 08/08/84 Expires: 12/31/86

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**Description: PROVIDES GUIDANCE ON QUESTIONS OF FAIRNESS WHEN
ASSERTING DISCRETIONARY AUTHORITY TO REQUIRE INDIVIDUAL
RATHER THAN NATIONWIDE PERMITS.**

1. The current wording of 33 CFR 330.7 is rather brief, relying upon the sound judgment of division engineers to implement their discretionary authority under that section fairly and with due regard for the rights and interests of all parties concerned. It is my understanding that division engineers normally have followed sound principles of equity and fairness when acting under 330.7. Nevertheless, this RGL will serve as a reminder and guide on that subject.

2. Before acting to assert any of the forms of discretionary authority authorized under Section 330.7, the division engineer should, to the maximum extent practicable, seek the views of and consult with those persons and governmental agencies affected by or interested in such an assertion. The circumstances of each case will dictate the appropriate means and manner of such consultation.

3. An area of particular sensitivity is the division engineer's authority to set aside an authorization under a nationwide permit for a particular proposed activity, thereby requiring that the person proposing to conduct that activity submit an application for an individual permit. To the maximum extent practicable, the division engineer should attempt to consult with the person who would be required to submit an individual permit application and with other interested parties and the appropriate federal, state, and local governmental agencies before making a final decision on assertion of the discretionary authority under 330.7.

4. Permit regulations do not preclude the district engineer from responding to inquiries from the public regarding nationwide permit coverage of specific activities. District engineers are encouraged to use their judgment in such responses. In cases of reasonable

doubt as to the potential for the division engineer subsequently to assert discretionary authority, district engineers may wish to consult with the division engineer. In all cases where the nationwide permit coverage has been affirmed but the division engineer has not made an explicit decision on whether to assert discretionary authority, the nationwide permittee should be advised of the provisions of Section 330.7.

5. Where a party has acted in justifiable reliance on a nationwide permit (particularly where a district or division office has found a proposed activity to be within a nationwide permit authorization), principles of fairness and equity require a division engineer to consider the party's good faith reliance in making the decision whether to exert discretionary authority. As stated in Section 330.7, the assertion of discretionary authority shall be based upon concerns for the aquatic environment as expressed in the 404(b)(1) guidelines. The demands of equity and fairness will vary in each case the division engineer considers asserting his discretion. For instance, a party may have expended funds, entered into contractual obligations, or otherwise acted in justifiable reliance on a nationwide permit. The division engineer should decide whether the concerns for the aquatic environment warrant an assertion of his discretionary power in the factual context of each case, including the relevant equities.

6. Of course, all of the above guidance must be implemented as practicable according to the circumstances of each individual case, and fully in compliance with the terms of our regulations.