



**COMMENTS OF  
THE WATER RESOURCES COALITION  
ON THE U.S. ARMY CORPS OF ENGINEERS  
NOTICE OF INTENT AND REQUEST FOR COMMENTS  
76 FED. REG. 70927 (NOV. 16, 2011)  
DOCKET NO. COE-2011-0028  
JANUARY 17, 2012**

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- 1. How should the Corps modify its Regulations to ensure that they are serving their stated purpose efficiently and effectively? Please provide specific recommendations on edits that could be made and suggestions on appropriate outreach and timing.**

In 2007, the Corps of Engineers reissued Nationwide Permits under the Clean Water Act. The rule merged the requirements of Nationwide Permit 29 and Nationwide Permit 39 into a single permit for all residential construction activities. The combined permit governs the construction of single-family and multiple-family residential developments. That rule change reversed a seven-year-old federal policy of segregating the two types of permits to minimize environmental harms. That policy was upheld by the U.S. District Court for the District of Columbia in 2006. We recommend that the Corps revisit the decision to merge the two permits and explain in some detail whether, and how, the combined permit will be more protective of the environment than the separate permits.

The Corps' 2007 rule also established a new acreage limit in NWP 29 that lacked a scientific or engineering basis for supporting an increase in unpermitted discharges from residential developments. The Corps ought to revisit that determination.

- 2. How can we reduce burdens and maintain flexibility for participants in the regulatory process in a way that will promote the protection of waters of the United States via the improvement of the Regulations?**

Between January 2004 and December 2011, there were 4,271 draft and final environmental impact statements filed with the Environmental Protection Agency under the National Environmental Policy Act (NEPA). The U.S. Army Corps of Engineers (355 filings) represented approximately eight percent of all EISs filed.

To expedite the delivery of critically needed infrastructure renewal projects WRC urges the Corps of Engineers to work with the Council on Environmental Quality (CEQ) to revise its regulations under NEPA in order to allow additional factors to narrow the number of alternatives considered as "reasonable

alternatives” during the NEPA review process. Alternatives should be appropriate for project-level (rather than planning-level) decisions. These alternatives should reflect community values and funding realities.

Additionally, the Corps should support efforts to deal with impact identification and mitigation issues early by considering them in an integrated fashion, looking at overall resources rather than in a sequential, project-by-project basis. This might involve addressing these issues at the programmatic level earlier in the planning process.

The Corps should standardize “risk design” approach under federal regulations so that project sponsors can proceed with design activities for any project during the NEPA EIS process. Finally, the Corps should encourage CEQ to require greater coordination among federal agencies reviewing all project permits, including using federal funds to pay for regulatory staff to speed reviews and comply with time limits at the state and local levels.

### **3. How can the process set forth in the Regulations better achieve simplified and efficient outcomes?**

#### ***A. Clean Water Act Section 404 Individual Permits Program***

Businesses seeking individual permits under section 404 of the Clean Water Act spend significant amounts of time and money when they seek an individual permit. The following suggestions are made to streamline the Corps’ requirements, bring efficiency to the regulatory program, and reduce the paperwork burden of Corps staff:

1. The Corps must work with EPA to develop clear, concise, and timely rules for determining the jurisdictional status of water bodies. Such rules will help both applicants and Corps staff to address the confusion and lengthy process in verifying wetlands boundaries and coverage under the Clean Water Act.
2. Verification of wetlands delineations for jurisdictional determinations should not automatically require field visits by District staff, particularly when any changes made as a result of the field visit are minor and have no significant effect on the permit application. Field visits are time-consuming and expensive, and should be used only when wetlands boundaries are likely to be significantly changed.
3. The Corps should establish a specific deadline for reviewing individual permits. WRC suggests that 180 days is an adequate amount of time for the entire process. In particular, Corps staff should not have complete discretion to repeatedly seek additional information from the applicant before determining whether an application is complete; an interim deadline could be established to make a final completeness decision. Similarly, the Corps

- should observe a mandatory schedule to verify a routine wetlands delineation; we suggest 30 days.
4. Permit applications and accompanying documents should be able to be submitted by applicants electronically. Most other federal permitting agencies already have this capability.
  5. In order to reduce duplication and costs, a joint application for Sections 404/401 permits should be developed by the Corps and EPA.
  6. The Corps should end its case-by-case determinations of the compensatory mitigation required for permitted wetland impacts. Such determinations are entirely discretionary, subjective, and inconsistent. Guidance or specific procedures should be developed to reduce the wide variations among permit writers.
  7. Permit writers should be adequately trained and have the necessary experience to perform their responsibilities. They should be held accountable for their compliance with regulatory deadlines and other duties. Given the Corps' current fiscal limitations, the agency should consider expanding the use of contracted private sector service providers in the regulatory program.

### ***B. Clean Water Section 404 Nationwide Permits Program***

Despite its statutory mandate to utilize an expedited process under the Nationwide Permitting Program (NWP) for projects with minimal environmental impacts, the program has evolved into a complex and burdensome system. WRC urges that the Corps examine the NWP program to find ways of lessening its regulatory burdens and increasing its efficiency. We suggest that the Corps create an advisory work group comprised of NWP users and the engineering firms that advise them to undertake a regulatory review and develop options to improve the program. We also urge that the current NWPs be extended beyond their expiration date in March, 2012 so that the review can be completed and used as a guide for existing as well as future NWPs.

Improving the NWP process should include the following:

1. Significantly shorten the time period for the issuance of an NWP; the WRC recommends no longer than 30 days from the receipt of a notification in a Corps district office. Headquarters should require District staff to specifically justify a longer time period to process an NWP.
2. The threshold for use of the NWP program for minimal impacts on jurisdictional waters should be raised from its current 0.5 acres to 1 acre. This would reduce the workload of Corps district staff and improve the usefulness of the program.

3. Eliminate the requirement that a NWP 43 be obtained in addition to an NPDES permit for installing or maintaining low impact development stormwater management measures or devices.
4. Remove the requirement that an NWP permittee cease activities that could potentially affect historic remains or artifacts on a building site until the Corps coordination activities with other parties has been completed.
6. Allow oil and gas drilling operations to use a NWP for small (1-5 acres) well pad construction rather than being required to obtain an individual Section 404 permit for each pad. The degree of growth in oil and natural gas well pad construction in recent years, as well as the standard design of most small well pads makes it appropriate for the Corps to consider a new NWP for this purpose.

### ***C. Improving the Relationships between Corps Districts and Stakeholders***

Operating procedures and contracting practices among district offices varies considerably from location to location. We urge the Corps to reexamine its most recent Standard Operating Procedure (SOP) to ensure that Districts carry out headquarters directives and policies consistently and transparently. While we appreciate that district offices are afforded considerable flexibility, we believe that control must be exercised by headquarters on significant issues, whether that involves regulatory programs or administrative activities. Too broad an interpretation of statutory or policy directives can lead to non-compliance, delays, unnecessary costs or inequities. More consistency between Districts would help alleviate the occasional discord that takes place between some district offices and permit applicants as well as service providers.

#### **4. How can the Regulations be changed to better harmonize with, be consistent with, and coordinate effectively with, other federal regulations and environmental review procedures?**

Current Corps of Engineers regulations require the District Engineer to make a final decision on all permit applications within 60 days after receiving a complete application. 33 C.F.R. § 325.2(d) (3). There are exceptions, however.

Certain laws (e.g., the Clean Water Act, the CZM Act, the National Environmental Policy Act, the National Historic Preservation Act, the Preservation of Historical and Archeological Data Act, the Endangered Species Act, the Wild and Scenic Rivers Act, and the Marine Protection, Research and Sanctuaries Act) require procedures such as state or other federal agency certifications, public hearings, environmental

impact statements, consultation, special studies, and testing which may prevent district engineers from being able to decide certain applications within 60 days.

Id. (d) (3) (VI).

The Corps should amend its regulations to establish clear time limits for a final decision in order to avoid lengthy delays in the processing of permit applications. For example, the Corps could adopt a rule that requires the District Engineer to make a final decision to approve or deny a permit—e.g., within 180 or 365 days, for example—regardless of the status of other agency processes or reviews.

**5. How can we ensure that information developed to support findings under the Regulations [is] guided by objective scientific evidence?**

The WRC urges the Corps of Engineers to incorporate scientific risk management in all decision-making processes that affect the public's safety, health, or welfare. Engineers and decision makers should establish the quantifiable risk to the public's safety, health, and welfare as well as the economic value of costs and benefits when making decisions on: infrastructure development and improvement; capital funding; land use; disaster resiliency; emergency preparedness; the development of environmental standards, and all other areas of civil engineering practice. The Corps should clearly communicate its risk assessments and comparative risk analyses to the public, and, in a collaborative process, decide how much risk is acceptable to our communities in planning for land use; establishing water quality and other environmental standards; and particularly for developing infrastructure for flood and storm protection, and for resistance to other natural hazards.

WRC recommends that the Corps of Engineers:

- Develop and implement up-to-date risk management guidelines.
- Identify and implement strategies to reduce risk to public safety from natural and man-made hazards.
- Establish core risk assessment research programs to ensure that risk management is based on adequate scientific data and appropriate processes.
- Encourage and facilitate public participation in formulating risk assessment guidelines.

Risk assessment, comparative risk analysis, and risk management provide the tools to determine the severity of problems and prioritize the allocation of

resources to protect people, property and the environment. Government agencies often do not effectively communicate to the public how risk management is conducted, what risk assessments mean, and what the uncertainties are. As Hurricane Katrina demonstrated, neither government agencies nor the public appreciated the risk that a major hurricane posed to New Orleans.

With effective risk assessment, comparative risk analysis, and risk management, and with public participation in the process, government agencies and private entities will make informed decisions in land use, infrastructure development, mitigation for natural hazards, and establishment of environmental standards.

Effective risk assessment, comparative risk analysis and risk management can help us respond to the challenge of allocating limited resources while maximizing protection of human safety, health, and welfare and protecting the environment. Risk assessment is the characterization of the potential adverse effects that hazards can inflict on communities or the environment. Comparative risk analysis is a procedure for ranking the relative risk of hazards. Risk management is a powerful tool in the decision-making process where the conclusions of risk assessment and comparative risk analysis are weighed among other considerations such as statutory requirements, costs, public values and politics.

This completes the WRC submission, which addressed questions 1-5 only.

Respectfully submitted,

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*The Water Resources Coalition was founded in 2007 to ensure that a comprehensive, national water resources policy is developed, implemented and funded to provide a sustainable, productive economy; a healthy aquatic ecology; and public health and safety. Membership is open to organizations representing state and local government, engineering and construction, ports, waterways, transportation services and conservation organizations that have an interest in a comprehensive national water resources policy.*

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