Regulatory Branch
File Number: 199609500

December 9, 1996

Mr. Jerry S. Van Fossen
Deputy Project Manager
Department of Energy
Weldon Spring Site
Remedial Action Project Office
7235 Highway 94 South
St. Charles, Missouri 63304

Dear Mr. Van Fossen:

We are in receipt of your August 13, 1996, request to remove chemically and radioactively contaminated sediment from an unnamed tributary originating in the southeast drainage area on the Weldon Springs Remedial Action Site. The drainage is a natural 1.5 mile stream channel extending from the eastern portion of a chemical plant area to it's confluence with the Missouri River. Flows within the drainage result from surface runoff and groundwater discharge through four springs. Sediments within the drainage became chemically and radioactively contaminated as a result of past activities of the U.S. Army and the Department of the Energy. The primary contaminants are radium, uranium, and thorium.

Your proposed remedial action would involve utilizing a track operated machine to excavate specific contaminated areas approximately 2 to 4 feet below the existing tributary’s stream bed. The anticipated 2,000 cubic yards of excavated sediment would be stored at the chemical plant before disposal in the engineered disposal cell for the Weldon Spring Site. The subject activity site's start point is located in proximity to the Southeast 1/4 of Section 5, Township 45 North, Range 3 East, while the end point is in proximity to the Northwest 1/4 of Section 32, Township 45 North, Range 3 East, St. Charles County, Missouri.

A Preliminary Notification (PDN) was sent to all applicable resource agencies, on December 5, 1996, for comments. No negative or conditional requests were received from the responding agencies.

Section 404 of the Clean Water Act assigns responsibility to the Secretary of the Army to administer a permit program to regulate the excavation or placement of dredged or fill material in waters of the United States. The excavation or placement of any dredged or fill material in waters of the United States below ordinary high water elevation or in wetlands, must be authorized by a Section 404 permit.
We have determined that the proposed project is authorized under Section 404 of the Clean Water Act by an existing Department of the Army nationwide permit as described in 33 CFR 330, Appendix A (B)(38). Enclosed is a copy of the nationwide permit, and terms and conditions (marked in red) with which you must comply.

The Missouri Clean Water Commission has waived water quality certification under Section 401 of the Clean Water Act for this nationwide permit. The District Engineer has conditioned this permit to include that the banks of the remediated channel shall be seeded with grasses and/or woody vegetation to establish erosion control.

This determination is applicable only to the permit program administered by the Corps of Engineers. It does not eliminate the need to obtain other Federal, state, or local approvals before beginning work.

You are reminded that this permit is based on submitted plans. Variations from these plans may result in the revocation of the permit. This verification will be valid until the nationwide permits are modified, reissued, or revoked. All of the nationwide permits are scheduled to be modified, reissued or revoked prior to January 21, 1997. It is incumbent upon you to remain informed of changes to the nationwide permits. We will issue a public notice announcing the changes when they occur. Furthermore, if you commence, or are under contract to commence, this activity before the date the nationwide permits are modified or revoked you will have twelve months from the date of modification or revocation to complete the activities under the present terms and conditions of the nationwide permit.

If the proposed project does not satisfy all conditions and management practices as indicated, please contact Mr. Charles Fretker at (314) 331-8583 for advice or information you may need in preparing an application for an individual permit.

Sincerely,

Danny D. McClendon
Missouri Evaluation Section
Regulatory Branch

Enclosure
Copy furnished: (w/o enclosure)

Ms. Diana Fawks  
Missouri Department of Natural Resources  
Water Pollution Control Program  
Post Office Box 176  
Jefferson City, Missouri  65102-0176

Mr. Norm Stucky  
Missouri Department of Conservation  
Post Office Box 180  
Jefferson City, Missouri  65102-0180

Field Supervisor  
U.S. Fish and Wildlife Service  
Ecological Services  
608 East Cherry Street, Room 200  
Columbia, Missouri  65201

Ms. Kathy Mulder  
U.S. Environmental Protection Agency  
Region VII  
726 Minnesota Avenue  
Kansas City, Kansas  66101

Ms. Claire Blackwell  
Missouri Department of Natural Resources  
Division of State Parks  
Post Office Box 176  
Jefferson City, Missouri  65102-0176
include a statement that the verification will remain valid for the specified period of time, if during that period, the NWP authorization is reassigned without modification or the activity complies with any subsequent modification of the NWP authorization. Furthermore, the response should include a statement that the provisions of § 330.8(b) will apply if, during that period of time, the NWP authorization expires or is suspended or revoked, or is modified, such that the activity would no longer comply with the terms and conditions of an NWP. Finally, the response should include any known expiration date that would occur during the specified period of time. A period of time less than two years may be used if deemed appropriate.

(3) For activities where a state has denied 401 water quality certification and/or did not agree with the Corps' consistency determination for an NWP, the DE's response will state that the proposed activity meets the terms and conditions for authorization under the NWP with the exception of a state 401 water quality certification and/or CWM consistency concurrence. The response will also indicate the activity is denied without prejudice and cannot be authorized until the requirements of § 330.4(c)(5), 330.4(c)(9), 330.4(d)(3), and 330.4(d)(6) are satisfied. The response will also indicate that work may only proceed subject to the terms and conditions of the state 401 water quality certification and/or CWM concurrence. Once the DE has provided such verification, the activity must follow the procedures of 33 CFR 330.3 in order to modify, suspend, or revoke the authorization.

(b) Expired nationwide permits. The Chief of Engineers will periodically review NWPs and their conditions and will decide whether to modify, reissue, or revoke the permits. If an NWP is not modified or reissued within five years of its effective date, it automatically expires and becomes null and void. Activities which have commenced (i.e., are under construction) or are under contract to commence in reliance upon an NWP will remain authorized provided the activity is completed within twelve months of the date of an NWP's expiration, modification, or revocation; unless discretionary authority has been exercised on a case-by-case basis to modify, suspend, or revoke the authorization in accordance with 33 CFR 330.4(c) and 33 CFR 330.5 (c) or (d). Activities completed under the authorization of an NWP which was in effect at the time the activity was completed continue to be authorized by the NWP.

(c) Multiple use of nationwide permits. Two or more different NWPs can be combined to authorize a "single and complete project" as defined at 33 CFR 330.3(f). However, the same NWP cannot be used more than once for a single and complete project.

(d) Combining nationwide permits with individual permits. Subject to the following qualifications, portions of a larger project may proceed under the authority of the NWP while the DE evaluates an individual permit application for other portions of the same project, but only if the portions of the project qualifying for NWP authorization would have independent utility and are able to function or meet their purpose independent of the total project. When the functioning or usefulness of a portion of the total project qualifying for an NWP is dependent on the remainder of the project, such that the construction and use would not be fully justified even if the Corps were to deny the individual permit, the NWP does not apply and all portions of the project must be evaluated as part of the individual permit process.

(i) When a portion of a larger project is authorized to proceed under an NWP, it is with the understanding that its construction will not in any way prejudice the decision on the individual permit for the rest of the project. Furthermore, the individual permit documentation must include an analysis of the impacts of the entire project, including related activities authorized by NWP.

(ii) NWPs do not apply, even if a portion of the project is not dependent on the rest of the project, when any portion of the project is subject to an enforcement action by the Corps or EPA.

(e) After-the-fact authorization. These authorizations often play an important part in the resolution of violations. In appropriate cases where the activity complies with the terms and conditions of an NWP, the DE can elect to use the NWP for resolution of an after-the-fact permit situation following a consideration of whether the violation being resolved was knowing or intentional and the circumstances of the need for a penalty. For example, where an unauthorized fill meets the terms and conditions of NWP 13, the DE can consider the appropriateness of allowing the residual fill to remain, in situations where said fill would normally have been permitted under NWP 13. A knowing, intentional, willful violation should be the subject of an enforcement action leading to a penalty, rather than an after-the-fact authorization. Use of after-the-fact NWP authorization must be consistent with the terms of the Army/EPA Memorandum of Agreement on Enforcement. Copies are available from each district engineer.

Appendix A to Part 330—Nationwide Permits and Conditions

A. Index of the Nationwide Permits and Conditions

Nationwide Permits

1. Add to Navigation
2. Structures in Artificial Canals
3. Maintenance
4. Fish and Wildlife Harvesting, Enhancement, and Alteration Devices and Activities
5. Scientific Measurement Devices
6. Survey Activities
7. Ossabaw Structures
8. Oil and Gas Structures
9. Structures in Floating and Anchorage Areas
10. Mooring Buoys
11. Temporary Railway Structures
12. Utility Line Blackfill and Bedding
13. Bank Stabilization
14. Road Crossing
15. U.S. Coast Guard Approved Bridges
16. Return Water From Upstream Conversion
17. Disposal Areas
18. Hydraulic Projects
19. Minor Discharges
20. Cut Off Wells
21. Suitability of Dredging
22. Removal of Vessels
23. Approved Categorical Exclusions
24. State Administered Section 404 Program
25. Structural Discharges
26. Hardwater and Isolated Waters Discharges
27. Federal Restoration Activities
28. Modifications of Existing Marinas
29. Reserved
30. Reserved
31. Reserved
32. Completed Enforcement Actions
33. Temporary Constr. and Access
34. Cranberry Production Activities
35. Maintenance Dredging of Existing Basins
36. Boat Keeps
37. Marine Waterfront Protection
38. Reserves
39. Reserves
40. Fossil Fuels

B. Nationwide Permit Conditions

General Conditions

1. Navigation
2. Structure Maintenance
3. Erosion and Sediment Control
4. Aquatic Life Movements
5. Equipment
6. Regional and Case-by-Case Constraint
7. Wild and Scenic Rivers
8. Tribal Rights
9. Water Quality Certification
10. Coastal Zone Management
11. Endangered Species
12. Historic Properties
13. Notification
4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities. Fish and wildlife - harvesting devices and activities such as pound nets, creel boxes, gill nets, dip nets, seine nets, lobster traps, duck blinds, clam pots, oyster digging, and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This nationwide permit authorizes shellfish seeding provided this activity does not occur in wetlands or vegetated shallow areas. This nationwide permit does not authorize artificial reefs or impoundments and semi-impoundments of waters of the United States for the culture or holding of non-native species such as lobsters. (sections 10 and 404)

5. Scientific Measurement Devices. Staff gages, tide gages, water recording devices, water quality testing and improvement devices and similar structures. Small weirs and frames constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards and further for discharges of 10 to 25 cubic yards provided the permittee notifies the district engineer in accordance with “Notification” general condition. (sections 10 and 406)

6. Survey Activities. Survey activities including core sampling, seismic exploratory operations, and plugging of active shell holes and other exploratory-type bore holes. Drilling and the discharge of excavated material from test wells for oil and gas exploration is not authorized by this nationwide permit; the plugging of such wells is authorized. Fill placed for roads, pads and other similar activities is not authorized by this nationwide permit. The discharge of drilling muds and cuttings may require a permit under section 402 of the Clean Water Act. (sections 10 and 404)

7. Oilfield Structures. Activities related to construction of oilfield structures and associated intake structures where the effluent from the oilfield is authorized, conditionally authorized, or specifically exempted, or are otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System program (section 402 of the Clean Water Act), provided that the nationwide permit authorizes the district engineer in accordance with“Modification” general condition. (Also see 33 CFR 330.4(e)). Intake structures per se are not included—only those directly associated with an oilfield structure. (sections 10 and 404)

8. Oil and Gas Structures. Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of the Interior, Minerals Management Service. Such structures shall not be placed within the limits of any designated shipping safety fairway or traffic separation scheme, except temporary anchors that comply with the fairway regulations in 33 CFR 222.41. (Where such limits have not been designated, or where changes are anticipated, district engineers will consider asserting discretionary authority in accordance with 33 CFR 330.4(e) and will also review such purposes to ensure they comply with the provisions of the fairway regulations in 33 CFR 222.41). Such structures will not be placed in established danger zones or restricted areas as designated in 33 CFR part 334; nor will such structures be permitted in EPA or Corps designated dredged material disposal areas. (section 10)

10. Mooring Burros. Non-commercial, single-boat mooring buoys. (section 10)

11. Temporary Recreation Structures. Temporary boats, markers, small floating docks, and similar structures placed for recreational use during specific events such as water skiing competitions and boat races or seasonal use provided that such structures are removed within 30 days after use has been discontinued. All Corps of Engineers reservists, the reservoir manager must approve each buoy or marker individually. (section 10)

12. Utility Line Rockfill and Barring. Discharges of material for rockfill or barring for utility lines, including culverts and intake structures, provided there is no change in preconstruction contours. A “utility line” is defined as any pipe or pipeline for the transportation of any gas, liquid, inflammable, or noxious substances, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telegraphic and telephonic messages, and radio and television communication. The term “utility line” does not include activities which drain a water of the United States, such as drainage ditches, however, it does apply to pipes conveying drainage from another area. Material resulting from the removal of excavation may be temporarily sidecast (up to three months) into waters of the United States provided that the material is not placed in such a manner that it is.
dispersed by currents or other forces. The DE may extend the period of temporary side-casting up to 180 days, where appropriate. The area of waters of the United States that is disturbed must be limited to the minimum necessary to construct the utility line. In wetlands, the top 6′ to 12′ of the trench should generally be backfilled with topsoil from the trench. Excess material must be removed to upland areas immediately upon completion of construction. Any exposed slopes and streambanks must be stabilized immediately upon completion of the utility line. The utility line itself will require a Section 10 permit if it is in navigable waters of the United States. (See 33 CFR part 224, section 404.)

13. Bank Stabilization. Bank stabilization activities necessary for erosion protection and provided:

a. No material is placed in excess of the minimum needed for erosion protection.

b. The bank stabilization activity is less than 500 feet in length.

c. The activity will not exceed an average of one cubic yard per running foot placed along the bank below the place of the ordinary high water mark or the high tide line.

d. No material is placed in any special aquatic site, including wetlands.

e. No material is of the type or is placed in any location or in any manner so as to impair surface water flow into or out of any wetland area.

f. No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored trees and shrubs may be used in low energy areas).

g. The activity is part of a single and complete project.

Bank stabilization activities in excess of 500 feet in length or greater than an average of one cubic yard per running foot may be authorized if permits notify the district engineer in accordance with the “Notification” general condition and the district engineer determines the activity complies with the other terms and conditions of the nationwide permit and the adverse environmental impacts are minimal both individually and cumulatively. (sections 10 and 404)
cleanup of oil and hazardous substances which are subject to the National Oil and Hazardous Substances Pollution Contingency Plan, at least part 300, provided that the work is done in accordance with the Spill Control and Countermeasures Plan required by 40 CFR 112.3 and any existing State contingency plan and provided that the Regional Response Team (if it exists in the area) consents to the proposed containment and cleanup action. (sections 10 and 404)

21. Surface Coal Mining Activities. Activities associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977, provided the permits notify the district engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.11(e)). (sections 10 and 404)

22. Removal of Vessels. Temporary structures or minor discharges of dredged or fill material required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This nationwide permit does not authorize the removal of vessels listed or determined eligible for listing on the National Register of Historic Places unless the district engineer is notified and indicates that there is compliance with the "Historic Properties" general condition. This nationwide permit does not authorize maintenance dredging, boat removal, or river bank staking. Vessel disposal in waters of the United States may not be done without a permit from EPA (see 40 CFR 228.3). (sections 10 and 404)

23. Approved Categorical Exclusions. Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department unless that agency or department has determined, pursuant to the Council on Environmental Quality Regulation for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR part 1500 et seq.), that the activity, work, or discharge is environmentally excluded from environmental documentation because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment, and the Office of the Chief of Engineers (ATTN: CECW-OR) has been furnished notice of the agency's or department's application for the categorical exclusion and concurs with that determination. Prior to approval for purposes of this nationwide permit of any agency's categorical exclusions, the Chief of Engineers will solicit public comment. In addressing these comments, the Chief of Engineers may require certain conditions for authorization of an agency's categorical exclusions under this nationwide permit. (sections 10 and 404)

24. State Administered Section 404 Program. Any activity permitted by a state administering its own section 404 permit program pursuant to 33 U.S.C. 1344(g)(1) is permitted pursuant to section 10 of the Rivers and Harbors Act of 1899. Those activities which do not involve a section 404 state permit are not included in this nationwide permit, but certain structures will be exempted by section 134 of Public Law 94-589, 90 Stat. 2927 (33 U.S.C. 1390) (see 33 CFR 332.2(a)(5), (section 10)

25. Structural Discharges. Discharges of material such as concrete, sand, rock, etc., into navigable waters of the United States, including water and structures, such as bridges, transmission line footings, and walkways. The NWP does not authorize structural modifications that would support buildings, homes, parking areas, storage areas and other such structures. In addition, the NWP does not include permits for fill that involves dredged or fill material into headwaters and isolated waters provided:
   a. The discharge does not cause the loss of more than 30 acres of waters of the United States;
   b. The permits notify the district engineer if the discharge would cause the loss of waters of the United States greater than one acre in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.11(e))
   c. The discharge, including all attendant features, both temporary and permanent, is part of a single and complete project.
   d. For the purposes of this nationwide permit, the acreage of loss of waters of the United States includes the filled area plus waters of the United States that are adversely affected by flooding, excavation or drainage as a result of the project. The ten-acre and one-acre limits of NWP 28 are absolute and cannot be increased by any mitigation plan offered by the applicant or required by the DE.

Subdivisions: For any real estate subdivision created or subdivided after October 5, 1984, a notification pursuant to subsection b. of this nationwide permit is required for any discharge which would cause the aggregate total loss of waters of the United States for the entire subdivision to exceed one (1) acre. Any discharge in any real estate subdivision which would cause the total loss of waters of the United States in the subdivision to exceed ten (10) acres is not authorized by this nationwide permit unless the DE exempts a particular subdivision or parcel by making a written determination that:
   1. The individual and cumulative adverse environmental impacts would be minimal and the property owner had, after October 5, 1984, but prior to January 21, 1986, committed substantial resources in reliance on NWP 28 with regard to a subdivision. In circumstances where it would be inequitable to frustrate his investment-backed expectations, or if
   2. The individual and cumulative adverse environmental effects would be minimal, and high quality wetlands would not be adversely affected, and there

26. Headwaters and Isolated Waters Discharges. Discharges of dredged or fill material into headwaters and isolated waters provided:
   a. The discharge does not cause the loss of more than 30 acres of waters of the United States;
   b. The permits notify the district engineer if the discharge would cause the loss of waters of the United States greater than one acre in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.11(e))
   c. The discharge, including all attendant features, both temporary and permanent, is part of a single and complete project.
   d. For the purposes of this nationwide permit, the acreage of loss of waters of the United States includes the filled area plus waters of the United States that are adversely affected by flooding, excavation or drainage as a result of the project. The ten-acre and one-acre limits of NWP 28 are absolute and cannot be increased by any mitigation plan offered by the applicant or required by the DE.
activities associated with the restoration of altered and degraded non-tidal wetlands, riparian areas and creation of wetlands and riparian areas on U.S. Forest Service and Bureau of Land Management lands, Federal surplus lands (e.g., military lands proposed for disposal), Farmers Home Administration inventory properties, and Resolution Trust Corporation inventory properties that are under Federal control in the process of being transferred to the private sector. Such activities include, but are not limited to, installation and maintenance of small water control structures, dikes, and berms; backfilling of existing drainage ditches; removal of existing drainage structures; construction of small nesting islands; and other related activities. The nationwide permit applies to restoration projects that serve the purpose of restoring "natural" wetland hydrology, vegetation, and function to altered and degraded non-tidal wetlands and "natural" functions of riparian areas. For agreement restoration and creation projects only, this nationwide permit also authorizes any future discharge of dredged or fill material associated with the revegetation of the area to its prior condition and use (i.e., prior to restoration under the agreement) within five years after expiration of the limited term wetland restoration or creation agreement even if the discharge occurs after this nationwide permit expires. The prior condition will be documented in the original agreement, and the determination of return to prior conditions will be made by the Federal agency executing the agreement. Once an area is reverted back to its prior physical condition, it will be subject to whatever the Corps regulatory requirements will be at that future date. This nationwide permit does not authorize the conversion of natural wetlands to another aquatic use, such as creation of waterfowl impoundments where a forested wetland previously existed. (sections 10 and 404)

29. Modifications of Existing Marinas. Recreational use of existing docking facilities within an authorized marina area. No dredging, additional slips or dock spaces, or expansion of any kind within the authorized marina area. The United States is authorized by this nationwide permit. (section 10)

30. Reserved
31. Reserved

32. Completed Enforcement Actions. Any structure, work or discharge of dredged or fill material undertaken in accordance with, or remaining in place in compliance with, the terms of a final Federal court decision, consent decree, or settlement agreement in an enforcement action brought by the United States under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899. (sections 10 and 404)

33. Temporary Construction, Access and Dewatering. Temporary structures and shore protection activities, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites: provided the associated temporary activity was previously authorized by the Corps. (sections 10 and 404)

34. Cranberry Production Activities: Discharges of dredged or fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations provided:

a. The cumulative total area of disturbance per cranberry production operation, including but not limited to, filling, flooding, ditching, or clearing, does not exceed 10 acres of waters of the United States, including wetlands;

b. The permittee notifies the District Engineer in accordance with the notification procedures; and

c. The activity does not result in a net loss of wetland acreage.

This nationwide permit does not authorize any discharge of dredged or fill material related to cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes of this nationwide permit, the cumulative total of 10 acres will be measured over the period that this nationwide permit is valid. (section 404)

35. Maintenance Dredging of Existing Basins. Excavation and removal of accumulated sediment for maintenance of existing marinas, basins, canals, and boat slips is with a limited depth or controlling depths for ingress/egress whichever is less provided the dredged material is disposed of at an upland site and proper wetland controls are used. (section 20)

36. Boat Ramps. Activities required for the construction of boat ramps provided:

a. The discharge into waters of the United States does not exceed 30 cubic yards of concrete, rock, crushed stone or gravel into forms, or placement of precast concrete panels or slabs.

b. Unsuitable material causes unacceptable chemical pollution or is structurally unstable is not authorized;

c. The boat ramp does not exceed 20 feet in width;

d. The base material is crushed stone, gravel or other suitable material;

e. No material is placed in special aquatic sites, including wetlands.

Dredging to provide access to the boat ramp may be authorized by another NWP, regional general permit, or individual permit pursuant to section 10 if located in navigable waters of the United States. (sections 10 and 404)

37. Emergency Watershed Protection and Rehabilitation. Work done by or funded by the Soil Conservation Service qualifying as an "emergency" situation (requiring immediate action) under its Emergency Watershed Protection Program (7 CFR part 654) and work done or funded by the Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 328.21) provided the district engineer is notified in accordance with the notification general.
condition. ([See also 33 CFR 330.1(a)].
sections 10 and 404)

38. Cleanup of Hazardous and Toxic Waste. Specified activities required to affect the containment, stabilization, or removal of hazardous or toxic wastes materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority, or by a government agency with established legal or regulatory authority, provided that the permittee notifies the Corps of the activity in accordance with the "Notification" section (404). For discharges in special aquatic sites, including wetlands, the notification must also include the elimination of affected special aquatic sites, including wetlands. Court ordered remedial action plans or related settlements are also authorized by this nationwide permit.
This nationwide permit does not authorize the establishment of new disposal sites or the expansion of existing sites. [See section 404 only conditions]. (section 404)

39. Reserved.

40. Farm Buildings. Discharges of dredged or fill material into jurisdictional wetlands (but not including prairie potholes, playas lakes, or vernal pools) that were in agricultural crop production prior to December 23, 1985 (i.e., farmed wetlands) for foundations and building pads for buildings or agricultural related structures necessary for farming activities. The discharge will be limited to the minimum necessary but will in no case exceed 1 acre in size. [See the "Minimization" section 404 only conditions].

C. Nationwide Permit Conditions

General Conditions: The following general conditions must be followed in order for any authorization by a nationwide permit to be valid:

1. Navigation. No activity may cause more than a minimal adverse effect on navigation.

2. Proper maintenance. Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.

3. Erosion and alluvial controls. Appropriate erosion and alluvial controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills shall be permanently stabilized at the earliest practicable date.

4. Aquatic life movements. No activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area, unless the activity's primary purpose is to impound water.

5. Equipment. Heavy equipment working in wetlands must be placed on mats or other means to minimize soil disturbance.

6. Regional and case-by-case conditions. This activity must comply with any regional conditions which may have been added by the division engineer (see 33 CFR 330.4(g)) and any case specific conditions added by the Corps.

7. Wild and Scenic Rivers. No activity may occur in a component of the Wild and Scenic rivers System of in a river officially designated by Congress as a "wild" or "scenic" river for possible inclusion in the system, while the river is in an official study status. Information on Wild and Scenic Rivers may be obtained from the National Park Service and the U.S. Forest Service.

8. Tribal rights. No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

9. Water quality certification. In certain states, individual state water quality certification must be obtained or waived (see 33 CFR 330.4(c)).

10. Coastal zone management. In certain states, the individual state coastal zone management certification must be obtained or waived. (see 33 CFR 330.4(d)).

11. Endangered Species. No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which is likely to destroy or adversely modify the critical habitat of such species. Notice of intent to notify the district engineer if any listed species or critical habitat might be affected or in the vicinity of the project and shall not begin work on the activity until notified by the district engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. Information on the location of threatened and endangered species and their critical habitat can be obtained from the U.S. Fish and Wildlife Service and National Marine Fisheries Service. (see 33 CFR 330.4(f)).

12. Historic properties. No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, unless the activity has been authorized, in accordance with the provisions of 33 CFR, appendix C. The prospective permittees must notify the district engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittees have reason to believe may be eligible for listing on the National Register of Historic Places and shall not begin the activity until notified by the Division Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places (see 33 CFR 330.4(g)).

13. Notification. (a) Where required by the terms of the NWP, the prospective permittees must notify the District Engineer as early as possible and shall not begin the activity:

(1) Until notified by the District Engineer that the activity may proceed under the NWP without any special conditions imposed by the district or division engineer;

(2) If notified by the District or Division engineer that an individual permit is required, or

(3) Unless 30 days have passed from the District Engineer's receipt of the notification and the prospective permittees have not received notice from the District or Division Engineer.

Subsequently, the permittees' right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedures set forth in 33 CFR 330.50.

(b) The notification must be in writing and include the following information and any required fees:

(1) Name, address and telephone number of the prospective permittees;

(2) Location of the proposed project;

(3) Brief description of the proposed project: the project's purpose, direct and indirect adverse environmental effects and the project would cause any other NWP(s), regional general permit(s) or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity;

(4) Where required by the terms of the NWP, a delineation of affected special aquatic sites, including wetlands;

(5) A statement that the prospective permittees have consulted:

(i) The USFWS/NMFS regarding the presence of any Federally listed, or proposed for listing), endangered or threatened species or critical habitat in the project area that may be affected by the proposed project and any available information provided by those agencies.

(The prospective permittees may contact their District Office of the USFWS/NMFS agency and the dates of the critical habitat.)
(ii) The SHPO regarding the presence of any historic properties in the permit area that may be affected by the proposed project and the available information, if any, provided by that agency.

(e) The standard individual permit application form (Form ENG 4935) may be used as the notification but must clearly indicate to the SHPO that the NWP and must include all of the information required in (a) (1)–(6) of General Condition 43.

(f) In reviewing an activity under the notification procedure, the District Engineer will first determine whether the activity will result in more than minimal individual or cumulative adverse environmental effects or will be contrary to the public interest. The prospective permits may, at his option, submit a proposed mitigation plan with the notification to expedite the process and the District Engineer will consider any unusual mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed work are minimal. The District Engineer will consider any comments from Federal and State agencies concerning the proposed activity’s compliance with the terms and conditions of the nationwide permits and the need for mitigation to reduce the project’s adverse environmental effects to a minimal level. The district engineer will upon receipt of a notification provide immediately (e.g. facsimile transmission, overnight mail or other expedited manner) a copy to the appropriate offices of the Fish and Wildlife Service, State natural resource and water quality agencies, EPA, and, if appropriate, the National Marine Fisheries Service. With the exception of NFW 37, these agencies will then have 3 calendar days from the date the material is transmitted to telephone the District Engineer if they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 10 calendar days before making a decision on the notification.

The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency. The District Engineer will indicate in the administrative record associated with each notification that the resource agencies’ comments were considered. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects are minimal, he will notify the permittee and include any conditions he deems necessary. If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then he will notify the applicant stating (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit or (2) That the project is authorized under the nationwide permit subject to the applicant’s submitting a mitigation proposal that would reduce the adverse effects to the minimal level. This mitigation proposal must be approved by the District Engineer prior to commencing work. If the prospective permittee elects to submit a mitigation plan, the DE will expeditorily review the proposed mitigation plan, but will not commence a 30-day notification procedure. If the net adverse effects of the project (with the mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant informing him that the project can proceed under the terms and conditions of the nationwide permit.

(e) Wetland Delineations: Wetland delineations must be prepared in accordance with the current methodology required by the Corps. The permits may ask the Corps to delineate the special areas site. There may be some delay if the Corps does the delineation. Furthermore, the 30-day period will not start until the wetland delineation has been completed.

(f) Mitigation Factors: That the District Engineer will consider when determining the acceptability of appropriate and practicable mitigation include, but are not limited to:

(1) To be practicable the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of overall project purposes.

(2) To the extent appropriate, permits should consider mitigation banking and other forms of mitigation including contributions to wetland trust funds, which contribute to the restoration, creation, replacement, enhancement, or preservation of wetlands.

Furthermore, examples of mitigation that may be appropriate and practicable include but are not limited to: reducing the size of the project; establishing buffer zones to protect aquatic resource values and replacing the loss of aquatic resource values by creating, restoring, and enhancing similar functions and values. In addition, mitigation must address impacts and cannot be used to offset the acreage of wetland losses that would occur in order to meet the acreage limits of some of the nationwide permits (e.g., 5 acres for wetlands that cannot be expected to change > 5 acres loss is 1 acre loss; however, the 5 created acres can be used to reduce the impacts of the 5 acre loss).

Section 404 Only Conditions

In addition to the General Conditions, the following conditions apply only to activities that involve the discharge of dredged or fill material and must be approved in order for authorization by the nationwide permits to be valid:

1. Water supply intakes. No discharge of dredged or fill material may occur in the proximity of a public water supply intake except where the discharge is for repair of the public water supply intake structures or adjacent bank stabilization.

2. Shellfish production. No discharge of dredged or fill material may occur in areas of concentrated shellfish production, unless the discharge is directly related to a shellfish harvesting activity authorized by nationwide permit 4.

3. Suitable material. No discharge of dredged or fill material may consist of unsuitable material (e.g., trash, debris, car bodies, etc.) and material discharged must be free from toxic substances and pollutants in toxic amounts (see section 307 of the Clean Water Act).

4. Mitigation. Discharges of dredged or fill material into waters of the United States must be minimized or avoided to the maximum extent practicable at the project site (i.e. on-site), unless the DE has approved a compensation mitigation plan for the specific regulated activity.

5. Spawning areas. Discharges in spawning areas during spawning seasons must be avoided to the maximum extent practicable.

6. Obstruction of high flows. To the maximum extent practicable, discharges must not permanently restrict or impede the passage of normal or expected high flows or cause the relocation of the water (unless the primary purpose of the fill is to impend water).

7. Adverse impacts from impoundments. If the discharge creates an impoundment of water, adverse impacts on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow shall be minimized to the utmost extent practicable.

8. Watershed breeding areas. Discharges into breeding areas for
migratory waterfowl must be avoided to the maximum extent practicable.

3. Removal of temporary fills. Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.

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