



# The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments

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January 30, 2012

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

97-223

## Summary

Permits issued by the U.S. Army Corps of Engineers authorize various types of development projects in wetlands and other waters of the United States. The Corps' regulatory process involves two types of permits: general permits for actions by private landowners that are similar in nature and will likely have a minor effect on wetlands, and individual permits for more significant actions. The Corps uses general permits to minimize the burden of its regulatory program: they authorize landowners to proceed with a project without the time-consuming need to obtain standard individual permits in advance. About 90% of the Corps' regulatory workload is processed in the form of general permits.

Nationwide permits are one type of general permit. Nationwide permits, which currently number 49, are issued for five-year periods and thereafter must be renewed. They were most recently reissued in total in March 2007. The current nationwide permit program has few strong supporters, for differing reasons. Developers and other industry groups say that it is too complex and burdened with arbitrary restrictions that limit opportunities for an efficient permitting process and have little environmental benefit. Environmentalists say that it does not adequately protect aquatic resources, because the review procedures and permit requirements are less rigorous than those for individual or standard permits. At issue is whether the program has become so complex and expansive that it cannot either protect aquatic resources or provide for a fair regulatory system, which are its dual objectives. Controversies also exist about the use of specific nationwide permits for authorizing particular types of activities, such as surface coal mining operations.

In addition to general objections, interest groups have a number of specific criticisms of the permits, such as requirements that there must be compensatory mitigation for impacts of some authorized activities, impacts of regional conditioning through which local aquatic considerations are addressed, and the need to define "minimal adverse effects" for purposes of implementing the nationwide permit program. Coordinating implementation of the nationwide permits between federal and state governments also raises a number of issues. Of particular concern to states is tension over whether their authority to certify the nationwide permits is sufficient to assure that water quality standards or coastal zone management plans will not be violated.

The nationwide permits issued in 2007 are due to expire March 18, 2012. In anticipation of that date, in February 2011 the Corps proposed to reissue and modify the current permits. One focus of that proposal is modification or repeal of one nationwide permit, number 21, which authorizes discharges associated with surface coal mining activities and has been controversial. The Corps expects to take final action on reissued and modified permits by March 18.

Congressional interest in wetlands permit regulatory programs has been evident in the past in oversight hearings and in connection with bills to fund the Corps' regulatory programs. For some time, there has been a stalemate over legislation that would revise wetlands regulatory law and that could, if enacted, modify the nationwide permit program. During this time, no consensus has emerged on whether or how to reform overall wetlands policy legislatively. Recently, Obama Administration initiatives and actions intended to restrict harmful effects of surface coal mining activities in Appalachia have drawn congressional attention and criticism that is likely to continue in the 112<sup>th</sup> Congress and that could include oversight of the Corps' regulatory program generally.

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## Introduction

Federal laws require government approval prior to beginning any work in or over waters of the United States that affects the course, location, condition, or capacity of such waters, or prior to discharging dredged or fill material into U.S. waters. Regulatory programs that implement these laws are administered through permits issued by the U.S. Army Corps of Engineers (the Corps), which shares responsibility with the Environmental Protection Agency (EPA), under the authority of the Clean Water Act, the Rivers and Harbors Act, and the Marine Protection, Research, and Sanctuaries Act.

The Corps' regulatory process involves two types of permits: general permits for actions by private landowners that are similar in nature and will likely have a minor effect on wetlands, and individual permits for more significant action. A nationwide permit is a form of general permit that authorizes a category of activities throughout the nation and is valid only if the conditions applicable to the permit are met. These permits are issued under authority of Section 404(e) of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. Under Section 404, permits are required for discharges of dredged or fill material into waters of the United States. Under Section 10, permits are required for any structures or other work that affect the course, location, or condition of navigable waters of the United States.

Nationwide permits, which currently number 49, are issued for five-year periods and thereafter must be renewed. They were most recently reissued in total in March 2007. At issue in the nationwide permit program is the balance of two objectives: providing regulatory protection to ensure minimal impacts on aquatic resources, and providing a fair and efficient regulatory system. For several years, however, interest groups of differing perspectives have criticized the program and increasingly question whether either objective is being achieved, much less both objectives. Stakeholders involved in this debate include, on the one hand, industry groups (e.g., members of building—especially homebuilding—design, realtor, and petroleum and mining organizations) and, on the other, environmental advocacy groups, along with many state water quality, water resources, and environmental agencies.

Particularly under the Clean Water Act, the Corps' regulatory authority is broadly defined. It covers waters of the United States, including the territorial seas, and includes traditionally navigable waterways capable of supporting interstate and foreign commerce, plus their tributaries, and adjacent wetlands and isolated waters where the use, degradation, or destruction of such waters could affect interstate or foreign commerce.<sup>1</sup> In fact, much of the public concern about the nationwide permit program—with regard to impacts of authorized activities, and terms and conditions intended to limit impacts—often focuses on permits for projects that affect the nation's wetlands. Controversies about the permit program are compounded by disputes about the data on which the Corps bases its conclusions that adverse environmental impacts of authorized activities are minimal. Critics, especially environmental advocates, argue that the Corps' data are dated (the most recent available statistics are from 2003) and inaccurate, because the Corps lacks an effective tracking and monitoring system for evaluating impacts.

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<sup>1</sup> Debate about the jurisdictional reach of the Corps' regulatory program has been a controversial policy and judicial issue for some time. It is beyond the scope of this report, but for additional information see CRS Report RL33483, *Wetlands: An Overview of Issues*, by Claudia Copeland.

The nationwide permit regulatory program has drawn Congress's attention several times in the past, but not recently. In 1997, House and Senate committees held oversight hearings to review several issues and controversies. In 1999 and again in 2000, congressional appropriators directed the Corps to take certain actions concerning its overall regulatory program, and nationwide permits in particular.

This report describes and reviews the nationwide permit program and discusses several major issues that have drawn the attention of stakeholder interest groups, including program complexity, coordination with states, and assessing cumulative impacts of the program.

## Background

General permits, including nationwide permits, are a key means by which the Corps seeks to minimize the burden and delay of its regulatory program: they authorize a landowner or developer to proceed with the covered activity without having to obtain an individual, site-specific permit in advance. Individual permits are subject to public notice, public hearing, and case-by-case evaluation which typically involve longer time before the activity is authorized. General permits are intended to allow certain activities to proceed with little delay or paperwork. According to Corps data, in 2003, general permits entailed average processing time of 24 days, in contrast with individual permits, which, on average, took 187 days of processing and evaluation, once an application was completed. Approximately 74,000 activities per year (representing 92% of the Corps' regulatory workload) were authorized by nationwide and other general permits. The Corps acknowledges that it does not have resources to evaluate all of these activities as individual permits. General permits, including nationwide permits, authorize activities that usually would be authorized through the individual permit process with little or no change in the scope of the work.<sup>2</sup> While more than half require advance notification to the Corps for some or all covered activities, others only require after-the-fact notification. The following are examples of nationwide permits.<sup>3</sup>

- Placement of aids to navigation approved by, and installed according to, U.S. Coast Guard requirements (nationwide permit 1);
- Activities related to construction and maintenance of authorized outfall structures and associated intake structures (nationwide permit 7);
- Stream or river bank stabilization activities necessary to prevent erosion (nationwide permit 13);
- Minor dredging, that is, dredging of no more than 25 cubic yards of material (nationwide permit 19);
- Activities associated with restoration, enhancement, or establishment of wetlands and riparian areas where the activities result in net increase in aquatic resource functions and services (nationwide permit 27);

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<sup>2</sup> 64 *Federal Register* 32268, July 21, 1999.

<sup>3</sup> The full text of the current nationwide permits and related general conditions, issued in March 2007, is available at [http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/nwp2007\\_gen\\_conditions\\_def.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/nwp/nwp2007_gen_conditions_def.pdf).

- Discharges of dredged or fill material for the construction or expansion of residential developments (nationwide permit 29); and
- Discharges for construction or expansion of recreational facilities such as ski areas and golf courses (nationwide permit 42).

Many nationwide permits have specific conditions and terms (such as maximum acreage limitations). In addition, a number of general conditions apply to some or all nationwide permits; for example, no activity may cause more than a minimal adverse effect on navigation; no activity may jeopardize a threatened or endangered species; discharges into spawning areas and migratory waterfowl breeding areas must be avoided, to the maximum extent practicable; and discharges of dredged or fill material must be minimized or avoided through mitigation to offset more than minimal impacts on the aquatic environment, to the maximum extent practicable.

The specific statutory authority for these permits is Section 404(e) of the Clean Water Act.

In carrying out the functions relating to the discharge of dredged or fill material under this section, the Secretary [of the Army] may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.

## **Nationwide Permits: 1977-2007**

The Corps first issued regulations for general permits in the mid-1970s, and Congress codified the concept in amendments to the Clean Water Act in 1977 (P.L. 95-217). Nationwide and other general permits<sup>4</sup> are valid only for a period of five years, as is the case with other Clean Water Act permits. Thus, they were reissued in 1982 and 1987. They were reissued as a group in November 1991, taking effect in January 1992. Prior to 1991, the nationwide program involved little individualized review of these permits, as the guiding criterion was that covered activities impose so minimal an environmental impact that the full review given individual permits was not warranted. In the 1991 revisions, however, district engineers were given greater authority to modify, suspend, or revoke nationwide permits for specific activities, and division engineers were authorized to exercise discretionary authority to revoke applicability of specific nationwide permits in high value aquatic areas and to then require individual permits for the activity. Further, preconstruction notification (PCN) to the Corps was required for several of the nationwide

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<sup>4</sup> §404(e) of the act authorizes the Corps to promulgate general permits on a regional, state, or nationwide basis. The Corps' regulations authorize the issuance of general permits on a regional (sub-state) or statewide basis by district or division engineers, rather than headquarters, which issues the nationwide permits. The Corps uses the general permit authority to authorize statewide general permits covering activities in states that are deemed to have sufficient state regulatory authority. These statewide general permits (programmatic general permits, or PGPs) are derived from an existing state, local, or other federal agency program and are designed to avoid duplication with that program. They function as a substitute for full state program authorization to administer the 404 program. Depending on the core state program, state PGPs may encompass all wetlands regulation in a state, certain waters only, or certain types of regulated activities. Once a PGP is approved, the Corps suspends its permit activity in lieu of the authorized state or sub-state entity, although the Corps retains the right to override the PGP and issue a federal permit in individual cases. Thus, in addition to 49 nationwide permits, the Corps has authorized several hundred regional general permits (RGPs) and more than 50 PGPs. Also, some activities qualify for abbreviated permit processing with authorization by district engineers in the form of Letters of Permission.

permits,<sup>5</sup> and when such notice is required, the applicant must provide a wetlands delineation, as well. Advance notification is intended to give the Corps time to determine that the adverse effects of the discharge or activity will be minimal. The district engineer generally has 45 days to notify the person of approval to proceed or, instead, of the need to obtain an individual permit before the applicant may proceed. Even with those changes, the nationwide permits did not attract significant controversy when they were reissued in 1991.

More attention and more controversy focused on the Corps' process of reissuing the permits in 1996. The Corps had several substantive purposes behind modifying the permits at that time. One was the need to better ensure that permits have minimal adverse effects, especially on isolated wetland areas. A second was the need to better regionalize the program, by emphasizing that Corps officials (38 district and 11 division engineers) should condition nationwide permits on a local basis with limitations that reflect differences in aquatic ecosystem functions and values that exist across the nation. Third was the Corps' desire to restrict a particular nationwide permit, NWP 26, which authorized discharges in headwaters or isolated waters. Critics had long been concerned that this permit was overly broad and had resulted in large amounts of unmonitored wetland losses. Consequently, in 1996 the Corps re-issued NWP 26 but with modifications that reduced the allowed acreage limits and required advance notification by the applicant if the discharge would affect ½ acre or more. Further, the Corps reissued this permit only for two years, intending to replace NWP 26 with activity-based permits.

In March 2000, the Corps issued several new activity-based permits to authorize specific categories of activities, replacing the approach in NWP 26, which was based on acreage and particular geographic types of waters (headwaters and isolated wetlands). The final permits<sup>6</sup> repealed NWP 26 entirely, authorized five specific activity-based permits as replacements, modified several existing NWPs and general conditions, and added two new general conditions. They became effective June 7, 2000. The five new permits covered the following activities: residential, commercial, and institutional developments (NWP 39); reshaping of existing serviceable drainage ditches constructed in non-tidal waters (NWP 41); recreational facilities (NWP 42); stormwater management facilities (NWP 43); and aggregate and hard rock mineral/mining activities (primarily commercial sand, gravel, stone, and hard rock metals and minerals) (NWP 44).

Several of the new permits issued in 2000 (residential, commercial, and institutional activities; recreational facilities; and stormwater management facilities) required compensatory mitigation to offset unavoidable losses of waters of the United States. Compensatory mitigation may be provided through restoration, enhancement, or creation of aquatic habitats; preservation of adjacent open or green space; land trusts; or mitigation banks. A mitigation bank is a site where wetlands or other aquatic resources have been restored, created, enhanced, or preserved to provide compensatory mitigation in advance of the authorized impacts. The entity that developed the mitigation bank provides these aquatic resources in return for payment from the permittee. Specific compensatory mitigation requirements are determined by district engineers on a case-by-case basis, but the basic Corps concept was that there should be a minimum requirement of an acre-for-acre (1:1) wetland replacement as compensatory mitigation for all activities requiring

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<sup>5</sup> A PCN is a brief document that is intended to provide the Corps district engineer with enough information to determine whether an activity is authorized by a nationwide permit. Detailed studies or analyses are not required.

<sup>6</sup> U.S. Department of the Army, Corps of Engineers, "Proposal to Issue and Modify Nationwide Permits; Final Notice," 65 *Federal Register* 12818, March 9, 2000.

preconstruction notification. Greater than a 1:1 ratio can be required in some cases to adequately replace aquatic resource functions and values lost as a result of NWP-authorized activities.

The new general conditions adopted in 2000 put limits on the use of nationwide permits for projects within critical resource waters, and for permanent above-grade wetland fills within the 100-year floodplain as defined by the Federal Emergency Management Agency (FEMA). Critical resource waters are those designated as having particular environmental or ecological significance (such as designated marine sanctuaries and state natural heritage sites). Regarding the 100-year floodplain, the Corps said it sought to ensure that the nationwide permit program discourages further development that would reduce the flood storage capacity of the floodplain, but not create undue constraints or costs on the regulated public, unless necessary to improve the aquatic environment.

In August 2001, with the approaching expiration of the 1996 nationwide permits, the Corps proposed to reissue those and others that had been issued and modified since 1996 (including the 2000 replacement permits for NWP 26) in order to put all of the nationwide permits in the program on a unified five-year schedule.<sup>7</sup>

The proposals raised controversies and criticism from environmental advocates and some other federal agencies, including EPA and the U.S. Fish and Wildlife Service. Environmental groups said that the proposal would substantially weaken protection of the nation's wetlands and streams. On the other hand, industry groups said that the proposal involved only minor changes. These changes offered some benefits, they said, but any such benefits are more than offset by problems with the 2000 replacement permits, which developers and other groups continued to oppose, saying that the permits impose arbitrary and burdensome restrictions. Following a public comment period that generated more than 2,100 comments, the nationwide permits were reissued in January 2002, essentially as proposed, with an effective date of March 18, 2002. The Corps' action modified nine existing permits and six existing general conditions and added one general condition.<sup>8</sup>

## **Permit Reissuance in 2007**

Authorization for the 2002 NWPs expired in March 2007. In preparation for that expiration, in September 2006, the Corps published a proposal to reissue the 43 existing NWPs, with some modification, and to issue six new permits. Following a public comment period, the permits were reissued in March 2007, essentially as proposed, with an effective date of March 19, 2007.<sup>9</sup> The reissued permits also modified some of the general conditions and definitions that apply to nationwide permits. The six new permits are:

- Repair of Uplands Damaged by Discrete Events. This permit applies to activities for restoration of upland areas that have been damaged by storms, floods, fire, or

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<sup>7</sup> U.S. Department of the Army, Corps of Engineers, "Proposal to Reissue and Modify Nationwide Permits," 66 *Federal Register* 42069, August 9, 2001.

<sup>8</sup> U.S. Department of the Army, Corps of Engineers, "Issuance of Nationwide Permits," 67 *Federal Register* 2020, January 15, 2002.

<sup>9</sup> U.S. Department of the Army, Corps of Engineers, "Reissuance of Nationwide Permits; Notice," 72 *Federal Register* 11091, March 12, 2007. A summary table, identifying changes in the 2007 permits, is available at [http://www.saw.usace.army.mil/WETLANDS/NWP2007/PN-NWP07/NWP%20Table\\_2007\\_final.pdf](http://www.saw.usace.army.mil/WETLANDS/NWP2007/PN-NWP07/NWP%20Table_2007_final.pdf).



- other discrete events. The permit only authorizes activities to restore damaged areas to previously existing conditions. (NWP 45)
- Discharges in Ditches. This permit applies to discharges of dredged or fill material into certain types of ditches and canals that are constructed in upland areas, that receive water from another water of the United States, and that divert water to another water of the United States. The Corps argues that, with these limitations, the types of ditches and canals covered by the permit are likely to affect few aquatic resources, thus ensuring that the environmental impact of the discharge is minimal. The permit is limited to discharges that cause the loss of no more than one acre of waters of the United States. (NWP 46)
  - Pipeline Safety Program Designated Time-Sensitive Inspections and Repairs. This permit authorizes inspection, repair, rehabilitation, or replacement of any currently serviceable structure or fill for pipelines that are time-sensitive, for example, following a pipeline rupture and are done in accordance with Department of Transportation procedures. The new permit allows rapid response when needed to reduce environmental impacts. No PCN is required. (NWP 47)
  - Existing Commercial Shellfish Aquaculture Activities. This permit authorizes structures or works in navigable waters, as well as discharges into all waters of the United States, for the continued operation of existing commercial oyster, clam, geoduck, mussel or scallop aquaculture operations. It does not apply to new projects or expansion of existing ones and does not include operations that raise crustaceans or finfish. (NWP 48)
  - Coal Remining Activities. This permit authorizes activities for the restoration of coal mine sites that are causing physical and/or chemical impacts to water; many are likely to be abandoned or closed sites. The permit allows new mining, either at the site or as part of a reclamation project, or together with adjacent unmined areas, and authorizes related discharges of dredged or fill material into non-tidal waters of the United States. There is no specific acreage limit for this permit, which applies only to activities already authorized under the Surface Mining Control and Reclamation Act by the federal Office of Surface Mining or qualified states. The applicant must demonstrate to the Corps that the overall project, including the reclamation activity and any new mining, will result in a net increase in aquatic resource functions. (NWP 49)
  - Underground Coal Mining Activities. This permit authorizes a number of different activities associated with underground coal mining, such as excavating rock and soil on the surface in order to expose coal seams; providing road access for people and equipment to a site; and constructing acid mine drainage impoundments or sedimentation ponds. It can be used to authorize permanent structures or fills that will remain after reclamation of the site. The permit authorizes discharges to non-tidal waters only. It does not authorize coal preparation and processing activities outside the mine site (but these could be authorized by NWP 21). Like NWP 21 (surface coal mining), no specific acreage limit applies. (NWP 50)

The 2007 permits also modified a number of existing permits. For example, previously two NWPs applied to construction of residential developments: NWP 29 (single unit residences) and NWP 39 (multiple unit residential developments and commercial and institutional developments). In 2007 the Corps modified these permits so that NWP 39 now authorizes commercial and

institutional developments, and NWP 29 authorizes all types of residential developments. The change in effect eliminates the previous NWP 29, which had a ¼-acre limit on authorized discharges. As reissued, the revised NWP 29 has the same conditions as NWP 39: authorized discharges would be limited to impacts affecting ½ acre of non-tidal waters and a 300-foot linear foot limit on the loss of a stream bed. The Corps' rationale for the changes to these two permits was that it is inappropriate to establish different permits for single and multiple unit residential developments, because impacts to the aquatic environment are determined by permit conditions (such as the ½-acre limit), not the type of residential development. Regarding the changes to NWP 39, the Corps argued that commercial developments (e.g., retail stores, industrial facilities, and shopping centers) and institutional structures (e.g., schools, fire stations, hospitals, and places of worship) are different from residential developments in a number of ways, such as different state and local requirements concerning planning, zoning, and stormwater management. Therefore, it is appropriate to group them in one permit (NWP 39) and to group residential structures in a separate permit (NWP 29).

Both industry groups and environmental advocates criticized the modifications to NWP 29. Industry groups, particularly homebuilders, objected to the fact that new NWP 29 would require preconstruction notification (PCN) for all applications (previously, NWP 29 required PCN for projects with certain impacts over one-tenth of an acre), arguing that it is unclear why a PCN should be required for all activities, regardless of size. Many single-unit projects that previously were not required to submit a PCN would have to do so under the revised permit, they said. Further, they objected to the 300-foot linear limit and the ½-acre threshold under this permit, saying these limits are too stringent (presumably for multiple unit developments) and will exclude many projects with minimal impact from seeking a nationwide permit. Environmental groups, on the other hand, argued that the ¼-acre threshold in NWP 29 should be retained, not increased.

The 2007 nationwide permits are due to expire on March 18, 2012. Anticipating that date, in February 2011 the Corps proposed to reissue and modify the NWPs, as discussed below (see "2011 Proposal to Reissue and Modify the 2007 Nationwide Permits").

## Critiques

As noted previously, as the nationwide permit program has become more complex over time, major interest groups have increasingly united to argue that the program as it has developed fails to meet its overall objectives, although their reasons for this criticism are very different. One view was expressed by an environmental advocacy group in comments on the 2006 draft NWPs.

The nationwide permit system was presumably developed in order to balance two somewhat contrary objectives: to ensure that the permits issued result in only minimal impacts on aquatic resources, and to provide a predictable, fair, and simply regulatory system for citizens applying for permits. Given the complexity and confusion surrounding the nationwide permit program, together with the clearly more than minimal environmental impacts, we question whether either of these objectives is being achieved.<sup>10</sup>

Similar views were expressed by a group representing one set of land developers.

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<sup>10</sup> Gulf Restoration Network et al., Comments Submitted on Docket number COE-2006-0005, undated, pp. 1-2.

Over time, however, the NWPs have become increasingly restrictive and complex to the point that they faintly resemble the streamlined permitting process Congress envisioned when it enacted Section 404(e)... [T]he program waivers between providing administrative relief and imposing red tape, between a truly streamlined process and one that is so severely limited that few projects can qualify.... The history of the NWP has been a consistent tightening of the eligibility for the program.... Each time the Corps has drawn the line between NWP eligibility and ineligibility, eligibility has been restricted, never relaxed.<sup>11</sup>

Beyond apparent broad agreement that the program fails to meet its objectives, the views of industry and environmental advocacy groups diverge greatly. Major industry groups support the NWP program, or the type of streamlined program that they believe was originally intended, and agree with the Corps that the use of nationwide permits will result in minimal adverse environmental impacts. Nevertheless, they were highly critical of many aspects of the Corps' 2006 proposal.

The Corps' attempt to illegally expand its jurisdiction, the stringent and largely inflexible acreage and PCN [preconstruction notification] thresholds, the lack of a proper administrative process and record to support the proposal, the problematic regional conditions and the overall trend toward the elimination of NWPs all contribute to a permit package that is hardly even a semblance of the streamlined process directed by Congress.<sup>12</sup>

Major environmental groups argue that permitted activities will have more than minimal impacts on the environment and that the Corps has no substantial or scientific evidence to conclude otherwise. They argue that the permits are unlawful because they violate the requirements of Section 404(e) that there may be no more than minimal adverse environmental effects on aquatic resources, both individually and cumulatively. Environmental groups are highly critical of many aspects of the program, such as inconsistent and inadequate PCN requirements, overly vague requirements which will result in weakened regulatory protection, the granting of excessive authority to Corps district engineers to waive permit limits in individual cases, and what they describe as "irrational reliance" on compensatory mitigation to offset the harmful effects of permitted activities.<sup>13</sup>

In addition to general objections, a number of specific concerns became evident after issuance of the 2002 permits and continue with the 2007 permits.

## **Mitigation Requirements**

The Corps acknowledges that, although minimal adverse effects are anticipated from the nationwide permit program, the use of NWPs may still affect the aquatic environment. Therefore, the permits include a general condition detailing how district engineers may require compensatory mitigation to offset the authorized impacts. Mitigation is intended to compensate for lost functions and values resulting from permitted activities. Compensatory mitigation can be

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<sup>11</sup> National Association of Home Builders, "Advice and Recommendations of the National Association of Home Builders on the Department of the Army, Corps of Engineers' Proposal to Reissue and Modify Nationwide Permits," undated, pp. 3, 21, 44.

<sup>12</sup> *Ibid.*, pp. 3-4.

<sup>13</sup> See generally, Comments of the Gulf Restoration Network et al.; Natural Resources Defense Council et al., Comments Submitted on Docket # COE-2006-0005; and Ohio Valley Environmental Council, "Re: Proposal to Reissue and Modify Nationwide Permits, Docket No. COE-2006-0005," November 27, 2006.

accomplished through the restoration, creation, enhancement, and/or preservation of aquatic resources, either by the permittee's individual project, or the use of mitigation banks or other consolidated mitigation efforts. Mitigation requirements incorporated in the nationwide permit program have become more specific over time, especially since 1996, and are viewed by environmental protection advocates as critically important.

Before reissuance in 2002, this general condition required one-for-one mitigation of adverse impacts to wetlands with a stated preference for restoration of wetland impacts over preservation.<sup>14</sup> In 2002, the Corps revised the mandate to allow a case-by-case waiver of this requirement in cases where the Corps determines that some other form of mitigation, such as establishment of vegetated buffers, is more appropriate. The intention of the change, the Corps said, was to have a more ecologically and watershed-based approach to mitigation. In the agency's view, the one-for-one acreage requirement was too restrictive, in that it focused solely on wetlands but did not allow the Corps to mitigate aquatic impacts to streams and other non-wetland aquatic resources. Because the Corps regulates the entire aquatic environment, not just wetlands, it said, mitigation should consider the entire aquatic environment, as well. The Corps said that it will require mitigation for impacts based on a watershed approach, often involving a mix of vegetated buffers and other mitigation in non-wetland areas. Thus, for example, a district engineer might authorize a project with impacts on a particular wetland and require mitigation within the overall aquatic environment of the particular watershed involved but not wetland-acre-for-wetland-acre mitigation. This approach, the Corps said, allows district engineers to require the mitigation for project impacts that best protects the aquatic environment.<sup>15</sup>

Environmentalists strongly opposed this change in 2002, saying that it effectively ignores the principle of "no net loss" of wetlands which has been a goal of national wetlands policy since 1990. In response, Corps officials said that under the revision, project applicants must ensure that wetland functions are replaced and that the "no net loss" goal be met on an acreage basis within a Corps district.<sup>16</sup> Environmental groups also argued that the Corps is too quick to look towards mitigation as the answer for development activities affecting wetlands and should focus on avoiding impacts as a first priority.

In 2007 the Corps also made certain modifications to the general condition for mitigation. Previously, compensatory mitigation was required for all activities requiring a PCN and for permanent losses of U.S. waters, at a minimum one-for-one ratio, unless the district engineer decides that another form of mitigation would be more appropriate. The Corps modified this requirement in 2007 by adding a one-tenth of an acre threshold—that is, if a PCN is required, and if the proposed activity is expected to result in the loss of more than one-tenth of an acre of wetlands, the permittee must comply with compensatory mitigation requirements. Mitigation banks and in-lieu fee programs can be used for compensatory mitigation activities authorized by nationwide permits. The Corps also added language stating that district engineers may require mitigation when certain functions and services of waters of the United States would be

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<sup>14</sup> The policy preference for restoration derives from the fact that preservation does not provide new acres and thus cannot compensate for wetlands loss on an acreage basis.

<sup>15</sup> U.S. Department of the Army, Corps of Engineers, "Issuance of Nationwide Permits," *67 Federal Register* 2063-2067, January 15, 2002.

<sup>16</sup> U.S. Department of the Army, Corps of Engineers, "U.S. Army Corps of Engineers clarifies inaccuracies in wetlands permit reporting," press release, January 16, 2002.

permanently changed by the permitted activity (such as conversion of a forested wetland to a herbaceous wetland in a permanently maintained utility line right-of-way).

In the decision documents accompanying the NWP proposal in 2006, the Corps estimated that in total the permits (including the six new permits) will be used 52,434 times per year and are expected to impact 6,366 acres of wetlands and other waters per year. The Corps also estimated that 19,501 acres will be mitigated to offset the impacts of authorized activities. The data in these estimates were based on reported use of the NWPs during FY2003 and the period of July 1, 2005, to June 30, 2006, as well as a survey of Corps district offices.

Environmental groups were skeptical of these data, asserting that it is unclear how the numbers were obtained, due to inconsistencies in the Corps' permit database.

Even more troubling is the notion that the Corps uses these flawed permit numbers to arrive at the acres of wetlands and waters impacted, and for the presumed use and impact of the proposed NWPs. Again, we can only assume that the Corps has averaged the impacts associated with some subset of known nationwide permit applications. This type of statistical mean does not provide us with the actual impact to waters of the United States, nor can it be used as a basis for predicting the future cumulative impacts of the proposed NWPs.<sup>17</sup>

Environmentalists have continued to be critical of the Corps' reliance on mitigation as the basis for concluding that impacts of the nationwide permits will be minimal. They have pointed to the incomplete track record of mitigation projects described in a number of reports, including a June 2001 report of the National Research Council<sup>18</sup> and a 2005 GAO report, showing that mitigation is not fully successful and does not compensate for wetlands lost to permitted fills.<sup>19</sup> In light of the lack of data that mitigation is performed or that it would successfully replace lost functions and values, they asserted that the Corps lacks sufficient evidence to conclude that mitigation will render the impacts of authorized activities minimal. If an activity requires mitigation, these critics said, by definition it has more than minimal adverse effects to begin with, and under the Clean Water Act, activities with more than minimal adverse effects can only be authorized by an individual permit. They noted that the Council on Environmental Quality has said that relying on mitigation to assume impacts are reduced below the threshold of significance violates the National Environmental Policy Act.<sup>20</sup> The Corps acknowledges that ecological success of mitigation varies widely, but argues that mitigation is important to ensuring that nationwide permits result in minimal adverse effects. The Corps says that it has increased its compliance efforts to ensure that authorized projects are constructed as authorized, and that mitigation is successful.

Under the 2007 NWPs, compensatory mitigation is required for all wetland losses that exceed one-tenth of an acre, unless the district engineer issues a project-specific waiver. Industry was critical that the Corps appears to elevate one form of mitigation (compensation) above all others<sup>21</sup>

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<sup>17</sup> Gulf Restoration Network et al., Comments Submitted on Docket number COE-2006-0005, p. 4.

<sup>18</sup> National Academy of Sciences, National Research Council, *Compensating for Wetland Losses under the Clean Water Act*, Washington, 2001, 267 p.

<sup>19</sup> U.S. Government Accountability Office, "Wetlands Protection: Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure that Compensatory Mitigation is Occurring," GAO-05-898, September 2005.

<sup>20</sup> Council on Environmental Quality, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," March 23, 1981.

<sup>21</sup> Under its regulations and policy, when the Corps evaluates standard permit applications, it first determines that (continued...)

and does not give district engineers flexibility to determine the extent to which mitigation is needed, on a case-by-case basis. Environmental groups, on the other hand, strongly objected to allowing waivers from mitigation requirements and giving discretion to district engineers, particularly because the NWP's contain no criteria or performance standards that would govern mitigation.

## **Coal Mining Activities**

The use of nationwide permits to authorize coal mining activities has been and continues to be controversial, particularly in connection with NWP 21, which concerns surface coal mining activities. Critics say that the environmental impacts of coal mining are typically far greater than the standard set forth in the Clean Water Act (CWA) Section 404(e), that authorized activities will cause only minimal adverse environmental effects, individually and cumulatively. The mining industry argues that nationwide permit procedures are necessary to minimize regulatory burdens that would threaten the economics of coal mining and to provide the kind of flexibility needed by industry to respond to quickly changing operating requirements.

Nationwide permit 21 authorizes discharges from surface coal mining activities which result in no more than minimal impacts (site-specifically and cumulatively) to the aquatic environment. There is no acreage limit or threshold for a project to use this permit. The Corps reissued NWP 21 in 2002 with two changes intended to strengthen environmental protection for projects authorized by the permit. First, the permit requires the Corps to determine appropriate mitigation in accordance with nationwide permit general conditions, rather than relying primarily on less restrictive state-required mitigation established under the Surface Mining Control and Reclamation Act, as had previously been the case. Second, the permit requires explicit authorization before the activity can take place, rather than only requiring preconstruction notification, as in the past.

Critics were less focused on these 2002 changes than on the basic permit itself, because environmentalists have long contended that the permit authorizes disposal of coal mining waste material which buries streams with overburden material, thereby disturbing the natural stream processes and water quality in entire watersheds and resulting in permanent loss of habitat. According to that view, mitigation cannot sufficiently compensate for these impacts, and any use of this permit is inconsistent with ensuring "minimal adverse effects" on the aquatic environment.

Contributing to controversy over NWP 21 is the fact that in recent years the Corps has allowed the use of this permit to authorize mountaintop mining activities in several Appalachian states (e.g., West Virginia and Kentucky).<sup>22</sup> This practice involves removing the tops of mountains to expose and remove underlying coal seams. Upon completion of the coal removal, some amount of the overburden, or excess spoil, is placed back on the top of the mountain, while the majority is disposed in nearby valleys where streams and wetlands are filled with the mining waste.

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(...continued)

potential impacts to wetlands and other aquatic resources have been avoided to the maximum extent practicable; remaining unavoidable impacts will then be mitigated to the extent appropriate and practicable, in a sequence beginning with avoidance of impacts, followed by minimization of adverse impacts, and then compensatory mitigation for unavoidable impacts which remain. Compensatory mitigation might include restoration of a former wetland, or enhancement for specified purposes such as water quality improvement.

<sup>22</sup> For information, see CRS Report RS21421, *Mountaintop Mining: Background on Current Controversies*, by Claudia Copeland.

Environmentalists have sought to strengthen regulation of mountaintop mining, if not halt it altogether, in part by arguing that the practice should be regulated under more stringent Clean Water Act provisions than Section 404. Citizen groups have filed lawsuits seeking generally to halt the Corps' use of nationwide permit 21 for mountaintop mining operations. So far, protection advocates have been unsuccessful in their efforts. The Corps has asserted that use of NWP 21 for surface mining and mountaintop mining activities avoids and minimizes impacts to the extent practicable and that adequate mitigation can be used to determine that a project has minimal effects. These activities, the Corps has said, can result in a "substantial improvement in downstream water quality and aquatic habitat within a watershed."<sup>23</sup>

However, as discussed further below, the Obama Administration is reviewing NWP 21 in connection with a broad review of the environmental impacts of mountaintop mining and has proposed to prohibit use of the permit in conjunction with surface coal mining activities in the Appalachian region (see "Recent Administration Activity Concerning the Surface Coal Mining NWP").

In the September 2006 proposal to reissue the 2002 permits, the Corps noted a number of administrative steps taken to address public concerns about NWP 21, such as adopting a standard operating procedure for review of permit applications. In the proposal, the Corps requested public comment on the need for an acreage limit for this permit, as it previously included none. The mining industry generally supported NWP 21 and two related new permits, 49 and 50. However, they opposed any acreage limit on NWP 21, saying that the permit would be useless to them if it included an acreage limit. Most coal companies would not be able to comply with such a limit and would, therefore, be required to obtain an individual permit, they said. Getting an individual permit imposes costs of time and money to applicants and to government, industry contended, without additional environmental benefits. In the revised permits, issued in March 2007, the Corps did not include an acreage limit for NWP21.

Environmental critics cited data on the degrading impacts of current NWP 21 to aquatic life in Appalachian streams, as well as terrestrial resources and wildlife, including data from a programmatic environmental impact statement on mountaintop mining prepared by the Corps which acknowledged that fills authorized by this permit have eliminated more than 1,200 miles of streams in the past.<sup>24</sup> In the 2006 decision document for NWP 21, the Corps estimated that in total this permit will be used 204 times per year and is expected to impact 81 acres of wetlands and other waters per year. The Corps also estimated that 71 acres will be mitigated to offset the permit's impacts. Environmental groups argued that there is no support for the Corps' claim that mitigation will reduce impacts of this permit to a minimal level, and urged that individual permits should be required. In their view, nationwide permits should only be used for mining-related activities with lesser impacts than valley fills, such as road crossings, temporary sediment ponds, or stream diversions. The Corps responded that NWP 21, like the other nationwide permits, requires compliance with general conditions, which address many of these criticisms.

Two of the 2007 permits, 49 and 50, also address coal mining activities. The Corps' intention with these permits was to provide incentives to coal remining and underground mining activities,

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<sup>23</sup> U.S. Department of the Army, Corps of Engineers, "Issuance of Nationwide Permits," 67 *Federal Register* 2043, January 15, 2002.

<sup>24</sup> U.S. Environmental Protection Agency, "Mountaintop Mining/Valley Fills Final Programmatic Environmental Impact Statement," October 2005. Available at <http://www.epa.gov/region3/mtntop/index.htm>.

arguing that for permittees that meet specified terms and conditions such as acreage impact limits, it will be faster to gain authorization under an NWP than it would be to obtain an individual permit and that the environment will benefit from encouraging coal remining in this manner. By allowing such activities to proceed under a nationwide permit, rather than requiring an individual permit, the environmental benefits of remining (such as removing existing sources of water pollution that harm downstream waters) are more likely to occur, according to the Corps. Further, while acknowledging that permits 21, 49, and 50 have the potential to result in more than minimal adverse effects on water quality, the agency contended that compensatory mitigation, opportunities for division engineers to impose regional conditions, and site-specific evaluation of PCNs will ensure that adverse environmental effects are minimal. In the decision documents accompanying the NWP proposal, the Corps estimated that permits 49 and 50 will be used 204 times per year and are expected to impact 475 acres of wetlands and other waters per year. The Corps also estimated that 404 acres will be mitigated to offset the impacts of authorized activities.

Environmental critics said that the Corps has no factual basis for determining that impacts of the coal mining NWPs will be minimal, since there are no documented data for estimating future impacts of permits that did not exist before 2007. They point out that coal mining waste contains chemicals that are toxic to aquatic life; there have been cases of spills of impounded wastes, with impacts that are more than minimal. Underground mining is a destructive practice, they said, that results in loss of stream and wetland functions through subsidence and waste disposal. They also argue that the general permit process is inappropriate for such large scale activities.

## **Fills Within the 100-Year Floodplain**

As discussed above, in 2000 the Corps established a general condition for the nationwide permit program limiting activities within the 100-year floodplain as defined by FEMA. In 2002, the Corps modified a portion of this general condition to delete a mandate that permittees document that the project meets FEMA-approved requirements and delete a requirement for preconstruction notification to the Corps for certain activities occurring in the 100-year floodplain. Environmental critics argued that the modification allows development in ecologically sensitive floodplain areas. The Corps said it believed that requiring applicants to comply with FEMA requirements is just as effective as also requiring applicants to document their compliance and that the changes to this general permit condition would not reduce the floodplain restrictions adopted in 2000.

This general condition prohibits the use of certain NWPs (39, 40, 42, and 44) to authorize discharges of dredged or fill material in waters of the United States resulting in permanent above-grade fills within mapped 100-year floodplains located above or below headwaters of streams. It also prohibits the use of NWP 43 (stormwater management) discharges within mapped 100-year floodplains located below headwaters. Activities covered by these permits are subject to PCN requirements, meaning that the permittee must notify the district engineer before beginning the work and cannot proceed sooner than 45 days after filing a complete PCN without written notice from the Corps. In 2007, the Corps modified the general condition related to mitigation to simply require permittees to comply with applicable state or local floodplain management requirements that have been approved by FEMA. Thus, potential impacts to 100-year floodplains will be addressed through case-by-case review resulting from preconstruction notification by the permittee. The Corps argued that modifying this general condition will increase government efficiency by promoting conformity with state and local planning and zoning efforts, and federal programs, since FEMA is the lead federal agency for floodplain management.



While industry groups supported this change, environmental groups and others criticized lifting restrictions on activities in the 100-year floodplain, saying that allowing fills in the 100-year floodplain could lead to catastrophic consequences during significant flood events. Restrictions should be retained or even strengthened, some said, so as to prevent cumulative losses of valuable resources which are allowable under FEMA requirements. Without regulatory limits, development can occur in the floodplain, inducing citizens to occupy areas that are at risk of severe flooding. Environmental groups argued that the job of reducing U.S. flood losses by controlling new development should not be left just to state and local governments and that the Corps' regulatory responsibility under the CWA is not lessened by the involvement of other agencies. In the 2007 reissued permits, the Corps said that the revised general condition will provide protection to floodplain values that is appropriate to the scope of the Corps' regulatory authority; additional restrictions or prohibitions on development in the 100-year floodplain are more appropriate to land use planning and zoning, not Corps regulations.

## **Other Issues Concerning Nationwide Permits**

The nationwide permits issued since 1996 have raised a number of additional issues. For example, the program is intended to balance a desire for administrative simplicity and reduced regulatory burden, on the one hand, with protecting aquatic resources, including wetlands. Yet, many industry stakeholders question whether a number of administrative requirements of the permits, such as advance notification to the Corps and other agencies, written verification of permit compliance, and opportunities for regional conditions, are tilted too much in the direction of protecting aquatic resources and not enough in the direction of regulatory relief, while also making the nationwide permit program unduly complicated.

## **Regional Conditioning**

Corps officials have the authority to apply special conditions to use of any of the nationwide permits or even to revoke use of specific permits in aquatic environments of particularly high value or in specific geographic areas. Indeed, the Corps expects its district and division engineers to utilize a significant amount of regional conditioning to ensure effective protection at the local level of wetlands and other water resources, because aquatic resource functions and values vary considerably across the country and cannot be imposed through more stringent national limitations (regional conditioning cannot be used to make an NWP less restrictive).

The purpose of regional conditioning is to consider local differences in aquatic resource functions and values to ensure that nationwide permits do not authorize activities with more than minimal adverse effects on the aquatic environment. One type of regional conditioning is done by district and division engineers who propose specific conditions if there are concerns for the aquatic environment in a particular district, watershed, or other geographic region. Corps officials also may propose revocation of NWP authorization for all, some, or portions of the nationwide permits. A second type of regional conditions is imposed by state Section 401 water quality certification or for state coastal zone consistency (see discussion below). Regional conditions might include identifying distinct watersheds or waterbodies where certain nationwide permits should be suspended or revoked, thus requiring landowners to obtain individual project-specific permits; reducing the acreage thresholds in certain types of waters; or adding notification requirements for all permitted work in certain watersheds. The permits issued in 2000 provided a new and somewhat more formal approach than in the past to developing appropriate conditional

requirements in each Corps District, providing explicitly for public input and coordination with federal resource agencies.

For more than a decade, the NWP program has relied greatly on regional conditioning to adjust the national program to local watersheds. A district engineer can either add special conditions to the NWP authorization or exercise discretionary authority to require an individual permit. This flexibility continues to cause various concerns among stakeholders, with some environmentalists arguing that more restrictive national standards on the NWPs should be imposed instead of relying upon a discretionary authority process. Some in industry believe that the discretionary authority results in greater complexity and less predictability for regulated entities.

However, regarding increased use of regional conditioning to strengthen permits, some environmental groups have been skeptical that the Corps would be able to attach meaningful conditions, while developers have had the opposite concern—that restrictions imposed by Corps regions would be unduly burdensome.<sup>25</sup>

The 2007 reissued NWPs continue the Corps' reliance on regional conditioning and review of preconstruction notification of specific projects as a way for regulators to ensure that impacts of activities are minimal. Echoing their concerns about the Corps' reliance on compensatory mitigation, environmental groups criticized the Corps' expectation that regional conditioning can assure that impacts are minimal. Industry groups contend that regional conditions make the NWPs more complex and burdensome for both the Corps and permit applicants. "As more conditions are placed on the use of NWPs, fewer permit applicants fall outside of the many restrictions and exclusions, thus fewer will qualify for the efficient NWP process."<sup>26</sup>

## **State Coordination Issues**

Implementation of the Corps' regulatory program, including the nationwide permits, requires considerable coordination between federal and state governments. For one thing, many states (and some localities) administer their own wetlands management and protection programs which vary in the way wetlands are defined and the activities that may or may not take place within or near regulated wetlands, and officials attempt to minimize duplication and overlap.

More important, however, is a coordinating responsibility given to states under Section 401 of the Clean Water Act. This provision requires certification by states that a proposed project seeking a federal license or permit, such as a Section 404 permit, will not violate a state's water quality standards.<sup>27</sup> In addition, the 34 states and territories that operate management programs under the Coastal Zone Management Act are required to provide concurrence that the activity is consistent with the state's coastal zone management (CZM) program. Review under the 401 water quality certification process or CZM concurrence is an important means by which states ensure that their water quality concerns will be considered in federally licensed activities, because a state can use this authority to place its own conditions on the federal permit, or to deny the permit's use in that

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<sup>25</sup> "Six New Classes of Activities Covered Under Proposed Corps Replacement Permits," *Daily Environment Reporter*, June 25, 1998, No. 122, p. AA-1.

<sup>26</sup> National Association of Home Builders, "Advice and Recommendations of the National Association of Home Builders on the Department of the Army, Corps of Engineers' Proposal to Reissue and Modify Nationwide Permits," p. 19.

<sup>27</sup> States also may waive 401 certification, which is effectively the same as issuing an unqualified certification.

state.<sup>28</sup> Coordination begins at the time the Corps proposes to issue or reissue the nationwide permit package. However, coordination evidences a number of tensions between the Corps and states, especially when states deny certification or CZM concurrence.

### ***NWP Reissuance: Public Review and Coordination; State Responses***

Issuance or reissuance of NWPs typically begins approximately six months in advance of expiration of existing nationwide permits. The process involves publishing the proposal for public comment and coordinating with states. Publication of the proposed permits in the Federal Register initiates a 60-day public comment period on the draft permits and also serves as the Corps' request to states to issue, deny, or waive certification of the NWPs. Concurrent with the Federal Register Notice, Corps district offices solicit comments on proposed regional conditions and also on their proposals to suspend or revoke some or all of the NWPs, if they have issued or propose to issue regional general permits, programmatic general permits, or letters of permission in lieu of NWPs. The comment period for district public notices is 45 days.

After reviewing public comments on the draft NWPs, the Corps prepares final NWPs, which are subject to another round of review by interested federal agencies (but not the public). The Corps then publishes the final NWPs, which become effective 60 days after publication. During the 60-day period, Corps division engineers approve regional conditions for the final NWPs and issue decision documents which address the environmental considerations related to the use of NWPs in specific Corps districts. The decision documents certify that the NWPs, together with any regional conditions or geographic revocations, will only authorize activities that result in minimal individual adverse effects on the aquatic environment at the regional level.

Also during the 60-day post-publication period, states and Indian Tribes complete their 401 water quality certification and CZMA consistency decisions. Water quality certifications and/or CZMA consistency determinations may be issued without conditions, issued with conditions, or denied for specific NWPs. Conditions placed as a result of 401 certification or CZMA concurrent by a state automatically become part of a nationwide permit in that state. Many states have denied blanket water quality certification for certain NWPs. For example, many states have opposed NWP 29 since it was first issued in 1995, and about one-third of states have denied 401 certification, because the permit was determined to be inconsistent with state water quality standards or other state wetlands management activities. Other states have attached additional conditions to the use of NWPs to ensure that water quality impacts are minimal.

The Corps believes, in general, that activities authorized by NWPs will not violate state or tribal water quality standards and will be consistent with CZM plans. Thus, if a state denies a water quality certification or disagrees that the activities authorized by the NWPs are consistent with a state CZM program, the Corps will deny authorization for the affected activities within that state, but does so without prejudice. Thus, when applicants request approval of such activities, and the Corps determines that the activities meet the terms and conditions of the NWP, the Corps will issue provisional verification letters, notifying the applicant that NWP authorization is contingent upon obtaining the necessary project-specific water quality certificate or waiver thereof, or CZMA consistency determination, from the state, through a process called "individual certification of NWP use on a case-by-case basis."

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<sup>28</sup> For additional information, see CRS Report 97-488, *Clean Water Act Section 401: Background and Issues*, by Claudia Copeland.

An issue of long-standing concern to states is the fact that, if a state denies 401 certification or CZM concurrence, the Corps does not necessarily consider the state's action sufficient cause to deny issuance of the federal permit. When this happens in the case of nationwide permits, the state is forced either to accept the permitted activity, as authorized by the Corps, or to expend its resources to review the project separately and issue a 401 certification with conditions specific to that project. States object that when the Corps issues provisional verification of NWP authorization, this puts pressure on states to certify projects. Many states take the position that, if a state denies certification, the Corps should evaluate the project under the individual permit process. States would like the Corps to treat a 401 denial of an NWP as a veto. The Corps may deny the permit (withdrawing its applicability in a state), but will not always do so. The Corps does not believe that state denial of 401 certification should be the sole basis for requiring an individual permit. The Corps' position is that denial of state water quality certification for a nationwide permit does not necessarily mean that unacceptable adverse effects will occur on a case-by-case basis, and the Corps prefers that the burden of conditioning or restricting the project at that point be with the state through issuance of a project-specific 401 certification or CZM consistency determination.

This tension over state and federal responsibilities does not exist under other Clean Water Act permits. For example, under the act's discharge permit program for industrial and municipal sources (the National Pollutant Discharge Elimination System program in Section 402 of the act), if a state denies 401 water quality certification, EPA insists on changes to the project until it gains certification.

One option is for states to seek approval of a programmatic general permit (PGP; see discussion in footnote 4), if the state is qualified and has sufficient regulatory authority. The Corps would then suspend federal permitting, and there would be less question over state water quality or other requirements. This is the case in a number of states with PGP programs, which replace some or all of the federal nationwide permits. State PGPs are duplicative of some nationwide permits and offer a more streamlined regulatory process for applicants. Another option is for states to seek authorization for full assumption of the 404 program, a more complicated process than PGP approval, and only Michigan and New Jersey have done so. However, not all states are interested or able to seek PGP approval or full program authorization. Thus, even though the Corps has stated its intention to work in partnership with states, most states will continue to conduct 401 certification reviews of nationwide and other wetlands permits, and it is likely that conflicts over water quality certification will persist.

### **Defining Minimal Adverse Effects, Assessing Cumulative Impacts**

Some observers have been critical that, while the Corps has made some environmentally strengthening improvements to many of the nationwide permits since 1996, it has not addressed a number of outstanding concerns. For example, both environmental groups and industry groups have criticized the Corps for declining to define what are "minimal adverse effects." Industry groups contend that a determination of minimal effects is central to whether an individual permit is required. If the Corps cannot define "minimal effects," they say, how can it claim that any particular restriction is required to achieve it? Environmental groups argue a different point, that without defining what "minimal" is, the Corps cannot argue that, even with specified restrictions, a given activity will have only minimal environmental impacts. On these points, the Corps' general position is that it is not appropriate to define or dictate these matters on a nationwide basis, because what constitutes minimal adverse environmental effects can vary widely from state to state and watershed to watershed.

Environmentalists have urged the Corps to conduct a cumulative impact analysis of the nationwide permit program. The agency has declined to do so, contending that the permits do not constitute a major federal action having a significant effect on the human environment, since Corps data on the usage of permits suggest that the adverse effects, even cumulatively, are less than minimal. Thus, the agency argues that it is not required to prepare an Environmental Impact Statement under provisions of the National Environmental Policy Act, nor is a cumulative impact analysis warranted. In February 1998, environmental groups brought suit against the Corps for failure to fully evaluate the effects of the nationwide permit program. Partly in response to this litigation, the Corps announced in June 1998 that it would prepare a programmatic environmental impact statement (PEIS) on the nationwide permit program and would consult with the other federal resource agencies, although the Corps continued to hold that the program has no significant impact on the environment or on endangered species.<sup>29</sup> The Corps viewed voluntary preparation of this PEIS as part of its commitment to ensure that the nationwide program authorizes only activities with minimal individual and cumulative environmental effects. A draft PEIS was issued in July 2001,<sup>30</sup> and the Corps said at the time that a final PEIS would be issued early in 2002. This did not occur, because the Corps determined that it was not necessary to complete the PEIS. For the nationwide permits, the Corps contends that it fulfills the requirements of NEPA through the issuance of environmental assessments.<sup>31</sup>

Rather than conducting an EIS for any of the nationwide permits individually or a PEIS for the package of permits, the Corps prepares “preliminary decision documents” for each proposed NWP, including an environmental assessment and a Finding of No Significant Impact. These documents consider the environmental effects of each NWP from a national perspective, and thus comply with requirements of NEPA. Environmental groups are strongly critical of these documents, saying that they “consist mostly of rote boilerplate with little actual analysis and no real evaluation of alternatives.”<sup>32</sup> Others argue that the documents “are nearly identical in language for each NWP, and merely reiterate the language of Section 404(e) of the Clean Water Act, as if repeating the mantra that the impacts are minimal, they magically become minimal.”<sup>33</sup> By extracting data from each of the 2006 draft decision documents, environmental groups estimated that the permits proposed by the Corps would impact a total of 31,800 acres over five years, or 49.7 square miles. While these groups argue that the data used by the Corps are flawed and undercount likely impacts, they also argue that it is not reasonable to conclude that impacts of that scope are below the required threshold of minimal, even with the addition of regional conditions and district engineers’ discretionary authority to limit impacts.<sup>34</sup>

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<sup>29</sup> U.S. Department of the Army, Corps of Engineers, “Finding of No Significant Impact for the Nationwide Permit Program,” June 23, 1998.

<sup>30</sup> U.S. Department of the Army, Corps of Engineers, “Draft Nationwide Permits Programmatic Environmental Impact Statement,” July 31, 2001.

<sup>31</sup> David B. Olson, U.S. Army Corps of Engineers, personal communication, November 17, 2006.

<sup>32</sup> Natural Resources Defense Council et al., Comments Submitted on Docket #COE-2006-0005, p. 32.

<sup>33</sup> Gulf Restoration Network et al., Comments Submitted on Docket number COE-2006-0005, p. 13.

<sup>34</sup> *Ibid.*, pp. 2-5.

## **Recent Administration Activity Concerning the Surface Coal Mining NWP**

On June 11, 2009, officials of EPA, the Corps, and the Department of the Interior signed a Memorandum of Understanding (MOU) and Interagency Action Plan (IAP) outlining a series of administrative actions to reduce the harmful environmental impacts of mountaintop mining in Appalachia. The plan includes a series of near-term and longer-term actions that emphasize specific steps, improved coordination, and greater transparency of decisions.<sup>35</sup> A key element is an agreement detailing criteria that will be used to coordinate and expedite review of pending permit applications for surface coal mining operations in Appalachia (including but not limited to mountaintop mining projects).

In July 2009, the Corps published a two-part proposal concerning one aspect of the IAP, the use of Nationwide Permit 21 to authorize mountaintop mining activities.<sup>36</sup> First, the Corps proposed permanent modification of this NWP to prohibit its use in conjunction with surface coal mining activities in the Appalachian region. Second, because modification of the NWP is a long-term process, the Corps also proposed to temporarily suspend NWP 21 for surface coal mining activities in the Appalachian region in order to quickly halt the use of NWP 21 in the region. Surface coal mining activities in other regions would not be affected. The proposed suspension and modification would mean that surface coal mining activities in Appalachia would need to be evaluated through the Corps' detailed individual permit review process, rather than under a streamlined nationwide permit. The Corps explained its reason in the proposal:

[T]he Corps now believes that impacts of these activities on jurisdictional waters of the United States, particularly cumulative impacts, would be more appropriately evaluated through the individual permit process, which entails increased public and agency involvement, including an opportunity for public comment on individual projects.<sup>37</sup>

Subsequently, in June 2010 the Corps acted to suspend use of NWP 21 in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia immediately (the second part of the July 2009 proposal) as an interim measure while it continues to evaluate permanent modification or suspension of the permit (the first part of the 2009 proposal), which expires in 2012. According to the Corps' announcement, NWP 21 activities in the affected region that had been verified by the Corps prior to June 18, 2010, will continue to be authorized until March 18, 2012, unless modified on a case-by-case basis.<sup>38</sup> The Corps estimated that the immediate suspension would affect approximately six operations that at the time were seeking to use NWP 21; they would then have to submit applications for individual permits to authorize their activities.

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<sup>35</sup> For additional information on these Administration actions, see CRS Report RS21421, *Mountaintop Mining: Background on Current Controversies*, by Claudia Copeland.

<sup>36</sup> Department of Defense, Department of the Army, Corps of Engineers, "Proposed Suspension and Modification of Nationwide Permit 21," 74 *Federal Register* 34311-34316, July 15, 2009.

<sup>37</sup> *Ibid.* at 34313.

<sup>38</sup> Department of the Army, Corps of Engineers, "Suspension of Nationwide Permit 21," 75 *Federal Register* 117, June 18, 2010.

## **2011 Proposal to Reissue and Modify the 2007 Nationwide Permits**

The nationwide permits issued in 2007 are due to expire on March 18, 2012. Anticipating that date, in February 2011 the Corps proposed to reissue and modify the NWP.<sup>39</sup>

The major focus of the proposal is what to do with NWP 21, the nationwide permit authorizing certain discharges associated with surface coal mining activities. The proposal identified and solicited comment on three options for NWP 21: (1) to not reissue NWP 21; (2) to reissue it with modifications to limit its application; or (3) to reissue it with modifications, as in option number 2, and to prohibit its use for authorizing discharges associated with valley fills for surface coal mining activities. The latter option is the Corps' preference, according to the Notice. Under the preferred option, the nationwide permit could be used to authorize minor activities associated with surface coal mining—including in the 20 states outside Appalachia where it has been used—but could not be used to authorize discharges associated with valley fills (i.e., in Appalachia). Currently NWP 21 does not include any limit on losses of waters of the United States, in terms of acreage or linear foot limits. However, in the 2011 Notice, the Corps proposes that either Option 2 or 3 also would include limits of ½ acre for losses of non-tidal waters and a 300 linear foot limit for loss of stream bed. In total, the changes proposed for NWP 21 are intended to ensure minimal adverse effects to the nation's waters from surface coal mining operations.<sup>40</sup>

The Corps's Notice contains other proposed changes:

- The Corps proposes two new nationwide permits, one for discharges into waters of the United States for the construction, expansion, or modification of land based renewable energy generation facilities, and one for structure and work in navigable waters for water-based renewable energy generation (i.e., wind) pilot projects.
- The Corps does not propose to reissue NWP 47, Pipeline Safety Program Designated Time Sensitive Inspections and Repairs. According to the Corps, this NWP is no longer appropriate, because its terms require permittees to report their use to a Pipeline and Hazardous Safety Administration program, which no longer exists. Other NWPs may be available to authorize such projects.
- The Corps requested public comment on modifying NWP 48, Existing Commercial Shellfish Aquaculture Activities, to include authorizing the expansion of existing operations, or in the alternative, issuing a new NWP to authorize only new commercial shellfish aquaculture operations.

The Corps expects to release the reissued, modified, and new permits before March 18, 2012.

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<sup>39</sup> Department of Defense, Department of the Army, Corps of Engineers, "Proposal to Reissue and Modify Nationwide Permits; Notice," 76 *Federal Register* 9174-9207, February 16, 2011.

<sup>40</sup> *Ibid.*, p. 9182.

## Congressional Interest

Congressional interest in legislation to revise the federal wetlands regulatory program has been apparent in the past, as groups have pursued proposals intended to simplify and streamline permitting; revise federal and state roles in permitting; or clarify the geographic reach of Clean Water Act programs, in response to court cases that have created jurisdictional uncertainties.<sup>41</sup> None has focused specifically on nationwide permits. For some time, controversy over the direction of overall wetlands policy has been a major component of debates on the Clean Water Act and is partly the reason that no comprehensive clean water legislation has been enacted since 1987. Interest groups have been unable to reach consensus on whether legislative reform is needed and, if so, how far it should extend.

Congress has shown some interest in permitting issues, however. In 1997, a House Transportation and Infrastructure subcommittee held an oversight hearing on the developments concerning nationwide permits and other issues.<sup>42</sup> A Senate Environment and Public Works subcommittee held a similar hearing that year.<sup>43</sup> At both hearings, witnesses representing developers and other groups subject to wetlands regulation expressed concern about impacts of the overall wetlands regulatory program, and a number were critical of the 1996 changes to the nationwide permit program, saying that the changes would be costly and could result in project delays. Administration witnesses supported the modifications, responding that the changes would allow the Corps to implement a more fair, flexible, and effective program which is appropriately responsive to environmental protection needs.

Interest in these topics recurred in the 106<sup>th</sup> Congress, focusing on changes to nationwide permit 26. Regulatory issues first were addressed in the FY2000 Energy and Water Development Appropriations bill. As approved by the House in July 1999, this bill included a provision to require the Corps to submit a study on the workload impact and compliance costs of replacement permits for NWP 26. Landowner and developer groups supported the provision, contending that the costs and impacts should be better identified before revised permits were issued, but the Clinton Administration opposed it, saying that the study was unnecessary and would increase wetlands loss in the nation by delaying issuance of replacement permits. The final bill, P.L. 106-60, modified the House language by directing the Corps to study the workload impacts and costs of compliance of the proposed replacement permits, but dropped language that would have required submission of a report to Congress before publication of final permits. In March 2000, the Corps reported estimates of increased permitted workload and compliance costs associated with changes to the nationwide permit program that were proposed in July 1999.

In connection with the FY2001 funding bill for the Corps, Congress addressed the issue of the activity-specific permits issued in 2000, but it did not attempt to modify or rescind the permits themselves. Congress included legislative language in the FY2001 Energy and Water Development Appropriations Act, directing the Corps to improve the analysis and increase

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<sup>41</sup> For additional information, see CRS Report RL33483, *Wetlands: An Overview of Issues*, by Claudia Copeland.

<sup>42</sup> U.S. Congress, House of Representatives, Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, "Recent Regulatory and Judicial Developments on Wetlands," Hearing, 105<sup>th</sup> Cong., 1<sup>st</sup> sess., April 29, 1997 (105-36), 461 p.

<sup>43</sup> U.S. Congress, Senate, Committee on Environment and Public Works, Subcommittee on Clean Air, Wetlands, Private Property and Nuclear Safety, "Wetlands: Review of Regulatory Changes," Hearing, 105<sup>th</sup> Cong., 1<sup>st</sup> sess., June 26, 1997 (S.Hrg. 105-328), 230 p.



information available to the public regarding the costs of the nationwide permit program and permit processing times. This bill was enacted in October 2000 as P.L. 106-377 (after the effective date of the replacement permits that were issued in March 2000). It directed the Corps to revise its cost estimate of the nationwide permits program, based on the final replacement permits (which differed in a number of ways from the July 1999 proposal); prepare a plan to manage the additional workload of these permits; provide quarterly program performance reports and annual reports on two specific Corps divisions; and provide improved information on permit applications and the functioning of the administrative appeals process. A revised analysis of the permitting changes and incremental compliance costs for the 2000 permits was issued in August 2001.<sup>44</sup> This report concluded that the replacement package would increase by about 25% the number of individual permit applications submitted to the Corps, due to activity restrictions and new general conditions, and that processing time and pending applications would rise steadily each year. In principle, the additional permitting time could be avoided if the Corps' permitting budget were increased sufficiently, the report said.<sup>45</sup>

It has been more than a decade since Congress examined the nationwide permit program through oversight hearings or through legislation, in connection with appropriations bills. As this report has described, the program has continued to evolve and to generate wide-ranging concerns among stakeholder and interest groups. Further, the Obama Administration's initiatives and actions concerning surface coal mining activities in Appalachia have drawn congressional attention and criticism in the 112<sup>th</sup> Congress;<sup>46</sup> thus far, that attention has not extended to include oversight of the Corps' regulatory program generally.

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<sup>44</sup> U.S. Army Corps of Engineers, Institute for Water Resources, "Cost Analysis for the 2000 Issuance and Modification of Nationwide Permits," August 2001.

<sup>45</sup> Appropriations for the Corps' regulatory program, which totaled \$117 million in FY2000, have increased to \$190 million in FY2010. The President's FY2011 budget requests \$193 million.

<sup>46</sup> For information, see CRS Report RS21421, *Mountaintop Mining: Background on Current Controversies*, by Claudia Copeland.