

## Modification of Section 404 Nationwide Permits by Douglas Eldred/Martin Janda

The Army Corps of Engineers has issued five new Nationwide Permits (NWP) and has modified six existing NWP's to replace NWP 26. NWP 26 expired and the new NWP's became effective on June 5, 2000. New applications received after March 7, 2000 are subject to the new regulations. The new and modified permits can be used to authorize work in federally regulated wetlands.

Contact our office for a summary table which gives an overview of the new NWP's, their applicability and threshold requirements. The new and modified Nationwide Permits are activity specific. The stated purpose for the revisions is to "...substantially increase protection of the aquatic environment, while efficiently authorizing activities with minimal impact on the aquatic environment."

Most of the new NWP's require submission of a pre-construction notice for disturbance of more than 1/10 ac. into waters of the United States, including wetlands. The maximum acreage limit for most of the new permits is 1/2 ac. Discharges between 1/10 ac. and 1/2 ac. will be evaluated by the District Engineer, and in most cases mitigation will be required. In addition, actions which require mitigation and are adjacent to open water will also require preservation/construction of a 25'-50' minimum buffer area. Typical minimum mitigation requirements will be 1:1 (mostly 2:1) replacement of wetlands plus buffer protection. There are increased restrictions for use for NWP's in floodplains as well.

All States have published Regional Conditions, as required by the Corps, which also became effective on June 7, 2000. The Regional Conditions establish additional regulatory requirements for the NWP's. The NYS Regional Conditions require mitigation of all disturbances of more than 1/4 ac., (1/10 - 1/2 ac. discretionary with the Corps) and golf courses and ski resorts cannot be authorized by nationwide permit.

### Ongoing Activities

Activities currently covered by NWP #26 can continue to be authorized under the following condition:

- Proposed work had to be under construction contract before June 7, 2000 and final construction has to be completed before June 7, 2001. You may also obtain an exemption from the District Engineer under some circumstances.

The revised regulations represent the culmination of a 2 1/2 year public review process. Virtually all the development-friendly measures have been eliminated. Indexing, which would have allowed larger fill for larger parcels, has been eliminated. The pre-construction notification requirements and fill without mitigation threshold dropped from 1/3 acre to 1/10 acre, and the ability to use nationwide permit authorization has dropped from 3 acres to 1/2 acre. In addition, a wetland buffer area will now be required for many situations.

Based on a Corps report, the revision will increase direct costs to applicants by about \$20 million per year, and the Corps will need about \$6 million in additional funding to maintain current levels of service to the public.

The response period for complete nationwide permit applications has been established as 45 days. Typically, when new regulations take effect, there is an additional period of confusion while the Corps establishes policies relative to the new regulations. Considering this and the Corps workload increase, we would expect a much longer review time.

We would suggest that you review your ongoing and future projects to see what the effect will be. Please feel free to contact Doug Eldred or Martin Janda if you have questions or need help dealing with the new regulations.

