

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

Public Notice Concerning Changes to Nationwide Permit 26

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice for public comment.

SUMMARY: In response to a court order issued on October 27, 1997, the Corps is requesting comments on three changes to Nationwide Permit (NWP) 26, which were published in the **Federal Register** on Friday, December 13, 1996 (61 FR 65874-65922). The Corps is requesting comments on the following changes to NWP 26: (1) The expiration of NWP 26 on December 13, 1998; (2) the prohibition against filling or excavating more than 500 linear feet of stream bed under NWP 26; and (3) the prohibition against using other NWPs with NWP 26 to authorize the loss of more than 3 acres of waters of the United States. The Corps is not requesting comments on any other issues related to the recent modification of NWP 26 or any other NWP. Within 90 days of the close of the comment period, the Corps will publish its final determination on these issues in the **Federal Register**.

DATES: Comments must be received by February 24, 1998.

ADDRESSES: HQUSACE, CECW-OR, Washington, D.C. 20314-1000.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson or Mr. Sam Collinson, CECW-OR, at (202) 761-0199.

SUPPLEMENTARY INFORMATION:**Background**

In the June 17, 1996, **Federal Register**, the Corps published a notice requesting comments on the issuance, reissuance, and modification of the NWPs and announced a public hearing to invite the public to provide comments on the NWPs. The Corps proposed changes to several NWPs, including several changes to NWP 26. In the June 17, 1996, **Federal Register** Notice, the Corps did not specifically request comments on limiting filling or excavation of stream beds to 500 linear feet under NWP 26, restricting the use of other NWPs with NWP 26 to limit impacts to waters of the United States to 3 acres for a single and complete project, or issuing NWP 26 for a period shorter than 5 years, which is the maximum legal limit for any NWP.

In response to the June 17, 1996, **Federal Register** Notice, the Corps received over 500 comments concerning

NWP 26. Based on comments from the public and other agencies, as well as Corps internal review of the implementation of NWP 26 over the past five years, several changes were made to NWP 26 to ensure that NWP would comply with a number of legal requirements. These changes were published in the **Federal Register** on December 13, 1996 (61 FR 65874-65922) and became effective on February 11, 1997. On March 6, 1997, a lawsuit was filed by the National Association of Home Builders, objecting to three of these changes. These three changes are: (1) The expiration of NWP 26 on December 13, 1998; (2) the prohibition against filling or excavating more than 500 linear feet of stream bed under NWP 26; and (3) the prohibition against using other NWPs with NWP 26 to authorize the loss of more than 3 acres of waters of the United States.

The Corps believes that the changes we made to NWP 26 were promulgated in full compliance with all legal requirements, and were necessary to ensure compliance with the requirements of the Clean Water Act. However, in view of the public interest in the three changes explained below and in order to avoid the time and expense of litigation, the Corps volunteered to seek comments on the three changes cited above. Accordingly, on October 27, 1997, a court order was issued remanding the action to the Corps to request public comments on the changes to NWP 26 cited in the previous paragraph.

The public is invited to provide comments on these three changes to NWP 26 within 90 days of the date of this notice. The Corps is not requesting comments on any other issues related to the recent modification of NWP 26. Within 90 days of the close of the comment period, the Corps will publish its decision on these issues in the **Federal Register**. In the interim, all the terms and conditions of NWP 26 as published in the December 13, 1996, **Federal Register**, including the three changes that are the subject of this notice, will remain in effect pending a Corps decision. The following is a brief discussion of the three changes to NWP 26. For more details, see the Preamble to the December 13, 1996, **Federal Register** Notice, (61 FR 65874-65922).

(1) Expiration of NWP 26 on December 13, 1998

As a result of an internal evaluation of NWP 26 and consideration of all comments received in response to the June 17, 1996, **Federal Register** Notice, the Corps determined that modification of NWP 26 was necessary and that it

should be replaced with activity-specific NWPs to ensure that no more than minimal impacts to waters of the United States, both individually and cumulatively, are authorized. Knowing that it will take up to two years to issue replacement NWPs, the Corps reissued NWP 26 for a two year period, which will expire on December 13, 1998. Section 404(e) of the Clean Water Act states that no general permit can be issued for a period of more than five years, thereby, allowing the Corps to issue an NWP for a period of less than five years. This two year period will allow the Corps to collect detailed information on the types of activities being authorized by NWP 26, the nature and extent of wetlands and other waters being affected by the NWPs, and potential effects of the NWPs on the Nation's federally listed threatened and endangered species.

In the December 13, 1996, **Federal Register** Notice, the Corps requested comments from the public regarding specific categories of activities that should be considered for new NWPs. Prior to the expiration of NWP 26 on December 13, 1998, the Corps will develop, propose, and issue activity-specific replacement NWPs, with appropriate limitations, to provide consistency with the "minimal adverse effects" mandate of section 404(e). The public will have an opportunity to comment formally on the proposed replacement permits once they are officially proposed in the **Federal Register**. We anticipate that the activity-specific replacement NWPs will be published for public review and comment in approximately March 1998.

(2) Prohibition Against Filling More Than 500 Linear Feet of Stream Bed

In response to the June 17, 1996, **Federal Register** Notice, a few commenters recommended using linear footage to quantify stream bed impacts for the purpose of NWP 26, instead of acreage. They believed that using acreage to quantify impacts to stream beds is inappropriate, because it can allow losses of long segments of streams. For example, filling a 5-foot wide stream bed over a distance of 1/2 mile will result in a loss of 0.30 acre of stream bed. If acreage were used to quantify the stream bed impacts, notification to the Corps would not be required and the work could result in more than minimal impacts if the stream bed provides important functions, such as spawning habitat for fish. Limitations of 200 to 500 linear feet of stream bed impacts were recommended by commenters.

We concurred with these commenters and placed a prohibition in NWP 26 against activities directly affecting (i.e., filling or excavating) more than 500 linear feet of stream bed. Therefore, filling or excavating more than 500 linear feet of stream bed was not authorized under the revisions to NWP 26. The threshold of 500 linear feet was chosen to maintain consistency within the NWP Program, because NWPs 12 and 13 have pre-construction notification thresholds of 500 linear feet. We believe that this additional limitation enhances the Corps ability to ensure that projects with more than minimal adverse impacts will not be authorized under NWP 26.

(3) Use of NWP 26 With Other NWPs Cannot Exceed 3 Acres of Impact

Many commenters recommended that the use of multiple NWPs for a single and complete project (a practice also referred to as "stacking") should be eliminated or restricted because it would allow the possibility of more than minimal adverse effects to result under the NWP Program.

Under certain circumstances, NWPs can be used in combination and result in only minimal individual and cumulative adverse environmental effects. NWP regulations provide for

multiple use of NWPs, as long as each NWP is used only once for a single and complete project and the combined adverse effects are minimal. However, the use of more than one NWP for a particular project could potentially result in more than minimal adverse effects. Many NWPs are usually "stand alone" project authorizations. Generally, only seven of the 37 NWPs are used more than occasionally with certain other NWPs for authorizing projects. These seven NWPs are 3, 12, 13, 18, 19, 26, and 33. We believe that of those seven NWPs, those with the potential to have more than minimal impacts when used with certain other NWPs, are NWPs 18 and 26 in combination with each other and with NWPs 14 and 29. To ensure that multiple use of NWPs does not result in more than minimal adverse effects, the Corps has added a General Condition to the NWPs and restricted certain combinations of nationwide permits. General Condition 15 requires permittees to submit a pre-construction notification to the District Engineer when any NWP 12 through 40 is combined with any other NWP 12 through 40, as part of a single and complete project. NWP 14 was modified so that it cannot be combined with NWP 18 or NWP 26 for the purpose of

exceeding the limitations of any of these three NWPs. For example, NWPs 14 and 26 cannot be combined to authorize the loss of 3½ acres of waters of the United States. Furthermore, NWP 18 cannot be combined with NWP 26 to increase the thresholds or the limitations of NWP 26. NWP 29 is already conditioned so that it cannot be used with NWP 14, NWP 18, or NWP 26. We have also limited the amount of authorized impacts when combining any NWP with NWP 29 or NWP 26. If another NWP is used with NWP 29 to authorize a single and complete project, the total acreage of impacts to water of the United States cannot exceed 0.5 acres. Whenever any other NWP is used in conjunction with NWP 26, the total acreage of impacts to waters of the United States, for all NWPs combined, cannot exceed 3 acres. Likewise, the Corps is only requesting comments on the prohibition against combining other NWPs with NWP 26 to exceed the 3-acre limitation of NWP 26.

Dated: November 13, 1997.

Charles M. Hess,

Chief, Operations, Construction, and Readiness Division, Directorate of Civil Works.

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