

October 9, 2001

HQUSACE  
Attn: CECW-OR  
441 G St.; NW  
Washington, DC 20314-1000

**RE: Comments on the Federal Register notice: “Proposal to Reissue and Modify Nationwide Permits” 66 Fed. Reg. 42070 (August 9, 2001)**

To Whom It May Concern:

On behalf of the nearly 800,000 members of the NATIONAL ASSOCIATION OF REALTORS® (NAR), I am pleased to submit these comments in response to the proposals made by the U.S. Army Corps of Engineers (USACE) to reissue and modify the Nationwide Permits, as noticed in the August 9, 2001 Federal Register.

NAR appreciates the small modifications that the Corps has made in this proposal to ameliorate some of the unintended adverse effects of the existing Replacement Permit program. Some of these improvements include: (1) The Corps’ decision to provide a project-specific waiver of the general condition precluding the use of NWP for projects affecting 300 linear feet of streambed; (2) the Corps’ decision to allow the District Engineer to waive the one-to-one mitigation requirement for projects that meet the PCN threshold; and (3) the Corps’ decision to adopt General Condition 27, which will extend the life of NWP permits until a project is completed, if construction has begun before the original term of the permit has expired.

However, NAR strongly urges the Corps to use this opportunity to reconsider the rationale for its decision to replace the simpler and more efficient NWP 26 program. The Replacement Permit program needlessly complicates what was a straight-forward and efficient approach to authorizing small projects that would not meet the minimal effects standard of § 404(e) under the Clean Water Act.

The Replacement Permit program drastically lowered the acreage threshold at which projects may be undertaken without Corps notification and review. Moreover, even within this lowered threshold a new regime of project-by-project review has been created for all but the smallest projects. Under the Corps’ pre-construction notification (PCN) process, many projects which are nominally within the scope of the NWP program will actually be subject to a form of the individualized review, similar to what is given to individual permit applications. These stringent requirements add considerable cost and administrative burdens to a development project.

Under the current Replacement Permit program, projects undertaken in the 100 year floodplain or affecting more than 300 linear feet of streambed would automatically require individual permits and be taken out of the NWP process. This requirement will result in a substantial increase in its workload and administrative costs. Moreover, most of this extra time will be spent looking at small projects, the vast majority of which will be insignificant from an environmental perspective, leaving the Corps with less time and resources to focus on more significant projects.

Part of the impact of the Replacement Permit program will be to remove the incentive created by the old NWP 26 to try to keep the wetland impacts of projects small in order to fall below the individual permit threshold. Under the current Replacement Permit program, the PCN threshold is so low as not to be meaningful in most cases. Moreover, the type of individualized review that will occur once the PCN is approved is so similar to the review given to individual permit applications that the program provides little incentive to keep project impacts small.

The consequences of the Replacement Permit Program – the substantially increased workload for the Corps and the additional delay and expense to the regulated community – might be justified if the Corps were able to demonstrate that the NWP 26 program was responsible for creating more than minimal effects on the environment in satisfaction of standard in § 404(e).

Throughout this process, the Corps has conspicuously avoided making that determination. The Corps has expressly refused to provide a definition of the term “minimal effects.” Indeed, the Corps simply declares – without any supporting basis – that the NWP 26 program failed to meet the very “minimal effects” standard that it refused to define. How NWP 26 supposedly failed to meet that undefined standard also remains unexplained.

Rather, the Corps tries to use the “minimal effects” concept in manner that is completely inconsistent with 404(e). In that section, Congress used the term as a standard on which the nationwide permit program as a whole would be evaluated: Under the language of the statute, if the program, considered on a collective basis, did not create more than minimal adverse effects on the environment, it would pass muster. But the Corps does not use the term as a standard by which the program as a whole should be judged, but rather as a standard – still undefined – for evaluating individual permit applications within the program, indicating that District Engineers will apply this standard in determining whether specific projects will be authorized under the Nationwide Permit program.

This turns the concept of the program on its head – instead of being a program to

authorize without bureaucratic process small projects that do not individually and collectively cause “minimal effects,” it will become a miniaturized version of the individual permit program, in which each project is separately judged against a “minimal effects” standard.

While NAR continues to urge the Corps to withdraw the Replacement Permit program, NAR appreciates the Corps’ efforts in adopting measures that ameliorate some of the unintended effects of the Replacement Permit program. NAR applauds the Corps for its responsiveness to some of the concerns expressed about the effects of the program. However, NAR continues to suggest that the program as a whole should be reconsidered.

The NATIONAL ASSOCIATION OF REALTORS® appreciates this opportunity to comment on the Corps proposal to reissue and modify the Nationwide Permit system. Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink that reads "Richard Mendenhall". The signature is written in a cursive style with a large, looped initial "R".

Richard Mendenhall  
2001 President