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**Friday  
October 5, 1984**

**33 CFR Parts 320, 323, 325, and 330**

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**Part V**

**Department of  
Defense**

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**Corps of Engineers, Department of the  
Army**

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**33 CFR Parts 320, 323, 325, and 330  
Final Regulations for Controlling Certain  
Activities in Waters of the United States**

**EXHIBIT**

**5**

**DEPARTMENT OF DEFENSE**

**Corps of Engineers, Department of the Army**

**33 CFR Parts 320, 323, 325, and 330**

**Final Regulations for Controlling Certain Activities in Waters of the United States**

**AGENCY:** Army Corps of Engineers, DOD.

**ACTION:** Final rule.

**SUMMARY:** The Department of the Army is amending the Corps of Engineers permit regulations for controlling certain activities in the waters of the United States. This final rule is published to comply with requirements of a settlement agreement reached in *National Wildlife Federation v. Marsh*, No. 82-3632 (D.D.C. December 22, 1982). These changes include several policy and procedural changes and modifications to certain nationwide permits. The major effect of this rule is to establish reporting requirements and procedures.

**EFFECTIVE DATE:** October 5, 1984.

**FOR FURTHER INFORMATION CONTACT:** Mr. Sam Collinson or Mr. Bernie Goode, Regulatory Branch, (202) 272-0199

**SUPPLEMENTARY INFORMATION:** In December of 1982, 16 environmental organizations filed suit against the Department of the Army and the U.S. Environmental Protection Agency (*NWF v. Marsh*) over several provisions of the Corps of Engineers interim final regulations published on July 22, 1982 (47 FR 31794). Nine industrial groups intervened in support of the Army and EPA. On February 10, 1984, the court approved a settlement agreement between the plaintiffs and defendants whereby the Army agreed to publish regulations proposing several policy and procedural changes and modifications to certain nationwide permits. The settlement agreement was endorsed by the Army, EPA, the Department of Justice, the 16 environmental organizations, and two industrial groups. The Army believes the settlement agreement strikes a reasonable balance between environmental protection and an effective and responsive regulatory program. The settlement agreement did not commit the Army to promulgate any particular final regulations. All comments received on the March 29, 1984, proposed regulations were evaluated and considered in promulgating these final regulations.

**Environmental Documentation**

We have determined that this action does not constitute a major federal action significantly affecting the quality of the human environment.

Appropriate environmental documentation is prepared for all permit decisions. Environmental assessments for each of the nationwide permits issued today are available from the Corps of Engineers. We determined that, considering the potential impacts, required conditions, discretionary authority and best management practices, none would require preparation of an environmental impact statement.

**Public Comments**

We received over 150 comments on the March 29, 1984, proposed regulations (49 FR 12660), which comments covered a full range of views. We also received nearly 200 comments on the July 22, 1982, interim final regulations (47 FR 31794) and nearly 500 comments on the May 12, 1983, proposed regulations (48 FR 21466). The comments on the 1982 and the 1983 regulations which pertained to provisions of the March 29, 1984, regulations were also considered in the development of these final regulations. The comments on the 1982 and the 1983 regulations which do not pertain to the provisions of the March 29, 1984, proposal will be considered during the development of those final regulations. The March 29, 1984, proposals were adopted as published except for changes in § 330.4(b), 330.5(a), 330.5(a)(17), and 330.5(a)(26). A new § 330.5(c) has been added. See discussion below.

**Part 320—General Regulatory Policies**

**Section 320.4(a)(1)**

In accordance with the proposal, this paragraph clarifies the fact that no 404 permit can be issued unless it complies with the 404(b)(1) guidelines. If a proposed action complies with the guidelines, a permit will be issued unless the district engineer determines that it will be contrary to the public interest. A number of commenters were concerned that this section now shifts the "burden of proof" with respect to the public interest from the applicant to the Corps. As a practical matter, both the current wording and the wording being adopted by this change describe the same public interest balancing process. The district engineer may issue a permit when he has determined, after weighing the benefits and detriments of a proposal, that the activity requiring a permit will not be harmful to the public interest. The responsibility for weighing

the benefits of a proposed activity against the detriments has always been and remains vested in the Corps of Engineers.

**Section 320.4(b)(4)**

In accordance with the proposal, this paragraph states that the district engineer will apply the 404(b)(1) guidelines (40 CFR 230.10(a) (1), (2), (3)) in evaluating whether a particular discharge of dredged or fill material into waters of the United States shall be permitted.

**Section 320.4(c)**

In accordance with the proposal, the last sentence of this paragraph states that district engineers will give "full consideration" to the views of federal and state fish and wildlife agencies in permit decisions. Many commenters misunderstood the intent of this change. They believed that the effect of changing the wording from "great weight" to "full consideration" placed unwarranted significance on these resource agency views. Some suggested this amounted to a veto power for federal and state agencies that was beyond the scope of section 404. Other commenters saw the change as having just the opposite effect (i.e., weakening the degree of consideration given to resource agency comments). The intent and the probable effect of the change in modifiers have largely been misinterpreted. The basis for making the change to "full consideration" was to reflect the statutory language of the Fish and Wildlife Coordination Act; this term is also consistent with the National Environmental Policy Act and other legal authority.

**Section 320.4(g)**

In accordance with the proposal, this paragraph recognizes the right to reasonable private use of property as a factor in the public interest review. Comments on this paragraph covered a broad range of views, some supporting the change, others feeling that this change adversely impacts individual property rights. The expectations and wishes of a private property owner have been generally considered in the processing of permit applications, even though these rights were not hitherto explicitly listed as a factor in the Corps public interest review. These expectations may not prevail when public interest considerations lead to denial or conditioning of a permit.

**Section 320.4(j)(2)**

In accordance with the proposal, this paragraph clarifies that the district

engineer will normally consider the decisions of state, local, and tribal governments on land use matters to be conclusive as to this factor in the public interest review. Many commenters interpreted this change to mean that the Corps would automatically base its permit decisions on existing or planned zoning or land use designations, or on the permit decisions of a state, local or tribal government rather than its current objective public interest review. This interpretation is not correct. Land use is one of several factors considered by the Corps in the public interest review (33 CFR 320.4(a)). The intent of this paragraph is to recognize that the primary responsibility for addressing this factor (i.e., local zoning and/or land use matters) rests with state, local and tribal governments. When a state, local, or tribal government gives its zoning or other land use approval for a particular project, this will be considered conclusive for this factor. However, the Corps will continue to perform a thorough, objective evaluation of each application in full compliance with applicable regulations and laws.

#### **Part 323—Permits for Discharges of Dredged or Fill Material Into Waters of the United States**

##### **Section 323.4(a)(3)**

In accordance with the proposal, this paragraph clarifies the types of appurtenant structures to irrigation facilities for which the discharges associated with such structures are exempt from the provisions of these regulations unless otherwise regulated under paragraphs (b) and (c) of this section. The comments on this paragraph of the proposal were reviewed by EPA and the following discussion was prepared by that agency in light of its responsibility to interpret section 404(f).

While a number of commenters supported the language of this paragraph as written, others suggested revisions which, as discussed below, EPA does not believe are necessary.

Several commenters requested the restoration of the sentence from the 1982 regulations implementing the 404(f) irrigation ditch exemption which stated that the exemption did not include discharges which had the effect of bringing waters of the United States into a use to which they were not previously subject or where the flow or circulation of such waters may be impaired or their reach reduced. The commenters were concerned that this deletion would widen the scope of the exemption. However, the removal of this sentence has no effect on the scope of the

exemption. The sentence was deleted from § 323.4(a)(3) simply because it duplicated § 323.4(c), which already applied a comparable limitation to all the section 404(f) exemptions, including the irrigation ditch exemption, in accordance with the requirements of section 404(f)(2).

Two commenters requested a size limitation to prevent serious fish and wildlife losses from damming of a stream to take all its water for irrigation under this exemption. EPA does not believe that such a size limitation is necessary in light of the safeguards provided by section 404(f)(2), as reflected in § 323.4(c). Furthermore, while the list of types of facilities in the revised regulations is not all-inclusive, as one commenter correctly noted, it is intended to give a general indication of the scale and nature of associated facilities which are "appurtenant and functionally related to irrigation ditches." Thus, discharges associated with major dams and diversion projects and other large-scale facilities which are not subsidiary to irrigation ditches are clearly not included in the exemption.

One commenter suggested revising the phrase "functionally related to irrigation ditches" to read "directly related to irrigation structures." We have retained the word "functionally" because EPA believes it more clearly expresses the intent of this exemption. The word "ditches" has been retained because that is the statutory language.

Several commenters suggested additional changes or clarifications to the section 404(f) regulations, particularly to the exemption for drainage ditches. EPA and Army will take those comments under consideration if changes to those provisions are proposed in the future.

##### **Section 323.6(a)**

In accordance with the proposal, this paragraph states that district engineers will deny permits for discharges which fail to comply with the 404(b)(1) guidelines, unless the economic impact on navigation and anchorage necessitates permit issuance pursuant to section 404(b)(2) of the Clean Water Act.

The majority of commenters supported this clarification of the role of the 404(b)(1) guidelines in the public interest review process. One commenter recommended that the provision state that compliance with the guidelines should be a prerequisite to the issuance of 404 permits and that the additional factors of the public interest review would be a separate basis for denial but could not be used to offset an unfavorable finding under the guidelines. This is, in fact, required by

the revisions to this paragraph. Although no 404 permit can be issued unless compliance with the 404(b)(1) guidelines is demonstrated (i.e., compliance is a prerequisite to issuance), the 404(b)(1) evaluation is conducted simultaneously with the public interest review set forth in 33 CFR 320.4(a). Therefore, we believe the proposed language already reflects our intent.

#### **Part 325—Permit Processing**

##### **Section 325.3(b)**

In accordance with the proposal, this paragraph clarifies the public notice procedures for any new general permit, or for the modification or reissuance of existing general permits. Public notices will contain a statement of availability of information confirming that the activities to be covered by the proposed general permit comply with general permit requirements. Existing paragraphs (b) and (c) have been renumbered (c) and (d). The majority of commenters supported adoption of this paragraph as proposed. One commenter requested that language be incorporated to require all items enumerated in § 325.3(a) (1) through (16) be included in the public notice. Some of the listed information requirements are not applicable to general permits. We believe that the adopted regulations require that all information necessary to provide a clear understanding of a proposal be included in the public notice.

##### **Section 325.4**

In accordance with the proposal, this section clarifies the district engineer's authority to condition permits and to identify those circumstances wherein he will deny permits if conditions which are necessary to protect the public interest cannot be reasonably implemented or enforced, or cannot otherwise be required. This section also provides that under certain conditions off-site mitigation may be required. Some commenters questioned the basis for requiring the incorporation of 401 water quality certification conditions in Corps permits. Section 401(d) of the Clean Water Act requires that such conditions become conditions of any federal permit or license. Most commenters supported these changes.

#### **Part 330—Nationwide Permits**

##### **Section 330.4**

In accordance with the proposal, the former § 330.4 has been replaced with a new section discussing public notice requirements for nationwide permits. The nationwide permits formerly found

in this section have been consolidated and placed in § 330.5(a)(26). This change was supported by most commenters. Some confusion was expressed concerning the district engineer's role in the public notice process. District engineers are required to issue public notices of the final issuance of nationwide permits by the Chief of Engineers on a local basis concurrently with publication in the Federal Register, including any regional conditions which have been adopted by the division engineer.

#### Section 330.5

In accordance with the proposal, the introductory text of this section and § 330.5(a) (7), (17), (21), and (23) have been modified and § 330.5(a)(26) has been added. Over 100 individual comments were received in response to the proposed changes in this section. The majority of these comments addressed the nationwide permit at paragraph (a)(26). However, many were concerned about other changes or revisions to this section. These comments are discussed below.

#### Sections 330.5(a) (7), (17), (21)

These nationwide permits have been modified to include reference to new § 330.7. Some commenters questioned how the district engineer and the resource agencies would be notified of proposed activities under these permits. The existing notification procedures required by the National Pollutant Discharge Elimination System (NPDES) program, Federal Energy Regulatory Commission (FERC) licensing process, and Title V of the Surface Mining Act respectively provide notice to the Corps and resource agencies so that their concerns, if any, can be forwarded to the district engineer for his action pursuant to the requirements of § 330.7(c)(2). Section 330.7(c)(3) requires notification to EPA and the state water quality agencies since the surface mining process does not assure this notification. An additional notification beyond these procedures is not necessary. In § 330.5(a)(17), the proposal has been changed to substitute "Federal Energy Regulatory Commission" for "Department of Energy" to more accurately identify the agency which licenses small hydropower projects.

#### Section 330.5(a)(23)

This nationwide permit has been modified to require that the Chief of Engineers solicit comments through a Federal Register notice on another agency's categorical exclusions prior to authorizing them under this permit. Several commenters questioned whether

previously authorized categorical exclusions could also be subjected to these provisions and, if so, the new procedure would be redundant, costly, and could result in significant delays of some projects. The categorical exclusions which have already been authorized by the Chief of Engineers are not subject to the requirements of this paragraph unless modifications or additions are proposed in the future. Federal Highway/Urban Mass Transportation Agency exclusions (23 CFR 771.115, October 30, 1980) and the U.S. Coast Guard exclusions published May 10, 1980 (45 FR 32818) are the only exclusions previously authorized. Future consideration of agency categorical exclusions for purposes of this nationwide permit will be subject to the provisions of these regulations.

#### Section 330.5(a)(26)

This nationwide permit modifies the headwaters and isolated waters permits previously found at § 330.4(a) (1) and (2). Many commenters raised questions concerning the definition of the term "loss or substantial adverse modification" and indicated that there was a need for a definition of that term. The "loss" portion of this term generally includes all discharges of dredged or fill material which result in an area no longer being a water of the U.S. The "substantial adverse modification" portion of this term does not refer to all effects on the aquatic system, but rather only to modifications that are *substantial* and *adverse*. Generally, a substantial adverse modification occurs when a discharge eliminates the principal valuable functions of a water of the United States (including wetlands) even though the discharge does not convert the water to dry land. The Corps will monitor the use of this term to determine if further guidance is necessary.

A number of commenters expressed concern with the acreage limitation, explaining that wetland areas and open water areas vary greatly in value; thus, the modification of a 10-acre area in some locations might not create more than minimal adverse environmental impacts, while the loss of 1 acre in another location could be very significant in terms of environmental impacts. It is for exactly these reasons that the provisions for notification and evaluation in § 330.7 were developed, and the provisions for exercising discretionary authority were provided in § 330.8. The Corps is aware of the gradations in values associated with widely differing areas and believes that the regulations being adopted by this rule provide an appropriate mechanism

to fully evaluate these areas and to assure conformance of any proposed activity with general permit criteria.

Minor word changes have been made in this paragraph to clarify the exclusion of activities from this permit. In addition, the reference to 33 CFR 323.2(a)(3) has been deleted to correct a previous error which included this reference to 1980 proposed language which was not adopted.

#### Section 330.5(c)

A significant number of commenters expressed concern about the impact of these regulations on ongoing projects and supported the inclusion of a "grandfathering" provision to prevent inequitable impacts on previously authorized projects. In adopting these regulations, we considered how to avoid retroactive applications of these regulations which would frustrate the expectations of permittees who justifiably relied on the previous permits modified and reissued herein. Yet we were also mindful of the need to achieve the goals of these regulations. We determined that an equitable transition procedure was necessary to prevent the injustice of imposing new regulatory obligations upon permittees who had adhered to and justifiably relied on the previous regulations.

In § 330.5(c), we set out the procedures to "grandfather" discharges previously authorized by the nationwide permits (§ 330.4(a) (1) and (2) of the July 22, 1982, Interim Final Regulation) modified and reissued at § 330.5(a)(26). Section 330.5(c) includes three ways discharges may continue under these previous authorizations for 18 months from the effective date of these regulations. First, the discharge may continue if it was commenced or under contract to commence by the effective date of these regulations. Second, the discharge may continue if the permittee had received written authorization by March 29, 1984, from the Corps stating the specific discharge was authorized by the previous nationwide permits modified and reissued herein at § 330.5(a)(26) and has obtained by the effective date of these regulations all federal, state or local permits or approvals required for the specific discharge to begin. Permittees discharging under the two "grandfathering" criteria above must provide documents demonstrating compliance within 60 days of the effective date of these regulations. Third, district engineers may "grandfather" other discharges not meeting the two grandfathering criteria above after determining the discharge

complies with the 404(b)(1) guidelines. To be eligible for such "grandfathering," permittees must demonstrate to the district engineer within 60 days of the effective date of these regulations, investments made toward the discharge in reliance on the previous authorization of the nationwide permits modified and reissued at § 330.5(a)(26) which cannot be modified to comply with these regulations without causing substantial loss to the permittee. The previous authorization under any of these three criteria for grandfathering discharges continues for 18 months from the effective date of these regulations. After 18 months, any new or remaining discharges must meet the terms of these regulations.

Discharges previously authorized by the nationwide permits modified and reissued at § 330.5(a)(7), (17) and (21) continue to be authorized by these permits.

**Section 330.7**

In accordance with the proposal, this new section establishes procedures to be followed by district and division engineers upon receipt of pre-discharge notifications. Many of the comments received addressed specific portions of this section and are discussed in the following paragraphs; however, a large majority of responses stated that 20 days is inadequate to carry out the required notifications, reviews, and decisions required by this section. It is not intended that a "full public interest review" type evaluation be completed during this period, but rather that activities which do not meet the criteria for coverage by the nationwide permits might be identified and the proper action taken to require individual permits, if appropriate. Twenty days has been determined to be a reasonable period in which to make this evaluation and to notify the project sponsor of the need for an individual permit or that he may proceed under the nationwide permit. However, in order to meet this time limit, coordination procedures making the maximum use of telephonic and electronic mail exchanges between the federal and state agencies and the Corps districts will be developed as necessary.

**Section 330.7(a)(2)**

Two commenters suggested that the proposed paragraph be modified to read "if notified by the district or division engineer that an individual permit will be required \* \* \*" rather than " \* \* \* may be required." They considered this change to be necessary to assure that decisions required by the notification procedures will be made within the

allowable 20-day period. These commenters believed that use of the word "may" would allow the Corps to notify an applicant in accordance with this paragraph that he could not proceed under the nationwide permit, but would not require the Corps to make any final decision on the need for an individual permit within the 20-day period. This interpretation is not correct. The Corps must, in all but exceptional cases, make a final decision on the need for an individual permit within the 20-day period. The Corps will notify an applicant that an individual permit *may* be required *only* when unusual circumstances point to the need for an individual permit yet prevent the Corps from making such a finding without a limited additional time.

**Section 330.7(c)(1)**

Some commenters were uncertain about the nature of the review process to be followed by district engineers. Upon receipt of notification for a discharge which will cause the loss or substantial adverse modification of 1 or more but less than 10 acres of waters including wetlands above the headwaters or in isolated waters, the district engineer will determine whether the activity is in a "class of discharge" or "category of waters" identified as of "particular interest" to a resource agency or otherwise would be of interest to those agencies. He will coordinate with those agencies and provide his recommendation to the division engineer.

**Section 330.7(d)**

Several commenters were concerned that division engineers are required to document any decision authorizing an activity under a nationwide permit that would be contrary to the views of resource agencies, but that division engineers are not specifically required to document a determination to require an individual permit. Division engineers will document all determinations, providing information concerning the basis for requiring individual permits, as well as the final determination. If a decision is made to require an individual application, the requirements of Parts 320 through 325 of the Corps regulations will be implemented.

**Section 330.8**

No comments were received on the proposed change. Revisions to this section have been adopted as proposed.

**State Certification of Nationwide Permits**

In our proposed rulemaking of March 29, 1984 (49 FR 12660), we restated our

earlier intention to allow all states to reconsider certification of the nationwide permits (NWP) pursuant to section 401 of the Clean Water Act. Also, states with approved coastal zone management plans were allowed to reconsider consistency determinations under the Coastal Zone Management Act. Some states have denied 401 certification and/or CZM consistency concurrence for one or more of the five NWPs being reissued today. Accordingly, authorization for any such activities is denied without prejudice in those states pursuant to 33 CFR 320.4(j)(1). Also many states granted conditional water quality certification to one or more of the NWPs and in some states final action on certification/consistency concurrence is still pending and imminent. Concurrently with the publication of those final regulations, district engineers will be issuing public notices for the five NWPs being reissued today. Notices will identify states which have denied certification/CZM consistency concurrence, states which have granted conditional water quality certification for one or more of the five NWPs, and states where certification/consistency concurrence is still pending. Applicants considering a project or activity defined by the NWPs referenced above and located in such a state are advised to check with the district engineer regarding eligibility under the NWPs. In those states which raised concerns, but have not updated their final position on certification/consistency concurrence, we will continue to use their position as taken for the NWPs adopted on July 22, 1982, until the final action has been taken on certification/consistency concurrence or waived in accordance with statutory requirements.

**Determinations under Executive Order 12291 and the Regulatory Flexibility Act**

The Department of the Army has determined that the proposed regulation revisions do not contain a major proposal requiring the preparation of a regulatory analysis under E.O. 12291. The Department of the Army certifies, pursuant to section 605(b) of the Regulatory Flexibility Act of 1980, that these regulations will not have a significant economic impact on a substantial number of entities.

**Note 1.**—The term "he" and its derivatives used in these regulations are generic and should be considered as applying to both male and female.

List of Subjects

33 CFR Part 320

Environmental protection, Intergovernmental relations, Navigation, Water pollution control, Waterways.

33 CFR Part 323

Navigation, Water pollution control, Waterways.

33 CFR Part 325

Administrative practice and procedure, Intergovernmental relations, Environmental protection, Navigation, Water pollution control, Waterways.

33 CFR Part 330

Navigation, Water pollution control, Waterways.

Dated: September 10, 1984.

Robert K. Dawson,

Acting Assistant Secretary of the Army (Civil Works).

Accordingly, the Department of the Army is amending 33 CFR Parts 320, 323, 325, and 330 as set forth below:

Authority: 33 U.S.C. 401 et seq., 33 U.S.C. 1344, 33 U.S.C. 1413.

PART 320—GENERAL REGULATORY POLICIES

1. Section 320.4 is amended by revising paragraphs (a)(1), (b)(4), (c), (g) introductory text, (g)(1), and (j)(2) to read:

§ 320.4 General policies for evaluating permit applications.

(a) Public interest review. (1) The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impacts which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so the conditions under which it will be allowed to occur, are therefore determined by the outcome of the general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof. Among those are conservation, economics, aesthetics, general environmental concerns,

wetlands, cultural values, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership, and, in general, the needs and welfare of the people. For activities involving 404 discharges, a permit will be denied if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency's 404(b)(1) guidelines. Subject to the preceding sentence and any other applicable guidelines or criteria (see §§ 320.2 and 320.3), a permit will be granted unless the district engineer determines that it would be contrary to the public interest.

\* \* \* \* \*

(b) \* \* \*

(4) No permit will be granted which involves the alternation of wetlands identified as important by paragraph (b)(2) of this section or because of provisions of paragraph (b)(3) of this section, unless the district engineer concludes, on the basis of the analysis required in paragraph (a) of this section, that the benefits of the proposed alteration outweigh the damage to the wetlands resource. In evaluating whether a particular discharge activity should be permitted, the district engineer shall apply the section 404(b)(1) guidelines (40 CFR 230.10(a)(1), (2), (3)).

\* \* \* \* \*

(c) Fish and wildlife. In accordance with the Fish and Wildlife Coordination Act (see § 320.3(e) of this part), district engineers will consult with the Regional Director, U.S. Fish and Wildlife Service, the Regional Director, National Marine Fisheries Service, and the head of the agency responsible for fish and wildlife for the state in which work is to be performed, with a view to the conservation of wildlife resources by prevention of their direct and indirect loss and damage due to the activity proposed in a permit application. The Army will give full consideration to the views of those agencies on fish and wildlife considerations in deciding on the issuance, denial, or conditioning of individual or general permits.

\* \* \* \* \*

(g) Consideration of property ownership. Authorization of work or structures by the Department of the Army does not convey a property right, nor authorize any injury to property or invasion of other rights.

(1) An inherent aspect of property ownership is a right to reasonable

private use. However, this right is subject to the rights and interests of the public in the navigable and other waters of the United States, including the federal navigation servitude and federal regulation for environmental protection.

\* \* \* \* \*

(j) \* \* \*

(2) The primary responsibility for determining zoning and land use matters rests with state, local, and tribal governments. The district engineer will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance. Such issues would include but are not necessarily limited to national security, navigation, national economic development, water quality, preservation of special aquatic areas, including wetlands, with significant interstate importance, and national energy needs. Whether a factor has overriding importance will depend on the degree of impact in an individual case.

\* \* \* \* \*

PART 323—PERMITS FOR DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES

2. Section 323.4 is amended by revising paragraph (a)(3) to read:

§ 323.4 Discharges not requiring permits.

(a) \* \* \*

(3) Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches. Discharges associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

\* \* \* \* \*

3. Section 323.6 is amended by revising paragraph (a) to read:

§ 323.6 Special policies and procedures.

(a) The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny section 404 permits. The district engineer will review applications for permits for the discharge of dredged or fill material into waters of the United States in accordance with guidelines promulgated by the Administrator, EPA, under authority of section 404(b)(1) of the Clean Water Act (see 40 CFR Part 230). Subject to consideration of any economic impact on navigation and anchorage pursuant to section 404(b)(2), a permit will be denied if the discharge

that would be authorized by such permit would not comply with the 404(b)(1) guidelines. If the district engineer determines that the proposed discharge would comply with the 404(b)(1) guidelines, he will grant the permit unless issuance would be contrary to the public interest.

\* \* \* \* \*

**PART 325—PROCESSING OF DEPARTMENT OF THE ARMY PERMITS**

4. Section 325.3 is amended by adding a new paragraph (b) and redesignating paragraphs (b) and (c) as (c) and (d) respectively as follows:

**§ 325.3 Public notice.**

\* \* \* \* \*

(b) *Public notice for general permits.* District engineers will publish a public notice for all proposed regional permits and for significant modifications to, or reissuance of, existing regional permits within their area of jurisdiction. Public notices for statewide regional permits may be issued jointly by the affected Corps districts. The notice will include all applicable information necessary to provide a clear understanding of the proposal. In addition, the notice will state the availability of information at the district office which reveals the Corps' provisional determination that the proposed activities comply with the requirements for issuance of general permits. District engineers will publish a public notice for nationwide permits in accordance with 33 CFR 330.4.

(c) *Evaluation factors.* \* \* \*

(d) *Distribution of public notices.*

\* \* \*

5. Section 325.4 is revised to read:

**§ 325.4 Conditioning of permits.**

(a) District engineers will add special conditions to Department of the Army permits when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the public interest requirement. Permit conditions will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable.

(1) Legal requirements which may be satisfied by means of Corps permit conditions include compliance with the 404(b)(1) guidelines, the EPA ocean dumping criteria, the Endangered Species Act, and requirements imposed by conditions on state section 401 water quality certifications.

(2) Where appropriate, the district engineer may take into account the existence of controls imposed under other federal, state, or local programs

which would achieve the objective of the desired condition, or the existence of an enforceable agreement between the applicant and another party concerned with the resource in question, in determining whether a proposal complies with the 404(b)(1) guidelines, ocean dumping criteria, and other applicable statutes, and is not contrary to the public interest. In such cases, the Department of the Army permit will be conditioned to state that material changes in, or a failure to implement and enforce such program or agreement, will be grounds for modifying, suspending, or revoking the permit.

(3) Such conditions may be accomplished on-site, or may be accomplished off-site for mitigation of significant losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment.

(b) District engineers are authorized to add special conditions, exclusive of paragraph (a) of this section, at the applicant's request or to clarify the permit application.

(c) If the district engineer determines that special conditions are necessary to insure the proposal will not be contrary to the public interest, but those conditions would not be reasonably implementable or enforceable, he will deny the permit.

(d) *Bonds.* If the district engineer has reason to consider that the permittee might be prevented from completing work which is necessary to protect the public interest, he may require the permittee to post a bond of sufficient amount to indemnify the government against any loss as a result of corrective action it might take.

**PART 330—NATIONWIDE PERMITS**

6. Section 330.4 is revised to read as follows:

**§ 330.4 Public notice.**

(a) *Chief of Engineers.* Upon proposed issuance of new nationwide permits, modification to, or reissuance of, existing nationwide permits, the Chief of Engineers will publish a notice in the Federal Register seeking public comments and including the opportunity for a public hearing. This notice will state the availability of information, at the Office of the Chief of Engineers and at all district offices, which reveals the Corps' provisional determination that the proposed activities comply with the requirements for issuance under general permit authority. The Chief of Engineers will prepare this information which will be supplemented, if appropriate, by division engineers.

(b) *District engineers.* Concurrent with publication in the Federal Register of new or reissued nationwide permits by the Chief of Engineers, district engineers will so notify the interested public within the district by an appropriate notice. The notice will include any applicable regional conditions adopted by the division engineer.

7. Section 330.5 is amended by revising the section heading, the introductory text of paragraph (a), paragraphs (a)(7), (a)(17), (a)(21), and (a)(23) and adding paragraphs (a)(26) and (c) as follows:

**§ 330.5 Nationwide permits.**

(a) *Authorized activities.* The following activities, including discharges of dredged or fill material, are hereby permitted provided the conditions listed in paragraph (b) of this section and the notification procedures, where required, of § 330.7 are met. *Comment.* Because some states have denied water quality certification/coastal zone consistency for some nationwide permits reissued herein and many states have granted conditional water quality certification, applicants should check with the district engineer regarding eligibility under the nationwide permits.

\* \* \* \* \*

(7) Outfall structures and associated intake structures where the effluent from that outfall has been permitted under the National Pollutant Discharge Elimination System program (section 402 of the Clean Water Act) (see 40 CFR Part 122) provided that the district or division engineer makes a determination that the individual and cumulative adverse environmental effects of the structure itself are minimal in accordance with §§ 330.7 (c)(2) and (d). Intake structures *per se* are not included—only those directly associated with an outfall structure are covered by this nationwide permit.

\* \* \* \* \*

(17) Fills associated with small hydropower projects at existing reservoirs where the project which includes the fill is licensed by the Federal Energy Regulatory Commission under the Federal Power Act of 1920, as amended; has a total generating capacity of not more than 1500 kw (2,000 horsepower); qualifies for the short-form licensing procedures of the Federal Energy Regulatory Commission (see 18 CFR 4.61); and the district or division engineer makes a determination that the individual and cumulative adverse effects on the environment are minimal

in accordance with §§ 330.7 (c)(2) and (d).

(21) Structures, work, and discharges associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977; the appropriate district engineer is given the opportunity to review the Title V permit application and all relevant Office of Surface Mining or state (as the case may be) documentation prior to any decision on that application; and the district or division engineer makes a determination that the individual and cumulative adverse effects on the environment from such structures, work, or discharges are minimal in accordance with §§ 330.7 (c)(2) and (3) and (d).

(23) Activities, work, and discharges undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another federal agency or department where that agency or department has determined, pursuant to the CEQ Regulation for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Part 1500 *et seq.*), that the activity, work, or discharge is categorically excluded from environmental documentation because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment, and the Office of the Chief of Engineers (ATTN: DAEN-CWO-N) has been furnished notice of the agency's or department's application for the categorical exclusion and concurs with that determination. Prior to approval for purposes of this nationwide permit of any agency's categorical exclusions, the Chief of Engineers will solicit comments through publication in the Federal Register.

(26) Discharges of dredged or fill material into the waters listed in paragraphs (a)(26) (i) and (ii) of this section except those which cause the loss or substantial adverse modification of 10 acres or more of waters of the United States, including wetlands. For discharges which cause the loss or substantial adverse modification of 1 to 10 acres of such waters, including wetlands, notification of the district engineer is required in accordance with § 330.7 of this section.

(i) Non-tidal rivers, streams, and their lakes and impoundments, including

adjacent wetlands, that are located above the headwaters.

(ii) Other non-tidal waters of the United States, including adjacent wetlands, that are not part of a surface tributary system to interstate waters or navigable waters of the United States (i.e., isolated waters).

*Grandfathering.* (1) Discharges previously authorized by the nationwide permits (§ 330.4(a) (1) and (2) of the July 22, 1982, Interim Final Regulation) modified and reissued at § 330.5(a)(26) continue to be authorized by those nationwide permits for 18 months from the effective date of this regulation if:

(i) The discharge was commenced or under contract to commence by the effective date of this regulation or

(ii) The permittee had (A) By March 29, 1984, received written confirmation from the Corps stating that the Corps considered the specific discharge in question and determined it was previously authorized by the nationwide permits modified and reissued at § 330.5(a)(26) and

(B) By the effective date of this regulation, obtained all necessary pre-discharge approvals or permits required by federal, state or local laws or regulations.

(2) Permitting discharging under paragraph (c)(1) of this section must provide documents demonstrating compliance to the district engineer on or before October 5, 1984. These documents will become a part of the public record. The district engineer will notify such permittees whether they meet the criteria of paragraph (c)(1) of this section within 15 days of receipt of such documents.

(3) If a permittee cannot meet the criteria of § 330.5(c)(1), but can otherwise demonstrate to the district engineer on or before October 5, 1984, investments made toward the discharge in reliance on the previous authorizations of the nationwide permits modified and reissued at § 330.5(a)(26) which cannot be modified to comply with 33 CFR Parts 320-330 without substantial loss to the permittee, then the district engineer may allow the discharge to proceed for 18 months from the effective date of this regulation if and when he determines the discharge complies with the section 404(b)(1) guidelines.

(4) After 18 months from the effective date of this regulation, the permittee must follow 33 CFR Parts 320-330 for any new or remaining discharges.

(5) This section shall not set aside, alter, prevent or affect any past, present, or future assertion of the division engineer's authority to require an

individual permit under either § 330.7 of the July 22, 1982, Interim Final Regulation (47 FR 31794) or § 330.8 of this part.

8. Sections 330.7 and 330.8 are redesignated as §§ 330.8 and 330.9 respectively, and a new § 330.7 is added to read as follows:

#### § 330.7 Notification procedures.

(a) The general permittee shall not begin discharges requiring pre-discharge notification pursuant to the nationwide permit at § 330.5(a)(26):

(1) Until notified by the district engineer that the work may proceed under the nationwide permit with any special conditions imposed by the district or division engineer; or

(2) If notified by the district or division engineer that an individual permit may be required; or

(3) Unless 20 days have passed from receipt of the notification by the district engineer and no notice has been received from the district or division engineer.

(b) Notification pursuant to the nationwide permit at § 330.5(a)(26) must be in writing and include the information listed below. Notification is not an admission that the proposed work would result in more than minimal impacts to waters of the United States; it simply allows the district or division engineer to evaluate specific activities for compliance with general permit criteria.

(1) Name, address, and phone number of the general permittee;

(2) Location of the planned work;

(3) Brief description of the proposed work, its purpose, and the approximate size of the waters, including wetlands, which would be lost or substantially adversely modified as a result of the work; and

(4) Any specific information required by the nationwide permit and any other information that the permittee believes is appropriate.

(c) *District engineer review of notification.* Upon receipt of notification, the district engineer will promptly review the general permittee's notification to determine which of the following procedures should be followed:

(1) If the nationwide permit at § 330.5(a)(26) is involved and the district engineer determines either: (i) The proposed activity falls within a class of discharges or will occur in a category of waters which has been previously identified by the Regional Administrator, Environmental Protection Agency; the Regional Director, Fish and Wildlife Service; the Regional Director,

National Marine Fisheries Service; or the heads of the appropriate state natural resource agencies as being of particular interest to those agencies; or (ii) the particular discharge has not been previously identified but he believes it may be of importance to those agencies, he will promptly forward the notification to the division engineer and the head and appropriate staff officials of those agencies to afford those agencies an adequate opportunity before such discharge occurs to consider such notification and express their views, if any, to the district engineer concerning whether individual permits should be required.

(2) If the nationwide permits §§ 330.5(a) (7), (17), or (21) are involved and the Environmental Protection Agency, the Fish and Wildlife Service, the National Marine Fisheries Service or the appropriate state natural resource or water quality agencies forward concerns to the district engineer, he will forward those concerns to the division engineer together with a statement of the factors pertinent to a determination of the environmental effects of the proposed discharges, including those set forth in the 404(b)(1) guidelines, and his views on the specific points raised by those agencies.

(3) If the nationwide permit at § 330.5(a)(21) is involved the district engineer will give notice to the Environmental Protection Agency and

the appropriate state water quality agency. This notice will include as a minimum the information required by paragraph (b) of this section.

(d) *Division engineer review of notification.* The division engineer will review all notifications referred to him in accordance with paragraph (c)(1) or (c)(2) of this section. The division engineer will require an individual permit when he determines that an activity does not comply with the terms or conditions of a nationwide permit or does not meet the definition of a general permit (see 33 CFR 322.2(f) and 323.2(n)) including discharges under the nationwide permit at § 330.5(a)(26) which have more than minimal adverse environmental effects on the aquatic environment when viewed either cumulatively or separately. In reaching his decision, he will review factors pertinent to a determination of the environmental effects of the proposed discharge, including those set forth in the 404(b)(1) guidelines, and will give full consideration to the views, if any, of the federal and state natural resource agencies identified in paragraph (c) of this section. If the division engineer decides that an individual permit is not required, and a federal or appropriate state natural resource agency has indicated in writing that an activity may result in more than minimal adverse environmental impacts, he will prepare a written statement, available to the

public on request, which sets forth his response to the specific points raised by the commenting agency. When the division engineer reaches his decision he will notify the district engineer, who will immediately notify the general permittee of the division engineer's decision.

9. Redesignated § 330.8 is amended by revising the introductory paragraph and adding a new paragraph (d) as follows:

**§ 330.8 Discretionary authority.**

Except as provided in paragraph (d) of this section, division engineers on their own initiative or upon recommendation of a district engineer are authorized to modify nationwide permits by adding regional conditions or to override nationwide permits by requiring individual permit applications on a case-by-case basis. Discretionary authority will be based on concerns for the aquatic environment as expressed in the guidelines published by EPA pursuant to section 404(b)(1). (40 CFR Part 230)

(d) For the nationwide permit found at § 330.5(a)(26), after the applicable provisions of § 330.7(a) (1) and (3) have been satisfied, the permittee's right to proceed under the general permit may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 325.7.

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