

NEW JERSEY DEPARTMENT OF TRANSPORTATION (NJDOT) COMMENTS ON  
FEDERAL REGISTER NOTICE: 71 F.R. 56257  
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DEPARTMENT OF DEFENSE–DEPARTMENT OF THE ARMY, CORPS OF  
ENGINEERS  
PROPOSAL TO REISSUE AND MODIFY NATIONWIDE PERMITS  
DOCKET NUMBER COE-2006-0005  
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Comments are submitted by Elkins Green, Director, Division of Environmental Resources and Context Sensitive Solutions, New Jersey Department of Transportation, 1035 Parkway Avenue, P.O. Box 600, Trenton, NJ 08625-0600  
phone: (609) 530-8075  
e-mail: [elkins.green@dot.state.nj.us](mailto:elkins.green@dot.state.nj.us)

### **General Comment**

The NJDOT supports the idea of clarifying and simplifying the text of the Nationwide Permits (NWP), General Conditions (GCs), and definitions to make them easier for the regulated community to read and understand.

### **Comments on Proposed Modifications to Existing Nationwide Permits**

#### **NWP 3. Maintenance**

Under the proposal, routine maintenance activities have been consolidated under NWP 3 (e.g., maintenance aspects of NWP 7). Perhaps other routine maintenance activities should be included here, such as NWP 43 (stormwater management facilities) and NWP 31 (flood control facilities).

#### **NWP 6. Survey Activities**

A definition of “exploratory trenching” was added to this NWP. Perhaps this should be included in the *Definitions* section instead.

#### **NWP 31. Maintenance of Existing Flood Control Facilities**

This NWP includes maintenance activities. As previously suggested, perhaps these activities should be combined with NWP 3.

Since the last sentence (discussing types of maintenance activities that do not require Section 404 permits) of the first paragraph was removed, perhaps a reference to 33 CFR

323.2(d) and/or 33 CFR 323.4(a)(2) should be included to clarify to the applicant which activities may not require a permit.

### **NWP 43. Stormwater Management Facilities**

This NWP includes maintenance activities. As previously suggested, perhaps these activities should be combined with NWP 3.

## **Comments on Proposed New NWPs**

### **A. Emergency Repair Activities**

The proposed permit language on F.R. Page 56292 states that the repair, rehabilitation, or replacement of structures or fills destroyed or damaged by storms, floods, fire, or other discrete events must commence, or be under contract to commence, within two years of the date of destruction or damage (although in cases of catastrophic events, the two-year limit may be waived by the district engineer). It also states that restoration of upland areas damaged by storms, floods, or other discrete events and bank stabilization to protect the restored uplands must commence, or be under contract to commence, within two years of the date that a PCN is filed unless this condition is waived by the district engineer. There appear to be two different start dates for the repair commencement/contract: one from the date of damage, and one from the date of PCN submittal. Is the distinction intentional? Also, the discussion on F.R. Page 56273 relative to NWP A states that the repair work must be **completed** within two years of submitting the PCN. This is very different from what the actual proposed permit states.

The NJDOT suggests that the time frame to commence or be under contract to commence the repair, rehabilitation, or replacement of structures or fills or restoration of upland areas be two years from the issuance of the permit, rather than from the date of damage or the submittal of the PCN. This doesn't waste 45 or more days of the applicant's preparation time.

## **Comments on Proposed Modifications to General Conditions**

### **GC 5. Shellfish Beds**

Perhaps the term "areas of concentrated shellfish populations" should be explained or defined in the *Definitions* Section.

### **GC 7. Water Supply Intakes**

The term "proximity" should be defined.

## **GC 20. Mitigation**

The 0.1-acre threshold for requiring mitigation appears to be rather small, especially since NWP's, by their nature, are intended for activities that are not expected to result in adverse impacts. Perhaps, the threshold for mitigation could be increased.

## **GC 27. Pre-Construction Notification**

The NJDOT suggests that the Corps define "complete" as it relates to a PCN. The regulations generally describe what should be included in a PCN, but there is no standardized format, checklist, etc. In fact, the only "form" required is the standard Individual Permit application form (Form ENG 4345), which lacks the substance to make any sound determination of PCN completeness.

The NJDOT suggests that the Corps adopt a comprehensive Nationwide Permit Application Checklist (such as that used by the Corps' Philadelphia District), to allow for consistent PCN technical compliance, completeness, and format. The checklist should be universal to the Districts and should be available digitally. This would be of assistance to the Corps in reviewing PCN submissions as well as aid the applicant in preparing a package for submission.

## **Former GC 27. Construction Periods**

If this GC is eliminated, will the District Engineer (DE) still have the discretion to authorize an extension for an existing project NWP authorization that occurred in the early years of the five-year limit on Nationwide Permits? For example, if a project NWP authorization is due to expire in the third year of the five-year period, would the DE be able to extend the expiration date for another year or two if warranted?

## **Comments on Proposed Modifications to Definitions**

### **Compensatory Mitigation**

There appears to be an inconsistency in the explanation for the definition of "compensatory mitigation". The discussion on F.R. Page 56280 states that the term "creation" used in the definition of "compensatory mitigation" will be replaced with "establishment (creation)"; however, the proposed definition of "compensatory mitigation" (F.R. Page 56298) only states "establishment". (However, the listing for the term "Creation" was revised and changed to "Establishment (creation)" in the proposed definitions.)

## **Loss of Waters of the United States**

There is a definition for a “Loss of (my emphasis) waters of the United States”, but no definition for “Waters of the United States” in the NWP *Definitions* Section. Perhaps this could be added to the NWP *Definitions* section or a reference to 33 CFR Part 328.3 could be provided.

### **Open Water**

The modified definition of this term adds a definition for “Ordinary High Water Mark”. Perhaps it would be better to include the latter term as a separate entry in the NWP *Definitions* section.

### **Re-establishment**

The definition should point out that “Re-establishment” is a form of “Restoration” per RGL 02-02.

### **Rehabilitation**

The definition should point out that “Rehabilitation” is a form of “Restoration” per RGL 02-02.

### **Riparian Areas**

The proposed definition of “riparian area” is somewhat confusing since it incorporates the term “waterbody”, which could include wetlands. This creates a conflict between the two definitions. The discussion on F.R. Page 56281 states that the vegetated buffer (former term for “riparian area”) requirement does not apply to wetlands. The NJDOT suggests that a similar statement be added to the definition to alleviate the conflict.

### **Stream Channelization**

The NJDOT suggests that “more than minimal interruption of normal stream processes” needs clarification.

### **Structure**

It is the NJDOT’s opinion that the provided “dictionary definition” (“an object that is arranged in a definite pattern of organization”) is of limited use in the context of these regulations. Perhaps a more appropriate definition for “structure” would be “a man-made feature constructed in an area of regulated aquatic resources” followed by the examples given. Additional examples could include buildings, bridges, dams, levees, and stormwater outfalls.

### **Waterbody**

The text of this definition contains a definition for “Ordinary High Water Mark”, which the NJDOT suggests should be defined separately, as previously mentioned.

The NJDOT suggests that the Corps define “Waters of the United States” in the NWP *Definitions* section or reference 33 CFR Part 328.3, as previously mentioned.

### **Additional Definitions**

The NJDOT suggests that the term “temporary” as it relates to the duration of fills or impacts be included in the *Definitions* section.

The NJDOT suggests that a definition for the term “Special Aquatic Site” be included in the *Definitions* section, or that another section be referenced if it is defined elsewhere.