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CORPS REISSUES NATIONWIDE PERMITS, LITIGATION TO FOLLOW

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On March 12, 2007, the Corps released the reissuance and revisions of its Nationwide Permits (NWP's). Many Corps Divisions also released regional conditions or regional general permits. NWP's have a 5-year term, and must be reissued or the permit will lapse. This summary addresses only a few of the major items in the new NWP's; anyone using a NWP must carefully check the text of the permit and applicable general conditions. A summary chart of the NWP's is provided as an additional document along with this issue of *The Natural Lawyer*.

The 2007 NWP's did not modify all permits, but made changes to a number of permits related to transportation activities. For many years, revised and reissued NWP's have been immediately challenged in litigation. The most controversial activities under the NWP's have been surface coal mining and other mineral extraction. As a general matter, the environmental community maintains that some of these NWP's authorize activities that warrant individual permit review. The regulated community, on the other hand, has long argued that the increased

complexity and small acreage limits of most NWP's fails to meet the statutory standard and fails to minimize regulatory burden.

Transportation projects regularly use NWP's 3, 12, 13, 14, 18 and 23, which are summarized here. The NWP package is lengthy and the permits themselves are complex. It will be very important for project managers and attorneys to (1) carefully check and document eligibility for a NWP and (2) follow the expected litigation on NWP's. Although the transportation-related NWP's may not be the focus of such litigation, those permits could none the less be impacted by any litigation.

NWP 3 covers maintenance of existing structures. The permit allows activities to restore a structure to pre-existing conditions. Temporary structures, fills and work needed to conduct the maintenance are allowed under this permit, which does not have an acreage limit. This permit may be used to remove accumulated sediment. In this round of NWP's, there were proposals to modify and combine this permit with others. The Corps moved certain activities that were under NWP 3 to new NWP 45 which authorizes repair of uplands damaged by discrete events. This activity was previously covered by NWP 3.

NWP 12 addresses utility line activities. After considering various changes, the reissued permit has a 1/2 acre limit and requires pre-construction notification under most circumstances, including discharges impacting more than 1/10 acre.

NWP 13 for bank stabilization has limits of 500 linear feet (of work) and one cubic yard per running foot.

NWP 14 for linear transportation projects generated many comments. The basic approach of this permit is that a water crossing (or crossings at one location) is the project. This means NWP 14 can be used for each crossing of separate water bodies, without violating the principle that NWP's normally cannot be "stacked" to exceed acreage limitations. Thus the permit is available multiple times for a road, at different water crossings. The Corps retained the 1/2 acre limit and declined to impose a linear foot limit for stream impacts.

NWP 18 for minor discharges was modified to provide a 1/10 acre limit.

NWP 23 addresses activities under approved categorical exclusions. In response to a specific comment, on whether this would cover activities undertaken by a State that was delegated FHWA NEPA authority, the Corps responded that it would.

NWP 27 for aquatic restoration has no acreage limit. A variety of restoration projects, including mitigation banks, may be eligible for this permit. The permit now requires additional reporting on restoration activities.

A number of NWP's not normally used by transportation projects remain controversial. In addition to NWP 21 for surface coal mining, housing and land development activities continue to generate controversy. Previously, NWP 29 addressed 1/2 of impacts on single owner residential property and NWP 39 addressed both residential and commercial land development. The Corps has kept the two permits, but now NWP 29 covers all residential developments, and NWP 39 covers all commercial developments. Under new NWP 29, any residential development may use the 1/2 acre/300 linear feet permit. It is likely that these three permits – 21, 29 and 39 – will remain the focus of controversy and possible litigation.

While the NWP's hit the *Federal Register* on March 12 (72 FR 11092), it is likely that there will be an additional notice with clarifications within a number of weeks or months.

FTA SETS OUT P3 PILOT PROGRAM

Submitted by Scott Biehl

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SAFETEA-LU Section 3011(c) authorizes FTA to establish and carry out a pilot program to demonstrate the advantages and disadvantages of public-private partnerships for design and construction of certain capital transit fixed guideway projects. On 19 January 2007 the FTA Chief Counsel announced the definitive terms of FTA's Public-Private Partnership Pilot Program ("Penta P," in FTA parlance), and solicited a first round of applications for the program by the end of March. 72 *Fed.Reg.* 2583-91. In short, the pilot program is designed to study whether, in comparison to conventional procurements, public-private partnerships might reduce and better allocate the risks associated with construction of transit infrastructure; accelerate project delivery; improve the reliability of cost estimates and projected benefits; and enhance transit performance. Applicant projects might include, specifically, the operation and maintenance of transit through evolving procurement approaches such as "design-build with a warranty," "construction manager at risk," "design-build-operate-maintain," "design-build-finance-operate," and "build-operate-transfer." Moreover, FTA is interested in understanding the extent to which the private sector's incentives for financial returns and assumption of risks for costs and benefits may permit FTA to relax certain Federal requirements or accelerate approvals necessary for major capital projects funded by the agency. Accordingly, FTA's decision to recommend Federal funding or grant regulatory relief to a particular project will turn on whether the commercial terms between the project sponsor and the private partner allocate risks and create incentives and liabilities in a way that safeguards the Federal interest, rather than a limited review of costs and benefits.

Readers of *The Natural Lawyer* may be especially interested in subsection 3(I) of the "Definitive Terms" of the pilot program, which addresses compliance with

NEPA for projects chosen to participate in the pilot program. See, *72 Fed.Reg.* at 2590-91. Any questions can be addressed to the FTA Chief Counsel, David B. Horner, at 202.366.4040 or David.Horner@dot.gov.

FTA ISSUES STATEMENT OF POLICY ON JOINT DEVELOPMENT

Submitted by Scott Biehl
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Consistent with the SAFETEA-LU amendment that expanded the definition of an eligible "capital project" at 49 U.S.C. § 5302(a)(1)(G), on 7 February 2007 FTA issued a statement of policy that affords grantees maximal flexibility to undertake joint development of Federally-funded assets with private and other third-party partners, consistent with good business practice and arms-length negotiations. *72 Fed.Reg.* 5788-5800. *Inter alia*, FTA expects this policy to facilitate the development of intercity bus and rail stations and terminals, and it is framed such that the agency will generally defer to the decisions of a grantee as a lead project sponsor in pursuing any type of transit-oriented development. The policy sets forth in some detail how FTA intends to apply the following statutory clauses to determinations of eligibility: "enhances economic development or incorporates private investment"; "enhances the effectiveness of a public transportation project"; "related physically or functionally" to a public transportation project; "new or enhanced coordination between public transportation and other transportation"; and "provides a fair share of revenue...for public transportation." This policy also addresses FTA's intentions for ensuring *satisfactory continuing control* of Federally-funded assets, and the precautions a grantee must take to guard against premature disposition of those assets. Finally, the guidance sets forth the procedure by which an FTA regional office will set forth the eligibility of a joint development project. Any questions can be addressed to FTA staff attorney Jayme L. Blakesley at 202.366.0304 or Jayme.Blakesley@dot.gov.

FTA ISSUES POLICY ON HO/T LANES AS FIXED GUIDEWAY MILES UNDER FORMULAE PROGRAM

Submitted by Scott Biehl
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On 27 December 2006 the FTA Chief Counsel issued a statement of policy setting the terms and conditions under which the agency will continue to count High Occupancy Vehicle (HOV) lanes converted to High Occupancy/Toll ("HO/T") lanes as *fixed guideway miles* for purposes of the 49 U.S.C. §§ 5307 Urbanized Area and 5309 Fixed Guideway Modernization programs, and the circumstances in which FTA will not count HO/T lanes as *fixed guideway mileage* for purposes of these two formulae programs. *71 Fed.Reg.* 77862-8. FTA's policy now jibes with USDOT's policy of encouraging HOV-to-HO/T lane conversion, and aligns FTA practice with Federal-aid highway funding for HO/T lanes per SAFETEA-LU Section 112, in support of States' and cities' efforts to reduce congestion and maximize throughput using excess HOV lane capacity—while ensuring that

Federal Transit formula funding is not fundamentally reallocated amongst FTA grantees or transferred from existing grantees to new grantees. In brief, the FTA policy requires that the following three conditions be met for a HO/T lane facility to be counted as *fixed guideway miles* for the Sections 5307 and 5309 formulae: the HO/T lanes must previously have been reported as HOV lanes in the National Transit Database; the HO/T lanes must be continuously monitored and deemed to meet specified performance standards to preserve free flow for transit vehicles; and the program income from the HO/T lanes, including all toll revenue, must be expended solely for "permissible uses" (e.g., debt service, reasonable return on investment of private financing, and the costs of operation and maintenance of the facility). Any questions can be addressed to the FTA Chief Counsel, David B. Horner, at 202.366.4040 or David.Horner@dot.gov.

**FTA ISSUES PROPOSED GUIDANCE ON
NEW STARTS AND SMALL STARTS**

Submitted by Scott Biehl
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On 12 February 2007 FTA issued a notice of availability of "Proposed Guidance on New and Small Starts Policies and Procedures," which are designed to carry out both the SAFETEA-LU changes to the New Starts program authorized by 49 U.S.C. § 5309(d) and the enactment of the new Small Starts program at 49 U.S.C. § 5309(e). 72 *Fed.Reg.* 6663. (The full text of the proposed guidance is available on USDOT's electronic docket and FTA's public website; by issuing a notice of availability, only, FTA is saving printing costs in the *Federal Register*.) Of most interest to readers of the *Natural Lawyer*, the proposed New and Small Starts guidance would eliminate the current reporting requirements for environmental benefits; make optional the submission of information related to land use; require travel modeling to be validated by recent transit surveys; give credit to a promising congestion pricing strategy as an "other factor" for weighing the merits of a project against the New Starts project justification criteria; and set simplified criteria and an expedited funding procedure for "Very Small Starts" – projects costing less than \$50 million and meeting certain threshold requirements. Any questions can be addressed to the FTA Deputy Chief Counsel, Scott Biehl, at 202.366.4011 or Scott.Biehl@dot.gov.

**FHWA REPORT ON CONFLICT RESOLUTION IN
OUTDOOR ADVERTISING PROGRAM**

Submitted by Janet Myers, Senior Attorney Advisor
FHWA Office of the Chief Counsel

The Federal Highway Administration (FHWA) reached a major milestone in its evaluation of the Federal Outdoor Advertising Control Program (OAC Program) with the February 6 issuance of an assessment report by the U.S. Institute for Environmental Conflict Resolution (the Institute). The report delineates OAC

Program issues and suggests options for collaboratively addressing conflicts in order to achieve program improvements. It is available through the U.S. Department of Transportation Docket Management System (<http://dms.dot.gov>, Docket Number FHWA-2006-25031) and on the FHWA Web site (http://www.fhwa.dot.gov/realestate/out_ad.htm).

The FHWA initiated the assessment because it recognized the continuing challenges the OAC Program presents. Federal statutes and regulations have seen only limited change since the enactment of the Highway Beautification Act, 23 U.S.C. §131, in 1965. State laws and regulations, which implement the OAC Program as a grant condition of the Federal-aid Highway Program, vary widely. The OAC Program has many different stakeholders and they hold substantially different perspectives on the core issues pertaining to the control of outdoor advertising signs. Apart from the FHWA, stakeholders include sign owners, advertisers, state and local regulators, landowners, elected and appointed officials at all levels of government, the traveling public, community and environmental groups.

The Institute and its contractor, The Osprey Group, carried out the assessment through extensive interviews, public meetings, focus groups, and solicitation of written comments from the public. The assessment identifies three types of conflict affecting the OAC Program: substantive, organizational and attitudinal. The report acknowledges that federal and state legislative actions would be necessary to address many OAC issues. Against that background, however, the assessors found that there is a reasonable potential for developing stakeholder agreement in several major, long-standing areas of conflict.

The assessors recommended that the FHWA and other stakeholders focus those issues identified as having the highest potential for agreement, which are: regulatory treatment of changes in sign technology (such as digital billboards); regulatory treatment of nonconforming signs; improved consistency in the administration of OAC laws and regulations; better enforcement of requirements relating to commercial or industrial activities that qualify a billboard for legal conforming status; maintenance of sign visibility through the control of vegetation in the highway right-of-way; and improvements to the FHWA OAC Program organizational structure.

On March 2, 2007, the FHWA published a request for comments on the assessment report in the *Federal Register* (72 FR 9592). Comments may be submitted electronically at <http://dms.dot.gov> under Docket Number FHWA-2006-25031. The comment period closes on May 1, 2007. The FHWA will consider the docket comments, together with the assessment report and other information, as it works with stakeholders and deliberates future actions relating to the OAC Program.

Note: The views expressed here are solely those of the author and do not necessarily represent the views of the Federal Highway Administration or the United States Department of Transportation.

**NO TRO AGAINST HIGHWAY BYPASS OVER
IMPACTS TO HISTORIC DRAIN TILES**

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The court denied plaintiff's motion for a temporary restraining order against the United State Army Corps of Engineers for that agency's decision to grant the City of Concord's construction permit for a connector road.

Plaintiff's chief concern was that the road construction would damage an underlying tile drainage system. The system was part of the White Farm complex, which was registered on the National Register of Historic Places for its significance in New Hampshire development. The complex's tile drainage system as a whole was integral to the historic significance of the farm and the City acknowledged that construction work would affect a portion of the tile drainage system.

The court found that the U.S. Army Corps of Engineers' decision to grant the City's construction permit was not arbitrary and capricious. The Corps had considered the impact and the construction was planned to minimize the impact. The construction would affect only one drain tile line and the City designed a drainage system that will alleviate any damage to that line. The court was persuaded that the system would be protected even though the City's commitment regarding the tile drainage system was not included in the formal Memorandum of Agreement between the Corps and the City since the City affirmatively represented to the Corps that it would act to protect the system. *Northwest Bypass Group v. United States Army Corps of Eng'rs*, 453 F. Supp. 2d 333 (D.N.H. 2006)

**EXTRA RECORD MATERIAL OK TO OVERTURN
POST KATRINA NAVIGATION EIS**

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In a challenge to an environmental impact statement ("EIS") examining the impacts of a \$600 million canal lock improvement project under the National Environmental Policy Act ("NEPA"), the court determined it was authorized to

look outside the administrative record in order to determine adequacy of the environmental review.

Holy Cross Neighborhood Association and other groups sued the United States Army Corps of Engineers ("Corps") to overturn its approval of an EIS studying the construction of a more modern lock in the Inner Harbor Navigational Canal, located just east of New Orleans in the navigational system that connects the Gulf Intracoastal Waterway and the Mississippi River.

The defendant Corps asked the court not to consider post-decision, extra-record materials submitted by the plaintiffs. The court ruled, however, that if an agency has left technical scientific information outside of the record, the court can still look to that information to determine whether the review is adequate. The court felt the information provided shed light on the "real issue" in the case: the Corps' plan to dispose of the contaminated sediments in confined disposal sites that would be built to standards that were acceptable before Hurricane Katrina, but not in light of that disaster. "Hurricane Katrina has exposed the inadequacies of the EIS and raised questions about the importance and priority of the whole project." "In light of Hurricane Katrina, the underlying purpose of NEPA will not be served if the Corps moves forward with the Industrial Canal Project according to a plan devised almost a decade ago." The court thus enjoined the project pending further environmental review. *Holy Cross v. United States Army Corps of Eng'rs*, 455 F. Supp. 2d 532 (D. La. 2006)

CHALLENGE TO CALIFORNIA GREENHOUSE GAS AUTO EMISSION STANDARDS CAN PROCEED

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Car dealerships sued the California Air Resources Board (CARB) to prevent enforcement of state greenhouse gas emission standards for motor vehicles, which are based on "fleet average" emissions.

The dealerships claimed that the state regulations are preempted by the Energy Policy and Conservation Act of 1975 (EPCA), 49 U.S.C. § 32902 et seq. EPCA established federal fuel economy standards for new vehicles via the well known corporate average fuel economy ("CAFE") mechanism for a manufacturer's fleet of new vehicles. Plaintiffs argued that the EPCA preempts the entire field of fuel economy regulations, which could be impacted by the new California emission standards. The court ruled that plaintiffs have stated a claim for EPCA preemption and thus the court denied defendants' motion for judgment on the pleadings on this preemption claim.

The court also held that the dealerships have stated a claim for preemption of the regulations based on foreign policy.

However, the court rejected the car dealers argument that the regulations are impermissible under the U.S. Constitution's Dormant Commerce Clause because they burden "the production and sale of new motor vehicles" while providing "no local environmental benefit, or insubstantial benefits at best." U.S. EPA has granted a waiver for the regulations which contradicts a Commerce Clause challenge. Finally, the court rejected arguments that the California regulations violate the Sherman Act antitrust prohibitions. *Central Valley Chrysler-Jeep v. Witherspoon*, 456 F.Supp.2d 1160 (E.D.Cal.2006)

NO OIL COMPANIES' CONSPIRACY ON LUST'S

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A United States District Court in Alabama granted defendant oil companies' motion for summary judgment on the issue of whether they conspired together to avoid liability for the prevention, detection, and clean-up of leaking underground storage tanks (USTs) in violation of several state torts, including fraudulent concealment, trespass, and nuisance. The plaintiffs owned property in Alabama and Massachusetts that was adjacent to or near sites where gasoline had been stored in now failing USTs. Confronted with the potential liability from leaking USTs, the defendants adopted strategies to reduce their costs and liabilities. However, the court found that plaintiffs failed to establish the existence of a conspiracy because they failed to offer evidence that tended to exclude the possibility that the conduct at issue was independent. The evidence only showed that the defendants were all faced with the problem of leaking USTs and there was no evidence excluding the possibility that when confronted by similar problems, they independently adopted convergent strategies or solutions. The defendants' acts against their economic interest, meetings discussing UST leak issues, participation in the creation of industry, legislative, and regulatory standards, and communication and exchange of information do not support the conclusion that defendants reached an agreement or acted jointly with regard to the alleged conspiracy. *Buddy Lynn, et al. v. Amoco Oil Co., et al.*, 459 F. Supp. 2d 1175 (D. Ala. October 10, 2006).

CORPS EA/FONSI AND 404 PERMIT OK FOR RESTORATION OF MASSACHUSETTS COMMUTER RAIL

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The plaintiffs alleged that the U.S. Army Corps of Engineers ("Corps") violated federal environmental statutes by issuing a permit pursuant to the Clean

Water Act to the defendants to the Massachusetts Bay Transportation Authority ("MBTA") to restore commuter rail service on the Greenbush Line between Braintree and Scituate, Massachusetts. The Corps had conducted an environmental assessment ("EA") and made a finding of no significant impact ("FONSI"). The court examined the factors raised by the plaintiffs to determine if the degree of human and environmental impacts were significant and thus required the preparation of an EIS, and found that the Corps did not unlawfully balance positive and negative impacts on human health and the environment. While there were public health and safety impacts, the degree of those impacts were not significant. The Corps adequately identified uncertain risks and reasonably concluded that they are not highly uncertain based on the probable results of the MBTA's mitigation measures and construction plans. The impacts upon federal jurisdictional wetlands would be mitigated through other recreational opportunities by the MBTA. While a number of historic properties would be impacted by the Greenbush Project, none of these impacts rises to the level of NEPA significance. The court thus concluded that the FONSI was neither arbitrary nor capricious, and granted defendants' motion for summary judgment.

The plaintiffs also alleged that the FONSI was procedurally inadequate because the Corps improperly determined the practicable alternatives and failed to seek public comment on the EA and FONSI. Though it was undisputed that other alternatives would have resulted in less environmental impact than the Greenbush Commuter Rail alternative, the Corps' practicable alternatives analysis was reasonable. The regulations regarding public comment on the EA and FONSI do not apply to Section 404 permit applications. The EA and FONSI do not meet the limited circumstances outlined in the NEPA regulations for circulation of public review and comment. Finally, the record revealed that the Corps sufficiently considered and analyzed the impacts of the alternatives on historic resources. *Advocates for Transportation Alternatives, Inc. v. Massachusetts Bay Transportation Authority*, 453 F. Supp. 2d 289 (D. Mass. September 26, 2006).

FHWA ISSUES FINAL MAJOR PROJECT GUIDANCE

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The previous issue of *The Natural Lawyer* summarized the Federal Highway Administration's ("FHWA") proposed Major Project Guidance from January 27, 2006. FHWA finalized the Major Project Guidance on January 19, 2007, with one significant change. For all major NEPA projects, the proposed guidance requires the completion of a Project Management Plan ("PMP"), which serves as a roadmap to ensure efficient completion within budgetary limits and defines the roles of involved parties and agencies. The proposed guidance required submission of the PMP at the beginning of the NEPA phase, subject to revisions up until the authorization of federal funds. The final guidance, however, requires submission of the PMP at the end of the NEPA phase. FHWA posits that this

change will allow time for a project to be better defined through the NEPA decision-making process before the preparation of a formal document, such as an EIS.

As an offset to this shift in timing and to ensure proper management of projects prior to the formulation of a PMP, FHWA requests that FHWA Division Offices engage in project management discussions with State Transportation Agencies based on a document entitled *Risk Management Tool for Managing the Planning/Environmental Phases of Prospective Major Projects*, available at <http://www.fhwa.dot.gov/programadmin/mega/rmtools.cfm>. This document is an updated and refined version of the *Checklist of Major Project Questions for DAs to Use during Planning/Environment Stages*, which FHWA issued in January 2006 along with the proposed Major Project Guidance. FHWA suggests that the following issues be considered as part of project management for major projects: any planning and environmental issues that could affect the scoping, schedule, and cost of the project; whether all facets of the project meet the FHWA/FTA fiscal restraint requirements for planning; strategies for public and media engagement and involvement; staff capability; relationships with other key agencies and personnel; multimodal issues; documentation; FEIS integrity; and lessons learned from other projects. The updated version of the document provides discussion of these issues for a sample major project. <http://www.fhwa.dot.gov/programadmin/mega/011907.cfm>

ENVIRONMENTAL GROUPS BRING CLEAN WATER ACT SUIT AGAINST MASSHIGHWAY FOR FAILURE TO OBTAIN STORM WATER PERMITS

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On July 27, 2006, three environmental groups, the Conservation Law Foundation, the Charles River Watershed Association, and the Leominster Land Trust, filed a complaint against the Massachusetts Highway Department ("MassHighway") in the United States District Court of Massachusetts, alleging that MassHighway operates, and has operated, in violation of the storm water management requirements of the Clean Water Act ("CWA"). The citizen suit named the Commissioner of MassHighway, the Massachusetts Secretary of Transportation, and Governor Mitt Romney, and sought an order requiring MassHighway to come into compliance with the CWA as well as civil penalties.

The groups allege that MassHighway had not obtained the required storm water runoff permits because the state's required management plan to control storm water runoff is inadequate. In August of 2004, EPA indicated that MassHighway's drainage system meets the definition of Small Municipal Separate Storm Sewer Systems (MS4s), which require permit coverage under Part V of a General Permit. EPA also notified MassHighway that its failure to submit a complete Notice of Intent ("NOI") was a violation of the CWA. The

environmental groups alleged that since the notification from EPA, MassHighway had failed to obtain approval for its NOI, which in turn has prohibited EPA from granting the needed NPDES permits for storm water runoff from the 4,132 miles of road in Massachusetts. According to the groups, these facts demonstrated that MassHighway operates, and has operated, in violation of sections 301(a) and 402(p)(4)(B) of the CWA, as well as various federal regulations.

In September, 2006 the defendants filed a motion to dismiss. In October, 2006 Judge William G. Young denied the motion, provided that EPA did not act by mid-November and thereby moot the case. EPA did not take action, and, on November 27, 2006, the defendants filed an answer. As of this writing, the case is scheduled for mediation before Magistrate Judge Marianne B. Bowler in late April, 2007. The case could go to trial in late 2007 or early 2008.

FHWA ISSUES CSS ACTIVITIES REPORT

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FHWA recently issued a Context Sensitive Solutions (CSS) Current Activities Report documenting the agency's progress in developing and integrating CSS into national, state, and local transportation planning processes. CSS embodies a collaborative, interdisciplinary approach to transportation projects, aimed at early involvement of broadly defined stakeholders and better environmental results through identification of sensitive resources and facilitation of cooperative interagency relationships. The Report highlights several of FHWA's ongoing CSS-related efforts (spearheaded by several FHWA Offices) intended to train practitioners, consolidate relevant experience, raise CSS awareness, and foster a national CSS dialog. These efforts include various training and education programs; integration of CSS principles into university curricula; creation of a "toolbox" of CSS guidance, case studies, and fact sheets to assist states and communities; a "lessons learned" video; publication of a "CSS Primer," "CSS Self Assessment Guide," and other outreach material; various conferences and Webinars; and a CSS Clearinghouse at <http://www.contextsensitivesolutions.org>.

The Report is available at <http://www.fhwa.dot.gov/csd/activities.cfm>. Contact persons are identified for each project. For more information on CSS, visit <http://www.fhwa.dot.gov/csd>.

COURT SET TO RULE IN CHALLENGE TO MASS/NH I-93 WIDENING PROJECT

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The U.S. District Court for the District of New Hampshire held a hearing on

March 16, 2007 pertaining to summary judgment motions in *Conservation Law Foundation v. Federal Highway Administration and New Hampshire Department of Transportation*. The case involves an environmental challenge brought almost a year ago against a \$480 million FHWA and NHDOT project to construct four additional highway lanes on the southernmost 19.8-mile segment of Interstate 93 (I-93), between Salem and Manchester. CLF brought NEPA, FAHA, APA, and FOIA claims seeking declaratory and injunctive relief, including preparation of a Supplemental EIS. Among the key contested issues in the case are alleged induced growth and air impacts from widening I-93, mitigation and alternatives analyses (including exclusion of rail), and supplementation of the administrative record. Plaintiffs and both federal and state defendants have moved for summary judgment. The case docket number is No. 1:06-cv-00045-PB; the presiding judge is Judge Paul Barbadoro.

At the hearing, CLF highlighted the non-pursuit of commuter rail as viable alternatives to widening I-93. Federal and State defendants replied that the project purpose is to improve congestion and reduce safety concerns, addressing specific I-93 shortcomings rather than general transportation needs. Judge Barbadoro indicated some agreement with defendants, rejecting CLF's claim that the project approval process was tainted because it was focused from the beginning on a highway widening project, rather than construction of commuter rail. However, Judge Barbadoro ultimately took the matter under advisement. A decision is expected within the next few months.

MISSOURI CITY SUES TO STOP NOISE WALLS THAT RESIDENTS WANT

Submitted by Gregory W. Schroeder, Senior Administrative Counsel
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An appeal is pending in the Eighth Circuit Court of Appeals after the District Court ruled in favor of MHTC/MoDOT. The appeal concerns the placement of Type I sound or noise walls to reduce the noise of a state highway expansion from two to four lanes (or more) in the City of Clarkson Valley. The case is made more complex by the fact that MoDOT (and FHWA) failed (for reasons unknown) to perform the Type I noise analysis, and construct the sound walls, when the state highway expansion took place. Thus, the Type I noise reduction is being retrospectively performed that should have been done earlier, under the mandate of 23 U.S.C. 109.

The plaintiffs/appellants, the City of Clarkson Valley and its mayor, are contending that the cost of the sound walls exceeds the cost limitation per receptor stated in MoDOT's sound wall policy, which has been approved by FHWA. The appellants are contending that the gross or aggregate construction costs must be used to compute the sound wall costs per receptor. However, the Administrative Record clearly shows that as a Type I noise wall, only the net costs attributable to the sound wall construction itself, exclusive of all other construction contract costs apply to the determination of the acceptable sound wall cost per receptor under 23 CFR Part 772. The case will be argued in the Eighth Circuit at 9:00 a.m. on April 12.

It is interesting to note that while the City of Clarkson Valley is suing to block the noise wall construction, the impacted residents of that city who live along the State highway, Route 340, Clarkson Road, want the noise walls to be built along their property by a nearly unanimous count. That factor, among others, led MoDOT and FHWA to proceed with the sound wall construction under the criteria in 23 CFR Part 772, despite the belated opposition of the municipal corporation as an entity itself. *City of Clarkson Valley, et al. v. Norman Mineta, et al.*, 8th Circuit #06-3613.

MISSOURI CITY SUES OVER INTERSTATE RECONSTRUCTION

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This suit was filed March 24, 2006 by the City of Richmond Heights, Missouri (City) against officials of USDOT, FHWA, and the Missouri Department of Transportation (MoDOT) in two counts. Count I is founded in NEPA, Section 4(f) and Section 106 of the National Historic Preservation Act, as amended. It seeks judicial review of the joint MoDOT-FHWA decision in a Final EIS and Record of Decision to keep, but reconfigure, the I-64/Highway 40 interchanges in the City at Bellevue Avenue and Big Bend Boulevard. Count I claims that as proposed in the FEIS and ROD, these interchanges take too many historic properties (5 total), when there were other reasonable and prudent alternatives available. Thus, the FEIS and ROD decision violates Section 4(f).

[The City of Richmond Heights, as a "cooperating party", fought against retaining an interchange at Bellevue throughout the pre-FEIS period, even though it is needed for a hospital in Richmond Heights. Some City officials also do not like the reconfigured Big Bend Boulevard, because it changes local access to and traffic flow on that street. Those issues were not raised directly in Count I.]

However, even before the lawsuit was filed, MoDOT was working with FHWA to reduce the footprint of The New I-64. On 11/16/2006, FHWA issued its Re-Evaluation under 23 CFR § 771.129, approving (among other changes) a narrower footprint at the Big Bend and Bellevue interchanges, so that only 1 historic property was affected, and MoDOT had already acquired that property. This was brought to the City's attention just before the parties were scheduled to file cross-briefs for summary judgment on Count I. The City is still determining what action it wants to take at this time.

The major activity in this case has been on Count II. The City claimed that MoDOT and the City, post-FEIS and post-ROD, had entered into an enforceable contract to compel a change in the ROD, to retain the current configuration of the Big Bend and Bellevue interchanges, through a one page "Agreement in Principle". The Agreement also called for sound abatement and instructed MoDOT to secure FHWA approval. In return, the City agreed to drop its suit.

The City requested full discovery of all records and witnesses on this as a breach of contract case, plus a federal court jury trial, and ultimately, a court order mandating compliance with MoDOT's "obligations" under this Agreement in Principle. MoDOT and FHWA filed a joint motion to dismiss Count II, contending that it was not enforceable since a necessary party, FHWA, was not a party to the agreement, and without FHWA's cooperation, the agreement could not be enforced; that the alleged agreement was executory, and therefore could not be enforced; that the agreement was contrary to NEPA policy and procedures, since the alleged agreement was result oriented and disregarded the NEPA process and considerations to date; plus other related arguments. Judge Webber granted the federal and state defendants' motion to dismiss, and then restated his position on a motion for reconsideration. His ruling focused on the fact that the ultimate actor and decision-making entity under NEPA is FHWA, and not MoDOT; MoDOT could not implement or enforce the terms of the Agreement in Principle without the active cooperation and participation of FHWA; and FHWA was not a party to the Agreement in Principle.

The City has taken no major action on the suit since Count II was dismissed under Rule 12(b)(6). Count I is now pending under a court continuance, awaiting further action by the parties.

The counsel on the City of Richmond Heights case are: for the United States, Assistant U.S. Attorney Jane Rund; for MoDOT, Regional Counsel Philip Morgan and myself. FHWA Midwest counsel Julie Dingle is also assisting and advising

the parties, but is not counsel of record. For Richmond Heights: DC attorney Andrea Ferster, and City Counselor Ken Heinz. *City of Richmond Heights, Missouri v. Norman Mineta, et al.*, U.S. District Court, Eastern District of Missouri, Case No. 4:06CV00511ERW (Honorable E. Richard Webber, Judge)

ILLINOIS CORRIDOR PROTECTION STATUTE SURVIVES CONSTITUTIONAL CHALLENGE

A group of property owners opposed to a highway project in the early planning stages filed suit when Illinois DOT filed a corridor map to protect the future right of way. They claimed that the statute that IDOT used to file the map was facially unconstitutional. Neither the statute nor the map restricts use of the land on the corridor map. Once the map is recorded, the property owners are required to give notice when they intend to develop their property so IDOT can decide whether or not to acquire the property. IDOT can use eminent domain. Although each property owner giving notice may not develop the property for up to 165 days (the statutory period for IDOT to acquire), the Illinois Supreme Court ruled that this was not a long enough period to constitute a regulatory taking. The Court rejected the claim that the corridor protection statute violated separation of powers by doing away with the need to show necessity in eminent domain. IDOT would still have to show necessity in the event it took any property in the corridor by eminent domain. The statute did not violate due process since it was not enacted as a means to purposefully and improperly drive down the value of property. *Marvel Davis, et al. v. Brown, et al*, 221 Ill.2d 435, 851 NE2d 1198, 303 Ill.Dec.773, *cert den.* No. 06-302, 10/30/06.

NOTES FROM THE CHAIR

Submitted by Peggy Strand
MStrand@venable.com

Many thanks to Committee Members who were able to participate in our meeting in January, 2007. We are now planning for the TRB July Workshops and I hope many of you will be able to attend that session.

The TRB July Workshops are July 8-11, 2007 at the Courtyard Marriott in Philadelphia, Pennsylvania. There will be a full suite of educational programs, receptions, committee meetings and social outings. This year, the Federal Highway Administration plans to send all of its attorneys to the Workshops so we should have a terrific opportunity to meet and work with our federal counterparts.

At our Committee meeting in July, we will do planning for the January 2008 TRB Annual Meeting. Please come full of ideas and energy!

NEXT DEADLINE FOR SUBMISSIONS IS JUNE 15, 2007

Anyone who would like to submit a case summary or other news for the July, 2007 edition of this newsletter should send the material to the Editor at Richard.Christopher@hdrinc.com and should use Microsoft Word. Submissions are due by the close of business on June 15, 2007.

Summary of the 2007 Nationwide Permits¹

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes in 2007	Other Information
NWP 1 – Aids to Navigation	10	none	PCN not required	no	navigable waters of the U.S.	none	
NWP 2 – Structures in Artificial Canals	10	none	PCN not required	no	navigable waters of the U.S.	none	
NWP 3 – Maintenance	10/404					removed provision for the restoration of uplands to new NWP 45	
(a) Repair, rehabilitation, or replacement of previously authorized, currently serviceable structures or fills		authorizes only minor deviations for maintenance	PCN not required	no	all waters of the U.S.	none	does not authorize maintenance dredging for the primary purpose of navigation or beach restoration; does not authorize new stream channelization or stream relocation projects
(b) Discharges associated with removal of accumulated sediments and debris in the vicinity of existing structures, including intake and outfall structures and associated canals		200 feet from structure; minimum necessary to restore capacity intake or outfall or associated canal	all activities	yes	all waters of the U.S.	added maintenance dredging/excavation provision for intakes, outfalls, and canals from NWP 7; 200 linear foot limit doesn't apply to removal of sediments from intake or outfall structures or canals	also authorizes placement of rip rap to protect the structure
(c) Temporary structures, fills, and work necessary to conduct maintenance activity			PCN not required	no	all waters of the U.S.	added temporary structures, fills, and work associated with the maintenance activity	temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations
NWP 4 – Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities	10/404	none	PCN not required	no	all waters of the U.S.	moved provision for shellfish seeding to NWP 27	does not authorize impoundments or artificial reefs; does not authorize covered oyster trays or clam racks
NWP 5 – Scientific Measurement Devices	10/404	25 cubic yards for weirs and flumes	PCN not required	no	all waters of the U.S.	removed PCN requirement	
NWP 6 – Survey Activities	10/404	25 cubic yards for temporary pads	PCN not required	no	all waters of the U.S.	added exploratory trenching and temporary pads	does not authorize fills for roads; does not authorize permanent structures
NWP 7 – Outfall Structures and Associated Intake Structures	10/404	none	all activities	yes	all waters of the U.S.	changed title; also authorizes modification of these structures; moved maintenance dredging/excavation activities to NWP 3	activity must comply with National Pollutant Discharge Elimination System Program

¹ This table is intended to provide **general** information on the nationwide permits published in the March 12, 2007, *Federal Register* (72 FR 11092). Prospective users of the nationwide permits should read the text of the nationwide permits, general conditions, and definitions to assess whether a particular nationwide permit could authorize a specific project. Prospective users should also review the pre-construction notification requirements of the nationwide permits and contact the appropriate Corps district to determine if any regional conditions have been imposed on the nationwide permits.

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes in 2007	Other Information
NWP 8 – Oil and Gas Structures on the Outer Continental Shelf	10	none	all activities	no	navigable waters of the U.S.	changed title; clarified that PCN is required for all activities	limited to facilities in areas leased by the Minerals Management Service of the Department of the Interior
NWP 9 – Structures in Fleeting and Anchorage Areas	10	none	PCN not required	no	navigable waters of the U.S.	none	applies to structures, buoys, and other devices placed in anchorage or fleeting areas established by the U.S. Coast Guard
NWP 10 – Mooring Buoys	10	none	PCN not required	no	navigable waters of the U.S.	none	
NWP 11 – Temporary Recreational Structures	10	none	PCN not required	no	navigable waters of the U.S.	none	structures must be removed within 30 days after use discontinued
NWP 12 – Utility Line Activities	10/404	1/2 acre	<ul style="list-style-type: none"> a section 10 permit is required mechanized land clearing in forested wetlands for the right-of-way discharges that result in the loss of >1/10 acre 	yes, if PCN required	see text of NWP	apply the PCN requirement for discharges that result in loss of >1/10 acre to all utility line activities, not just substations; added temporary structures, fills, and work associated with the utility line activity	temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations
utility lines			<ul style="list-style-type: none"> utility line exceeds 500 linear feet in waters of the U.S. utility line runs parallel to a stream bed within jurisdictional area 		all waters of the U.S.		must restore area to pre-construction contours
utility line substations					non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters		
foundations for overhead utility line towers, poles, and anchors					all waters of the U.S.		separate footings for each tower leg should be used where feasible
access roads			<ul style="list-style-type: none"> above-grade permanent access roads exceeding 500 feet; permanent access roads constructed with impervious materials 		non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters		access roads must be constructed to minimize adverse effects to waters of the U.S.

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes in 2007	Other Information
NWP 13 – Bank Stabilization	10/404	<ul style="list-style-type: none"> 500 feet along the bank (unless waived by DE) 1 cubic yard per running foot (unless waived by DE) 	<ul style="list-style-type: none"> >500 linear feet in length >1 cubic yard per running foot along bank below OHWM or HTL discharges into special aquatic sites 	yes, if PCN required	all waters of the U.S.	authorizes discharges into special aquatic sites, provided district engineer issues written waiver	activity cannot impair surface water flow into or out of waters of the U.S.
NWP 14 – Linear Transportation Projects	10/404	<ul style="list-style-type: none"> 1/2 acre in non-tidal waters 1/3 acre in tidal waters 	<ul style="list-style-type: none"> >1/10 acre discharges into special aquatic sites 	yes, if PCN required	all waters of the U.S.	removed requirement for compensatory mitigation proposal with PCN; stream channel modifications must be minimum necessary to construct or protect the linear transportation project; authorizes temporary structures, fills, and work necessary to construct the linear transportation project	temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations; does not authorize storage buildings, parking, lots, train stations, aircraft hangars, or other non-linear transportation features
NWP 15 – U.S. Coast Guard Approved Bridges	404	none	PCN not required	no	navigable waters of the U.S.	none	causeways and approach fills for bridges are not authorized by this NWP; those activities require separate section 404 authorization
NWP 16 – Return Water From Upland Contained Disposal Areas	404	none	PCN not required	no	all waters of the U.S.	none	water quality issues addressed through section 401 certification process
NWP 17 – Hydropower Projects	404	none	all activities	yes	all waters of the U.S., except section 10 waters	reworded text, but terms and limits remain unchanged	applies to activities licensed by the Federal Energy Regulatory Commission or activities exempt from licensing requirements
NWP 18 – Minor Discharges	10/404	<ul style="list-style-type: none"> 25 cubic yards discharged below plane of OHWM/HTL 1/10 acre of waters of the U.S. 	<ul style="list-style-type: none"> >10 cubic yards discharged below plane of OHWM/HTL discharges into special aquatic sites 	yes, if PCN required	all waters of the U.S.	expanded the 1/10 acre limit to include all waters of the U.S., not just special aquatic sites; does not authorize discharges for stream diversions	does not authorize discharges for stream diversions
NWP 19 – Minor Dredging	10/404	25 cubic yards below plane of OHWM/MHWM	PCN not required	no	navigable waters of the U.S.	none	does not authorize dredging or degradation through siltation of coral reefs, submerged aquatic vegetation beds, anadromous fish spawning areas, or wetlands
NWP 20 – Oil Spill Cleanup	10/404	none	PCN not required	no	all waters of the U.S.	authorize clean-up of polychlorinated biphenyls under 40 CFR Part 761	authorizes activities subject to the National Oil and Hazardous Substances Pollution Contingency Plan and any existing state contingency plan
NWP 21 – Surface Coal Mining Operations	10/404	none	all activities	yes	all waters of the U.S.	changed title; include activities processed under integrated permit processing procedures	prospective permittee must receive written authorization prior to commencing the activity

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes in 2007	Other Information
NWP 22 – Removal of Vessels	10/404	none	<ul style="list-style-type: none"> if vessel listed or eligible for National Register of Historic Places activities in special aquatic sites 	yes, if PCN required	all waters of the U.S.	restructured text; added PCN requirement for activities in special aquatic sites	does not authorize maintenance dredging, shoal removal, or river bank snagging; disposal of removed vessel in waters of the U.S. may require separate authorizations from EPA and Corps
NWP 23 – Approved Categorical Exclusions	10/404	none	PCN not required, except for certain activities stated in RGL	yes, if PCN required	all waters of the U.S.	clarified that some activities may require PCN; provided COE web site with RGLs for NWP 23; added reference to RGL 05-07, which provides the current categorical exclusions	categorical exclusions must be approved by the Office of the Chief of Engineers
NWP 24 – Indian Tribe or State Administered Section 404 Program	10	none	PCN not required	no	navigable waters of the U.S.	added Indian Tribe Section 404 programs as eligible; listed states that have assumed section 404 permitting authority	does not authorize activities in navigable waters that require only a section 10 permit
NWP 25 – Structural Discharges	404	none	PCN not required	no	waters of the U.S.	none	structure may require section 10 permit if located in navigable waters of the U.S.; does not authorize structures that support buildings or similar structures
NWP 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities	10/404	none	all activities, except for those that require reporting (e.g., activities under a binding agreement between the landowner and an agency)	yes, if PCN required	all waters of the U.S.	added shellfish seeding; requires reporting for Federal agency agreements; added state cooperating agencies; revised terminology; revised to include wetland actions documented by NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; removed restriction limiting use by mitigation bank to those approved under mitigation banking guidelines; no conversion of natural wetlands or streams (except for relocation)	does not authorize stream channelization, relocation or conversion of tidal waters, or conversion of natural wetlands or streams (except for relocation activities); notification required for reversion activities
NWP 28 – Modifications of Existing Marinas	10	activities limited to authorized marina area	PCN not required	no	navigable waters of the U.S.	none	does not authorize dredging, additional slips, dock spaces, or expansion in waters of the U.S.
NWP 29 – Residential Developments	10/404	<ul style="list-style-type: none"> 1/2 acre 300 linear feet of stream bed, but DE can waive for intermittent and ephemeral 	all activities	yes	non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters	moved provisions (including subdivision provision) for residential developments from NWP 39 to NWP 29; added ephemeral streams to 300 linear foot limit; removed restrictions on who could use NWP	

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes in 2007	Other Information
NWP 30 – Moist Soil Management for Wildlife	404	none	PCN not required	no	non-tidal waters of the U.S.	removed term limiting use to government-owned or managed property; clarified that it is limited to non-tidal waters	authorizes only on-going activities; does not authorize construction of new dikes, roads, water control structures, etc.; does not authorize conversion of wetlands to uplands; does not authorize impoundments
NWP 31 – Maintenance of Existing Flood Control Facilities	10/404	maintenance baseline approved by district engineer	all activities	yes	all waters of the U.S.	added levees to list of examples of flood control facilities	PCN must indicate location of dredged material disposal sites and baseline information
NWP 32 – Completed Enforcement Actions	10/404	<ul style="list-style-type: none"> 5 acres of non-tidal waters 1 acre of tidal waters also see text of NWP 	PCN not required	no	all waters of the U.S.	changed acreage limit applicability from “wetlands” to “waters”	
NWP 33 – Temporary Construction, Access, and Dewatering	10/404	none	all activities	yes	all waters of the U.S.		associated primary activity must be authorized by Corps or U.S. Coast Guard, or be exempt from permit requirements; PCN must include restoration plan
NWP 34 – Cranberry Production Activities	404	10 acres, but activity cannot result in net loss of wetland acreage	all activities	yes	section 404 waters only	clarify that PCN is required only once during time NWP is valid	does not authorize discharges in waters of the U.S. for attendant features, such as warehouses, processing facilities, or parking areas
NWP 35 – Maintenance Dredging of Existing Basins	10	dredging to previously authorized depths or controlling depths, whichever are less	PCN not required	no	navigable waters of the U.S.		dredged material must be deposited at upland site
NWP 36 – Boat Ramps	10/404	<ul style="list-style-type: none"> 50 cubic yards, unless waived by DE 20 foot width, unless waived by DE 	<ul style="list-style-type: none"> >50 cubic yards >20 feet wide 	yes, if PCN required	all waters of the U.S., except special aquatic sites	district engineer can waive 50 cubic yard limit and/or 20 foot width limit	section 10 permit required if dredging navigable waters is necessary for access to boat ramp
NWP 37 – Emergency Watershed Protection and Rehabilitation	10/404	none	all activities	yes	all waters of the U.S.	added abandoned mine land reclamation activities with no coal extraction; added Emergency Conservation Program activities administered by Farm Service Agency	in general, permittee should wait until district engineer issues verification, but may proceed immediately if there is an unacceptable hazard to life or significant loss of property or economic hardship will occur
NWP 38 – Cleanup of Hazardous and Toxic Waste	10/404	none	all activities	yes	all waters of the U.S.		does not authorize the establishment of new disposal sites or the expansion of existing disposal sites

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes in 2007	Other Information
NWP 39 – Commercial and Institutional Developments	10/404	<ul style="list-style-type: none"> 1/2 acre 300 linear feet of stream bed but DE can waive for intermittent and ephemeral 	all activities	yes	non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters	add ephemeral streams to 300 linear foot limit; PCN for all activities; move residential developments to NWP 29; remove subdivision provision	does not authorize construction of new golf courses, new ski areas, or oil and gas wells
NWP 40 – Agricultural Activities	404	<ul style="list-style-type: none"> 1/2 acre 300 linear feet of stream bed but DE can waive for intermittent and ephemeral 	all activities	yes	non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters	add ephemeral streams to 300 linear foot limit; PCN for all activities; add farm ponds (but no fills in perennial streams or aquaculture ponds); remove restrictions on who could use NWP; remove provisions relating to USDA participants	NWP can be used for agricultural activities, regardless of whether applicant is USDA participant; does not authorize aquaculture ponds
NWP 41 – Reshaping Existing Drainage Ditches	404	none	reshape greater than 500 linear feet of drainage ditch	yes, if PCN required	non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters	removed prohibition for permanent sidesteading; as-built capacity of ditch is to be used as baseline	reshaping drainage ditch cannot increase capacity of ditch or drain additional waters of the U.S.; does not authorize relocation of drainage ditches constructed in waters of the U.S.
NWP 42 – Recreational Facilities	404	<ul style="list-style-type: none"> 1/2 acre 300 linear feet of stream bed but DE can waive for intermittent and ephemeral 	all activities	yes	non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters	add ephemeral streams to 300 linear foot limit; PCN for all activities; remove requirement to integrate into landscape and not substantially change pre-construction grades or contours; expanded list of examples of authorized activities	authorizes variety of recreational facilities, except for hotels, restaurants, racetracks, stadiums, arenas, or similar facilities (these may be authorized by NWP 39)
NWP 43 – Stormwater Management Facilities	404	<ul style="list-style-type: none"> 1/2 acre 300 linear feet of stream bed but DE can waive for intermittent and ephemeral 	all activities involving expansion or construction of SWM facilities	yes, if PCN required	non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters	added ephemeral streams to 300 linear foot limit; PCN required for expansion of existing SWM facilities and construction of new SWM facilities; removed 1/10 acre PCN threshold for maintenance	does not authorize construction of new SWM facilities in perennial streams; maintenance does not require PCN if limited to restoring original design capacities
NWP 44 – Mining Activities	10/404	1/2 acre	all activities	yes	non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters	NWP can be used for any mining activity, except coal mining	PCN must include reclamation plan if reclamation is required by other statutes
NWP 45 – Repair of Uplands Damaged by Discrete Events	10/404	Restore uplands to pre-event ordinary high water mark	all activities	yes	all waters of the U.S.	New NWP from 2002 NWP 3(iii); removed 50 cubic yard limit; authorizes bank stabilization to protect restored uplands; clarified that upland can be restored without permit to OHWM or high tide line	PCN must be submitted to district engineer within one year of date of damage; work must start or be under contract within two years of date of damage

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes in 2007	Other Information
NWP 46 – Discharges in Ditches	404	1 acre	all activities	yes	certain types of non-tidal ditches constructed in uplands, and determined to be waters of the U.S.	new NWP	NWP does not authorize discharges into ditches constructed in streams or other waters of the U.S., or in streams that have been relocated in uplands.
NWP 47 – Pipeline Safety Program Designated Time-Sensitive Inspections and Repairs	10/404	none	none	no	all waters of the U.S.	new NWP	permittee must participate in Pipeline Repair and Environmental Guidance System
NWP 48 – Existing Commercial Shellfish Aquaculture Activities	10/404	existing project area	<ul style="list-style-type: none"> • project area > 100 acres • reconfiguration of the activity • change in species • change in culture methods • dredge harvesting, tilling, or harrowing in SAV 	yes, if PCN required	navigable waters of the U.S.	new NWP	molluscan species only; project area usually defined as area for which state or local agency has issued a lease or permit for aquaculture activities; for those activities that do not require a PCN, permittees must submit report (report required only once during 5-year period)
NWP 49 – Coal Remining Activities	10/404	limited to sites that were previously mined for coal, but new mining may be conducted in adjacent areas if the newly mined area is less than 40 percent of the area being remined plus any unmined area needed for reclamation	all activities	yes	non-tidal waters of the U.S.	new NWP	permittee must demonstrate net increase in aquatic resource functions through reclamation; activities must be authorized by the Department of Interior (DOI), Office of Surface Mining (OSM), or by states with approved programs under Title IV and V of the Surface Mining Control and Reclamation Act of 1977 or are currently being processed as part of an integrated permit processing procedure; prospective permittee must receive written authorization prior to commencing the activity
NWP 50 – Underground Coal Mining Activities	10/404	none	all activities	yes	non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters	new NWP	activities must be authorized by the Department of Interior (DOI), Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 or are currently being processed as part of an integrated permit processing procedure; if reclamation required, a copy of the plan must be submitted with PCN; does not authorize coal preparation and processing activities outside of the mine site (these may be authorized by NWP 21); prospective permittee must receive written authorization prior to commencing the activity