

SUPPLEMENT TO THE DECISION DOCUMENT FOR NATIONWIDE PERMITS

This document is a second supplement to the national decision document for Nationwide Permits (NWP) in the State of Texas, and addresses additional regional modifications and conditions for the NWP specifically in the San Jacinto Waste Pits (SJWP) area. The Southwestern Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of the NWP, including the need for additional modifications of the NWP by the establishment of regional conditions to ensure that those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of use of the NWP from certain geographic areas or specific water bodies. Regional conditions are necessary to address important regional issues relating to the aquatic environment. The regional conditions are required to ensure that the NWP authorize activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment.

1.0 Background

In the September 26, 2006, issue of the Federal Register (71 FR 56258), the Corps published its proposal to reissue the existing NWP and issue six new NWP. To solicit comments on its proposed regional conditions for the NWP, the Corps districts with regulatory jurisdiction in Texas concurrently issued public notices on or about October 12, 2006. The issuance of the NWP was announced in the March 12, 2007, Federal Register notice (72 FR 11092). For each of the reissued and new NWP, HQUSACE issued a decision document that contains an Environmental Assessment (EA), Statement of Findings, public interest review, and as appropriate, a Section 404(b)(1) Guidelines analysis. The Office of the Chief of Engineers determined that division engineers will issue supplemental decision documents to address locally important factors relating to the public interest, compliance with the Section 404(b)(1) Guidelines, and any potential adverse effects on the human environment, to ensure that the NWP authorize only those activities that result in no more than minimal individual and cumulative adverse effects on the environment. On August 23, 2007, Southwestern Division (SWD) issued supplemental decision documents with 13 regional conditions necessary to ensure that activities authorized by NWP result in no more than minimal individual and cumulative adverse effects on the environment. The documents stated that if, at a later time, there is clear, unequivocal evidence that the NWP would result in more than minimal adverse effects on the aquatic environment, individually or cumulatively, the modification, suspension, or revocation procedures at 33 CFR 330.4(e) or 33 CFR 330.5 will be used. This document identifies a geographic area in which the NWP should be regionally conditioned, as described below, to further ensure that the NWP do not authorize activities that may exceed the minimal adverse effects threshold.

On March 19, 2008, the U.S. Environmental Protection Agency (EPA) placed the SJWP site on the National Priorities List. This event marked the beginning of several steps that the EPA will be taking to clean up the SJWP site thru the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) process. The SJWP site is comprised of an area of land and an area of the San Jacinto River bottom, i.e., river sediment that is contaminated with

certain hazardous materials including dioxin from released waste paper mill sludge. Due to the site being partially located in the San Jacinto River, activities in the area permitted under Section 404 of the CWA and Section 10 of the Rivers and Harbors Act (RHA) may impact the SJWP site and potentially expose permittees to CERCLA liability.

In August 2008, SWG sent letters to both the EPA and Texas Commission on Environmental Quality (TCEQ), informing them that the elevation of the SJWP site to the National Priorities List was recently brought to our attention by the Texas Parks and Wildlife Department (TPWD). SWG requested input regarding the agencies' position on the issuance of Permit SWG-2007-01865, the management of currently issued permits, and the ongoing issuance of permits in the area of the SJWP site. Similar letters were sent again on 8 January 2009 to EPA and TCEQ. In a letter dated 31 March 2009, TCEQ informed SWG of its concern regarding activities in the area of the SJWP, and of the suspension of 401 Water Quality Certification for Permit SWG-2007-01865, which is within the EPA identified Area of Concern (AOC), a boundary where potential dredging and/or construction activities may impact the Remedial Investigation (RI) and Feasibility Study (FS) that is currently being negotiated, as well as the future cleanup of the Site (Enclosure 1). Accordingly, SWG initiated suspension procedures pursuant to 33 CFR 325.7, and notified the permittee, by letter dated 18 May 2009, that permit SWG-2007-01865 had been suspended.

On 15 July 2009, managers representing EPA, TCEQ Superfund Section, TCEQ 401 Section, and CESWG Regulatory Branch met and agreed to form an SJWP workgroup (Workgroup), with representatives from each agency, to develop a process for managing permit actions within the AOC. To minimize permittee exposure to CERCLA liability and to continue to effectively evaluate proposed and permitted activities, the Workgroup developed a Permit Evaluation Requirement Process (Process), for all permit applicants and existing permittees within the AOC to undertake. A Joint Public Notice was issued on 21 October 2009, by EPA, USACE, and TCEQ to inform the public of the AOC and the Process. In summary, as part of the Process, all standard permit applicants and existing permittees within the AOC must conduct certain sampling events to ensure that any activities, especially activities involving dredging or disposal of dredged materials, do not impact the SJWP Site investigation and cleanup. The verification of such sampling events and adherence to the Process will be completed by TCEQ. The issuance of permits for work and/or activities regulated under Section 10 of the RHA and/or Section 404 of the CWA, with any associated special conditions (if necessary), will be completed by USACE. The Joint Public Notice and the Process are attached (Enclosures 2 & 3).

Pursuant to 33 CFR 330.1(d), and based on the stated views of other agencies and the reported levels of dioxin and other contaminants in the AOC, the SWD Division Engineer determined that sufficient concerns exist for the environment and that NWP's could result in more than minimal adverse effects either individually or cumulatively. As required by 33 CFR 330.5, a public notice was issued on 8 March 2010, to announce the suspension of all NWP's for the specific geographic area and to solicit comments on the proposal to modify the NWP's by adding the following regional condition:

Regional Condition No. 14: All work in the San Jacinto River Waste Pits (SJWP)

Area of Concern (AOC), authorized under a Nationwide Permit, requires a waiver from the District Engineer (DE). The applicant must submit a Preconstruction Notification (PCN) according to General Condition No. 27 (Federal Register, Vol. 72, No.47, FR 11194 - 11196). This PCN shall be used to review the project to determine if it will result in more than minimal effects to the region, and does not lessen the restrictions provided by any General Conditions of the NWP. The applicant must receive written approval, including a waiver from the DE prior to starting work in jurisdictional areas of waters of the United States.

2.0 Consideration of Public Comments

In response to the public notice, the Texas Parks and Wildlife Department (TPWD), in a letter dated March 31, 2010, expressed concerns about potential dioxin concentrations in site sediments within the AOC. TPWD indicated activities which disturb dioxin-contaminated sediments could further exacerbate dioxin contamination by spreading contaminated sediments and by re-suspending dioxins sequestered in the sediment into the water column. It believes this disturbance would make the toxins available for entrance into the food web and ultimately into the top level of predators, including humans. TPWD added that traditional upland disposal and subsequent drying of contaminated sediments could lead to distribution of the dioxins via windblown dust. In summary, TPWD supported the suspension of NWP within the AOC, but objected to the proposed modification for reasons stated above, and recommended that all activities within the AOC be reviewed by an individual permit process.

Response: SWG shares TPWD's concern regarding dioxin contamination. The proposed modification will require that a Preconstruction Notification (PCN) be submitted for all activities within the AOC, which will be reviewed according to the "Process" and sampling conducted as described in the Joint Public Notice issued on 21 October 2009 by EPA, USACE, and TCEQ. The purpose of this "Process" is to address the very same concerns raised by TPWD. TCEQ in coordination with EPA will provide SWG with the necessary conditions respective to contamination levels tested, to ensure no more than minimal impacts occur from any authorized action. If any action appears not to meet the conditions of the NWP, the district engineer will take discretionary authority to require an individual permit review process. Therefore continued suspension of the NWP in the AOC will no longer be necessary.

The Galveston District consulted with the National Marine Fisheries Service (NMFS) under the Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act. In a letter dated 26 March 2010, the NMFS stated it supports the suspension and the addition of Regional Condition 14 as a modification to the NWP utilized in the Galveston District. NMFS added that no further consultation is required for this action.

Response: Same as above.

No other comments were received on the proposed regional condition.

3.0 Waters Excluded from NWP or Subject to Additional Pre-Construction Notification Requirements

SWD previously exercised discretionary action to suspend all Nationwide Permits (NWP), for a specific geographic area. I am now revoking that suspension and modifying the NWP by adding a regional condition respective to the EPA identified AOC. The AOC location for this action includes all waters, wetlands, and aquatic resources in and surrounding the SJWP site. The SJWP site is located in the San Jacinto River, along the south bank, north of the Interstate Highway 10 Bridge, in Channelview, Harris County, Texas. The USGS Quad reference map is: Highlands, Texas. Approximate coordinates for the northern and southern-most limits of the AOC include an area south of 29.833 Latitude and -95.0639 Longitude; and north of 29.7615 Latitude and -95.08648 Longitude.

4.0 Findings

Pursuant to 33 CFR 330.1(d) division engineers have been delegated a discretionary authority to suspend, modify, or revoke authorizations under a NWP. This discretionary authority may be used by division engineers to further condition or restrict the applicability of an NWP for cases where they have concerns for the aquatic environment under the Clean Water Act Section 404(b)(1) Guidelines or for any public interest factor. I have such concerns with respect to the SJWP AOC. The addition of regional condition 14, including the PCN requirement, will ensure that the NWP authorize only activities with minimal individual and cumulative adverse effects on the aquatic environment. During the PCN process, the district engineer will exercise discretionary authority and require an individual permit for those activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment.

If, at a later time, there is clear, unequivocal evidence that any of these NWP would result in more than minimal adverse effects on the aquatic environment, individually or cumulatively, the modification, suspension, or revocation procedures at 33 CFR 330.4(e) or 33 CFR 330.5 will be used.

5.0 Final Determination

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that the Regional Condition 14 is necessary to ensure that the NWP will authorize only those activities with minimal adverse effects on the aquatic environment, individually and cumulatively. Regional Condition 14 is effective immediately.

25 JUN 10

DATE



ANTHONY C. FUNKHOUSER

Colonel, EN
Commanding

3 Encls