

**SELECT WATER QUALITY  
PERMITTING AND RELATED ISSUES  
A QUICK HEADS UP FOR REAL  
ESTATE PRACTITIONERS**

October 23, 2003  
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**CWA PROGRAM – REMINDERS**

- ❖ **Section 301 (a) of CWA – prohibits the discharge of any pollutant by any person into navigable waters except in compliance with sections 402, 404 [and other sections]**



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**CWA PROGRAM – REMINDERS**

*continued*

- ❖ **Discharge of pollutant = any addition of any pollutant to navigable waters from any point source**
- ❖ **Pollutant = rock, sand, heat, industrial, municipal, agricultural wastes (and others)**
- ❖ **Point Source = “any discernible, confined and discrete conveyance” includes “any pipe, ditch, channel, conduit, well, discrete fissure . . . (from which pollutants are or may be discharged).”**



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## CWA PROGRAM – REMINDERS

*continued*

- ❖ **Navigable Waters = waters of the U.S. including the territorial seas (includes wetlands adjacent to waters, mudflats, most impoundments, all waters used in interstate commerce)**
- ❖ **Section 402 – point source permit requirement**
- ❖ **Section 404 – dredge and fill permit requirement**



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## TYPES OF PERMITS

- ❖ **Individual**
- ❖ **General**



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## WHO ADMINISTERS PERMIT PROGRAMS?

- ❖ **States for point source permit programs (402)**
- ❖ **U.S. Army Corps of Engineers (404)**



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## STORM WATER (Section 402)

- ❖ What is the big deal about storm water?



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## STORMWATER REGULATION

- ❖ PHASE I: Storm water discharges associated with industrial activity and large construction activities
  - No exposure exclusion
  - Storm water discharges from large and medium municipal separate storm sewer systems



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## STORMWATER REGULATION

*continued*

- ❖ PHASE II: Storm water discharges from "small" construction activities
- ❖ Discharges from "small municipal separate storm sewer systems"



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## HOW TO PERMIT CONSTRUCTION SITES?



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## GENERAL PERMIT

- ❖ EPA general permit
- ❖ Utah general permit



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## WHO GETS THE PERMIT?

- ❖ The owner, developer, project instigator, controller
- ❖ Contractor may be required to sign on as copermittee
- ❖ Exceptions
  - Low erosivity waiver (construction occurs and complete between Jan. 1 and April 30)
  - Small site falls within phase I or phase II municipal separate storm sewer area



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### HOW TO GET COVERAGE?

- ❖ **Develop a SWPPP**
- ❖ **Submit a NOI before construction begins**
- ❖ **Electronic Submission**  
[<http://www.waterquality.utah.gov/updates/stormwater.htm>]



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### WHAT LEVEL OF PERFORMANCE IS REQUIRED?

- ❖ **Reduce the discharge of pollutants to the maximum extent practicable**
- ❖ **Protect water quality**



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### HOW LONG MUST THE SITE BE PERMITTED?

- ❖ **Before construction through final site stabilization**



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**OTHER**

- ❖ **Reminder: not an entitlement**
- ❖ ***Environmental Defense Center v. EPA* (9th Circuit)**



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**ENFORCEMENT**

- ❖ **1991 Walmart Enforcement \$1 million penalty and \$4.5 million requirement for environmental management plan**
- ❖ **Walmart CT Enforcement "Walmart and other large retail stores have a practice of keeping fertilizers and pesticides outside the store."**
- ❖ **Lowes – \$137,500 penalty in Feb. of 2003**



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**ENFORCEMENT** *continued*

- ❖ **July 25, 2003 EPA Announcement of \$928,500 in Penalties for Colorado Construction Sites**
- ❖ **Utah**



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**DREDGE AND FILL PERMITTING**



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**SECTION 404 PERMIT**

- ❖ Any discharge of dredged or fill material into navigable waters



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**WHAT ARE WATERS OF THE UNITED STATES?**

*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*

- ❖ Navigable waters, tributaries, adjacent (neighboring, bordering, contiguous) wetlands
- ❖ What about wetland complexes? Are they adjacent?



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## WATER OF THE UNITED STATES

- ❖ What about a two-foot wide roadside ditch constructed by a county road department to collect rainfall runoff and that is connected through a series of ditches culverts, dams and ponds to a navigable river eight miles away?
- ❖ What about manmade drainage ditch that occasionally discharges to a tributary of a navigable water?



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## ISSUE: JURISDICTION BASED ON THEORETICAL CONNECTIONS VS. "CLOSE, DIRECT, PROXIMATE LINKS"



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## NATIONWIDE PERMITS UNDER 404

- ❖ Available for de minimis activities



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## HOW TO DETERMINE SCOPE OF JURISDICTION?

- ❖ Obtain a delineation from a certified professional
- ❖ What if delineation performed in past?



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## MITIGATION REQUIREMENTS

- ❖ Regulatory guidance letter – guidance on compensatory mitigation programs  
<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/RGL2-02.pdf> [A bit more flexibility - out of kind, off site]



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## SPILL PREVENTION, CONTROL, AND COUNTERMEASURES PLANS



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## WHO MUST PREPARE?

- ❖ Aggregate aboveground oil storage capacity of greater than 1320 gallons, or an aggregate underground oil storage capacity greater than 42,000 gallons (subject to certain exceptions) and
- ❖ Could reasonably be expected to discharge oil in harmful quantities into navigable waters of the United States



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## CONTENTS OF AN SPCC PLAN

- ❖ Detailed, prescribed by regulation



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## ENFORCEMENT POTENTIAL



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**PERMITS FOR TRANSBASIN  
DIVERSIONS?**

- ❖ *Miccosukee* (11<sup>th</sup> Cir. 2002)
- ❖ *Catskill Mtns.* (2<sup>nd</sup> Cir. 2001)
- ❖ *Dubois* (1<sup>st</sup> Cir. 1996)
- ❖ *Northern Plains Resource Council* (9<sup>th</sup> Cir. 2003)



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## Summary of 2002 Nationwide Permits<sup>1</sup>

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes in 2002	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						
(i) repair, rehabilitation, and 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	if damage is due to a discrete event, maintenance activity must be done within 2 years, unless time limit waived by district engineer
(ii) discharges associated with removal of accumulated sediments and debris in the vicinity of existing structures		200 feet from structure	all activities	No	all waters of the U.S.	none	also authorizes placement of rip rap to protect the structure
(iii) discharges associated with restoration of upland areas damaged by a storm, flood, or other discrete event		restore to original ordinary high water mark; dredge up to 50 cubic yards	all activities	No	all waters of the U.S.	none	PCN to district engineer within one year of damaging event; work must start or be under contract within two years of date of damage
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.	none	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	10 to 25 cubic yards for weirs and flumes	No	all waters of the U.S.	none	
NWP 6 – Survey Activities	10/404	none	PCN not required	No	all waters of the U.S.	none	does not authorize fills for roads or pads; does not authorize permanent structures
NWP 7 – Outfall Structures and Maintenance	10/404						
(i) construction of outfall structures and associated intake structures		none	all activities	No	all waters of the U.S.	none	activity must comply with National Pollutant Discharge Elimination System Program
(ii) maintenance excavation and dredging to remove accumulated sediments		restore to original design capacity	all activities	Yes	all waters of the U.S.	none	for maintenance dredging, PCN must describe original design capacities and configurations of facility
NWP 8 – Oil and Gas Structures	10	none	PCN not required	No	navigable waters of the U.S.	none	limited to facilities in areas leased by Minerals Management Service of the Department of the Interior

<sup>1</sup> This table is intended to provide general information on the nationwide permits published in the January 15, 2002, *Federal Register*, as amended. 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, and if additional requirements are necessary to obtain water quality certification.

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes in 2002	Other Information
NWP 9 – Structures in Fleeting and Anchorage Areas	10	none	PCN not required	No	navigable waters of the U.S.	None	applies to structures and buoys 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
NWP 12 – Utility Line Activities	10/404	1/2 acre	see text of NWP	Yes			
(i) utility lines			see text of NWP	Yes	all waters of the U.S.	none	must restore area to pre-construction contours
(ii) utility line substations		1/2 acre	>1/10 acre	Yes	non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters	none	
(iii) foundations for overhead utility line towers, poles, and anchors		minimum necessary	see text of NWP	Yes	all waters of the U.S.	none	separate footings for each tower leg should be used where feasible
(iv) access roads		1/2 acre	>500 feet in waters of U.S.; construction with impervious materials	Yes	non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters	none	access roads should be constructed as near as possible to pre-construction contours and elevations
NWP 13 – Bank Stabilization	10/404	minimum necessary	>500 linear feet; or >1 cubic yard per running foot	No	all waters of the U.S., except special aquatic sites	none	does not authorize bank stabilization activities in wetlands and other special aquatic sites
NWP 14 – Linear Transportation Projects	10/404	1/2 acre in non-tidal waters; or 1/3 acre in tidal waters	>1/10 acre; discharges into special aquatic sites	Yes	all waters of the U.S.	simplified acreage limits; removed 200 linear foot limit	does not authorize storage buildings, parking, lots, train stations, aircraft hangars, or other non-linear transportation facilities; PCN must include compensatory mitigation proposal and minimization statement
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; these activities may require individual or regional general permits
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	No	all waters of the U.S., except navigable waters	none	applies to activities licensed by the Federal Energy Regulatory Commission or activities exempt from licensing requirements
NWP 18 – Minor Discharges	10/404	25 cubic yards; 1/10 acre of special aquatic sites	>10 cubic yards or discharges into special aquatic sites	Yes	all waters of the U.S.	none	does not authorize stream diversions

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes in 2002	Other Information
NWP 19 -- Minor Dredging	10/404	25 cubic yards	PCN not required	No	navigable waters of the U.S.	none	does not authorize activities in 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.	none	authorizes activities subject to the National Oil and Hazardous Substances Pollution Contingency Plan and any existing state contingency plan
NWP 21 -- Surface Coal Mining Activities	10/404	none	all activities	Yes	all waters of the U.S.	permittee must receive written verification from Corps before starting work; mitigation may be required by district engineer to ensure minimal adverse effects	authorizes surface coal mining and reclamation activities authorized by the U.S. Department of the Interior, Office of Surface Mining or states with programs approved under the Title V of the Surface Mining Control and Reclamation Act of 1977; PCN must include mitigation plan
NWP 22 -- Removal of Vessels	10/404	none	removal of vessels listed or eligible for National Register of Historic Places	No	all waters of the U.S.	none	does not authorize maintenance dredging, shoal removal, or river bank snagging
NWP 23 -- Approved Categorical Exclusions	10/404	none	PCN not required	No	all waters of the U.S.	none	categorical exclusions must be approved by the Office of the Chief of Engineers
NWP 24 -- State Administered Section 404 Program	10	none	PCN not required	No	navigable waters of the U.S.	none	does not authorize activities in navigable waters that require only a Section 10 permit
NWP 25 -- Structural Discharges	404	none	PCN not required	No	all waters of the U.S.	none	structure may require Section 10 permit if located in navigable waters of the U.S.; does not authorize building support pads
NWP 27 -- Stream and Wetland Restoration Activities	10/404	none	certain activities on public and private land (see text of NWP)	No	all waters of the U.S.	simplified paragraph (a); also authorizes construction of oyster habitat in unvegetated tidal waters	does not authorize stream channelization, conversion of streams to another aquatic use, net conversion of wetlands to other aquatic waters, or relocation of tidal waters
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 -- Single Family Housing	10/404	1/4 acre	all activities	Yes	non-tidal waters of the U.S., including non-tidal wetlands	can authorize work in 100-year floodplain if activity complies with floodplain management requirements	PCN must include statement that the housing activity will be a personal residence of the permittee

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes in 2002	Other Information
NWP 30 – Moist Soil Management for Wildlife	404	none	PCN not required	No	all waters of the U.S., except navigable waters	also authorizes activities on property owned or managed by local governments	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.	mitigation required once baseline established; authorizes emergency maintenance; authorizes maintenance in open waters within facility that are not part of a constructed channel	PCN must indicate location of dredged material disposal sites and baseline information
NWP 32 – Completed Enforcement Actions	10/404	5 acres of non-tidal wetlands or 1 acre of tidal wetlands (see text of NWP)	all activities	No	all waters of the U.S.	added provision extending applicability of this NWP to authorize activities required by Court decisions or settlement agreements for certain other statutes (see text of NWP)	
NWP 33 – Temporary Construction, Access, and Dewatering	10/404	none	all activities	No	all waters of the U.S.	none	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	all waters of the U.S., except navigable waters	none	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 is less	PCN not required	No	navigable waters of the U.S.	none	dredged material must be deposited at upland sites
NWP 36 – Boat Ramps	10/404	50 cubic yards of fill; 20 foot width for boat ramp	PCN not required	No	all waters of the U.S., except special aquatic sites	none	does not authorize placement of material into special aquatic sites
NWP 37 – Emergency Watershed Protection and Rehabilitation	10/404	none	all activities	No	all waters of the U.S.	added provision extending applicability to Department of the Interior's Wildland Fire Management Burned Area Emergency Stabilization and Rehabilitation Program	

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes in 2002	Other Information
NWP 38 – Cleanup of Hazardous and Toxic Waste	10/404	none	all activities	Yes	all waters of the U.S.	none	does not authorize the establishment of new disposal sites or the expansion of existing disposal sites PCN must include avoidance and minimization statement and a compensatory mitigation proposal; activities that do not require a PCN must be reported to the district engineer
NWP 39 – Residential, Commercial, and Institutional Developments	10/404	1/2 acre; 300 linear feet of perennial or intermittent stream bed	>1/10 acre; discharges into open waters	Yes	non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters	waiver can be issued by district engineer to authorize loss of greater than 300 linear feet of intermittent stream bed; simplified subdivision provision; eliminated prohibition against stream channelization or relocation below 1 cubic foot per second point of stream	
NWP 40 – Agricultural Activities	404	1/2 acre; 300 linear feet of perennial or intermittent stream bed	>1/10 acre; >300 linear feet of intermittent stream bed; construction of farm buildings in farmed wetlands	Yes	non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters and navigable waters of the U.S.	waiver can be issued by district engineer to authorize relocation more than 300 linear feet of drainage ditches constructed in intermittent streams	Natural Resources Conservation Service takes lead for most activities undertaken by U.S. Department of Agriculture program participants; activities where NRCS is the lead must be reported to the district engineer; PCN must include compensatory mitigation proposal
NWP 41 – Reshaping Existing Drainage Ditches	404	none	reshape >500 linear feet of drainage ditch	Yes	non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters and navigable waters of the U.S.	none	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	1/2 acre; 300 linear feet of perennial or intermittent stream bed	>1/10 acre; >300 linear feet of intermittent stream bed	Yes	non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters and navigable waters of the U.S.	waiver can be issued by district engineer to authorize loss of greater than 300 linear feet of intermittent stream bed	recreational facilities are integrated into natural landscape and do not substantially change pre-construction grades or contours; PCN must include compensatory mitigation proposal
NWP 43 – Stormwater Management Facilities	404	1/2 acre for construction of new facilities; 300 linear feet of perennial or intermittent stream bed	>1/10 acre; >300 linear feet of intermittent stream bed	Yes	non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters and navigable waters of the U.S.	waiver can be issued by district engineer to authorize loss of greater than 300 linear feet of intermittent stream bed; stormwater management facilities in 100-year floodplain above headwaters	does not authorize construction of new SWM facilities in perennial streams; PCN must include avoidance and minimization statement, maintenance plan, and compensatory mitigation proposal

Nationwide Permit	Statutory Authority	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes in 2002	Other Information
NWP 44 – Mining Activities	10/404	1/2 acre	all activities	No	isolated waters and non-tidal wetlands adjacent to headwater streams; aggregate mining in lower perennial streams	none	PCN must include documentation of avoidance and minimization requirements; PCN must include description of waters of the U.S. adversely affected by the proposed work; PCN must include reclamation plan for certain mining activities