

9511 West Sam Houston Parkway North, Houston, Texas 77064
281.970.8970 x140 281.970.8971 FAX



Fax

To: Developers Council	From: Toy Wood
Fax:	Pages:
Phone:	Date: 04/11/00
Re: Nationwide Permitting	CC:

Urgent
 For Review
 Please Comment
 Please Reply
 Please Recycle

Attached are two NAHB articles (for better viewing, go to www.nahb.com) regarding the proposed national permits for wetlands. Please review and comment at next developers council meeting.

<Picture: tier2_top.GIF (1953 bytes)><Picture>
<Picture>
<Picture>
<Picture>
<Picture>
<Picture>
<Picture>

<Picture>Overview Of The Nationwide Permit (NWP) 26 Wetlands Permit

- Section 404 of the Clean Water Act requires permits for the discharge of dredged or fill material into "waters of the U.S." which includes "wetlands."

- Wetlands are protected in the U.S. under Section 404 of the Clean Water Act

- As of the 1990s, there were more than 170 million acres of wetlands in the lower 48 states, plus another 100 million in Alaska.

- Wetlands are defined broadly to include dry areas wet as little as 7 days a year, 18 inches below the ground surface.

- Builders usually encounter these as little "pockets" scattered throughout the development site.

- The Clean Water Act provides for two types of permits - individual and general.

- Individual permits apply to a single project in a specific location.

- General permits (which can be issued on a regional or nationwide basis) apply to any project that meets the permit's conditions and requirements. They are a streamlined permit process, reducing permit processing from over 1 year to a month or two.

- Nationwide permit 26 historically allowed up to 10 acres of fill into "isolated and headwaters" wetlands (the very dry end of the wetland spectrum).

- Fills less than 1 acre were exempt.

- NWP 26 required builders to, above all, minimize wetlands impacts.

- Often, NWP 26 required mitigation. That is, acres of low-quality wetlands could be filled only if high-quality wetlands were restored elsewhere, either on-site or perhaps at a mitigation bank.

- Mitigation-wise, NWP 26 is a success. In 1995 under NWP 26, for every 1 acre of wetlands filled, 1.15 acres were mitigated. Under a revised version of NWP 26, from May to September of 1997 the mitigation ratio increased by more than 2 to 1. And in 1998 builders and other landowners provided more than 6,304 acres in mitigation in exchange for permission to fill or otherwise impact 2,974 acres under NWP 26.

- In December of 1996, the U.S. Army Corps of Engineers severely limited the use of Nationwide Permit 26 and said it would be completely phased out at the end of 1998.

- Specifically, the 10-acre limit was reduced to 3 acres and the threshold for notifying the Corps was tightened, from 1 acre to 1/3 acre. Thus, fewer projects meet the limitations.

- In March of 1997 NAHB sued the Corps of Engineers - and won - claiming that the changes to Nationwide Permit 26 were made illegally, because the Corps failed to allow public comments on those changes.

- Since the comment period was reopened, NAHB has made suggestions for maintaining a streamlined permitting process, including wetlands permits that would encourage Smart Growth.

- In the summer of 1998, the Corps proposed modifying existing NWPs and devising new ones to replace NWP 26, along with an acreage filling limit of three acres.

- In October of 1999, NAHB submitted 140 pages of comments arguing against the three-acre threshold limit.

- On March 9, 2000, the Corps announced new and modified NWPs to replace NWP #26, as well as some notable restrictions, including a ½ acre limit on use, a pre-construction notification (PCN) requirement for any activity affecting more than 1/10 of an acre; a prohibition against use of NWPs for any activity affecting more than 300 feet of a linear streambed, and a prohibition against use of NWPs in many areas of floodplains.

- On the same day the replacement permits were announced, NAHB sued the Corps of Engineers, arguing that there was no evidence to back up the changes the Corps has decided to make; that the changes will create a bloated Corps bureaucracy and delays for builders; and that the changes go beyond the Corps' regulatory authority and against the intent of Congress for a streamlined permitting process.

Environmental Safeguards

Historically, use of NWP #26 comes with several environmental provisions, including:

- Avoidance - Permit users have to demonstrate that they have made a conscious effort to avoid wetlands at all reasonable costs.

- Minimization - a permittee must ensure that minimal disturbance to a wetland occurs.

- Adherence to state water quality standards, coastal zone management requirements, historic preservation requirements, and endangered species requirements.

- Sequencing - to use a permit a builder or developer must ensure that a project is planned thoroughly, in sequences, to make sure a wetland is not damaged or disturbed.

- A "kick out" option - Based on wetlands conditions that vary from region to region, the Corps has the authority to deny an NWP 26 permit for any reason and make a project go through the more lengthy individual permitting process.

- Compensation - NWP 26 users must use best management practices (BMPs) and on- or off-site mitigation that will restore wetlands to compensate for wetlands lost.

- A number of states and Corps districts have imposed further restrictions and conditions on the use of NWP 26.

- EPA and FWS have an opportunity to review projects involving impacts of more than one acre.

<Picture: bottom_nav.GIF (703 bytes)>

<Picture: tier2_top.GIF (1953 bytes)><Picture>
 <Picture>
 <Picture>
 <Picture>
 <Picture>
 <Picture>
 <Picture>
 <Picture>Builders File Suit Against Corps On Wetlands Permits

March 10 -- The National Association of Home Builders (NAHB) filed suit in the U.S. District Court for the District of Columbia yesterday, charging that U.S. Army Corps of Engineers' new and modified Nationwide Permits (NWP) to replace the wetlands permit NWP #26 have no rational basis, go beyond the agency's authority under the Clean Water Act, and will result in a bloated bureaucracy instead of the streamlined permitting process envisioned by Congress.

"NAHB believes that with these costly, complex and unnecessary wetlands regulations, the Corps will create serious delays for public and private sector projects across the country. Small towns, suburbs and large cities alike are about to be hit with a new wave of regulation that will lengthen the time frame and add costs for vital projects ranging from highway safety programs to stormwater management maintenance work and housing developments," said NAHB President Robert Mitchell. "A thorough analysis of the regulations leads to an equally serious conclusion: the Corps has exceeded its authority under the Clean Water Act."

NAHB based its lawsuit, a challenge to the Corps' March 9, 2000 action, on three principles:

- The Corps cannot substantiate its actions.
- The Corps is breaking the law-again.
- The Corps' decision goes against Congressional intent and will create an unmanageable regulatory program.

The Corps Cannot Substantiate its Actions
 NAHB believes there is no evidence to substantiate the need for the new acreage limits of between one-quarter and one-half acre. The Corps is 'pulling numbers out of thin air' because it has offered no explanation of why these new acreage limits are needed to protect wetlands.

Under the most recent version of NWP 26, up to three acres could be filled, but with the new rule, the Corps has supplied no basis for lowering the acreage limit in replacement permit NWP #39 to one-half acre. NAHB believes the agency should explain why it is enacting

regulations in such an arbitrary manner. Equally important, the Corps has not explained why the prior standards didn't protect the environment.

Furthermore, the Corps has chosen to ignore important evidence of the effectiveness of NWP #26. In 1998, builders and other landowners provided more than 6,304 acres in wetlands mitigation in exchange for unavoidable fills of 2,974 wetlands acres under NWP 26.

The Corps is Breaking the Law—Again

In its March 9 rule, the Corps still takes the position that it can regulate activities such as mechanized landclearing and excavation that remove materials from wetlands. However, the Tulloch Rule case made that type of regulation invalid; in three instances, the courts ruled that the Corps can only require permits when materials are added to wetlands.

Additionally, the Corps has taken the position that it can require upland buffer zones ranging from 25-50 feet around wetlands. NAHB believes this is illegal extension of control; the Clean Water Act only allows the Corps to regulate waters and wetlands, not dry upland areas. In short, regulating dry land through a statute that addresses pollutants in waters is not only illogical, it is illegal.

The Corps' Decision Goes Against Congressional Intent and will Create an Unmanageable Regulatory Program

Congress intended for the NWP program to be efficient and streamlined, but the March 9 rule is so complex that the Corps will find it impossible to manage the workload it has created for itself. At the very least, the new rules will increase the permit review period from 45 days to 75 days. Furthermore, applicants will have to present extensive documentation to justify the use of the permits.

With the demise of NWP 26, the concept of a streamlined permitting process under Section 404 is now extinct. A vast number of public and private projects will now have to go into the Individual Permit process, and in a matter of months, the Corps see a significant increase in its work load. NAHB's conservative estimate is that the one-half acre limitation will push into the Individual Permitting process approximately 40 percent of the projects that previously would have qualified for an NWP. As many as 5,600 additional projects could be forced into the Individual Permitting Process.

Is This Really Necessary?

Opponents of NWP 26 have charged that use of the permits led to widespread wetlands degradation. The Corps' own statistics show just the opposite. An objective analysis shows that the Corps has an extremely efficient wetlands mitigation machine under NWP 26. In 1998, NWP projects caused only 19 percent of all wetlands impacts, yet NWP 26 was responsible for a disproportionate share—40 percent—of wetlands mitigation, at a 2-to-1 positive gain.

A Call for Reasonable Negotiation, Not Legislation by Regulation

In filing the lawsuit, NAHB President Robert Mitchell urged Corps officials to suspend use of the new and modified NWP permits for NWP 26 and meet with members of the regulated community to resolve the problem. NAHB's legal action comes only after a significant effort on its part to find constructive solutions, and the agency's unnecessary and illegal decision to radically change the wetlands program. "So many conditions and restrictions have now been attached to the NWPs that it is no longer the efficient program that Congress intended," Mitchell concluded.

Note to Editors and Reporters: This suit, National Association of Home Builders v. U.S. Army Corps of Engineers, was filed in the U.S. District Court for the District of Columbia as Case #1:00CV00379.

<Picture: bottom_nav.GIF (703 bytes)>