

Wetlands Permitting Alert!

All U.S. Army Corps of Engineers (Corps) nationwide permits (NWP) expired on January 21, 1997. As part of the reissuing process, the Corps curtailed the circumstances in which landowners can fill waters and wetlands, and imposed various new restrictions. The Corps also added two new NWPs, one of which authorizes maintenance of existing flood control facilities.

The most important permit used in California and throughout the west coast is NWP 26, which previously authorized the discharge of dredged or filled material that causes the loss of not more than ten acres of waters and adjacent non-tidal wetlands, in isolated waters and wetlands (jurisdictional wetlands). This permit provided for consultation for proposed fills of one to ten acres, after which the Corps would determine the level of mitigation required. If the impacts to wetlands were less than one acre, there was no need to even notify the Corps; otherwise, for impacts between one and ten acres, case-by-case consultation was required.

In response to environmentalists' complaints, NWP 26 has been *drastically curtailed* effective December 13, 1996, and is slated for complete elimination in two years. Under this change, any work in wetlands affecting more than three acres of jurisdictional wetlands between now and 1999 will require an individual permit, effectively precluding most dredges because of the extraordinary legal and administrative costs involved in applying for and obtaining a permit. The Corps must be notified 45 days in advance of any activity causing the loss of *more than 1/3 acre of waters or wetlands, and mitigation generally will be required for losses exceeding 1/3 acre.*

Additionally, use of NWP is precluded if more than 500 linear feet of streambed could be lost. *Note that this 500-foot limit is cumulative for all streambeds on the property.* In the arid southwest, for example, where any sizable piece of property will have many narrow, dry arroyos or washes crossing the property, the development of such properties will almost certainly impact more than 500 linear feet of dry, unvegetated streambed, even though the total area of impact might be well under 1/3 acre. Additionally, effective with these changes, use of NWP 12 and 14 requires advance notification to the Corps for underground utility line trenching, backfilling and stream crossings, and the amount of displaced fill must be counted cumulatively within the 1/3 minimum threshold. Moreover, the Corps has announced that it will consult with the U.S. Fish and Wildlife Service under section 7 of the Endangered Species Act regarding the procedures for administering the nationwide permit program, which may lead to further changes down the road.

In its proposed regulations changes last fall, the Corps did not specify what changes it was proposing for this NWP, and even said that it could leave the one- and ten-acre limits as they were. The revised permit as published reduced the limits of the NWP to 1/3 and three acres, without advance notice to the regulated community. As with any Corps permit, the NWPs do not become effective unless the state in which the authorized activities take place "certifies" that

the activities comply with state water quality standards. California's State Water Resources Board will likely impose additional conditions (e.g. smaller acreage limits, if that is imaginable), or even deny permits altogether.

These permit changes will seriously affect small commercial and development properties, greatly expanding the cost of compliance and remediation. Stay tuned for Action Alerts to involve Congressman Doolittle, sitting on the House Water Committee, and Congressman Pombo, who sits on Resources.