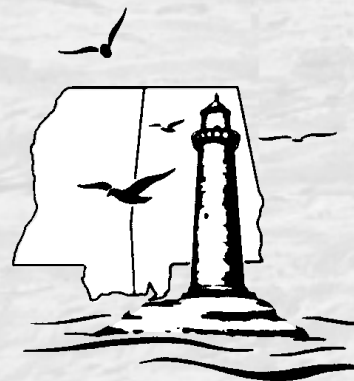


Volume 25, Number 3  
November, 2005

# WATER LOG

A Legal Reporter of the Mississippi-Alabama  
Sea Grant Consortium



## D.C. Circuit: Nationwide Permits are “Final Action”

*Natl. Assn. of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272 (D.C. Cir 2005)

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### Introduction

The D.C. Circuit Court of Appeals recently found that the issuance of nationwide permits by the U.S. Army Corps of Engineers (Corps), pursuant to § 404(e) of the Clean Water Act, constitutes a “final agency action” under the Administrative Procedure Act that is subject to judicial review. In addition, the court found that the appellants<sup>1</sup> may challenge the Corps’ compliance with the Regulatory Flexibility Act (RFA) but lack the requisite standing to challenge the agency’s action under the National Environmental Policy Act (NEPA).

### Background

The Clean Water Act (CWA) grants the Corps the power to issue permits for discharges of dredged or fill material on a general or individual basis.<sup>2</sup> If a proposed activity is covered by a general permit, the party may proceed with the activity without obtaining any further permits because a general permit is issued class-wide (state, regional, or national) and covers a category of activities that are similar in nature. On the contrary, if the proposed activity is not covered by a general permit, the party must obtain an individual permit, which requires a more comprehensive application process. The individual permit process involves “site specific documentation and analysis, public interest review, public notice and comment, and if necessary, a public hearing.”<sup>3</sup> A party that does not meet the conditions for a general permit or obtain an individual permit faces both civil and criminal penalties.

The appellants challenged the Corps’ issuance of several general permits called nationwide permits (NWP) claiming that the new NWP were imposing limits that exceeded the Corps’ statutory authority under the CWA and violated both the RFA and NEPA. Specifically, appellants challenged the “activity-specific” general permits that are replacing NWP 26 which, at one time, authorized a party to discharge dredged or fill materials affecting up to ten acres without applying for an individual permit. The National Association of Home Builders’ (NAHB’s) dissatisfaction stemmed from the Corps’ reduction of authorized maximum per project acreage impact from ten acres to one-half acre. In addition, the activity-specific general permits require preconstruction notification for impacts greater than one-tenth acre.

*See Final Action, page 8*

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Both parties moved for summary judgment. The district court granted summary judgment to the Corps, finding that the issuance of new NWP's did not constitute a final agency action because the appellants still have an opportunity to apply for individual permits and are "not legally denied anything until [their] individual permit[s] are rejected."<sup>4</sup> The appellants appealed the district court's ruling.

#### **Final Agency Action & the APA**

The appeals court first addressed whether the Corps' issuance of the NWP's was a final agency action subject to challenge under the Administrative Procedure Act (APA) and whether such challenge was ripe for review. The APA empowers a federal court to review a "final

any further project specific review. Parties that do not meet the NWP's requirements have only two options: apply for individual permits or modify their projects. Either way, the NWP's directly affect the investment and project development choices.

Next, the court turned to the issue of ripeness to consider whether the issues were ready for judicial review and the hardship to the parties of withholding court consideration.<sup>7</sup> The court found the issues ripe because the appellants alleged the Corps exceeded its statutory authority in drafting NWP's and its action was arbitrary and capricious. Even though the appellants could still apply for an independent permit, no further factual development would be necessary to evaluate the appellants' challenges. The court also found that by postponing the review of the appellants' claims, they were left with only the two aforementioned options: to modify the projects or wait and try to get an individual permit. Either way, the court found that a considerable hardship existed and that judicial review was appropriate.

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agency action"; an agency action is reviewable if it is definitive and has a direct and immediate effect on the day-to-day business of the party challenging it.<sup>5</sup> The court found that both conditions were satisfied in the issuance of the NWP's. The action was definitive because the NWP's are not tentative or interlocutory - any party may discharge fill and dredged materials into navigable waters if they meet the required conditions; no other procedure is required. Even though the appellants could apply for individual permits, additional administrative proceedings are "different in kind and legal effect from the burdens attending what heretofore has been considered to be final agency action."<sup>6</sup> The court also held that the NWP's had a direct and immediate effect on the appellants because they create legal rights and impose binding obligations by authorizing certain discharges of dredged and fill materials without

#### **Review under the RFA**

The court then addressed whether the appellants could challenge the Corps' compliance with the RFA. A challenge under the RFA requires that the challenged rule be subject to the RFA.<sup>8</sup> The Corps argued that the NWP's are not "rules" and therefore are not subject to judicial review under the RFA. But the court found that the NWP's fit within the statutory definition of rules because they are "legal prescription[s] of general and prospective applicability which the Corps has issued to implement the permitting authority the Congress entrusted to it in section 404 of the CWA."<sup>9</sup>

The Corps also argued that NWP's are not rules because the agency did not issue a notice of rulemaking. However, because NWP's "grant rights, impose obligations, and produce significant effects on private interests" the court considered them rules.<sup>10</sup>

#### **Environmental Assessment under NEPA**

Finally the court addressed the issue of whether or not the appellants had standing to challenge the Corps' compliance with NEPA. The appellants claimed that the Corps violated NEPA by failing to prepare a Programmatic Environmental Impact Statement (PEIS) for the NWP's.