37126 RULES AND REGULATIONS

alteration is "necessary". The change now requires the District Engineer to consider whether the proposed activity "is primarily dependent on being located in or in close proximity to the aquatic environment and whether feasible alternative sites are available." Applicants are required to provide sufficient information to make this evaluation. We believe that this change more closely corresponds to the wetlands policy in the Section 404 Guidelines (40 CFR 230.5(b)(8)).

At the request of the Department of the Interior, we have added sites acquired under the Recreational Demonstrations Projects Act of 1942 (PL 77-594) to the types of sites for which the policy in § 320.4(e) on historic, scenic, and recreational values is applicable.

Clarifying language has been added to our policy in § 320.4(j) on other permits or certifications required for the same activity to ensure that it is applicable to all Federal, State and/or local permits or certifications. Under this policy, we will process permit applications concurrently (and in many cases we plan to do this jointly) with other required applications for Federal, State and/or local permits or certifications. If another required permit or certification is denied, we will not issue a permit.

To ensure that this policy cannot be used as a mechanism to delay decision-making on our permit application processing and decision-making, however, we also have modified it to allow the District Engineer to process a permit application to conclusion if the responsible government agency fails to take any definitive action to issue or deny its permit or certification within three months of our public notice.

We have added two new general policies to the review of all applications for permits. Section 320.4(k) includes a policy on the safety of impoundment structures that requires the District Engineer to condition permits for these types of structures to require the permittee to operate and maintain the structure properly to ensure public safety. This policy is not applicable, however, to impoundment structures for which an adequate safety inspection program is required or which are under the control of another Federal agency. Section 320.4(l) includes a policy on the review of permit applications in floodplains as required by the May 24, 1977 Executive Order 11988.

PART 321

This part describes the special policies and procedures that are followed in the review of applications for dams or dikes to be located in a navigable water of the United States. As noted above, this review is made under Section 9 of the River and Harbor Act of 1899 (33 U.S.C. 401). The general policies described in Part 320 and the general procedures described in Part 325 are also applicable to the review of these applications.

Part 321 replaces 33 CFR 209.125, which has been rescinded. We have defined the terms "navigable waters of the United States", "dam", and "dike" in this part to specify the types of waters to which Section 9 is applicable, and the type of structures that will require Section 9 permits. We anticipate that our administrative definitions of "dam" and "dike" in Section 321.2 will assist in distinguishing these types of structures from those that would otherwise be regulated under Section 10 of the River and Harbor Act of 1899.

In all other respects, the language in Part 321 resembles that in rescinded § 209.125.

PART 322

This part prescribes the special policies and procedures to be followed by the Corps in the evaluation of applications for structures or work in or affecting navigable waters of the United States pursuant to Section 10 of the River and Harbor Act of 1899. The general policies specified in Part 320.4 and the general procedures specified in Part 325 also are applicable to this evaluation. Furthermore, some of the activities that fall under this Part will also require permits under Section 404 of the FWPCA and Section 103 of the Ocean Dumping Act.

This Part corresponds to those sections of rescinded 33 CFR 209.120 that incorporated the Section 10 program. These include paragraphs (d)(1), (e)(1) and (4), and (g)(2), (7), (8), (9), (11), (13), (14), (15) and (16).

We have adopted administrative definitions of the terms "structure" and "work" to identify the types of activities that will require Section 10 permits (Sec. 322.2).

The 1975 regulation administratively "grandfathered" certain types of activities performed in navigable waters of the United States (see rescinded 33 CFR 209.120(g)(12)(vii)) and exempted others altogether from the need to obtain Section 10 permits (see rescinded 33 CFR 209.120(e)(1)). This latter category included the placement of aids to navigation by the U.S. Coast Guard and structures placed in artificial canals, the connection of which previously was authorized by a Section 10 permit.

Today, instead of again exempting or grandfathering these activities, we are permitting them through the issuance of nationwide permits that are incorporated into this regulation. We have also included other small structures in these nationwide permits that are often placed in navigable waters and have only a de minimus impact on the environment. We are issuing nationwide permits for these activities because we feel that this administrative device is preferable to those affected by it, and is a better administrative approach than relying on a "grandfathering" or "exemption" provision to satisfy the requirements of the 1899 Act.

The following activities are subject to these nationwide permits (see § 322.4):

1. The placement of aids to navigation by the U.S. Coast Guard;

2. Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water already has received a Section 10 permit;

3. Repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure, or of any currently serviceable structure constructed prior to the requirement for a Seciton 10 permit (no deviation from original plans is authorized);

4. Marine life harvesting devices, such as pound nets, crab pots, eel pots, and lobster traps;

5. Staff and tidal gages, water recording devices, water quality testing and improvement devices, and similar scientific structures;

6. Survey activities including core sampling; and

7. Structures of work completed before December 18, 1968 (the date on which we adopted our public interest review) or in navigable waters over which the District Engineer has not asserted jurisdiction.

The nationwide permit imposes conditions on each of these structures, primarily to protect navigation.

Besides the nationwide permit, three other types of authorizations are used to issue Section 10 permits. These are:

1. Letters of permission—an individual permit issued following the abbreviated review procedures outlined in § 325.5(b);

2. Individual permits—permits issued following a case-by-case analysis of an application; and

3. General permits—permits issued for future minor work or structures in a particular region of the country that will have only minimal individual and cumulative impact on the environment.

We have included definitions of each of these terms in the regulation (§ 322.2). A person needing a Section 10 permit should first check to see whether the proposed project has already been permitted by a general permit or in this Part through a nationwide permit.

In all other respects, this regulation remains basically the same as published in 1975.

PART 323

This Part prescribes the special policies and procedures to be followed by the Corps in the evaluation of applications for permits to discharge dredged or fill material into the waters of the United States pursuant to Section 404 of the FWPCA. Again, as we have noted in Parts 321 and 322, the general policies specified in Part 320 and the general procedures specified in Part 325 also would be applicable to this evaluation. Furthermore, some of the activities that fall under Section 404 will also require permits under Sections 9 and 10 of the River and Harbor Act of 1899 (Parts 321 and 322).

This Part corresponds to those sections of the rescinded 33 CFR 209.120 that incorporated the Section 404 program. These include: paragraphs (d)(2), (4), (5), (6), (7) and (8) and (g)(17).

Section 404 provides that the Corps of Engineers may issue permits, after notice and opportunity for public hearing, for "discharges of dredged or fill material into navigable waters". The majority of comments received on the July 25, 1975 interim final regulation were in response to our definitions of terms "navigable waters", "dredged material", and "fill material".

FEDERAL REGISTER, VOL. 42, NO. 138—TUESDAY, JULY 19, 1977

We also discussed that it may be something to think about whether or not to put something on our website about these "grandfathering," or a special public notice out, to reduce the number of these requests we get. Something that also states that these are not priorities and will be responded to when we have capacity…

Thanks!
Lisa

Lisa M. Gibson
Chief, Special Projects Branch
Regulatory Division
1325 J Street, Room 1350
Sacramento, California 95814-2922

Phone: 916-557-5288
e-mail: lisa.m.gibson2@usace.army.mil

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From: Haley, Nancy A CIV USARMY CESPK (USA) <Nancy.A.Haley@usace.army.mil>
Sent: Thursday, March 7, 2024 3:13 PM
To: Gibson, Lisa M CIV USARMY CESPK (USA) <Lisa.M.Gibson2@usace.army.mil>
Cc: Morgan, Shannon R CIV SPK <Shannon.R.Morgan@usace.army.mil>; Schindler, Ethan W CIV USARMY CESPK (USA) <Ethan.W.Schindler@usace.army.mil>; Grabreck, Kirsten R CIV USARMY CESPK (USA) <Kirsten.R.Grabreck@usace.army.mil>
Subject: "grandfather" status

Hi Lisa,

Today we spoke to the fact there is no such thing as "grandfathering" structures placed or built prior to December 18, 1968 in Federally Navigable Waterways (Section 10 waters), and that we are actually verifying they were permitted in 1977 under 33 CFR 330.3. I move that we change that letter we send to state exactly that and Shannon let's talk about it for the RGP.

Any ideas?

Thanks - N

Nancy A Haley
Chief, Nevada Section
Regulatory Division/Sacramento District
USACE
916-557-7731 Office
nancy.a.haley@usace.army.mil

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