

**DEPARTMENT OF DEFENSE****Department of the Army, Corps of Engineers**

[ZRIN 0710-ZA02]

**Reissuance of Nationwide Permits****AGENCY:** Army Corps of Engineers, DoD.**ACTION:** Final notice.

**SUMMARY:** The U.S. Army Corps of Engineers (Corps) is reissuing all existing nationwide permits (NWP), general conditions, and definitions, with some modifications. The Corps is also issuing six new NWPs, two new general conditions, and 13 new definitions. The effective date for the new and reissued NWPs will be March 19, 2007. These NWPs will expire on March 18, 2012. The NWPs will protect the aquatic environment and the public interest while effectively authorizing activities that have minimal individual and cumulative adverse effects on the aquatic environment.

**DATES:** The NWPs and general conditions will become effective on March 19, 2007.

**ADDRESSES:** U.S. Army Corps of Engineers, Attn: CECW-CO, 441 G Street NW., Washington, DC 20314-1000.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Olson at 202-761-4922 or by e-mail at [david.b.olson@usace.army.mil](mailto:david.b.olson@usace.army.mil) or access the U.S. Army Corps of Engineers Regulatory Home Page at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>.

**SUPPLEMENTARY INFORMATION:****Background**

In the September 26, 2006, issue of the **Federal Register** (71 FR 56258), the U.S. Army Corps of Engineers (Corps) published its proposal to reissue 43 existing nationwide permits (NWP) and issue six new NWPs. The Corps also proposed to reissue its general conditions and add one new general condition.

The Corps proposal is intended to simplify the NWP program while continuing to provide environmental protection, by ensuring that the NWPs authorize only those activities that have minimal individual and cumulative adverse effects on the aquatic environment and satisfy other public interest factors.

As a result of the comments received in response to the September 26, 2006, proposal, we have made a number of changes to the NWPs, general conditions, and definitions to further clarify the permits, facilitate their

administration, and strengthen environmental protection. These changes are discussed in the preamble.

The Corps is reissuing the 43 existing NWPs, issuing six new NWPs, reissuing 26 existing general conditions, and issuing one new general condition. The Corps is also reissuing many of the NWP definitions, and providing 13 new definitions. The effective date for these NWPs, general conditions, and definitions is March 19, 2007. These NWPs, general conditions, and definitions expire on March 18, 2012.

While the Administrative Procedure Act requires a substantive rule to be published in the **Federal Register** at least 30 days before its effective date, exceptions to this requirement can be made for good cause (5 U.S.C. 553(d)(3)). We are utilizing this good cause exception to reduce hardships on the regulated public.

**Grandfather Provision for Expiring NWPs**

In accordance with 33 CFR 330.6(b), activities authorized by the current NWPs issued on January 15, 2002, that have commenced or are under contract to commence by March 18, 2007, will have until March 18, 2008, to complete the activity under the terms and conditions of the current NWPs.

**Clean Water Act Section 401 Water Quality Certifications (WQC) and Coastal Zone Management Act (CZMA) Consistency Determinations**

In the September 26, 2006, **Federal Register** notice and concurrent with letters from Corps Districts to the appropriate state agencies, the Corps requested initial 401 certifications and CZM consistency determinations. This began the Clean Water Act section 401 water quality certification (WQC) and Coastal Zone Management Act (CZMA) consistency determination processes.

Today's **Federal Register** notice begins the 60-day period for states, Indian Tribes, and EPA to complete their WQC process for the NWPs. This **Federal Register** notice also provides a 60-day period for coastal states to complete their CZMA consistency determination processes. This 60-day period will end on May 11, 2007.

While the states, Indian Tribes, and EPA complete their WQC processes and the states complete their CZMA consistency determination processes, the use of an NWP to authorize a discharge into waters of the United States is contingent upon obtaining individual water quality certification or a case-specific WQC waiver. Likewise, the use of an NWP to authorize an activity within, or outside, a state's

coastal zone that will affect land or water uses or natural resources of that state's coastal zone, is contingent upon obtaining an individual CZMA consistency determination, or a case-specific presumption of CZMA concurrence. We are taking this approach to reduce the hardships on the regulated public that would be caused by a substantial gap in NWP coverage if we were to wait 60 days before these NWPs would become effective.

After the 60-day period, the latest version of any written position take by a state, Indian tribe, or EPA on its WQC for any of the NWPs will be accepted as the state's final position on those NWPs. If the state, Indian tribe, or EPA takes no action by May 11, 2007, WQC will be considered waived for those NWPs.

After the 60-day period, the latest version of any written position take by a state on its CZMA consistency determination for any of the NWPs will be accepted as the state's final position on those NWPs. If the state takes no action by May 11, 2007, CZMA concurrence will be presumed for those NWPs.

**Discussion of Public Comments****I. Overview**

In response to the September 26, 2006, **Federal Register** notice, we received more than 22,500 comments. We reviewed and fully considered all comments received in response to that notice.

**General Comments**

Many commenters provided general support for the proposal, and some of them stated that the changes are a step forward in improving consistency in the NWP program. Some commenters said that the proposed NWPs provide a balance between environmental protection and allowing development to occur. One commenter said that the NWP program provides sufficient environmental protection, through its general conditions and the ability for the district engineer to exercise discretionary authority to require individual permits. Several commenters stated that the proposed NWPs are simpler, clearer, and easier to understand. Three commenters said that further streamlining is necessary. One commenter recommended adopting a standard numbering system for paragraphs and subparagraphs within the NWP text. Three commenters said that the Corps should retain appropriate references to general conditions in the text of NWPs, for purpose of clarification.

To the extent that it is feasible, we have adopted a standard format for the

NWPs. Some NWPs require different formats, to make them easier to read and provide further clarification. For the most part, it is not necessary to retain references to general conditions in the text of the NWPs, except for general condition 27, Pre-Construction Notification, because most general conditions apply to all NWPs.

In contrast, a few commenters said that the proposed NWPs are not simpler and clearer. Three commenters declared that the proposed NWPs are more like individual permits than general permits. A number of commenters asserted that the proposed NWPs will significantly increase costs and delays for permit applicants. Four commenters said that the attempt at clarification and simplicity will reduce the flexibility of the NWP program.

The NWPs issued today are not similar to individual permits. The NWPs provide a streamlined form of Department of the Army authorization for those activities that result in minimal individual and cumulative adverse effects on the aquatic environment and satisfy other public interest review factors. In 2003, the average processing time for NWPs was 27 days and for individual permits it was 144 days. In response to comments received as a result of the September 26, 2006, **Federal Register** notice, we have modified some of the proposed NWPs to address provisions that could have unnecessary negative effects on regulatory efficiency and environmental protection.

Other commenters expressed general opposition to the proposal, and said that the proposal weakens protection for waters and should be withdrawn. Many of these commenters objected to the goals of "streamlining" or "improving regulatory efficiency," stating that the focus of the NWPs should be on compliance with the Clean Water Act. Some commenters expressed opposition to the issuance of the NWPs, and said that activities proposed for NWP authorization should be individually subjected to a public notice and comment process. One commenter suggested that pre-construction notifications should be posted on district web sites for at least 30 days before an NWP verification is issued, to allow for public comment on those proposed activities.

The NWPs issued today comply with the requirements of the Clean Water Act. When the Clean Water Act was amended in 1977, Congress recognized the importance of general permits for the effective and efficient implementation of section 404. We do not agree that pre-construction

notifications should be posted on the Internet for a public comment period. The review of pre-construction notifications by district engineers is sufficient for effective environmental protection. Some NWP activities require coordination with other Federal and/or State agencies, which provides a supplemental level of environmental protection. The activities authorized by NWPs have minimal adverse effects and are limited, within each permit, to narrowly defined categories of similar activities. Notice and opportunity for public comment on the authorization of these activities through NWPs is provided as part of the NWP promulgation process. The Corps believes this is the appropriate level of public notice and comment for these types of activities. Further, when reviewing pre-construction notifications, district engineers will exercise discretionary authority to require individual permits for those activities that they determine may result in more than minimal adverse effects on the aquatic environment or do not satisfy other public interest review factors, and thus warrant a more thorough individual review through a public notice and comment process.

Some commenters stated that the NWPs should require consideration of less damaging alternatives, and others said that the Corps did not provide sufficient scientific justification for proposed changes to the NWPs, or demonstrate that NWP activities result in minimal adverse environmental effects. One commenter said that there is not sufficient emphasis on avoidance of impacts to waters of the United States. Another commenter objected to using NWPs to expand existing projects, stating that it discourages avoidance and minimization.

The NWPs authorize only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment, and thus do not include a formal process for consideration of less damaging alternatives. General condition 20, Mitigation, requires permittees to avoid and minimize adverse effects to the maximum extent practicable on the project site. The Corps believes this ensures sufficient consideration of alternatives for the types of low-impact projects that are eligible for authorization through NWPs. The Corps notes that expansion of existing projects may support the goals of avoidance and minimization, in contrast to the alternative of developing new sites, which may involve more substantial adverse impacts. The 404(b)(1) Guidelines contain flexibility for those

activities that result in minimal adverse effects on the aquatic environment. Compliance with the National Environmental Policy Act and the Section 404(b)(1) Guidelines is accomplished through decision documents prepared by the Corps. These decision documents contain findings that the NWPs result in minimal adverse effects, and are based on available data at the national scale. Division engineers issue supplemental decision documents for use of NWPs within Corps district boundaries.

Several commenters said that the NWPs do not protect small wetlands and waterbodies enough, and one commenter said that the proposed permits do not support the "no overall net loss" goal for wetlands. In contrast, one commenter stated that the proposal provides adequate protection to the environment and supports the "no overall net loss" of wetlands goal.

The NWPs protect all jurisdictional waters, including small wetlands and other waterbodies, through their terms and conditions, such as acreage limits and linear foot limits. The NWPs also support the "no overall net loss goal" through mitigation requirements, including aquatic resource restoration, establishment, enhancement, and preservation activities that may be required as compensatory mitigation. As noted above, general condition 20, Mitigation, also includes requirements for on-site avoidance and minimization.

Two commenters objected to allowing district engineers to issue waivers that allow permittees to exceed the limits of NWPs, stating that such waivers do not support the minimal adverse effects requirement. Two commenters said that the NWPs authorize unlimited impacts to waters of the United States. One commenter remarked that acreage limits should be consistent for all NWPs. One commenter stated that the acreage limits in the proposed NWPs are sufficient to ensure minimal adverse effects. Three commenters asserted that the acreage limits of the proposed NWPs are too low, and they reduce the effectiveness of the NWP program. One commenter said that the low acreage limits for the NWPs lessen incentives to reduce impacts to waters, since many projects that previously qualified for NWP authorization now require individual permits. Another commenter stated that the acreage limits for all NWPs should be based on appropriate scientific and environmental criteria.

Many of the NWPs have acreage limits, and most of those that do not are self-limiting due to the nature of the authorized activity (e.g., NWP 1 for aids to navigation or NWP 10 for mooring

buoys). Acreage limits in NWP's cannot be waived by the district engineer. Linear foot limits in some permits can be waived, but only for intermittent and ephemeral (not perennial) streams. Two NWP's (i.e., NWP's 13 and 36) have cubic yard limits that may be waived. Those NWP's that contain provisions allowing district engineers to waive linear foot or cubic yard limits require the district engineer to make a written determination of minimal adverse effects. In such cases, the permittee cannot assume that a waiver was granted if the district engineer does not affirm that waiver in writing (see general condition 27). The Corps believes these limited waiver provisions are appropriate because activities that exceed the limits may still have minimal adverse impacts and it may require a site-specific evaluation by the district engineer to decide if they do. Other NWP's that do not have limits typically provide environmental benefits, such as aquatic resource restoration activities authorized by NWP 27 or hazardous and toxic waste cleanup activities authorized by NWP 38.

NWP's 21, 49, and 50 are a special case, in that they authorize activities for which review of environmental impacts, including impacts to aquatic resources, is separately required under other Federal authorities (e.g., Surface Mining Control and Reclamation Act (SMCRA) permits for coal mining activities). The Corps believes it would be unnecessarily duplicative to separately require the same substantive analyses through an individual permit application as are already required under SMCRA. However, through the pre-construction notification review process, the district engineer will consider the analyses prepared for the SMCRA permit and exercise discretionary authority to require an individual permit in cases where the district engineer determines, after considering avoidance and reclamation activities undertaken pursuant to SMCRA, that the residual adverse effects are not minimal. The project sponsor is required to obtain written verification prior to commencing work.

The acreage limits for the NWP's are established so that they authorize most activities that result in minimal adverse effects on the aquatic environment. We acknowledge that there may be some activities that exceed the acreage limits and still have minimal impacts but the Clean Water Act requires us to ensure that all projects authorized by NWP's have minimal impacts, not that all minimal-impact projects can be authorized by NWP's. Activities that are

not authorized through NWP's may be authorized through regional general permits or individual permits.

One commenter stressed that the NWP's must be reissued in time, so that there is no gap between the expiration date of the current NWP's and the effective date of the new NWP's. Two commenters recommended administratively extending the current NWP's until the effective date of the new NWP's, through 5 U.S.C. 558(c), which is used to administratively extend National Pollutant Discharge Elimination System (NDPES) permits issued under Section 402 of the Clean Water Act.

We cannot use 5 U.S.C. 558(c) to administratively extend the NWP's, since that provision of the Administrative Procedures Act applies only to activities of "a continuing nature" such as discharges of effluents authorized by National Pollutant Discharge Elimination System permits issued under Section 402 of the Clean Water Act. The vast majority of activities authorized by NWP's are construction activities, with specific start and end dates, either for the discharge of dredged or fill material into waters of the United States, or structures or work in navigable waters of the United States. In general, these NWP activities are not of a continuing nature, and do not meet the requirements of 5 U.S.C. 558(c). The grandfather provision at 33 CFR 330.6(b) can be used to continue the authorization for those NWP activities that are under construction, or under contract to begin construction, after the NWP expires. This provision of the NWP regulations allows the permittee up to one year to complete the authorized NWP activity. Today's reissued and new permits will become effective on March 19, 2007, the day after the existing permits expire. Thus there will be no gap in coverage. The Corps expects that some States may be able to make their final Section 401 water quality certifications for all or some permits by this date. In cases where the State has not completed a 401 water quality certification by this time, the Corps will issue provisional verifications and permittees will be required to obtain individual State certifications prior to commencing discharges into waters of the United States.

#### *Compliance With Section 404(e) of the Clean Water Act and the 404(b)(1) Guidelines*

Several commenters said that the proposed NWP's are contrary to the intent of section 404(e) to provide an expedited, streamlined permit program

for activities that have minimal environmental impacts.

The NWP's continue to provide a streamlined authorization process for those activities that result in minimal individual and cumulative adverse effects on the aquatic environment. Those activities that do not qualify for NWP authorization may be authorized by regional general permits or individual permits.

Many commenters asserted that the NWP's result in more than minimal adverse effects on the aquatic environment, individually and cumulatively. Several commenters said that the NWP's do not comply with the 404(b)(1) Guidelines. One commenter said that the Corps should provide quantitative statistics on actual impacts, to predict cumulative impacts resulting from the NWP's. Two commenters believe that the draft decision documents do not adequately demonstrate that NWP's will result in minimal individual and cumulative impacts to waters of the United States. They said that there is not sufficient documentation to support estimates of the number of times an NWP will be used, the acres impacted, and the acres mitigated. They also stated that there should be more specific evaluations of particular types of waters, as well as landscape considerations. Four commenters said that the Corps cannot rely on mitigation to ensure minimal adverse effects, stating that the evaluation of minimal adverse effects must be completed prior to issuing a general permit. Therefore, the Corps cannot rely on mitigation that will be offered by permittees when making its finding under the 404(b)(1) Guidelines.

When we issue the NWP's, we fully comply with the requirements of the 404(b)(1) Guidelines at 40 CFR 230.7, which govern the issuance of general permits under section 404. For the section 404 NWP's, each decision document contains a 404(b)(1) Guidelines analysis. Section 230.7(b) of the 404(b)(1) Guidelines requires only a "written evaluation of the potential individual and cumulative impacts of the categories of activities to be regulated under the general permit." Since the required evaluation must be completed before the NWP is issued, the analysis is predictive in nature. The estimates of potential individual and cumulative impacts, as well as the projected compensatory mitigation that will be required, are based on the best available data from the Corps district offices, based on past use of NWP's. In our decision documents, we also used readily available national data on the status of wetlands and other aquatic

habitats in the United States, and the potential impacts of the NWP on those waters.

The 404(b)(1) Guidelines at 40 CFR 230.7 do not prohibit the consideration of mitigation when making the predictive evaluation of potential individual and cumulative impacts that may be authorized by an NWP. The practice of using compensatory mitigation to ensure minimal adverse individual and cumulative adverse effects is an important component of the NWP program (see 33 CFR 330.1(e)(3)).

Two commenters said that the Corps cannot rely on regional conditioning and discretionary authority to ensure minimal adverse effects. One commenter objected to the ability of the district engineer to exercise discretionary authority to impose conditions on NWP activities. Another commenter stated that in order to ensure minimal adverse effects, pre-construction notification should be required for all NWPs. A number of commenters said that many of the NWPs do not authorize activities that are similar in nature. They said that the Corps is required to explain why activities authorized by an NWP are similar in nature to warrant authorization under a single NWP.

The pre-construction notification review process and discretionary authority are important tools to help ensure that the NWPs authorize only those activities with minimal individual and cumulative adverse effects. If the district engineer reviews a pre-construction notification and determines that the impacts are more than minimal, discretionary authority will be exercised and either the NWP will be conditioned to require mitigation or other actions to ensure minimal adverse effects or an individual permit will be required. The Corps disagrees that pre-construction notification is necessary for all NWP activities. However, the Corps has expanded the scope of activities requiring pre-construction notification. Specifically, all activities conducted under NWPs 7, 8, 17, 21, 29, 31, 33, 34, 37, 38, 39, 40, 42, 44, 45, 46, 49, and 50 now require pre-construction notification, regardless of acreage impacted. This will enable district engineers to better ensure that these permits authorize only activities with minimal impacts.

These NWPs satisfy the requirement under Section 404(e) of the Clean Water Act that the categories of authorized activities be similar in nature. The "similar in nature" provision does not require NWP activities to be identical to each other. We believe that the

"categories of activities that are similar in nature" requirement of section 404(e) is to be interpreted broadly, for practical implementation of this general permit program. Nationwide permits, as well as other general permits, are intended to reduce administrative burdens on the Corps and the regulated public, by efficiently authorizing activities that have minimal adverse environmental effects. For each NWP that authorizes activities under Section 404 of the Clean Water Act, the 404(b)(1) Guidelines analysis provides a brief explanation as to why the activities authorized by that NWP are similar in nature.

One commenter said that consideration of impacts resulting from general permits should not be limited to the aquatic environment. This commenter said that Section 404(e) of the Clean Water Act requires permitted activities to have minimal impacts on the environment as a whole.

In addition to the requirement that there be no more than minimal adverse effects on the aquatic environment, activities authorized by NWPs must also result in minimal adverse effects with regards to the Corps public interest factors (see 33 CFR 330.1(d)), which include other components of the environment.

#### *Compliance With the National Environmental Policy Act*

Many commenters said that the Corps must complete an Environmental Impact Statement for the proposed NWPs. One commenter remarked that the EIS must consider the individual impacts of the NWPs, as well as their cumulative impacts. One comment asserted that mitigation cannot be used to justify using an environmental assessment for NEPA compliance, instead of an Environmental Impact Statement.

The NWPs authorize activities that have minimal individual and cumulative adverse effects on the aquatic environment and satisfy other public interest review factors. The NWPs do not reach the level of significance required for an EIS. The Corps complies with the requirements of the NEPA by preparing an environmental assessment for each NWP. When an NWP is issued, a Finding of No Significant Impact is also issued.

The use of mitigation to make a Finding of No Significant Impact is a standard practice for NEPA compliance. For the purposes of NEPA, mitigation includes avoiding impacts, minimizing impacts, rectifying impacts through repairing or restoring the affected environment, reducing or eliminating

impacts over time through preservation and maintenance activities, and compensating for impacts by replacing or providing resources or environments (see 40 CFR 1508.20). Through the requirements of general condition 20, Mitigation, the review of pre-construction notifications by district engineers, and regional and special conditions imposed on the NWPs by division and district engineers, NWP activities use all these forms of mitigation so that the adverse effects of the NWPs do not reach the level of significance that requires an Environmental Impact Statement.

Several commenters stated that the draft decision documents do not satisfy the requirements of the National Environmental Policy Act (NEPA). Some commenters said that the analyses in the decision documents are not based on realistic data. One commenter noted that the average impact is often much less than the acreage limit for the NWP, and said that the mitigation ratios seem too high. One commenter said that the environmental assessments in draft decision documents must contain site-specific analyses. Two commenters asserted that the cumulative effects analyses in the decision documents are inadequate. One commenter said that the cumulative effects analysis should include information on the past use of NWPs, as well as information on other development activities expected to have impacts on protected resources.

We believe the data in the draft decision documents comply with the requirements of NEPA. The estimates of the projected use of the NWPs, the acres impacted, and the amount of compensatory mitigation are based on available data from Corps district offices, and other sources of data, such as surveys. Those data are based on pre-construction notifications and other requests for NWP verifications for activities that do not require pre-construction notification. For those NWP activities that do not require notification, it is necessary to derive estimates. For the decision documents, we must use predictive data, since the future use of an NWP is speculative. Likewise, we cannot provide site-specific information for these environmental assessments, because there are no specific sites or projects associated with the proposed issuance of an NWP. Authorized impacts are usually much less than the acreage limit for an NWP because of the avoidance and minimization required by the terms and conditions of the NWPs. The compensatory mitigation data provided in the decision documents include preservation.

On June 24, 2005, the Council on Environmental Quality issued guidance on the consideration of past actions for cumulative effects analyses. According to this guidance, the cumulative effects analysis needs to consider relevant past actions that can be used to analyze reasonably foreseeable effects that have "a continuing, additive, and significant relationship to those effects." The guidance also recommends that agencies look at the present effects of past actions that are relevant because of significant cause-and-effect relationships with the effects for the proposed action and its alternatives. Except for a few activities, the NWP's do not authorize activities of a continuing nature. In general, they authorize construction activities with specific start and end dates. The NWP's can be issued for only a period of five years or less, and once an NWP expires, it cannot be used to authorize activities in waters of the United States. An activity must then be authorized by the reissued NWP, another NWP, a regional general permit, or an individual permit. The cumulative effects analysis is more properly focused on the permits that can be used to authorize regulated activities, not past permits that have expired. Therefore, the cumulative effects analysis for the NWP issuance needs to focus on the reasonably foreseeable cumulative effects that are expected to occur during the five year period the NWP's are valid. We use information on past use of the NWP's to estimate how often an NWP will be used during the period it will be valid, and to estimate the impacts and compensatory mitigation resulting from the use of that NWP.

One commenter requested clarification as to whether the draft decision documents included an environmental assessment, an EIS, or another type of NEPA document. Two commenters remarked that the Corps failed to solicit public comment on the environmental assessments for the proposed NWP's. Two commenters objected to the Finding of No Significant Impact (FONSI) in each draft decision document, stating that it is inappropriate to do a FONSI for a proposed action. Another commenter concurred with the FONSI found in each NWP decision document. One commenter said that the draft decision documents accurately analyzed anticipated environmental effects of the proposed NWP's.

A draft environmental assessment was prepared for each of the proposed NWP's. The draft environmental assessment was in the draft decision document, along with the draft statement of findings and, if the NWP

authorized activities under Section 404 of the Clean Water Act, a draft Section 404(b)(1) Guidelines analysis. Those draft decision documents were available for public review and comment at the same time as the proposed NWP's, general conditions, and definitions. A number of commenters who commented on the proposed NWP's also commented on the draft decision documents. Commenters could also provide input on the draft FONSI in each decision document.

#### *Compliance With the Endangered Species Act*

In the September 26, 2006, **Federal Register** notice, we stated that we will conduct Endangered Species Act Section 7(a)(2) consultation for the NWP's. Since the issuance of the September 26, 2006, proposal, the Corps has been working with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) to develop an analysis plan to guide the formal programmatic Section 7 consultation for the NWP's. As soon as the analysis plan is completed, the Corps will request programmatic Endangered Species Act Section 7(a)(2) consultation with the USFWS and NMFS. Prior to the effective date of these NWP's, the Corps will issue a section 7(d) determination for the NWP Program.

Two commenters said the Corps must conduct Endangered Species Act consultation before the NWP's are issued. One of these commenters said that the Corps must conduct programmatic section 7 consultation for the NWP program, with mandatory district-by-district formal consultations. One commenter requested a timeline for the programmatic Section 7 consultation with the USFWS and NMFS. Another commenter asked for clarification whether Section 7 ESA consultation will be conducted for each NWP authorization or the NWP program as a whole. One commenter objected to the Corps conducting section 7 consultation for coal mining activities authorized by the Surface Mining Control and Reclamation Act.

The programmatic ESA consultation will be conducted for the NWP program as a whole, and will be concluded as expeditiously as possible. To address ESA compliance while programmatic consultation is being conducted, a revised Section 7(d) determination will be issued for the NWP program before the effective date of these NWP's. The Section 7(d) determination discusses how the issuance of these NWP's will not foreclose any options. The requirements of general condition 17

and 33 CFR 330.4(f) will ensure compliance with the ESA. We anticipate that the programmatic consultation will result in a biological opinion that provides tools that districts can use to better address potential impacts to the endangered and threatened species that occur in their areas of regulatory jurisdiction. Corps districts will conduct their own formal Section 7 consultations as necessary. The programmatic consultation will be conducted for the NWP program; its applicability to NWP 21 and other NWP's will be addressed as part of the programmatic consultation itself.

One commenter said that the Corps cannot rely on permit applicants to notify them in cases where ESA consultation is necessary. Two commenters said that the proposed changes to general condition 17, which requires district engineers to notify prospective permittees of their "no effect" or "may affect" determinations within 45 days of receipt of a complete pre-construction notification, violates the ESA since the Corps will be unable to make its decision based on the best available science. Two commenters said that the Corps must require pre-construction notifications for all NWP activities to help ensure compliance with the requirements of the ESA. Two other commenters stated that species-specific regional conditions must be imposed on the NWP's to protect endangered and threatened species.

Non-federal permittees shall notify the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, and in such cases shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. This requirement applies even when a pre-construction notification would not otherwise be required. In such cases, this condition also prohibits the prospective permittee from conducting the NWP activity until the district engineer notifies him or her that the requirements of the ESA have been fulfilled and the activity is authorized by NWP. The ESA regulations at 50 CFR part 402 do not require ESA consultation for those activities that will not affect endangered or threatened species or destroy or modify designated critical habitat. In some districts, regional conditions will be imposed on the NWP's to protect listed species and critical habitat.

The notification requirement in general condition 17 does not violate the ESA. Forty-five days is generally

sufficient to screen proposed activities for potential effects to endangered and threatened species or designated critical habitat, and determine if section 7 consultation is necessary. The notification requirement will help improve ESA compliance by keeping the prospective permittee aware of the status of his or her pre-construction notification and preclude applicants from assuming that they can proceed after the 45 day pre-construction notification period has ended, if they have not heard back from the Corps that ESA requirements have been fulfilled and the activity is authorized. Districts will continue to develop regional conditions to further protect endangered and threatened species, as well as critical habitat.

#### *Linear Foot Limits for Stream Bed Impacts*

In the September 26, 2006, **Federal Register** notice, we proposed to modify several NWP's to include ephemeral streams in the 300 linear foot limits for losses of stream beds. We also proposed to allow district engineers to issue written waivers to the 300 linear foot limit for intermittent and ephemeral streams, upon making a determination that the adverse effects on the aquatic environment will be minimal. Many commenters objected to including ephemeral streams in the 300 linear foot limit for stream beds for NWP's 29, 39, 40, 42, and 43. Many other commenters supported the proposed change. A large number of commenters objected to allowing district engineers to waive the 300 linear foot limit, stating that miles of stream bed could be lost, resulting in more than minimal adverse environmental effects. A few commenters supported the proposed waiver. One commenter said that limits to filling or excavating ephemeral streams should be addressed through the regional conditioning process, instead of the national terms and conditions of the NWP's. Another commenter recommended imposing a higher linear foot limit for losses of ephemeral streams.

Ephemeral streams are important components of the stream network. Applying the 300 linear foot limit to ephemeral stream beds will help ensure that the applicable NWP's will authorize activities with minimal individual and cumulative adverse effects on the aquatic environment. The ability of district engineers to issue written waivers of the 300 linear foot limit for intermittent and ephemeral stream beds provides flexibility in the administration of the NWP program. In cases where the 300 linear foot limit is

waived, the acreage limit of the NWP still applies. We believe it is more appropriate to limit losses of ephemeral stream beds through the national NWP terms and conditions, to provide consistent protection for those waters across the country. Regional differences in the values applied to ephemeral stream functions and services can be addressed through the waiver process. We believe the 300 linear foot limit, in conjunction with the waiver process, provides sufficient flexibility for the NWP program while ensuring minimal adverse effects.

Three commenters recommended that the Corps modify its definition of "ephemeral stream" to simplify the process of distinguishing between ephemeral and intermittent streams instead of applying the 300 linear foot limit to ephemeral streams. Another commenter indicated that the difficulty of distinguishing between ephemeral and intermittent streams is sufficient justification for including ephemeral streams in the 300 linear foot limit. In contrast, several commenters stated that including ephemeral streams in the 300 linear foot limit would not simplify the administration of the NWP program, because it would result in a large number of individual permits, as well as substantial increases in the Corps workload. Two commenters asked the Corps to establish criteria for determining when a waiver of the 300 linear foot limit can be issued. One commenter stated that the 300 linear foot limit should not apply to filling or excavating drainage ditches. One of these commenters said that an acreage limit should be applied to streams, instead of a linear foot limit.

Modifying the definition of "ephemeral stream" is not an appropriate alternative to modifying the 300 linear foot limit. The definitions of "ephemeral stream" and "intermittent stream" that were first promulgated for the NWP's in 2000 are based on the hydrologic differences between those stream types, especially the differences in how the stream bed interacts with the water table. We do not agree that the changes to the 300 linear foot limit will result in a large increase in the number of individual permits processed per year. Under the current NWP's, district engineers could exercise discretionary authority and require individual permits if proposed impacts to ephemeral streams would be more than minimal. We do not believe it would be appropriate to establish national criteria for determining when a waiver of the 300 linear foot limit would be applied. These determinations should be made on a case-by-case basis by district

engineers, depending upon assessments of site-specific conditions. Even though the acreage limits of NWP's 29, 39, 40, 42, and 43 also apply to losses of stream bed, the linear foot limit is a useful tool for ensuring minimal adverse effects to these linear aquatic ecosystems. The 300 linear foot limit for filling and excavating stream beds does not apply to ditches constructed in wetlands, or to ditches constructed in uplands that are determined to be waters of the United States. However, the 300 linear foot limit does apply to ditches that are constructed by modifying streams through channelization or other activities.

#### *Pre-Construction Notification*

Many commenters objected to the proposal to add or expand pre-construction notification requirements for several NWP's, and a few of these commenters said that lowering the pre-construction notification threshold will substantially increase the Corps workload. Several commenters stated that increasing the number of activities that require pre-construction notification will result in additional delays and costs for permit applicants. In contrast, a number of commenters said that pre-construction notification should be required for all NWP activities, so that site-specific concerns can be more effectively addressed. One commenter asserted that the use of the pre-construction notification process and the use of discretionary authority should be limited, to provide more certainty to the NWP authorization process. Another commenter said that the decision to lower pre-construction notification thresholds should be left to division engineers and the regional conditioning process, to provide more flexibility for the NWP program.

Modifying NWP's 39, 40, 42, and 43 to require pre-construction notification for all activities will help ensure that these NWP's authorize only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment and other public interest review factors, such as flood hazards and floodplain values. Corps districts have already been receiving large numbers of verification requests for NWP 39, 40, 42, and 43 activities that do not require pre-construction notification, so we believe that this change will not result in a substantial increase in our workload. In addition, the modified pre-construction notification threshold will facilitate compliance with the Endangered Species Act and Section 106 of the National Historic Preservation Act, by better ensuring notice of activities that

may have a higher likelihood of affecting endangered or threatened species, designated critical habitat, or historic properties. We do not agree that it is necessary to require pre-construction notifications for all NWP activities, because many NWP activities have negligible effects on the aquatic environment and the public interest review factors. We have focused the pre-construction notification requirements on those activities that have the potential for adverse effects that may require additional scrutiny by district engineers, including ESA and/or NHPA consultation.

The pre-construction notification and discretionary authority processes provide flexibility to the Corps regulatory program, by allowing the Corps to focus its limited resources on activities that have the potential to have more than minimal adverse effects on the aquatic environment. We believe that the proposed changes to the pre-construction notification thresholds are necessary for effective implementation of the NWP program, and to address issues of concern at the national level.

One commenter objected to the increased use of the pre-construction notification process and the waivers of limits, such as the 300 linear foot limit for the loss of intermittent and ephemeral stream beds for certain NWPs, to authorize activities by NWP. Another commenter said that it is an administrative burden to require the use of NWP 33 with other NWPs when in-stream construction activities need to occur in dry conditions. This commenter said that NWP 33 should only be used when temporary work is done in waters of the United States, and no other NWP is needed to authorize permanent structures or fills for the activity. One commenter recommended requiring pre-construction notifications for filling waters of the United States that are five or more feet deep, because of the effects on the hydrologic balance of a region.

The ability to waive limits after the review of a pre-construction notification and a written determination that the adverse effects of a particular NWP activity will be minimal provides flexibility to the NWP program, and allows the Corps to focus more of its resources on those activities that require individual permits and may have substantial adverse effects on the aquatic environment and the public interest. In the final NWPs, we have addressed the concern regarding the requirement to use NWP 33 for all temporary construction, access, and dewatering activities. Those changes are discussed in further detail for each

applicable NWP. Many NWP activities that result in a discharge of dredged or fill material into waters of the United States, regardless of water depth, require pre-construction notification, which will allow district engineers to review those activities on a case-by-case basis and assess potential effects on the hydrologic balance of the area in the vicinity of the proposed work.

One commenter said that the pre-construction notification process should be modified to require notification of Indian Tribes, to provide them with the opportunity to comment on proposed activities that may result in the violation of Indian rights. This commenter also said that if the Indian Tribe identifies a potential conflict with Federally-protected Indian rights, the use of the NWPs should not be allowed.

The regional conditioning process, as well as government-to-government consultation between Tribes and the Corps districts where Tribal lands are located, are more appropriate mechanisms to address this commenter's concerns, since there are over 580 Federally-recognized tribes, and each Tribe is likely to have different concerns regarding the implementation of the NWP program. General condition 16 states that no NWP activity may impair reserved Tribal rights. Activities that do impair reserved Tribal rights are not authorized by NWPs. Regional conditions are an effective mechanism for addressing the concerns of a specific Indian Tribe, and can be used to facilitate working relationships between the Corps and the Tribe to help the Corps fulfill its trust responsibilities.

#### *Clean Water Act Jurisdiction*

On June 19, 2006, the Supreme Court issued its decision in the case of *Rapanos et ux, et al, v. United States*. Many commenters cited this decision, as well as other court decisions, and said that the proposed NWPs exceed the Corps jurisdictional authority under Section 404 of the Clean Water Act. Several commenters said that ephemeral streams are not subject to Clean Water Act jurisdiction and should not be covered in the NWPs. Another commenter asserted that intermittent streams are not waters of the United States.

The Rapanos decision, as well as other court decisions made in the past several years, raises questions about the jurisdiction of the Clean Water Act, including Section 404, over some intermittent and ephemeral streams and their adjacent wetlands. The Corps will assess jurisdiction regarding such waters on a case-by-case basis in accordance with evolving case law and

any future guidance that may be issued by appropriate Executive Branch agencies (e.g., the Corps, U.S. Environmental Protection Agency). Under the current regulations and guidance, intermittent and ephemeral streams may meet the regulatory definition of "waters of the United States" and be subject to Clean Water Act jurisdiction. Regulatory jurisdiction over these waterbodies will be determined on a case-by-case basis by district engineers, in accordance with current and future regulations and guidance.

One commenter said that when applying the NWP acreage limits to wetlands, the Corps should not include all wetlands, just those subject to Clean Water Act jurisdiction. One commenter stated that a clearer definition of "navigable waters" is needed. Another commenter said that ditches are not waters of the United States, and impacts to ditches should instead be addressed through state programs. A commenter stated that the Corps must promulgate regulations to define "waters of the United States" for the purposes of implementing the NWP program.

The acreage limits of the NWPs apply only to losses of waters of the United States, including jurisdictional wetlands (see the definition of the term "loss of waters of the United States" in the "Definitions" section of the NWPs). Similarly, linear foot limits apply only to jurisdictional streams. Ditches may also be subject to jurisdiction under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899, if they meet the regulatory definitions of "waters of the United States" and/or "navigable waters of the United States." Waters of the United States are defined at 33 CFR part 328 and navigable waters of the United States are defined at 33 CFR part 329.

#### *Regional Conditioning of Nationwide Permits*

One commenter stated that regional conditions are unnecessary, and result in too much restriction of the NWPs. A commenter remarked that placing too many regional conditions on the NWPs is contrary to E.O. 13274, Environmental Stewardship and Transportation Infrastructure Project Reviews. One commenter said that regional conditions should not be redundant with the requirements of other agencies, and the streamlining objective of the NWPs should be maintained.

Regional conditions are necessary to account for regional differences in aquatic resource functions, services, and values and to ensure that the NWPs



authorize only those activities that have minimal individual and cumulative adverse effects on the aquatic environment and other public interest review factors. Regional conditions are important tools for protecting endangered and threatened species, designated critical habitat for those species, essential fish habitat, historic properties, and other important resources. As a general matter, we agree that regional conditions should not duplicate the requirements of other agencies, but the Corps often has the responsibility to comply with other statutes and regulations administered by other agencies.

Two commenters said that there needs to be clearer rules for the adoption of regional conditions for the NWP. A couple of commenters indicated that districts need to provide justifications for proposed regional condition, and make that information available to the public. Three commenters said that regional conditions should not be limited to further restricting the use of the NWPs. One commenter said that regional conditions should not be based on district boundaries. Instead, they should be based on ecoregions or other ecologically-delineated areas. Another commenter recommended that the Corps work with other agencies to develop a list of high value wetlands in which NWPs cannot be used.

Regional conditions may only further condition or restrict the applicability of an NWP (see 33 CFR 330.1(d)). In areas where environmental conditions and other circumstances warrant less restrictive general permit conditions, district engineers may issue regional general permits to authorize similar activities, as long as those general permits meet applicable requirements. The regulations governing the adoption of regional conditions are provided at 33 CFR 330.5(c). We believe it is necessary to provide flexibility to division engineers to determine the necessity and appropriateness of regional conditions to address concerns regarding the use of NWPs in a particular area. The notices issued by Corps districts soliciting public comment on proposed regional conditions are required to include statements concerning the environmental factors or other public interest factors resulting in the need for regional conditions (see 33 CFR 330.5(c)(1)). Regional conditions may be based on geographic areas other than district boundaries. Regional conditions may be imposed on the use of NWPs in watersheds, counties, states, ecoregions, or other types of areas. General

condition 19, designated critical resource waters, provides a national list of high value waters. Districts can coordinate with other agencies to develop lists of high value wetlands within their district boundaries.

#### *Data Collection*

One commenter said that the supporting data used by the Corps falls short of the standards required by the Data Quality Act of 2001, and the Office of Management and Budget's "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies." This commenter stated that the Corps should provide data on aquatic resource functions to support its minimal impact determinations.

The data used for the NWP decision documents are the best available data at a national scale. The estimated impacts and mitigation provided in the decision documents were developed by reviewing and analyzing permit data from our district offices, as well as through consideration of how proposed changes to the NWPs would affect the amounts of authorized impacts and mitigation. Data on aquatic resource functions is generally not available. The National Wetland Inventory examines wetland status and trends for the conterminous United States, but information on wetland quality and function is not available.

Three commenters expressed concern about tracking permanent and temporary impacts to waters of the United States and recommended that the Corps implement a national tracking and monitoring system. This system would also facilitate the sharing of information with cooperating resource agencies and help improve decision making.

We are in the process of transitioning to a new automated information system (AIS) for the Corps regulatory program. The new AIS is version 2.0 of the "OMBIL Regulatory Module" (ORM 2.0). This national tracking and monitoring system will improve and standardize data collection for the Corps regulatory program, and will assist in decision-making for permit actions and other types of regulatory activities, such as jurisdictional determinations. ORM 2.0 will be spatially enabled, using geographic information systems and other analytical tools that will provide more efficient and effective processing of permit applications, jurisdictional determinations, and other tasks. Cumulative impact analysis will also be supported by ORM 2.0. The structure of ORM 2.0 will also be standard among

Corps districts, providing for more consistent information collection and storage, and will be readily available for analysis and reporting. The standard structure of ORM will also promote consistency in Regulatory Program implementation.

ORM 2.0 will help improve data collection for the NWP program, as well as other types of permits issued by the Corps. Data collection will be more standard among permit types, especially for impact and mitigation data. We will continue to collect data on authorized losses of waters of the United States, including resource type, acreage, and impact type. ORM 2.0 incorporates several additional AIS resources to assist in the tracking of all required compensatory mitigation, including the amount, type (e.g., reestablishment), and source (i.e., permittee-responsible mitigation, mitigation bank, or in-lieu fee).

ORM 2.0 will also facilitate compliance with the Endangered Species Act, the National Historic Preservation Act, and the essential fish habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act. Screening tools based on available data for those resources will help Corps personnel identify activities that may affect those resources and require further consultation. The available resource data will be provided by other agencies, through data sharing agreements. Available data sets from the national, state, and local levels can be utilized by ORM 2.0.

ORM 2.0 is capable of supporting electronic interagency coordination. For activities that typically require interagency coordination and consultation, agencies will have the option of receiving electronic coordination notices and consultation requests and of responding to the Corps via a link to ORM 2.0. Agencies will be required to enter into a Memorandum of Agreement supporting the use of electronic communications for permit activities.

ORM 2.0 will also include time tracking features to help remind Corps project managers when the end of the 45-day pre-construction notification review will occur. Monitoring and enforcement activities will also be supported by ORM 2.0, including the tracking of when monitoring reports for compensatory mitigation projects are due.

ORM 2.0 will also support an electronic permit application, thereby allowing prospective permittees to submit their pre-construction notifications electronically to the appropriate Corps district. Permit



applicants will be able to check the status of their permit applications through the electronic permit Web site.

#### *Other Issues*

One commenter said that the Corps should stop issuing NWP until effective compensatory mitigation is provided for those permits. Several commenters stated that the Corps places too much reliance on compensatory mitigation, citing recent studies that concluded that compensatory mitigation projects often fail to achieve their objectives. A couple of commenters asserted that the Corps should not rely on compensatory mitigation to ensure minimal individual and cumulative adverse effects. Another commenter objected to the more stringent requirements for compensatory mitigation for NWP activities, stating that compensatory mitigation for small impacts tends to be more expensive than the costs to plan and construct the proposed activity requiring NWP authorization.

Compensatory mitigation is an important mechanism to help ensure that the NWPs authorize activities that result in minimal individual and cumulative adverse effects on the aquatic environment. We acknowledge that the ecological success of compensatory mitigation projects varies widely. Some compensatory mitigation projects fail to meet their objectives, while others do result in successful replacement of aquatic resource functions that are lost as a result of activities authorized by NWPs. We are committed to improving compliance for compensatory mitigation required for Department of the Army permits, including NWPs. District engineers have the flexibility to determine when compensatory mitigation should be required for activities authorized by NWPs. If it is not appropriate or practicable to require compensatory mitigation for a particular activity, and that activity will result in minimal adverse effects on the aquatic environment, then the district engineer may determine that compensatory mitigation is not necessary. Otherwise, if the proposed activity will result in more than minimal adverse effects on the aquatic environment after determining that compensatory mitigation is not appropriate or practicable, then an individual permit would be required.

One commenter said that the NWPs do not distinguish between different types of waters, but combine waters when applying the acreage limit for the NWP. This commenter stated that the Corps needs to recognize that different

types of waters often have different functions.

The NWPs do recognize different types of waters. The terms and conditions of NWPs are often based on the characteristics of different types of waters. For example, NWP 39 does not authorize discharges of dredged or fill into non-tidal wetlands adjacent to tidal waters.

One commenter said that the requirement for NWP activities to be single and complete projects should not be removed, citing the proposed changes to NWPs 13, 15, 18, and 19. This commenter stated that the requirement for single and complete projects does not appear outside of the Corps definition at 33 CFR 330.2(i). One commenter objected to the removal of the requirement in several NWPs to submit an avoidance/minimization statement with the pre-construction notification.

The requirement that NWPs authorize single and complete projects applies to all NWPs. Limiting the NWPs to authorize only single and complete projects is a long-standing practice, and we are adding a new general condition (GC 28) to clarify that the NWPs only authorize single and complete projects.

The requirement for an avoidance/minimization statement that was in NWPs 39, 43, and 44 is not necessary, because we have modified NWP 39 to require pre-construction notification for all activities, and we are requiring pre-construction notification for all construction and expansion of storm water management facilities under NWP 43. In addition, general condition 20 requires permittees to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable on the project site. When reviewing a pre-construction notification, the district engineer will determine whether sufficient avoidance and minimization of impacts to waters of the United States has occurred, and whether the activity complies with general condition 20. It is the responsibility of the district engineer to make this determination, and we do not believe it is appropriate to place that burden on the prospective permittee by requiring the submittal of a statement with the pre-construction notification.

One commenter recommended that the Corps adopt an administrative appeal process for activities authorized by NWPs, which would provide for third party appeals. Another commenter said that compliance inspections should be conducted for a certain number of NWP activities per year. One commenter said that the Corps needs to

do more enforcement and monitoring of activities authorized by NWPs.

We do not believe it would be appropriate or necessary to establish an administrative appeal process for the NWP program, since the NWPs authorize only those activities that have minimal individual and cumulative adverse effects on the aquatic environment. The administrative appeal process at 33 CFR part 331 applies only to individual permits and jurisdictional determinations, and does not provide for third party administrative appeals.

Performance measures established for the Regulatory Program require our district offices to conduct compliance inspections for a proportion of general permit activities occurring in a given year.

One commenter said that the Corps should retain a separate NWP for aggregate mining activities (the current NWP 44), and provide greater acreage limits, since the proposed modification of NWP 44 will have little utility for the aggregate mining industry.

We do not believe it would be appropriate to issue another NWP for aggregate mining activities, with greater acreage limit. The acreage limit for NWP 44 is intended to ensure that this NWP authorizes only those activities with minimal individual and cumulative adverse effects on the aquatic environment. This NWP authorizes aggregate mining activities.

Two commenters said that all references to excavation in the NWPs should cite 33 CFR 323.3(d) to clarify that not all excavation activities require section 404 permits. One commenter suggested adding a new general condition which would require submittal of a delineation of non-jurisdictional wetlands with the pre-construction notification for those NWPs authorizing development activities, so that states could be notified of these activities. One commenter said that NWPs should not authorize activities in springs, seeps, headwater streams, and fens.

Many excavation activities result in discharges of dredged material that require section 404 permits. When reviewing pre-construction notifications, district engineers will determine whether an excavation activity results in a discharge of dredged material and requires a section 404 permit, or whether a permit is not needed. It is not appropriate for the Corps to require prospective permittees to submit delineations of areas that are not waters of the United States with their pre-construction notifications. States that regulate these non-jurisdictional aquatic habitats should

address those concerns through their permit processes. The NWP can be regionally conditioned to restrict or prohibit NWP activities in springs, seeps, headwater streams, and fens.

One commenter requested that the Corps reissue NWP 26, which authorized discharges into headwaters and isolated waters, in accordance with the limits described in the December 13, 1996 **Federal Register** notice.

There are no plans to reissue NWP 26. This NWP expired on June 7, 2000. We have issued NWPs that have replaced NWP 26.

#### *Water Quality Certification/Coastal Zone Management Act Consistency Determination Issues*

One commenter said that the Corps should provide an opportunity for state and Tribal water quality certification agencies to participate early in the NWP reissuance process, to reduce potential conflicts during the water quality certification process. Another commenter requested clarification regarding enforcement of the NWPs, in cases where a provisional NWP verification is issued, but the permittee proceeds with work without receiving the individual water quality certification. This commenter asked whether the Corps or the state would initiate an enforcement action. One commenter objected to use of provisional NWP verifications in cases where water quality certification has not yet been issued for a particular NWP activity.

We cannot begin coordination for water quality certification at an earlier time in the NWP reissuance process. States and Tribes need to see the proposed permit and general condition language, which is not available until the publication of the proposal in the **Federal Register**, in order to proceed with the certification process. We believe there is generally adequate time to complete the water quality certification process, however, where there is not, the Corps will issue only provisional verifications until the State or Tribe has completed its certification process; in this case, permittees are required to obtain individual certification directly from the State or Tribe before commencing work.

If a provisional NWP verification is issued, the activity is not authorized by NWP until the required water quality certification is obtained or waived. If the project proponent begins the work before water quality certification is obtained or waived, the district engineer has full authority to initiate an enforcement action for the discharge of dredged or fill material into waters of

the United States without a valid permit, in violation of the Clean Water Act. The district engineer will use his or her discretion, when determining whether to pursue an enforcement action. The use of provisional NWP verifications is necessary to provide timely responses to prospective permittees in cases where the State or Tribe has not yet completed its certification process. In addition, some States prefer not to issue general certifications for some or all NWPs. These States require a review of individual PCNs before issuing water quality certification for a particular activity.

#### *Discussion of Comments and Final Permit Decisions*

##### *Nationwide Permits*

NWP 1. *Aids to Navigation*. There were no changes proposed for this NWP, and no comments were received. This NWP is reissued without change.

NWP 2. *Structures in Artificial Canals*. There were no changes proposed for this NWP, and no comments were received. This NWP is reissued without change.

NWP 3. *Maintenance*. We proposed to modify this NWP by removing the provisions for the restoration of uplands damaged by discrete events. We also proposed to add maintenance dredging or excavation of intakes, outfalls, and canals, which was authorized by NWP 7.

Several commenters expressed support for the proposed changes to this NWP. One commenter objected to the removal of the explicit references to the "water quality" and "management of water flows" general conditions, stating that the removal of those references would change the intent of the NWP. One commenter recommended removing the language regarding the disposal of excavated material in upland areas, since it implies that excavation activities are regulated by the Corps under Section 404 of the Clean Water Act. Several commenters recommended adding language to clarify that excavation activities, or incidental fallback, do not require a section 404 permit. One commenter said that the definition of "currently serviceable" should remain in the text of this NWP, instead of moving it to the "Definitions" section.

Even though explicit references to general conditions were removed from its text, all general conditions, including those general conditions cited above, are still applicable to this NWP. The terms of this NWP require permittees to deposit and retain dredged or excavated

materials in an upland area, unless the district engineer authorizes the use of another area. This term does not suggest that excavation activities not involving discharges of fill or dredge material into Section 404 waters are regulated by the Corps. Instead, it specifies the type of site that may receive dredged or excavated material under this NWP for activities that do require Section 404 authorization. Excavation activities in waters of the United States require section 404 permits if they result in a discharge of dredged or fill material into those waters (see 33 CFR 323.2(d)). Activities that result in only incidental fallback do not require permits. Since the definition of "currently serviceable" is used in NWPs 41 and 47, it is more appropriate to have the definition in the "Definitions" section, for easier reference.

A couple of commenters objected to moving the provision authorizing the repair, rehabilitation, or replacement of structures or fills destroyed or damaged by discrete events to proposed NWP A, which requires pre-construction notification for all activities. These commenters said that the proposed change would hinder the ability of utility companies and transportation departments to quickly repair utility lines, roads, and other important infrastructure damaged or destroyed by severe storms. One commenter suggested adding another note to this NWP, to refer potential applicants to NWP 45 in cases where structures that have been made non-functional by some discrete event may qualify for repair, rehabilitation, or replacement.

We have restored the language authorizing the repair, rehabilitation, or replacement of structures or fills destroyed or damaged by storms or other discrete events in paragraph (a) of NWP 3, and removed it from proposed NWP A (now designated as NWP 45). Because of this change, it is no longer appropriate to add a note to this NWP to refer to NWP 45.

One commenter suggested that this NWP should not be used to authorize additional or new work, fill, riprap or structures that was not part of the original authorization. One commenter stated that the continued maintenance, repair, restoration, and replacement of a structure may represent ongoing impacts that are more than minimal, and may preclude restoration of environmental features at the project site. This commenter said that those types of activities should require ongoing mitigation. Another commenter said that this NWP should not be reissued, since its use results in more than minimal adverse impacts to the

aquatic environment. Another commenter suggested that this NWP should not authorize replacement of structures and fill, and that it should be restricted to repair or rehabilitation activities involving 50 percent or less of a structure. One commenter said that this NWP should authorize modifications to older structures that would help improve the aquatic environment. This commenter also recommended replacing the use of riprap with less environmentally damaging alternatives, such as bioengineered structures.

This NWP does not authorize any significant increase in the original structure or fill. Only minor deviations necessary to conduct repairs and maintenance, or the placement of the minimum necessary riprap to protect the structure, are eligible for authorization under this NWP. Because of the nature of activities authorized by this NWP, as a general rule compensatory mitigation should not be required for these maintenance activities. If a Department of the Army permit was required to construct the original structure or fill, appropriate compensatory mitigation would have been required by the district engineer when the permit was issued, to offset the loss of aquatic resource functions and services resulting from the authorized work. Additional compensatory mitigation is usually unnecessary to maintain those structures or fills. The terms and conditions for NWP 3, plus any regional conditions imposed by division engineers, will ensure that this NWP authorizes only those activities with minimal individual and cumulative adverse effects on the aquatic environment. We believe that this NWP should continue to authorize the replacement of structures or fills, or rehabilitation activities, since those activities usually result in minimal adverse effects on the aquatic environment. As for modifying this NWP to authorize changes to structures that would improve the aquatic environment, we believe it would be more appropriate for district engineers to authorize such changes through other permits. Changes to structures would require more thorough evaluation to ensure that net improvements to the aquatic environment will occur. The use of bioengineering methods to protect existing structures may not be very effective, because of the environmental conditions, such as water flows, near these structures. Riprap is usually the most effective means of protecting these structures, and the terms of this NWP

require minimization of the footprint of the riprap. District engineers can consider bioengineering on a case-by-case basis, and authorize such activities as appropriate.

One commenter said that this NWP should not authorize the maintenance of bank stabilization structures that are more than 300 feet long. One commenter suggested dividing paragraph (b) into two subparagraphs. One subparagraph would authorize debris and sediment removal and the other subparagraph would authorize riprap. This commenter also indicated that this NWP should be modified to limit the removal of sediment to the minimum necessary to "restore the bed of the waterway to its natural grade."

This NWP authorizes only activities that repair or return an activity to previously existing conditions. We do not believe it is necessary to further restrict this NWP to limit maintenance of bank stabilization structures. Dividing paragraph (b) into two subparagraphs is not needed, since the riprap is typically used to protect the structure once the accumulated sediment has been removed. The purpose of this NWP is to authorize restoring structures or fills to their original condition. It may not be possible to determine the "natural grade" of the waterway, and this may not have been the condition at the time the structure or fill was originally authorized. Therefore, we believe the current language is more appropriate.

Several commenters recommended modifying this NWP to authorize both permanent and temporary impacts of maintenance activities, since the requirement to submit a pre-construction notification for temporary impacts would significantly increase regulatory and administrative burdens on the applicants and the Corps, without any environmental benefits or added value to the process.

We agree, and have added a new paragraph (c) to this NWP to address temporary structures, fills, and work necessary to conduct the maintenance activities authorized by this NWP.

Several commenters objected to the requirement to provide information about original design capacities and configurations of the structures and canals as part of the pre-construction notification for the proposed activity. These commenters stated that this information may not exist or be readily available, particularly for old facilities and structures. These commenters recommended that the information be required only where it is reasonably available. Alternatively, the commenters proposed retaining the language

regarding the project not causing more than minimal changes to the flow characteristics of the stream, or increased flooding, instead of specifically requiring original design information.

The provision to require information regarding the original design capacities and configurations of structures and other features is only applicable when maintenance dredging is proposed. We believe that this information can be developed fairly easily, since the capacities and configurations of the outfalls, intakes, impoundments, and canals can be developed or inferred by examining the existing facilities, in cases where historical documentation is not available.

Several commenters expressed opposition to the terms of the NWP that limit the removal of sediment to the minimum necessary to restore the waterway to the approximate dimensions that existed when the structure was built. Another commenter recommended changing the language to require restoration of the project to its original design conveyance capacity.

The current language is adequate to ensure that this NWP authorizes necessary sediment removal activities that result in minimal adverse effects on the aquatic environment. We believe that the limits for the removal of sediments should be established with regard to the conditions of the waterway itself at the time of project construction rather than to the specifications of the structures.

One commenter requested clarification as to whether the 200 foot limit on the removal of accumulated sediment is subject to the 1/2 acre limit found in other NWPs.

This NWP does not have a 1/2 acre limit. If this NWP is used with another NWP to authorize a single and complete activity, then the activity is subject to the requirements of general condition 24, Use of Multiple Nationwide Permits. If this NWP is used with an NWP with a 1/2 acre limit, such as NWP 39, then the 1/2 acre limit would apply to the single and complete project.

One commenter requested the addition of "flood conveyance channels" to paragraph (b) of this NWP, instead of requiring the use of NWP 31. Another commenter stated that additional routine maintenance activities, which are authorized by NWPs 31 and 43, should be consolidated under NWP 3. One commenter suggested adding language to clarify that this NWP authorizes emergency repairs of submarine fiber optic cables.

NWP 31 is being reissued to authorize maintenance activities for existing flood control facilities, including flood conveyance channels. Therefore, we do not believe it is necessary to modify NWP 3 to authorize those activities. We are also reissuing NWP 43 to authorize maintenance activities for storm water management facilities. Emergency repairs of submarine fiber optic cables may be authorized by this NWP, provided the activity meets its terms and conditions.

One commenter indicated that small sediment removal projects should not require pre-construction notification. Another commenter stated that pre-construction notification should not be required for the placement of riprap to protect structures. A few other commenters said that pre-construction notification should not be required for activities authorized by paragraph (b) of this NWP. In contrast, one commenter suggested that pre construction notification should be required for all activities covered under NWP 3.

We believe that the pre-construction notification requirements for this NWP are appropriate. Pre-construction notification is required for those activities that may have the potential to cause more than minimal adverse effects on the aquatic environment.

One commenter recommended that sediments should be sampled to project depth prior to dredging, and that sandy sediment suitable for nearshore disposal should be returned to the littoral system down drift of the project site.

Regulatory Guidance Letter 06-02 establishes that testing of dredge material is not required when there is reason to believe that no contaminants are present in the material. Therefore, a standard requirement to sample and test sediments to be dredged under NWP 3 would not be appropriate. The nearshore disposal of sandy sediments should be addressed through separate authorizations, such as individual permits, since those activities may have more than minimal adverse environmental effects.

One commenter indicated that significant wetland habitat development has been observed on sediments left in place for many years within canals associated with outfall and intake structures. That commenter stated that exempting maintenance activities in such canals from the 200 linear foot restriction may have a significant impact on the wetland habitats in these channels. Another commenter suggested that the placement of riprap or any other bank stabilization material in, or the removal of accumulated sediment from,

any special aquatic site should be prohibited.

Since this NWP only authorizes activities that restore an area to its previous condition, we do not believe it is appropriate to prohibit the maintenance of structures or fills simply because a special aquatic site may have formed in these areas. District engineers will review pre-construction notifications to determine if the placement of riprap or the removal of accumulated sediments in special aquatic sites would cause more than minimal impact, and use discretionary authority to address situations where they would.

One commenter stated that affected tribes should be informed of all pre-construction notifications for this NWP that involve in-water work and be provided 30 days to provide comments. This commenter also suggested that while bioengineered projects are less environmentally damaging than riprap and offer benefits to salmon, the presence of wood in some bank protection structures has the potential to interfere with treaty fishing access by preventing the use of nets.

Coordination of proposed NWP 3 activities with Indian tribes is more appropriately addressed through government-to-government consultations with Corps districts. General condition 16, Tribal Rights, does not allow an activity or its operation to impair reserved tribal rights, including but not limited to, reserved water rights and treaty fishing and hunting rights. Compliance with this general condition, along with coordination with interested Indian Tribes, will help protect tribal rights.

One commenter suggested that the placement of riprap should be the minimum necessary to protect the structure, in order to reduce adverse effects to habitat-forming processes within waterbodies, such as salmon habitat. Another commenter said that this NWP should not authorize maintenance work on culverts that fail to meet appropriate standards for the upstream and downstream passage of fish, or culverts that do not allow for the downstream passage of substrate and wood.

The terms and conditions of this NWP limit the placement of riprap to the minimum necessary to provide adequate erosion protection. Other NWP general conditions, such as general condition 17 for endangered species, may provide additional protection for species of concern, as well as their habitat. General condition 2 prohibits activities which could disrupt the necessary life cycle movements of aquatic species.

One commenter stated that pre-construction notifications should be required for all NWP 3 activities to ensure compliance with its terms and conditions. Another commenter stated that the Corps should carefully review all maintenance applications to ensure that the area impacted is not larger than needed to complete the maintenance activities, and that no additional impacts are authorized or conducted.

We do not agree that pre-construction notification should be required for all activities. The terms and conditions of this NWP are adequate to ensure that it authorizes only those activities with minimal adverse effects on the aquatic environment. Where there are concerns for the aquatic environment, division engineers can regionally condition this NWP to require pre-construction notification or other measures.

One commenter said that streams near roads may migrate from their original location and compromise the road. This commenter said that for those situations, this NWP should authorize relocation of the stream back to its original location. The commenter also indicated that small channel realignments should be authorized to properly convey the water into culverts.

This NWP does not authorize new stream channelization or stream relocation projects. Those activities may be authorized by other Department of the Army permits.

This NWP is reissued with the modifications discussed above.

NWP 4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities*. We proposed to remove the provision for shellfish seeding, since we proposed to modify NWP 27 to authorize this activity. No comments were received. This NWP is reissued as proposed.

NWP 5. *Scientific Measurement Devices*. We proposed to remove the pre-construction notification requirement for discharges of 10 to 25 cubic yards for the construction of small weirs and flumes, but retain the 25 cubic yard limit for such construction.

Several commenters supported this NWP and the proposed removal of the pre-construction notification requirement on the basis that activities authorized under this NWP result in minimal impacts. Another commenter agreed with the removal of the pre-construction notification requirement for discharges of 10 to 25 cubic yards for construction of weirs and flumes because it will facilitate the implementation of water quality improvement projects sponsored by Federal, State, and local agencies, as well as the scientific community. Two

commenters objected to the removal of the pre-construction notification threshold. One commenter recommended conditioning this NWP to ensure that authorized activities do not interfere with the movements of organisms within watercourses or prevent ingress or egress of aquatic organisms.

Based on our past experience with this NWP, we believe the removal of the pre-construction notification requirement for discharges of 10 to 25 cubic yards for the construction of small weirs and flumes is appropriate. Project proponents are required to comply with all applicable general conditions, including general condition 2, Aquatic Life Movements, which prohibits activities from substantially disrupting life cycle movements of aquatic organisms. Further, we believe the district engineer's authority to issue case-specific special conditions and to impose regional conditions to require pre-construction notifications for certain activities, such as activities involving specified quantities of fills for the construction of small weirs and flumes, is adequate to address local concerns regarding potential adverse effects to the movement of aquatic organisms.

One commenter said that the NWP should have a condition requiring all temporary devices to be removed when the devices will no longer be used. This commenter also asked whether this NWP authorizes the installation of single measurement devices or multiple measurement devices.

The removal of temporary fills is required by general condition 13. The NWP authorizes single and complete scientific measurement device projects. Scientific measurement devices with independent utility can be authorized by separate NWP authorizations.

This NWP is reissued as proposed.

NWP 6. *Survey Activities*. We proposed to modify this NWP to add exploratory trenching to the list of authorized activities and to authorize the construction of temporary pads used for survey activities, provided the discharge does not exceed 25 cubic yards.

Two commenters supported the proposed modifications and one commenter said that the NWP would result in more than minimal impacts to the aquatic environment. One commenter stated that there should be a ¼ acre limit for exploratory trenching. This commenter also suggested imposing a 25 cubic yard limit on all activities authorized by this NWP.

It has been our experience that exploratory trenching results in minimal adverse effects on the aquatic

environment, and this NWP has been conditioned to require restoration of the trenched area upon completion of work. Since most impacts associated with exploratory trenches are temporary, an acreage limit is not necessary. Division engineers may impose regional conditions to require pre-construction notifications or specific limits for certain activities. District engineers may also exercise discretionary authority and require an individual permit if a proposed activity would result in more than minimal adverse effects on the aquatic environment. It is unnecessary to impose a 25 cubic yard limit on all discharges authorized by this NWP, since most of these discharges are temporary. Temporary fills must be removed upon completion of the work, in accordance with the requirements of general condition 13. Any permanent fills are likely to be small in size, because of the types of activities authorized by this NWP.

One commenter suggested adding language regarding the backfilling of the exploratory trench. Some commenters stated that the definition of "exploratory trenching" should include more prescriptive details such as benchmarks, width, and depth.

We are conditioning this NWP to require permittees to backfill the top 6 to 12 inches of exploratory trenches constructed in wetlands with topsoil from the trench. This change will bring consistency with the terms of other NWPs that authorize trenching activities. We do not believe that it is necessary to include prescriptive limits on the trench dimensions. However, division engineers may choose to establish such limits through regional conditions.

One commenter suggested that the 25 cubic yard limit for discharges associated with temporary pads should be removed. Another said that the 25 cubic yard limit should apply to the cumulative amount of material for multiple drill sites. Two commenters said that limits should be placed on the amount of such discharges because a state may not issue water quality certification for this NWP.

The 25 cubic yard limit is necessary to help ensure that the NWP authorizes only activities with minimal adverse effects on the aquatic environment. It also provides a suitable limit on the quantity of discharge necessary for construction of these temporary pads. The cubic yard limit for temporary pads applies to a single and complete project, as defined at 33 CFR 330.2(i). If a state does not issue water quality certification for this NWP, an individual water quality certification must be obtained or

waived for each activity before it is authorized in that state.

One commenter stated the NWP should also authorize temporary access roads. Such work may qualify for the 404(f) exemption for temporary mining roads or could be authorized by NWP 33.

The NWP is reissued with the modification discussed above.

NWP 7. *Outfall Structures and Associated Intake Structures*. We proposed to move maintenance dredging and excavation activities to NWP 3. We also proposed to change the title of this NWP to more clearly describe what it authorizes.

Several commenters supported moving maintenance dredging and excavation activities to NWP 3, while one commenter objected to the proposed change. One commenter said this NWP should require pre-construction notification only for section 10 activities, since Clean Water Act authorization for these structures is already provided through the permit process under Section 402 of the Clean Water Act. One commenter stated that construction and maintenance of outfall structures should not include bank stabilization structures.

Outfall structures and associated intake structures require section 404 authorization if they involve discharges of dredged or fill material into waters of the United States. Sections 404 and 402 of the Clean Water Act address different types of discharges. In addition, the permitting criteria under section 404 differ from those of section 402. In addition, some activities authorized by this NWP may be exempt from section 402 permit requirements. The pre-construction notification requirement is necessary to ensure that activities authorized by this NWP will have no more than minimal adverse impacts to the aquatic environment. Bank stabilization activities are not authorized by this NWP but may be authorized by NWP 13 or other types of permits.

One commenter suggested adding a provision to require intake structures constructed for withdrawing cooling water to adhere to requirements contained in Section 316(b) of the Clean Water Act. Another commenter suggested that this NWP should include a reference to the U.S. Environmental Protection Agency's section 316(b) implementation initiative and require incorporation of Best Technology Available methods developed from this initiative. This commenter also said that intake structures should utilize passive screens with openings not to exceed one centimeter (or one millimeter in waters

having anadromous fish), with a maximum intake velocity of 0.5 feet per second.

Section 316(b) of the Clean Water Act is implemented through (and only applies to) permits issued pursuant to Section 402. Thus, any structure that is in compliance with regulations issued under the NPDES program (Section 402) must also be in compliance with regulations issued under Section 316(b). Specific suggestions regarding technology choices for intake structures are more appropriately addressed through other permit authorities, such as the 402 program. Activities authorized by this NWP may require other Federal, State, or local permits or licenses.

One commenter suggested adding modifications of existing intakes as an authorized activity, for cases where intake structure modifications are required by rules recently promulgated under Section 316(b) of the Clean Water Act. Another commenter recommended adding a note to refer applicants to NWP 3 for future maintenance activities.

In the first sentence of this NWP, we have added the phrase "or modification" after the word "construction. It is important to note that this NWP only authorizes the construction or modification of intake structures that are associated with outfall structures. This would include cooling water intake structures where the heated cooling water is subsequently discharged back into the waterbody from which it was withdrawn. Adding a note referencing NWP 3 for future maintenance activities is inappropriate, since there may be outfall structure maintenance activities that do not qualify for NWP 3 authorization.

One commenter requested clarification that this NWP authorizes only those activities that require permits under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. This commenter said that the current text of this NWP indicates that all outfall and associated intake structures that require section 402 permits would also require an NWP authorization.

This NWP authorizes outfall structures and associated intake structures that require authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. If the construction or modification of an outfall structure or associated intake structure that requires a section 402 permit does not involve discharges of dredged or fill material into waters of the United States or structures or work in navigable waters

of the United States, then a Corps permit is not required.

One commenter recommended conditioning this NWP to require intake structures to be marked in a manner that will reduce hazards to navigation during and after construction. Another commenter said that this NWP should not authorize dredging operations during fish spawning seasons. One commenter said that this NWP should prohibit the stockpiling of excavated materials where sediment may erode to surface waters. A commenter asserted this NWP should be conditioned to prohibit exposure of surface waters to wet concrete, which may be toxic to aquatic organisms.

General condition 1 states that any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained. This condition adequately addresses potential hazards to navigation. Maintenance dredging associated with outfall structures and their intake structures may be authorized by NWP 3 or another type of permit. General condition 3 states that activities in spawning areas that occur during the spawning seasons must be avoided to the maximum extent practicable. General condition 12 addresses requirements for soil erosion and sediment controls. Although concrete may be toxic under certain circumstances, it is generally not considered to have toxic pollutants present in toxic amounts. Therefore, its use is not generally prohibited by general condition 6, Suitable Materials.

One commenter said that agency coordination should be required for the construction of intake structures, because those structures may impinge and entrain larval fish.

We do not believe it is necessary to require agency coordination for the construction of intake structures. For cooling water intake structures, this issue is already addressed by the Section 402 program. For other types of intakes, it would be more appropriate to address concerns regarding the impingement and entrainment of larval fish through regional conditions or special conditions. Division and district engineers, in consultation with resource agencies, can develop species-specific regional or special conditions to protect larval fish.

This NWP is reissued with the modification discussed above.

NWP 8. *Oil and Gas Structures on the Outer Continental Shelf*. We proposed to clarify that pre-construction notification is required for all activities authorized by this NWP. No comments

were received. This NWP is reissued as proposed.

NWP 9. *Structures in Fleeting and Anchorage Areas*. There were no changes proposed for this NWP. One commenter said that moorage structures may preclude the continued exercise of Tribal fishing rights. This commenter also asked that the Corps consult with Indian Tribes that utilize these areas for fishing, and requested that pre-construction notification be required for all activities authorized by this NWP.

General condition 16 states that NWP activities cannot impair reserved tribal rights. Division and district engineers can consult with Tribes to develop regional conditions that will further ensure that tribal rights are not impaired by this NWP. Division engineers can regionally condition this NWP to require coordination with Tribes when proposed activities may affect Tribal lands or trust resources.

The NWP is reissued without change.

NWP 10. *Mooring Buoys*. There were no changes proposed for this NWP. One commenter stated that individual mooring buoys can interfere with the exercise of Tribal fishing rights and should not be authorized by NWP. This commenter also said that pre-construction notification should be required for all activities authorized by this NWP, and the Corps should consult with Indian Tribes with usual and accustomed fishing grounds. Another commenter suggested limiting mooring buoys to areas outside of Federal navigation channel or dredged material placement areas.

General condition 16 states that NWP activities cannot impair reserved tribal rights. Division and district engineers can consult with Tribes to develop regional conditions that will ensure that tribal fishing rights are not impaired by activities authorized by this NWP. District and division engineers will consider the need to add regional conditions or case-specific conditions where necessary to protect tribal rights. Prohibiting the placement of mooring buoys in Federal navigation channels or dredged material placement areas is not desirable. There are occasions where it may be appropriate to place mooring buoys in these areas on a permanent or temporary basis, where the adverse effects on navigation and other public interest review factors are minimal. Mooring buoys authorized by this NWP must comply with general condition 1, Navigation. Division engineers may also add regional conditions to this NWP to prohibit the placement of mooring buoys in certain Federal navigation channels or other areas of concern.

The NWP is reissued without change.

NWP 11. *Temporary Recreational Structures*. There were no changes proposed for this NWP. One commenter suggested that temporary buoys, markers, small floating docks, and similar structures can interfere with the exercise of treaty fishing access and, therefore, in an area subject to treaty fishing, notification to affected tribes is required. The commenter further stated that regional conditions should be added to require that such structures shall be removed from salmon spawning areas prior to commencement of the spawning season. Another commenter suggested that temporary recreation structures may come into conflict with Tribal fisheries and that pre-construction notification should be required. In addition, consultation with Indian Tribes with usual and accustomed fishing grounds in the area should also be conducted.

This NWP cannot authorize any activity that may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights (see general condition 16). District and division engineers will consider the need to add regional conditions or case-specific conditions where necessary to protect such tribal rights.

One commenter recommended conditioning the NWP to require temporary recreation structures to be removed within seven days after the use has been discontinued, instead of the 30 days specified in the NWP. One commenter asserted that the required approval from the reservoir manager should be in writing.

Shorter time periods for removal can be imposed through regional conditioning, or through special conditions provided in NWP verifications. The process for approving buoys or markers at Corps of Engineers reservoirs is at the discretion of the reservoir manager.

The NWP is reissued without change.

NWP 12. *Utility Line Activities*. We proposed to modify this NWP by removing the provisions authorizing the construction of permanent and temporary access roads and simplifying the pre-construction notification thresholds. Several commenters supported all proposed changes to this NWP.

One commenter recommended modifying this NWP to explicitly include utility line relocation, in addition to utility line construction, maintenance, and repair. Two commenters suggested reducing the authorized duration of temporary sidecasting. One of these commenters said that four weeks is sufficient time

for temporary sidecasting, and the other commenter recommended a time limit of 30 days. One commenter said that this NWP should require all trenched material to be returned to the trench as backfill, not just the upper 6 to 12 inches, to sustain groundwater hydrology and prevent drainage of wetlands and other waters of the United States. One commenter requested that total impacts at the site be limited to  $\frac{3}{10}$  acre.

This NWP authorizes the relocation of utility lines, which is covered by the construction, maintenance, and repair activities authorized by this NWP. We believe that three months is an appropriate time frame for temporary sidecasting of excavated material into waters of the United States. Division engineers can regionally condition this NWP to reduce the authorized period of temporary sidecasting, to further ensure minimal adverse effects. In response to a pre-construction notification, district engineers can add special conditions to the NWP authorization to reduce the length of time temporary sidecasting is authorized. We do not agree that it is necessary to require that all trenched material be returned to the trench to maintain pre-construction hydrology. The NWP explicitly prohibits backfilling the trench in a manner that would result in a french drain effect, and drain nearby waters. We believe the  $\frac{1}{2}$  acre limit for this NWP is sufficient to ensure that it authorizes only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment. This limit applies to the total discharges associated with the single and complete project.

Several commenters supported the proposed pre-construction notification thresholds for this NWP, stating that they are simpler than the current thresholds and would capture many of those utility line activities that required pre-construction notification under the 2002 NWP. A couple of commenters recommended retaining the pre-construction notification thresholds of the NWP 12 issued in 2002. A number of commenters said that the pre-construction notification for temporary losses of greater than  $\frac{1}{10}$  acre of water of the United States should be eliminated. Some of these commenters stated that this pre-construction notification threshold is confusing, because it is not consistent with the definition of "loss of waters of the United States." Other commenters recommended changing the phrasing of this pre-construction notification threshold from "temporary loss" to "temporary impact" to provide

consistent terminology for the NWPs. Several commenters said that the  $\frac{1}{10}$  acre pre-construction notification threshold for temporary losses should be eliminated, because it is not necessary to ensure minimal adverse effects and it is not consistent with the pre-construction notification thresholds of other NWPs. One commenter indicated that the pre-construction notification threshold for temporary losses would result in a dramatic increase in the numbers of pre-construction notifications submitted to the Corps. Another commenter stated that this pre-construction notification threshold would remove incentives for project proponents to minimize temporary impacts. Several commenters said that requiring pre-construction notifications for temporary losses greater than  $\frac{1}{10}$  acre would increase the number of wetland delineations required to be submitted with those notifications.

One commenter asked if an activity resulting in impacts of  $\frac{1}{10}$  acre or less to special aquatic sites, including wetlands, would require pre-construction notification. Another commenter said that there may be utility line activities resulting in the loss of less than  $\frac{1}{10}$  acre that may result in more than minimal adverse effects on the aquatic environment. One commenter objected to the removal of the pre-construction notification requirement for activities that include mechanized landclearing of forested wetlands, stating that this may result in significant habitat loss of forested wetlands and a significant permanent loss of forested wetland functions. One commenter recommended requiring pre-construction notifications for activities that may impact fish passage.

We are restoring the pre-construction notification thresholds that were in the NWP 12 issued in 2002, so that district engineers will be able to conduct case-by-case review for certain utility line activities that have the potential to result in more than minimal adverse effects on the aquatic environment. Pre-construction notification will be required if any of the following criteria are met: (1) The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than  $\frac{1}{10}$ -acre of waters of the United States; (6)



permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials. Discharges resulting in temporary losses of waters only will no longer trigger a pre-construction notification requirement, unless they trigger one of the criteria above.

Division engineers can regionally condition this NWP to require pre-construction notification for other utility line activities, if there are concerns for the aquatic environment or public interest that warrant lower pre-construction notification thresholds, such as endangered or threatened species, or impacts to forested wetlands. General condition 2, Aquatic Life Movements, requires permittees to not disrupt necessary life cycle movements of aquatic organisms, such as fish.

Several commenters requested that the definition of single and complete project, as applied to utility line projects, be modified to state that the  $\frac{1}{10}$  acre pre-construction notification threshold applies to the entire utility line and not to each separate water or wetland crossing.

The requirement to submit a pre-construction notification for those utility line activities listed in the "Notification" paragraph of this NWP applies to a single and complete project, as defined at 33 CFR 330.2(i). In the case of a utility line, a single and complete project consists of a single crossing of a water of the United States, or more than one crossing at the same location (see the definition of "single and complete project").

Several commenters expressed opposition to the proposed removal of access roads from this NWP, especially the construction of temporary access roads, which would require authorization under NWP 33 and require pre-construction notification for all activities. One commenter supported the use of NWPs 14 and 33 for utility line access roads, because it would provide greater flexibility in the locations where these roads could be built. Most of these commenters expressed concern that requiring pre-construction notification for all temporary access road construction activities will significantly increase the regulatory burdens on permittees and most likely cause substantial delays in utility line projects. One commenter said that access roads should be retained in this NWP, with a  $\frac{1}{2}$  acre limit for the utility lines and a  $\frac{1}{2}$  acre limit for the access road. Several commenters stated that requiring

authorization of permanent access roads through NWP 14 could result in impacts greater than  $\frac{1}{2}$  acre at the site of a single and complete project. One commenter said that utility line substations should be authorized by another NWP, because these facilities can be constructed at a more distant location from the utility line.

After considering these comments, as well as the probable negative effects that this proposed change would have on essential services such as the distribution of energy to the public, we have decided to retain authorization of permanent and temporary access roads in NWP 12. We have added a paragraph to authorize access roads, using language from the NWP 12 issued in 2002. We are also putting Note 2 back into this NWP. This note states that access roads used for both construction and maintenance are authorized by this NWP. This note has been adapted from the NWP 12 issued in 2002, but revised to clarify that temporary access roads may be authorized by NWP 12, provided the area is restored to pre-construction elevations and revegetated as appropriate. To address concerns about temporary impacts to waters of the United States associated with utility line activities, we are adding explicit requirements to remove all temporary fills in their entirety, return affected areas to pre-construction elevations, and revegetate affected areas as appropriate.

The  $\frac{1}{2}$  acre limit for this NWP applies to each single and complete utility line activity. There are not separate acreage limits for utility lines and access roads. Retaining authorization of access roads in this NWP, as well as authorization for utility line substations, will help provide effective authorization for utility line activities.

One commenter recommended reformatting this NWP to be consistent with other NWPs. Another commenter suggested that the phrase "provided the activity does not result in the loss of greater than  $\frac{1}{2}$  acre of those waters" be deleted, since the  $\frac{1}{2}$  acre limit is indicated in the first paragraph of this NWP. One commenter said that mitigation should be required for all NWP activities. Another commenter stated that the NWP should clarify that mitigation banks may be used to provide compensatory mitigation for permanent adverse effects authorized by this NWP.

The format of this NWP need not be consistent with the other NWPs, because of the authorized activities. We are retaining the reference to the  $\frac{1}{2}$  acre limit in the paragraph that authorizes utility line substations, to make it clear that any losses associated with this activity are included in the  $\frac{1}{2}$  acre limit.

A similar reference to the  $\frac{1}{2}$  acre limit is also provided in the paragraph authorizing access roads. Mitigation requirements for this NWP will be established in accordance with general condition 20, Mitigation. This general condition states that mitigation banks may be used to provide compensatory mitigation for activities authorized by NWPs.

One commenter suggested adding language to this NWP that would require sand and gravel excavated from a lake bed during trench excavation to be temporarily sidecast in a manner such that it would not be buried by material with finer grain sizes. Another commenter stated that this NWP should not be used to authorize utility line activities in streams that support salmon.

Concerns for potential impacts to lake substrate are more appropriately addressed through either the special conditions added to an NWP authorization by the district engineer, or by regional conditioning of the NWP by division engineers. Potential impacts to salmon are also more appropriately addressed through regional conditions or the review of pre-construction notifications, including the district engineer's use of discretionary authority and the addition of special conditions to the NWP authorization.

One commenter said that this NWP should be conditioned to require placement of the utility line in the right-of-way of existing or proposed roads or at the narrowest section of wetlands or streams. This commenter also stated that the number of stream crossings should be limited to the minimum necessary.

These concerns are addressed by general condition 20, Mitigation, which requires avoidance and minimization on the project site to the maximum extent practicable. It is not appropriate to condition this NWP to require utility lines to be placed in existing rights-of-way or at the narrowest sections of waters of the United States. Often it is not feasible to limit utility lines to these areas, and practicable alternatives are usually rather limited. Many utility lines need to be installed in areas without roads.

One commenter said that this NWP should require communication or power poles to be upgraded to current standards to avoid detrimental impacts to migratory birds. This commenter also stated that this NWP should not authorize wind generating turbines.

Design requirements for communication or power poles relative to migratory birds are more appropriately addressed through other

regulatory programs. Wind generating turbines are not considered to be utility lines. To the extent that the construction of wind generating turbines requires Department of the Army authorization, those activities may be authorized by individual permits, regional general permits, or other NWP (e.g., NWP 25).

NWP 12 is reissued with the modifications discussed above.

NWP 13. *Bank Stabilization*. We proposed to modify this NWP to authorize bank stabilization activities in special aquatic sites, provided the prospective permittee submits a pre-construction notification.

Several commenters expressed support for the proposed changes to this NWP. Several commenters stated that this NWP will result in more than minimal adverse effects to the aquatic environment, particularly for headwater streams, and that individual permits should be required for these activities. Other commenters stated that the linear limits of this NWP should be reduced and that the waivers to the linear foot and cubic yard limits should be removed to ensure that the NWP authorizes only those activities with minimal adverse effects on the aquatic environment. Several commenters stated that bank stabilization projects in excess of 500 feet or involving more than one cubic yard per running foot should be evaluated as individual permits, with opportunity for public review.

The terms and conditions of this NWP, especially the pre-construction notification requirements, will help ensure that this NWP authorizes only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment. The 500 linear foot and the one cubic yard limits must be waived in writing by the district engineer, or the NWP cannot be used to authorize activities that exceed these limits. Bank stabilization activities are often necessary to help protect property, as well as water quality. In response to a pre-construction notification the district engineer can add special conditions to the NWP authorization to ensure minimal adverse effects, or exercise discretionary authority and require another type of permit, such as an individual permit, for the activity. Division engineers can regionally condition this NWP to protect high value waters and other important resources.

One commenter recommended modifying the text of this NWP to clarify that authorized activities are not limited to rivers and streams, but that this NWP can also be used in coastal areas. Several commenters stated that this

NWP should not authorize impacts to special aquatic sites. One commenter recommended requiring a written waiver from the district engineer to authorize discharges of dredged or fill material into special aquatic sites. A few commenters said that mitigation should always be required for activities authorized by this NWP.

This NWP can be used to authorize bank stabilization activities in all waters of the United States, including rivers, streams, and coastal areas. We do not believe it is necessary to modify the text of this NWP to list the types of waterbodies in which it can be used. Because many streams include or are bordered by special aquatic sites, precluding use of this permit in these areas significantly limits its usefulness. It may be beneficial to watersheds to stabilize eroding banks, even though small amounts of fringe wetlands or mudflats may be impacted by a bank stabilization activity. Therefore, bank stabilization activities involving discharges of dredged or fill material into special aquatic sites may be authorized by this NWP but pre-construction notification is required for all such activities, which will provide an opportunity for the district engineer to review those activities to ensure that any adverse effects on the aquatic environment are minimal. For additional assurance, we have added a new paragraph (d) to require a written waiver from the district engineer if the activity involves discharges of dredged or fill material into special aquatic sites. If a written waiver is not issued by the district engineer, then this NWP does not authorize such discharges. In response to a pre-construction notification, the district engineer will exercise discretionary authority if the proposed bank stabilization activity is in a special aquatic site and will result in more than minimal adverse effects on the aquatic environment. Division engineers may also regionally condition this NWP to prohibit discharges of dredged or fill material into special aquatic sites, where there are concerns for the aquatic environment or other public interest review factors.

We do not believe compensatory mitigation should be required for all bank stabilization activities. In cases where the bank stabilization activity affects a special aquatic site, it may be appropriate for the district engineer to require compensatory mitigation. For bank stabilization activities in other waters of the United States, the district engineer may determine that it is not necessary to require compensatory mitigation.

Several commenters stated that pre-construction notification should be required for all activities authorized by this NWP. One commenter suggested adding language to clarify that any requests for waivers of limits for this NWP would be approved or denied during the 45-day pre-construction notification review period. Another commenter requested that additional language be added to the text of the NWP to clarify that bank stabilization activities are authorized unless prohibited by the district engineer following review of the pre-construction notification.

We do not agree that it is necessary to require pre-construction notification for all activities authorized by this NWP. Many small bank stabilization activities are conducted each year that result in minimal adverse effects on the aquatic environment. We have modified paragraph (a)(2) of general condition 27 to clarify that NWP activities that require written waivers of limits are not authorized unless the district engineer issues the written waiver. In other words, a default NWP authorization does not occur after 45 days if the proposed activity requires a written waiver. The modification to general condition 27 is sufficient to address this concern, and it is not necessary to modify the text of this NWP. In the case of this NWP, all activities that require a pre-construction notification also require a written waiver. The Corps will do its best to process requests for such waivers within 45 days.

One commenter stated that this NWP should not be used to authorize bank stabilization activities in waters of the United States inhabited by anadromous fish. One commenter stated that use of wood in bank stabilization projects may interfere with tribal rights, such as treaty fishing access, and therefore affected tribes should be notified of requests to use this NWP. Several commenters said interagency coordination should be conducted on all NWP 13 pre-construction notifications.

Division engineers can regionally condition this NWP to restrict or prohibit its use in waters inhabited by anadromous fish. General condition 16, Tribal Rights, states that activities authorized by NWP cannot impair reserved treaty rights. Division and district engineers should consult with Tribes to develop regional conditions where necessary to ensure that tribal rights are adequately protected by this NWP. Division engineers can regionally condition this NWP to require coordination with Tribes when proposed NWP activities may affect Tribal lands or trust resources. General

condition 27, Pre-Construction Notification, sets out the requirements and procedures for interagency coordination for all NWP's; we do not believe additional requirements are necessary for this permit.

A number of commenters requested clarification as to whether the linear and running foot limits in this NWP are applicable to the length of the bank or the length of the stream channel. Several commenters stated that the prohibition against stream channelization should be retained, while others recommended that it be removed because many bank stabilization activities could be considered stream channelization projects. One commenter stated that this NWP should not be used to authorize hardening of bank surfaces. A number of commenters also stated NWP 13 should only authorize vegetative or bioengineered stabilization methods and not bank hardening methods. One commenter recommended modifying this NWP to encourage bioengineered methods, or placement of riprap above the ordinary high water mark or high tide line, by not requiring pre-construction notification for such activities. Two commenters said that this NWP should be limited to bioengineering, living shoreline, or vegetative bank stabilization techniques, and that individual permits should be required for bank stabilization activities involving the placement of rip-rap and other hard armoring techniques.

The linear foot and cubic yard limits apply to the length of the bank. We have modified paragraph (b) of this NWP to clarify that the 500 linear foot limit applies to the length of the bank stabilization activity, not the length of the stream segment. We are retaining paragraph (g), since stream channelization activities may result in more than minimal adverse effects on the aquatic environment. Bank stabilization activities differ from stream channelization activities in several ways. Bank stabilization reduces or eliminates erosion to prevent the loss of structures or adjacent property, and typically only one side of a stream is stabilized. The location and cross-section shape of the waterway is generally unaffected except for material placed along the stabilized bank. Stream channelization alters the length, location, and/or cross section shape of a stream channel. Stream channelization changes the hydraulic flow characteristics of the stream, reduces channel complexity and diversity, and can include bank stabilization on one or both banks of the channelized waterway. Stream channelization

substantially reduces natural stream functions, while bank stabilization by itself does not.

We do not agree that this NWP should be limited to vegetative or bioengineering techniques. In many areas, those techniques will not provide adequate protection to the bank, especially in those waters where banks are subjected to substantial wave energy, such as coastal shorelines. In those areas, hard bank stabilization techniques may be the only feasible option. The pre-construction notification requirements in this permit apply to specific situations not directly related to the type of bank stabilization used (e.g., hard or vegetative). We do not believe that the use of bank hardening methods, in and of itself, requires a pre-construction notification, nor do we believe that pre-construction notification requirements should be waived simply because a project that exceeds the 500 foot or one cubic yard limit, or that involves discharges into special aquatic sites, uses vegetative or bioengineering techniques. However, for such projects, the use of more environmentally friendly methods may well be a factor in the district engineer's decision regarding whether or not to grant the requested waiver.

One commenter suggested that in order to make the one cubic yard per running foot limit more practical for bank construction methods in streams of significant size, this limit should only apply to the amount of material placed from the ordinary high water mark to the streambed, and not to anything below or above those planes. Alternatively, the commenter suggested that this limit could be adjusted to increase proportionally with increasing channel depth at the ordinary high water mark, so that stream magnitude is taken into account. One commenter indicated that the language limiting the placement of erodible material may discourage plantings on riprap, since the soil used for those plantings could be washed away during high flows. One commenter said that NWP 13 should not be used with other permits. Another commenter suggested that this NWP be conditioned to prohibit the use of waste concrete for bank stabilization material, since it may adversely affect the environment. One commenter recommended modifying paragraph (d) (now designated as paragraph (e)) to state that the placement of material may not impair surface water flow into or out of any water of the United States. In the September 26, 2006, **Federal Register** notice, this paragraph referred only to wetlands.

The cubic yard limit for this NWP, along with the waiver provision, is adequate to provide flexibility while protecting the aquatic environment and ensuring that authorized activities result in minimal adverse effects. We are retaining the language in paragraph (a), to help protect water quality. Bank stabilization projects involving the installation of plant materials on riprap may be authorized by this NWP, but erodible materials should be properly stabilized within the riprap or stabilized by other means. This NWP can be used with other NWP's to authorize single and complete projects that result in minimal individual and cumulative adverse effects on the aquatic environment, provided the permittee complies with general condition 24, Use of Multiple Nationwide Permits. General condition 6, Suitable Material, addresses the use of suitable material for discharges of dredged or fill material into waters of the United States. This general condition prohibits the use of materials that contain toxic pollutants in toxic amounts. We have modified paragraph (e) by replacing the word "wetland" with "water of the United States" to help ensure that surface water flows are maintained.

This NWP is reissued with the modifications discussed above.

**NWP 14. Linear Transportation Projects.** We proposed to modify this NWP to limit stream channel modifications to the minimum necessary to protect the linear transportation project and state that the NWP does not authorize temporary construction, access, and dewatering activities necessary to construct the linear transportation project.

Several commenters supported our proposal to change the first sentence of this NWP to refer to "linear transportation projects" instead of "linear transportation crossings." One commenter said that this sentence should be consistent with the definition of "single and complete project."

We are retaining the proposed language in the first sentence of this NWP. However, in the case of linear transportation projects, a "single and complete project" consists of a single crossing of a water of the United States, or more than one crossing at the same location (see the definition of "single and complete project").

One commenter recommended reducing the acreage limit to  $\frac{1}{3}$  acre. One commenter said that this NWP should not be used in tidal waters. Another commenter stated there should be a condition requiring culverts to allow for unimpeded upstream and downstream passage of fish as well as

the passage of substrate and wood expected to be carried by 100 year flow events.

We do not agree that it is necessary to reduce the acreage limit to  $\frac{1}{3}$  acre for all activities authorized by this NWP. The  $\frac{1}{2}$  acre limit for losses of non-tidal waters and the  $\frac{1}{3}$  acre limit for losses of tidal waters, in addition to the pre-construction notification requirements and other general conditions, will ensure that this NWP authorizes linear transportation projects that result in minimal adverse effects on the aquatic environment. General condition 2, Aquatic Life Movements, states that no activity may disrupt the necessary life cycle movements of aquatic species, including those species that normally migrate through the area. General condition 9, Management of Water Flows, states that, to the maximum extent practicable, the activity must not restrict or impede the passage of normal or high flows, unless the primary purpose is to impound water.

A large number of commenters objecting to the removal of the language regarding authorization of temporary construction, access, and dewatering activities necessary to construct the linear transportation project, because NWP 33 requires pre-construction notification for all activities. One commenter suggested that the Corps expressly state that all activities authorized previously under this NWP remain authorized.

We have decided not to remove the language authorizing the temporary construction, access, and dewatering activities from this NWP. In addition, we have added a new paragraph to this NWP to help ensure that temporary impacts associated with NWP 14 activities are minimized, and that temporary fills are removed and affected areas are returned to pre-construction elevations and revegetated as appropriate.

One commenter said that this NWP should not authorize the construction of new transportation or spur projects, because potential future development activities might occur after the transportation project is constructed. One commenter stated that the NWP should be applicable only to the expansion, modification or improvement of existing linear transportation projects. One commenter recommended modifying the pre-construction notification thresholds to clarify whether temporary losses require pre-construction notification.

This NWP authorizes the construction, expansion, modification, or improvement of linear transportation projects that result in minimal

individual and cumulative adverse effects on the aquatic environment. It does not prohibit new projects simply because there may be future development activities. It would be impractical to condition use of this NWP on consideration of hypothetical effects of potential future activities. Such effects will be addressed through applicable permitting requirements if and when future activities are proposed.

The acreage-based pre-construction notification threshold applies only to permanent losses of waters of the United States. However, pre-construction notification is also required for any discharges of dredged or fill material into special aquatic sites, whether those discharges are permanent or temporary.

One commenter stated that this NWP should not authorize bridge footings, because they result in a significant impact to stream habitat and that edge habitat is lost to hardened banks. One commenter asked whether this NWP authorizes cul-de-sacs and hammerhead turnarounds.

Bridge footings are necessary to construct certain types of linear transportation projects, and they usually result in minimal adverse effects on the aquatic environment. The pre-construction notification thresholds for this NWP will ensure that district engineers will review those activities with bridge footings that have the potential to result in more than minimal adverse effects on the aquatic environment. Bridge footings are generally confined to narrow stream segments, so only small amounts of edge habitat will be lost as a result of the construction of a bridge footing. In addition general condition 3, Spawning Areas, prohibits the physical destruction of important spawning areas that could result from these activities. Discretionary authority will be asserted in those cases where the construction of bridge footings will result in more than minimal individual and cumulative adverse effects on the aquatic environment. Cul-de-sacs and hammerhead turnarounds may be authorized by this NWP, as they are part of the street network used for transportation.

Another commenter recommended adding storm water management features to the list of examples of activities authorized by this NWP. One commenter requested clarification as to whether stream modifications, encroachments, and relocations associated with highway construction are authorized. We received several comments on the proposed language limiting stream channel modifications

to the minimum necessary to construct or protect linear transportation projects. One commenter objected to the proposal, stating that it would limit public transportation safety requirements by adding unnecessary restrictions.

Storm water management features are authorized by this NWP, provided they are integral features of the linear transportation project. If they are not, then they may be authorized by NWP 43, regional general permits, or individual permits. Stream channel modifications are authorized by this NWP provided they are minimized and conducted in the immediate vicinity of the project. Otherwise, they require authorization under another NWP, a regional general permit, or an individual permit. This provision allows most linear transportation projects to use this NWP while ensuring that they result in minimal adverse effects on the aquatic environment.

Two commenters requested further clarification on the meaning of the phrase "minimum necessary." Another commenter recommended modifying this NWP to require these activities to result in no changes to the course or hydrology of streams.

The phrase "minimum necessary" refers to minimizing the loss of waters of the United States needed to protect the project. This is determined based on case specific circumstances such as the environmental setting and the nature of the project. General condition 9, Management of Water Flows, requires maintenance of the course, condition, capacity, and location of open waters, such as streams, to the maximum extent practicable. The construction of linear transportation projects over streams usually results in some unavoidable changes to stream morphology, but the conditions of the NWP authorization require such impacts to be minimized to the maximum extent practicable.

Three commenters recommended adding a 300 linear foot limit to this NWP, and another commenter suggested a 2,000 linear foot limit. One commenter recommended a 200 linear foot limit.

This NWP does not have a linear foot limit for stream bed impacts. Instead, the acreage limits for this NWP are sufficient to ensure that this NWP authorizes only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment. A 200 linear-foot limit was previously removed from NWP 14 to eliminate varied interpretations and to simplify the basis for use of the permit.

This NWP is reissued with the modifications discussed above.

NWP 15. *U.S. Coast Guard Approved Bridges*. There were no changes proposed for this NWP. One commenter asked why this permit only applies to U.S. Coast Guard approved bridges and not all bridges. The commenter suggested that the Corps simplify the permit by revising it to include construction, repair, seismic retrofit, or widening of any bridge, regardless of whether it spans navigable waters. Another commenter suggested modifying this NWP to allow the use of another NWP to authorize the causeways and approach fills.

The authority to authorize bridges or causeways across navigable waters of the United States is held by the U.S. Coast Guard. This NWP provides authorization under Section 404 of the Clean Water Act for discharges of dredged or fill material into waters of the United States associated with the construction of those bridges. The construction, repair, seismic retrofit, or widening of these bridges must be approved by the U.S. Coast Guard. The environmental review conducted by the U.S. Coast Guard during its authorization process will normally suffice for those related activities that require the section 404 authorization provided by this NWP. District engineers can exercise discretionary authority when the adverse effects to the aquatic environment may be more than minimal. Bridges constructed across section 404 waters may be authorized by NWP 14, a regional general permit, or an individual permit. For the purposes of clarification, the last sentence of this NWP is revised to read as follows: "Causeways and approach fills are not included in this NWP and will require a separate Section 404 permit."

This NWP is reissued with the modification discussed above.

NWP 16. *Return Water From Upland Contained Disposal Areas*. We proposed to rearrange the text of this NWP so that it will be consistent with the format of the other NWPs. No substantive changes were proposed to the text of the NWP. One commenter recommended that the permit require the issuance of a National Pollutant Discharge Elimination System permit under Section 402 of the Clean Water Act, in case the return water contains pollutants entrained in the dredged material. This commenter expressed concern that the discharge would not be properly considered through the water quality certification process under Section 401 of the Clean Water Act. One commenter said that the last sentence should be modified to acknowledge that incidental fallback would not require a section 404 permit.

Return water from upland contained disposal areas is administratively defined as a discharge of dredged or fill material subject to section 404. Therefore, section 401 water quality certification is the appropriate process for determining whether the discharges associated with the return water comply with the appropriate water quality standards. It is not necessary to qualify the citation of 33 CFR 323.2(d). District engineers will use that definition to determine whether section 404 permits are required for dredging activities. We believe that the inclusion of the citation provides a more complete description of activities that may constitute a discharge of dredged material.

The NWP is reissued without change.

NWP 17. *Hydropower Projects*. We proposed to rearrange the text of this NWP, without modifying any of its terms or its scope. One commenter stated that the NWP should not apply to hydropower projects exempt from Federal Energy Regulatory Commission licensing requirements. This commenter remarked that an individual permit should be required to ensure that impacts to aquatic resources are evaluated.

We are retaining the applicability of this NWP to hydropower projects that are exempt from the licensing requirements of the Federal Energy Regulatory Commission. We believe the pre-construction notification process will provide adequate means for district engineers to assess the impacts to the aquatic environment and, if necessary, exercise discretionary authority and require an individual permit for a particular activity. In addition, division and district engineers will condition such activities where necessary to ensure that these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively.

The NWP is reissued as proposed.

NWP 18. *Minor Discharges*. We proposed to modify this NWP by applying the  $\frac{1}{10}$  acre limit to all losses of waters of the United States, not just special aquatic sites.

Several commenters expressed support for the proposed revisions. A few commenters said that this NWP does not comply with the "similar in nature" requirement for general permits. Other commenters asserted that the cumulative impacts resulting from the use of this NWP would not be minimal. Another commenter said that this NWP should not authorize discharges into waters inhabited by species of anadromous salmon.

We believe that the minor scope and nature of the types of discharge

activities authorized by this NWP are sufficient to establish that the activities are similar in nature. We also maintain that the discretion vested in district engineers to issue case-specific special conditions, including requirements for appropriate and practicable mitigation, coupled with the ability of division engineers to impose regional conditions for certain activities will ensure minimal adverse effects on the aquatic environment, individually and cumulatively. We disagree that activities in areas accessible to anadromous salmonids will necessarily result in more than minimal impacts. Permittees must adhere to all applicable NWP general conditions including general condition 2, Aquatic Life Movements, and general condition 3, Spawning Areas. The terms and conditions of this NWP, as well as the ability for district engineers to exercise discretionary authority, will help ensure that the activities authorized by this NWP result in minimal adverse effects to anadromous salmon.

Several commenters remarked that the wording of NWP 18 is confusing and suggested clarifications be provided. One commenter stated the language pertaining to "losses" is vague and suggested we clarify the text by adding "permanent" losses.

We do not agree that additional modifications are necessary to clarify the terms and conditions of this NWP. The proposed revisions to the text of the NWPs were made to remove redundant language and simplify the wording to make it clearer and more concise. The term "loss of waters of the United States" is defined in the "Definitions" section which explains that the loss of waters of the United States includes the filled area and other waters that are permanently adversely affected by flooding, excavation or drainage because of the regulated activity. Therefore, we do not agree that elaboration on the term "losses" within the text of this NWP is warranted.

Some commenters objected to the  $\frac{1}{10}$  acre limit as an unnecessary administrative burden and unduly restrictive when coupled with the pre-construction notification requirement.

We do not agree that the  $\frac{1}{10}$  acre limit will result in an unnecessary administrative burden or be unduly restrictive for the regulated public. While we recognize that the  $\frac{1}{10}$  acre threshold may preclude use of this NWP for some activities, we have determined that activities that result in loss of more than  $\frac{1}{10}$  acre of waters of the United States are not necessarily "minor" within the meaning of this permit. We believe the reduced scope of the permit

is justified by the enhanced protection afforded to the aquatic environment and will better ensure that authorized activities result in no more than minimal effects.

Several commenters asserted that a 25 cubic yard threshold is sufficient to ensure minimal adverse impacts on the aquatic environment. One commenter suggested that the volume criteria reflect a net total volume of discharge or excavation to allow for the management of volumes greater than 25 cubic yards as long as the net total discharged or excavated does not exceed 25 cubic yards.

The 25 cubic yard limit for excavating material, or discharging dredged or fill material, below the plane of the ordinary high water mark or high tide line is necessary to ensure that this NWP authorizes only those activities with minimal individual and cumulative adverse effects on the aquatic environment. Applying this 25 cubic yard limit to net volumes may result in more than minimal adverse effects, because it could allow substantially larger volumes of material to be excavated or discharged. Excavation or discharges of greater than 25 cubic yards in waters of the United States may be authorized by other types of permits, including regional general permits and individual permits. The language in the September 26, 2006, proposal also helps simplify the implementation of this NWP, by providing clear, easily measured limits and making it easier to enforce.

Another commenter suggested this NWP be simplified to authorize only discharges of dredged or fill material and exclude excavation activities in section 10 waters since the Corps does not regulate excavation activities under section 404 that result only in incidental fallback.

Excavation activities may result in discharges of dredged or fill material into waters of the United States that require section 404 permits (see 33 CFR 323.2(d)). Therefore, it is not appropriate to remove references to excavation from this NWP. Unless exempted under Section 404(f) of the Clean Water Act, excavation activities in waters of the United States that result in more than incidental fallback require section 404 authorization. Minor discharges authorized under NWP 18 often involve excavation activities that result in more than incidental fallback and would therefore constitute a discharge that is regulated under section 404.

One commenter recommended NWP 18 be specifically prohibited from use for any new residential and commercial

construction and that impacts resulting from new residential or commercial development be subject to NWPs 29 and 39, respectively.

This NWP authorizes minor discharges of dredged or fill material in waters of the United States provided that the activity complies with the specific terms and conditions of the NWP and all applicable NWP general conditions. The applicability and verification of the use of this NWP is at the discretion of district engineers based on case-specific circumstances. Therefore, we believe it would be inappropriate to prohibit its use for new residential and commercial development in the absence of case-specific information. We note that the limits on use of this permit are more restrictive than the limits on use of NWPs 29 and 39, so developers could only use this permit if their impacts were smaller than those that could be potentially authorized by these other NWPs.

One commenter recommended including language stating that the discharge will not result in significant stream geomorphologic or hydrologic alteration, and that the discharge will not be placed for the purpose of, or result in, impeding navigation.

General condition 9, Management of Water Flows, requires maintenance of the course, condition, capacity, and location of open waters, such as streams, to the maximum extent practicable. Concerns regarding potential impacts to navigation are addressed by general condition 1, which states that no activity may cause more than minimal adverse effects on navigation.

This NWP is reissued as proposed.

NWP 19. *Minor Dredging*. We proposed to remove the phrase "as part of a single and complete project," since that requirement applies to all NWPs and it is not necessary to include that phrase in the text of this NWP. One commenter supported the proposed change.

Another commenter said that the phrase "including sites where submerged aquatic vegetation is documented to exist but may not be present in a given year" is not appropriate and recommended that it be removed. The commenter asserted that the Corps should not prohibit the use of this NWP in areas where submerged aquatic vegetation was present in the past, but there is no longer evidence that it is still present.

We are retaining this provision of the NWP, since areas where submerged aquatic vegetation is documented to exist have a high potential for those

species to return to the area. In a given year, poor water quality may prevent submerged aquatic vegetation from inhabiting that area, but once water quality improves those plants may grow back.

One commenter was concerned about authorizing minor dredging activities in waters containing habitat features for various life stages of anadromous fish, including complex wood structures and edge habitats used for juvenile rearing and adult holding. The commenter indicated that this NWP should not be used to authorize dredging in waters that are inhabited by anadromous salmonids.

The terms and conditions of this NWP, as well as the ability for division and district engineers to exercise discretionary authority or condition this NWP, are sufficiently protective of species of anadromous salmon. General condition 2, Aquatic Life Movements, specifies no activity may disrupt the necessary life cycle movements of the aquatic species indigenous to the waterbody. In addition, general condition 3, Spawning Areas, states that activities in any spawning areas must be avoided to the maximum extent practicable during spawning seasons and the specific terms of this NWP prohibit its use in anadromous fish spawning areas at all. Additional time of year restrictions may be imposed by division and district engineers to reduce or avoid impacts to juvenile salmonids utilizing these areas.

Other commenters expressed concerns that NWP 19 does not authorize activities that are similar in nature with minimal impacts. One commenter questioned whether this NWP can be used for removal of a sandbar across the mouth of a navigable waterway. A couple of commenters questioned why this NWP applies to section 404 waters when the text of the permit states that it only authorizes minor dredging activities in section 10 waters. One commenter said that this NWP should not authorize dredging activities in non-navigable waters, including small streams, because of the greater potential for more than minimal adverse environmental effects.

We believe that the minor scope and nature of the types of dredging activities authorized by this NWP are sufficient to establish that the activities are similar in nature. This NWP can only be used to authorize the removal of materials from waters subject to Section 10 of the Rivers and Harbors Act of 1899.

Dredging activities in section 10 waters may require section 404 authorization, which may be provided by this NWP. In waters of the United States that are not

subject to section 10 jurisdiction (i.e., section 404-only waters), NWP 18, regional general permits, or individual permits may be used to authorize those activities. This permit could be used to remove a sandbar across the mouth of a Section 10 water provided the activity met all of the other conditions for its use.

This NWP is reissued without change.

**NWP 20. *Oil Spill Cleanup.*** We did not propose any substantive changes to this NWP. One commenter requested clarification of the applicability of NWP 38 for emergency response to an oil release in waters of the United States from electrical equipment that is not covered by a Spill Prevention, Control, and Countermeasure (SPCC) Plan. These releases are governed by EPA's polychlorinated biphenyl spill response regulations at 40 CFR part 761. Because the activities are not included in a SPCC Plan, they were not authorized by the previous or the proposed versions of NWP 20. Since the required work must be initiated within 24 or 48 hours of discovery of the release, the commenter requested that either NWP 20 be modified or the pre-construction notification requirement for NWP 38 be removed, to allow these activities to take place in a timely manner.

We agree with the commenter's concern but do not think it is appropriate to remove the pre-construction notification requirement from NWP 38. We are thus modifying NWP 20 to authorize the cleanup of oil releases in waters of the United States from electrical equipment that are governed by EPA's polychlorinated biphenyl spill response regulations at 40 CFR part 761.

This NWP is reissued with the modification discussed above.

**NWP 21. *Surface Coal Mining Operations.*** We proposed to change the title of this NWP. We also proposed allowing authorization of projects by this NWP that were currently being processed as part of an integrated permit processing procedure in lieu of an authorization from the Department of Interior, Office of Surface Mining (OSM) or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act (SMCRA) of 1977. The Corps, the Environmental Protection Agency, OSM, and the U.S. Fish and Wildlife Service entered into a Memorandum of Understanding on February 8, 2005. This MOU envisioned a collaborative process in which the SMCRA authority chooses to be the lead agency in coordinating interagency review of applications for surface coal mining operations while preserving the

authorities and responsibilities of each agency for permit decisions.

We believe there may be some confusion regarding the intent of the term "surface" coal mining operations. The Corps did not intend to restrict use of this NWP to only a particular type of coal mining technique. Any coal mining activities can be considered for authorization under NWP 21 to the extent the activities occur on the surface of the land. In particular, while discharges associated with underground coal mining activities now require authorization under NWP 50 rather than NWP 21, surface processing activities associated with underground coal mining may still be authorized by this permit provided they meet the conditions for its use.

#### *Proposed Limits*

There were numerous comments regarding limitations on NWP 21. A number of commenters recommended limits on the length of stream that could be filled under NWP 21, and other commenters recommended an overall limit on impacts to waters of the United States of  $\frac{1}{2}$  acre. One commenter suggested that the threshold limits should be 2 acres and 1,500 linear feet. Three commenters recommended a 300 linear foot limit on filling streams and a  $\frac{1}{2}$  acre limit on impacts to all waters, and that these impacts could not be waived by the district engineer. Two other commenters concurred with the 300 foot limit but also suggested not allowing the use of NWP 21 in watersheds where the cumulative amount of filled streams was already causing more than minimal harm. Several commenters stated that any linear foot limits should apply to all streams, ephemeral, intermittent, and perennial. One commenter said that this NWP should not authorize discharges into perennial streams. Another commenter stated that the use of NWP 21 should not be allowed if more than 10 percent of the headwater streams in the watershed had been filled or otherwise degraded. One commenter stated that a 250-acre watershed limit was appropriate but that drainage areas was not the only factor that should be considered in determining if a project should qualify for NWP 21.

There were also a substantial number of comments that objected to limitations on NWP 21. Many commenters stated that acreage limits that may be appropriate for eastern states would not be appropriate for western states and would be unnecessarily restrictive. Two commenters suggested issuing two versions of NWP 21, one for the western United States and another for the

eastern United States. They discussed the differences in mining and reclamation techniques and believed the Corps should recognize these differences by establishing two NWPs for coal mining. One commenter noted that acreage limits need to be larger for the western United States. A number of commenters suggested that regional conditions could be used to address the issue of limits. Several commenters noted that there was no compelling scientific or environmental basis or rationale to establish limits on NWP 21. They noted that due to hydrologic, climatic, and ecological variations, there was no defensible way to establish a specific threshold below which impacts could be said to be "minimal" across the vastly differing geographical and hydrological regimes where mining occurs. Several commenters stated that arbitrary and unnecessary thresholds would slow the permit process and result in a loss of coal production, which could be construed as a "takings" that violated substantive due process rights. Other commenters noted that limiting the use of NWP 21 would result in a loss in royalty and tax revenues and increases to the cost of the nation's energy supply by restricting coal production. One commenter noted that it would take more of the Corps' limited resources to review surface mining projects as individual permits. One commenter stated that thresholds would also impact the Corps' ability to comply with Executive Order 13212, which requires federal agencies to expedite their review of permits for energy related projects. One commenter noted that if a 2-acre limit were established for NWP 21, more than 60 percent of the nation's coal production would not be eligible for the NWP. One commenter stated that a 3-acre limit in the western United States would have a significant impact on Western mining operations. One commenter noted that if a limit of less than 50 acres was adopted, the Corps' would not achieve its goal of focusing its limited resources on projects that have the potential for more environmentally damaging adverse effects. Two commenters believed safeguards were in place to ensure impacts do not cause more than minimal individual or cumulative effects. They noted that general condition 20, Mitigation, requires compensatory mitigation to offset the adverse effects to the aquatic environment, and that there was no need for arbitrarily chosen acreage limits because the mitigation requirement counterbalances all adverse effects.



This NWP is used to provide section 404 authorization for surface coal mining activities that have also been authorized by the Office of Surface Mining or states with approved programs under Title V of the Surface Mining Control and Reclamation Act (SMCRA). Previously, there have been no limits associated with impacts to waters of the United States for NWP 21. This was based partly on the belief that the analyses and environmental protection performance standards required by SMCRA in conjunction with the pre-construction notification requirement, are generally sufficient to ensure that NWP 21 activities result in minimal individual and cumulative adverse impacts on the aquatic environment.

Furthermore, we believe the change in NWP 21 in 2002, which requires not only notification to the Corps for all projects that may be authorized by this permit but also explicit authorization from the Corps before the activity can proceed, has strengthened the environmental protection for projects authorized by this permit. One commenter requested that this requirement be removed from this NWP. However, we continue to believe that this 2002 change helps ensure that no activity authorized by this permit will result in greater than minimal adverse impacts, either individually or cumulatively, on the aquatic environment, because it requires a case-by-case review of each project. If the district engineer determines through this case-by-case review that the activity has the potential to result in more than minimal adverse effects to the aquatic environment, he or she can exercise discretionary authority to require an individual permit. Also, because of the case-by-case review and the requirement for written verification, we do not agree that it is necessary to prohibit discharges of dredged or fill material into perennial streams.

Lastly, the Corps recognizes that there are vast differences in coal mining techniques not only between the western and eastern parts of the United States, but also within the Illinois Coal Basin and the Appalachian Coal Fields themselves. There are also considerable differences in geological, topographical, climatological, hydrological and ecological regimes in the areas where coal resources are located across the United States. Furthermore, no specific scientific or environmental basis for determining a uniform national limit on NWP 21 was submitted for consideration. As noted above, there were several comments suggesting specific limits but no ecological

rationale was supplied to support these specific limits. Several commenters did submit information from the Programmatic Environmental Impact Statement (PEIS) for mountaintop mining/valley fill. However, the PEIS did not support or determine appropriate limits for NWP 21. Based on these considerations along with the fact that the impacts to waters vary greatly depending on the mining techniques and the environmental factors in the area, we have determined that establishing a specific threshold limit would not be practical on a national basis. We believe that regional conditions, as appropriate, and site-specific review of each pre-construction notification will ensure that NWP 21 authorizes activities with no more than minimal adverse effects on the aquatic environment, individually and cumulatively. The Corps has determined that it is both efficient and environmentally protective to issue an NWP 21 that can be used to authorize most activities that have no more than minimal adverse effects on the aquatic environment and allow division engineers to establish regional conditions that determine appropriate limits for impacts to waters based on the functions and values of aquatic resources within their division.

#### *Regional Conditions*

There were three commenters who noted that the division engineer has the discretion to add regional terms and conditions to NWP 21 and that acreage limitations should be determined at the regional level. The Corps agrees, based on the discussion above regarding limitations, that regional conditions are the best way to address regional concerns regarding surface coal mining activities and NWP 21. Division engineers can add regional conditions to any NWP to further restrict the use of the NWP to ensure that the NWP authorizes only activities with no more than minimal adverse effects on the aquatic environment in a particular watershed or other geographic region. The division engineer cannot modify the NWP by adding regional conditions to make the NWP less restrictive (see 33 CFR 330.1(d)). The use of regional conditions recognizes that functions and values of aquatic resources differ greatly across the country.

#### *Discretionary Authority*

Three commenters noted that NWP 21 allows the Corps to exercise discretionary authority during the pre-construction notification review process for any project which has the potential to cause more than minimal individual

and cumulative adverse impacts on the aquatic environment.

We agree with these commenters. The pre-construction notification requirements of all NWPs allows for a case-by-case review of activities that have the potential to result in more than minimal adverse effects to the aquatic environment. If the adverse effects on the aquatic environment are more than minimal, then the district engineer can either add special conditions to the NWP authorization to ensure that the activity results in no more than minimal adverse environmental effects or exercise discretionary authority to require an individual permit. While many NWPs allow the permittee to assume authorization if he or she has not heard back from the Corps within 45 days of submitting a complete pre-construction notification, NWP 21 requires written verification before the project can proceed. This ensures that adequate time is available to the Corps to review the extensive documentation that pre-construction notifications for NWP 21 often include, coordinate with other agencies as necessary, and determine whether exercise of discretionary authority is necessary to ensure no more than minimal effects.

#### *Scope of Analysis*

One commenter stated that the scope of analysis for NWP 21 review should extend beyond the effects of fills in waters. Another commenter noted that the Clean Water Act is clear that general permits may only be issued if the permitted activities have minimal impacts on the environment as a whole and not just the aquatic environment.

Several commenters stated that NWP 21 should not be reissued, in order to protect wildlife habitat, outdoor recreation, the quality of life in rural communities and environmental integrity. A myriad of comments were received itemizing impacts related to authorizations associated with NWP 21. These impacts included irreversible damages to the American people, the destruction of lives and the natural and cultural heritage of Appalachia, Montana and Wyoming, loss of hunting opportunities, the exploitation of impoverished areas by large corporations, global warming, landslides, blasting, truck traffic on roads not designed or built to handle heavy loads, harm to bird populations, destruction of valuable hardwood trees, loss of medicinal plants, affects on the tourism/vacation home industry, and local sickness. Several commenters stated that mined areas cannot be restored to pre-mining conditions, such as native forest. Several commenters

expressed concern about coal slurry damaging downstream areas.

All of these impacts are outside of the Corps' scope of analysis pursuant to the National Environmental Policy Act (NEPA). The Corps evaluation of coal mining activities is focused on impacts to aquatic resources. Mining in general is permitted under a separate Federal law, the Surface Mining Control and Reclamation Act. Impacts associated with surface coal mining and reclamation operations are appropriately addressed by the Office of Surface Mining or the applicable state agency. Under these circumstances, the Corps' NEPA implementing regulations clearly restrict the Corps' scope of analysis to impacts to aquatic resources.

#### *Integrated Permit Process*

Several commenters supported the Memorandum of Understanding (MOU) between the EPA, Corps, OSM and the USFWS regarding the integrated permit process for coal mining mentioned in the proposed NWP language. Some suggested the integrated permit process along with the Standard Operating Procedure (SOP) for NWP 21 be mandatory under NWP 21. Some commenters stated that the integrated permit process does not eliminate the dual review of section 404 and SMCRA as the MOU intended, while other commenters stated that the integrated permit process was unlawful because through it, the Corps has delegated its section 404 authority to the states processing the SMCRA permit applications. One of the commenters supporting the MOU stated that the current integrated permit process did not meet the goal of the MOU, as evidenced by its failure in Ohio, since dual reviews were still being undertaken by the regulatory agencies.

The MOU recommends that Federal and state agencies coordinate reviews of coal mining permit applications, with the SMCRA agency as the lead agency. Currently, in areas that have developed or are in the process of developing an integrated permit process, the agencies have elected to make the process voluntary. The integrated permit process does not eliminate the regulatory responsibilities of the participating agencies, but allows the various permit applications to be reviewed concurrently while utilizing information from one application to fulfill required sections of other applications, where appropriate. The process allows for timelier reviews while providing the framework for better environmental protection. The Ohio integrated permit process is still in use for those who choose to use it.

#### *State Programmatic General Permits and Regional General Permits*

Several commenters suggested that a state programmatic or regional general permit or other methods (e.g., a national MOU) be developed to reduce the duplication of effort by the regulatory agencies, therefore reducing cost and delays in receiving authorizations.

State programmatic and regional general permits are developed at the district level. The Corps supports and participates in such efforts where possible.

#### *Surface Mining Control and Reclamation Act*

Several commenters stated that coal mining is the most environmentally regulated activity, and SMCRA, along with Sections 401 and 402 of the Clean Water Act, already require analyses of all of the factors addressed under Section 404 of the Clean Water Act. Therefore, as the above-referenced programs already regulate impacts to aquatic resources, including impacts related to water quality, endangered species, historic properties, and the hydrologic regime, further review by the Corps only creates an additional administrative burden without any real benefits.

The Corps understands coal mining is covered by many environmental regulations; however the Corps has determined that SMCRA, in its current form, does not remove the need, either legally or substantively, for independent authorization under Section 404 of the Clean Water Act. Consequently, this NWP does not duplicate the SMCRA permit process. The Corps continues to work with the other agencies to avoid potential duplication of efforts and uses appropriate work and studies done by or for other agencies (e.g., surveys/findings under the Endangered Species Act or Section 106 of the National Historic Preservation Act as well as SMCRA permit documentation) in its analysis of the proposed project.

#### *Mitigation*

Several commenters stated that mitigation done for NWP 21 is scientifically indefensible and, absent such mitigation, the projects authorized under NWP 21 have more than minimal adverse effect and are therefore impermissible. They stated that current mitigation projects have so far been unsuccessful and referenced a court case in the Southern District of West Virginia (*Ohio Valley Environmental Coalition v. Bulen*), where they noted that a Corps official stated that he did not know of a single instance of

successful headwater stream creation. Also, the commenters stated that the Corps did not include any specific guidelines for how to assess stream function in order to determine the adequacy of compensatory mitigation. They also stated that the Corps has not shown that mitigation will offset the impacts authorized under NWP 21 or that off-site enhancement of streams would fully compensate for functions of streams that are destroyed. Other commenters stated that the Corps mistakenly allows the mitigation requirements of SMCRA and state water quality laws to satisfy the independent requirements of Section 404 of the Clean Water Act. They stated that allowing a permittee to claim a compensatory mitigation or reclamation activity already required under SMCRA as compensatory mitigation under the Clean Water Act is "double-counting" and improperly blurs the requirements of sequencing (i.e., avoidance, minimization, mitigation) imposed under the 404(b)(1) guidelines. Other commenters recommended that mitigation of 1:1 should be required in order to achieve no net loss, and that mitigation also be required for potential, as well as actual, impacts. Several commenters stated that final reclamation of wetland habitat will most likely exceed the required compensatory mitigation.

In order to ensure that an activity results in no more than minimal adverse effect on the aquatic environment, the Corps will add permit conditions that require compensatory mitigation that meets specified success criteria. The Corps will generally require the permittee to monitor the mitigation site for five years and, if the mitigation site does not meet the success criteria at that time, remediation or additional mitigation will be required. This ensures that the authorized activity will not result in a net loss in aquatic functions. The Corps has increased its compliance efforts to ensure that projects authorized by DA permits are constructed as authorized and that mitigation is successful.

We are currently developing new stream functional assessment protocols to identify and quantify the functions lost through authorized impacts and the functions gained or enhanced through mitigation. We removed the language from the proposed NWP 21 that required the applicant to furnish a SMCRA or state-approved mitigation plan. The Corps recognizes that SMCRA does not require "mitigation" per-se, but does require "reclamation/restoration", and that some states require "mitigation" above Corps requirements.

The Corps coordinates with the SMCRA and state resource agencies to achieve appropriate aquatic restoration on mine sites, which can reduce or eliminate off-site compensatory mitigation needs. The Corps does not consider this “double-counting”, because the areas restored are only counted once in the replacement of aquatic resource functions. As long as the functions lost as a result of the permitted activity are mitigated through the onsite restoration or enhancement, it does not matter if the restoration also meets other goals unrelated to the Section 404 impacts. General condition 20 establishes the framework for achieving no net loss of waters/wetlands, as well as the sequential review of mitigation on-site. The Corps takes into account the fact that, in certain areas and circumstances, any Corps compensatory mitigation requirement may be fully encompassed or exceeded by requirements under other authorities. As long as the impacts to the aquatic environment are fully mitigated, the Corps will not require additional compensation.

#### *Withdraw NWP 21*

Several commenters requested that NWP 21 be withdrawn and that the Corps consider authorizations under state or regional permits where cumulative impacts and mitigation measures can be evaluated on a more focused level that assures minimal impacts on the environment.

Division and district engineers have the authority to revoke or modify any or all of the NWPs and require authorizations for proposed projects by other general permits or individual permits. This should be determined on a local level.

#### *Independent Evaluation*

Several commenters stated that the burial or other degradation of hundreds of miles of Appalachian streams from mining demands a thorough, independent review, public notice, and analysis of alternatives and minimization, which is provided only through the individual permit process. A few commenters stated that coal mining rearranges the natural landscape and deserves to be studied on a case-by-case basis. One commenter stated that each project should be independently evaluated with proper safeguards in place to include meaningful bonds that would be sufficient to cover remediation costs when companies declare bankruptcy.

A careful case-specific determination that a project will result in no more than minimal impacts is necessary for a project to be authorized by this NWP.

The pre-construction notification process for NWP 21, which requires the applicant to wait until he or she receives verification from the Corps, provides this case-specific determination. If the District Engineer determines that a particular proposal will result in more than minimal adverse environmental effects, he will assert discretionary authority and require an individual permit. Bonding is covered under general condition 20. The Corps notes that the SMCRA permitting process provides for public notice and comment on all coal mining permits.

#### *Minimal Adverse Effects*

A few commenters stated that the Secretary of the Army can only issue NWPs by making an up-front determination that the activities authorized by each NWP category will cause only minimal adverse effects and the Corps cannot ignore harm already done when assessing cumulative impacts. The commenters stated that the Corps has no reasoned basis or substantial evidence to support its determinations that the individual or cumulative environmental impacts associated with NWP 21 will be minimal. Several commenters similarly stated that compensatory mitigation could not be used to reduce the net adverse impacts to the minimal level in order to qualify for general permits. Therefore, NWP 21 exceeds the definition of minimal adverse environmental effects and all coal mining should be reviewed under the individual permit process. A number of commenters stated that surface coal mining results in significant ecological damage to headwater stream systems, when considered both individually and cumulatively, and it cannot be reasonably assumed that those stream losses can be mitigated into insignificance.

We believe our process for NWP 21 ensures that activities authorized by the NWP result in no more than minimal adverse impacts to the aquatic environment because each project is reviewed on a case-by-case basis and the district engineer either makes a minimal impacts determination on the project or asserts discretionary authority and requires an individual permit. Additionally, as noted above, division engineers can add regional conditions to any NWP to further restrict the use of the NWP to ensure that the NWP authorizes only activities with no more than minimal adverse effects on the aquatic environment in a particular watershed or other geographic region. Each district tracks losses of waters of the United States authorized by

Department of the Army permits, including NWPs, as well as compensatory mitigation achieved through aquatic resource restoration, creation, and enhancement.

In addition, we believe that the Corps can rely on mitigation in making a minimal adverse environmental effects determination.

One commenter requested that the Corps clarify what constitutes a “single and complete surface coal mining operation” since approved mines can expand through either the addition of substantial acreages or the addition of small acreages (incidental boundary revisions). This commenter asked whether all revisions, including incidental boundary revisions, are considered as single and complete coal mining operations.

District engineers use the criteria in the definition of “single and complete project,” which is found in the “Definitions” section of the NWPs, when identifying single and complete coal mining operations. District engineers will determine, on a case-by-case basis, whether the expansion of an existing mine constitutes a separate single and complete project.

#### *Impacts From NWP 21 Activities*

Many commenters opposed the reissuance of NWP 21 because of the potential impacts to the aquatic environment and water resources. Several commenters expressed concerns about impacts to water supplies and drinking water, downstream water uses, and recreational opportunities such as fishing. Concerns were also expressed about water pollution, the effects of burying streams that support aquifers, and loss of streams and wetlands. This NWP requires compliance with all of the general conditions for the NWPs, which address many of these concerns. Additionally, many of these factors will be evaluated during the project-specific evaluation.

One commenter noted that NWP 21 does not provide the public an opportunity to comment on the specific conditions of a permit that will affect their communities and watersheds.

Section 404(e) of the Clean Water Act provides the statutory authority for the issuance of general permits on a nationwide basis for any category of activities. The Corps establishes NWPs in accordance with section 404(e), by publishing and requesting comments on the proposed permits. The general public has the opportunity to comment on NWPs at this time. In order to address the requirements of the National Environmental Policy Act, the Corps prepares a decision document for each

NWP along with a 404(b)(1) Guidelines analysis. The decision document discusses the anticipated impacts on the Corps' public interest factors from a national perspective. NWPs are issued at the conclusion of this process. The individual projects that are proposed for authorization under an NWP are not given a permit but a verification or authorization that the project complies with an NWP. There are no requirements for public comments on specific projects authorized under NWPs. However, in the case of NWP 21, all projects must have undergone a separate SMCRA review process the provides for public notice and comment.

Several commenters recommended that NWP 21 be eliminated because it fails to require that the applicant demonstrate that there are no practicable alternatives to placing fill in waters of the United States, a requirement of Section 404(e) of the Clean Water Act. The commenters stated that the Corps wrongly assumes the SMCRA process to be comparable to Section 404 and the 404(b)(1) Guidelines. The commenters noted that, in fact, SMCRA does not require the applicant to choose the method of coal waste management that avoids and minimizes impacts and is least damaging to waters of the United States.

The Corps does not assume that other state or Federal agencies conduct a review that is comparable to the section 404(b)(1) Guidelines. Although analysis of offsite alternatives is not required in conjunction with general permits, each proposed project is evaluated for onsite avoidance and minimization, in accordance with general condition 20, and is not authorized under the NWP if the adverse impacts to waters of the United States are more than minimal.

Five commenters noted that coal slurry impoundments should not be allowed by an NWP and that NWPs can only be issued for activities that are similar in nature and that valley fills and coal slurry impoundments are not similar in nature.

The Corps has determined that slurry impoundments and valley fills are part of surface coal mining activities and are therefore similar in nature. The "similar in nature" requirement does not mean that activities authorized by an NWP must be identical to each other. We believe the "categories of activities that are similar in nature" requirement of Section 404(e) is to be interpreted broadly, for practical implementation of the NWP program.

The NWP is reissued as proposed.

NWP 22. *Removal of Vessels.* We proposed to rearrange the text of this

NWP so that it is in a format similar to the other NWPs. In addition, we proposed to require pre-construction notification if the activity requires discharges of dredged or fill material into special aquatic sites.

One commenter asked if the pre-construction notification requirement included marine protected areas. One commenter said that pre-construction notification should be required for all vessel removals because certain removal methodologies may result in additional environmental impacts. One commenter stated that pre-construction notification should be required for all vessel removals from special aquatic sites, not just those involving discharges of dredged or fill material.

Pre-construction notification is required for NWP 22 activities in designated critical resources waters and their adjacent wetlands (see general condition 19), which may include marine protected areas. Designated critical resource waters include NOAA-designated marine sanctuaries, Natural Estuarine Research Reserves, and other waters identified by the district engineer after the issuance of a public notice and an opportunity for public comment. We do not agree that pre-construction notification should be required for all activities authorized by this NWP. However, we are modifying this NWP to require pre-construction notification for activities in special aquatic sites, to ensure that those activities result in minimal adverse effects on the aquatic environment. Vessel removal activities in special aquatic sites, especially coral reefs and vegetated shallows, have the potential to result in more than minimal adverse effects, even though there may be no discharge of dredged or fill material. Vessel removal activities in other areas conducted in compliance with the NWP and the general conditions will normally have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. Further, division and district engineers will condition these activities as necessary to ensure that they will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively.

Another commenter observed that vehicles are often found in waters of the United States due to accidents, abandonment, and other reasons, and that the removal of the vehicles is necessary to minimize the adverse environmental impacts associated with release of automotive fluids. The commenter requested that this NWP be modified to allow for the expedited

removal of vehicles from waters of the United States.

We agree that the presence of vehicles, and the associated automotive fluids, in waters of the United States can be environmentally damaging, and this NWP can be used to authorize their removal when they constitute an obstruction to navigation. However, we believe that the pre-construction notification requirements for activities into special aquatic sites are necessary to ensure that the activities authorized by this NWP have no more than minimal adverse effects. Division and district engineers can evaluate projects on a case by basis in situations where pollutants may be leaking from vehicles and determine if expedited or emergency processing procedures are warranted.

A commenter requested that the Corps indicate when EPA and Corps permits are required or provide citations to EPA and Corps regulations. One commenter noted that the parenthetical identification of statutory authorities was not included at the end of the text for this NWP.

The "Note" to this NWP already includes a citation of applicable EPA regulations. We do not believe it is necessary to add citations to the Corps regulations for implementing Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. We are correcting this NWP to identify the statutory authorities under which this NWP is issued (i.e., sections 10 and 404).

Another commenter requested that the Corps clarify in the preamble to the final rule that this NWP also applies to the removal of objects and structures such as derelict mooring and breasting structures, piles, docks, bridges and trestles that are man made obstructions to navigation. They remarked that some districts apply this NWP only to the removal of vessels. One commenter requested clarification as to when a pre-construction notification is required with respect to general condition 18, Historic Properties. They asked if the permittee would have to wait to remove the vessel until after the district engineer has informed the permittee that compliance with general condition 18 is complete.

The text of the NWP clearly states that the NWP applies to the removal of man-made obstructions to navigation, which may include any of the obstructions identified by the commenter in addition to wrecked, abandoned, or disabled vessels. If the vessel is listed, or eligible for listing, in the National Register of Historic Places, then consultation under Section 106 of the National Historic

Preservation Act is required. The permittee would have to wait until the section 106 process has been completed before conducting the work.

The NWP is reissued with the modification discussed above.

NWP 23. *Approved Categorical Exclusions.* We proposed to modify this NWP by reorganizing the text, adding language to explain that Corps' Regulatory Guidance Letters (RGLs) list the approved Categorical Exclusion (CE) activities, and adding language that directs prospective permittees to the appropriate RGLs to determine if pre-construction notification is required.

One commenter supported the proposed rewording of NWP 23, and supported the clarification of pre-construction notification requirements. One commenter remarked that this NWP violates the intent of the National Environmental Policy Act (NEPA) by enabling developers to avoid addressing ecological impacts.

The process for approving categorical exclusions for use with this NWP, including any approved categorical exclusions that require pre-construction notification, helps ensure that this NWP authorizes only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment and the public interest. In addition, only the actions of government agencies qualify for this NWP.

Another commenter suggested requiring pre-construction notification for activities adversely affecting more than  $\frac{1}{10}$  acre of wetland, and recommended adding a  $\frac{1}{3}$ -acre limit to this NWP for wetland impacts. One commenter suggested that larger activities should be evaluated under individual permit procedures instead of using this NWP, and suggested that large highway projects impacting wetlands should not be authorized without the public involvement and the environmental safeguards of the 404(b)(1) Guidelines. One commenter suggested that all projects requiring stream channelization and any bridges spanning less than 1.5 times the bankfull width of a stream should be evaluated through the individual permit process.

The pre-construction notification thresholds established for the categorical exclusions approved for use with this NWP require case-by-case review for activities that have the potential to result in more than minimal adverse effects on the aquatic environment. For the same reasons, it is not necessary to impose an acreage limit on this NWP or require individual permits for large highway projects that

impact small amounts of waters of the United States and qualify for approved categorical exclusions. In response to a pre-construction notification, the district engineer can add special conditions to the NWP authorization to ensure that adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work.

Two commenters said that this NWP authorizes activities that are not similar in nature. One commenter suggested that categorizing impacts by the effects instead of by the nature of activity is invalid, and that there appeared to be no limiting principle on the nature of the activities that could be permitted.

Regulatory Guidance Letter 05-07 lists all categorical exclusions currently approved for use with this NWP as of the date of this notice. This RGL is available on the Internet at: [http://www.usace.army.mil/cw/cecwo/reg/rpls/rpl\\_05\\_07\\_v2.pdf](http://www.usace.army.mil/cw/cecwo/reg/rpls/rpl_05_07_v2.pdf). The lists of approved categorical exclusion activities referenced in RGL 05-07 represents impacts that are minor in nature, both individually and collectively. A limiting principle on the nature of activities exists because each government agency has inherent and mission-specific responsibilities and projects, and activities proposed by a specific agency within an approved categorical exclusion are similar in nature. The primary Federal action agency determines that the activities are categorically excluded from further environmental review. We believe that normally these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. However, division and district engineers can condition such activities where necessary to ensure there will be no more than minimal adverse effects on the aquatic environment, or exercise discretionary authority to require an individual permit for the work.

Two commenters asserted that the NWP fails to comply with a statutory requirement that the activities have minimal impacts individually and cumulatively. One of these commenters said that the Corps' estimate of 1,020 acres of impact to waters of the United States represents a significant impact.

We disagree with this assertion. Pre-construction notification is required for certain approved categorical exclusions that apply to activities that have the potential to result in more than minimal individual and cumulative adverse effects on the aquatic environment. In general, impacts authorized by this NWP are not significant because they

are individually minor, are widely distributed across a vast area, and are scattered across many watersheds. In addition, compensatory mitigation offsets the authorized losses, and helps ensure that the authorized activities result in minimal adverse effects on the aquatic environment.

One commenter objected to the lack of specificity regarding the method of solicitation of public comments if new categorically excluded activities are proposed.

When proposing to add categorical exclusions for use with this NWP, Corps Headquarters publishes a proposal in the "Notices" section of the **Federal Register**. Public comment will be solicited through this notice, and all comments received will be thoroughly considered when the Corps makes its determination regarding those proposed categorical exclusions.

One commenter asked that the "Note" at the end of this NWP be expanded to list all of the agencies or departments that have categorical exclusions approved for use under this NWP. One commenter believed that referencing RGLs in the NWP is not sufficient, and suggested that the list of approved activities and pre-construction notification requirements be wholly included within the text of the permit rather than referenced to a separate document. Another commenter stated that the pre-construction notification requirements are vague, and recommended stating the pre-construction notification requirements within the text of the NWP or listing the specific RGL to refer to for those pre-construction notification requirements.

We have modified the "Note" by adding a sentence listing the agencies with approved categorical exclusions. Listing the approved activities and pre-construction notification requirements in the text of the permit is impractical, because of the lengths of those lists. In addition, simply referencing the list of RGLs is more useful because additional RGLs may be issued if more categorical exclusions are approved for use with this NWP.

One commenter asked that the text of this NWP be amended to acknowledge that state transportation agencies can legally assume the responsibility for categorical exclusion determinations for the Federal Highway Administration (FHWA).

The current text of the NWP states that activities "undertaken, assisted, authorized, regulated, funded, or financed" in whole or in part by a Federal agency are eligible to be considered by the Corps for possible approval as a categorical exclusion. We

believe that the current text is sufficient and there is no need to restate or affirm the relationships between the FHWA and the state transportation agencies, which generally fall into one or more of these categories.

This NWP is reissued as proposed.

NWP 24. *Indian Tribe or State Administered Section 404 Programs*. We proposed to add Indian tribes to this NWP, since they can be approved by EPA to administer the section 404 program. No comments were received.

This NWP is reissued as proposed.

NWP 25. *Structural Discharges*. No changes to this NWP were proposed. One commenter stated that it is difficult to perform these types of activities without some minor related temporary construction activity. They suggest adding a statement that allows minor construction activities.

The construction of these structural members is usually accomplished by installing sheeting or pilings to construct forms, which are then filled with concrete, sand, rock, or other materials. The installation of the sheeting or pilings usually does not result in a discharge of fill material that would require section 404 authorization. However, in cases where temporary construction, access, and dewatering activities are necessary to complete the activities authorized by this NWP, those temporary activities may be authorized by NWP 33, a regional general permit, or an individual permit.

The NWP is reissued as proposed.

NWP 27. *Aquatic Habitat Restoration, Establishment, and Enhancement Activities*. We proposed to modify this NWP by requiring reporting to the district engineer for those activities that do not require pre-construction notification. We also proposed to add shellfish seeding to the list of examples of activities authorized by this NWP, and remove the restriction limiting the use of this NWP only to those mitigation banks that have been approved in accordance with the 1995 mitigation banking guidelines. In addition, we proposed to prohibit the use of the NWP to authorize the conversion of natural wetlands.

We have modified the first paragraph of this NWP to more clearly present the general categories of authorized activities.

One commenter supported the broadening of the title of this NWP to include all aquatic habitats. One commenter said that this NWP has the potential to authorize projects with significant adverse impacts. One commenter said that this NWP should be revoked, because it could result in

losses of wetland function and habitat and other adverse impacts to the aquatic environment. One commenter stated that there should be an acreage limit on this NWP. Two commenters said that wetland impacts should be limited to 2 acres, and another commenter stated that stream impacts should be limited to 2,000 linear feet. Another commenter stated that the lack of an acreage limit on this NWP does not encourage applicants to minimize adverse impacts. This commenter suggested a  $\frac{1}{2}$  acre limit for wetland fills and a 300 linear foot limit for stream impacts.

This NWP authorizes aquatic habitat restoration, establishment, and enhancement activities, provided those activities result in net increases in aquatic resource functions and services. Its use will not cause significant adverse effects on the overall aquatic environment. We do not believe there should be an acreage limit on this NWP, because of the requirement for these projects to result in net increases in aquatic resource functions and services. Moreover, all activities authorized under this NWP will be reviewed in advance by the Corps, either through the pre-construction notification requirement, or through the reporting requirement for projects conducted under authorities of other Federal agencies.

One commenter recommended prohibiting establishment of open water areas in existing wetlands and streams, and prohibiting the relocation of all aquatic resources. One commenter recommended removing the references to waterfowl impoundments because those impoundments may be considered enhancements by some people. This commenter said the establishment of impoundments in streams or natural wetlands should not be allowed for any reason. One commenter requested clarification whether this NWP authorizes green-tree reservoirs. One commenter suggested allowing dam removal activities to be authorized by this NWP. One commenter said that this NWP should authorize stream establishment, in cases where impaired or degraded streams can be relocated to provide net benefits to the aquatic environment and the overall watershed.

We have modified the text of this NWP, by removing the reference to establishing an impoundment for wildlife habitat. This NWP does not authorize green-tree reservoirs, because those activities generally degrade natural wetlands and would not result in a net increase in aquatic resource functions and services. Discharges of dredged or fill material into waters of the United States for the continued

operation of existing green-tree reservoirs may be authorized by NWP 30. New green-tree reservoirs may be authorized by individual permits or regional general permits. This NWP prohibits the conversion of streams or natural wetlands to other aquatic habitat types or uplands, except for the relocation of non-tidal waters on the project site. We have also simplified the language regarding the relocation of non-tidal waters, including non-tidal wetlands, on the project site. The requirement that such relocations provide net gains in aquatic resource functions and services has been retained. Dam removal activities can be authorized by this NWP, provided they meet the requirements for its use, including that there is a net increase in aquatic resource functions and services. We have modified the third paragraph of this NWP to state that this NWP can be used to authorize the relocation of non-tidal streams, provided there are net increases to aquatic resource functions and services.

One commenter stated that using this NWP to authorize the relocation of non-tidal waters, including non-tidal wetlands, on the project site as long as there are net gains in aquatic resource functions and services, appears to contradict the provision prohibiting the conversion of streams or natural wetlands to another aquatic use. This commenter indicated that there will be different interpretations of the relative value of certain aquatic resource functions and services. This commenter also said that temporal lags associated with replacing certain wetland types, such as forested wetlands, should be considered.

The relocation of non-tidal waters on a project site does not necessarily contradict the provision prohibiting the conversion of streams or natural wetlands to another aquatic habitat type, if comparable streams or wetlands are restored or established elsewhere on the project site. District engineers will determine compliance with these provisions on a case-by-case basis, in response to a pre-construction notification or a report. We recognize that relocating non-tidal waters may result in temporal losses of certain aquatic resource functions and services, while the relocated waters undergo ecosystem development. To comply with these provisions of this NWP, the net increases in aquatic resource functions and services does not need to occur immediately after the NWP 27 activity has been constructed. However, those net increases need to occur over time through ecosystem development processes as a result of a successful

aquatic habitat restoration, establishment, or enhancement activity.

Two commenters noted that conversion of streams or wetlands to other aquatic uses is prohibited but conversions of waters to uplands are not prohibited. Three commenters supported the proposed language prohibiting conversion of streams or natural wetlands to other aquatic uses. Another commenter supported the language prohibiting conversion of wetlands to other aquatic uses, but said that it may limit the usefulness of this NWP, as it will not be able to authorize large ecosystem restoration projects that involve conversions of wetlands to other aquatic types, even where there are net benefits for the aquatic environment.

We have modified this NWP to prohibit the conversion of streams or natural wetlands to uplands. This prohibition does not apply to projects involving the relocation of non-tidal waters on the project site, as long as those activities result in net increases in aquatic resource functions and services. Large ecosystem restoration projects that involve conversions of aquatic habitat to other aquatic uses are more appropriately authorized through either regional general permits or individual permits.

To prevent re-arrangement of wetlands within a single development tract, one commenter asked that this NWP prohibit the relocation of aquatic habitat types on parcels where a local planning document exists for the development. One commenter objected to prohibiting the conversion of natural wetlands to other aquatic uses on the grounds that NWPs are intended to allow any activities with minimal adverse effects. This commenter stated that some conversions enhance ecosystem functions.

This NWP can be used to authorize relocation of aquatic habitats on a project site, even those with development activities, provided there are net gains in aquatic resource functions and services. These activities can be beneficial in cases where the development activity could have indirect adverse effects on the functions of existing aquatic resources on the project site, and where relocating those aquatic resources would result in enhanced ecosystem functions. We have revised the text of this NWP to prohibit the conversion of natural wetlands to other uses, unless that conversion is part of relocating non-tidal waters on the project site. This NWP does not authorize stream channelization, which often involves extensive armoring and straightening of stream channels.

One commenter suggested allowing the use of NWP 27 for the restoration and enhancement of tidal streams and tidal open waters. Another commenter said that this NWP should authorize the relocation and/or conversion of any tidal waters, provided the proposed work would result in net increases in aquatic resource functions and services. One commenter stated that this NWP should not authorize the construction of impoundments or partial impoundments in tidal wetlands or estuarine waters.

This NWP does not authorize the restoration of tidal streams and tidal open waters, but may authorize the restoration of riparian areas next to such waters. The restoration of tidal streams and other tidal open waters that involve more than restoring riparian areas is more appropriately authorized by other Department of the Army permits, since those activities may result in more than minimal adverse effects on the aquatic environment. We do not believe it would be appropriate to modify this NWP to authorize those activities. We maintain our position that this NWP should not authorize the relocation or conversion of tidal waters. Those activities may be authorized by individual permits or regional general permits. This NWP does not authorize the conversion of tidal waters to other uses, such as impoundments or partial impoundments.

One commenter said that many activities proposed as restoration actually degrade habitat or result in a net loss of habitat, and stated that pre-construction notification should be required for all activities authorized by this NWP, to determine the beneficial effects and whether the activity is protective of tribal resources.

Pre-construction notification is required for activities authorized by this NWP, except for those activities conducted in accordance with binding agreements between certain Federal agencies or their designated state cooperating agencies, voluntary wetland activities documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards, or the reclamation of surface coal mining lands, in accordance with permits issued by the Office of Surface Mining or the applicable state agency. For those activities that do not require pre-construction notification, reporting to the district engineer is required. In the latter cases, the district engineer can review the documentation provided through reporting to ensure that the activity qualifies for NWP authorization. The reporting requirements provide

district engineers with the opportunity to review aquatic habitat restoration, establishment, and enhancement activities conducted under the purview of other government entities, to ensure that those activities result in net increases in aquatic resource functions and services. The pre-construction notification requirements, as well as the reporting requirements, will help ensure that this NWP authorizes only activities that comply with the terms and conditions of this NWP, including general condition 16, Tribal Rights.

One commenter stated that the reporting requirement for voluntary NRCS-related wetland projects would be burdensome, and suggested that requiring NRCS documentation could discourage voluntary wetland restoration activities. Another commenter said that there appears to be little difference between the reporting and pre-construction notification provisions, and suggested requiring pre-construction notifications for all NWP 27 activities. Two commenters supported the requirement that copies of restoration agreements be submitted. One commenter recommended requiring pre-construction notifications and interagency coordination for all projects using NWP 27, to ensure that development activities are not conducted as NWP 27 activities. A commenter objected to requiring the submittal of restoration agreements to fulfill the reporting requirement, citing privacy concerns. This commenter said that alternative types of information could be submitted instead to report proposed NWP 27 activities conducted under these agreements. One commenter stated that the Corps and other agencies should be required to approve wetland enhancement, restoration, or establishment agreements referenced in the reversion provisions of NWP 27.

The pre-construction notification requirements are sufficient to ensure proper implementation of NWP 27. We have clarified the language in the NWP to reduce confusion. To avoid duplicative efforts by the government, pre-construction notification is not required for activities conducted under agreements or arrangements with other state or Federal government agencies. Pre-construction notification is required for all other activities. The reporting requirement will provide a mechanism whereby the Corps can review proposed activities conducted under other agency programs, to ensure that they comply with the terms and conditions of this NWP. We are modifying the reporting requirement to allow the submittal of project descriptions and plans, in lieu of



binding agreements executed between agencies and landowners.

It would be inappropriate to require Corps approval of wetland enhancement, restoration, or establishment agreements executed and administered by other agencies. For those activities that require pre-construction notification and will result in the loss of greater than ½ acre of waters of the United States, agency coordination is required (see paragraph (d) of general condition 27).

One commenter suggested modifying the reversion, reporting, and notification provisions by referencing actions documented by “NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide Standards” instead of “NRCS regulations,” since many of these wetland restoration, enhancement, and establishment activities are performed by technical service providers, who must be certified by NRCS and comply with the Field Office Technical Guide standards. We concur with this recommendation, and have made appropriate changes to the text of this NWP.

One commenter said that replacing the word “values” with “services” demeans the functions provided by a healthy ecosystem, unless the term “functions” is specifically retained. Another commenter remarked that replacing the word “values” with “services” is inconsistent with the common industry vernacular. They suggest using the word “functions” instead of “services.”

We are retaining the term “functions” in the text of this NWP, and are replacing the word “values” with “services” because ecosystem services provide a more objective measure of the importance of aquatic resource functions to human populations. The terms “functions” and “services” are not equivalent, and therefore it would not be appropriate to replace the term “services” with “functions.” Services are the benefits that humans derive from the functions performed by wetlands and other aquatic resources. The term “services” is now being used in place of “values” in the ecological economics literature, because of the difficulty in assigning value to ecosystem services. As discussed in the September 26, 2006, **Federal Register** notice, values may relate to either monetary or non-monetary measures, but services can be described in physical terms that are easier to evaluate and address, where necessary, in NWP authorization letters and special permit conditions.

Two commenters supported allowing the use of NWP 27 to authorize the

construction of mitigation banks. One commenter requested clarification that this NWP could be used for wetland mitigation banks, and one commenter asked that the NWP apply to all mitigation banking projects, not just those with a signed mitigation banking agreement. Two commenters said that the construction of mitigation banks should not be authorized by NWP 27, but should be authorized by individual permits instead. One commenter stated that it would be acceptable to allow the use of NWP 27 for mitigation bank construction with a caveat that impacts associated with mitigation bank construction be deducted from any available credit the mitigation bank develops. One commenter requested that this NWP contain language stating that compensatory mitigation is required for activities authorized by NWP 27, but another commenter suggested that no compensatory mitigation should be required for impacts associated with construction of compensatory mitigation projects.

This NWP can be used to authorize aquatic resource restoration, establishment, and enhancement activities necessary for the construction of mitigation banks. It is not necessary for the mitigation bank proponent to obtain a signed mitigation banking instrument prior to conducting the NWP 27 activity, but the mitigation bank proponent needs to understand that activities conducted prior to approval of a banking instrument may or may not be approved in any final instrument. The Corps thus recommends that construction of mitigation banks not begin until a final instrument has been signed. Requiring compensatory mitigation for losses of waters of the United States as a result of NWP 27 is at the discretion of the district engineer. The crediting of a mitigation bank will be determined by the district engineer during the approval process for the mitigation banking instrument. Any adverse impacts to aquatic resources resulting from construction of the bank would certainly be considered in that determination.

Two commenters said that this NWP should require permittees to plant native species at the site. They said that the proposed language contains too much flexibility. One commenter said that NWP 27 should not authorize activities in waters inhabited by anadromous fish. One commenter stated that the U.S. Fish and Wildlife Service must concur with projects in which machinery must work in waters where endangered or threatened species are present. One commenter indicated that this NWP should authorize work in

flowing waters where the activity will result in long-term stability and habitat benefits.

It would be inappropriate to require permittees to plant only native species at the project site. Native plant materials may not be available for all of these projects, and it is difficult to define precisely what constitutes a “native” species. The activities authorized by this NWP are required to result in net increases in aquatic resource functions and services, which should benefit anadromous fish species. However, district engineers will review pre-construction notifications and other reported activities to determine if the proposed aquatic habitat restoration, establishment, or enhancement activity would have more than minimal adverse effects on anadromous fish species, or require consultation under Section 7 of the Endangered Species Act. In addition, division and district engineers can develop regional conditions or case-specific conditions to ensure that potential impacts to anadromous fish are minimal, or exercise discretionary authority to require an individual permit for the work if impacts are expected to be more than minimal. Compliance with the other general conditions for the NWPs, including general condition 9, Management of Water Flows, is required, though general condition 9 specifically allows activities that alter the pre-construction course, condition, capacity, and location of open waters if they benefit the aquatic environment.

One commenter requested clarification of what constitutes a “small” nesting island, and requested that the NWP state that approved water quality standards cannot be violated during construction of small nesting islands. Another commenter said that pre-construction notification should be required for the construction of small nesting islands in special aquatic sites. One commenter asked for a definition of the term “enhancement activities.” One commenter suggested requiring monitoring of stream restoration projects, with mandatory corrective actions for projects that are not successful.

The district engineer has the discretion to determine what a “small nesting island” is for the purposes of this NWP. Either pre-construction notification or reporting is required for all activities authorized by this NWP, which will provide district engineers with opportunities to review all proposed activities, including the construction of small nesting islands, to determine those activities comply with the terms and conditions of the NWP.

The term "enhancement" is defined in the "Definitions" section of the NWP. District engineers have the authority to require additional monitoring or corrective measures on a case-specific basis. We believe it is unnecessary to restate those authorities in the text of this NWP.

One commenter said that this NWP should prohibit the widening or straightening of stream channels, the removal of gravel bars, the destruction of woody vegetation, and the in-stream use of bulldozing or heavy equipment. Another commenter stated that NWP 27 should require the use of natural stream channel design for in-stream work. Two commenters suggested that this NWP should not authorize the use of riprap or other armoring. One commenter suggested limiting the use of this NWP to restoration of a stream to its historic non-degraded condition to prevent the use of this NWP for construction of flood control projects.

This NWP does not authorize stream channelization activities. It may be necessary to temporarily impact gravel bars or vegetation during the construction of stream restoration and enhancement activities. After the construction of the stream restoration or enhancement project, the stream channel should move water and sediment in a manner that will result in a channel morphology that provides habitat for a diverse community of species. That restored or enhanced habitat will include gravel bars, if the bed load carried by the stream includes a sufficient proportion of gravel. In addition riparian vegetation will normally be planted or allowed to grow back to replace the impacted riparian vegetation after construction activities have been completed. In-stream use of heavy equipment is not prohibited, because such equipment is usually necessary to conduct stream restoration and enhancement activities. In response to a pre-construction notification, or the review of the other Federal agency agreement, the district engineer will determine whether the proposed activity complies with the terms and conditions of the NWP, including the requirement for the activity to result in net increases in aquatic resource functions and services. It would be inappropriate to require, in the text of this NWP, specific design or construction methods, or prohibit the use of riprap or other armoring. Armoring using riprap or other materials can be a necessary component of beneficial aquatic habitat restoration, establishment, and enhancement projects.

We believe that limiting the use of this NWP for the sole purpose of restoring streams to historic conditions would be overly restrictive, and would effectively prohibit its use for other beneficial restoration activities. Further, the pre-construction notification and reporting requirements for this NWP will help ensure that activities conducted under this NWP comply with the purposes and intent of the NWP, as well as its terms and condition.

Two commenters said that the prohibition against stream channelization conflicts with general condition 9, Management of Water Flows, which allows stream restoration and relocation for some NWP activities. One commenter suggested that the Corps remove the channelization restriction from NWP 27 and expand the definition of "stream channelization" to authorize activities beneficial to the aquatic environment.

As noted above, general condition 9 allows the use of any NWP for projects that alter the pre-construction course, condition, capacity, and location of open waters if they benefit the aquatic environment. The removal of the stream channelization prohibition from NWP 27 could inadvertently allow projects to proceed under this NWP that have more than minimal adverse impacts on the aquatic environment. We also believe that it is unnecessary to modify the definition of stream channelization as suggested because the definition provides an accurate and concise description of what constitutes stream channelization.

One commenter recommended limiting the use of NWP 27 to projects conducted by or sponsored by state or federal agencies. One commenter recommended removing the reference to prior converted croplands.

We disagree that use of this NWP should be limited to activities conducted or sponsored by state or federal agencies, however, projects not conducted pursuant to authorities of other agencies do require a pre-construction notification. The reference to prior converted croplands in the reversion provision is necessary, since prior converted croplands are not considered to be waters of the United States (see 33 CFR 328.3(a)(8)).

One commenter suggested including a definition for shellfish seeding in the NWP. One commenter questioned whether the Corps has regulatory jurisdiction over shellfish aquaculture and restoration activities. Another commenter requested clarification whether pre-construction notification is required for shellfish seeding authorized by this NWP. One commenter

recommended removing the pre-construction notification requirement for shellfish activities that have the approval of other government agencies with resource management responsibilities. Two commenters said that state natural resource agencies should be exempted from the pre-construction notification requirements if the shellfish seeding activity is done over an unvegetated bottom, since those activities are already addressed by other state and Federal permit processes. Two other commenters expressed concern that the proposed changes to the NWP would adversely affect community-based shellfish restoration efforts, including locally-based oyster restoration programs. They said that the pre-construction notification requirements, or requiring any permit for shellfish restoration, would be overly burdensome and would adversely affect community-based programs that are already operating with volunteer staffs, minimal budgets, and limited resources.

We are providing a definition of "shellfish seeding" in the "Definitions" section of the NWPs. This definition was derived from the definition provided in the preamble discussion for proposed NWP D, Commercial Shellfish Aquaculture Activities (see 71 FR 56275). Shellfish aquaculture and restoration activities require Department of the Army authorization, if they involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States. On-going commercial shellfish aquaculture activities may be authorized by NWP 48 and shellfish restoration activities may be authorized by NWP 27. New commercial shellfish aquaculture activities may be authorized by regional general permits or individual permits. The pre-construction notification requirement is necessary for shellfish habitat restoration activities, except those conducted under one of the other listed authorities, to ensure that those projects comply with the terms and conditions of this NWP and do not cause more than minimal adverse effects. However, the Corps does not believe that the PCN requirement is overly burdensome and it should not limit the ability of community-based programs to conduct such activities.

One commenter opposed modifying this NWP to authorize shellfish restoration activities because they believe that these projects can have more than minimal impact on benthic habitat. One commenter said that shellfish seeding should not be authorized by this NWP. Another

commenter suggested that fill placement for shellfish seeding or shellfish bed preparation activities should not qualify for any NWP and should only be evaluated under individual permit processes. Several commenters recommended that shellfish seeding should be authorized by this NWP. A number of commenters stated that shellfish seeding can be used to protect or restore valuable aquatic habitats since construction of oyster reefs has been used to attenuate wave energy as part of coastal restoration strategies.

The restoration of oyster habitat, as well as the habitat of other shellfish species, usually provides substantial benefits to the overall aquatic environment. Shellfish help improve water quality and other habitat characteristics of estuarine and marine waters. Shellfish seeding is often a necessary component of restoration activities, when the objective is to increase populations of shellfish. District engineers will review pre-construction notifications or agreements with other agencies to ensure that these activities result in minimal individual and cumulative effects on the aquatic environment and other public interest factors. In response to a pre-construction notification, the district engineer can add special conditions to the NWP authorization or exercise discretionary authority and require an individual permit.

One commenter remarked that shellfish seeding practices could be considered an aquaculture activity, and said that the requirements of NWP 27 could be a significant barrier to aquaculture development. Another commenter indicated that projects solely associated with shellfish restoration could be authorized by NWP 27, but suggested that it would be more appropriate to authorize such activities under the proposed NWP for commercial shellfish aquaculture activities. One commenter expressed concern that NWP 27 may overlap with NWP 48. One commenter stated that some oyster restoration and enhancement is done by commercial shellfishing operations that harvest only wild oysters. In some cases, shellfish husbandry or restoration is required by other regulatory agencies, and the commenter stated that neither NWP 27 nor NWP 48 allow this activity. One commenter asked if each oyster bed restoration would require a separate permit, or could an entity apply for a single permit to cover all of their shellfish restoration projects. They recommended establishing a single permit that any state natural resource agency could use at any time to

eliminate the need for those agencies to obtain separate permits for numerous individual projects.

This NWP does not authorize commercial aquaculture activities. It authorizes shellfish habitat restoration activities, including shellfish seeding, that are conducted to restore populations of shellfish in navigable waters of the United States. Although these restored shellfish populations may be harvested at a later time by licensed fisherman, the objective of the activities authorized by this NWP must be to restore populations of shellfish in navigable waters of the United States. This NWP does not authorize structures or work, such as nets and anchors, that are used to reduce or eliminate predation of shellfish growing in these restored habitats. On-going commercial aquaculture activities may be authorized by NWP 48, regional general permits, or individual permits. New commercial aquaculture activities may be authorized by regional general permits or individual permits. This NWP authorizes single and complete shellfish habitat restoration activities. Regional general permits or individual permits may be issued by district engineers to authorize shellfish restoration programs.

This NWP is reissued, with the modifications discussed above.

**NWP 28. *Modifications of Existing Marinas.*** No changes were proposed for this NWP. One commenter said that modifications in special aquatic sites, such as vegetated shallows or coral reefs, should require pre-construction notification. This commenter also requested clarification whether this NWP authorizes pile driving, and recommended requiring pre-construction notification for such activities.

This NWP authorizes the installation of piles for the reconfiguration of marinas. The reconfiguration of existing marinas generally results in minimal individual and cumulative adverse effects, since these activities are limited to areas currently used for marinas. Therefore, it is unnecessary to require pre-construction notification for these activities. However, division engineers can regionally condition this NWP to require pre-construction notification for activities in certain areas.

This NWP is reissued as proposed.

**NWP 29. *Residential Developments.*** We proposed to modify this NWP by incorporating the residential development provisions of NWP 39, so that there would be one NWP to authorize single unit and multiple unit residential developments, including residential subdivisions. We also proposed to reduce the scope of

applicable waters for this NWP, by prohibiting its use to authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters. In addition, we proposed to require pre-construction notification for all activities.

One commenter requested that a definition of "residential property" be provided. This commenter also said that this NWP should include a provision prohibiting its use with NWP 39 to authorize mixed use developments. Two commenters objected to including multiple-unit residential developments in NWP 29 because they felt it is inconsistent with the original intent of NWP 29. Several commenters stated that including multiple-unit residential development would lead to problems with water quality certifications or local government decisions. Two commenters said that single-family and multi-unit developments are not similar in nature while another questioned the need and the rational for the proposed change.

This NWP utilizes the commonly accepted definition of what constitutes a residential property. We do not agree that there should be a prohibition against combining NWPs 29 and 39 to authorize mixed use developments, because the terms and conditions of those NWPs, including the pre-construction notification requirements and general condition 24, Use of Multiple Nationwide Permits, will help ensure that those activities will result in minimal individual and cumulative adverse effects on the aquatic environment and other public interest review factors. As discussed in the preamble of the September 26, 2006, **Federal Register** notice, the proposed changes effectively eliminate the previous NWP 29. Previously, single family residential projects could choose between NWPs 29 and 39. NWP 39 had a higher acreage limit, but NWP 29 could allow activities in wetlands adjacent to tidal waters. We have determined that that all residential projects using an NWP, whether single-family or multi-family, should face the same set of requirements. In particular, we have determined that residential projects in wetlands adjacent to tidal waters should not be authorized through an NWP, so we are combining all residential development activities in NWP 29 and eliminating its use in wetlands adjacent to tidal waters. We believe the 1/2 acre limit previously included in NWP 39 will ensure that projects undertaken only in non-tidal waters and their adjacent wetlands will not have more than minimal adverse effects. Limits for multi-family residential projects have not changed,

these activities have merely been shifted into NWP 29. States concerned with multiple unit residential developments may add stipulations to their water quality certifications that differentiate between single-family and multi-unit developments. Local governments can address their concerns over residential development through their planning and zoning processes. Also, the Corps is expanding the pre-construction notification requirement to include all projects authorized under this NWP, to enhance our ability to identify projects that may have more than minimal adverse effects.

One commenter suggested we add "single-unit residential subdivision" to the list of authorized activities in the first sentence.

We have added the phrase "residential subdivision" to the list of activities authorized by this NWP. This NWP authorizes residential subdivisions with multiple single-family units or multiple-family units.

Several commenters objected to raising the acreage limit from  $\frac{1}{4}$  acre to  $\frac{1}{2}$  acre. One commenter said that the  $\frac{1}{2}$  acre limit will result in substantial cumulative losses of waters of the United States. Two comments recommended acreage limits of one or two acres. One commenter asked why the  $\frac{1}{2}$  acre limit is not for associated multi-unit developments when it is expressed as the limit for single-family residences.

As noted above, the effective acreage limit for residential projects has not been raised. We have simply removed the option of using an NWP with a  $\frac{1}{4}$  acre threshold to authorize single-family projects in wetlands adjacent to tidal waters. Through the review of pre-construction notifications, district engineers will monitor the use of this NWP so that more than minimal cumulative adverse effects do not occur. We disagree that increasing the acreage limit to one to two acres would result in activities that have minimal impacts on the aquatic environment. The  $\frac{1}{2}$  acre limit applies to any type of residential subdivision (single-family, multi-family, or a combination of both), as it did previously when these projects were authorized by NWP 39.

Some commenters objected to requiring pre-construction notification for all activities, and suggested changing the pre-construction notification threshold to  $\frac{1}{10}$  acre. Three commenters proposed a  $\frac{1}{10}$  acre pre-construction notification threshold for single-family developments. Three commenters supported the proposed pre-construction notification threshold. One commenter suggested establishing a

graduated pre-construction notification threshold based on the size of the overall development.

We are retaining the requirement for pre-construction notification for all activities authorized by this NWP. Although this will result in an increase in the number of pre-construction notifications submitted to district engineers, we do not believe that it will be a substantial increase, since many permittees proposing to construct residential developments in the past have submitted verification requests for NWP 39 authorization even when not required to do so. The NWP 29 issued in 2002 require pre-construction notification for all proposed single family homes. The pre-construction notification threshold will also help ensure compliance with general condition 17, Endangered Species, and general condition 18, Historic Properties. A graduated pre-construction notification requirement would be unnecessarily complex and would not provide as much assurance that only activities with no more than minimal adverse effects are authorized.

Many commenters discussed the 300 linear foot limit for stream bed impacts. Those comments are discussed in a separate section of the preamble. We are retaining the 300 linear foot limit for stream bed impacts, as well as the ability for district engineers to provide written waivers of the 300 linear foot limit for losses of intermittent and ephemeral stream beds.

Several commenters said that this NWP should retain the requirement to maintain sufficient buffers adjacent to all open water bodies, such as streams. Some commenters stated that a minimum buffer width should be required. One commenter supported the removal of the buffer requirement and addressing the need for riparian areas through general condition 20, Mitigation.

The establishment and maintenance of riparian areas next to streams and other open waters will be required by district engineers as compensatory mitigation where necessary to ensure that the authorized work results in minimal individual and cumulative adverse effects on the aquatic environment. Although the NWP 29 issued in 2002 contained a requirement to establish sufficient vegetated buffers, the counterpart language in the 2002 NWP 39 reflected the use of vegetated buffers as components of the compensatory mitigation plan for the NWP 39 activity, if there were streams or other open waters on the project site. District engineers will make determinations regarding the

appropriateness and practicability of requiring riparian areas, as well as their width, in the implementation of general condition 20, Mitigation.

Three commenters said that residential developments are not water dependent activities, and therefore, under the Section 404(b)(1) Guidelines, an NWP should not be issued unless all practicable alternatives have been considered. Some commenters objected to authorizing attendant features by NWP 29, because they may not be water dependent or there may be secondary impacts associated with the development.

An activity that is not water dependent may still be authorized by NWP as long as an appropriate Section 404(b)(1) Guidelines analysis is conducted when the NWP is issued. The decision documents for all NWPs, including this NWP, that authorize discharges under Section 404 of the Clean Water Act include a Section 404(b)(1) Guidelines analysis.

Two commenters objected to including septic fields as attendant features and three commenters objected to including sports fields and golf courses as attendant features. One commenter requested a definition of the term "integral part" to reduce the potential for authorizing golf courses that are not directly associated with the residential development. One commenter objected to the use of the NWP for large subdivisions, because of potential impacts due to sprawl, traffic, and degradation of water quality.

Septic fields are often necessary attendant features for residences, and should be authorized where part of a single and complete project. Sports fields and golf courses may also be integral attendant features of residential developments. District engineers will determine, in response to pre-construction notifications, whether golf courses are integral parts of the residential development. Impacts of large subdivisions will be considered during the pre-construction notification review process. If such projects would have more than minimal adverse effects, these will be addressed through project-specific special conditions or by requiring an individual permit.

One commenter requested that we define "subdivision" as an "area that involves all residences that share the attendant features." One commenter urged that phased developments be prohibited since they can result in impacts to waters that otherwise can be avoided with comprehensive planning and permitting.

Defining the term "subdivision" is unnecessary as there is little confusion

surrounding the term. Phased developments can be authorized by the NWP, provided that each phase is a single and complete project and has independent utility. When reviewing pre-construction notifications, district engineers will take into account individual and cumulative impacts of phased developments. We strongly support comprehensive planning efforts undertaken by local governments as a means of reducing impacts to the aquatic environment. Where the cumulative effects of phased projects would be more than minimal, these will be addressed through project-specific special conditions or by requiring an individual permit.

Four commenters requested that the NWP authorize projects in non-tidal wetlands adjacent to tidal waters, while two comments supported the proposal to prohibit the use of the NWP in those areas. One commenter requested a definition of the term "adjacent." Two commenters objected to removal of language concerning minimization of on-site and off-site impacts, such as avoiding flooding of adjacent lands.

Limiting the use of this NWP to non-tidal waters of the United States, and prohibiting its use in non-tidal wetlands adjacent to tidal waters is necessary to ensure that this NWP authorizes only those activities with minimal individual and cumulative adverse effects on the aquatic environment. Development along coastal waters is a growing concern with significant potential to cause more than minimal adverse effects, particularly cumulatively. Such projects can be authorized by an individual permit following appropriate environmental review. The term "adjacency" is defined at 33 CFR 328.3(c). For the NWPs, including NWP 29, requirements to avoid and minimize impacts to waters of the United States are addressed through general condition 20, Mitigation.

District engineers will review pre-construction notifications to ensure that all practicable on-site avoidance and minimization has been accomplished. In response to a pre-construction notification, the district engineer may require compensatory mitigation to ensure that the authorized activity results in minimal adverse environmental effects (see 33 CFR 330.1(e)(3)).

One commenter said that NWP 29 should not be issued because it results in more than minimal adverse impacts particularly when salmonids are present. One commenter stated that this NWP should not authorize impoundments. One commenter said that there should be an exemption for

residential developments in coastal areas in the eastern United States.

Potential impacts to salmon species are more appropriately addressed through regional conditions. Division engineers may regionally condition this NWP to restrict or prohibit its use in waters inhabited by salmonids. Impoundments may be authorized as attendant features, after reviewing the pre-construction notification. Section 404 permits are required for discharges of dredged or fill material into waters of the United States to construct residential developments. Such activities do not qualify for exemptions under Section 404(f)(1) of the Clean Water Act.

This NWP is reissued with the modifications discussed above.

NWP 30. *Moist Soil Management for Wildlife*. We proposed to modify this NWP to allow any landowner to use this NWP to authorize discharges of dredged or fill material into non-tidal waters of the United States for the purpose of managing wildlife habitat and feeding areas.

Some commenters supported the proposed changes to this NWP, since it will facilitate the production of large amounts of wetland/wildlife habitat and conserve the Nation's native wildlife populations. However, other commenters expressed concern about the use of this NWP by private landowners, because they may be creating impoundments to increase wildlife habitat. One commenter recommended requiring interagency coordination to provide guidance to landowners and to help ensure land cover types are not detrimentally converted to other land cover types. One commenter said that expanding the NWP to apply to all landowners would result in more than minimal cumulative adverse effects.

We believe that it is appropriate to expand the use of this NWP to private landowners that have an interest in attracting and supporting various species of wildlife on their land. This NWP does not authorize the construction of impoundments, because it does not authorize new roads, dikes, and water control structures. We believe that it is not necessary to require interagency coordination for these activities because only activities that do not result in a net loss of aquatic resource functions and services are authorized. The terms and conditions and the ability of division engineers to impose regional and case-specific conditions on this NWP, will ensure that the activities authorized by this NWP will result in no more than minimal individual and cumulative

adverse effects on the aquatic environment.

One commenter recommended imposing a 1/2 acre limit on activities conducted by private landowners. One commenter recommended adding pre-construction notification requirements to this NWP, so that district engineers can review proposed activities to ensure that they comply with the terms and conditions of the NWP. One commenter indicated that this NWP should authorize moist soil management activities for native vegetation that are not necessarily for wildlife use.

Since this NWP authorizes only on-going wildlife management activities involving moist soil management, we do not believe it is necessary to impose an acreage limit or require pre-construction notification for these activities. Division engineers can regionally condition this NWP to require pre-construction notification, if there are concerns for the aquatic environment or other public interest review factors that may need to be addressed through case-specific review of these activities. Moist soil management activities conducted primarily for growing native plants may be authorized by other NWPs, regional general permits, or individual permits. Restoration of wetland meadows, forested wetlands, and other native plant communities may also be authorized by NWP 27.

One commenter suggested changing the title of this NWP to "Maintenance of Existing Moist Soil Management Areas for Wildlife." One commenter recommended modifying the "Note" at the end of this NWP to acknowledge that maintenance may be exempt under Section 404(f) of the Clean Water Act.

We do not agree that it is necessary to change the title of this NWP, because the text of the NWP clearly states that it authorizes only soil management for on-going, site-specific, wildlife management activities. We have modified the "Note" to include a statement concerning the section 404(f) exemption.

This NWP is reissued with the modification discussed above.

NWP 31. *Maintenance of Existing Flood Control Facilities*. We proposed to remove the last sentence of the first paragraph of this NWP. In addition, we proposed to add levees to the list of features that can be maintained through the authorization provided by this NWP.

A few commenters stated support for the addition of levees to the list of features that can be maintained with authorization under this NWP. In addition, one commenter recommended that the Corps exempt or develop a streamlined NWP for federally

constructed or funded levees where maintenance responsibilities for those levees have reverted to a local agency.

We believe that the NWP program is already a streamlined permit process and discharges associated with federally constructed and funded flood control projects which have reverted to a local agency should still be subject to the requirements of this NWP, including the establishment of a maintenance baseline. At this time, we believe it is necessary to conduct a site specific verification through the pre-construction notification process to ensure that the adverse effects of the project are no more than minimal. The Corps has no authority to exempt discharges of dredged or fill material that occur in conjunction with the maintenance of the facility, or to waive any requirement for necessary mitigation. The inclusion of levees in this NWP does not preclude maintenance of levees that is allowed under other NWP authorizations, such as NWP 3.

One commenter stated that, as flood control projects constructed by the Corps and transferred to a non-federal sponsor have a Corps-developed Operations and Maintenance (O&M) manual, and the sponsor is obligated to perform maintenance according to the O&M manual, the project's as-built drawings and O&M manual should constitute the maintenance baseline. Therefore, no maintenance baseline submittal should be required.

The intent of this NWP is to require the submittal of a maintenance baseline for all projects requesting authorization by this NWP. A non-federal sponsor can submit the as-built drawings and O&M manual from a federally-constructed or funded flood control project. In any case the maintenance baseline must be approved by the district engineer.

Another commenter suggested that the requirement to submit best management practices (BMPs) with the maintenance baseline documentation be eliminated, as BMPs are addressed by several general conditions. This commenter also requested that we clarify the important exception that applies to this NWP in regard to the general condition 27 requirement that the district engineer must approve any compensatory mitigation proposal before the permittee commences work. The Corps disagrees that the requirement to submit BMPs is adequately addressed by general conditions. We believe that inclusion of the BMPs in the documentation is necessary so that the Corps can ensure that the impacts associated with the activity will be no more than minimal.

In addition, the inclusion of certain BMPs may reduce the impacts to the aquatic environment and, as a result, the required one-time mitigation associated with establishing the baseline. The BMPs submitted with the maintenance baseline documentation do not preclude the Corps from requiring additional BMPs that might be necessary to ensure that the maintenance activity results in minimal adverse effects on the aquatic environment. Regarding mitigation approval, we believe the proposed text of this NWP clearly states that for this NWP, the district engineer will not delay necessary maintenance so long as the district engineer and permittee establish a schedule for identification, approval, development, construction and completion of any such required mitigation. It also states that work can begin before approval of the maintenance baseline in emergency situations.

Two commenters opposed adding levees to the list of features that can be maintained through authorization by this NWP. One of these commenters believed that the change constitutes more than a wording change, because levees are large scale structures with impacts that require a thorough assessment. The other commenter stated that levees disrupt natural processes important to floodplains and habitat. They also noted that the presence of levees on a stream does not transform the stream into a flood control facility.

While we agree that the construction of levees may require a thorough assessment of impacts on the watershed, the maintenance of existing levees is an activity that is appropriate for inclusion in this NWP since levees are often integral parts of flood control facilities. This NWP does not authorize the construction of levees. We believe that the limitations and general conditions associated with the NWP will ensure that authorized projects will have no more than minimal adverse effects. The requirement for an approved baseline and the ability to require mitigation provides a safeguard for valuable habitat. The Corps agrees that levees do not make a stream a flood control facility. However, levees are a flood control facility and this NWP should allow maintenance of the levees. In order for flood control activities to occur in the stream, they would have to be included in the maintenance baseline, as described in the text of the NWP.

One commenter observed that the text of this NWP uses the phrase "significantly reduced capacity" when discussing abandonment. They stated that Regulatory Guidance Letter 87-2 discusses the ramification of using the

word "significant" in Corps documentation and suggested that it be changed. Another commenter said that this NWP should not authorize actions that need to be taken because of neglect.

We believe that the use of the word "significantly" in this NWP is not contrary to the Regulatory Guidance Letter because it describes a level of reduction in flood capacity and does not relate to any determination of environmental impacts. If a flood control facility can be considered abandoned because of neglect, then the NWP would not authorize the work needed to reconstruct that facility.

Another commenter requested that the fill associated with beaver dam control and maintenance be added to the list of features authorized by this NWP. While the Corps agrees that the maintenance of beaver dam control and maintenance structures may be authorized by this NWP, this NWP does not authorize fills associated with the construction of new structures.

Two commenters opposed removing the last sentence in the first paragraph of this NWP (regarding types of maintenance activities that do not require section 404 permits) because they believe that the language clarified that vegetation maintenance does not require a section 404 permit. The Corps believes that this sentence is unnecessary, since Section 404 permits are only required for discharges of dredged or fill material, and, per the regulations at 33 CFR 323.2(d)(3)(ii), vegetation removal above the ground, that does not disturb the root system or include redeposition of excavated soil material, is not a discharge of dredged or fill material.

One commenter stated that many existing flood control facilities may not have met the criterion (i.e., it was previously permitted by the Corps, it did not require a permit at the time it was constructed, or it was constructed by the Corps and transferred to a non-federal sponsor), or the permittee cannot provide documentation that the criterion was met. Another commenter requested that this NWP authorize the maintenance of projects that were built by others but accepted as part of a federal flood control project or those that are authorized under state or local flood control laws. Both commenters requested that the Corps modify or eliminate the criterion listed in the first sentence of this paragraph and authorize maintenance of any flood control facility after approving the maintenance baseline and reviewing the activity through the pre-construction notification process. In addition, one commenter stated that the Corps should

not consider a flood control facility to be abandoned because vegetation has become established in the facility. That commenter also said that the NWP should compel agencies to perform maintenance more frequently by requiring mitigation for temporal losses in vegetation or habitat. Another commenter stated that agencies should be encouraged to reduce the frequency of maintenance where feasible by approving maintenance baselines that allow for less frequent maintenance. One commenter said that this NWP should also authorize temporary stockpiling as authorized by NWP 12.

The criteria in the first sentence of this NWP cover all properly authorized flood control facilities. Unless a flood control facility was constructed as a result of a Corps Civil Works project, it would have required a Corps permit unless it was constructed in a manner that did not require Corps authorization or it was exempt from permit requirements. If it should have had Corps authorization but did not, we do not think it is appropriate to authorize maintenance under this NWP. The Corps will not generally require documentation of compliance with these criteria, unless there is reason to believe that these criteria are not met.

We believe that the current text accurately describes how a site should be determined to be abandoned. The presence of vegetation does not necessarily indicate that a flood control facility has been abandoned. However, a site may be determined to be abandoned when vegetation has substantially diminished the capacity of the channel. We do not believe it is necessary to require permittees to conduct maintenance more frequently, to prevent the establishment of vegetation within the flood control facility. The one-time mitigation requirement is sufficient to offset the losses of aquatic resource functions and services that will occur as a result of keeping the facility within the maintenance baseline. Maintenance-related discharges that do not exceed the established maintenance baseline will not result in losses of aquatic resources beyond those addressed at the time the maintenance baseline is established. The frequency of maintenance will depend on the characteristics of the flood control facility and the surrounding area. Those flood control facilities that were constructed in more dynamic environments generally require more frequent maintenance. Because of the various environmental factors affecting the need for maintenance and the physical parameters that apply to an existing facility, it would be difficult to

establish a maintenance baseline that lessens the frequency of maintenance. We do not believe it would be appropriate to modify this NWP to authorize temporary stockpiling of sediments and other materials in waters of the United States. Sediments and other materials removed during the maintenance of flood control facilities must be deposited at non-jurisdictional areas, unless the district engineer authorizes temporary stockpiling through a separate Department of the Army authorization.

The previous commenter also remarked that the provisions for emergency situations still require that the permittee submit a pre-construction notification and wait for Corps approval before conducting any emergency work within the flood control facility. They stated that this requirement could compromise public health and safety, as it typically takes one or two days, minimum, to obtain the necessary approval to proceed. They requested deferral of the pre-construction notification requirement until after the emergency maintenance activities have been conducted. We believe that NWP 31, as proposed, is a reasonable and prudent way to minimize the burdens imposed on permittees, within the constraints of applicable law and regulation. It is not appropriate to defer the submittal of a pre-construction notification, due to the fact that the Corps must determine if authorization by this NWP is applicable. The Corps has developed specific procedures for dealing with emergency situations. Entities responsible for maintaining flood control facilities should contact their local Corps office well in advance of the rainy season, to familiarize themselves with the available emergency processing procedures for that district.

One commenter suggested that activities authorized by this NWP instead be authorized by NWP 3. We believe that the specific requirements of this NWP are necessary to ensure that impacts to the aquatic environment are minimal. Incorporating these requirements into NWP 3 would be confusing and make implementation of that NWP more difficult.

Another commenter asserted that this NWP has the potential for more than minimal impacts, based on the fact that there are no limits on acreage or volume of discharges. The commenter also commented that one-time mitigation does not adequately ensure that aquatic functions will be restored, and that limiting mitigation to one-time will result in more than minimal adverse impacts if mature wildlife habitat is

destroyed repeatedly. The Corps believes that activities authorized by NWP 31 that comply with the maintenance baseline provision do not result in more than minimal impacts, even without acreage limitations. The establishment of the maintenance baseline, in effect, identifies the location and physical dimensions of waters of the United States that have been incorporated in the flood control facility. Discharges that result in losses of these waters (i.e., that exceed the maintenance baseline) are not eligible for authorization under NWP 31. In light of this, we believe that the "one-time mitigation requirement" imposed in conjunction with the establishment of the maintenance baseline is sufficient for the purpose of this NWP. The intent of the one-time mitigation is to replace the aquatic functions that may be lost each time maintenance is performed. Once the mitigation is in place, any aquatic functions that develop between maintenance activities, are over and above the level of function that existed before the initial maintenance occurred. For areas or projects with specific issues, the division and district engineer may choose to add regional conditions or special conditions to the NWP authorization.

One commenter made reference to a particular project containing salmonids and stated that an NWP should not have been issued for that particular project. The commenter objected to this NWP authorizing the continued maintenance of the project because the salmonid habitat may have partially recovered and would be repeatedly impacted. While we agree that this can occur, we do not agree that requiring mitigation over and over for what is, in effect, the same impact is appropriate. We believe that the limitations and general conditions included within this NWP will ensure that it will result in no more than minimal effects. The requirement for an approved baseline and the ability to require mitigation provides a way to safeguard valuable habitat.

This NWP is reissued as proposed.

**NWP 32. Completed Enforcement Actions.** We proposed to eliminate the phrase "For either (i), (ii), or (iii) above," from the last paragraph of this NWP. In addition, we proposed to remove the phrase "or fails to complete the work by the specified completion date."

Two commenters suggested that the five-acre non-tidal water or one-acre tidal water limits be eliminated. They believe that if the NWP applied to enforcement actions with greater impacts, then the mitigation could be completed earlier which would reduce



temporal losses. One commenter said that the NWP should have a limit of two acres for wetland impacts, since the permit process, including the opportunity for public comment, has been avoided. One commenter stated that individual permits should be required for activities undertaken as a result of an enforcement action. They believe that greater oversight is appropriate for a party that broke the law.

We believe that if the unauthorized activity impacts more than five acres of non-tidal waters or one acre of tidal waters that it may be more appropriate to either require an individual permit review or to pursue a judicial settlement or judgment. In cases where judicial settlements are pursued, there is usually a comprehensive evaluation of the environmental damage associated with the unauthorized work and substantial mitigation and penalties. In addition, we recognize that the limits for this NWP exceed the limits for the majority of the NWPs. We believe however, that the requirement that non-judicial settlements provide for environmental benefits equal to or greater than the environmental harm caused by the unauthorized activity ensures that the net impacts caused by the unauthorized work are no more than minimal. The thresholds limit the maximum size of the impact area and, wherever appropriate and practicable, restoration of this area will be required to undo the impacts. In any case, full compensation for the impacts in some form is required.

One commenter requested we delete the sentence stating that the NWP does not apply to any activities occurring after the date of the court decision, decree or agreement that are not for the purpose of mitigation, restoration or environmental benefit. The commenter believes that this provision limits the ability of the Corps to enter into a settlement agreement. Another commenter requested that language be added to the NWP to expressly prohibit its use for any future impacts related to the existing project that is under the enforcement action.

The Corps believes that the NWP as proposed is appropriate. Proposed additional project impacts (e.g., impacts necessary to complete the project that was initiated without a permit) must be evaluated under other NWPs, regional general permits, or individual permit review processes. This permit is intended only to authorize past discharges along with the required compensatory activities, not to substitute for applicable permit requirements for future activities.

One commenter remarked that the activities authorized by this NWP do not correlate with the programmatic general permits in the commenter's state.

The Corps acknowledges this comment, however, we believe it is simply a statement and does not warrant any changes to the proposed NWP.

This NWP is reissued as proposed.

NWP 33. *Temporary Construction, Access, and Dewatering.* We proposed to divide the first sentence of this NWP into two sentences, to clarify that the NWP can be used to authorize temporary activities associated with both construction projects that do not otherwise require permits from the Corps or the U.S. Coast Guard, and those that do require and have obtained such permits. We also proposed to move the requirement for a restoration plan from the "pre-construction notification" general condition (general condition 13 of the 2002 NWPs) to the "Notification" paragraph of this NWP, because it only applies to this NWP. We inadvertently used the term "mitigation plan" in the "Notification" paragraph in the proposed NWP, and have changed it to "restoration plan" in the final permit. The pre-construction notification must include a restoration plan showing how all temporary fills and structures will be removed and the area will be restored to pre-project conditions. The restoration plan should also describe reasonable measures for avoidance and minimization of adverse effects to aquatic resources. Please note that this restoration plan is different from the mitigation requirements in general condition 20 for permanent losses of waters of the United States. We proposed to remove the sentence that states that the district engineer will add special conditions to ensure minimal adverse effects, since the addition of special conditions where necessary to ensure minimal adverse effects is a condition of all NWPs.

One commenter suggested that NWP 33 should also be used to authorize temporary stockpiles and temporary fills that are related to construction activities.

The Corps agrees that this work could potentially be authorized under NWP 33 as long as all other conditions are met and the work is the minimum necessary to complete the project. However, the districts have discretion in determining if the work is the minimum necessary.

One commenter expressed concern about the last statement in this NWP, which requires a Section 10 permit for structures left in place. The commenter indicated this statement is contradictory since any structures left in place would be permanent and would not qualify for

the NWP 33 anyway. The commenter recommends removing or clarifying this statement.

This statement is intended to reiterate that if any structures are left in place, separate authorization is required, however we have broadened it to cover all situations where structures left in place require separate Section 10 authorization.

Another commenter generally supported NWP 33 as proposed, but recommended changing the word "conditions" to "contours" in the sentence stating "Following completion of construction, temporary fill must be entirely removed to upland areas, dredged material must be returned to its original location, and the affected areas must be restored to the pre-project conditions." Several commenters indicated that requiring the area to be restored to pre-project conditions may not be beneficial when the pre-project conditions were degraded. One commenter suggested we require the affected areas be restored to the pre-project conditions or to a condition with greater than pre-project habitat functions and services. Another commenter suggested saying that the area should be returned to appropriate pre-existing stable elevations and slope and restored with vegetation species matching the adjacent undisturbed areas, but consistent with the purposes of the associated project for which the temporary construction is necessary.

We agree that returning a degraded area to better than pre-existing conditions is beneficial and we support this concept. We will not require the area to be restored to create better habitat functions and services, but we are not precluding this work from occurring. Removal of temporary fills is also addressed in general condition 13 and the language in NWP 33 has been slightly modified to match this general condition. Any fill left in place will require separate authorization.

One commenter questioned whether the restoration plan for temporary and permanent impacts could be included in a single plan, with any proposed mitigation, and whether the mitigation plan must be submitted concurrently with the pre-construction notification. Another commenter opposed the provision requiring that a restoration plan be included in the pre-construction notification that shows how the area will be restored to pre-project conditions. The commenter was concerned that a restoration plan is not always developed up front because a contractor is often not selected until after a permit has been issued.

The pre-construction notification must contain a restoration plan showing how all temporary fills and structures will be removed and the areas restored to pre-project conditions. The restoration plan must, at a minimum, include a general description of how restoration will be accomplished, with as much detail as is practicable when the pre-construction notification is submitted. We do not believe that selection of a contractor is necessary for the development of an appropriate restoration plan.

Several commenters requested that we clarify or define some of the terms in NWP 33, such as cofferdam, access fill, and temporary structure. One of the commenters also asked if the Corps considers temporary construction pads to be a form of access that requires authorization. They also asked if cofferdam includes structures that only partially isolate a portion of the streambed but still allow water to pass.

The Corps believes that cofferdam, access fill, and temporary structure are widely used and accepted terms. The Corps is hesitant to place strict definitions on these terms. The Corps does consider temporary construction pads to be a form of access that can be authorized under NWP 33 and we do consider a structure that partially blocks a portion of the streambed to be a cofferdam that could be authorized by NWP 33.

One commenter suggested that notification should not be required for temporary impacts that last less than 24 hours, when used with Best Management Practices. Another commenter requested we include a limit on the duration of impacts, such as 48 hours. Another commenter requested that the Corps consider an exemption to the pre-construction notification requirement if the temporary fill is a mat instead of dirt, or a stabilized material, and it is in place for only a short time, such as 48 hours. This commenter also suggested that the Corps allow an exemption to the pre-construction notification requirement for minor amounts of temporary impacts. A commenter questioned whether a water-inflated cofferdam would be considered *de minimus* and be exempt from submitting a pre-construction notification. Several commenters recommended that a PCN should not be required for temporary construction access roads and other construction activities covered under NWP 33, unless the discharge causes the temporary loss of greater than  $\frac{1}{10}$  acre of waters of the United States.

We have modified NWPs 3, 12, and 14 to address concerns regarding pre-

construction notification and temporary impacts to waters of the United States. In particular, we are not requiring separate authorization under NWP 33 for temporary impacts associated with activities authorized under these three NWPs. Therefore, we are retaining the pre-construction notification requirements from the September 26, 2006, proposal for NWP 33. We have modified the text of this NWP to require restoration of affected areas to pre-construction elevations, with revegetation, as appropriate, to be consistent with the changes to general condition 13, Removal of Temporary Fills.

This NWP is reissued with the modification discussed above.

NWP 34. *Cranberry Production Activities*. We proposed to rearrange the text of the NWP and to eliminate the phrase "provided the activity meets all of the following criteria". In addition, we proposed to eliminate the requirement for delineations of special aquatic sites from the text of the NWP, since this is a requirement of general condition 27.

One commenter requested clarification of the last part of the last sentence which reads "...and the NWP would authorize that existing operation, provided the 10-acre limit is not exceeded." Another commenter recommended reducing the acreage limit to  $\frac{1}{2}$  acre. This commenter also said that pre-construction notifications must clearly indicate areas to be impacted by the proposed activity.

We believe that the text of this NWP is clear. This NWP only authorizes activities associated with existing cranberry production operations, such as expansion, reconfiguration or leveling. The NWP provides authorization for these types of activities, provided the total impacts to waters of the United States during the 5-year term of the NWP do not exceed 10 acres. It does not authorize the construction of new cranberry production operations. Since this NWP authorizes only existing cranberry production activities, the 10-acre limit is appropriate because these areas remain as wetlands, even though they are managed to improve cranberry production. General condition 27 requires prospective permittees to submit delineations of waters of the United States with their pre-construction notifications, so that the impacts of the proposed activity can be assessed.

Some commenters asserted that the activities authorized by this NWP will result in more than minimal adverse impacts, individually and cumulatively.

These commenters also requested that the Corps not reissue this permit as it violates section 404(e) of the CWA and the section 404(b)(1) Guidelines. In addition, they remarked that it is unclear how the permittee would determine whether a net loss occurs. They were concerned that permittees would claim that converting a natural wetland to a cranberry bog does not result in a net loss of wetlands and as a result these losses would not be counted. In addition, one commenter remarked that the Corps should not rely on compensatory mitigation to offset the potential adverse impacts associated with conversion of wetlands to cranberry bogs.

We believe that the activities authorized by this NWP will not have more than minimal impacts both individually and cumulatively. This NWP authorizes activities associated with the expansion, enhancement, or modification of existing cranberry operations. This NWP does not authorize new operations. Regarding the determination of net loss, this NWP requires pre-construction notification. The district engineer will determine if the proposed project would result in a net loss of wetland acreage, not the permittee. In making this determination, the Corps would consider conversion of natural wetlands to cranberry bogs a loss of waters. We believe the pre-construction notification requirement gives district engineers the ability to assess the impacts to aquatic resources and, if the acreage limit is exceeded or if otherwise warranted, exercise discretionary authority and require an individual permit. The individual permit process includes case-specific reviews to ensure compliance with the Section 404(b)(1) Guidelines. In addition, division and district engineers will condition such activities where necessary to ensure that these activities will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. The Corps believes that this NWP is fully in compliance with section 404(e) of the Clean Water Act.

One commenter stated that the Corps' limited cumulative effects data suggests a reduction in average impacts associated with this NWP. They added that this reduction appears to be due to cranberry production activities being authorized under state or regional general permits.

We believe that the use of state programmatic and regional general permits to authorize cranberry operations are appropriate. All general permits must have no more than minimal adverse effect. Regional general

permits developed in consideration of local and regional issues have been determined to have minimal impacts both individually and cumulatively. As with the NWP, regional general permits also enable the district engineer to exercise discretionary authority to require individual permit review, where appropriate.

The NWP is reissued as proposed.

NWP 35. *Maintenance Dredging of Existing Basins*. We proposed to change the phrase "disposed of" to "deposited at" in the text of this NWP.

One commenter suggested the NWP be modified to allow disposal of dredged material (e.g., sand and gravel) in the littoral system.

We believe the placement of dredged material at upland sites with the implementation of proper siltation controls helps to ensure minimal impacts on the aquatic environment, individually and cumulatively. We agree that beneficial use of dredged material, including placement of suitable material on beaches or in the littoral zone, can provide environmental benefits. However, such activities can result in unintended adverse environmental effects, and therefore require detailed and comprehensive analysis of sediment and littoral processes. We believe that an individual permit is the appropriate mechanism for authorizing this use of dredged material and that it should not be permitted under this NWP.

Another commenter requested that we require pre-construction notification to help determine whether dredging activities authorized under this NWP may indirectly adversely impact adjacent beaches and near shore habitat.

Generally, dredging of existing basins does not result in substantial adverse impacts to adjacent beaches and/or near shore habitat when proper siltation controls are used, as required by this NWP. We disagree that pre-construction notification is necessary for these dredging activities since division engineers have the ability to impose regional conditions, including the requirement for pre-construction notifications for certain activities, to ensure minimal adverse effects on the aquatic environment, individually and cumulatively.

One commenter remarked that we should provide clarification on the applicability of this NWP to existing access channels and mooring facilities.

This NWP authorizes excavation and removal of accumulated sediment for maintenance of existing basins provided that the activity complies with its terms and conditions.

This NWP is reissued as proposed.

NWP 36. *Boat Ramps*. We proposed to modify this NWP to allow district engineers to waive the 50 cubic yard limit for discharges of dredged or fill material into waters of the United States to construct a boat ramp. We also proposed to allow district engineers to waive the 20 foot width limit for boat ramps. These waivers can be issued only if, after reviewing a pre-construction notification, the district engineer determines that adverse effects on the aquatic environment and other factors of the public interest will be minimal.

Many commenters supported the discretion vested in district engineers to waive the limitations imposed by this NWP, however one commenter objected to the flexibility provided to the district engineers and suggested activities that exceed 50 cubic yards or 20 feet in width be evaluated under an individual permit process. Another commenter requested we include guidelines for when and to what degree the district engineer would apply waivers to the 50 cubic yard fill limit and/or 20-foot width limit to avoid inconsistencies.

We believe deference must be given to district engineers' expertise and knowledge of the local aquatic environment, as well as his/her assessment of information submitted in pre-construction notifications, to make case-specific determinations on the effects to the aquatic environment. The proposed pre-construction notification requirement for discharges that exceed 50 cubic yards or 20 feet in width will enable the district engineer to evaluate the direct, indirect and cumulative effects of a proposed activity to determine whether a waiver is appropriate or an individual permit is required. Because of the inherent variability across the nation, we disagree that it is necessary or appropriate to establish guidelines for the application of the waiver. We expect district engineers to formulate their case-specific determinations on the appropriateness of the waiver based on the unique characteristics of the local aquatic environment and in consideration of the specific circumstances of the proposed activity.

One commenter noted that boat ramps are hardened surfaces that diminish near shore or bank habitat and asserted that pre-construction notification should be required along with mitigation.

We believe that the discretion vested in district engineers to issue special conditions on a case-specific basis, including requirements for appropriate and practicable mitigation (see general condition 20), will ensure that losses to

the aquatic environment are adequately offset. We also believe that the ability of division engineers to impose regional conditions for certain activities will ensure minimal adverse effects on the aquatic environment, individually and cumulatively.

Two commenters indicated that the case-by-case waiver of the 50 cubic yard and 20-foot width discharge limits should also require the Corps to coordinate with appropriate federal and state natural resource agencies.

We disagree it is necessary to coordinate with federal and state natural resource agencies prior to the district engineer determining whether to grant a waiver for those activities that exceed the 50 cubic yard fill limit and/or 20-foot width limit. District engineers have the aquatic resources expertise to determine whether activities will result in more than minimal adverse effect on the aquatic environment.

One commenter noted that activities authorized under this NWP do not require Department of the Army authorization in Section 404-only waters unless there is more than incidental fallback.

Discharges in waters of the United States that are not otherwise exempt from regulation require Corps authorization. We acknowledge that the Corps does not regulate excavation under section 404 in instances when there is only incidental fallback.

This NWP is reissued as proposed.

NWP 37. *Emergency Watershed Protection and Rehabilitation*. We proposed to rearrange the text of this NWP to match the other permits. In the final permit, we have added two additional types of activity (reclamation of abandoned mine lands pursuant to Title IV of SMCRA and the Emergency Conservation Program administered by the Farm Service Agency) that may be authorized.

One commenter supported the reissuance of this NWP without change, since they regularly partner with the Natural Resources Conservation Service on emergency projects. Another commenter expressed concerns that NWP 37 does not contain specific requirements for conducting repair work and it only includes generic references to environmentally defensible approaches. The commenter agreed that allowing the work to commence immediately (with follow-up permitting as necessary) may be desirable due to the urgency of some disaster responses; however, they indicated that the process may be prone to uncertainty about requirements and may cause more than minimal harm to the aquatic resources. The commenter indicated that activities

are funded by the Natural Resources Conservation Service but not always implemented by the agency, so people with limited experience may be completing the work. The commenter suggested that work should only be allowed to proceed prior to verification where a damage response team comprised of federal and state agencies have developed the site specific plans for damage repair.

We believe that in some cases the urgency of the activities authorized by this NWP requires an expedited process. All activities require pre-construction notification, and as a general matter, the prospective permittee should wait until the district engineer issues an NWP verification before proceeding with the watershed protection and rehabilitation activity. A watershed protection and rehabilitation activity may proceed immediately only in those cases of true emergencies (i.e., where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur). Where practicable, permittees are encouraged to consult informally with the Corps before proceeding with emergency activities. In cases where emergency watershed protection and rehabilitation activities were conducted prior to receiving an NWP verification, the district engineer, after reviewing the pre-construction notification, may modify, suspend, or revoke the NWP authorization through the procedures at 33 CFR 330.5. All of the projects authorized by this permit are conducted under the sponsorship of another Federal resource management agency. Those agencies, not the Corps, have the responsibility to determine whether the project complies with their program authority. The Corps must determine the applicability of the NWP to the specific project, but for the most part, the Corps only reviews the proposed work to determine compliance with the requirements of the NWP and the general conditions. We believe that any specific concerns should be addressed through regional conditions or through consultation with the sponsoring agency.

A couple of commenters recommended adding Title IV of the Surface Mining Control and Reclamation Act, which governs the abandoned mine land reclamation program, to proposed NWP E, Coal Remining Activities. One commenter suggested adding to NWP 37 work funded by the Farm Service Agency under its Emergency Conservation Program, which rehabilitates farmland damaged by natural disasters.

As discussed below, we have revised proposed NWP E (now designated as

NWP 49), to authorize abandoned mined land reclamation activities that also involve coal extraction activities. However, for those abandoned mine land reclamation activities that do not involve coal extraction, we believe it is more appropriate to authorize these activities under NWP 37, since they help protect and rehabilitate watersheds, and have revised the text of the NWP accordingly. In cases where it is necessary to conduct an emergency abandoned mine reclamation activity immediately, the project proponent may proceed with the work (see paragraph (d)(3) of general condition 27) while the district engineer reviews the pre-construction notification. For clarity, we have also added a new paragraph to this NWP that is consistent with paragraph (d)(3) of general condition 27. We have also added Emergency Conservation Program activities funded by the Farm Service Agency, which provides cost-share assistance to eligible participants to rehabilitate farmland damaged by floods, hurricanes, or other natural disasters. The implementing regulations for the Emergency Conservation Program are found at 7 CFR part 701.

The NWP is reissued, with the modifications discussed above.

NWP 38. *Cleanup of Hazardous and Toxic Waste*. We proposed to modify this NWP by moving the requirement to submit a delineation of waters of the United States to paragraph (b)(4) of the "pre-construction notification" general condition (GC 27). We also proposed to move the last sentence of this NWP to a "Note" at the end of the NWP.

One commenter requested this NWP be revoked, because the cleanup of hazardous waste has the potential to cause adverse effects during and after the activities. The commenter indicated that remedial activities in navigable waters and wetlands need site-specific review, evaluation and permitting to ensure proper design, appropriate restoration, and long term stability.

This NWP requires pre-construction notification to the Corps. We believe our review under this NWP is sufficient, since the activities authorized must be performed, ordered, or sponsored by a government agency with established legal or regulatory authority.

Another commenter suggested the expansion of this NWP to allow removal of waste material, such as trash, debris, detritus, or rubble, in waters of the United States. The commenter suggested that the NWP should be modified to authorize the immediate removal of the waste and the notification to the Corps after the material has been removed.

In general, the removal of waste material should not require Corps

authorization, unless the activity involves discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States. Temporary access to remove the material may be authorized by NWP 33. Restoration of the affected area may be authorized under NWP 27.

One commenter requested clarification regarding the applicability of NWP 38 for emergency response to an oil release in waters of the United States from electrical equipment that is not covered by a Spill Prevention, Control, and Countermeasure (SPCC). The releases are governed by EPA's polychlorinated biphenyl spill response regulations (40 CFR part 761). Because the activities are not included in a SPCC Plan, they are not authorized by NWP 20. The work that is required must be initiated within 24 or 48 hours of discovery of the release, so the commenter requested that either NWP 20 be modified or the pre-construction notification requirement under NWP 38 be removed in situations where the response time is critical.

Instead of modifying this NWP, we have modified NWP 20 to include coverage of response to spills not covered by a SPCC Plan, but otherwise required to be initiated in a short time frame by another government agency, such as EPA's polychlorinated biphenyl spill response regulations at 40 CFR part 761.

This NWP is reissued as proposed.

NWP 39. *Commercial and Institutional Developments*. We proposed to modify this NWP by moving the provisions authorizing residential developments to NWP 29, requiring pre-construction notification for all activities authorized by this NWP, and applying the 300 linear foot limit to ephemeral streams.

Three commenters objected to moving residential developments from NWP 39 to NWP 29 because these developments are inconsistent with the original intent of NWP 29. Six commenters supported removing residential developments stating that the impacts associated with residential developments are not the same as commercial and institutional developments. Three commenters desired the ability to use multiple NWPs with NWP 39 for mixed-use developments, such as housing and commercial. One commenter did not support removing residential development from this NWP because mixed-use developments would lead to more than minimal impacts if multiple NWPs were used.

As discussed in the preamble to the September 26, 2006, **Federal Register**

notice, the proposed changes effectively eliminates the previous NWP 29. We do not believe that NWP 39 will result in more than minimal individual and cumulative adverse effects, on the aquatic environment if it is used with other NWPs in accordance with general condition 24, Use of Multiple Nationwide Permits.

Two commenters recommended allowing the NWP to be used in non-tidal wetlands adjacent to tidal waters, while another agreed with the proposed language to exclude its use from these wetlands. One commenter declared that the NWP should not be used in wetlands accessible to anadromous fish or in difficult-to-replace aquatic environments. One commenter wanted the acreage limit increased to 5 acres and another recommended it be decreased to  $\frac{1}{4}$  acre so that it reflects the limits in the previous version of NWP 29.

We believe that restricting the types of wetlands the NWP applies to is an appropriate method of assuring that minimal adverse impacts are not exceeded. Division engineers may regionally condition or revoke this NWP in certain areas or for certain activities if they believe the NWP would result in more than minimal impacts. Increasing the acreage limit to 5 acres would likely result in activities that will have more than minimal individual and cumulative adverse effects on the aquatic environment. Reducing the acreage limit to  $\frac{1}{4}$  acre would cause many projects that do have minimal adverse impacts to be evaluated under the individual permit process.

Many commenters supported retaining the language requiring sufficient vegetated buffers to be maintained adjacent to all open water bodies, such as streams. One commenter requested an unspecified minimum vegetated buffer width while two commenters suggested a 200 foot setback from streams containing anadromous fish. One commenter supported removing of the buffer language and relying on paragraph (d) (now designated as paragraph (f)) of general condition 20.

In general, the Corps agrees that buffers (i.e., riparian areas) are necessary to protect streams and other open waters. District engineers will make determinations regarding the need for and amount of required riparian areas in the context of general condition 20, Mitigation.

One commenter stated that including the expansion of commercial or institutional buildings will lead to piecemealing projects and result in more than minimal impacts on the

aquatic environment. Five objected to removing language concerning avoidance and minimization to the maximum extent practicable. Two commenters suggested maintaining language requiring a conceptual mitigation plan. Several commenters recommended retaining the language concerning single and complete projects. Two commenters asserted that maintaining language addressing minimal change to flow and water quality was necessary. Two commenters objected to removal of language concerning minimizing on-site and off-site impacts, such as avoiding flooding of adjacent lands. Another commenter objected to removing "many" of the restrictions in the NWPs, including this one. One commenter suggested that problems will occur without the language about "single and complete projects."

We disagree with these comments. Requirements for avoidance and minimization, management of water flows, and water quality are provided in the NWP general conditions. Removal of language from the permit text itself does not affect the applicability of requirements contained in Corps regulations and in the NWP general conditions. We have repeatedly emphasized in this preamble that permittees must review the general conditions before using any NWP to ensure that they are meeting all requirements for its use. District engineers will review pre-construction notifications to ensure that all practicable on-site avoidance and minimization has been accomplished. In response to a pre-construction notification, the district engineer may require compensatory mitigation to ensure that the authorized activity results in minimal adverse environmental effects (see 33 CFR 330.1(e)(3)).

Several commenters objected to the mandatory pre-construction notification requirement and suggested a pre-construction notification threshold of  $\frac{1}{10}$  acre or greater than 300 feet of stream loss. Some of these commenters reasoned that eliminating the  $\frac{1}{10}$  acre pre-construction notification threshold would be a disincentive to avoid the loss of waters of the United States. Two commenters supported the proposed pre-construction notification requirement.

We disagree that the pre-construction notification threshold should be  $\frac{1}{10}$  acre. We acknowledge that this will result in an increase in the number of pre-construction notifications district engineers receive, however, we are proposing to simplify the information

required in a pre-construction notification (see general condition 27) to reduce the paperwork burden on prospective permittees. Requiring notification for all activities authorized under NWP 39 will help ensure adverse minimal effects.

Thirteen commenters wrote concerning impacts to streams and the use of waivers. See the discussion regarding this topic, above.

One commenter stated that projects authorized by this NWP are not water-dependent and should not be permitted.

We agree that most commercial and institutional developments are not water dependent activities. This does not mean that they cannot be permitted, only that they undergo an alternatives analysis (see the EPA's 404(b)(1) Guidelines at 40 CFR part 230). Although analysis of off-site alternatives is not required for general permits, each proposed project is evaluated to determine whether avoidance and minimization has been accomplished on the project site to the maximum extent practicable (see general condition 20, Mitigation). In addition, the activity is not authorized under an NWP if the adverse impacts to waters of the United States are more than minimal.

This NWP is reissued as proposed.

NWP 40. *Agricultural Activities*. We proposed to modify this NWP to require pre-construction notification for all activities, authorize the construction of farm ponds in waters other than perennial streams, and remove certain restrictions on who could use the NWP.

One commenter wanted to retain the paragraph numbering of the 2002 NWP. Another commenter said that this NWP should be limited to USDA program participants.

The Corps believes the revised numbering system is appropriate and easy to understand. This NWP should not be limited to USDA program participants, since there are agricultural activities being conducted by non-participants that result in minimal adverse effects on the aquatic environment which are appropriately authorized by NWP.

One commenter opposed reissuance of NWP 40 because of unacceptable impacts to wetlands. Two commenters did not support eliminating the  $\frac{1}{2}$  acre limit per farm tract on impacts to waters of the United States, and one commenter recommended reducing the acreage limit to  $\frac{1}{10}$  acre. One commenter expressed concern that removing farm tracts as the basis for the acreage limit would result in use of this NWP to authorize discharges of dredged or fill material for non-agricultural activities. One commenter stated that

roadside stands should not be considered farm buildings for authorization under this NWP. One commenter recommended retaining the  $\frac{1}{10}$  acre threshold for pre-construction notification. One commenter stated that pre-construction notification should not be required for projects conducted under USDA programs.

We believe the requirement for pre-construction notifications for all activities and the case-by-case review by district engineers will ensure that activities authorized by this NWP result in no more than minimal individual and cumulative adverse effects to the aquatic environment and other public interest review factors. The district engineer will add case specific conditions and require mitigation when needed to ensure impacts do not exceed the minimal level, and will assert discretionary authority to require an individual permit when impacts are more than minimal. Due to differences in program requirements between USDA programs and Section 404 of the Clean Water Act, it is not possible to ensure that activities conducted under USDA programs will necessarily comply with Section 404 requirements and have minimal adverse impact to waters of the United States. Therefore, we are retaining the pre-construction notification requirement for USDA program participants and projects. We have removed the reference to "farm tracts" because we have found that it caused confusion in the past. The limit applies to each single and complete project (see definitions section). District engineers will determine during the pre-construction notification process whether the acreage limit is satisfied. Eliminating the use of farm tracts would not expand the use of this NWP to non-agricultural activities. The text of this NWP clearly states that it authorizes only agricultural activities.

One commenter objected to authorizing farm ponds in wetlands and two objected to authorizing farm ponds in non-tidal waters excluding perennial streams. One commenter supported the use of NWP 40 for construction of farm ponds only in streams without aquatic life use designations. Another commenter said that the proposed modification was unnecessary, since many farm ponds are constructed outside of waters of the United States or they are exempt from section 404 permit requirements because of the exemption at Section 404(f)(1)(C) of the Clean Water Act. This commenter expressed concern that the proposed changes to NWP 40 would require landowners to submit pre-construction notifications for all farm ponds, even if they are not constructed in waters of the United

States or they qualify for the section 404(f) exemption.

We are limiting the construction of farm ponds to certain types of waters where the adverse effects to the aquatic environment are likely to be minimal, individually and cumulatively. This NWP does not authorize the construction of farm ponds in perennial streams. Under this NWP, farm ponds may be constructed in non-tidal wetlands, intermittent streams, and ephemeral streams. Pre-construction notification is required for all activities authorized by this NWP, so that district engineers will have the opportunity to review each proposed activity to determine whether the adverse effects on the aquatic environment will be minimal. If the construction of a farm pond does not involve discharges of dredged or fill material into waters of the United States, or if it qualifies for a Section 404(f) exemption, the project proponent is not required to submit a pre-construction notification. This NWP authorizes the construction of farm ponds that involve discharges of dredged or fill material into waters of the United States and do not qualify for the Section 404(f)(1)(C) exemption, because of the recapture provision at Section 404(f)(2). We have added a sentence to the "Note" at the end of this NWP to clarify that this NWP is used to authorize the construction of farm ponds that are not exempt under Section 404(f).

One commenter was concerned about negative impacts to salmonids from agriculture activities. Of main concern was placement of farm buildings in wetlands and streams, discharges from drainage tiles into farm ditches that were built in salmonid streams, and levee maintenance that degrades salmonid habitat and riparian areas.

Potential adverse impacts from these activities will be addressed during the pre-construction notification review. Water quality issues are also addressed during Section 401 water quality certification or by a Clean Water Act Section 402 permit.

Two commenters stated that the proposed permit will destroy wetland acres. One commenter stated that the loss of prairie potholes and western glacial potholes will be staggering. Another commenter stated that discharges into playas, prairie potholes, and vernal pools should not be allowed under NWP 40.

The  $\frac{1}{2}$ -acre limit for this NWP applies to the loss of waters associated with activities authorized by this NWP. During the pre-construction notification review process, if the district engineer determines that adverse effects to

aquatic resources are more than minimal, individually or cumulatively, he or she will impose special conditions to reduce the impacts to the minimal level or assert discretionary authority and require an individual permit. In addition, division engineers may add regional conditions to this NWP to restrict or prohibit its use in certain types of waters, if discharges into those waters for agricultural activities would result in more than minimal adverse effects on the aquatic environment. General condition 20, Mitigation, requires district engineers to determine appropriate and practicable mitigation necessary to ensure that impacts are no more than minimal. The Corps believes the pre-construction notification requirement for all activities and the case-by-case review by district engineers will ensure that activities authorized under this NWP will result in no more than minimal individual and cumulative adverse effects to the aquatic environment. The Corps notes that the acreage and linear foot limits in the NWPs apply only to waters that are jurisdictional under the Clean Water Act.

One commenter stated that the Corps now proposes to ignore impacts to waters of the United States associated with agricultural dredge and fill activities that are deemed exempt under Section 404(f) of the Clean Water Act.

This NWP authorizes certain agriculture activities that are not eligible for the exemptions under Section 404(f) of the Clean Water Act. Those agricultural activities that qualify for the Section 404(f) exemptions do not require a Section 404 permit. This has always been the case; it is not a change from current practice.

One commenter stated that the possible waiver for the relocation of greater than 300 linear feet of existing serviceable drainage ditches constructed in intermittent and ephemeral streams would result in more than minimal adverse impacts. Another commenter said that the provision authorizing the relocation of existing serviceable drainage ditches constructed in non-tidal streams should be conditioned to ensure that the activity does not result in a reduction in base flow to the stream.

In response to a pre-construction notification for the proposed relocation of greater than 300 linear feet of existing serviceable drainage ditches constructed in intermittent or ephemeral streams, the activity is not authorized unless the district engineer issues a written waiver after determining that the activity will result in minimal adverse effects on the aquatic environment. The relocation of

drainage ditches must also comply with general condition 9, Management of Water Flows, to maintain the capacity of those waters to the maximum extent practicable.

Several commenters stated that some language in the NWP was confusing or needed clarifying. This included the phrase "ditches constructed in waters of the United States", whether the permit applies to farm tracts or the entire farm, and the concept of "necessary for agriculture production".

We have removed the definition of "farm tract" and the conditions limiting the use of NWP 40 on a particular site, since district engineers will receive pre-construction notifications for all activities authorized by this NWP. District engineers will review pre-construction notifications for those NWPs to ensure that the proposed work results in minimal individual and cumulative adverse environmental effects. We believe that the other terms are self-explanatory. Determining whether an activity is necessary for agriculture production involves some discretion, which the district engineer will apply when evaluating pre-construction notifications for proposed projects.

One commenter said that this NWP should not authorize the construction of livestock watering ponds unless the applicant submits documentation showing that he or she has obtained government assistance for the construction of the pond, and that no feasible alternatives are available that would avoid discharges into waters of the United States. This commenter supported the proposed prohibition against constructing farm ponds in perennial streams, but also recommended that the NWP prohibit the construction of farm ponds in oxbows or lakes. Another commenter stated that NWP 40 should authorize the construction of aquaculture ponds.

We do not agree that it is necessary to require prospective permittees to obtain government assistance as a condition of authorization under this NWP. General condition 20, Mitigation, requires permittees to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable on the project site. District engineers will also review pre-construction notifications to ensure compliance with the terms and conditions of this NWP, including general condition 20. If a farm pond is proposed to be constructed in an oxbow or a lake, the district engineer will review the pre-construction notification to determine if the activity will result in minimal adverse effects. In addition,

division engineers may also regionally condition this NWP to restrict or prohibit its use to construct farm ponds in certain categories of non-tidal waters of the United States. We believe that construction of aquaculture ponds is a distinct activity that should not be authorized under this NWP because there may be unique issues associated with it (e.g., invasive species concerns, changes in water quality). Ponds constructed for purposes other than conventional agriculture may be authorized under other general permits or individual permits.

This NWP is reissued as proposed.

**NWP 41. *Reshaping Existing Drainage Ditches.*** We proposed to modify this NWP to clarify that it authorizes only the reshaping of drainage ditches constructed in waters of the United States where the purpose of reshaping the ditch is to improve water quality. As a result of this modification, we also proposed to remove the sentence that states why compensatory mitigation is not required for the activities authorized by this NWP.

The purpose of this NWP is to encourage landowners who need to maintain drainage ditches constructed in waters of the United States to do so in a manner that benefits the aquatic environment. The maintenance of a drainage ditch is exempt under Section 404(f)(1)(C) of the Clean Water Act, and does not require a section 404 permit. This exemption does not apply to the reshaping of existing drainage ditches, so landowners have a disincentive to reshape their ditches, even though such reshaping can be beneficial to the aquatic environment. This NWP authorizes those reshaping activities that benefit the aquatic environment.

This NWP was first issued on March 9, 2000, (65 FR 12818) to authorize, to the extent that a section 404 permit is required, the grading of the banks of a currently serviceable ditch to gentler (shallower) slopes than its current or original configuration. Reshaping a drainage ditch so that it has shallower side slopes can help improve water quality by decreasing the velocity of water flowing through the ditch and by spreading out water flow over a greater area of soil surface. It should also provide more area for plants to become established and grow within the ditch. These changes are likely to help improve water quality by increasing water contact with vegetation and soil microbes, which facilitates the removal of nutrients and other chemical compounds through biogeochemical processes. Slower water flow rates through the ditch should also decrease

erosion, further improving water quality.

We proposed to remove the prohibition against permanent sidecasting of excavated material into waters of the United States, where the excavated material results from the ditch reshaping activity. In cases where there are jurisdictional wetlands or other waters next to the ditch to be reshaped, this prohibition is likely to cause many landowners to maintain the ditch at its originally designed configuration to qualify for the exemption, since the 404(f)(1)(C) exemption allows discharges of dredged or fill material into waters of the United States resulting from ditch maintenance activities.

Some commenters supported the modifications to this NWP because they encourage landowners to maintain drainage ditches in a manner that benefits the aquatic environment. Several commenters also agreed with the proposal to remove the prohibition against permanent sidecasting of excavated materials into waters of the United States. Several other commenters did not support allowing permanent sidecasting of material excavated from reshaped ditches. These commenters suggested that the sidecasting would have adverse impacts that exceed the water quality improvements. One commenter suggested we provide conditions on the sidecast material, such as requiring the fill to be no higher than 18 inches, so that the hydric soils will retain their hydric characteristics. They also suggested requiring random distribution of the material and that the sidecast should not interfere with surface water flows. Another commenter indicated that permanent sidecasting that isolates wetlands on-site, rendering them non-jurisdictional, should not be allowed.

The exemption at 404(f)(1)(C) allows sidecasting, but prohibits reshaping drainage ditches. This NWP provides an incentive to improve water quality through reshaping the drainage ditches while still allowing sidecasting of the material. The Corps believes that allowing the sidecasting under this NWP will encourage landowners to reshape existing drainage ditches in favor of water quality improvements instead of conducting traditional maintenance activities. The Corps recognizes the need to ensure that the sidecasting has minor impacts on the aquatic environment and does not isolate wetlands. Regional conditions may be added to ensure that the individual and cumulative impacts are minimal. We note that the presence of a man-made berm between wetlands



and adjacent waters does not necessarily make the wetlands non-jurisdictional.

Some commenters suggested that many drainage ditches are within what was a historical stream that has been straightened and many of these drainage ditches are used by anadromous salmonids as transport to upstream spawning grounds and for juvenile rearing. One commenter suggested this NWP should not be used in waterbodies bearing salmon where a state or federal watershed analysis or limiting factors analysis has determined that off-channel rearing habitat is limiting or potentially limiting to salmonid production. The commenters indicated that an individual permit should be required for work in ditches that are accessible to anadromous salmonids. The commenter suggested if this NWP is utilized in such waterbodies, a regional condition should require a delineation of pools and riffles and that reshaping be conducted in a manner that does not reduce volume and surface area of pools or other suitable low velocity habitat.

The Corps agrees that these are important concerns but they only relate to certain areas. Division and district engineers will impose regional conditions or case-specific conditions, so that adverse effects to salmon species that utilize these drainage ditches are minimal, individually and cumulatively.

One commenter suggested this NWP should allow for the restoration of ditches that lose their original shape, become vegetated, and obtain characteristics of wetlands due to long ditch maintenance cycles, which are often greater than 20 years.

The Corps believes that this NWP may potentially be used in such areas in cases where the purpose of the work is to improve water quality. However, to be eligible to use this NWP, the drainage ditches must be currently serviceable and not so degraded that the area appears to have more the characteristics of a wetland than those of a drainage ditch.

One commenter suggested this NWP should authorize reshaping of natural drainage features. The commenter indicated that reshaping unvegetated streambeds, channels, and watercourses with vertical banks subject to continuous erosion would provide flatter and vegetated side slopes, which would improve water quality.

We do not agree that this NWP should be modified to authorize alterations to the geomorphology of natural streams and other waters of the United States. Such changes to natural waterbodies may result in more than minimal adverse effects to the aquatic

environment. Other forms of Department of the Army authorization may be more appropriate to authorize this type of work.

Another commenter indicated that the amount of change in reshaping is not specified.

We do not believe it is necessary to place a limit on the cubic yards of change that can occur with this permit. We believe if the purpose is to reshape the ditch and improve water quality, an upper limit does not need to be specified.

One commenter indicated that the term “\* \* \* ditches constructed in waters of the United States” is confusing and suggested changing it to “serviceable drainage ditches which were constructed in regulated wetlands or by channelizing waters of the United States.” Another commenter stated that the Corps has too narrowly defined what constitutes a drainage ditch. The commenter indicated that a large number of streams in the United States have had some channelization and some people refer to these water bodies as drainage ditches. The commenter is concerned that some natural waterbodies will be reshaped, which would actually reduce water quality.

We believe the current phrasing is simple and concise, since jurisdictional wetlands are waters of the United States. This NWP is intended for currently serviceable drainage ditches and the applicability of the NWP can be determined on a case-by-case basis by the district engineers. This NWP does not authorize the channelization of existing streams and it does not authorize the relocation of those streams. In addition, this NWP does not authorize the reshaping of natural waterbodies. If a ditch has become incised, this NWP may potentially be used to reshape the ditch, thereby making it more stable.

Another commenter is concerned about the lack of required documentation or demonstration of how the proposed reshaping will meet this basic condition of NWP eligibility. The commenter also questioned why the Corps does not define the term “improving water quality” and does not explain how to evaluate a project that improves some aspects of water quality, but harms others. One commenter suggested a wording change to say, “for the purpose of stabilizing eroded banks” instead of “for the purpose of water quality.” The commenter indicated that saying the work is for the purpose of improving water quality is vague and subject to misinterpretation.

The work authorized by this permit is designed to improve water quality by

reggrading the drainage ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, and increase uptake of nutrients and other substances by vegetation. We have added this language to the NWP. More stable banks may result from these activities, but the primary objective of these projects is to improve water quality. We recognize that the environmental benefits of these activities usually need to be determined subjectively.

A commenter was also concerned that the NWP does not require an applicant to prove the proposed ditch reshaping activity will not increase the area drained by the ditch. The commenter is concerned this NWP has a high potential for abuse and will attract landowners looking for authorization to make their ditches larger to drain wetlands more thoroughly and they suggest that the Corps will need to dedicate more resources to track and monitor the use of this permit. The commenter also indicated there must be a limit on the extent of impacts authorized under this permit and that extensive reshaping of drainage ditches should be subject to individual permit review.

The Corps believes that the pre-construction notification requirement for this NWP will allow us to review larger-scale proposals and ensure that additional wetlands are not drained by the work. We have modified the text of this NWP, to prevent drainage of additional wetlands. We have replaced the phrase “original design capacity” with “original as-built capacity” to reflect the extent of drainage that occurred when the drainage ditches were originally constructed. We have also changed the word “designed” to “constructed” in that sentence to ensure that the reshaping activity does not drain additional waters. We believe these changes will help prevent increases in the area drained by these ditches, especially in those cases where the ditch did not achieve its design capacity when it was originally constructed.

A commenter recommended modifying the requirement that the capacity of the ditch must be the same as originally designed. The commenter is concerned that the only way for the capacity to remain the same is if the side slopes are increased is to narrow the bottom of the existing ditch. The commenter expressed concern about narrowing the bottom of the ditch and still having a stable system. The commenter suggested requiring the bottom width and depth of the ditch to be the same as originally designed.

We do not agree that this language should be changed, except to refer to the as-built capacity or the original construction of the ditch, for the reasons discussed above. The Corps believes that changing the language as recommended in the previous paragraph may unduly restrict the design criteria, because there may be some cases where the bottom width and depth would change, but the capacity would remain the same; therefore, we are keeping the current language. The important point is that this NWP may not be used to increase the capacity of the ditch.

A commenter requested that some provisions be made to allow for an increase in capacity to accommodate increased drainage in the watershed. Due to increased runoff, ditches may have become incised and restoring stable slopes may require increased capacity. The commenter suggested not restricting the permit to original design capacity, since this does not allow for laying back the side slopes without decreasing maximum depth to avoid increasing cross sectional area. Another commenter indicated that there may be constricted conditions that do not allow for shallow side slopes and wanted to know if there would be flexibility in the use of NWP 41.

Modifying this NWP to allow increased drainage capacity would be contrary to the intent of the NWP, which is to authorize changes in the ditch that help improve water quality. If the site characteristics do not support reshaping the ditch in a manner that improves water quality, without increasing drainage capacity, then this NWP cannot be used. Modifications of drainage ditches to accommodate changes in watershed hydrology or site limitations may be authorized by other types of Department of the Army permits.

One commenter asked if the NWP 41 would authorize the reshaping of existing drainage ditches that were not constructed in waters of the United States but now contain an ordinary high water mark or wetlands.

This NWP may be used in currently serviceable drainage ditches to the extent that they are jurisdictional. Division or district engineers can make a determination on the applicability of this NWP on a case-by-case basis.

A commenter was concerned about the prohibition against stream channelization activities. The commenter suggested that activities that modify the cross sectional configuration of drainage ditches could easily be interpreted as manipulation of a stream's condition that causes more than minimal interruption of normal

stream processes. The commenter encouraged the Corps to remove the channelization restriction from NWP 41.

The intent of this NWP is to authorize the reshaping of ditches to provide more stable conditions, which will improve water quality. The Corps does not believe this permit should allow channelization of streams.

Several commenters questioned why this NWP excludes non-tidal wetlands adjacent to tidal waters. The commenters asked why it matters whether currently serviceable drainage ditches were originally constructed in non-tidal wetland adjacent to tidal waters or in upland settings.

We believe that excluding ditch reshaping activities in non-tidal wetlands adjacent to tidal waters is necessary to ensure that the adverse effects on the aquatic environment will be minimal, individually and cumulatively. Wetlands adjacent to tidal waters tend to have a high level of ecological and hydrologic connectivity with tidal waters. Ditch reshaping activities in these areas may have more than minimal adverse effects and can be better addressed by other general permits or individual permits.

One commenter stated that this NWP should have a 500 linear foot limit and a 250-foot pre-construction notification threshold and that mitigation must be required for all adverse impacts to the aquatic environment authorized under this permit. Another commenter said that the activities authorized by this NWP would result in more than minimal adverse effects.

The Corps believes that the pre-construction notification threshold is sufficient. Since we will see all proposals that are over 500 linear feet, we will have the opportunity to determine if the impacts are more than minimal. The Corps does not believe this NWP will cause a permanent loss of waters, since the work involves reshaping existing drainage ditches to improve water quality, therefore, mitigation is not required.

Several commenters suggested that removing some of the language from the NWP 41 issued in 2002 made the permit less clear. One commenter suggested that the Corps add language stating indicating that this NWP is limited to reshaping activities that would restore more natural stream characteristics such as increasing the area of riparian vegetation through regrading or recreating stream meanders.

The Corps believes that including this type of language would go beyond the intent of this NWP, which is to authorize the reshaping of existing drainage ditches that may not have ever

contained meanders or other natural stream characteristics.

Other commenters suggested putting the language from the 2002 NWP 41 about compensatory mitigation back in the NWP.

The Corps agrees and the following language has been placed in the final version of NWP 41: "Compensatory mitigation is not required because the work is designed to improve water quality."

This NWP is reissued with the modifications discussed above.

NWP 42. *Recreational Facilities*. We proposed to modify this NWP by removing the language that limits its use to those recreational facilities that are integrated into the existing landscape and do not substantially change pre-construction grades or deviate from natural landscape contours. We also proposed to modify this NWP to require pre-construction notifications for all activities, and apply the 300 linear foot limit for losses of stream bed to ephemeral streams. In addition, we proposed to modify this NWP, to authorize the construction of ski areas, playing fields, and basketball and tennis courts.

One commenter suggested that the Corps change the word "loss" to "fill" or "impact" (including temporary and permanent impacts). Another commenter suggested rewording a sentence to address the Rapanos and Carabell decisions.

The Corps believes that the term "loss" is the appropriate term. The term "loss of waters of the United States" is defined in the "Definitions" section of the NWPs. Issues related to the jurisdictional reach of the CWA are not addressed in the NWPs or this preamble. Department of the Army Section 404 permits are required only for activities involving discharges of dredged or fill material into jurisdictional waters.

Three commenters stated that the activities authorized by this NWP are not similar in nature, and will not result in minimal adverse effects to water quality and the aquatic environment.

This NWP authorizes recreational facilities. The activities authorized by this NWP are all recreational facilities, which is a category of activity that is similar in nature. The pre-construction notification requirement gives district engineers the ability to assess the impacts to aquatic resources and, if warranted, exercise discretionary authority to add special conditions or require individual permits. Division and district engineers will condition such activities where necessary to ensure that these activities will have no more than

minimal adverse effects on the aquatic environment, individually and cumulatively.

Two commenters supported the removal of the limits on the types of recreational activities that can be authorized by this NWP. A number of commenters objected to allowing changes in preconstruction grades and deviations in natural landscape contours. Two commenters requested we prohibit the use of this NWP for golf courses, ski areas, playing fields, and basketball and tennis courts because these types of facilities are likely to alter natural landscape contours. One commenter stated that projects such as golf courses that require filling large valleys to create flatter areas, will change the hydrology of the area. One commenter requested that the Corps revoke this NWP or exclude golf courses, ski slopes, campgrounds and associated structures from this NWP. A couple of commenters suggested prohibiting the use of this NWP for habitat conversion, and the construction of buildings, stables and parking lots. Another commenter supported excluding hotels, racetracks, stadiums, and arenas from authorization by this NWP. A few commenters stated the proposed NWP encourages development of recreational facilities in wetlands, which creates maintenance problems, and they requested the NWP not be modified.

The Corps believes that recreational facilities that result in minimal individual and cumulative adverse effects on the aquatic environment should be authorized by this NWP, regardless of the changes that might occur to pre-construction grades or natural landscape contours in areas not subject to section 404 jurisdiction. This is consistent with activities authorized by other NWPs, which do not restrict grading and landscape contouring in uplands. Because of the pre-construction notification requirement for this permit, the district engineer will have the opportunity to review proposed recreational facilities to determine if they will result in more than minimal individual and cumulative adverse effects.

Six commenters objected to the proposal to allow district engineers to waive the 300 linear foot limit in ephemeral and intermittent streams. The district engineer will only waive the 300-linear foot limit in ephemeral and intermittent streams if he or she determines that the individual and cumulative adverse effects on the aquatic environment are minimal. Any waivers must be issued in writing from the district engineer.

Two commenters requested that the NWP be clarified so that acreage limits are applied cumulatively for both the original construction and expansion. One commenter said that this NWP should not be used with NWPs 29 or 39, to authorize recreational facilities within residential, commercial, or institutional developments, and that the  $\frac{1}{2}$  acre should apply to such projects.

The NWPs authorize single and complete projects, as defined in the "Definitions" section of the NWPs. The  $\frac{1}{2}$ -acre limit associated with this NWP applies to a single and complete project. In any case, if the district engineer determines that the impacts of a proposed project are more than minimal, individually or cumulatively, he or she will assert discretionary authority and require an individual permit. It is not necessary to prohibit the use of NWP 42 with NWPs 29 or 39. Even though NWPs 29 and 39 may be used to authorize recreational facilities as attendant features of residential, commercial, or institutional developments, any use of NWP 42 with NWPs 29 or 39 would be limited by general condition 24, Use of Multiple Nationwide Permits. Under that general condition, the  $\frac{1}{2}$  acre limit would apply to such projects.

Two commenters supported requiring pre-construction notification for all activities authorized by this NWP. In addition, they stated that the Corps should require documentation in the pre-construction notification that the facilities will result in unaltered surface and groundwater regimes and will not alter flow into open waters or streams. Another commenter supported retaining the  $\frac{1}{10}$  acre threshold for pre-construction notifications and eliminating it completely for projects conducted under USDA programs. The commenter believed requiring pre-construction notifications for all activities makes more work for both the public and the Corps.

The Corps believes that pre-construction notifications are necessary to ensure that proposed activities will result in no more than minimal individual and cumulative adverse impacts. If the district engineer determines that the construction or expansion of recreational facilities will result in adverse effects on aquatic resources, including water regimes and flow, he or she can impose special conditions or require an individual permit.

One commenter opposed the prohibition on use of this NWP in non-tidal wetlands adjacent to tidal wetlands, stating that it is arbitrary.

We believe that prohibiting the use of this NWP to authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters to construct or expand recreational facilities is necessary to ensure that the NWP authorizes only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment. Non-tidal wetlands adjacent to tidal waters warrant greater protection because of their interactions with those tidal waters and the functions and services they provide to coastal ecosystems. Construction activities resulting in discharges of dredged or fill material into those waters are more appropriately addressed through the individual permit process or regional general permits.

One commenter stated that recreation facilities proposing impacts in streams accessible to anadromous salmonids should not be authorized by this NWP. Another commenter request that the Corps place regional conditions on this NWP such that it will not authorize the construction of trails or paths along the top bank of a stream unless there is no loss of riparian vegetation or the riparian vegetation can grow back. That commenter also suggested that this NWP should not be used with NWP 13, since activities authorized by these two NWPs may adversely affect the addition of woody material in stream channels.

Division engineers can impose regional conditions on this NWP to address cumulative impacts, including impacts to salmon habitat. We do not agree that NWP 13 should be prohibited from being used with this NWP for a single and complete project. Bank stabilization may be required to maintain the integrity and safety of a recreational facility and to protect aquatic resources.

One commenter stated that the pre-construction notification requirement is not enough to ensure minimal impacts and that the Corps position that adverse impacts will be offset by compensatory mitigation is unfounded. This commenter also opposed eliminating the requirement to submit avoidance and minimization statements and water quality management measures.

The pre-construction notification requirement allows the Corps to evaluate recreational facilities on a case-by-case basis and determine if the project, as proposed, will result in more than minimal impact. The Corps believes that compensatory mitigation is an appropriate means of ensuring that adverse effects on the aquatic environment are minimal. The requirement to demonstrate avoidance

and minimization is part of general condition 20, Mitigation.

One commenter said that this NWP should be conditioned to require the establishment and maintenance of buffers adjacent to all open waters, streams, and wetlands on the site, to prevent water quality degradation due to erosion and sedimentation, protect stream banks, provide wildlife habitat, and to enhance watershed functions and values.

The establishment and maintenance of riparian areas next to streams and other open waters is addressed through the requirements of general condition 20, Mitigation. Please see the preamble discussion for general condition 20, where we address comments concerning requirements and recommended widths for riparian areas.

This NWP is reissued as proposed.

NWP 43, *Stormwater Management Facilities*. We proposed to modify this NWP to require pre-construction notification for the construction or expansion of stormwater management facilities, but not for maintenance activities. We also proposed to modify the 300 linear foot limit for the loss of stream bed by applying that limit to ephemeral streams. We proposed to allow district engineers to waive the 300 linear foot limit if the stream bed is intermittent or ephemeral and the filling and/or excavation of that stream bed will result in minimal individual and cumulative adverse effects on the aquatic environment. In addition, we proposed to remove the requirement for prospective permittees to submit maintenance plans and the permit text requiring the submission of compensatory mitigation proposals with pre-construction notifications.

One commenter suggested we refer to the definition of "stormwater management facilities" rather than furnish examples of the types of stormwater management facilities in the description of the NWP.

The text of the proposed NWP describes the type and nature of activities that are authorized in various stormwater management facilities (e.g., construction, maintenance, excavation, installation), rather than defining what constitutes a stormwater management facility. Therefore, we do not agree that the language within the text of the NWP is redundant or superfluous.

Several commenters requested we add restrictions to this NWP to exclude its use in special aquatic sites and/or prohibit construction of in-stream retention or detention basins and construction of hardened channels (e.g., concrete or riprap).

We do not agree it is necessary to prohibit the construction of in-stream retention or detention basins and/or hardened channels since division engineers can impose regional conditions to this NWP to exclude certain types of activities in specific streams, watersheds, or other designated aquatic resources to ensure impacts to the aquatic environment are minimal, individually and cumulatively. In addition, since construction and expansion activities require pre-construction notification, the district engineer can either require case-specific special conditions or exercise discretionary authority to require an individual permit if the proposed activity, such as construction of in-stream basins and/or hardened channels, would result in more than minimal adverse impact on the aquatic environment. All new construction and expansion of existing facilities requires a pre-construction notification.

Several commenters objected to the application of a 300 linear foot threshold for intermittent and ephemeral streams, while other commenters indicated the activities authorized under this NWP should apply exclusively to ephemeral streams and prohibit work in intermittent and perennial streams. One commenter stated that no stormwater management facilities should be constructed in waters of the United States.

We agree that intermittent and ephemeral streams often provide important functions, services, and values, although there are situations where activities in these streams will result only in minimal adverse effects on the aquatic environment. In many cases, the only practicable alternatives involve constructing stormwater management facilities in waters of the United States. The pre-construction notification process allows district engineers to review proposed construction and expansion activities on a case-by-case basis to ensure that those activities result in minimal individual and cumulative adverse effects on the aquatic environment.

In order for the 300 linear foot threshold for intermittent and ephemeral streams to be waived, the district engineer must make a written determination that the proposed work will result in no more than minimal adverse effects on the aquatic environment. If the district engineer does not provide written confirmation of the waiver, then the 300 linear foot limit remains in place and the prospective permittee must obtain another type of authorization for the proposed activity. As an added level of

protection, division engineers can impose regional conditions to further restrict or prohibit the use of NWP 43 in high value perennial, intermittent and ephemeral streams. Please note that this NWP prohibits discharges of dredged or fill material to construct new stormwater management facilities in perennial streams.

Some commenters asserted that activities authorized under this NWP would result in adverse environmental impacts on spawning habitat or cause more than minimal adverse impacts to the aquatic environment if the 300 linear foot limit is waived, and, as a result should be evaluated under the Corps individual permit process.

In general, we believe the activities authorized under NWP 43 would result in minimal adverse impacts to the aquatic environment, including spawning habitat. Requiring individual permits for all activities that would otherwise qualify for authorization under NWP 43 based solely on the fact that they involve the loss of greater than 300 linear feet of ephemeral or intermittent stream bed would place an unnecessary burden on the Corps and the permittee, with negligible added environmental benefits. District engineers will use their knowledge of the local aquatic environments and case-specific circumstances to determine when proposed activities would result in more than minimal adverse effects on the aquatic environment and consequently require an individual permit. In addition, general conditions 2 and 3 provide for the protection of aquatic life movement and spawning habitat, respectively, which collectively we believe will help to ensure overall minimal impacts.

One of the commenters requested we establish criteria for the district engineer's determination to waive the 300 linear foot limit. One other commenter expressed concerns that in the absence of such guidelines there would be inconsistencies within the Corps as to how or to what degree the waiver is applied.

We believe deference must be given to the district engineers' expertise and knowledge of the local aquatic environment, as well as their assessment of information submitted in pre-construction notifications, to make case-specific determinations on the effects to the aquatic environment. Based on the inherent variability across the nation, we disagree that it is necessary or appropriate to establish nationally applicable criteria for the application of the waiver. Aquatic resource functions, services, and values differ across the United States and,

accordingly, there will be corresponding differences in the criteria considered for implementation of the waiver consistent with regional and/or local variations. District engineers will make their case-specific determinations on the appropriateness of the waiver based on the characteristics of the local aquatic environment and in consideration of the specific circumstances of the proposed activity.

Some commenters suggested we combine this NWP with NWP 3, Maintenance, since both include maintenance activities.

We believe the specific requirements of NWP 43 are necessary to allow for specific types of maintenance activities that may not be authorized by NWP 3. For example, NWP 43 authorizes activities necessary to return the storm water management facility to its original design capacities, which may include basins that are not considered structures or fills. In contrast, NWP 3 is limited to the repair, rehabilitation, or replacement of structures or fills, or the removal of accumulated sediments in the vicinity of existing structures.

A few commenters requested we provide clarifications to NWP 43, including whether maintenance and mitigation plans for these facilities would be required. Several commenters requested we retain the requirement for submittal of maintenance plans for stormwater management facilities. Other commenters indicated the pre-construction notifications should include maintenance plans, avoidance and minimization measures, and water quality management measures.

The removal of the requirement for prospective permittees to submit maintenance plans and compensatory mitigation plans with pre-construction notifications simplifies this NWP and eliminates redundancy with general condition 20, Mitigation. Maintenance plans are not necessary if maintenance does not increase the design capacity of the facility. For new construction or expansion of existing facilities, compensatory mitigation requirements are addressed in general condition 20, Mitigation. Division engineers also have the ability to impose regional conditions to ensure specific activities authorized under this NWP result in minimal adverse impacts on the aquatic environment.

One commenter indicated maintenance of an existing stormwater management facility should not require Department of the Army authorization.

We disagree with this comment. Unless an exempted activity, all work and/or actions that result in the discharge of dredged or fill material into

waters of the United States require Department of the Army authorization.

One commenter opposed the elimination of the  $\frac{1}{10}$  acre pre-construction notification threshold.

We believe that pre-construction notification should be required for all new construction and expansion of existing facilities in order for the Corps to ensure that the individual and cumulative adverse environmental impacts associated with the project are minimal.

One commenter indicated this NWP should not apply to specific watersheds, while another commenter insisted we not re-issue this NWP.

We believe the stormwater management facilities authorized under NWP 43 often constitute vital development or improvement projects that serve important public functions, including protection of aquatic resources. While such activities may need to be located in waters of the United States, we believe the underlying provisions of the NWP program that require all authorized activities to have minimal impacts on the aquatic environment, coupled with the ability of division engineers to impose regional conditions on specific activities, will provide effective regulatory mechanisms for protecting the aquatic environment without adding further restrictions on the use of NWP 43.

One commenter indicated the prohibition on use in non-tidal wetlands adjacent to tidal waters is an unfair limitation to prospective permittees in coastal plains.

In consideration of the relatively high functions, services, and values these wetlands contribute to the overall health of the aquatic environment on a national basis, we do not agree that the prohibition on the use of NWP 43 in non-tidal wetlands adjacent to tidal waters is unfair to those perspective permittees located in coastal plains. More importantly, this prohibition is necessary to ensure that this NWP authorize only activities with minimal adverse effects, individually and cumulatively.

We have slightly revised the wording of this NWP to clarify that activities which increase existing capacity may be authorized as "expansion" of existing facilities if pre-construction notification is submitted.

This NWP is reissued as modified above.

**NWP 44. Mining Activities.** We proposed to simplify this NWP and modify it to authorize all types of mining activities except for coal mining. Surface coal mining activities may be authorized by NWP 21. Other types of

coal mining activities may be authorized by NWP 49 (Coal Remining Activities) or NWP 50 (Underground Coal Mining Activities). This NWP continues to authorize aggregate mining and hard rock/mineral mining activities. We proposed to retain the  $\frac{1}{2}$  acre limit for this NWP.

A number of commenters supported reissuance of NWP 44, but opposed the  $\frac{1}{2}$  acre limit, stating that it is arbitrary and duplicative of other existing regulatory requirements, or is too stringent for the permit to be useable. Several commenters expressed support for the  $\frac{1}{2}$ -acre limit and recommended adding a linear foot limit for stream impacts. One commenter recommended a  $\frac{1}{4}$  acre limit for this NWP, to protect anadromous fish. One commenter recommended a 2,000 linear foot limit for impacts to streams.

We believe that the terms and conditions of this NWP, including the  $\frac{1}{2}$ -acre limit, will ensure that activities authorized by this NWP result in no more than minimal adverse effects to the aquatic environment, individually and cumulatively. Aggregate and hard rock/mineral mining activities that do not qualify for authorization under this NWP can be authorized by individual permits. We believe the  $\frac{1}{2}$  acre limit is appropriate. We have modified the text of this NWP to clarify that the  $\frac{1}{2}$  acre limit applies to all non-tidal waters of the United States. This NWP only authorizes discharges of dredged or fill material into certain non-tidal waters of the United States. It does not authorize discharges into tidal waters, or non-tidal wetlands adjacent to tidal waters. As a pre-construction notification must be submitted for all activities, a specific linear foot threshold for streams is not necessary, as the district engineer can exercise discretionary authority or include special conditions to ensure that impacts to streams are no more than minimal. District or division engineers can condition this NWP on a case-by-case or regional basis to protect anadromous fish.

One commenter stated that ephemeral streams, isolated waters, and artificially created wetlands should not be considered in the acreage limitations.

The acreage limit for this NWP applies to waters of the United States. Impacts to non-jurisdictional waters are not considered as losses of waters of the United States, and are not counted towards the acreage limit for this NWP.

A couple of commenters stated that the reclamation plan should not be required as part of the pre-construction notification. Pre-construction notifications are frequently submitted to the Corps before reclamation plans are

required and the Corps has no authority over mining reclamation.

The Corps needs to review the reclamation plan to ensure that the authorized activities, including any required reclamation, do not result in more than minimal adverse environmental impact. In addition, reclamation activities may affect the need to require compensatory mitigation.

Several commenters opposed the removal of the prohibition on using NWP 44 in 100-year floodplains, while one commenter stated that certain mining activities will increase the flood storage capacity of floodplains and streams and thereby reduce flooding, which would benefit local communities.

In accordance with general condition 10, permittees must comply with applicable state or local floodplain management requirements that have been approved by the Federal Emergency Management Agency. In addition, the Corps will address impacts to 100-year floodplains through the case-by-case review that occurs through the pre-construction notification process.

Several commenters supported the simplification of NWP 44 by eliminating redundant terms and conditions. One commenter questioned whether the permittee could mine the same area over and over for aggregates as new deposits accumulate each year. This commenter also asked whether there is a limit on the number of times or locations that the permit can be used by one mining company, what kind of separation is necessary between mining sites, and whether this NWP can be used by one mining company on multiple streams.

This NWP can be used for any single and complete mining activity that has independent utility. The definitions of "single and complete project" and "independent utility" are provided in the "Definitions" section. Therefore, it is possible for an applicant to use this NWP each year or on multiple sites, provided each activity is a single and complete project that complies with the terms and conditions of the NWP, including the requirement that the individual and cumulative adverse environmental impacts are minimal. In response to pre-construction notifications, district engineers will determine whether proposed mining activities constitute separate single and complete projects that qualify for NWP authorization.

A number of commenters were opposed to the reissuance of NWP 44 because they believe the environmental impacts associated with the permit are more than minimal, and could result in

significant adverse effects to rivers and streams, including those with important fish and mussel species. One commenter stated that this NWP does not satisfy the "similar in nature" requirement for general permits. One commenter recommended that the Corps establish an activity-specific NWP for the aggregates industry. One commenter recommended excluding peat mining and in-stream gravel mining, due to the environmental damage produced by these types of mining.

This NWP authorizes mining activities that have no more than minimal individual and cumulative adverse effects on the aquatic environment. The terms and conditions of this NWP, including the NWP general conditions, will ensure that these mining activities will have no more than minimal adverse environmental effects. All activities authorized by this NWP require pre-construction notification to the district engineer prior to commencement of mining activities. The pre-construction notification process allows district engineers to review mining activities on a case-by-case basis, to ensure that the proposed work has no more than minimal adverse effects on the aquatic environment. The district engineer can add special conditions to the NWP authorization to ensure that any adverse effects on the aquatic environment are no more than minimal, or exercise discretionary authority to require an individual permit for the work. This NWP complies with the "similar in nature" requirement of general permits because it authorizes a specific category of activities (i.e., mining activities, except for coal mining activities).

One commenter recommended that the NWP be revoked in Montana because these activities would have more than minimal adverse environmental effects. One commenter also stated that the permit is not adequately coordinated with state and federal resource agencies and eliminates the public interest review.

Division engineers may add regional conditions to this NWP to enhance protection of the aquatic environment and address local concerns. Division engineers can also revoke this NWP in a specific geographic area if the use of that NWP would result in more than minimal adverse effects on the aquatic environment, especially in high value or unique wetlands and other waters.

This NWP is reissued with the modification discussed above.

NWP 45. *Repair of Uplands Damaged by Discrete Events*. This was proposed as NWP A. We proposed to remove

paragraph (iii) and portions of paragraph (i) from NWP 3 to this new NWP, to authorize emergency repair activities. This was intended to simplify NWP 3 and limit that NWP to routine maintenance activities.

Numerous commenters supported the issuance of this new NWP.

The majority of the comments received in response to the proposed NWP involved general concerns regarding the way in which this permit could affect time critical responses for emergency situations. Many commenters stated that authorization of the repair, rehabilitation, or replacement of structures or fills destroyed or damaged by storms or other discrete events should remain in NWP 3, since NWP 3 did not require pre-construction notification for those activities. Therefore, NWP 3 would allow expeditious maintenance activities, especially for infrastructure and other important features.

We agree, and have returned the language to NWP 3 that authorizes the repair, rehabilitation, or replacement of structures or fills destroyed or damaged by storms or other discrete events. We wish to clarify that this NWP is not intended to serve as an emergency permit. An "emergency" is a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action is not undertaken within a time period that does not allow the Corps to process the application under standard procedures. As many commenters pointed out, pursuant to 33 CFR 325.2(e)(4), the Corps has already developed special permitting and permit application processing procedures for emergency situations, which are applicable to all types of DA permits. Further, as several commenters indicated, in accordance with 33 CFR 323.4(a)(2), certain emergency response activities are exempted from the permitting requirements of Section 404 of the Clean Water Act. As a result of the changes discussed above, this NWP authorizes only the restoration of upland areas damaged by storms, floods, or other discrete events. Those repairs may or may not require emergency processing, though in most cases we believe they will not. We believe that the confusion regarding the purpose of this NWP was caused by the inclusion of the word "Emergency" in its name. In order to remove that confusion, we are renaming this NWP "Repair of Uplands Damaged by Discrete Events."

Several commenters expressed concerns over the lack of clear limits for this NWP, and recommended

establishing acreage or linear-foot limits in order to prevent more than minimal impacts to the aquatic environment. On the other hand, several commenters suggested establishing thresholds that would require pre-construction notification only for large-scale activities. One commenter asked how "pre-event" bottom contours of waterbodies would be determined, particularly on those sites with limited or no data, aerial photos, or other information.

This NWP only authorizes the restoration of damaged uplands to the extent that existed before the damage occurred, along with any bank stabilization necessary to protect the restored uplands. This NWP may also authorize minor dredging where necessary to restore material that has washed from the uplands into a neighboring waterbody. Since this NWP only authorizes activities to restore damaged areas to previously existing conditions, we do not believe that it will result in adverse effects that did not previously exist. We believe that the pre-construction notification requirements established for this NWP are necessary to ensure that the proposed activities will result in no more than minimal adverse effects. We recognize that the pre-construction notification requirement imposes an additional burden on project proponents, but we do not believe that it is inequitable or, in most circumstances, substantial. The district engineer has discretionary authority to require an individual permit for any proposed activity that will have more than minimal individual or cumulative adverse effects on the environment, and the pre-construction notification requirement is necessary for the effective use of this authority. When reviewing pre-construction notifications, district engineers will use available information, including documentation provided by permit applicants in accordance with the "Notification" provision of this NWP, to determine the pre-existing conditions. If maps or photographs are not available, the district engineer's judgment will be used.

One commenter stated that this NWP could interfere with tribal rights, including treaty fishing access, and that it could severely impact anadromous salmonid habitat.

District engineers can impose special conditions or assert discretionary authority and require an individual permit for projects that have more than minimal adverse effect on the aquatic environment or other public interest factors. Furthermore, activities

authorized under this NWP must comply with the NWP general conditions, including general condition 16, Tribal Rights, and general condition 2, Aquatic Life Movements.

One commenter requested clarification regarding the effects of changes in the ordinary high water mark after discrete storm or flood events on the scope of activities authorized under this NWP.

Discrete storm or flood events may result in erosion, which can change the ordinary high water mark (OHWM) in non-tidal waters or high tide line (HTL) in tidal waters. For the purposes of this NWP, determinations regarding the location of the OHWM or HTL will be made by the district engineer upon receipt of the pre-construction notification.

One commenter stated that this NWP is unnecessary since repair activities that do not exceed the original scope of the project should be covered by the original authorization. One commenter stated that the Corps should not allow rebuilding of structures located in floodplains which are likely to be damaged again by subsequent storm events.

This NWP authorizes the restoration of uplands damaged by a discrete event, in cases where there is no available authorization to restore those areas. There would be no original authorization for natural uplands that were damaged by a discrete event. Man-made uplands may have been constructed without the need to obtain a Department of the Army permit.

Activities authorized by NWP must comply with general condition 10, Fills within 100-year Floodplains, which requires all NWP activities to comply with any applicable FEMA-approved state or local floodplain management requirements. We do not agree that there should be a prohibition against rebuilding structures in floodplains. Such decisions should be made by the appropriate state or local authorities, in accordance with FEMA-approved floodplain management requirements.

A number of commenters stated that the terms of the NWP were contradictory with regards to the start date of the authorized activity. These commenters requested clarification as to whether the work must commence within two years from the date of the damages or from the date the pre-construction notification is filed.

We have modified the text of this NWP to clarify that activities authorized by this permit must commence, or be under contract to commence, within two years of the date of damage. This change will make the second paragraph

of this NWP consistent with the pre-construction notification requirements for this NWP. This requirement may be waived by the district engineer if the permittee can show that delays were unavoidable.

One commenter indicated that this NWP should also authorize temporary impacts that are necessary to repair or provide maintenance to damaged structures.

This NWP does not authorize temporary fills, structures, or work required to conduct the upland restoration activities. Those temporary activities may be authorized by NWP 33.

Proposed NWP A is issued as NWP 45, with the modifications discussed above.

**NWP 46. *Discharges in Ditches.*** This NWP was proposed as NWP B to authorize discharges of dredged or fill material into certain types of ditches and canals. This NWP allows a landowner to return his or her land to its prior condition, but only in those cases where the ditches or canals meet all four criteria specified in the NWP. To qualify for this NWP, those ditches and canals must: (1) Be constructed in uplands, (2) receive water from another water of the United States, (3) divert water to another water of the United States, and (4) be determined to be waters of the United States. These four criteria will limit the use of this NWP to those ditches and canals that generally provide few aquatic resource functions. This proposed NWP does not authorize discharges of dredged or fill material into ditches or canals that were constructed in waters of the United States, such as streams.

Several commenters supported the new NWP. Several commenters stated that the limits for this NWP are too high to prevent more than minimal impacts on the aquatic ecosystem, particularly to flood storage and water quality. Several commenters recommended establishing a 300 linear foot threshold for pre-construction notification and a 1/2 acre limit on permitted impacts, in order to be consistent with other NWPs. Another commenter stated that filling ditches should not be allowed without an assessment of how the hydrology was altered when the ditch was created and how the hydrology and water quality would be affected if it is filled. Another commenter recommended requiring pre-construction notification for all activities under this NWP, because authorized activities could result in isolating wetlands that are adjacent to the ditches and severing the migratory pathways of aquatic organisms. On the other hand, one commenter stated that since the ditches regulated by this



permit have been determined to provide few aquatic resource functions, the thresholds for pre-construction notification and limits for permitted impacts should be increased. Similarly, one commenter suggested that this NWP should not have any limits, because the regulated ditches are not natural.

This NWP authorizes discharges of dredged or fill material into certain types of ditches. Those ditches must meet all of the criteria listed in the first paragraph of the NWP. To ensure that this NWP is used only to authorize discharges into those types of ditches, and to ensure that those activities result in minimal adverse effects on the aquatic environment, we are requiring pre-construction notification for all activities. To address concerns regarding the jurisdictional status of the waters of the United States other than the ditch to be filled, we have changed the text of this NWP to state that those other waters had to have been waters of the United States prior to the construction of the ditch. Therefore, the jurisdictional status of those waters should remain unchanged after the ditch is filled.

We are retaining the proposed one acre limit for this NWP. We believe that the applicable provisions and terms and conditions, including the general conditions, the pre-construction notification requirements, and the ability of division and district engineers to assert discretionary authority and impose regional and case-specific conditions on this NWP, will ensure that the activities authorized will result in no more than minimal individual and cumulative adverse effects on the aquatic environment.

One commenter stated that a determination of absence or presence of salmonids should be required in channels potentially accessible by anadromous salmonids. Another commenter said that this NWP should not authorize discharges of dredged or fill material into streams.

Potential impacts to salmon species will be considered by district engineers during the review of pre-construction notifications. General condition 2, Aquatic Life Movements, prohibits activities which could disrupt the necessary life cycle movements of aquatic species. If deemed appropriated, this NWP can be regionally conditioned by division engineers to limit or restrict the use of this NWP in waters accessible to anadromous salmonid species. The text of this NWP clearly states that it does not authorize discharges into streams, or streams that have been relocated into uplands.

Several commenters stated that the proposed NWP is contrary to Section 404(e) of the Clean Water Act because it is not a general permit for a category of activities that are similar in nature but rather a permit for a category of waters, and that the Corps has no authority to issue a permit for a category of waters. One commenter suggested that the Corps clarify that the NWP is not limited to situations where the landowner seeks to return his or her land to its prior condition. One commenter requested clarification on whether impacts to roadside ditches for road improvements can be permitted under this NWP, or if NWP 14 would be applicable. Similarly, another commenter suggested that fill for access roads should be included in this NWP.

We expect that this NWP will be mostly used by landowners to return ditches or portions of ditches to their prior upland condition. However, this NWP may also authorize ditch relocation and reshaping activities. To help ensure that this NWP only authorizes activities with minimal individual and cumulative adverse effects on the aquatic environment, we have added language stating that this NWP does not authorize discharges of dredged or fill material that will increase the drainage capacity of the ditch and will drain other waters of the United States. In the event that the ditch is returned to its prior upland condition, the Corps would no longer have regulatory jurisdiction over that ditch. This NWP may authorize discharges of dredged or fill material into roadside ditches, provided those ditches meet all four criteria specified in the first paragraph of this NWP. Access roads may be authorized by other NWPs, regional general permits, or individual permits.

One commenter requested clarification as to whether all four or only one of the four eligibility criteria are needed for a project to be authorized under this NWP. The same commenter requested clarification on the eligibility criterion "receive water from another waters of the United States." One commenter asked whether this NWP could be used to authorize discharges of dredged or fill material into both tidal and non-tidal waters of the United States. One commenter said that this NWP should not authorize discharges into canals, because canals can be large aquatic systems and the adverse environmental effects could be more than minimal.

This NWP applies only to those ditches that meet all four criteria specified in the first paragraph of the NWP. The second criterion for eligible

ditches refers to situations where the ditch constructed in uplands receives surface water flow from another water of the United States that existed prior to the construction of that upland ditch.

To ensure that this NWP authorizes only those activities with minimal individual and cumulative adverse effects on the aquatic environment, we have limited this NWP to discharges of dredged or fill material into non-tidal ditches. In addition, it does not authorize discharges of dredged or fill material into navigable waters of the United States (i.e., section 10 waters). We have removed the word "canal" from this NWP, to provide further clarity since canals may be navigable waters of the United States. Discharges into a non-tidal ditch that flows into a tidal water could be covered under NWP 46, but not discharges into a "tidal" ditch, i.e., one into which tidal waters flow.

A number of commenters questioned or requested clarification of Corps jurisdiction over ditches following the Supreme Court decisions in *Rapanos* and *Carabell*. One commenter requested clarification on whether the term "water of the United States" includes wetlands or only waterbodies, and whether a ditch connecting two wetlands would qualify for authorization under this NWP. One commenter suggested providing guidelines for or examples of the information required to determine that a ditch was constructed in uplands.

This NWP can be used to authorize discharges of dredged or fill material into ditches that meet the four criteria in the first paragraph, as well as the other terms and conditions of this NWP. The waters of the United States other than the ditch constructed in uplands may consist of wetlands, open waters, or both. This preamble does not address the limits of jurisdiction after *Rapanos* and *Carabell*.

Data used to determine whether a ditch was constructed in uplands may be obtained from a variety of sources, such as aerial photographs, soil surveys, property maps, plans, plots or plats, previous jurisdictional determinations and data sheets, topographical maps, wetland inventory maps, and photographs.

One commenter stated that mitigation should be required for impacts to wetlands and aquatic life that may be established in those ditches. In contrast, another commenter stated that requiring mitigation for reversion to a prior upland condition is excessive and unreasonable.

We do not believe that it would be appropriate or practical to establish a national standard requiring mitigation

for all activities authorized by this NWP. The need for compensatory mitigation to ensure minimal individual and cumulative adverse effects will be made by district engineers on a case-by-case basis, in response to pre-construction notifications. We believe that the provisions of general conditions 27 and 20 will allow the district engineer to determine if any compensatory mitigation is needed to reduce the effects of the activities authorized under this permit to the minimal level.

One commenter suggested that the one-acre limit should not apply if the impacted ditch is replaced with another ditch that would perform the same functions.

Although this NWP may be used to authorize discharges of dredged or fill material into ditches for the purpose of relocating those ditches, the one acre limit applies to the loss of waters of the United States that results from the discharge of dredged or fill material into the existing ditch.

One commenter requested clarification on how the "constructed in uplands" criterion reconciles with Corps policy at 51 FR 41217, under which ditches excavated on dry land are generally not waters of the United States.

The proposed NWP is consistent with the policy established in the November 13, 1986 **Federal Register** Notice (51 FR 41217), because that policy also states that the Corps reserves the right on a case-by-case basis to determine whether non-tidal ditches excavated on dry land or other features constitute waters of the United States.

One commenter requested clarification on how this NWP reconciles with the Section 404 exemption for construction and maintenance of irrigation ditches at 33 CFR 323.4(a)(3).

The Section 404 exemption at 33 CFR 323.4(a)(3) applies to construction and maintenance of irrigation ditches or the maintenance of drainage ditches. This NWP authorizes activities not covered in the exemption, such as discharges of dredged or fill material to restore the area to its previous upland condition.

One commenter stated that this NWP should not be issued because it is contrary to the Congressional intention that ditches should be regulated as point sources and not as navigable waters.

This preamble does not address the limits of Clean Water Act jurisdiction. To the extent that ditches are determined to be waters of the United States, this permit provides authorization for discharges of dredged

or fill material into them provided all conditions for its use are met.

One commenter recommended providing definitions for "ditch" and "canal".

We believe that district engineers should maintain the discretion to determine on a case-by-case basis whether particular features are ditches or canals and also are waters of the United States.

Proposed NWP B is issued as NWP 46 with the modifications discussed above.

NWP 47. *Pipeline Safety Program Designated Time Sensitive Inspections and Repairs*. In the September 26, 2006, **Federal Register** notice, we proposed this NWP (as proposed NWP C) to authorize the inspection, repair, rehabilitation, or replacement of any currently serviceable structure or fill for pipelines that are determined to be time-sensitive in accordance with the Pipeline and Hazardous Materials Safety Administration's Pipeline Safety Program (PHP), including its criteria at 49 CFR parts 192 and 195.

Thirteen comment letters were received concerning this proposed NWP with six expressing strong support for its issuance but also inquiring about the applicability of general conditions 17 (Endangered Species) and 18 (Historic Properties) to the use of the permit. Six commenters recommended that the Corps enter into programmatic ESA consultation with PHP and the U.S. Fish and Wildlife Service and the National Marine Fisheries Service.

This NWP only authorizes activities that are included in the U.S. Department of Transportation's Pipeline Repair and Environmental Guidance System (PREGS). The PHP is the lead Federal agency for these activities and, as such, conducts any Section 7 consultation required under the Endangered Species Act and consultation required under Section 106 of the National Historic Preservation Act. In cases where PHP has not conducted consultation required by either Section 7 of the Endangered Species Act, or Section 106 of the National Historic Preservation Act, permittees are required by 33 CFR 330.4(f) and (g) to notify the Corps if there are threatened or endangered species or critical habitat, or historic properties that might be affected or are in the vicinity of the project.

One commenter declared that "inspections" should be removed from the list of authorized activities since technology exists which allows pipeline operators to evaluate a pipeline without the need to visually inspect it. One commenter said that this NWP should not authorize the repair of pipelines that have deteriorated as a result of neglect.

Two commenters stated that acreage limits should be placed on the NWP. One commenter remarked that access roads should be authorized by the NWP because problems will occur when an activity requires use of multiple NWPs and one of the other NWPs has an acreage limit.

We disagree with the first two comments of the preceding paragraph. Pipeline inspections are critical activities related to the repair of these pipelines. In certain instances it is necessary that the pipeline be visually inspected, and this permit allows excavation to expose the pipeline. Impacts authorized under this NWP will be temporary in nature so the aquatic resources will recover over time. This NWP provides Department of the Army authorization for the repair, rehabilitation, or replacement of currently serviceable pipelines. These pipelines are unlikely to become unserviceable as a result of neglect, since operators are required to periodically inspect these pipelines and make necessary repairs or replacements. We do not believe acreage limits are necessary, given the nature of the category of activities authorized by this NWP. Access roads will not generally need to be constructed to conduct the pipeline inspection and repair, since access roads would likely have been built at the time the pipeline was constructed, or the terrain will not impede access to the pipeline. If temporary access roads are necessary to conduct the pipeline inspection and repair activity, they are authorized by this NWP as long as they are removed upon completion of the work. This NWP requires that all temporary structures and fill be removed and the area restored to preconstruction elevations. We have modified paragraph (c) of this NWP so that it is consistent with general condition 13, Removal of Temporary Fills.

One commenter inquired as to why temporary activities are included in the proposed NWP when this work is being removed from other NWPs that authorize maintenance. Two commenters requested we add a pre-construction notification requirement for environmentally sensitive areas. One commenter said the pre-construction notification should be required for all activities. Two commenters were against and one commenter supported prohibiting division engineers from placing regional conditions on the NWP.

Since the objective of this NWP is to authorize inspections and repairs for eligible pipelines in a timely manner, the NWP authorizes temporary activities necessary to conduct the inspection,

repair, rehabilitation, or replacement activity. We do not agree that it is necessary to require pre-construction notification for these activities, since PHP is the lead Federal agency for these activities. Submitting a pre-construction notification when a pipeline is in critical need for repair will delay the repair and increase the risk that the pipeline will leak and cause more damage to the aquatic environment, particularly environmentally sensitive areas. Given the nature of the activities authorized by this NWP, as well as its objective of authorizing these activities in a timely manner, we believe it is unnecessary for division engineers to regionally condition this NWP. However, division engineers can impose regional conditions on this NWP that are limited to measures necessary to minimize adverse effects to the aquatic environment, as long as those regional conditions do not require pre-construction notification or cause delays to inspection and repair activities. We have added a "Note" to this NWP to explain what types of regional conditions may be added by division engineers.

Two commenters suggested that in order for water quality certifications to be issued, a list of "time-sensitive" activities as well as appropriate best management practices must be provided by PHP and an opportunity for public comment should be given for the best management practices. One commenter stated PHP has not made all the best management practices available to the pipeline operators yet.

We do not agree that it is either necessary or feasible to provide a list of time-sensitive activities or best management practices for states, Indian tribes, and EPA to make their water quality certification decisions for this NWP. In response to concerns raised by states or tribes through the water quality certification process, districts may add regional conditions as long as they do not preclude its use for time sensitive repairs. Identification of time-sensitive activities will be made in the future, as the program is implemented. Best management practices may vary by region, and we do not believe it is necessary for PHP to solicit public comment on those best management practices prior to implementing this NWP.

Proposed NWP C is issued as NWP 47 with the modifications discussed above.

NWP 48. *Existing Commercial Shellfish Aquaculture Activities*. We proposed to issue this new NWP to authorize ongoing shellfish aquaculture activities throughout the United States.

The majority of commenters expressed their support for this new NWP, stating that existing commercial shellfish operations do not have more than minimal adverse impacts on the aquatic environment and contribute benefits to the ecosystem that balance any adverse impact. Referencing numerous scientific studies as evidence of the beneficial aspects of shellfish culture, many of these commenters expressed their desire for the 25-acre threshold for pre-construction notification to be raised considerably, or eliminated entirely, stating it was arbitrary and created an unnecessary bureaucratic paperwork burden for the operators and the Corps. In addition, many commenters recommended that the NWP not be limited only to existing operations but also be available for the expansion of existing operations and for new operations. One commenter supported limiting this NWP to existing operations. A few commenters objected to the issuance of this NWP, stating that commercial shellfish aquaculture operations of unlimited size threaten submerged aquatic vegetation, shorebirds, and other estuarine resources, and potentially exceed the minimal impact threshold, both individually and cumulatively. Several commenters believed that potential for adverse impacts was related more to specific activities than to the geographic extent of an operation, and that whether an operation engaged in these activities was thus a better basis for limits or pre-construction notification thresholds. One commenter recommended requiring pre-construction notification for the use of canopy predator nets that cover broad areas of an aquaculture operation because of potential impacts to a variety of aquatic species. One commenter recommended requiring pre-construction notification for all activities authorized by this NWP, while another commenter suggested a simple reporting requirement in lieu of a pre-construction notification.

Since shellfish improve water quality and increase food production, we believe that there is generally a net increase in aquatic resource functions in estuaries or bays where shellfish are produced. We do not believe it is necessary to require pre-construction notification for all activities authorized by this NWP, including those that involve canopy predator nets. Concerns regarding the use of canopy predator nets are more appropriately addressed through regional conditions imposed by division engineers, or by special conditions added to NWP authorizations by district engineers.

After review of the comments and of scientific literature, we have modified the pre-construction notification requirements. Pre-construction notification will be required if the project area is greater than 100 acres or if the operation conducts any of the following activities: any reconfiguration of the aquaculture activity, such as relocating existing operations into portions of the project area not previously used for aquaculture activities; a change in species being cultivated; a change in culture methods (e.g., from bottom culture to off-bottom culture); or dredge harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation. We do not believe it is necessary to require pre-construction notification for on-going operations, unless the project area is greater than 100 acres or the operation involves dredge harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation, since on-going operations not meeting these criteria are unlikely to result in significant adverse environmental effects. However, in order to generate better information for future permitting decisions, for those activities that do not require pre-construction notification, we are requiring operators to submit a brief report that will provide the district engineer with basic information on the activity. The report must include the size of the project area, the location of the aquaculture operations, a brief description of the culture methods used, a brief description of the harvesting method(s) used, the name(s) of the cultivated species, and a statement addressing whether canopy predator nets will be used. For each existing operation not submitting a pre-construction notification, the report needs to be submitted within 90 days of the effective date of this NWP. Following submission of this one-time report, no further reporting is necessary. However, if there are any changes to the operation that require Department of the Army (DA) authorization, then pre-construction notification is required if the proposed changes meet any of the pre-construction notification triggers. Depending on the region and culture method used, there may be additional restrictions (e.g., limits on timing of certain activities) that are necessary to further minimize impacts to aquatic resources. These regional concerns are best addressed by district engineers in coordination with State and local agencies and handled through regional conditioning.

Many commenters were confused about the definitions of "existing

operation” and “project area” and requested clarification of these terms.

For the purposes of this NWP, an existing operation is one that has been granted a permit, license, or lease from a state or local agency specifically authorizing commercial aquaculture activities and which has undertaken such activities prior to the date of issuance of this NWP. For the purposes of this NWP, the project area is defined as the area of waters of the United States occupied by the existing operation. In most cases, the project area will consist of the area covered by the state or local aquaculture permit, license, or lease. The project area may consist of several sites that are not contiguous. The project area may include areas in which there has been no previous aquaculture activity and/or areas that periodically are allowed to lie fallow as part of normal operations. Relocation of existing operations into portions of the project area not previously used for aquaculture activities may be authorized by this NWP but will require a pre-construction notification. Cultivation in areas that were previously used but allowed to lie fallow does not require a pre-construction notification. Operators should maintain appropriate documentation showing which areas were previously cultivated.

This NWP is limited to work associated with the continued operation of existing commercial shellfish operations, many of which have been in place for hundreds of years. The potential for adverse environmental impacts from such existing operations is minimal, and we support the objectives of the U.S. Department of Commerce's Aquaculture Policy to increase shellfish productivity in this country. Although we believe new projects and the expansion of existing operations are also unlikely to have a high potential for adverse effects on the aquatic environment, without an established data set from which to work, we are not prepared to include them in this NWP at this time. Although new projects and the expansion of existing operations are not authorized initially by this NWP, once authorized by another form of DA permit, such as a regional general permit or an individual permit, the commercial shellfish activities may continue in accordance with the terms and conditions of the issued permit and/or this NWP. Division engineers will conduct regional reviews of commercial shellfish aquaculture activities in coordination with interested agencies and shellfish producers over the next 5 years. After these reviews are completed, we may be prepared to propose an NWP to

authorize new commercial shellfish aquaculture operations and the expansion of existing operations in the next NWP re-issuance cycle. The information gathered through the pre-construction notification process and reporting requirement for existing operations in the current NWP will support this effort.

Several commenters expressed confusion regarding whether ongoing commercial shellfish operations require reauthorization under this NWP, if those existing operations have previously been permitted by the Corps.

Existing operations previously authorized by another NWP or another form of DA permit, such as a regional general permit or an individual permit, are covered until the expiration of the original permit. If the operator wishes to continue, and the operation's size, conditions, and/or practices trigger the pre-construction notification requirements of this NWP, then a pre-construction notification must be submitted to the appropriate district office for review prior to the expiration date of the original permit in order to remain in compliance with Federal laws. If the pre-construction notification requirements are not triggered, the operator must submit the required brief report within 90 days of the beginning of coverage under this NWP.

This NWP authorizes the continued operation of existing commercial shellfish aquaculture operations. The continued operation of an aquaculture activity may involve removing and replacing structures in navigable waters of the United States on a recurring basis and requires a current DA permit. However, if an operator is installing a fixed structure, the construction period for a DA permit is the period of time where the permittee is authorized to conduct work in navigable waters of the United States and/or discharge dredged or fill material into waters of the United States. Once the DA permit expires, further authorization is not required to maintain the structures or fills, but if additional work in navigable waters or discharges of dredged or fill material in jurisdictional waters are necessary for the continued operation of those activities, then another DA permit is required.

Many commenters were confused about the requirement to submit a pre-construction notification, assuming that having to submit a pre-construction notification meant that an individual permit would be required. The requirement to submit a pre-construction notification does not mean that an individual permit will be required. Instead, it means that a district

office will review the project, in coordination with appropriate resource agencies, within a 45-day timeframe and respond to the applicant with either a verification of the applicability of the NWP or a determination that an individual permit, or other type of DA permit, is required. If the applicant does not hear back from the Corps within 45 days, he or she may assume that the operation is authorized by the NWP.

A pre-construction notification is a brief document that is intended to provide the district engineer with enough information to determine whether an activity is authorized by NWP. The information requirements for a pre-construction notification are listed in paragraph (b) of general condition 27, Pre-Construction Notification. Detailed studies or analyses are not required for pre-construction notifications. The required description of the direct and indirect adverse environmental effects that are expected to result from the NWP activity should be brief, but with sufficient detail to allow the district engineer to determine whether the adverse environmental effects will be minimal and assess the need for compensatory mitigation. The description for the pre-construction notification should include the size of the project area, the name(s) of the species being cultivated, the types of cultivation methods (e.g., long lines, bottom culture, rack and bags), and the harvesting method (e.g., hand pick, dredge, long line harvest). The description should also state when dredge harvesting, harrowing, or tilling will occur in waters with SAV.

For all projects that do not trigger the pre-construction notification requirements of the NWP, submission of a brief report is required. This reporting requirement will help us monitor the use of this NWP, to help ensure that it authorizes only those activities that have minimal individual and cumulative adverse effects on the aquatic environment and other public interest review factors. We have attempted to keep the reporting requirement as simple as possible, to minimize administrative burdens on operators.

A few commenters suggested that NWP 48 is unnecessary because NWPs 4 and 27 adequately cover all the needs of commercial shellfish operations.

Although shellfish seeding activities were authorized by previous versions of NWP 4, that NWP did not authorize additional structures or work in navigable waters commonly associated with commercial shellfish aquaculture activities, such as the installation of stakes and netting in navigable waters to

prevent predators from feeding upon the shellfish. Because of the issuance of this NWP and the modification of NWP 27, it is no longer necessary to include shellfish seeding in the list of activities authorized by NWP 4 and we have removed it. NWP 27 does not cover commercial shellfish operations. It covers shellfish habitat restoration activities, including shellfish seeding, that are conducted to restore shellfish populations. Restored populations may, at some future date, be subject to recreational harvesting; but the purpose of activities conducted under NWP 27 is restoration, not commercial aquaculture. Although NWP 48 represents a change in how commercial shellfishing operations are being regulated by the Corps, structures and other work in navigable waters of the United States have been regulated activities for decades. Discharges of dredged or fill material into waters of the United States have been regulated under Section 404 of the Clean Water Act since 1972, but the definitions of these terms have changed over the years. Individual permits remain a permitting tool that will be necessary in some circumstances. There are several districts that currently have regional general permits in place to authorize aquaculture activities and more general permits are expected to be developed.

In the preamble to the September 26, 2006, proposal, we solicited comments on whether to impose limits on the quantity of dredged or fill material that could be discharged into navigable waters under this NWP. One commenter said that this NWP should be conditioned to prohibit discharges of dredged or fill material or to require pre-construction notification for each activity involving such discharges. Many commenters stated that there should be no limitation on the quantity of dredged or fill material that could be discharged into navigable waters because the cost of such material is limiting and also because most of the material is removed during harvest. Many mentioned large Federal restoration projects that have utilized shellfish seeding methods to enhance estuaries. Several commenters objected to having no limits and several suggested limiting the discharge to 3 to 6 inches or a certain percentage of the water column. Several others indicated that materials such as marl, concrete, and gravel, in addition to shell and shell fragments, should be included in the material authorized for discharge.

It would be illogical to prohibit discharges of dredged or fill material under this permit, since without such discharges, no permit is required

anyway. This NWP authorizes discharges of dredged or fill material into waters of the United States only for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities for on-going commercial shellfish aquaculture activities. With the exception of harvesting activities, such discharges usually enhance habitat characteristics to support the growth of shellfish. As for harvesting activities, pre-construction notification is required for dredge harvesting in areas inhabited by submerged aquatic vegetation, so case-by-case review will be conducted to determine if the activity results in more than minimal adverse effects on the aquatic environment. Pre-construction notification is also required for tilling and harrowing in submerged aquatic vegetation. Other harvesting activities that are part of on-going activities are unlikely to result in more than minimal adverse effects. Division engineers may impose regional conditions on this NWP to further restrict cultivation or harvesting practices or to require pre-construction notification for additional practices that may be of concern within a particular area.

Many commenters expressed concern over whether the gear associated with commercial shellfish culture would be authorized by this NWP, noting that much of the in-water gear serves as habitat for other aquatic species and is necessary for the success of a commercial shellfish venture. Other commenters expressed concern over the waste and trash left by geoduck operations and the adverse impacts that litter has on the surrounding intertidal environment.

This NWP authorizes structures or work in navigable waters of the United States, as well as discharges of dredged or fill material into all waters of the United States for the purposes of the commercial seeding, rearing, cultivating, transplanting, and harvesting of shellfish, which may involve the installation of buoys, floats, racks, trays, nets, lines, tubes, and containers, as well as other associated structures and work. The language of the NWP has been modified to clarify that it does not authorize the discharge of dredged or fill material into waters of the United States for attendant features of commercial aquaculture operations such as boat ramps, stockpiles, staging areas, and moorings or for the deposition of shell material back into tidal waters as a waste material. As stated above, discharges of dredged or fill material below the high tide line/ordinary high water mark must be of the minimum necessary to provide suitable

planting substrate. Examples of commercial shellfish species for which this NWP may be used to authorize existing commercial aquaculture activities include oysters, clams, geoducks, mussels, and scallops. The proposed NWP does not authorize commercial aquaculture activities for crustaceans or finfish. Types of gear specific to a particular region or species are best evaluated on a regional basis by the district engineer and can be addressed through regional conditions.

There are different types of shellfish seed that can be used to increase shellfish production. Shellfish seed may consist of immature individual shellfish, an individual shellfish attached to a shell or shell fragment (i.e., spat on shell) and shellfish shells, shell fragments, and/or shell fragments mixed with gravel/concrete/limestone placed into waters to provide a substrate for attachment by free swimming shellfish larvae (i.e., natural catch). Several commenters asked that we clarify the definition of shellfish seeding. We have provided a definition of shellfish seeding in the "Definitions" section of the NWPs. This definition was based on the definition provided in the preamble to the September 26, 2006, **Federal Register** notice (71 FR 56275).

Most commenters asked that we clarify our definition of submerged aquatic vegetation (SAV) and asked that we limit our concern to those species of aquatic vegetation that have been shown to have beneficial environmental effects. Some commenters expressed concern that any commercial aquaculture activity would have a negative impact on SAV and therefore this NWP should not be issued. Many commenters asked that we remove the pre-construction notification requirement for operations having more than 10 acres of the project area occupied by SAV, stating that shellfish beds clarify the water thereby increasing the likelihood that SAV would colonize their project area. A few commenters suggested that we define the density of bed and length of time present (i.e., recognize seasonal population fluctuation) necessary to trigger the reporting requirement.

Commercial shellfish aquaculture activities often take place in, and are found to co-exist with, intertidal areas that are occupied by submerged aquatic vegetation (i.e., vegetated shallows). The definition of vegetated shallows (see Part D, Definitions) clarifies that vegetated shallows are those areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in

freshwater systems. Macroalgae are not included in our definition of SAV nor is it our intent to provide protection for noxious or invasive species such as *Zostera japonica*. However, to minimize adverse effects to valuable aquatic habitat, such as shallows vegetated by species such as *Zostera marina*, we are requiring pre-construction notification for dredge harvesting, tilling, or harrowing in areas inhabited by SAV. To capture the regional variances, such as colonization rate, population shifts, density, and species composition, districts may choose to further refine the definition of SAV in their regional conditions to better reflect environmental circumstances in their region. We are removing the proposed requirement to submit a pre-construction notification if the project area includes 10 acres or more of SAV because we have determined that only certain types of activities (dredge harvesting, tilling, harrowing) in SAV areas have the potential to cause more than minimal adverse impacts.

The majority of commenters objected to the proposed prohibition against the cultivation of new species by an operation while recognizing the need to protect the environment from invasive species colonization. A few commenters were in favor of the prohibition citing concerns about invasive species and changing culture methods. One commenter said that this NWP should not authorize experimental cultivation of new species in a waterbody.

Upon review of the comments, the proposed NWP has been modified slightly. The NWP does not authorize aquaculture activities for any species that were not previously cultivated in the waterbody. However, under this NWP, an individual operator can change the species grown under this NWP within the project area, provided the change is limited to species that have been previously cultivated in the waterbody. Such a change would require pre-construction notification. The commercial production of a shellfish species that has not been previously commercially produced in the waterbody, including new exotic (non-native) species, may only be authorized by an individual permit or a regional general permit if applicable. Also, this NWP does not authorize experimental cultivation of new species. It only authorizes on-going commercial shellfish aquaculture activities, provided those activities satisfy the terms and conditions of this NWP. Experimental cultivation is considered to be a new activity, and may be authorized by other DA permits if it

involves activities subject to the Corps regulatory jurisdiction.

Producers must be licensed, as required, through their State's regulatory agency. Commercial harvest will only commence under each State's Shellfish Authority, as delegated by the U.S. Food and Drug Administration under the National Shellfish Sanitation Program. To be eligible for coverage under this NWP, producers must obtain all required permits or licenses required for their culture activities, such as transfer permits, development permits, and land-use permits.

In response to commenters concerned about the individual and cumulative adverse effects to the environment and the many commenters who stated that acreage limits were not an adequate way of establishing or evaluating the interaction of the shellfish operation with the aquatic environment, an additional pre-construction notification threshold has been added. When an existing operation decides to change culture methods, for example to go from bottom-culture to long-line or from long-line to bottom culture, pre-construction notification is required. These existing operations may be authorized by this NWP, after the district engineer has reviewed the pre-construction notification and determined that the new activity complies with the terms and conditions of the NWP and will have minimal adverse effects.

We are also committed to conducting programmatic reviews of commercial shellfish activities generally to ensure that the Corps is authorizing only those activities that result in minimal individual or cumulative adverse effects on the aquatic environment with this NWP or other general permits for aquaculture activities. These reviews will begin as soon as possible in all divisions, and will involve Federal, State and local agencies, stakeholders, and the general public to help the Corps develop future regional and special conditions to mitigate impacts to the aquatic environment or other aspects of the public interest which may result from commercial shellfish aquaculture activities. Completion of these programmatic reviews is not necessary for authorization under this NWP. The data collected through the pre-construction notification and reporting requirements will support these reviews.

One commenter said that this NWP should include conditions prohibiting the use of pesticides. A commenter stated that this NWP should require pre-construction notification for any activity located in National Park Service units, and that review by the National Park

Service should be conducted before the activity is authorized by this NWP.

The Corps does not regulate application of pesticides under Section 10 of the Rivers and Harbors Act of 1899 or Section 404 of the Clean Water Act. The application of pesticides into aquatic environments is regulated by other agencies through other authorities. We do not agree that pre-construction notification should be required for on-going commercial shellfish aquaculture activities being conducted in areas under the purview of the National Park Service. The National Park Service has the authority to control the activities conducted in its units, to ensure that those activities are consistent with any management requirements or objectives established for those units.

Proposed NWP D is issued as NWP 48, with the modifications discussed above.

**NWP 49. Coal Remining Activities.** This is a new NWP. It provides for authorization of projects associated with the remining and reclamation of lands that were previously mined for coal. New mining may be conducted on adjacent areas provided that the area mined is smaller than 40 percent of the previously mined lands plus the unmined lands required to reclaim the previously mined lands as determined by SMCRA. Pre-construction notification is required for all activities proposed to be authorized by this permit, and the permittee must receive written notification from the District Engineer prior to commencing the activity. Additionally, the projects must be authorized by OSM or by states with approved programs under Title IV or V of SMCRA.

One commenter requested that the proposed NWP be changed to include Abandoned Mine Land (AML) projects that are government funded or contracted. They believed that the aquatic benefits resulting from the AML projects are similar in nature to those that would be covered by this NWP, and that since this NWP requires notification, any adverse impacts to high-quality waters could be avoided. Another commenter suggested that the Corps clarify the extent to which NWPs are required for AML projects, and another commenter stated that the Corps should clearly state that no NWP of any kind is required for projects that fall under Title IV of SMCRA. One commenter stated that it is imperative that the new NWP 49 proposed by the Corps not inhibit efforts but rather support recent actions by states, EPA, and OSM to encourage opportunities for remining AML impacted lands and waters.

We agree that this NWP should support and encourage opportunities for remining AML impacted lands and waters. We are thus modifying the text of this NWP to authorize AML projects that include coal extraction authorized by Title IV of SMCRA, in addition to remining authorized under Title V. To authorize Title IV AML projects that do not involve coal extraction, we have modified NWP 37, which authorizes emergency watershed protection and rehabilitation activities. In response to the comment that projects conducted under Title IV of SMCRA should not require Section 404 authorization, any discharge of dredged or fill material into waters of the United States, requires an authorization under Section 404 of the Clean Water Act unless the activity is specifically exempt.

Several commenters agreed that the Corps should issue an NWP to authorize remining activities. They stated that until recently the Corps has not recognized the environmental benefits of remining and basically ignored remining incentives developed by Congress and other Federal agencies such as OSM and USEPA. However, these commenters believe that the requirement that any newly mined land not exceed 40 percent of previously mined land plus any unmined land necessary for reclamation is inappropriate. They state that the ratio should be left up to the SMCRA agency on a case-by-case basis and that a rigid 40 percent ratio may not allow enough material to be generated to reclaim the previously mined land. One commenter stated that the Corps should reconsider the proposed limitations since an overall improvement in aquatic resources is guaranteed and, as proposed, the ratio threshold only serves to limit the reclamation of abandoned mine lands. One commenter recommended that the ratio limitation be removed and that the Corps rely solely on the demonstration that the overall project, including the reclamation activity and any new mining, will result in a net increase in aquatic functions. One commenter stated that the Corps should reconsider basing permit eligibility on uplands area (acreage), which is outside the jurisdiction of the Corps, and instead focus on the improvement that such activities would have on the aquatic resources within the project area, which is within Corps jurisdiction. Another commenter said that this NWP should not authorize coal mining in any new areas, because of the potential for those activities to cause more than minimal

adverse effects on the aquatic environment.

We would like to clarify that the "remined" area on which the 40 percent ratio is based includes any unmined lands required to reclaim the previously mined lands, as determined by the SMCRA agency. The allowance for an additional 40 percent of newly mined area is above and beyond the area required to complete the restoration of the previously mined land. This NWP was intended to authorize single and complete projects where a clear majority of the mining would be considered remining, and therefore offer operators incentives to reclaim previously mined lands. We thus believe that there needs to be both a limit on new mining and a requirement for an overall increase in aquatic resource functions for this NWP. We believe it is appropriate to authorize a limited amount of coal mining in new areas, as long as the remining and reclamation activities are conducted. In addition, the adverse effects of any new mining will be reviewed through the pre-construction notification process, and the permittee cannot begin work until written verification is received from the district engineer, after determining that the remining activity, plus any new mining, will result in minimal adverse effects on the aquatic environment.

#### *Proposed Limits*

One commenter suggested that while some impact limits may be appropriate, the limit should not be based on drainage area, because such an approach fails to recognize that small impacts that occur in the lower reaches of a watershed may result in more than minimal adverse effects on the aquatic environment. One commenter stated they supported the concept of this NWP but believe it should have the same restrictions as NWP 21. Several commenters recommended that if the Corps does issue this NWP, it should include limitations on the linear feet of stream that can be filled. One commenter suggested a limit of 1/2-acre per use (which is the same as that proposed for NWP 50 and other NWPs), and stated that without such a limit this NWP would allow impacts that far exceed those allowed under other NWPs. One commenter recommended imposing a 300 linear foot limit for losses of stream bed. Several commenters recommended limiting this NWP to activities that result in the loss of less than 300 linear feet of streams, to be consistent with other NWPs.

We did not propose impact limits based on drainage area. We also do not believe that specific acreage or linear

feet of stream limits should be included on a national basis for this NWP and did not propose such limits. If division engineers believe they need to add limits at a regional level to ensure that this NWP authorizes only activities with minimal adverse effects on the aquatic environment and which satisfy other public interest review factors, they may do so. We believe that at a national level the ratio limitation and the requirement for an overall increase in aquatic function are sufficient to ensure that this NWP authorize only activities that produce no more than minimal adverse impacts, both individually and cumulatively. Furthermore, this NWP is used to provide Section 404 authorization for surface coal mining activities that have also been authorized by OSM or states with approved programs under Title IV or Title V of SMCRA. The Corps believes that the analyses and environmental protection standards required by SMCRA in conjunction with the pre-construction notification review further ensure that the NWP activities result in minimal individual and cumulative adverse impacts on the aquatic environment. In fact, this NWP requires a net environmental benefit in the form of increased aquatic resource functions, which will be identified through functional assessment methods. Through the pre-construction notification process, district engineers can also impose special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal. Also, if the district engineer determines through this case-by-case review that the activity has the potential to result in more than minimal adverse effects to the aquatic environment, he or she can exercise discretionary authority to require an individual permit.

#### *Functional Analysis*

A couple of commenters stated that the Corps should not require a functional analysis of the pre-mining aquatic conditions. They state that in these cases, water quality is poor and can only be improved by completion of the authorized activities. Furthermore, many of the sites are located on waters that are listed on a state's 303(d) impaired waters lists. A couple of commenters stated that the Corps' requirement for a quantified prediction of the environmental benefits that will result is unnecessary because EPA data shows that remining operations will result in a net increase in aquatic resource functions. One commenter stated that, as the Corps has the data to show that reclamation projects in



formerly mined areas have a beneficial environment effect, every permittee should not need to prove this again, in a duplication of the SMCRA requirements. One commenter stated that the Corps should not specify that a net overall improvement to the site's aquatic functions is required, but should focus on whether the project will have minimal impacts to aquatic resources in the project area.

We agree that remining projects are generally beneficial, which is one of the reasons for proposing to issue this new NWP. However, we must track impacts and mitigation and show both on an individual and a cumulative basis that each project has a minimal impact on the aquatic environment. This can only be done by the applicant submitting information on pre-mining conditions as well as what they anticipate the post mining conditions will be. This permit requires that the reclamation plan result in a "net increase in aquatic resource functions". Studies typically show that remining operations do improve areas that were degraded by past mining. However, landscape characteristics vary, as do mining and reclamation practices. Furthermore, as an incentive, this permit also authorizes a limited amount of new mining in previously unmined areas adjoining the remined area. Therefore, improvements to aquatic resource functions must be demonstrated for any project authorized under this NWP. To do this, the permittee must submit functional assessments showing that the project as a whole, including remining, reclamation and any new mining, will result in improved functions, such as water quality, sediment transport or retention, and habitat, as appropriate for the specific type of aquatic habitat (e.g., stream or wetland). The functional assessments can be based on information developed as part of the SMCRA process, and should clearly identify and, if possible, quantify, the functional lift that will be achieved for each function. We realize the often poor quality of the environment where these projects are proposed and appreciate the benefits to the aquatic environment that can be achieved by completing these projects.

We understand coal mining is covered by many environmental regulations, however the Corps has determined that the current SMCRA process does not adequately address impacts to the aquatic environment as required under Section 404 of the Clean Water Act. Accordingly, this NWP does not duplicate the SMCRA permit process, but we rely on that process for information that is useful in our Section

404 analyses. We work with the other agencies to avoid potential duplication of effort, and currently uses appropriate work and studies done by or for others (i.e., ESA or SHPO surveys/findings) in our analyses of proposed projects.

#### *Mitigation*

A couple of commenters stated that the Corps should not require additional mitigation beyond what is already required of the applicant pursuant to the SMCRA permit, since the permitted activities will lead to significant water quality improvements both at the site and in the watershed. A number of commenters asserted that the Corps has not demonstrated that compensatory mitigation offsets the adverse impacts of this NWP. Several commenters also stated that mitigation must be based on an assessment of stream functions, for which the Corps has no approved methods. One commenter recommended that mitigation should result in at least a 1:1 replacement of acres lost in order to achieve no net loss of waters of the United States from this NWP. Two commenters stated that the CWA does not allow the Corps to issue general permits based on the use of compensatory mitigation to reduce the environmental impacts to minimal.

As a result of the pre-construction notification process the Corps will review each project proposed for authorization by this NWP on a case-by-case basis. Additional mitigation may not be required for a project. However, this will be determined through the district engineer's minimal impact determination. As stated in our regulations, we can rely on mitigation in making a minimal adverse environmental effects determination (see 33 CFR 330.1(e)(3)).

The Corps will review the impacts from the proposed final design using a functional assessment method. If the functions gained by the proposed project exceed the functions lost as a result of proposed activities then additional mitigation may not be required. We are currently developing new stream functional assessment protocols for identifying the functions lost through impacts and the functions gained or enhanced through mitigation.

General condition 20 establishes the framework for determining appropriate mitigation and achieving no net loss of aquatic resources. The Corps takes into account the fact that, in certain areas and circumstances, any compensatory mitigation required by the Corps may be fully encompassed or exceeded by requirements of others (e.g., reclamation requirements under SMCRA). As long as the impacts to the aquatic environment

are fully mitigated, the Corps will not require additional compensation.

#### *Pre-Construction Notification Requirement*

One commenter requested the pre-construction notification requirement be removed. One commenter expressed approval of the requirement that the applicant receive written authorization from the district engineer prior to commencing the activity.

We believe that the pre-construction notification requirement helps ensure that no activity authorized by this permit will result in greater than minimal adverse impacts, either individually or cumulatively, on the aquatic environment, because it requires a specific case-by-case review of each project. If the district engineer determines through this case-by-case review that the activity has the potential to result in more than minimal adverse effects to the aquatic environment, he or she can exercise discretionary authority to require an individual permit.

#### *Minimal Adverse Effects*

A number of commenters stated that this NWP would result in more than minimal adverse environmental effects, particularly on a cumulative basis, and would result in significant degradation of streams. Therefore, the commenters believe NWPs should not be used to authorize these activities, and these activities should require individual permits. Several commenters cited the 2002 programmatic Environmental Impact Statement on surface coal mining, which documented impacts to waters, particularly in Appalachia. A few commenters cited studies conducted by EPA and other research on the ecological impacts of valley fill on streams and on fish populations.

We believe that a careful case-specific minimal impact determination is necessary for this NWP. In addition, as with NWP 21, this NWP requires a written verification before the project proponent may proceed with the work. The applicant must clearly demonstrate that the reclamation plan will result in a net increase in aquatic resource functions, and that any adverse impacts to the aquatic environment are minimal. If the district engineer determines through this case-by-case review that the activity has the potential to result in more than minimal adverse effects to the aquatic environment, he or she can exercise discretionary authority to require an individual permit.

Since the functions of aquatic resources vary widely across the country, assessment of cumulative impacts is conducted by Corps districts

on a watershed basis, based on regional and local conditions and procedures. If the use of this NWP results in more than minimal cumulative adverse effects on the aquatic environment in a watershed, the division engineer may modify, suspend, or revoke this NWP in that watershed. We believe the pre-construction notification requirements for this NWP ensure that authorized activities result in no more than minimal adverse impacts to the aquatic environment because each project is reviewed on a case-by-case basis and the district engineer either makes a minimal impacts determination on the project or asserts discretionary authority and requires an individual permit. Additionally, as noted above, division engineers can add regional conditions to any NWP to further restrict the use of the NWP to ensure that the NWP authorizes only activities with no more than minimal adverse effects on the aquatic environment in a particular watershed or other geographic region. Each district tracks losses of waters of the United States authorized by Department of the Army permits, including verified NWPs, as well as compensatory mitigation achieved through aquatic resource restoration, creation, and enhancement.

#### *Impoundments*

Several commenters stated that coal slurry impoundments should not be authorized by this NWP. The commenters also stated that NWPs 21, 49 and 50 cannot be used for both valley fills and coal slurry impoundments, as they are not activities that are "similar in nature", as required for authorization under an NWP.

The NWPs are issued in accordance with Section 404(e) of the CWA. NWPs authorize categories of activities that are similar in nature. The "similar in nature" requirement does not mean that activities authorized by an NWP must be identical to each other. We believe the "categories of activities that are similar in nature" requirement of Section 404(e) is to be interpreted broadly, for practical implementation of the NWP program. NWPs as well as other general permits are intended to reduce administrative burdens on the Corps and the regulated public. We believe that slurry impoundments are support features associated with coal mining and thus can be authorized by this NWP. However, the impacts associated with any such impoundments must be addressed in the required demonstration that the project will result in a net increase in aquatic resource functions.

#### *Scope of Analysis*

One commenter stated that only poor and isolated communities are being affected by surface coal mining. Another commenter noted that coal slurry impoundments can fail and release mining wastes into downstream waters. Two commenters stated that loss of forest and movement of dirt associated with surface coal mining has detrimental environmental effects.

Impacts to poor and isolated communities are outside of the Corps' scope of analysis pursuant to the National Environmental Policy Act. The Corps evaluation of coal mining activities is focused on impacts to aquatic resources. In accordance with E.O. 12898, the Corps has determined that the issuance of the NWPs, including NWP 49, will not cause disproportionate impacts to minority or low-income communities (see discussion of E.O. 12898 below). The design and safety of coal slurry impoundments are more appropriately addressed through the SMCRA process, which provides design and safety requirements for these facilities. Mining in general is permitted under a separate Federal law, the Surface Mining Control and Reclamation Act. Impacts associated with surface coal mining and reclamation operations are appropriately addressed by the Office of Surface Mining or the applicable state agency. Where relevant to potential impacts on aquatic resources, the Corps considers documentation prepared pursuant to SMCRA in its review of pre-construction notifications.

#### *Public Participation*

Several commenters stated that this NWP does not provide the public with an opportunity to comment on the specific conditions of the NWP authorizations that affect their communities and watersheds.

Section 404(e) of the Clean Water Act provides the statutory authority for the issuance of general permits on a nationwide basis for any category of activities that the Corps determines will have minimal adverse impacts on the aquatic environment, both individually and cumulatively. The Corps establishes NWPs in accordance with section 404(e), by publishing and requesting comments on the proposed permits. The general public has the opportunity to comment on NWPs at this time. In order to address the requirements of the National Environmental Policy Act, the Corps prepares an environmental assessment for each NWP, as well as a 404(b)(1) Guidelines analysis if the NWP authorizes activities under Section

404 of the Clean Water Act. The decision document discusses the anticipated impacts on the Corps' public interest factors from a national perspective. NWPs are issued at the conclusion of this process. The individual projects that are proposed for authorization under an NWP are not given a permit but a verification or authorization that the project complies with an NWP. There are no requirements for public comments on specific projects authorized under NWPs. However, as noted above, one of the bases for our determination that the activities authorized by this NWP will have minimal impacts is that they must also be authorized by a permit issued under SMCRA, which requires many of the same types of analyses that we would require under Section 404. In addition, each SMCRA permit action includes a public participation process. Therefore, as a practical matter, the public will have the opportunity to comment on each individual project authorized under this NWP.

#### *General*

One commenter stated that there is no rational basis for the creation of this proposed NWP since under SMCRA, the term "surface coal mining operations" includes both Title V permits authorizing remining of previously-mined lands as well as mining of lands that have not been previously disturbed. The commenter stated that the NWP may not conform to the Section 404(b)(1) Guidelines, which would require greater scrutiny for remining activities due to the availability of existing benches, roads and fills that could render new fill in waters of the United States unnecessary. The commenter also cited Section 301(p) of the Clean Water Act, which allows exceptions to effluent limits for surface coal remining operations. The commenter asserted that Section 404 does not have a similar exception for remining, and that this NWP cannot replace the requirements for avoidance, minimization and mitigation with the proposed amorphous standard of a "net increase in aquatic resource function". The commenter also stated that it was unclear from the text of this NWP how the Corps intends the remining authorization to work.

New coal mining activities eligible for authorization under this NWP may be authorized by NWP 21, but in contrast to NWP 21 this NWP also authorizes abandoned mined land reclamation activities under Title IV of SMRCA that involve coal extraction. We recognize the benefits of restoration of mine sites that are causing physical and or

chemical impacts to waters of the United States and the fact that due to changes in technology, additional coal may be excavated as part of the reclamation process. These sites may also be combined with adjacent unmined areas to develop a project that is economically viable. The net result of these combined reining/new mining projects is that sources of pollution to downstream waters, including acid mine drainage and sediment, will be eliminated or substantially reduced when the site is reclaimed. We believe this NWP will encourage applicants to consider reclamation of adjacent lands in their overall project plans. As noted previously, the applicant needs to show through a functional assessment method that the project will result in a net increase in aquatic resource functions.

As noted previously, Section 404(e) of the Clean Water Act provides the statutory authority for the issuance of general permits on a nationwide basis for any category of activities. As part of the establishment of the NWPs a decision document is prepared for each NWP along with a 404(b)(1) Guidelines analysis. Although analysis of offsite alternatives is not required in conjunction with general permits, each proposed project is evaluated for onsite avoidance and minimization, in accordance with general condition 20, Mitigation. This includes consideration of the availability of existing benches, roads, and fills that could be used instead of placing new fill in waters of the United States.

Proposed NWP E is issued as NWP 49, with the addition of authorization for projects authorized under Title IV of SMCRA that include coal extraction.

**NWP 50. Underground Coal Mining Activities.** This is a new NWP. Pre-construction notification is required for all activities proposed to be authorized by this permit. As with NWP 21, permittees must receive written authorization from the Corps before proceeding. Additionally, the projects must be authorized by OSM or by states with approved programs under Title V of SMCRA.

#### *Proposed Limits*

Numerous comments were received regarding the proposed 1/2 acre limit on this NWP. Many commenters stated that the 1/2 acre limit is too small to accommodate underground coal mining activities and attendant features and it should be deleted. One commenter recommended that any limits should be imposed regionally rather than nationally.

One commenter stated that the 1/2 acre limit was too high and the 1/2 acre limit

applied to small streams could result in the fill of long segments of streams without proper mitigation. Two commenters stated that if NWP 50 is issued, it must include stringent limits on the amount of stream that can be filled. One commenter stated that the NWP should be limited to activities that fill less than 300 feet of streams and should not be used in watershed where the cumulative amount of filled streams is already likely causing more than minimal harm.

In consideration of the comments received, we have decided not to include the 1/2-acre limit. This permit replaces the 2002 version of NWP 21 for underground coal mining activities. The new NWP 21, which continues authorization for surface coal mining activities, does not include an acreage limit. Instead, NWP 21 relies on the SMCRA permitting process in combination with an enhanced pre-construction notification requirement which requires that permittees wait for written verification from the Corps before beginning their projects, even if the pre-construction notification review takes more than 45 days. After further consideration, we have determined that the same logic that applies to NWP 21 also applies to NWP 50, and so have adopted similar requirements with respect to limits and verification. Thus, the 1/2 acre limit has been dropped, and permittees must wait for written verification from the Corps before proceeding.

#### *Pre-Construction Notification*

Four commenters recommended that applicants should be required to receive written authorization prior to commencing the activity. As noted above, the Corps has now adopted this requirement for this permit and dropped the 1/2 acre threshold. This requirement is necessary to give the district engineer adequate time to determine whether or not to assert discretionary authority and require an individual permit if the impacts of the proposed activity are more than minimal, either individually or cumulatively.

#### *Use of NWP 21 for Underground Mining*

Concerns were expressed by several commenters regarding the continued use of NWP 21 to authorize underground mining activities. These commenters requested clarification regarding this issue. One commenter noted that if NWP 21 could not be used for underground mining then most underground mine discharges would require an individual permit. One commenter expressed concerns regarding the use of NWP 21 for coal

preparation and processing activities outside of the mine site. The commenter noted that preparation activities were not part of a surface coal mining project.

The Corps envisions that activities that are not part of the underground mine site, which are outside the SMCRA permit area, can be authorized by NWP 21 if they met the conditions for its use. We note that many processing plants serve both underground and surface mine sites, some at considerable distance, and that construction of such plants does not involve underground disturbances in the way that underground mining does. Thus we believe it appropriate to continue allowing NWP 21 to authorize such activities. We believe the changes discussed above to NWP 50 address the concern that, under the proposed version of the permit, many underground coal mining activities would have required an individual permit. There is no longer an acreage limit on the use of this permit, although it can only be used to authorize activities which the district engineer has determined will have no more than minimal adverse effects, both individually and cumulatively, and only after the district engineer has notified the operator in writing that use of this NWP is authorized.

#### *Minimal Adverse Impacts*

Many commenters were opposed to issuance of this NWP. They stated that general permit procedures were inappropriate for such large scale activities and that these types of activities seemed to demand a thorough review, public notice, and an alternatives and minimization analysis. One commenter stated that the Clean Water Act does not allow the Corps to issue general permits on the basis that compensatory mitigation will reduce net adverse effects to a minimal level. Two comments stated that NWPs can only be used for activities that cause minimal environmental effects both individually and cumulatively, and if impacts are more than minimal, the project requires an individual permit with site-specific analysis and public comment. Several commenters stated that coal mining results in significant environmental impacts and degradation of streams in Appalachia.

The Corps believes that a careful case-specific determination of impacts is necessary for this NWP. The pre-construction notification process, along with the requirement for written verification from the Corps, will allow the district engineer to determine if the impacts of the proposed activity are no more than minimal, individually and

cumulatively, or whether an individual permit is required. Furthermore, we believe that the Corps can rely on mitigation in making a minimal adverse environmental effects determination.

We believe that an assessment of individual and cumulative impacts cannot be made on a national level, because the functions and values of aquatic resources vary widely across the country. Assessment of cumulative impacts is more appropriately conducted by Corps districts on a watershed basis, based on regional and local conditions and procedures. We believe our process for this NWP ensures that activities authorized by the NWP result in no more than minimal adverse impacts to the aquatic environment because each project is reviewed on a case-by-case basis and the district engineer either makes a minimal impacts determination on the project or asserts discretionary authority and requires an individual permit. Additionally, as noted above, division engineers can add regional conditions to any NWP to further restrict the use of the NWP to ensure that the NWP authorizes only activities with no more than minimal adverse effects on the aquatic environment in a particular watershed or other geographic region. Each district tracks losses of waters of the United States authorized by Department of the Army permits, including verified NWPs, as well as compensatory mitigation achieved through aquatic resource restoration, creation, and enhancement. Furthermore, as with NWP 21, all activities authorized by this permit require authorization under SMCRA, and the SMCRA analysis, documentation and process requirements largely substitute for the analysis, documentation and process requirements of an individual permit. This is not to say that discharges related to coal mining and their impacts on aquatic resources do not require independent review and authorization by the Corps with respect to the requirements of the CWA, but the Corps believes that the analytical and process requirements can be streamlined by relying on the SMCRA process to the extent appropriate. Where the district engineer determines that these process requirements are not adequate for a particular project, he or she will require an individual permit.

#### *404(b)(1) Guidelines*

Several commenters stated that any proposed disturbance to waters to support coal processing or underground coal mining activities should be subject to the Section 404(b)(1) Guidelines, and

that alternatives that do not result in impacts to waters of the United States are available.

As noted previously, Section 404(e) of the Clean Water Act provides the statutory authority for the issuance of general permits on a nationwide basis for any category of activities. As part of the establishment of the NWPs a decision document is prepared for each NWP along with a 404(b)(1) Guidelines analysis. Although analysis of offsite alternatives is not required in conjunction with general permits, each proposed project is evaluated for onsite avoidance and minimization, in accordance with GC 20. This includes consideration of alternatives that do not result in impacts to waters of the United States.

One commenter stated that it was a duplication of effort to have a review of the applicants' reclamation plan.

The Corps understands coal mining is covered by many environmental regulations, however the Corps has determined that SMCRA does not currently adequately address impacts to the aquatic environment as required under Section 404 of the CWA. Therefore this NWP does not duplicate the SMCRA permit process but does rely on it for information used in the analysis. The Corps continues to work with the other agencies to avoid potential duplication of efforts. The reclamation plan can be used to consider proposed mitigation measures for the projects being proposed for authorization by NWP 50. This information will be used by the Corps in making a determination as to whether the impacts are no more than minimal.

#### *Scope of Analysis*

One commenter stated that there should be a way to figure out how to extract the coal and still protect the environment. Another commenter noted that the amount of earth moving by mining activities is sufficient by itself to demonstrate that environmental impacts of mining are significant. One commenter stated that the subsidence that may occur as a result of underground mining should be considered in determining the acreage impacts to waters for this NWP. One commenter noted that coal mining waste contains chemical components that are toxic to aquatic life and that waste impoundments may fail. The commenter believed that this justifies an independent review. One commenter stated that the "facing up" practice cannot be carved out from the full range of environmental impacts associated with underground mining operations

and must be reviewed comprehensively and not piecemeal.

The Corps evaluation of coal mining activities is focused on impacts to aquatic resources. Other impacts of coal mining are addressed under a separate Federal law, SMCRA. Such impacts, including those associated with reclamation operations, are appropriately addressed by OSM or the applicable state agency, if program delegation has occurred. To the extent that reclamation activities affect waters of the United States, these will be addressed in the Corps review and appropriate mitigation required.

#### *Similar in Nature*

Several commenters stated that slurry impoundments should not be allowed under NWPs, and that NWPs can only be issued for activities that are similar in nature. The Corps has determined that slurry impoundments are related to underground mining activities. The NWPs are issued in accordance with Section 404(e) of the CWA. NWPs authorize categories of activities that are similar in nature. The "similar in nature" requirement does not mean that activities authorized by an NWP must be identical to each other. We believe the "categories of activities that are similar in nature" requirement of Section 404(e) is to be interpreted broadly, for practical implementation of the NWP program.

#### *Mitigation*

Several commenters stated that the mitigation done for coal mining impacts is scientifically indefensible and, absent such mitigation, the projects authorized under NWP 50 have more than minimal adverse effect and are therefore not eligible for an NWP. They stated that current mitigation projects have so far been unsuccessful and referenced a court case in the Southern District of West Virginia (*Ohio Valley Environmental Coalition v. Bulen*), where they noted that a Corps official stated that he did not know of a single instance of successful headwater stream creation. Also, the commenters stated that the Corps did not include any specific guidelines for how to assess stream function in order to determine the adequacy of compensatory mitigation. They also stated that the Corps has not shown that mitigation will offset the impacts authorized under NWP 50 or that off-site enhancement of streams would fully compensate for functions of streams that are destroyed. Other commenters stated that the Corps mistakenly allows the mitigation requirements of SMCRA and state water quality laws to satisfy the independent

requirements of Section 404 of the Clean Water Act. They stated that allowing a permittee to claim a compensatory mitigation or reclamation activity already required under SMCRA as compensatory mitigation under the Clean Water Act is "double-counting" and improperly blurs the requirements of sequencing (i.e., avoidance, minimization, mitigation) imposed under the 404(b)(1) guidelines. Other commenters recommended that a mitigation ratio of at least 1:1 should be required in order to achieve no net loss, and that mitigation also should be required for potential, as well as actual, impacts. Several commenters stated that final reclamation of wetland habitat will most likely occur in the absence of required compensatory mitigation.

In order to ensure that an activity results in no more than minimal adverse effects on the aquatic environment, the Corps will add permit conditions that require compensatory mitigation that meets specified success criteria. The Corps will generally require the permittee to monitor the mitigation site for five years and, if the mitigation site does not meet the success criteria at that time, remediation or additional mitigation will be required. This ensures that the authorized activity will not result in a net loss in aquatic functions. The Corps has increased its compliance efforts to ensure that projects authorized by DA permits are constructed as authorized and that mitigation is successful.

We are currently developing new stream functional assessment protocols to identify and quantify the functions lost through authorized impacts and the functions gained or enhanced through mitigation. The Corps coordinates with the SMCRA and state resource agencies to achieve appropriate aquatic restoration on mine sites, which can reduce or eliminate the amount of off-site compensatory mitigation needed. The Corps does not consider this "double-counting", because the areas restored are only counted once in the replacement of aquatic resource functions. As long as the functions lost as a result of the permitted activity are mitigated through the onsite restoration or enhancement, it does not matter if the restoration also meets other goals unrelated to the Section 404 impacts. General condition 20 establishes the framework for achieving no net loss of waters/wetlands, as well as the sequential review of mitigation approaches on-site. The Corps takes into account the fact that, in certain areas and circumstances, any Corps compensatory mitigation requirement may be fully encompassed or exceeded

by requirements of others. As long as the impacts to the aquatic environment are fully mitigated, the Corps will not require additional compensation.

Proposed NWP F is issued as NWP 50, with the modifications discussed above.

#### *General Conditions*

One commenter supported the proposed change to the ordering of the general conditions. One commenter said that the proposed changes to general conditions will reduce environmental protection. A commenter stated that temporary impacts should be addressed through a new general condition, instead of requiring separate authorization under NWP 33.

The changes to the general conditions will help improve environmental protection, by providing clearer and more enforceable requirements for permittees. Department of the Army permits are required for temporary structures, work, or discharges into waters of the United States, including navigable waters, unless those activities are exempt from permit requirements. Therefore, those regulated activities cannot be authorized through a general condition. In some cases, temporary structures, work, or discharges associated with another permitted activity are included in the NWP authorization for that activity; in other cases temporary structures, work or discharges must be authorized separately under NWP 33.

One commenter said that the proposed "Note" for the NWP general conditions should contain language requiring permittees to comply with regional conditions and state water quality standards. This commenter also requested that the word "should" be replaced with "must."

The proposed "Note" clearly states that permittees are required to comply with regional conditions and that permittees should check on the status of water quality certifications and Coastal Zone Management Act consistency determinations before using an NWP. We cannot require prospective permittees to contact district offices to obtain this information (hence we have not replaced "should" with "must") but we have clarified that individual certification is required in cases where prior certification for the NWP has not been received. Permittees may also be able to obtain information on regional conditions and the status of water quality certifications and Coastal Zone Management Act consistency determinations through the Internet or other sources.

One commenter recommended adding a new general condition to address the

downstream movement of substrate and wood. This general condition would require stream crossings, such as bridges and culverts, to allow downstream movement of substrate and wood during 100-year flow events, as well as movement of wood from upstream segments to downstream segments. Another commenter suggested adding a new general condition to address adverse impacts from invasive species.

We do not agree that it is necessary to add a new general condition, as there are other general conditions which already include adequate provisions to address this concern. General condition 2, Aquatic Life Movements, states that no activity may substantially disrupt the necessary life-cycle movements of those species that normally migrate through the area. General condition 9, Management of Water Flows, states that, to the maximum extent practicable, the activity must not restrict or impede the passage of normal or high flows, unless the primary purpose is to impound water. In general, blockages caused by restricted movement of wood or substrate would violate these conditions and must be prevented. Further, the ability for division and district engineers to exercise discretionary authority or regionally condition proposed activities under an NWP are sufficiently to address any site-specific concerns related to blocked movement of wood and ensure that authorized activities result in minimal adverse effects on the aquatic environment. The Corps does not have the regulatory authority to prohibit the introduction of invasive species. Invasive species may become established in areas through many mechanisms, not just disturbances caused by construction activities authorized by NWPs and other Corps permits. Such a condition would also be unenforceable and therefore such a general condition would be contrary to 33 CFR 325.4(a).

A number of commenters objected to the removal of the phrase "including structures or work in navigable waters of the United States or discharges of dredged or fill material" from text of certain general conditions. One commenter asked if removal of that phrase from those general conditions would reduce protection of aquatic resources.

The removal of that language will not affect protection of waters of the United States. The stricken language was considered redundant as it simply refers to the general types of activities regulated under sections 10 and 404.

### General Conditions

GC 1. *Navigation.* We proposed to modify this general condition to require permittees to install any safety lights and signals prescribed by the U.S. Coast Guard. We also proposed to modify this general condition to notify permittees that they may be required to remove structures or work that cause unreasonable obstruction to navigation.

One commenter supported the requirement concerning safety lights and signals. One commenter said that the Federal government should bear the financial costs for the removal of structures or work it authorized. One commenter stated that the Federal government itself could be a permittee and be required to remove the structure or work at the Federal government's expense. One commenter said that this general condition should also include waters determined by states to be navigable waters.

There may be cases where activities authorized by Department of the Army permits interfere with navigation or an existing or future operation of the United States and need to be removed. The cost of removal is the responsibility of the permittee, even in cases where the permittee is the Federal government. If there is any question as to whether or not a particular activity or structure will interfere with navigation, the permittee should check with the Coast Guard before beginning the activity. Adverse effects to navigable waters identified by states that are not navigable waters of the United States should be addressed by state regulatory programs. The Corps lacks the authority to enforce state laws and regulations for state navigable waters.

The general condition is adopted as proposed.

GC 2. *Aquatic Life Movements.* We proposed to modify this general condition by adding the phrase "if known" before "necessary life cycle movements" because those life cycle movements that are important are not always well understood for indigenous aquatic species. The intent of this general condition is to ensure that the necessary movements of aquatic species are not substantially disrupted.

Many commenters expressed opposition to the proposed modification and recommended removing the phrase "if known." They stated that the lack of knowledge concerning aquatic life movements should not be construed as authorization to allow disruption of aquatic life cycle movements. One commenter supported the proposed modification, and also recommended adding "at the time of the permit

application, if known, or if documented at the time of application." to this general condition.

Activities authorized by NWP should not substantially disrupt the necessary life cycle movement of aquatic species, and the absence of species-specific information does not mean measures cannot be taken to prevent unnecessary obstructions to those movements. Even if the necessary life cycle movements are not known, inferences can be made to help ensure that those movements can continue. Those inferences can be based on general considerations of the mitigation measures necessary to ensure that adverse impacts to aquatic life movements are minimized to the maximum extent practicable. For example, properly sized culverts that are installed to retain low flow conditions will help ensure that life cycle movements will continue. Therefore, we are removing the phrase "if known" from this general condition to allow district engineers to continue to use their judgment, so that adverse effects to aquatic life movements are minimized, even if the necessary life cycle movements are not known, but can be generally inferred.

Two commenters requested clarification of the term "substantially" as used in this general condition. One commenter said that this term results in too high a threshold for the disruption of aquatic life movement. One commenter stated that aquatic life movement should be reviewed using hydraulic analyses performed for the range of flows expected after a basin is fully developed. Another commenter said that this general condition should require stream crossings to be constructed with bottom elevations below the normal substrate grade to avoid creating improper elevations or barriers that may substantially disrupt aquatic life movements. This commenter also recommended modifying this general condition to prohibit changes to stream morphology that could substantially interfere with aquatic life movements.

In general, activities in waters of the United States authorized by NWPs are likely to result in some disruption of necessary life cycle movements of aquatic species, since we are authorizing discharges of dredged or fill material into those waters or structures or work in navigable waters of the United States. The word "substantially" supports the requirement that NWPs authorize only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment, while recognizing that some disruption may occur. Some

disruptions to aquatic life movement are measurable but not substantial, and may be acceptable during construction or during natural seasonal events such as floods, winter ice conditions, or during construction conducted during dry seasons. It is not practicable, appropriate, or necessary to conduct hydrologic analyses for each NWP activity that has the potential to disrupt life cycle movements, based on the projected development for a watershed. Compliance with this general condition is to be assessed on a case-by-case basis, through available information or general knowledge of aquatic life movements. The current language in the general condition, especially the requirement to install culverts to maintain low flow conditions, is sufficient to ensure that stream crossings do not substantially disrupt aquatic life movements. This general condition, as well as the requirements of general condition 9, Management of Water Flows, will help ensure that NWP activities result only in minimal adverse effects to the movement of aquatic life via streams.

The general condition is adopted, with the modification discussed above

GC 3. *Spawning Areas.* We proposed to modify this general condition by removing language describing the general types of activities authorized by NWPs under sections 10 and 404.

One commenter stated that not enough protection is provided since avoidance is only necessary to the maximum extent practicable. One commenter requested a definition of the term "important spawning area." One commenter said that this general condition should not apply to NWPs 27 or 48 because shellfish seeding can provide and/or increase availability of spawning habitat.

The removal of language describing the general applicability of NWPs will not affect protection of waters of the United States. This general condition applies to all NWPs. The phrase "to the maximum extent practicable" is necessary since some NWP activities may be time-sensitive and it is not possible to completely avoid activities in spawning areas. Since the NWPs authorize activities that have minimal adverse effects on the aquatic environment, some NWP activities may be conducted in spawning areas. Identification of important spawning areas is more appropriately addressed through either the regional conditioning processes or through the assessment of site-specific characteristics during the review of pre-construction notifications.

The general condition is adopted as proposed.

GC 4. *Migratory Bird Breeding Areas.* We proposed to modify this general condition to cover migratory birds generally, not just migratory waterfowl. We also proposed to remove language describing the general types of activities authorized by NWP's under sections 10 and 404.

One commenter said that the proposed modification would further restrict the use of the NWP's in wetlands. Another commenter asked how the change would affect non-waterfowl migratory birds in cases where their habitat requirements are different than the habitat requirements of waterfowl. One commenter fully supported the inclusion of migratory birds but requested a national no-work timing window in breeding areas from March 1 to July 15 to reduce uncertainty associated with the phrase "to the maximum extent practicable." Another commenter indicated that this general condition should prohibit haying or grazing during the nesting season unless an emergency is declared. One commenter said that the proposed changes do not comply with the Migratory Bird Treaty Act and suggested that breeding areas should "be avoided to the maximum extent practicable to assure minimal adverse impact on migratory birds and their breeding areas." This commenter asserted that authorized activities under any NWP must comply with the Migratory Bird Treaty Act. This commenter also urged expansion of the general condition to include protection of Important Bird Areas, which is an initiative by non-governmental entities to protect avian species of conservation concern. Another commenter said that this general condition should also state that the take of migratory birds, their eggs, nests, or parts is not allowed under the Migratory Bird Treaty Act without a permit.

Aquatic resources provide a diverse variety of breeding habitats for a wide variety of migratory avian species. The replacement of "waterfowl" with "migratory birds" will help reduce adverse impacts to aquatic habitats that are breeding areas of all migratory birds, not just waterfowl. It is not practicable to identify a uniform window of 4½ months during which no activities in any habitat potentially used as breeding areas by migratory birds is allowed. Furthermore, breeding patterns and seasons vary by region. Time-of-year restrictions to protect breeding areas are thus more appropriately addressed through regional conditions imposed by division engineers or special conditions added to NWP authorizations by district engineers. It would not be appropriate

to amend this general condition to prohibit haying or grazing during nesting seasons for migratory birds, since the Corps cannot enforce such a provision.

The applicability of the Migratory Bird Treaty Act is addressed by Executive Order 13186, "Responsibilities of Federal Agencies to Protect Migratory Birds," which was issued on January 10, 2001. This Executive Order does not apply to Department of the Army permits. Responsibility for complying with requirements of the Migratory Bird Treaty Act lies with the permittee, but this responsibility is independent of the Department of the Army permit. The provisions of the Migratory Bird Treaty Act are implemented by the U.S. Fish and Wildlife Service through the issuance of take permits under appropriate circumstances. It would not be appropriate to modify this general condition to include an explicit reference to Important Bird Areas, though to the extent that they are encompassed by the phrase, "waters...that serve as breeding areas for migratory birds," they are already covered. There is no Federal statute or authority for establishing these areas. We believe the general condition as written is adequate to protect migratory birds.

The general condition is adopted as proposed.

GC 5. *Shellfish Beds.* We proposed to remove language describing the general types of activities authorized by NWP's under sections 10 and 404. We also proposed to add proposed NWP D, Commercial Shellfish Aquaculture Activities to the exception in this general condition.

One commenter stated that "areas of concentrated shellfish populations" should be defined. One commenter said that the general condition is too restrictive and should instead provide the district engineer with discretion to prohibit an activity that may have a deleterious effect on shellfish.

It would be inappropriate to define the term "areas of concentrated shellfish populations" at the national level. Such determinations should be made on a case-by-case basis, and take into account the characteristics of the shellfish species inhabiting the waters in which the NWP activity is located. Criteria for identifying areas of concentrated shellfish populations may vary by species and region. With the exception of NWP's 4 and 48, the NWP's should not authorize activities in concentrated shellfish beds to ensure that the activities authorized by NWP's result in minimal adverse effects on the aquatic

environment. However, the district engineer may determine that this general condition does not apply in situations where a specific NWP activity will have little or no adverse effect on areas of concentrated shellfish populations. The reference to NWP D has been changed to NWP 48, to reflect the number assigned to that new NWP.

This general condition is adopted with the modification discussed above.

GC 6. *Suitable Material.* We proposed to modify this general condition by removing language describing the general types of activities authorized by NWP's under sections 10 and 404.

One commenter suggested the general condition contain a list of suitable materials rather than a list of unsuitable materials. One commenter said that asphalt should be removed from the list of examples in the general condition because research has shown that cured asphaltic concrete is inert. One commenter asserted that the general condition does not go far enough to protect aquatic resources, and recommended changing the text to prohibit "unacceptable chemical pollution" instead of requiring material to be free of toxic pollutants in toxic amounts. This commenter also said that the use of substances such as creosote and pentachlorophenol in open waters should be prohibited. One commenter suggested that the general condition contain language that the fill material must be obtained from an upland source and require it to be sufficiently sized and shaped to resist erosion for normal and expected high flows.

We do not agree that it is necessary to further define what constitutes "suitable material" for the purposes of this general condition. It is impractical to provide a comprehensive list of unsuitable materials. If there are questions concerning the suitability of a particular material, the permittee should contact the appropriate Corps district office and ask if that material is considered suitable for the purposes of this general condition. We continue to believe that "asphalt" is an unsuitable material for use in waters of the United States. Use of substances such as creosote and pentachlorophenol is prohibited by general condition 6, Suitable Material, if they would be released into the environment in toxic amounts. It is inappropriate to limit fill material only to material obtained from uplands, since material excavated from aquatic environments may also be suitable. Other general conditions, such as general conditions 12 (Soil Erosion and Sediment Controls) and 9 (Management of Water Flows) address



requirements for withstanding water flows.

This general condition is adopted as proposed.

**GC 7. Water Supply Intakes.** We proposed to modify this general condition by removing language describing the general types of activities authorized by NWP's under sections 10 and 404. We also proposed to add the phrase "or improvement" to account for adjustments of the public water supply intake structure that may be necessary to maintain or improve levels of service.

One commenter supported the proposed change. One commenter stated the general condition is overly restrictive and that the standard should be that activities that are likely to cause an impact to a public water supply intake should be prohibited. One commenter requested we define "proximity."

This general condition is not too restrictive, given the importance of water supply intakes for public, commercial and industrial use. District engineers will determine on a case-by-case basis what is necessary to comply with this general condition. We believe the term "proximity" is flexible enough to allow district engineers to determine that activities that will not adversely impact a public water supply intake are not in proximity to the intake. The term "proximity" should be defined on a case-by-case basis, after taking into account site characteristics and the nature of the waterbody and activity.

This general condition is adopted as proposed.

**GC 8. Adverse Effects from Impoundments.** We proposed to modify this general condition by removing language describing the general types of activities authorized by NWP's under sections 10 and 404.

One commenter recommended amending the language to prohibit the use of the NWP's in waters accessible to anadromous salmonids.

While the Corps recognizes the importance of protecting aquatic species, including salmonids, it would not be practicable to prohibit use of NWP's in all waters accessible to anadromous salmonids. Restricting or prohibiting the use of NWP's in waters inhabited by anadromous salmon species is more appropriately addressed through regional conditions imposed by division engineers, or assertion of discretionary authority by district engineers.

This general condition is adopted as proposed.

**GC 9. Management of Water Flows.** We proposed to modify this general condition by simplifying the language to

require that permittees maintain the pre-construction course, condition, capacity, and location of open waters to the maximum extent practicable.

Exceptions to this requirement may be made if the primary purpose of the NWP activity is to impound water or if the activity benefits the aquatic environment.

One commenter supported the proposed modification. One commenter supported the specific exception for impoundment activities, and two commenters supported the language that allows stream modifications if there are positive benefits to aquatic resources, such as for stream restoration projects. Two commenters supported the language requiring compliance only to the maximum extent practicable. One commenter said that the practicability considerations in this general condition should take into account sound engineering practices and project economics.

The term "practicable" is defined in the "Definitions" section of the NWP's. Costs, as well as existing technology and logistics, are considered when making practicability determinations.

One commenter stated that this general condition should not apply to ephemeral streams. One commenter said that this general condition should be modified to prohibit dewatering between October 1 and March 31 to protect hibernating species in the substrate of waterbodies. Another commenter requested that the general condition retain language stating that detailed studies or monitoring would not be required to ensure compliance, and that the Corps would normally defer to local and state officials on the issue. Another commenter said that this general condition provides only limited value because it is qualitative and does not require specific written documentation and assurances regarding how the requirements are met. One commenter stated the requirements of this general condition are inappropriate and hazardous with respect to regulation of stormwater management facilities. One commenter said that this general condition should require NWP activities to accommodate the passage of large woody debris and stream bed load, especially for stream crossing projects.

This requirement must apply to ephemeral streams, because they may carry substantial flow during storm events. Time-of-year restrictions on dewatering activities are more appropriately addressed through the regional conditioning process or through special conditions added to NWP authorizations by district

engineers. We do not believe it is necessary to retain language stating that detailed studies or monitoring are not required to ensure compliance with this general condition, though it is not our intent to require such studies where compliance can be based on reasonable assumptions about flow. District engineers will use their judgment to determine whether a particular activity complies with this general condition. In order to ensure that this general condition does not unduly restrict the construction and maintenance of storm water management activities, we have clarified that it does not apply to activities that have a primary purpose of managing storm water flows. The issue of maintaining passage of large woody debris in streams is more appropriately addressed through regional conditions, in areas where changes to the movement of large woody debris may result in more than minimal adverse effects on the aquatic environment. Compliance with the requirements of this general condition will generally accommodate the movement of bed load along a stream channel.

This general condition is adopted as proposed.

**GC 10. Fills Within 100-Year Floodplains.** We proposed to modify this general condition by simply requiring permittees to comply with applicable state or local floodplain management requirements that have been approved by the Federal Emergency Management Agency (FEMA).

Several commenters supported the general condition. One commenter said that the proposed change may cause a slight increase in case-by-case review and assertion of discretionary authority. This commenter also requested that the Corps provide guidance to assure consistent implementation of this general condition. A number of commenters stated that local governments are better able to implement the FEMA program. Two commenters favored the proposed change because it avoids duplication with other regulatory agencies, and another commenter stated that it is a simple and straightforward requirement. One commenter said that the general condition will create an incentive to design projects that reduce impacts to waters of the United States to qualify for an expedited NWP authorization.

We do not agree that this general condition will increase case-by-case reviews and the number of times discretionary authority is exercised. The version of this general condition that was adopted in 2002 prohibited the use of NWP's 39, 40, 42, and 44 to authorize

permanent, above-grade fills in waters of the United States within mapped floodways. Those activities required authorization by regional general permits or individual permits. The general condition adopted today allows those activities to be authorized by NWP, provided the activities comply with applicable state and local floodplain management requirements and the district engineer determines, after reviewing the pre-construction notification, that the individual and cumulative adverse effects on the aquatic environment and other public interest review factors are minimal. We continue to support efforts that reduce duplication with other agencies.

Many commenters objected to the general condition and requested that the Corps retain the previous floodplain prohibitions for NWPs 39, 40, 42 and 44. They said that the Corps has an independent obligation and role in protecting waters of the United States. One commenter stated no fills should be permitted within the 100-year floodplain in specific watersheds. One commenter said that employing the use of discretionary authority on a case-by-case basis will produce uncertainty for prospective permittees.

We do not believe it is appropriate to use the Section 404 program to restrict activities in flood plains over and above the requirements of FEMA-approved state and local floodplain management programs, except in specific cases where the district engineer determines that an activity would result in more than minimal adverse effects. This general condition, in conjunction with reviews of pre-construction notifications, will provide sufficient protection to floodplain values that is appropriate to the scope of the Corps regulatory authorities and implementing regulations. This general condition will also support the application of FEMA-approved state or local floodplain management requirements that are established to reduce flood hazards. Restricting or prohibiting development of 100-year floodplains is more appropriately addressed through the land use planning and zoning authorities granted to state and local governments. The Corps considers impacts to floodplains and flood hazards during its review of pre-construction notifications. If the proposed activity will result in more than minimal adverse effects to floodplains or increases in flood hazards, the district engineer will exercise discretionary authority and require an individual permit for the proposed activity.

We disagree that the pre-construction notification review process will produce more uncertainty for permittees. If the proposed work will have minimal adverse effects on the aquatic environment and other public interest review factors, such as floodplain values and flood hazards, the activity can be authorized by the applicable NWP. One benefit of the modified general condition is that it applies to all NWP activities, not just NWPs 39, 40, 42, and 44.

One commenter indicated that FEMA regulations are only designed to assure development is reasonably safe from flooding not to protect the quality and quantity of downstream waterways or the aquatic resources associated with the floodplain and downstream water segments. Two commenters stated that floodplain managers will not receive pre-construction notifications and therefore they will not be aware of floodplain development activities because they will no longer receive public notices for these individual permits. Two commenters said that the National Flood Insurance Program standards are insufficient to minimize flood hazard and floodplain impacts. One commenter argued that the Corps should strengthen and not weaken the floodplain protections that are outlined in 33 CFR 320.4(l)(2) and Executive Order 11988, Floodplain Management. One commenter concluded that the NWPs will have more than minimal impacts because of the proposed modification of this general condition.

When reviewing pre-construction notifications, district engineers will assess adverse effects to the aquatic environment, including impacts to aquatic resources located within 100-year floodplains and downstream waterways. General condition 9 requires permittees, to maintain to the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters. State water quality certifications ensure that NWPs do not authorize activities that degrade downstream water quality. Floodplain development activities are already thoroughly reviewed by state and local governments under their planning and zoning authorities, especially in those floodplains that consist mostly of uplands, where development is more likely to occur. The Federal Emergency Management Agency is designated through E.O. 11988 as the lead Federal agency for floodplain management, and we are deferring to their program requirements for floodplain management. The proposed modification of this general condition complies with 33 CFR 320.4(l)(2). The

modification of this general condition will not cause the NWP program to result in more than minimal individual and cumulative adverse environmental effects.

One commenter said that this general condition should be modified to require documentation of compliance with FEMA minimum standards by a licensed professional engineer, and require consultation with resource agencies. One commenter suggested modifying this general condition to require prospective permittees to demonstrate they have applied the National Environmental Policy Act process and to justify "no reasonable option" exists before filling within the base floodplain. One commenter noted that not all floodplains have been mapped and as such they do not fall under authority of a local government. Two commenters requested clarification on how the general condition will be applied when a 100-year floodplain is identified by an engineering study but FEMA approved management requirements are absent.

Requiring documentation of compliance with FEMA-approved standards is unnecessary for the purposes of the NWPs, because such requirements are more appropriately addressed through state and local construction authorizations. If a separate National Environmental Policy Act process is applicable for a particular development activity, then the lead Federal agency will conduct that process. For the purposes of the NWPs, compliance with the National Environmental Policy Act is achieved through the decision documents issued for each NWP. This general condition does not apply to 100-year floodplains where FEMA-approved state or local floodplain management requirements have not been established. In general, such floodplains have not been mapped. In such areas, district engineers will review pre-construction notifications and assess the adverse effects on floodplains and flood hazards to the extent practicable, and add special conditions as appropriate.

Two commenters requested clarification of the mechanism and documentation necessary to complete the public interest evaluation. One commenter asked if this process is expected to increase the amount of time needed to complete the review of a pre-construction notification.

The general condition simply requires permittees to comply with applicable FEMA-approved state or local floodplain management requirements. It does not require separate documentation to be provided to the

district engineer with a pre-construction notification. The modification of this general condition is not expected to cause an increase in the amount of time to prepare or review a pre-construction notification.

This general condition is adopted as proposed.

GC 11. *Equipment*. We proposed to modify the general condition to include mudflats, in addition to wetlands.

One commenter suggested changing this general condition to require heavy equipment to provide low ground pressure, to further minimize soil disturbance.

We do not agree that this change is necessary, because the general condition states that other measures can be used to minimize soil disturbance. This general condition is adopted as proposed.

GC 12. *Soil Erosion and Sediment Controls*. We did not propose any changes to this general condition.

One commenter expressed support for this general condition, stating that it provides sufficient flexibility to address emergency situations, public safety or infrastructure repairs, or situations where it is necessary to work in higher water conditions in order to adjust restoration design to meet on-site hydrologic and fluvial geomorphic conditions. One commenter said that the term "low-flow" is not adequately defined, and therefore it provides inadequate protection of the aquatic environment. One commenter suggested modifying this general condition to require permittees to follow state and/or local storm water sediment control requirements.

Determinations of low-flow conditions will be made by district engineers on a case-by-case basis. We believe the condition provides sufficient protection for the aquatic environment. Appropriate soil erosion and sediment control measures may be established by different levels of government or different agencies, so it would be more effective to retain the present language. Such requirements are independently applicable in any case.

This general condition is adopted as proposed.

GC 13. *Removal of Temporary Fills*. We proposed to modify this general condition by replacing the phrase "their preexisting elevation" with "pre-construction conditions."

One commenter supported the proposed change. Four commenters objected to the proposed change, stating that the language implies that the site needs to be revegetated or mitigated. One commenter suggested defining "temporary" as less than six months.

One commenter recommended modifying the text of this general condition to recommend removal of temporary fills during dewatered or low-flow conditions. Another commenter said that this general condition should require filled areas to be restored, as much as possible, to the same elevation, contours, grade, substrate, vegetative composition, hydrology, and/or geomorphology.

We agree that the proposed modification can be difficult to implement and enforce. For example, the proposed language implies that to return an area inhabited by trees to its pre-construction conditions, trees would have to be planted. Therefore, we have changed the phrase "pre-construction conditions" to "pre-construction elevations" to require that the permittee return the affected area to its previous elevations. We have also added a new sentence that requires the permittee to revegetate the affected area, as appropriate. A temporarily filled area that was previously vegetated must be planted with appropriate plant materials and allowed to grow back after the temporary fill is removed and the pre-construction elevations restored. In some cases, such as stream channels, it may be sufficient to simply remove temporary fills to satisfy this general condition.

The general condition is adopted with the modifications discussed above.

GC 14. *Proper Maintenance*. We did not propose any changes to this general condition.

One commenter stated the Corps should require that a new stream crossing be constructed when a crossing requires two or more debris removal requests within 10 years. One commenter said that the general condition should be modified to require maintenance as necessary to ensure minimal impacts and public safety. One commenter stated that long-term maintenance of structures and/or fills should be evaluated during the permit process and authorized in the permit authorizing construction.

We disagree with these suggested changes. We cannot condition the NWP to require a permittee to install a new stream crossing if debris accumulates at a certain frequency. Activities authorized by NWPs must already result in minimal adverse effects on the aquatic environment, and it is not necessary to add such a requirement to this general condition. Maintenance of authorized activities may be conducted either under the Clean Water Act exemption at Section 404(f)(1)(B) or under NWPs 3, 31, or 35.

The general condition is adopted as proposed.

GC 15. *Wild and Scenic Rivers*. We did not propose any changes to this general condition.

One commenter recommended expanding the prohibition to state wild and scenic and recreational river systems, and to any activities in rivers subject to the review of the National Park Service. One commenter expressed support for the general condition and recommended it be modified to require that the Federal agency with direct management responsibility for the river be contacted regarding the proposed use of an NWP and that the Corps receive a written statement from that agency regarding the effects the activity will have on the river.

State wild and scenic rivers are more appropriately addressed through state laws, regulations, and programs. The general condition contains language requiring the appropriate Federal agency with direct management responsibility for the river to determine in writing that the proposed activity will not adversely affect that river's designation. The Corps will not issue an NWP verification for an activity in a National Wild and Scenic River without the appropriate documentation.

This general condition is adopted without change.

GC 16. *Tribal Rights*. We did not propose any changes to this general condition. One commenter asked how the Corps will determine whether tribal rights are impacted, and if a tribal right is impaired.

We cannot define a specific threshold to be used to determine compliance with this general condition. District engineers make these determinations on a case-by-case basis, through appropriate consultations with Indian tribes.

This general condition is adopted without change.

GC 17. *Endangered Species*. We proposed to modify this general condition by stating that no activity is authorized by NWP, if it "may affect" a listed species or critical habitat unless Section 7 consultation has been completed. We also proposed to state that district engineers will make "may affect" or "no effect" determinations and notify prospective permittees within 45 days of receipt of a complete pre-construction notification.

Several commenters supported the proposed modifications of this general condition. One commenter recommended specifying the documentation that should be submitted with the pre-construction notification in circumstances when no listed species or

critical habitat will be affected. Two commenters requested that the 45 day time limit for notifying applicants of an effect determination be reduced to 30 days. One commenter requested clarification on whether the Corps has 45 days from submittal of the pre-construction notification or 45 days from receipt of a complete application, to notify the applicant of a "may effect" determination, and whether this will result in extra time to complete an NWP.

This general condition specifies that permittees shall notify the Corps if any listed species or critical habitat might be affected or is in the vicinity of the project. If this does not apply, no additional information is required to be submitted. We believe that 45 days is a reasonable and practical deadline, and it is consistent with the pre-construction notification time frame. The general condition states that the Corps will notify the applicant within 45 days of receipt of a complete pre-construction notification. However, if the applicant has provided notification to the Corps of possible effects on listed species or critical habitat, the applicant must wait for a Corps determination of either "may affect" or "no effect", even if this takes more than 45 days.

Several commenters expressed concern that requirement for Section 7 consultation in the absence of a "no effect" determination would delay processing of pre-construction notifications, and that the requirement to wait for the Corps "no effect" determination increases the administrative burden and uncertainty for applicants. Several commenters recommended that, if an applicant does not hear from the Corps within 45 days, the applicant may treat the lack of response as a "no effect" determination and proceed with the NWP activity. Other commenters stated that the open-ended period for the Corps to resolve concerns about species could result in NWPs taking much longer to issue than 45 days.

The 45-day period is necessary to allow district engineers to review proposed NWP activities that require notification because federally-listed species or critical habitat might be affected or are in the vicinity of the project (see 33 CFR 330.4(f)(2)). During that 45 day period, the district engineer will determine if the proposed project will have "no effect" or "may affect" listed species or critical habitat. If the proposed activity may affect listed species or critical habitat, the prospective permittee cannot begin the activity until the Endangered Species Act requirements have been satisfied,

even if 45 days have passed since the district received a complete pre-construction notification. Many "no effect" determinations do not take the full 45 days. We acknowledge that some NWP verification requests may take longer than 45 days, but the Corps is legally obligated to comply with the Endangered Species Act. The ESA requires Section 7 consultation for any activity authorized by a Federal agency unless that agency determines that the activity will have "no effect" on listed species. In cases where the permittee has determined that no listed species or critical habitat are in the vicinity of the project or might be affected by it, and thus has not notified the Corps of any possible effects, then (but only in such cases) the permittee does not have to wait for further confirmation of ESA compliance from the Corps.

One commenter stated that the wording in the general condition differs from that in the Endangered Species Act and in the existing NWPs, as it applies the standard of "may affect" rather than "takings" of listed species. In addition, without clear guidance, the "may effect" standard is likely to be applied inconsistently from district to district.

Section 7 of the Endangered Species Act states that Federal agencies must consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service if an activity "may affect" listed species or habitat. This language is virtually the same as that in the 2002 NWPs, including the requirement that a permittee cannot begin work until notified by the Corps if the project might affect a listed species or critical habitat.

One commenter recommended clarification of the terms "might be affected" and "may affect".

As stated in the text of the general condition, the district engineer determines if an activity "may affect" listed species or critical habitat. A non-federal permittee must notify the district engineer if listed species or critical habitat might be affected, so the district engineer can determine if the activity "may affect" the habitat or species. We have modified the second sentence of paragraph (b) of this general condition by changing the word "may" to "might" in order to clearly distinguish the formal determination by the Corps ("may affect" or "no effect") from the requirement on the applicant to notify the Corps where there is sufficient cause for concern to warrant a formal determination. This requirement applies if habitat or species is in the vicinity of the project or might be affected by it, or if the project is located in the habitat.

One commenter recommended modifying this general condition to exempt activities that occur in the vicinity of free-swimming species from the pre-construction notification requirement, provided the activities include reasonable efforts to avoid physical contact with listed species.

Any time a proposed NWP activity has the potential to affect listed species or critical habitat, the Corps must evaluate it and make a "no effect" or "may affect" determination. This requirement cannot be waived for free-swimming species, although efforts taken to avoid physical contact with listed species might result in a determination that the activity will have "no effect" on that species. Even in the case of a "may effect" determination, such efforts may help to expedite Section 7 consultation with the Services.

One commenter suggested clarifying that the work or activities that are prohibited from commencing until the Corps has provided notification of compliance with the Endangered Species Act only refers to work in waters of the United States, not upland areas. Several commenters stated that language requiring applicants to notify the Corps if listed species or habitat is in the "vicinity" of the activity creates uncertainty and should be eliminated.

District engineers must evaluate effects on listed species or habitat of any activity that is within the Corps' scope of analysis under the Endangered Species Act. This might include some areas outside of waters of the United States. However, it is correct that a Section 404 permit is only required for discharges of dredged or fill material into waters of the United States. The Corps has no authority to prohibit activities that do not involve such discharges. However, an activity in an upland area that adversely affects a listed species may make it more difficult for the Corps to later determine that an associated discharge of dredged or fill material into waters of the United States has "no effect" and/or may complicate any Section 7 consultation that is subsequently required. While defining the "vicinity" of an activity might be difficult, the Corps believes it must retain the ability to evaluate the effects of projects on species that are nearby, mobile, or otherwise could be affected. Defining the appropriate vicinity will also depend on the natural history of the particular species. If there is any doubt, permittees should contact the Corps or the local office of the USFWS or NMFS for guidance.

A couple of commenters stated that, as the U.S. Fish and Wildlife Service is

allowed to comment on coal mine permit applications during the Surface Mining Control and Reclamation Act (SMCRA) process, there is no need for consultation associated with Corps permits for coal mining.

Section 7(a)(2) of the Endangered Species Act requires Federal agencies to consult with the Services to ensure that they are not undertaking, funding, permitting, or authorizing actions likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat. This responsibility cannot be waived, unless another Federal agency is the lead agency for the project and conducts the required consultation. In cases where SMCRA is administered by a state agency, the Corps is required to conduct the necessary Federal consultation. Information obtained during other environmental reviews, including any comments made by the Services during the SMCRA process, is used by the Corps in evaluating the NWP.

One commenter stated that neither applicants nor the Corps are adequately trained to make endangered species determinations and therefore the Corps should institute formal consultation for each proposed NWP activity. In addition, pre-construction notification thresholds should be eliminated or reduced so that applicants are not put in the position of deciding whether or not their project has impacts on protected species.

Section 7 consultation is a cooperative effort involving affected parties engaged in analyzing effects posed by proposed actions on listed species or critical habitat(s). Many NWP activities result in "no effect" to listed species or critical habitat, so it is not necessary to conduct formal consultation for each NWP activity. The determination of jeopardy/no jeopardy is based on a careful analysis of the best available scientific and commercial data. The Corps is engaging with the Services on programmatic Section 7 consultation for the NWPs, but project-specific evaluations and consultation are still required to ensure that permitted activities do not jeopardize the continued existence of a listed species or critical habitat. The pre-construction notification thresholds for NWPs provide a balance between efficient authorization of activities that have minimal adverse environmental impact, and environmental protection, including protection of listed species and critical habitat. The requirement for prospective permittees to notify the district engineer if a listed species or critical habitat might be affected or is in the vicinity of the project provides a

relatively low bar for notification to the Corps of potential effects, while not bogging down the NWP process in cases where the applicant has performed due diligence and determined that there are no listed species or critical habitat in the vicinity of the project.

One commenter recommended that the general condition specify that the U.S. Fish and Wildlife Service or National Marine Fisheries Service has to make jeopardy determinations and that the Corps will initiate any required Section 7 consultation within 45 days of receiving a complete pre-construction notification.

We do not agree that it is necessary to modify this general condition to state that the U.S. Fish and Wildlife Service or National Marine Fisheries Service will make jeopardy determinations. Those determinations will be made when they issue biological opinions in response to a request for Section 7 consultation. The purpose of this general condition is to ensure compliance with the requirements of the Endangered Species Act, and to provide timely notification to prospective permittees, so that they do not begin work until the requirements of Section 7 have been fulfilled.

One commenter recommended that the prohibition on activities that adversely affect federally listed species should also apply to official state-listed endangered or threatened species.

The Endangered Species Act only applies to Federally-listed species. States may impose their own restrictions or prohibitions on activities that affect state-listed species.

One commenter suggested adding the word "negatively" to the second sentence of paragraph (a), to limit it to those activities that may negatively affect listed species or critical habitat. One commenter stated that this general condition should not apply to shellfish seeding activities authorized by NWPs 27 or 48, since traditional shellfish seeding activities do not negatively affect listed species or their habitat.

The term "may affect" comes from the ESA and is the statutory criterion for determining when Section 7 consultation is required. Changing this language to only apply to negative effects would not be consistent with the Corps' responsibilities under the Endangered Species Act. The general condition applies to all NWPs, to the extent that they have the potential to affect listed species or critical habitat. If an activity would not have an effect on listed species, no Section 7 consultation is required. The notification requirements in this general condition

facilitate the Corps' compliance with its Section 7 obligations.

One commenter stated that many activities eligible for NWPs are covered under programmatic Section 7 consultations. Therefore, it should be clarified that if a project falls within the scope of a program that has been reviewed and approved under Section 7 consultation, then individual consultation is not required. One commenter recommended modifying this general condition to clarify the responsibilities of Federal permittees that use the NWPs.

If Section 7 consultation has been completed for an activity, either programmatically or individually, the activity can be authorized under NWPs. This is implied in the statement that "no activity is authorized under any NWP which 'may affect' a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed." We do not believe additional clarification is necessary. When submitting a pre-construction notification for an activity that may affect a listed species, the applicant should indicate if Section 7 consultation has already been conducted, the Federal agency conducting the consultation, and the outcome of the consultation.

We have added a new paragraph to this general condition (paragraph (b)), to clarify that Federal agencies are to follow their own procedures for complying with the requirements of the Endangered Species Act, which is consistent with 33 CFR 330.4(f)(1). This paragraph also requires Federal permittees to provide appropriate documentation to the district engineer to demonstrate compliance with those requirements.

This general condition is adopted, with the modifications discussed above.

GC 18. *Historic Properties.* We proposed to modify this general condition by removing the reference to Appendix C of 33 CFR part 325 and stating that the district engineer will comply with the current procedures for addressing the requirements of Section 106 of the National Historic Preservation Act. We also proposed to modify the general condition to state that district engineers will notify prospective permittees within 45 days of receipt of a complete pre-construction notification whether section 106 consultation is required.

One commenter agreed with the 45-day timeline for a Corps response. One commenter stated that the general condition should specify what documentation should be submitted with the pre-construction notification.

One commenter stated that it should be the applicant's responsibility, not the Corps', to find out if section 106 consultation is required.

The general condition states that, for activities that may have the potential to cause an effect on listed, eligible, or potentially eligible properties, the pre-construction notification must state which historic properties may be affected by the proposed work or include a map indicating the location of the project and the location of the historic properties. The Corps is responsible for making determinations and findings for the purposes of section 106. We have modified paragraph (a) of this general condition to clarify that NWP activities are not authorized until the requirements of section 106 have been satisfied, in cases where the district engineer determines that the NWP activity has the potential to cause an effect on a historic property. If the applicant has provided notification to the Corps of possible effects on historic properties the applicant must wait for a Corps determination of either "potential to cause effects" or "no potential to cause effects" even if this takes longer than 45 days.

Several commenters expressed concerns about the delay in NWP authorization resulting from the 45-day requirement and suggested that authorization be automatically granted if the Corps does not notify the applicant within 45 days.

The 45 day period is necessary to allow district engineers to adequately review those activities that may affect eligible properties. During that 45 day period, the district engineer will determine if the proposed project has the potential to cause effects on historic properties. If so, the prospective permittee cannot begin the activity until section 106 consultation has been completed, even if 45 days has passed since the district received a complete pre-construction notification (see 33 CFR 330.4(g)(2)). However, many determinations do not take the full 45 days. The Corps cannot waive section 106 compliance by allowing the applicant to assume "no potential to cause effects" if the Corps has not been able to respond within 45 days. Therefore, this provision has not been changed. In cases where the permittee has determined there are no historic properties for which the activity has the potential to cause effects, and has thus not notified the Corps of such properties (but only in such cases) the permittee does not have to wait for further confirmation of NHPA compliance from the Corps.

One commenter stated that the Corps should eliminate the language that requires an applicant to notify the Corps if an activity may affect any property which the "prospective permittee has reason to believe may be eligible for listing," as the Corps is required only to take into account the effect of an undertaking on property that is included in or eligible for inclusion in the National Register. Two commenters recommended modifying this general condition to require a preliminary survey of the project area for the purposes of section 106 compliance.

The purpose of the notification requirement in this general condition is to provide the district engineer with the opportunity to consider effects to historic properties, in cases where pre-construction notification is not required by the NWP itself. Since the definition of "historic property" includes properties that are eligible for listing in the National Register of Historic Places, and the Federal agencies are required to carry out appropriate identification efforts, we believe that the concept in the proposed general condition is appropriate. We have modified this paragraph to provide further clarification of the role of the non-Federal permittee, and have added a sentence that states that district engineers are responsible for making final effect determinations. The notification requirement helps the Corps carry out those identification efforts. We have included a sentence in paragraph (c) to clarify that district engineers are to make reasonable and good faith efforts to identify historic properties when reviewing proposed NWP activities. We do not believe it is necessary to require a preliminary survey of the project area with the pre-construction notification. District engineers will review available information to determine if further investigations are warranted for section 106 compliance.

One commenter recommended that programmatic consultation and agreements should be allowed for section 106. One commenter stated that the Corps should initiate programmatic consultation on each NWP before reissuing them.

Programmatic agreements conducted in accordance with 36 CFR 800.14(b), meet the requirements of this general condition. We do not believe programmatic consultation on each NWP in advance is necessary or practical. Consultation will be conducted as appropriate for all activities that may affect historic properties listed on, eligible, or

potentially eligible for listing in the National Register of Historic Places.

One commenter suggested clarifying that the work or activities that are prohibited from commencing until the Corps has provided notification of compliance with section 106 only refers to work in waters of the United States, not upland areas outside of this area. One commenter stated that this general condition shifts the burden of determining "no effect" on historic properties from applicants and the Corps to other agencies, which could delay authorization. One commenter recommended modifying this general condition to clarify the responsibilities of Federal permittees that use the NWPs.

District engineers must evaluate effects on eligible historic properties that are within the Corps' scope of analysis under section 106. This might include some areas outside of waters of the United States. However, it is correct that a Section 404 permit is only required for discharges of dredged or fill material into waters of the United States. The Corps has no authority to prohibit activities that do not involve such discharges. However, an activity in an upland area that adversely affects a historic property may make it more difficult for the Corps to later determine that a Section 106 consultation is not required for an associated discharge of dredged or fill material into waters of the United States, and/or may complicate any Section 106 consultation that is subsequently required. The district engineer is responsible for making determinations and findings under section 106. This process has not changed. We have added a new paragraph (b) to this general condition, which states that Federal permittees should follow their own procedures for complying with the requirements of section 106.

One commenter expressed concerns that the general condition lacks clarity about who is responsible for identification and evaluation of historic properties and determination of effects, how such identification will be accomplished, and the nature of consultation required. This commenter suggested revised wording for the general condition and recommended that the Corps include a definition for historic properties. We agree that the wording proposed by this commenter clarifies responsibilities and procedures and have revised the general condition accordingly. We have also added a definition for historic property in the "Definitions" section for the NWPs.

This commenter also noted that the Corps' historic properties regulations

are not consistent with Advisory Council on Historic Preservation's regulations at 36 CFR part 800 and are not approved by the Council. As noted by the commenter, the Corps and the Council are currently involved in discussions to resolve the differences between the Corps' procedures and the Council's regulations at 36 CFR part 800. Pending the outcome of those discussions, the reference in this general condition to the Corps current procedures means the Corps "Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation's Regulations at 36 CFR Part 800" dated April 25, 2005.

The use of the interim guidance, as well as the Corps Regulatory Program procedures for the protection of historic properties at Appendix C of 33 CFR Part 325, are provisional measures to comply with the requirements of Section 106 of the National Historic Preservation Act until updated alternative procedures that are tailored to the Corps Regulatory Program can be promulgated through the appropriate processes.

This general condition is adopted with the modifications discussed above.

GC 19. *Designated Critical Resource Waters.* We proposed to modify this general condition to eliminate provisions that duplicate the requirements of other general conditions.

One commenter recommended adding proposed NWP's E and F to paragraph (a) of this general condition, to prohibit the use of those permits to authorize discharges of dredged or fill material in waters of the United States for activities in, or directly affecting, critical resource waters.

We have modified paragraph (a) of this general condition to include NWP's E and F (now designated as NWP's 49 and 50), since those activities have the potential to result in more than minimal adverse effects to designated critical resource waters and their adjacent wetlands. These mining activities may be authorized by individual permits or regional general permits in these waters.

One commenter stated that the Corps should not prohibit the use of an NWP in critical resource waters if the agency managing those critical resource waters approves those activities. This commenter recommended requiring pre-construction notification for all activities in critical resource waters and conducting coordination with the managing agency. Another commenter stated that limiting the use of NWP's in designated critical resource waters should be done through regional conditions and coordination with state

and local agencies and resource agencies, instead of a general condition.

Paragraph (a) of this general condition lists those NWP's that have a greater potential to result in more than minimal adverse effects on the aquatic environment, if they involve discharges of dredged or fill material into those designated critical resource waters, or their adjacent wetlands. Therefore, it would be more appropriate to review those activities through the individual permit process, with agency coordination, or authorize those activities through regional general permits. The designated critical resource waters listed in this general condition are generally considered to be important to the national public interest. Proposed activities involving discharges of dredged or fill material into those waters and their adjacent wetlands warrant more thorough review, through either the pre-construction notification process or other forms of Department of the Army authorization, such as individual permits.

One commenter suggested that in order to provide consistency with state definitions, a definition for "natural heritage sites" should be included in the text of this general condition.

Natural heritage sites are defined and designated by state agencies. The criteria and processes for designating state natural heritage sites vary from state to state. District engineers will utilize the appropriate state designations when implementing this general condition. Therefore, we do not believe that it is appropriate to provide a definition of state natural heritage sites at the national level.

One commenter suggested that source waters used for drinking water or ground water recharge should be included in the definition of critical resource water. The same commenter suggested that there should be no provision for the use of discretionary authority regarding discharges of dredged or fill material into designated critical waters.

Concerns regarding impacts to sources for drinking water and ground water recharge are more appropriately addressed through regional conditioning of the NWP's or review of pre-construction notifications for specific and identified waters. Division engineers can regionally condition the NWP's to prohibit or limit their use in such high value waters. District engineers will exercise discretionary authority and require individual permits for activities proposed in high value waters that will result in more than

minimal adverse effects on the aquatic environment.

One commenter said that critical resource waters should include the following areas: watersheds of nationally-designated wild and scenic rivers, waters within wilderness areas, national parks and wildlife refuges, and all waters with similar state designations. Another commenter recommended adding waters designated as National Monuments and National Historic Sites to the categories of waters in this general condition. This commenter also said that vernal pools, bogs and fens, native wet prairie, forested wetlands, eelgrass beds, and coral reefs should also be considered as designated critical resource waters subject to this general condition.

The use of NWP's in components of the National Wild and Scenic River System or designated study rivers is addressed by general condition 15, Wild and Scenic Rivers. Restricting or prohibiting the use of NWP's in waters of the United States within wilderness areas, national parks, national monuments, national historic sites, national wildlife refuges, or state-designated wilderness, parks, or refuges, is more appropriately addressed through the regional conditioning process. In areas where vernal pools, bogs and fens, native wet prairie, forested wetlands, eelgrass beds, and coral reefs warrant greater levels of protection, division engineers may impose regional conditions on NWP's to restrict or prohibit their use in those waters. Division engineers will determine whether regional conditions are necessary to ensure that the NWP's authorize only activities resulting in minimal individual and cumulative adverse effects on the aquatic environment in those areas.

This general condition is adopted with the modification discussed above.

GC 20. *Mitigation.* We proposed several modifications to this general condition, such as requiring compensatory mitigation for NWP activities that require a pre-construction notification and result in the loss of greater than  $\frac{1}{10}$  acre of wetlands. We also proposed to add a provision stating that compensatory mitigation may be required for activities that result in permanent adverse effects to certain aquatic resource functions and services.

Several commenters requested clarification as to whether compensatory mitigation is required only for permanent losses of waters of the United States, or whether it is also required for temporary impacts to those waters. A commenter asked if compensatory mitigation for stream bed



impacts should be quantified as linear feet or acres. A couple of commenters said that district engineers should be able to require compensatory mitigation for losses of other types of waters of the United States, such as streams. One commenter expressed support for watershed-based compensatory mitigation. One commenter said that it was unclear how the proposed compensatory mitigation rule published in the March 28, 2006, issue of the **Federal Register** (71 FR 15520) would apply to the NWP program. One commenter said that preservation should not be used as compensatory mitigation.

Compensatory mitigation is required only for permanent losses of waters of the United States, or for permanent adverse effects to aquatic resource functions (such as those described in paragraph (h) of this general condition). The restoration of waters of the United States where there were temporary fills and other impacts during the construction activity is not considered compensatory mitigation. Those actions are addressed by general condition 13. The unit of measure used to quantify stream bed impacts and compensatory mitigation is at the discretion of the district engineer. Compensatory mitigation may be required for losses of streams and other types of waters of the United States, to ensure that the NWP activity results in minimal individual and cumulative adverse effects on the aquatic environment. To clarify this concept, we have added a new paragraph (d) to this general condition, which states that the district engineer may require compensatory mitigation for losses of streams and other waters of the United States. When a final compensatory mitigation rule becomes effective, it will apply to all types of Department of the Army permits, including the NWPs. We are in the process of reviewing comments on the proposed rule and developing the final rule, in cooperation with the Environmental Protection Agency. Preservation of aquatic resources is an important form of compensatory mitigation which is appropriate in some cases to protect and maintain aquatic resource functions and services in the watershed. All compensatory mitigation should be determined, to the extent practicable, using a watershed approach that considers watershed needs holistically and identifies locations and types of compensatory mitigation that will be most beneficial to the watershed.

Two commenters said that prospective permittees should be required to submit statements with NWP pre-construction notifications that

explain how avoidance and minimization of losses of waters of the United States was achieved. They said that this statement would assist district engineers in determining if avoidance and minimization has been achieved to the maximum extent practicable. One commenter objected to including temporary adverse effects in the language in paragraph (a) of this general condition, stating that it is contrary to the definition of "loss of waters of the United States" which refers only to permanent losses. Another commenter said that compensatory mitigation should be considered only after avoidance and minimization has occurred.

We do not agree that it is necessary to require an avoidance and minimization statement with pre-construction notifications to evaluate whether avoidance and minimization has been achieved to the maximum extent practicable on the project site. The information required for a complete pre-construction notification, including any plans submitted with the pre-construction notification, is sufficient for district engineers to determine compliance with this general condition. We believe the minimization of temporary impacts to waters of the United States is important for ensuring that NWP activities result in minimal adverse effects on the aquatic environment, even though those impacts do not result in permanent losses and generally do not require compensatory mitigation. The requirements of this general condition support the mitigation sequence of avoidance, minimization, and compensation. Compensatory mitigation requirements are determined after considering compliance with the avoidance and minimization provisions of this general condition.

Several commenters expressed support for the  $\frac{1}{10}$  acre threshold for requiring compensatory mitigation for wetland losses that require pre-construction notification. A number of commenters said that compensatory mitigation should be required for all wetland losses, because of the potential cumulative impacts resulting from many small wetland losses. Several commenters asserted that there are enough mitigation banks and in-lieu fee programs throughout the country to require compensatory mitigation for wetland losses of less than  $\frac{1}{10}$  acre. Two commenters recommended changing the compensatory mitigation threshold to  $\frac{1}{4}$  acre, and one commenter reasoned that the threshold should be higher because the NWP program already meets the "no overall net loss"

goal for wetlands. Two commenters said that there should not be a mandatory compensatory mitigation requirement for the NWPs. Compensatory mitigation should be required only when necessary to ensure minimal adverse effects.

We are retaining the  $\frac{1}{10}$  acre compensatory mitigation threshold for wetland losses, with the provision allowing district engineers to waive this requirement on a case-by-case basis if the activity results in minimal adverse effects on the aquatic environment. This will help ensure that we continue to achieve the "no overall net loss" goal while providing appropriate flexibility and transparency to the wetlands compensatory mitigation requirements for the NWPs. We do not believe it is appropriate or practicable to require compensatory mitigation for all activities authorized by NWPs that result in wetland losses. Even though there are several hundred mitigation banks and in-lieu fee programs in the United States that are currently operational, these mitigation banks and in-lieu fee programs are not distributed throughout the country in a manner that would support the recommended change to this general condition. In many regions, individual permittee-sponsored projects are the only option available for compensatory mitigation to offset losses authorized by NWP activities. For very small impacts, such projects may not be practicable. Because most larger projects require more than one-for-one compensation, we are confident that we can continue to meet the "no overall net loss" goal without requiring mitigation for all impacts.

One commenter said that general condition 20 is not consistent with 33 CFR 320.4(r)(2), which states that compensatory mitigation will be for significant resource losses. This commenter articulated that there is large difference between "no more than minimal" and "significant resource loss." This commenter also stated that if the proposed activity requires a pre-construction notification and will result in loss of greater than  $\frac{1}{10}$  acre of wetlands, but the activity will result in minimal adverse effects, then compensatory mitigation cannot be required. This commenter recommended removing the  $\frac{1}{10}$  acre threshold, and modifying the general condition to simply state that the district engineer will require compensatory mitigation when necessary to ensure minimal individual and cumulative adverse effects on the aquatic environment.

General condition 20 is consistent with the NWP regulations governing mitigation (see 33 CFR 330.1(e)(3)). That

regulation states that mitigation may be required to reduce the adverse effects of the NWP activity so that they are minimal. There is already sufficient flexibility in the general condition for the district engineer to waive the compensatory mitigation requirement for wetland losses that exceed  $\frac{1}{10}$  acre if the project impacts are minimal. We believe the threshold serves an important purpose in communicating to the public that in most cases, impacts of greater than  $\frac{1}{10}$  acre will be judged to be more than minimal and will require compensatory mitigation.

One commenter asked whether the  $\frac{1}{10}$  acre threshold for requiring compensatory mitigation for wetland losses also applies to non-wetland waters of the United States. Several commenters stated that compensatory mitigation should be required for all authorized impacts to waters of United States. One commenter said that compensatory mitigation for losses of non-wetland waters of the United States should be optional. Another commenter said that on-site restoration of temporarily impacted areas should be achieved before compensatory mitigation is required.

The  $\frac{1}{10}$  acre compensatory mitigation threshold in paragraph (c) applies only to wetland losses. We are adding a new paragraph (d) to this general condition, to clarify that the district engineer may require compensatory mitigation for losses of streams and other types of waters of the United States. We do not believe it is necessary to require compensatory mitigation for all authorized impacts to waters of the United States. In response to pre-construction notifications, compensatory mitigation requirements for losses of streams and other open waters will be determined by district engineers on a case-by-case basis, to ensure minimal adverse effects. The NWP general conditions, especially general condition 13, Removal of Temporary Fills, address the restoration of temporarily impacted areas. Compensatory mitigation is required only for permanent losses, however, temporary impacts must also be minimized.

Three commenters asked for specific criteria that would be used by district engineers to determine when compensatory mitigation would be required for NWP activities. Two commenters requested clarification regarding the circumstances when compensatory mitigation would be required for wetland losses of less than  $\frac{1}{10}$  acre. One commenter recommended that permittees who believe their project should not require compensatory

mitigation be required to provide a justification for why compensatory mitigation is not necessary for their NWP activities.

Compensatory mitigation requirements will be determined by district engineers on a case-by-case basis, after considering relevant and available information, such as the ecological conditions of the project site, the type of activity, the impacts of the activity on the aquatic environment and other public interest factors, and the type of aquatic resources that will be adversely affected by the NWP activity. To the extent practicable, this evaluation will be conducted using a watershed approach. Compensatory mitigation will be required for wetland losses of less than  $\frac{1}{10}$  acre, when the district engineer determines it is necessary to ensure minimal adverse effects on the aquatic environment. This is particularly likely in areas where there is concern for the cumulative effects of multiple small losses. District engineers will review pre-construction notifications, and determine when compensatory mitigation will be required. It is not necessary to require permittees to provide a statement explaining why compensatory mitigation is not needed, however permittees are welcome to provide such information if they believe it will help the district engineer in determining the amount and type of required mitigation. Such statements are most useful when they are based on sound technical analysis using a watershed approach that draws on pre-existing assessments of watershed needs.

One commenter supported the provision allowing the district engineer to waive or reduce the compensatory mitigation requirement for wetland losses, when other forms of mitigation, such as the establishment and maintenance of riparian areas, would be better for the environment. One commenter said that off-site compensatory mitigation should be preferred in areas where invasive species are a problem. One commenter suggested that the general condition retain a preference for restoration.

The location of compensatory mitigation projects will be determined on a case-by-case basis. Off-site compensatory mitigation may be more appropriate for a variety of reasons, in addition to concerns for invasive species. Off-site compensatory mitigation may be more effective at replacing aquatic resource functions that will be lost as a result of the NWP activity. Off-site mitigation may also have a better chance of success, particularly if the proximity of the

permitted activity is likely to adversely impact the mitigation (e.g., through altered hydrology). This general condition retains a preference for wetland restoration, but the text has been modified to reflect the language in the 1990 "Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act 404(b)(1) Guidelines."

One commenter agreed with the one-to-one mitigation ratio in paragraph (c) of this general condition, provided there is flexibility in determining the appropriate ratio for a specific NWP activity. Several commenters said that district engineers should be allowed to require higher ratios of compensatory mitigation, to help ensure effective mitigation.

The mitigation ratio in paragraph (c) is a recommended minimum ratio that can be adjusted upward as necessary to provide for more appropriate mitigation for a specific activity. For a particular NWP activity, the district engineer will determine the appropriate mitigation ratio. Ratios of greater than one-to-one are often required to ensure that appropriate amounts of compensatory mitigation are provided to satisfy the minimal adverse environmental effects requirements of the NWPs. Higher ratios may be used to address temporal losses, uncertainty in mitigation success, and/or differences in functions and services between the impact site and the mitigation site.

One commenter expressed support for paragraph (d) of this general condition.

We are retaining this paragraph, with slight changes to its text to provide greater clarity. The substance of this paragraph remains unchanged. Because of the addition of a new paragraph (d), this paragraph is redesignated as paragraph (e).

Several commenters objected to requiring riparian areas as compensatory mitigation for activities authorized by NWPs, stating that the Corps lacks authority to require non-wetland riparian areas as compensatory mitigation. One commenter provided support for the use of riparian areas as compensatory mitigation, and another commenter said that riparian areas should be required for all activities. This commenter said that using riparian areas as the only form of compensatory mitigation is appropriate when the project impacts would be more than minimal without the protection of the riparian area. Another commenter asserted that the Corps is attempting to expand its jurisdiction by requiring establishment and maintenance of

riparian areas. One commenter asked for clarification of the jurisdictional status of riparian areas under the Clean Water Act. A commenter said that riparian areas cannot be required as compensatory mitigation for NWP activities near streams because compensatory mitigation projects may only consist of areas that are, or will become, waters of the United States.

The establishment and maintenance of riparian areas can be required by the district engineer as compensatory mitigation, to help ensure that the NWP activity results in minimal individual and cumulative adverse effects on the aquatic environment. Such a requirement does not make non-wetland riparian areas subject to Clean Water Act jurisdiction. Since non-wetland riparian areas are not jurisdictional, this paragraph also states that legal protection should be provided to the riparian areas, for their protection and maintenance. In many areas, riparian areas will be wetlands subject to Clean Water Act jurisdiction. In other areas riparian areas will not meet the criteria in the Corps wetland definition at 33 CFR 328.3(b).

We do not agree that the establishment and maintenance of riparian areas should be required for all NWP activities. It may not be a practicable or appropriate form of compensatory mitigation for some NWP activities.

Regardless of whether they are wetland or non-wetland, riparian areas generally provide ecological functions that are important to the aquatic environment, and especially to the ecological integrity of streams. Examples of ecological functions provided by riparian areas include: removing nutrients and pollutants from surface runoff, which improves water quality; moderating storm flows to streams, which reduces downstream flooding and degradation of aquatic habitat; erosion reduction; moderating water temperature changes; providing detritus, a food source for many aquatic organisms; providing a source of large woody debris to stream channels, which provides habitat for aquatic organisms; providing habitat to a wide variety of aquatic and terrestrial species; trapping sediments, thereby reducing degradation of stream habitat quality; providing corridors for the movement and dispersal of many species of wildlife; and providing flood storage capacity.

Compensatory mitigation projects can include areas that are not waters of the United States, as long as the mitigation is directly related to the impacts of the proposed work on such waters and

appropriate to the scope and degree of those impacts. Riparian areas are integral components of streams and other open waters, and are essential for their ecological integrity and functioning. The establishment and maintenance of riparian areas as compensatory mitigation for activities authorized by NWPs and other types of permits also helps advance the objective of the Clean Water Act, which is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Therefore, riparian areas can be required as compensatory mitigation for NWP activities.

One commenter asked whether the establishment and maintenance of riparian areas as compensatory mitigation is mandatory or discretionary. Two commenters said that in many areas with ephemeral waters, it may not be possible to establish and maintain riparian areas next to those waters. Another commenter stated that it is not always feasible to provide legal protection (*e.g.*, conservation easements) for riparian areas within highway rights-of-way. One commenter said that for ephemeral streams, vegetated buffers should be required instead of riparian areas.

The establishment and maintenance of riparian areas as a compensatory mitigation requirement is at the discretion of the district engineer. Compensatory mitigation requirements are established on a case-by-case basis, to ensure that the NWP activity results in minimal individual and cumulative adverse effects on the aquatic environment. If ephemeral streams are located on the project site, it may not be feasible to establish and maintain riparian areas next to those waters. Riparian areas should be self-sustaining. Also, if it is not possible to protect riparian areas through real estate instruments, the district engineer may require alternate arrangements or an alternative form of compensatory mitigation, as appropriate to the situation.

The general condition contains a recommended width of 25 to 50 feet for riparian areas on each side of the stream. Two commenters said that requiring 25 to 50 foot wide riparian areas may not always be feasible, and may be too costly. A commenter stated that the recommended width of riparian areas should be at least 150 feet to protect water quality, and wider to provide other ecological functions. Another commenter suggested a minimum width of 100 feet. One commenter indicated that wider riparian areas should be required to address habitat issues identified in

federal or state watershed plans.

Another commenter stated that wider riparian areas should be required to protect salmon habitat. One commenter requested clarification regarding the documentation necessary to determine the appropriate width of the riparian area.

The appropriate width of the riparian area will be determined by the district engineer, taking into account the ecological characteristics of the project site, as well as the nature and extent of the overall activity that will be constructed on the project site. The recommended width for riparian areas is intended to provide balance between environmental protection and the development of the project site. The recommended width is also intended to be commensurate with the level of impacts that need to be mitigated. The Corps' regulations require compensatory mitigation to be appropriate to the scope and degree of the authorized impacts. Requiring the establishment and maintenance of a 150- or 100-foot wide riparian area could comprise a substantial land area on a parcel, and would likely be an inappropriate amount of compensatory mitigation for an NWP activity, especially for an NWP that has a 1/2 acre limit for losses of waters of the United States. The information provided in the site plans, as well as supporting documentation, is normally sufficient to determine the appropriate width of the riparian area.

Another commenter said that there needs to be flexibility to allow use of other tools to protect water quality, such as storm water management features, instead of requiring the establishment and maintenance of riparian areas. One commenter stated that riparian areas should be planted only with local genetic stocks of native plant species.

Storm water management features, as well as best management practices, may be used instead of riparian areas to protect water quality, if site characteristics do not support the establishment and maintenance of riparian areas. Native species should be planted, but we do not agree that it is necessary to limit those plantings to local genetic stocks, though this should be encouraged where practicable. Such stocks may not be available in the area, and therefore such a requirement may not be practicable.

Two commenters stated that this general condition should clearly state that mitigation banks can be used to provide compensatory mitigation for NWPs. One commenter said that the use of mitigation banks to provide compensatory mitigation for NWP activities should be limited to the same

watershed as authorized impacts. Two commenters said that in-lieu fee programs should not be used for the NWP. Another commenter stated that in-lieu fee programs should not be used for compensatory mitigation for NWP activities unless they comply with 2000 in-lieu fee guidance. Two commenters expressed support for the use of in-lieu fee programs to provide compensatory mitigation for NWP activities.

Both mitigation banks and in-lieu fee programs can be used to provide compensatory mitigation for activities authorized by NWP permits. The established service area of the mitigation bank, as well as the judgment of the district engineer, will be used to determine whether credits provided by that mitigation bank are appropriate compensation for a specific NWP activity. In-lieu fee programs can provide compensatory mitigation projects that benefit the aquatic environment, as well as the watershed. When the final Compensatory Mitigation Rule is published, any changes in mitigation requirements will be applied to the NWP program as necessary at that time.

Paragraph (g) of the proposed general condition stated that compensatory mitigation may be required to offset permanent adverse effects to certain functions and services provided by waters of the United States, such as converting a forested wetland to a herbaceous wetland. Three commenters objected to characterizing this as an adverse effect. Two commenters said that compensatory mitigation should not be required for these impacts. Two commenters asserted that this paragraph should be deleted, since there is ample guidance concerning when compensatory mitigation should be required for these types of impacts. Two other commenters supported adding this provision to the general condition.

We are retaining this provision, while redesignating it as paragraph (h). Compensatory mitigation can be required for adverse effects to aquatic resources, even specific functions provided by those aquatic resources.

One commenter recommend adding language to this general condition which would state that the district engineer will determine appropriate compensatory mitigation based on what is best for the aquatic environment on a watershed basis. Another commenter requested clarification that the establishment of upland buffers around compensatory mitigation projects is voluntary, and compensatory mitigation credit would be provided for such vegetated buffers.

We do not believe it is necessary to revise the general condition to specifically state that appropriate compensatory mitigation will be determined based on what would be best for the aquatic environment on a watershed basis, though this is certainly the policy of the Corps. Mitigation policy documents, such as Regulatory Guidance Letter 02-02, already support that concept. There is also an extensive discussion of the watershed approach in the preamble to the proposed Compensatory Mitigation Rule. District engineers may grant compensatory mitigation credit for upland buffers surrounding compensatory mitigation project sites, if those buffers contribute to the ecological functioning and sustainability of those projects. Any requirement to establish and maintain vegetated buffers around compensatory mitigation project sites should be based on considerations of practicability and appropriateness.

One commenter asserted that the Corps does not have the statutory authority to require conservation easements to protect compensatory mitigation projects. This commenter said that such a requirement is problematic for mining activities because different parties may own different rights (e.g., surface rights v. mineral rights) associated with the parcel of land.

The district engineer has the discretion to require conservation easements for compensatory mitigation project sites, to protect those sites, if he or she determines that this is necessary to ensure minimal adverse impacts. In some cases, it may not be feasible to require conservation easements because the various rights associated with a particular parcel of land may belong to different individuals. In such cases, other methods of protecting the mitigation site should be explored.

One commenter said that this general condition should be revised to provide performance standards for compensatory mitigation projects required for NWP activities. This commenter also recommended retaining the requirement for NWP verifications to specify the party responsible for implementing the compensatory mitigation plan, instead of limiting it only to cases where the use of mitigation banks, in-lieu fee programs, and activity-specific compensatory mitigation is required.

Performance standards for compensatory mitigation projects are usually specific to certain types of aquatic resources and are, therefore, more appropriately determined by the district engineer. It would be

inappropriate to establish national performance standards through this general condition, because of the considerable variation among aquatic resource types across the country. Paragraph (g) of this general condition requires the mitigation provisions of NWP verifications to specify the party responsible for providing compensatory mitigation. This requirement applies to all three types of compensatory mitigation, including compensatory mitigation provided by the permittee.

General condition 20 is adopted, with the modifications discussed above.

GC 21. *Water Quality*. We proposed to modify this general condition by simplifying the provision regarding requirements for water quality management measures.

Several commenters expressed support for the proposed changes to this general condition. One commenter suggested that this general condition should not apply to NWPs 27 or 48, because the activities authorized by these NWP result in improvements to water quality.

If an aquatic habitat restoration, establishment, or enhancement activity or a commercial shellfish aquaculture activity involves discharges of dredged or fill material that require a section 404 permit, then water quality certification must be obtained, either for the NWP generally or individually by the project proponent, or waived. This is a requirement of Section 401 of the Clean Water Act. Therefore, we cannot modify this general condition to exclude NWPs 27 or 48.

Several commenters stated that this general condition creates the potential for duplicative oversight of water quality issues by the Corps and EPA or its designated state agency. Another commenter said that it would be arbitrary for the Corps to attempt to regulate water quality by requiring some type of undefined water quality management measures.

Whether duplicative or not, Section 401 certification by EPA or a State or Tribe, as appropriate, is required by the Clean Water Act. District engineers can condition NWP authorizations to ensure that the authorized activity results in minimal individual and cumulative adverse effects on the aquatic environment and other factors of the public interest, including water quality. By requiring water quality management measures necessary to ensure that the authorized activity results in minimal adverse effects, the Corps is not attempting to regulate water quality. Appropriate water quality management measures will be identified on a case-

by-case basis through the NWP verification process.

A Section 401 certification must be obtained or waived prior to commencing the authorized activity. In cases where a state has not yet provided, or has denied, water quality certification, for an NWP generally, the permittee must request individual certification before proceeding and provide documentation of this request to the Corps. The district engineer will wait for a reasonable period of time after receipt of this documentation. The NWP regulations generally define this period of time as 60 days, after which the district engineer can assume a waiver of the water quality certification. The wait period may vary as a result of negotiations between the district engineer and the state, but it cannot exceed one year. The district engineer will inform the project sponsor of the appropriate waiting period for presumption of a waiver of certification. The activity may not proceed until the project sponsor has received individual certification from the state or the waiting period has elapsed. This general condition is adopted as proposed.

GC 22. *Coastal Zone Management*. We proposed to modify this general condition to state that the district engineer or state may require additional measures to ensure consistency with state coastal zone management requirements.

One commenter stated that use of the term "waived" in this general condition is inappropriate, because Coastal Zone Management Act (CZMA) consistency determinations cannot be waived. This commenter also stated that obtaining a CZMA consistency concurrence cannot be a condition of a Federal permit, because the CZMA states that a Federal permit cannot be issued until a CZMA consistency concurrence is issued.

We have modified this general condition by removing the phrase "or waived" and replacing it with the phrase "or a presumption of concurrence must occur" to be consistent with the implementing regulations for the CZMA. This general condition is an appropriate means of ensuring compliance with CZMA requirements, especially for those NWP activities that do not require pre-construction notification. For activities subject to the CZMA, the NWP authorization is not valid until the permittee has complied with the requirements of the CZMA, including the requirement to obtain CZMA consistency concurrence or a presumption of concurrence.

A CZMA concurrence or presumption of concurrence must be obtained prior

to commencing the authorized activity. In cases where a state has not acted on, or has disagreed with the Corps' consistency determination, the permittee must provide the state with an individual consistency determination for concurrence, and must provide the district engineer with the state's individual consistency concurrence or a copy of the individual consistency determination provided to the state for concurrence. If the state fails to act on the permittee's consistency determination within six months of receipt by the state, concurrence will be presumed.

This general condition is adopted with the modification discussed above.

GC 23. *Regional and Case-by-Case Conditions*. We proposed to modify this general condition to clarify that water quality certifications may be issued by Indian Tribes or the U.S. Environmental Protection Agency, and that states issue CZMA consistency determinations.

One commenter recommended modifying this general condition to clarify that the U.S. EPA has delegated the section 401 water quality certification program to many states, and that in those cases it is the designated state that issues the water quality certification, not the U.S. EPA.

We do not agree that this suggested modification is necessary, since the wording already recognizes that delegated States or Tribes may issue Section 401 water quality certifications.

This general condition is adopted as proposed.

GC 24. *Use of Multiple Nationwide Permits*. We proposed to modify this general condition by making a grammatical adjustment.

Several commenters objected to the practice of using more than one NWP to authorize a single and complete project. In contrast, two commenters said that combining NWPs is both appropriate and desirable as a means for the Corps to reduce its workload and provide expedited approvals to the regulated public. Two comments said that the proposed general condition has the effect of raising the acreage limit when an NWP with an acreage limit is combined with another NWP that has no set limit. One commenter suggested rewording the general condition in the affirmative. One commenter suggested replacing the term "temporary loss" with "temporary impact" for purposes of calculating the loss of waters of the United States.

We agree that the ability to use multiple NWPs reduces our workload and expedites decisions for the regulated public while maintaining the necessary protections for the aquatic

environment. When two NWPs are used to authorize a single and complete project, and one NWP has a specified limit and the other NWP has no specified limit, the general condition states that the acreage loss of waters of the United States cannot exceed the acreage limit of the NWP with the highest specified acreage limit. The NWP with the specified acreage limit establishes the acreage limit for the single and complete project, not the NWP with no designated acreage limit. We believe phrasing this general condition as a prohibition assists in compliance. The reference to "acreage loss" in this general condition applies to permanent losses, to be consistent with the definition of "loss of waters of the United States" provided in the "Definitions" section of the NWPs.

This general condition is adopted as proposed.

GC 25. *Transfer of Nationwide Permit Verifications*. We proposed to add this new general condition to the NWPs.

Several commenters supported the proposed general condition. One commenter requested clarification whether there would be a standardized form for the parties to sign and submit. Another commenter recommended adding a permit transfer form as a separate section of the NWP verification or certificate of compliance.

This general condition provides specific language that must be included in all NWP verification transfer request letters from the original permittee to the appropriate Corps district office, to validate the transfer of the NWP verification to a new property owner. District engineers have the discretion to incorporate this language in NWP verification letters, either as language within the text of the letter, or as a separate form or attachment. At their discretion, district engineers may also ask permittees to include the referenced language as part of their own transfer request letter.

One commenter requested clarification whether the permit transfer information would be tracked in a database and made available to the public and other regulatory agencies.

The permit transfer authorization information will be retained in the appropriate recordkeeping facilities at Corps district or field offices. The information will be provided upon request to the public or other agencies.

One commenter recommended adding a sentence to the transfer statement to be signed, specifying that any changes in the permitted project must be evaluated by the district engineer and could require modifications to the permit.

Any requests for modification of an activity previously authorized by a DA permit will be reviewed by the district engineer. If the new proponent wants to modify the previously verified activity, the proposed modification must be submitted for the consideration of the Corps, to verify that the activity still complies with the terms and conditions of the applicable NWP. We do not believe it is necessary to add a sentence to this general condition to describe this requirement, which applies regardless of whether the permit is transferred or not.

Several commenters stated that this general condition only addresses the sale of the property associated with an NWP verification, and recommended that it be expanded to allow the transfer of a permit verification when responsibility over the project is transferred even if the lands in question do not undergo change in ownership. Another commenter suggested clarifying that the transfer provision is also applicable when only part of the property covered by the NWP is sold. This commenter also suggested changing the phrase "associated liabilities associated with compliance with its terms and conditions" to read "obligations to comply with its terms and conditions."

The language for the proposed general condition was taken from Appendix A of 33 CFR 325, which is the standard form for Department of the Army permits. This language is found at general condition 4 of Appendix A. We believe that the language in this general condition should be consistent with our standard permit language.

One commenter requested clarification on how the NWP verification transfer would affect off-site mitigation requirements associated with an NWP verification. One commenter requested clarification as to whether the transfer is a required condition or an option.

As stated in this general condition, when a property associated with an NWP verification is sold, the responsibilities and liabilities associated with the NWP verification are transferred to the new owner. This includes any mitigation requirements added as special conditions to the NWP authorization being transferred. Transferring the NWP verification to the new owner of the property is not necessary if the new owner decides not to conduct the authorized activity. The new owner also has the option of obtaining a different NWP verification. However, if the activity is (or was) conducted and any permit conditions

are still applicable, the new owner must have some form of DA authorization.

This general condition is adopted as proposed.

**GC 26. Compliance Certification.** We did not propose any substantive changes to this general condition. One commenter suggested changing the name of this general condition to "Compliance Verification" to avoid confusion with other certifications such as water quality certifications.

We do not agree with the proposed name change for this condition. For this general condition, the permittee is certifying that he or she has completed the authorized work and any required mitigation.

This general condition is adopted as proposed.

**GC 27. Pre-Construction Notification.** We proposed to modify and simplify this general condition by removing language that is redundant with the terms of specific NWPs. We also proposed to modify the information requirements for pre-construction notifications. Other proposed modifications are discussed in the September 26, 2006, **Federal Register** notice.

Two commenters stated that the reference to using ENG FORM 4345 should be removed because this form does not contain the necessary information required for a complete pre-construction notification. One commenter requested that a complete pre-construction notification be defined.

It is not necessary to use ENG FORM 4345 for pre-construction notifications. Instead of using ENG FORM 4345, a prospective permittees may choose to supply the information in a letter. Some districts provide checklists to assist prospective permittees, especially if they have regional conditions that specify additional information that must be submitted with pre-construction notifications.

One commenter asked if a pre-construction notification is presumed to be complete if the district engineer does not request additional information necessary to make the pre-construction notification complete within 30 days. This commenter also requested clarification on when the 45-day pre-construction notification review period begins. One commenter suggested that the district engineer should be allowed to make more than one request of additional information in order to make a more informed decision.

If 30 days has passed since the pre-construction notification was received by the Corps district, the pre-construction notification will be presumed to be complete. The 45 day

pre-construction notification review period begins on the date the complete pre-construction notification is received by the Corps district. If the district engineer requests additional information necessary to make the pre-construction notification complete, a new 45 day review period begins on the date the requested information is received by the Corps district. If no request for additional information is received, the original pre-construction notification is deemed complete and the 45 day review period begins on the date the pre-construction notification was received by the Corps district.

The provision limiting the district engineer to one request for additional information applies only to those requests for information necessary to complete the pre-construction notification. We have modified the second sentence of paragraph (a) to provide flexibility in cases where there are extenuating circumstances that warrant an additional request for information necessary to make a pre-construction notification complete. Such requests must also be made within the 30 calendar days of receipt of the pre-construction notification. This sentence has been modified to state that, as a general rule, the district engineer will make only one request for additional information to make the pre-construction notification complete. District engineers should endeavor to make only one request for additional information to make a pre-construction notification complete.

The information requirements for a complete pre-construction notification are provided in paragraph (b) of this general condition. We believe the information required for a complete pre-construction notification is the minimum information necessary for district engineers to begin the process of determining whether the proposed work will result in minimal adverse effects on the aquatic environment and is authorized by NWP.

If, as a result of the review of the complete pre-construction notification, the district engineer determines that additional information (such as a compensatory mitigation plan) is needed to make a final decision on whether the activity qualifies for NWP authorization or discretionary authority should be asserted, the district engineer may request that information. In cases where this additional information is necessary to make a decision on the pre-construction notification, the decision must still be made within 45 days of the receipt date for the complete pre-construction notification.

Two commenters said that the burden has shifted from the Corps to the prospective permittee for Endangered Species Act or National Historic Preservation Act compliance, and there is no relief provided in the 45 day clock for applicants when Endangered Species Act or section 106 consultation is necessary. Two commenters stated that if the 45 day period has passed, the NWP verification should be issued even if the Endangered Species Act or section 106 requirements have not been completed. One commenter inquired if the Corps could ensure that the Endangered Species Act or National Historic Preservation Act consultation processes will conclude within 45 days. One commenter said that paragraphs (b)(6) and (b)(7) of this general condition should clarify whether Federal permittees are required to submit information for compliance with the Endangered Species Act or Section 106 of the National Historic Preservation Act.

Permittees cannot presume NWP authorization if any endangered or threatened species or critical habitat might be affected or is in the vicinity of the project or if the project is located in designated critical habitat, or if the activity may have the potential to cause effects to any historic properties listed, determined to be eligible for listing, or potentially eligible for listing on the National Register of Historic Places (see general conditions 17 and 18). The NWP regulations state that if the prospective permittee notifies the district engineer that Federally-listed endangered or threatened species or critical habitat might be affected or are in the vicinity of the project, he or she cannot begin work until notified by the district engineer that the requirements of the Endangered Species Act have been satisfied (see 33 CFR 330.4(f)(2)). There is a similar provision for historic properties (see 33 CFR 330.4(g)(2)). We have modified general conditions 17 and 18 to require district engineers to inform permittees of the need to conduct these consultations within 45 days of receipt of complete pre-construction notifications, however, even if such notice is not received, the permittee cannot assume authorization. The permittee makes the first determination as to whether general conditions 17 or 18 are triggered, and will know if he or she has notified the Corps of any potential effects on listed species or critical habitat, or on historic properties. If so, the permittee must wait for written verification from the Corps that ESA and historic preservation requirements have been satisfied. In

cases where Endangered Species Act or section 106 consultation is necessary, we cannot require those consultations to be concluded with 45 days of receipt of a complete pre-construction notification. Those consultations often take more than 45 days; their timeframes are only partially within the control of the Corps. The Corps will do what it can to expedite any required consultations.

We have inserted the phrase “for non-Federal permit applicants” in paragraphs (b)(6) and (b)(7) since Federal permittees are to follow their own procedures for complying with the Endangered Species Act and the National Historic Preservation Act. Non-federal permittees are required to submit the information required by these paragraphs, since the Corps will use that information to determine whether it is necessary to conduct Section 7 or Section 106 consultations for those activities that may affect listed species, critical habitat, or historic properties.

One commenter recommended modifying paragraph (b) of this general condition to include guidance on the types of information and analyses that should be submitted with pre-construction notifications to support “effect” determinations and consultation efforts under Section 7 of the Endangered Species Act. This commenter said that this guidance should include instructions on how prospective permittees can obtain species lists. This commenter also suggested amending paragraph (b) to include guidance on evaluating “effects of the action” and constructing “consultation packages” for informal and formal Section 7 consultation.

In paragraph (e) of general condition 17, Endangered Species, we have provided the links to the Web sites of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, where prospective permittees can go to obtain further information on endangered or threatened species or critical habitat. The available information regarding endangered or threatened species or critical habitat varies by Service field office, and we believe providing a general link is sufficient since their Web pages are likely to change over time. As for providing guidance regarding information and analyses to be used for Endangered Species Act compliance, it would be more appropriate for our district offices to work with the field offices of the Services to develop such guidance as necessary, since the appropriate types of information and analyses are likely to vary by species,

and the type of activity being conducted.

One commenter stated that assuming the NWP verification after 45 days is problematic because many states require the Corps verification letter prior to commencing the water quality certification review.

In cases where the 45 day pre-construction review period has passed, the permittee must still comply with general condition 21, Water Quality. After the applicant has submitted an application for individual water quality certification, waiver of the requirement to obtain water quality certification for an NWP is assumed if the applicant has not heard from the state or Tribe within a reasonable amount of time, generally 60 days (see 33 CFR 330.4(c)(6)). If the state requires a Corps verification for water quality certification, the permittee must wait for the verification. The Corps will make every effort to provide verification letters within 45 days.

One commenter said that the 45 day default authorization provision should be eliminated and two commenters requested that the 45 day review period be reduced to 30 days. Two commenters asked if the time frames are measured in calendar days or business days. One commenter requested a list of potential differences in information requirements for pre-construction notifications for the various NWPs.

We are maintaining the 45 day default authorization provision. We are modifying the text of general condition 27 to clarify that calendar days are used. Paragraph (b) of this general condition lists all of the information necessary for a complete pre-construction notification. Corps districts can provide checklists to assist prospective permittees, especially if they have regional conditions that specify additional information that must be submitted with pre-construction notifications.

Two commenters expressed support for removing part of (a)(2) from the notification general condition adopted in 2002. One commenter suggested modifying paragraph (a)(2) to state that a prospective permittee cannot begin an NWP activity that requires a written waiver of NWP limits, until the written waiver is issued by the district engineer. One commenter said the district engineer should be required to provide written waivers to prospective permittees within the 45 day time-frame.

We have modified paragraph (a)(2) to state that the permittee cannot begin the activity until the district engineer issues the written waiver required by an NWP. Such waivers do not have to be



provided during the 45-day pre-construction notification review period, because the written waiver is required by the terms and conditions of the applicable NWP. For proposed projects that require any type of written waiver, district engineers must make a written determination that the proposed work will result in no more than minimal adverse effects on the aquatic environment. District engineers will try to determine whether or not to grant waivers as expeditiously as possible.

One commenter expressed support for the proposed changes to paragraph (b)(3). Another commenter said that paragraph (b)(3) contains an incomplete sentence. One commenter recommended adding a requirement for the prospective permittee to state how avoidance and minimization was accomplished in order for the Corps to make a better decision. One commenter suggested that the prospective permittee should list any waivers that are requested. One commenter said that paragraph (b)(3) should be modified to require analyses of losses of juvenile salmonid over wintering habitat and early rearing habitat.

We have inserted the words “and to determine the need for” before “any necessary compensatory mitigation” to complete the sentence in paragraph (b)(3). District engineers will review pre-construction notifications in accordance with general condition 20, Mitigation, to determine whether the prospective permittee has accomplished all practicable avoidance and minimization on the project site. The present information requirements in paragraph (b)(3) will suffice for determining whether waivers of NWP limits are being requested by the prospective permittee. Assessments of potential impacts to juvenile salmon are more appropriately addressed by Corps districts where significant salmon impacts are occurring.

Two commenters agreed with the requirement to include a delineation of wetlands and other waters of the United States with the pre-construction notification. One commenter asked if an approved jurisdictional determination is necessary for a complete pre-construction notification. One commenter said that the general condition should clarify whether a prospective permittee can assume that a delineation submitted with a pre-construction notification is an approved jurisdictional determination. One commenter stated a delineation of special aquatic sites should be required for NWPs 3, 11, 13, 19, 27, 29, 31 and 36. Two commenters voiced concern that delineating wetlands and waters of

the United States beyond those actually impacted by the project is too burdensome when working on large project sites.

The permittee cannot assume that a delineation of waters of the United States submitted with a pre-construction notification is an approved jurisdictional determination. Jurisdictional determinations are made by the Corps and documented through the issuance of an NWP verification. The Corps is in the process of revising its procedures for issuing and documenting its jurisdictional determinations, and will be providing guidance shortly.

The 45-day pre-construction notification review period starts on the date that a complete pre-construction notification is received. If the district engineer determines that the delineation is incorrect and requests a revised delineation from the applicant, the 45-day review period starts again when the revised delineation is received by the district engineer. This general condition requires delineations of special aquatic sites and other waters of the United States on the project site, so it is not necessary to specify which NWPs require delineations with their pre-construction notifications. Since this paragraph refers to project site, it does not imply that all waters of the United States on the property need to be delineated. The delineation need only cover a sufficient area surrounding the proposed NWP activity.

One commenter stated the while the methodology for delineating wetlands is established, methods for delineating non-wetland waters of the United States are lacking. One commenter voiced concern with the language stating that the delineation must be prepared in accordance with the “current method required by the Corps” and requested that we state that wetland delineations cannot be based solely on National Wetland Inventory maps because they were not developed for the 404 program. Furthermore, it was urged that the Corps require field-based delineations and not approve any delineations for waters of the United States, including wetlands, without a field inspection.

Delineations of non-wetland waters of the United States should follow the definitions for these areas. For example, in using the definition for riffle and pool complexes, maps indicating stream segments containing riffle and pool complexes and their location can be used as delineations of these special aquatic sites. It is not necessary to precisely map each riffle and pool complex within a stream. Rather, the delineation need only show the

locations of special aquatic sites at a sufficient level of detail for the district engineer to determine the potential for these sites to be impacted by project activities.

The reference to the “current method” means the 1987 Corps of Engineers Wetland Delineation Manual, associated guidance, and any approved regional supplements to the 1987 manual. National Wetland Inventory maps are useful for planning purposes but they do not provide delineations of waters of the United States. It is not necessary to require field inspections for all delineations of waters of the United States.

One commenter expressed concern regarding the language in paragraph (b)(4) that discusses situations where the Corps would conduct delineations. In this paragraph we are simply stating that if a prospective permittee relies on the Corps to conduct a delineation, that prospective permittee should anticipate delays due to the workloads facing the district engineers.

One commenter suggested modifying paragraphs (b)(5) and (e) to clarify that these paragraphs refer to permanent losses. One commenter recommended changing paragraph (b)(5) to require the prospective permittee to state why the project would exceed minimal adverse impacts without additional mitigation. Two commenters suggested that there should not be a requirement to submit detailed compensatory mitigation plans with a pre-construction notification, because of the costs to develop mitigation plans that may not be required once the district engineer makes a decision on the pre-construction notification.

It is unnecessary to modify these paragraphs to specify that we are referring to permanent losses, because the NWP definition for “loss of waters of the United States” refers only to permanent losses. In fulfilling the requirements of paragraph (b)(5), the prospective permittee’s statement can explain how the proposed activity complies with general condition 20. Paragraph (c) of general condition 20 states that the district engineer can waive the requirement for wetlands compensatory mitigation or require an alternate form of mitigation. We are modifying paragraph (b)(5) of this general condition to allow project proponents to submit conceptual or detailed mitigation plans.

One commenter said that a conceptual mitigation plan is not sufficient and detailed plans should be required. One commenter requested that detailed compensatory mitigation monitoring plans be required for activities

authorized by NWP 12, 14, 21, 29, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, and 50.

Conceptual mitigation plans are appropriate for submittal with pre-construction notifications. These conceptual plans are useful in making initial determinations regarding the appropriateness of proposed compensatory mitigation. If not submitted with the pre-construction notification, detailed compensatory mitigation plans will be required prior to commencing the authorized activity in cases where the permittee is performing the mitigation. If the permittee is using a mitigation bank or in-lieu fee program, he or she must provide the name of the bank or program and the number and type of credits being purchased.

One commenter suggested that paragraph (d)(2) be modified to include NWP 20 and 38 with NWP 37, because of the emergency nature of these activities. We do not agree that this is necessary, because NWP 20 does not require pre-construction notification and NWP 38 is not limited to emergency situations. We are adding numbers to the paragraphs within paragraph (d) to provide greater clarity.

One commenter recommended modifying paragraph (d) to reduce the acreage threshold for agency coordination from  $\frac{1}{2}$  acre to  $\frac{1}{10}$  acre, because of the  $\frac{1}{10}$  acre threshold for wetlands compensatory mitigation.

The present threshold for agency coordination is sufficient, since activities resulting in the loss of greater than  $\frac{1}{2}$  acre of waters of the United States have greater potential to result in more than minimal adverse effects. Decisions regarding the amount and type of compensatory mitigation that should be required for NWP activities are made by district engineers on a case-by-case basis in accordance with general condition 20 and other appropriate regulations and guidance. Requiring agency coordination for losses of less than  $\frac{1}{2}$  acre would result in a substantial workload increase to Corps districts and the resource agencies, and is unlikely to provide significant additional protection for the aquatic environment.

One commenter said that the authority to sign NWP verifications should not be delegated to Corps project managers.

Districts have the authority to determine the appropriate level of signature authority for NWP verifications, to implement the NWP program effectively.

This general condition is adopted with the modifications discussed above.

**GC 28. *Single and Complete Project.*** We are adding a new general condition to clarify that the NWPs authorize only single and complete projects. This is in response to a commenter's concern about the removal of language from the 2002 NWPs which limited the use of certain NWPs to a single and complete project or a part of a single and complete project. That language was in NWPs 13, 15, 18, 19, 29, 39, 42, 43, and 44.

Limiting all NWPs to authorize only single and complete projects is a long-standing practice. In this new general condition, the authorized activity must be a single and complete project. In addition, this general condition states that the same NWP can be used only once to authorize that single and complete project. For example, NWP 39 cannot be used twice to authorize a commercial development. This general condition is consistent with general condition 24, Use of Multiple Nationwide Permits. The new general condition will help improve environmental protection by clarifying that piecemealing of activities that require Department of the Army permits is prohibited.

**Former general condition 27. *Construction Period.*** We proposed to remove this NWP general condition.

Several commenters expressed support for the removal of this general condition, stating that it would eliminate confusion about the time frames when the NWPs are in effect. Several commenters objected to the elimination of this general condition, stating that it was needed since it took into account unexpected situations, which can delay the completion of a project. One commenter opposed the removal of this general condition, stating that it provided necessary flexibility at the end of a NWP cycle, and still allowed the permittee to complete the work without having to request another permit or verification from the Corps. Several other commenters said that elimination of this general condition could result in considerable delays and economic burdens for completion of projects with no more than minimal adverse effects. One commenter stated that removing this general condition would result in more individual permits for activities that would not result in more than minimal impacts.

We are removing this general condition, because it does not comply with Section 404(e)(2) of the Clean Water Act, which places a five-year limit on general permits issued under section 404. Since this general condition did not specify any limits on project

completion dates, in effect it provided the district engineer with the authority to state that the NWP activity was authorized for any period of time. We believe that this is contrary to section 404(e)(2).

Under the current NWP regulations, district engineers may issue NWP verification letters that are valid for a period of two years. In cases where an NWP verification letter expires before the NWP itself expires, the activity continues to be authorized by the NWP until the NWP expires. It is not necessary to issue a new verification during the five year period the NWP is in effect. Any special conditions that were imposed by the district engineer remain in effect after the NWP verification expires, unless the district engineer removes those conditions.

Once the NWP expires, the permittee can utilize 33 CFR 330.6(b) to complete the work. That regulation allows permittees to continue work for one year in reliance on an NWP authorization, if that NWP has expired or been modified or revoked, and the activity is under construction or under contract to commence construction. If that work cannot be completed within that one-year time period, then the permittee would have to obtain another DA authorization. We continue to believe that 33 CFR 330.6(b) is sufficient to address the concern with projects that may not be completed before an NWP expires. For NWP activities that will require substantial amounts of time to complete, project proponents should consider whether it would be more advantageous to pursue an individual permit authorization. Individual permits can authorize greater flexibility in construction periods. An individual permit authorization can also be extended, as long as the district engineer determines that the time extension would be consistent with applicable regulations and would not be contrary to the public interest.

One commenter requested clarification on whether newly issued NWP verifications for specific projects would be valid for five years or for only one to two years. Two commenters suggested that all NWP verifications should be issued with five-year expiration periods. Another commenter suggested that all NWP verifications should be set to expire concurrently with the NWPs themselves. Similarly, another commenter requested clarification on whether applicants could request NWP verifications with expiration dates corresponding to the new NWPs expiration date.

In the November 30, 2004, issue of the **Federal Register** (69 FR 69567) we

published a proposed rule that would allow district engineers to issue NWP verifications that would expire on the same date the NWP expires. Until that final rule is issued, the current 33 CFR 330.6(a)(3)(ii) applies, which states that an NWP verification letter can be valid for no more than two years. However, as stated above the activity continues to be authorized by the NWP until the NWP expires.

#### Definitions

One commenter said that the NWP definitions should be promulgated through the Administrative Procedure Act rulemaking process, and placed in the Code of Federal Regulations since many of these terms apply to other aspects of the regulatory program.

The definitions adopted today have been promulgated through the Administrative Procedure Act process. These definitions apply only to the NWP program. A separate rulemaking action would be required to adopt definitions with general applicability to the Corps Regulatory Program.

One commenter asked for definitions of ordinary high water mark, adverse, land, waters of the United States, environmental, environmental impact, "a timely manner", regulatory efficiency, cumulative impacts, public interest factors, mitigation banks, permittee-responsible mitigation, in-lieu fee program, aquatic resource functions, and grandfathering. Another commenter requested a definition of "temporary loss."

We are providing a separate definition of ordinary high water mark. Previously, this definition was in the definitions of "open water" and "waterbody." The term "waters of the United States" is defined at 33 CFR part 328. We do not believe it is necessary to define, for the purposes of the NWP program, the terms "environmental," "environmental impact," "a timely manner," "regulatory efficiency," or "grandfathering."

Commonly accepted definitions for those terms are sufficient for the implementation of the NWP program. The Corps uses the definition of the term "cumulative impact" from the Council on Environmental Quality's regulation at 40 CFR 1508.7. The terms "mitigation bank" and "in-lieu fee program" are currently defined by the November 28, 1995, mitigation banking guidance (60 FR 58605). The grandfather provisions for NWP authorizations are provided at 33 CFR 330.6(b). It is more appropriate to define the terms "permittee-responsible mitigation" and "aquatic resource functions" through the promulgation of the final compensatory mitigation rule

required by Section 314 of the National Defense Authorization Act for Fiscal Year 2004. Defining "temporary loss" is not desirable, because it would likely result in a reduction in flexibility in implementation of the NWP program. Where there is ambiguity, district engineers should have flexibility to determine, on a case-by-case basis, whether a particular activity causes a temporary or permanent loss of waters of the United States.

Two commenters requested a definition of "minimal effects." Another commenter said that this term should be defined regionally, since it cannot be defined at a national level.

We continue to maintain our position that the term "minimal effects" cannot be simply defined at a national level. It is challenging to define it precisely even at smaller scales, such as states or watersheds. There is considerable variation in aquatic resource functions, services, and values across the country. There is also wide variation in those functions, services, and values at smaller landscape scales. Site-specific factors, such as the types and amounts of functions provided by waters, the services those aquatic resource functions provide, the value society places on those functions and services, the geomorphic setting of those waters, and other factors are important to consider when determining whether an NWP activity will result in minimal adverse effects on the aquatic environment. We believe the term "minimal," while not precise, is well understood by the public and has not caused undue confusion in the implementation of the Section 404 program to date. A certain amount of flexibility on the part of district engineers to determine what is "minimal" in a particular context, after consideration of the factors discussed above, is necessary for the practical implementation of the program.

*Best management practices (BMPs).* We proposed to modify this definition by removing the last sentence. One commenter suggested that we acknowledge that BMPs may have impacts on groundwater and subsurface water.

Although best management practices may impact hydrology, the definition need not address that issue. The definition is adopted as proposed.

*Compensatory mitigation.* We proposed to modify this definition by removing the phrase "For the purpose of Section 10/404, compensatory mitigation is." We also proposed to replace "creation" with establishment (creation)." One commenter expressed support for removing "exceptional

circumstances" in relation to the use of preservation as a type of compensatory mitigation. One commenter stated that "aquatic resource" should be defined in the context of jurisdiction. Another commenter stated that this definition should be consistent with the other terms for different types of compensatory mitigation that are provided in this section, specifically the definition provided for establishment (creation).

Compensatory mitigation may be provided by aquatic resources that are not subject to the Corps regulatory jurisdiction. Therefore, it is not necessary to modify this definition by replacing "aquatic resources" with "waters of the United States." We have added the word "creation", to be consistent with "establishment (creation)," which is defined in this section. The definition is adopted as proposed.

*Currently serviceable.* We proposed to move the term and definition from NWP 3 to this section since it is used for other NWPs. One commenter suggested that most culvert replacement projects, regardless of current serviceability, have minimal impacts and recommended adding language allowing a failed culvert to be considered currently serviceable, so that it would be eligible for NWP 3 authorization.

While we agree that most culvert replacements have minimal impacts, the definition encourages maintenance to be conducted before the structure or fill falls into such a state of disrepair that it can no longer be considered serviceable. The definition is adopted as proposed.

*Discharge.* We are adding a definition of the term "discharge" to clarify when a discharge of dredged or fill material occurs for an NWP activity. This definition clarifies that the term "discharge" as used in the NWPs, also applies to any activity that causes or results in a discharge, as defined at 33 CFR 323.2.

*Enhancement.* We proposed to modify this definition to be consistent with the wetland project type described in Regulatory Guidance Letter 02-02 and the definition in the Council on Environmental Quality's April 2006 report entitled "Conserving America's Wetlands 2006: Two Years of Progress Implementing the President's Goal." We did not receive any comments on the proposed definition. The definition is adopted as proposed.

*Ephemeral stream.* We did not propose any changes to this definition. Four commenters said that this definition should address the jurisdictional status of ephemeral

streams. Some of these commenters said that this definition should be removed, because these features are not jurisdictional. One commenter stated that the hydrologic criteria in the second and third sentences should be qualified as occurring in a "typical year." One commenter suggested we define them as features that lack a connection to the water table and are not waters of the United States. One commenter said that this definition should state that groundwater is not typically a source of water for an ephemeral stream.

We do not agree that it is appropriate to state in the definition of this term that ephemeral streams are not waters of the United States because many ephemeral streams are subject to Clean Water Act jurisdiction as waters of the United States. Further, neither the NWP nor this preamble are intended to address jurisdictional issues. If an ephemeral stream is not a water of the United States, as defined at 33 CFR part 328, then no Section 404 permit is required for discharges of dredged or fill material into it. An ephemeral stream that meets the criteria at 33 CFR part 328 is a water of the United States. The phrase "typical year" applies to the entire definition, not just the first sentence. Groundwater is not a source of water for an ephemeral stream.

The definition is adopted as proposed.

*Establishment (creation).* We proposed to modify this definition to be consistent with the wetland project type described in Regulatory Guidance Letter 02-02 and the definition in the Council on Environmental Quality's April 2006 report entitled "Conserving America's Wetlands 2006: Two Years of Progress Implementing the President's Goal." One commenter suggested defining "upland" and "deepwater site," and retaining the flexibility of the current term "creation" when in-kind mitigation is conducted. One commenter said that the definition of "creation" should be retained until questions regarding the extent of the Corps jurisdiction are resolved. Another commenter recommended the removal of "deepwater" from this definition because deepwater areas are aquatic resources.

We do not believe it is necessary to define the word "upland" for purposes of the NWP program. This definition need not specifically address jurisdictional issues. What constitutes an "upland" in contrast to an "aquatic resource" will depend on the practices in place at the time the determination is made. We are removing the word "deepwater" because it is an aquatic

resource. This definition is adopted with the modification discussed above.

*Historic property.* In response to one commenter, we are adding this term to the "Definitions" section. It is adapted from the Advisory Council on Historic Preservation's definition at 36 CFR 800.16(l)(1), and is provided for the convenience of users of the NWPs.

*Independent utility.* We did not receive any comments on the proposed definition. The definition is adopted as proposed.

*Intermittent stream.* We did not receive any comments on the proposed definition. The definition is adopted as proposed.

*Loss of waters of the United States.* We proposed to modify this definition by replacing the phrase "above-grade, at-grade, or below-grade fills" with "discharges of dredged or fill material" to be consistent with the definitions of "fill material" and "discharge of fill material" issued on May 9, 2002 (67 FR 31129) at 33 CFR 323.2. We also proposed to eliminate the sentence stating that impacts to ephemeral streams are not included in the linear foot limits for stream impacts in NWPs 39, 40, 42, and 43, because of the proposed changes to those NWPs. We also proposed to add a sentence to this definition to clarify that activities exempt from section 404 permit requirements are not included when calculating the loss of waters of the United States.

Three commenters stated that activities that are not regulated should not be included. One commenter asserted that temporary fills should be included as a loss because the functions and values may not return. Six commenters said that ephemeral streams should not be included when determining whether the proposed work exceeds the acreage limit of the NWP because the Corps lacks jurisdictional authority in these areas. One commenter stated that intermittent streams and artificially created wetlands should not be included for the same reason. Another commenter said that the acres of waters of the United States provided as compensatory mitigation should count towards the acreage limit. One commenter stated that the loss of stream bed should include inundation, in addition to filling and excavation.

The first sentence of this definition states that the permanent adverse effects are caused by the regulated activity. Therefore, unregulated or exempt activities are not included when calculating the loss of waters of the United States. Temporary fills should not be considered as losses of waters of the United States, since they are

required to be restored (see General Condition 13, Removal of Temporary Fills). If they are not restored properly, then the district engineer may consider them to be permanent losses. District engineers may also consider permanent losses of specific aquatic resource functions and services when determining if mitigation is required (see paragraph (h) of general condition 20, Mitigation). Ephemeral streams, intermittent streams, and man-made wetlands that meet the regulatory definition of "waters of the United States" are included for the purposes of this definition. As discussed in paragraph (e) of general condition 20, compensatory mitigation cannot be used to decrease the acreage loss of waters of the United States for purposes of determining whether an NWP acreage threshold is exceeded. Mitigation can be used to ensure that adverse effects are minimal. Inundation does not usually result in the loss of stream bed. Once the cause of inundation has been removed, the normal water level of the stream will return. (Note: The use of the term "flooding" in the definition of "loss of waters of the United States" refers to the flooding of wetlands. This conversion of wetlands to open waters is considered a loss of waters.)

We have modified the first sentence of this definition to make it a complete sentence. In the third sentence of this definition, we replaced the word "existing" with "jurisdictional" to clarify that the measurement applies to waters of the United States.

The definition is adopted with the modifications discussed above.

*Non-tidal wetland.* We did not propose any changes to this definition. One commenter noted that not all wetlands are waters of the United States. We agree and have removed the parenthetical expression from this definition.

*Open water.* We proposed to change this definition by adding a sentence that describes what an ordinary high water mark is. One commenter said that the definition of ordinary high water mark should be removed because there is not common agreement regarding the definition of this term. One commenter recommended using the definition of "ordinary high water mark" from 1975 regulations. One commenter suggested removing the language defining "ordinary high water mark" and making it a separate definition. One commenter said that this definition should not include ephemeral waters because they are not open waters. Another commenter stated that this definition should be removed, because it is not used in the NWPs or general conditions.

We have removed the language defining “ordinary high water mark” and provided it as a separate definition in this section. The definition is from 33 CFR 328.3(e). Ephemeral waters are considered open waters, because they have flowing or standing water, at least for short periods of time. This definition is used in NWP’s 4, 27, 30 and 47, as well as general conditions 9 and 20. The definition is adopted with the modification discussed above.

**Ordinary high water mark.** Several commenters recommended providing a stand alone definition of this term.

We have provided a definition of ordinary high water mark in this section. It is based on the definition at 33 CFR 328.3(e).

**Perennial stream.** We did not propose any changes to this definition. One commenter said that perennial flow is dependent on time, not the water source, and suggested modification of this definition to state that groundwater is usually the primary source of water, since some perennial streams are fed by snow melt rather than groundwater. Another commenter stated that this definition should recognize that some perennial streams appear to be intermittent because of surface and subsurface flows in areas of karst topography.

We acknowledge that in some parts of the country, some perennial streams are fed solely by snowmelt. For simplicity, we have not included snowmelt since a large majority of perennial streams have groundwater as the primary source of hydrology. When determining whether a particular stream segment is perennial, district engineers should consider the source of hydrology and the normal circumstance of that hydrology. They will make these determinations on a case-by-case basis. District engineers can account for karst topography and other geological features when identifying perennial streams on a case-by-case basis. It is not necessary to modify this definition to account for such geological features.

The definition is adopted as proposed.

**Practicable.** We proposed to move this definition from the current “mitigation” general condition (GC 20) to the “Definitions” section of the NWP’s. One commenter suggested that this definition should be modified to include consideration of the availability of suitable locations and constructability, for the purposes of mitigation.

While we agree that these are factors involved with selecting mitigation sites, the term “practicable” applies to more

than mitigation. The definition is adopted as proposed.

**Pre-construction notification.** We did not receive any comments on the proposed definition. The definition is adopted as proposed.

**Preservation.** We proposed to modify this definition to be consistent with the definition for “protection/maintenance (preservation)” in Regulatory Guidance Letter 02–02 and the definition in the Council on Environmental Quality’s April 2006 report entitled “Conserving America’s Wetlands 2006: Two Years of Progress Implementing the President’s Goal.” One commenter expressed concern with the usage of “aquatic resources” in the definition because it is too expansive and should be defined and limited to waters of the United States.

Compensatory mitigation projects involving preservation may include areas that are not waters of the United States, such as non-wetland riparian areas next to streams or wetlands that are not subject to Clean Water Act jurisdiction. This definition is adopted as proposed.

**Re-establishment.** We proposed to add this definition to be consistent with the wetland project type described in Regulatory Guidance Letter 02–02 and the definition in the Council on Environmental Quality’s April 2006 report entitled “Conserving America’s Wetlands 2006: Two Years of Progress Implementing the President’s Goal.” One commenter suggested the definition should indicate re-establishment is a form of restoration. We do not believe that such clarification is necessary, since it is addressed by the definition for restoration. The definition is adopted as proposed.

**Rehabilitation.** We proposed to add this definition to be consistent with the wetland project type described in Regulatory Guidance Letter 02–02 and the definition in the Council on Environmental Quality’s April 2006 report entitled “Conserving America’s Wetlands 2006: Two Years of Progress Implementing the President’s Goal.” One commenter suggested the definition should state rehabilitation is a form of restoration. We do not believe that such clarification is necessary, since it is addressed by the definition for restoration. The definition is adopted as proposed.

**Restoration.** We proposed to modify this definition to be consistent with the wetland project type described in Regulatory Guidance Letter 02–02 and the definition in the Council on Environmental Quality’s April 2006 report entitled “Conserving America’s Wetlands 2006: Two Years of Progress

Implementing the President’s Goal.” We did not receive any comments on the proposed definition. The definition is adopted as proposed.

**Riffle and pool complex.** We did not propose any changes to this definition. One commenter said that a riffle and pool complex has a reoccurring pattern of riffles and pools, and is not limited to a single riffle and pool. One commenter stated that this definition should address steep gradients that are not conducive to forming riffle and pool complexes. One commenter said that riffle and pool complexes are too common to be a special aquatic site.

The definition of this term was taken from 40 CFR 230.45. District engineers will use their judgment to identify riffle and pool complexes at project sites and to distinguish between riffle and pool complexes (which are found in areas of moderate grades) and step-pool complexes (which are found in areas with steep grades, where the stream bed material consists mostly of boulders and large rocks). The definition is adopted as proposed.

**Riparian areas.** We proposed to replace the definition of “vegetated buffers” with a definition of “riparian areas” since the latter term more accurately reflects what is normally required as mitigation for NWP activities where there are streams and other open waters on a project site. Two commenters objected to replacing the definition of “vegetated buffers” with a definition of “riparian areas” and said the terms are not interchangeable. One commenter supported the proposed change. Another commenter said that this definition does not match the definition developed by the National Research Council, and should be revised accordingly. Five commenters said that the use of riparian areas should be limited to areas adjacent to streams and other waters of the United States, other than wetlands. They said that the definition implies wetlands have riparian areas due to the use of the words “lands” and “waterbody,” which includes wetlands by definition. Three commenters requested that the Corps acknowledge that not all riparian areas are jurisdictional. One commenter said that this definition should exclude intermittent and ephemeral streams as waterbodies.

We maintain that use of the term “riparian areas” is most appropriate, because it is the current term used to categorize the areas that meet the criteria in this definition. We also acknowledge that this definition does not contain all the concepts provided in the National Research Council’s definition, but we have tried to provide

a simpler definition for use in the NWP program. We have modified this definition to clarify that lands next to wetlands are not riparian areas and to be consistent with the definition of "waterbody." We acknowledge that not all riparian areas are subject to Clean Water Act jurisdiction, but it is not necessary to state that fact in this definition. However, the use of jurisdictional and non-jurisdictional riparian areas as compensatory mitigation is a legitimate method to provide compensatory mitigation for certain NWP activities. Riparian areas may be established and maintained next to intermittent streams, but in arid regions it may not be practicable to establish and maintain those areas next to ephemeral streams because there may not be sufficient water to sustain plant communities in those areas. The definition is adopted with the modification discussed above.

**Shellfish seeding.** We have added a definition of this term. This definition was derived from the definition provided in the preamble discussion for the September 26, 2006, proposal (see 71 FR 56275).

**Single and complete project.** We did not propose any changes to this definition. One commenter suggested that the district engineer be allowed to use multiple NWPs for projects that cross separate waterways. One commenter requested the definition be expanded to include phased projects.

The definition already allows the district engineer the ability to use multiple NWPs on separate waterways. Individual phases of phased projects can be considered as single and complete projects only if they have independent utility and they satisfy the requirements of the specific NWP. We have revised the wording of this definition slightly to further clarify that single and complete projects must have independent utility and to further clarify how multiple stream crossings for linear projects are treated. (See also the discussion of new general condition 28, Single and Complete Project, above.) The definition is adopted as modified.

**Stormwater management.** No comments were received on this definition. The definition is adopted as proposed.

**Stormwater management facilities.** We did not propose any changes to this definition. One commenter said that this definition is too restrictive. The definition does list examples of facilities and some of their roles but not in an exclusive manner. The definition is adopted as proposed.

**Stream bed.** We did not propose any changes to this definition. No comments

were received on this definition. The definition is adopted as proposed.

**Stream channelization.** We proposed to simplify this definition, by generally considering man-made changes to a stream's course, condition, capacity, or location to be stream channelization activities. One commenter fully supported the definition. One commenter requested clarification that mitigation projects involving a "natural channel design" do not constitute "stream channelization." Four commenters stated that many accepted techniques of bank stabilization may not satisfy the definition. As a result, one commenter recommended removing the word "condition" in order to allow minor changes to the bank. Another suggested modifying this definition to state that additional work undertaken to improve aquatic services or to increase the net sinuosity is not stream channelization.

Compensatory mitigation projects involving stream restoration activities normally would not be considered stream channelization, since they should not substantially disrupt normal stream process. The restoration activity should restore normal stream processes, based on comparison to reference stream systems in the vicinity of the proposed work. We acknowledge that some bank stabilization activities may result in stream channelization. This definition does not prohibit minor changes to the stream bank. As long as those changes are small, and do not disrupt normal stream processes, they would not be considered as stream channelization. District engineers will consider the overall net impacts, including beneficial and adverse impacts, to the course, condition, capacity or location of the stream when determining if a project will have more than minimal impacts on normal stream processes.

One commenter suggested inserting "natural" to describe the stream to exclude ditches from being considered a stream. District engineers will determine on a case-by-case basis the type of waterbody that is a stream. This definition is adopted as proposed.

**Structure.** We proposed to add this definition to the NWPs. One commenter said that references should be made to the structures included in NWPs 3 and 5 and that the definition ignores other common structures like culverts and bridges. One commenter observed that the definition involves examples that have fill. One commenter suggested the definition be rewritten as: "man-made feature constructed in an area of regulated aquatic resources."

Adding references to NWPs 3 and 5 in this definition is unnecessary. The examples in this definition were adapted from 33 CFR 322.2(b) and are not intended to be a complete list. Bridges may constitute structures, but bridges constructed over navigable waters are authorized by the U.S. Coast Guard. Culverts may consist mostly of fill material, in accordance with the definitions at 33 CFR 323.2. Our intent is not to imply that structures must not involve fill, since the construction of structures may also involve fill activities. We agree that structures must be manmade and have added this qualifier to the definition. The definition is adopted as modified.

**Tidal wetland.** We did not propose any changes to this definition. One commenter stated that not all wetlands are waters of the United States and suggested adding that certain vegetation is associated with the wetland. One commenter stated the high tide line is not the spring high tide line.

In the context of this definition, wetlands subject to the ebb and flow of the tide are waters of the United States. We acknowledge that the high tide line may include high tides other than spring high tides. Therefore, we have modified this definition by removing the language that discusses spring high tide lines. The definition is adopted as modified.

**Vegetated shallows.** We did not propose any changes to this definition. No comments were received on this definition. The definition is adopted as proposed.

**Waterbody.** We proposed to modify this definition to clarify that a waterbody is a jurisdictional water of the United States. We also proposed to include a definition of "ordinary high water mark" in the text of this definition. Five commenters said that the definition should be changed to reflect recent judicial rulings that affect Clean Water Act jurisdiction. They also stated that this term cannot be used to exert jurisdiction over areas that are not subject to Section 404 of the Clean Water Act.

As stated in the preamble to the September 26, 2006, **Federal Register** notice, the purpose of this definition is not to identify which waterbodies are jurisdictional, but to clarify how waters of the United States are grouped into waterbodies, especially for the purposes of implementing 33 CFR 330.2(i), which addresses single and complete projects for the NWPs. We agree, and have clarified in the definition, that only jurisdictional waters can be waterbodies for purposes of the NWPs.

One commenter asked for a list of other indicators to identify a waterbody and exert jurisdiction. One commenter requested that "adjacent" be defined. One commenter inquired how the loss of waters calculation will be made when wetlands and waterbodies that are considered a single aquatic unit.

It would not be appropriate to promulgate, through the NWP issuance process, a list of indicators to be used to identify waterbodies subject to regulatory jurisdiction. The term "adjacent" is defined at 33 CFR 328.3(c). District engineers will determine, on a case-by-case basis, when waterbodies are separate for the purposes of identifying single and complete projects. We note that, except in the case of linear crossings (see definition of "single and complete project"), all losses of waters of the United States, whether separate water bodies or not, are added together to determine whether an activity is a single and complete project that meets the acreage thresholds. The definition is adopted as proposed.

#### *Administrative Requirements*

##### *Regulatory Flexibility Act*

One commenter objected to the proposed certification for Regulatory Flexibility Act compliance, and indicated that a Regulatory Impact Analysis is necessary. This commenter stated that the Corps failed to analyze the costs or other burdens that NWP impose on small entities, and compare those costs or burdens to alternatives. The commenter also said that the Corps needs to consider burdens placed on those small entities that need to get individual permits, since the proposed NWPs determine who qualifies for NWPs, as well as those who must get individual permits. One commenter said that an initial regulatory flexibility analysis must be provided for public comment, and stated that the Corps must withdraw the proposed NWPs and make an initial regulatory flexibility analysis available for public review and comment.

Our Regulatory Flexibility Act certification was done in the context of the statutory requirements underlying the NWP program: the permit requirements under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. The NWPs (or any other general permits) can only authorize activities with minimal individual and cumulative adverse effects on the environment; other activities must obtain individual permits. Because the permitted impacts are minimal, the burden on permittees

for obtaining coverage under the NWP is also low. Generally, permittees are required to submit a pre-construction notification and adopt common sense, low-cost practices to ensure that adverse effects are minimal. Larger projects are also required to provide compensatory mitigation, but the scope of mitigation is commensurate with the impacts of the project and usually does not constitute a "significant economic impact." Further, such larger projects are less likely to be undertaken by small businesses. We continue to believe that our certification that the NWPs will not have a significant economic impact on a substantial number of small entities is appropriate. As a result, a formal Regulatory Flexibility Analysis is not required.

##### *Unfunded Mandates*

One commenter said that the Corps must provide a quantified assessment of costs and benefits of the permits (rule), in accordance with the Unfunded Mandates Reform Act. The costs of these permits (mostly paperwork costs associated with filing pre-construction notifications, estimated at 10 hours per pre-construction notification) do not rise to the level of an unfunded mandate, as defined in the statute. As a result, it is not necessary under UMRA to quantify the costs and benefits of this action.

##### *Paperwork Reduction Act*

A commenter stated that the estimate of time required to prepare a complete pre-construction notification is too low, because of the requirement to submit a delineation of waters of the United States with the pre-construction notification.

We believe the time estimates are accurate, because many activities will not require a complex delineation of waters of the United States. Most pre-construction notifications will have simple delineations showing the locations of waters near the project. The estimated time is an average for all projects.

##### *Regional Conditioning of the Nationwide Permits*

Concurrent with this **Federal Register** notice, district engineers are issuing local public notices. In addition to the changes to some NWPs and NWP conditions required by the Chief of Engineers, division and district engineers may propose regional conditions or propose revocation of NWP authorization for all, some, or portions of the NWPs. Regional conditions may also be required by state or Tribal water quality certification or

for state Coastal Zone Management Act consistency. District engineers will announce regional conditions or revocations by issuing local public notices. Information on regional conditions and revocation can be obtained from the appropriate district engineer, as indicated below. Furthermore, this and additional information can be obtained on the Internet at <http://www.usace.army.mil/where.html#State> by clicking on the appropriate district office.

#### **Contact Information for Corps District Engineers**

##### *Alabama*

Mobile District Engineer, ATTN:  
CESAM-RD, 109 St. Joseph Street,  
Mobile, AL 36602-3630.

##### *Alaska*

Alaska District Engineer, ATTN:  
CEPOA-CO-R, P.O. Box 6898,  
Elmendorf AFB, AK 99506-6898.

##### *Arizona*

Los Angeles District Engineer, ATTN:  
CESPL-CO-R, P.O. Box 532711, Los  
Angeles, CA 90053-2325.

##### *Arkansas*

Little Rock District Engineer, ATTN:  
CESWL-RO, P.O. Box 867, Little  
Rock, AR 72203-0867.

##### *California*

Sacramento District Engineer, ATTN:  
CESPK-CO-R, 1325 J Street,  
Sacramento, CA 95814-2922.

##### *Colorado*

Albuquerque District Engineer, ATTN:  
CESPA-OD-R, 4101 Jefferson Plaza  
NE, Albuquerque, NM 87109-3435.

##### *Connecticut*

New England District Engineer, ATTN:  
CENAE-R, 696 Virginia Road,  
Concord, MA 01742-2751.

##### *Delaware*

Philadelphia District Engineer, ATTN:  
CENAP-OP-R, Wannamaker  
Building, 100 Penn Square East  
Philadelphia, PA 19107-3390.

##### *Florida*

Jacksonville District Engineer, ATTN:  
CESAJ-RD, P.O. Box 4970,  
Jacksonville, FL 32232-0019.

##### *Georgia*

Savannah District Engineer, ATTN:  
CESAS-OP-F, P.O. Box 889,  
Savannah, GA 31402-0889.



*Hawaii*

Honolulu District Engineer, ATTN:  
CEPOH-EC-R, Building 230, Fort  
Shafter, Honolulu, HI 96858-5440.

*Idaho*

Walla Walla District Engineer, ATTN:  
CENWW-RD, 201 North Third  
Avenue, Walla Walla, WA 99362-  
1876.

*Illinois*

Rock Island District Engineer, ATTN:  
CEMVR-OD-P, P.O. Box 2004, Rock  
Island, IL 61204-2004.

*Indiana*

Louisville District Engineer, ATTN:  
CELRL-OP-F, P.O. Box 59, Louisville,  
KY 40201-0059.

*Iowa*

Rock Island District Engineer, ATTN:  
CEMVR-OD-P, P.O. Box 2004, Rock  
Island, IL 61204-2004.

*Kansas*

Kansas City District Engineer, ATTN:  
CENWK-OD-R, 700 Federal Building,  
601 E. 12th Street, Kansas City, MO  
64106-2896.

*Kentucky*

Louisville District Engineer, ATTN:  
CELRL-OP-F, P.O. Box 59, Louisville,  
KY 40201-0059.

*Louisiana*

New Orleans District Engineer, ATTN:  
CEMVN-OD-S, P.O. Box 60267, New  
Orleans, LA 70160-0267.

*Maine*

New England District Engineer, ATTN:  
CENAE-R, 696 Virginia Road,  
Concord, MA 01742-2751.

*Maryland*

Baltimore District Engineer, ATTN:  
CENAB-OP-R, P.O. Box 1715,  
Baltimore, MD 21203-1715.

*Massachusetts*

New England District Engineer, ATTN:  
CENAE-R, 696 Virginia Road,  
Concord, MA 01742-2751.

*Michigan*

Detroit District Engineer, ATTN:  
CELRE-RG, P.O. Box 1027, Detroit,  
MI 48231-1027.

*Minnesota*

St. Paul District Engineer, ATTN:  
CEMVP-OP-R, 190 Fifth Street East,  
St. Paul, MN 55101-1638.

*Mississippi*

Vicksburg District Engineer, ATTN:  
CEMVK-OD-F, 4155 Clay Street,  
Vicksburg, MS 39183-3435.

*Missouri*

Kansas City District Engineer, ATTN:  
CENWK-OD-R, 700 Federal Building,  
601 E. 12th Street, Kansas City, MO  
64106-2896.

*Montana*

Omaha District Engineer, ATTN:  
CENWO-OD-R, 106 South 15th  
Street, Omaha, NE 68102-1618.

*Nebraska*

Omaha District Engineer, ATTN:  
CENWO-OD-R, 106 South 15th  
Street, Omaha, NE 68102-1618.

*Nevada*

Sacramento District Engineer, ATTN:  
CESPK-CO-R, 1325 J Street,  
Sacramento, CA 95814-2922.

*New Hampshire*

New England District Engineer, ATTN:  
CENAE-R, 696 Virginia Road,  
Concord, MA 01742-2751.

*New Jersey*

Philadelphia District Engineer, ATTN:  
CENAP-OP-R, Wannamaker  
Building, 100 Penn Square East,  
Philadelphia, PA 19107-3390.

*New Mexico*

Albuquerque District Engineer, ATTN:  
CESPA-OD-R, 4101 Jefferson Plaza  
NE, Albuquerque, NM 87109-3435.

*New York*

New York District Engineer, ATTN:  
CENAN-OP-R, 26 Federal Plaza, New  
York, NY 10278-0090.

*North Carolina*

Wilmington District Engineer, ATTN:  
CESAW-RG, P.O. Box 1890,  
Wilmington, NC 28402-1890.

*North Dakota*

Omaha District Engineer, ATTN:  
CENWO-OD-R, 106 South 15th  
Street, Omaha, NE 68102-1618.

*Ohio*

Huntington District Engineer, ATTN:  
CELRH-OR-F, 502 8th Street,  
Huntington, WV 25701-2070.

*Oklahoma*

Tulsa District Engineer, ATTN: CESWT-  
RO, 1645 S. 101st East Ave, Tulsa, OK  
74128-4609.

*Oregon*

Portland District Engineer, ATTN:  
CENWP-OD-G, P.O. Box 2946,  
Portland, OR 97208-2946.

*Pennsylvania*

Baltimore District Engineer, ATTN:  
CENAB-OP-R, P.O. Box 1715,  
Baltimore, MD 21203-1715.

*Rhode Island*

New England District Engineer, ATTN:  
CENAE-R, 696 Virginia Road,  
Concord, MA 01742-2751.

*South Carolina*

Charleston District Engineer, ATTN:  
CESAC-CO-P, 69A Hagood Ave,  
Charleston, SC 29403-5107.

*South Dakota*

Omaha District Engineer, ATTN:  
CENWO-OD-R, 106 South 15th  
Street, Omaha, NE 68102-1618.

*Tennessee*

Nashville District Engineer, ATTN:  
CELRN-OP-F, 3701 Bell Road,  
Nashville, TN 37214.

*Texas*

Galveston District Engineer, ATTN:  
CESWG-PE-R, P.O. Box 1229,  
Galveston, TX 77553-1229.

*Utah*

Sacramento District Engineer, ATTN:  
CESPK-CO-R, 1325 J Street, CA  
95814-2922.

*Vermont*

New England District Engineer, ATTN:  
CENAE-R, 696 Virginia Road,  
Concord, MA 01742-2751.

*Virginia*

Norfolk District Engineer, ATTN:  
CENAO-OP-R, 803 Front Street,  
Norfolk, VA 23510-1096.

*Washington*

Seattle District Engineer, ATTN:  
CENWS-OP-RG, P.O. Box 3755,  
Seattle, WA 98124-3755.

*West Virginia*

Huntington District Engineer, ATTN:  
CELRH-OR-F, 502 8th Street,  
Huntington, WV 25701-2070.

*Wisconsin*

St. Paul District Engineer, ATTN:  
CEMVP-OP-R, 190 Fifth Street East,  
St. Paul, MN 55101-1638.

*Wyoming*

Omaha District Engineer, ATTN:  
CENWO-OD-R, 106 South 15th  
Street, Omaha, NE 68102-1618.

*District of Columbia*

Baltimore District Engineer, ATTN:  
CENAB-OP-R, P.O. Box 1715,  
Baltimore, MD 21203-1715.

*Pacific Territories (American Samoa, Guam, & Commonwealth of the Northern Mariana Islands)*

Honolulu District Engineer, ATTN:  
CEPOH-EC-R, Building 230, Fort  
Shafter, Honolulu, HI 96858-5440.

*Puerto Rico and Virgin Islands*

Jacksonville District Engineer, ATTN:  
CESAJ-RD, P.O. Box 4970,  
Jacksonville, FL 32232-0019.

**Administrative Requirements***Plain Language*

In compliance with the principles in the President's Memorandum of June 1, 1998, (63 FR 31855) regarding plain language, this preamble is written using plain language. The use of "we" in this notice refers to the Corps. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

*Paperwork Reduction Act*

These NWP's will increase the number of permittees who are required to submit a pre-construction notification. The content of the pre-construction notification is not changed from the current NWP's, but the paperwork burden will increase because of the increased number of pre-construction notifications submitted. The Corps estimates the increased paperwork burden at 4,500 hours per year. This is based on an average burden to complete and submit a pre-construction notification of 10 hours, and an estimated 450 additional projects that will require pre-construction notifications. Prospective permittees who are required to submit a pre-construction notification for a particular NWP, or who are requesting verification that a particular activity qualifies for NWP authorization, may use the current standard Department of the Army permit application form or submit the required information in a letter. The total burden for filing pre-construction notifications is estimated at 300,000 hours per year (10 hours times 30,000 projects per year requiring pre-construction notification). In addition, we are adding a requirement for existing aquaculture activities using NWP 48 that do not require a pre-construction notification to instead file a short report indicating basic information about the existing shellfish production operation. The estimated burden for this new requirement is 1,800 hours per year (900

existing aquaculture facilities times 2 hours per report). The information in the report is a subset of the information required for a full pre-construction notification.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. For the Corps Regulatory Program under Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, the current OMB approval number for information collection requirements is maintained by the Corps of Engineers (OMB approval number 0710-0003, which expires on April 30, 2008).

*Executive Order 12866*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), we must determine whether the regulatory action is "significant" and therefore subject to review by OMB and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, we have determined that this action is a "significant regulatory action" and it was submitted to OMB for review.

*Executive Order 13132*

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires the Corps to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." The issuance of NWP's does not have federalism implications. We do not believe that the NWP's will have substantial direct effects on the

States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. The NWP's will not impose any additional substantive obligations on State or local governments. Therefore, Executive Order 13132 does not apply to these final NWP's.

*Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 et seq.*

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of the proposed issuance and modification of NWP's on small entities, a small entity is defined as: (1) A small business based on Small Business Administration size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

The statutes under which the Corps issues, reissues, or modifies NWP's are Section 404(e) of the Clean Water Act (33 U.S.C. 1344(e)) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403). Under section 404, Department of the Army (DA) permits are required for discharges of dredged or fill material into waters of the United States. Under section 10, DA permits are required for any structures or other work that affect the course, location, or condition of navigable waters of the United States. Small entities proposing to discharge dredged or fill material into waters of the United States and/or conduct work in navigable waters of the United States must obtain DA permits to conduct those activities, unless a particular activity is exempt from those permit requirements. Individual permits and general permits can be issued by the Corps to satisfy the permit requirements of these two statutes. Nationwide permits are a form of general permit issued by the Chief of Engineers.

Nationwide permits automatically expire and become null and void if they are not modified or reissued within five years of their effective date (see 33 CFR 330.6(b)). Furthermore, Section 404(e) of the Clean Water Act states that general permits, including NWP, can be issued for no more than 5 years. If the current NWP are not reissued small entities and other project proponents would be required to obtain alternative forms of DA permits (i.e., standard permits, letters of permission, or regional general permits) for activities involving discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States. Regional general permits that authorize similar activities as the NWP may be available in some geographic areas, so small entities conducting regulated activities outside those geographic areas would have to obtain individual permits for activities that require DA permits.

Nationwide permits help relieve regulatory burdens on small entities who need to obtain DA permits. They provide an expedited form of authorization, provided the project proponent meets all terms and conditions of the NWP. In FY 2003, the Corps issued 35,317 NWP verifications, with an average processing time of 27 days. Those numbers do not include activities that are authorized by NWP, where the project proponent was not required to submit a pre-construction notification or did not voluntarily seek verification that an activity qualified for NWP authorization. The average processing times for the 4,035 standard permits and the 3,040 letters of permission issued during FY 2003 were 187 days and 89 days, respectively. The NWP issued today are expected to result in a slight increase in the numbers of activities potentially qualifying for NWP authorization. The estimated numbers of activities qualifying for NWP authorization are provided in the decision documents that were prepared for each NWP. The NWP issued today are not expected to significantly increase cost or paperwork burden for authorized activities (relative to the NWP issued in 2002), including those conducted by small businesses.

The costs for obtaining coverage under an NWP are low. We estimate the average time to prepare and file a pre-construction notification, for those activities where a pre-construction notification is required, is 10 hours. We do not believe this constitutes a "significant economic impact" on project proponents, including small businesses.

Another requirement of Section 404(e) of the Clean Water Act is that general permits, including NWP, authorize only those activities that result in minimal adverse environmental effects, individually and cumulatively. The terms and conditions of the NWP, such as acreage or linear foot limits, are imposed to ensure that the NWP authorize only those activities that result in minimal adverse effects on the aquatic environment and other public interest review factors. In addition to the paperwork burden of filing a pre-construction notification, many NWP require that low-cost, common sense practices be used to minimize adverse effects. These requirements also do not constitute "significant economic impacts."

After considering the economic impacts of these NWP on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. Small entities may obtain required DA authorizations through the NWP, in cases where there are applicable NWP authorizing those activities and the proposed work will result in minimal adverse effects on the aquatic environment and other public interest review factors. The terms and conditions of these NWP will not impose substantially higher costs on small entities than those of the previous NWP. If an NWP is not available to authorize a particular activity, then another form of DA authorization, such as an individual permit or regional general permit, must be secured. However, as noted above, we expect a slight increase in the number of activities than can be authorized through NWP, because we have issued several new NWP, and we are removing some limitations in existing NWP and replacing them with pre-construction notification requirements that will allow the district engineer to judge whether any adverse effects of the proposed project are more than minimal, and authorize the project under an NWP if they are not.

#### *Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under Section 202 of the UMRA, the agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate,

or to the private sector, of \$100 million or more in any one year. Before promulgating a rule for which a written statement is needed, Section 205 of the UMRA generally requires the agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows an agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted. Before an agency establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed, under Section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that the NWP issued today do not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. The NWP are generally consistent with current agency practice, do not impose new substantive requirements and therefore do not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. Therefore, the NWP issued today are not subject to the requirements of Sections 202 and 205 of the UMRA. For the same reasons, we have determined that the NWP contains no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the proposed issuance and modification of NWP is not subject to the requirements of Section 203 of UMRA.

#### *Executive Order 13045*

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be "economically

significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the proposed rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

The NWP's issued today are not subject to this Executive Order because they are not economically significant as defined in Executive Order 12866. In addition, these NWP's do not concern an environmental or safety risk that we have reason to believe may have a disproportionate effect on children.

#### *Executive Order 13175*

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 6, 2000), requires agencies to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” The phrase “policies that have tribal implications” is defined in the Executive Order to include regulations that have “substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.”

The NWP's issued today do not have tribal implications. They are generally consistent with current agency practice and will not have substantial direct effects on tribal governments, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Therefore, Executive Order 13175 does not apply to this proposal. Corps districts are conducting government-to-government consultation with Indian tribes to develop regional conditions that help protect tribal rights and trust resources, and to facilitate compliance with general condition 16, Tribal Rights.

#### *Environmental Documentation*

A decision document, which includes an environmental assessment and Finding of No Significant Impact (FONSI), has been prepared for each NWP. These decision documents are available at: <http://www.regulations.gov> (docket ID number COE-2006-0005). They are also available by contacting

Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street, NW., Washington, DC 20314-1000.

#### *Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. We will submit a report containing the final NWP's and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The proposed NWP's are not a “major rule” as defined by 5 U.S.C. 804(2).

#### *Executive Order 12898*

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each Federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

The NWP's issued today are not expected to negatively impact any community, and therefore are not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.

#### *Executive Order 13211*

The proposed NWP's are not a “significant energy action” as defined in Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

#### *Authority*

We are issuing new NWP's, modifying existing NWP's, and reissuing NWP's without change under the authority of Section 404(e) of the Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 et seq.).

Dated: March 1, 2007.

**Don T. Riley,**

*Major General, U.S. Army, Director of Civil Works.*

#### **Nationwide Permits, Conditions, Further Information, and Definitions**

##### *A. Index of Nationwide Permits, Conditions, Further Information, and Definitions*

##### *Nationwide Permits*

1. Aids to Navigation.
2. Structures in Artificial Canals.
3. Maintenance.
4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.
5. Scientific Measurement Devices.
6. Survey Activities.
7. Outfall Structures and Associated Intake Structures.
8. Oil and Gas Structures on the Outer Continental Shelf.
9. Structures in Fleeting and Anchorage Areas.
10. Mooring Buoys.
11. Temporary Recreational Structures.
12. Utility Line Activities.
13. Bank Stabilization.
14. Linear Transportation Projects.
15. U.S. Coast Guard Approved Bridges.
16. Return Water From Upland Contained Disposal Areas.
17. Hydropower Projects.
18. Minor Discharges.
19. Minor Dredging.
20. Oil Spill Cleanup.
21. Surface Coal Mining Operations.
22. Removal of Vessels.
23. Approved Categorical Exclusions.
24. Indian Tribe or State Administered Section 404 Programs.
25. Structural Discharges.
26. [Reserved].
27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities.
28. Modifications of Existing Marinas.
29. Residential Developments.
30. Moist Soil Management for Wildlife.
31. Maintenance of Existing Flood Control Facilities.
32. Completed Enforcement Actions.
33. Temporary Construction, Access, and Dewatering.
34. Cranberry Production Activities.
35. Maintenance Dredging of Existing Basins.
36. Boat Ramps.
37. Emergency Watershed Protection and Rehabilitation.
38. Cleanup of Hazardous and Toxic Waste.
39. Commercial and Institutional Developments.
40. Agricultural Activities.

41. Reshaping Existing Drainage Ditches.
42. Recreational Facilities.
43. Stormwater Management Facilities.
44. Mining Activities.
45. Repair of Uplands Damaged by Discrete Events.
46. Discharges in Ditches.
47. Pipeline Safety Program Designated Time Sensitive Inspections and Repairs.
48. Existing Commercial Shellfish Aquaculture Activities.
49. Coal Remining Activities.
50. Underground Coal Mining Activities.

#### Nationwide Permit General Conditions

1. Navigation.
2. Aquatic Life Movements.
3. Spawning Areas.
4. Migratory Bird Breeding Areas.
5. Shellfish Beds.
6. Suitable Material.
7. Water Supply Intakes.
8. Adverse Effects from Impoundments.
9. Management of Water Flows.
10. Fills Within 100-Year Floodplains.
11. Equipment.
12. Soil Erosion and Sediment Controls.
13. Removal of Temporary Fills.
14. Proper Maintenance.
15. Wild and Scenic Rivers.
16. Tribal Rights.
17. Endangered Species.
18. Historic Properties.
19. Designated Critical Resource Waters.
20. Mitigation.
21. Water Quality.
22. Coastal Zone Management.
23. Regional and Case-by-Case Conditions.
24. Use of Multiple Nationwide Permits.
25. Transfer of Nationwide Permit Verifications.
26. Compliance Certification.
27. Pre-Construction Notification.
28. Single and Complete Project.

#### Further Information

- Definitions.
- Best management practices (BMPs).
- Compensatory mitigation.
- Currently serviceable.
- Discharge.
- Enhancement.
- Ephemeral stream.
- Establishment (creation).
- Historic property.
- Independent utility.
- Intermittent stream.
- Loss of waters of the United States.
- Non-tidal wetland.
- Open water.
- Ordinary high water mark.
- Perennial stream.
- Practicable.
- Pre-construction notification.
- Preservation.
- Re-establishment.
- Rehabilitation.
- Restoration.
- Riffle and pool complex.
- Riparian areas.
- Shellfish seeding.
- Single and complete project.
- Stormwater management.
- Stormwater management facilities.
- Stream bed.
- Stream channelization.
- Structure.

- Tidal wetland.
- Vegetated shallows.
- Waterbody.

#### B. Nationwide Permits

1. *Aids to Navigation.* The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard (see 33 CFR, chapter I, subchapter C, part 66). (Section 10)

2. *Structures in Artificial Canals.* Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)). (Section 10)

3. *Maintenance.* (a) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized. This NWP authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the district engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(b) This NWP also authorizes the removal of accumulated sediments and debris in the vicinity of and within existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.) and the placement of new or additional riprap to protect the structure. The removal of sediment is limited to the minimum necessary to restore the waterway in the immediate vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend further than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance

dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an upland area unless otherwise specifically approved by the district engineer under separate authorization. The placement of riprap must be the minimum necessary to protect the structure or to ensure the safety of the structure. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the district engineer.

(c) This NWP also authorizes temporary structures, fills, and work necessary to conduct the maintenance activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

(d) This NWP does not authorize maintenance dredging for the primary purpose of navigation or beach restoration. This NWP does not authorize new stream channelization or stream relocation projects.

*Notification:* For activities authorized by paragraph (b) of this NWP, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). Where maintenance dredging is proposed, the pre-construction notification must include information regarding the original design capacities and configurations of the outfalls, intakes, small impoundments, and canals. (Sections 10 and 404)

**Note:** This NWP authorizes the repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Clean Water Act Section 404(f) exemption for maintenance.

4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.* Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, and

clam and oyster digging, and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This NWP does not authorize artificial reefs or impoundments and semi-impoundments of waters of the United States for the culture or holding of motile species such as lobster, or the use of covered oyster trays or clam racks. (Sections 10 and 404)

5. *Scientific Measurement Devices.* Devices, whose purpose is to measure and record scientific data, such as staff gages, tide gages, water recording devices, water quality testing and improvement devices, and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards. (Sections 10 and 404)

6. *Survey Activities.* Survey activities, such as core sampling, seismic exploratory operations, plugging of seismic shot holes and other exploratory-type bore holes, exploratory trenching, soil surveys, sampling, and historic resources surveys. For the purposes of this NWP, the term "exploratory trenching" means mechanical land clearing of the upper soil profile to expose bedrock or substrate, for the purpose of mapping or sampling the exposed material. The area in which the exploratory trench is dug must be restored to its pre-construction elevation upon completion of the work. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. This NWP authorizes the construction of temporary pads, provided the discharge does not exceed 25 cubic yards. Discharges and structures associated with the recovery of historic resources are not authorized by this NWP. Drilling and the discharge of excavated material from test wells for oil and gas exploration are not authorized by this NWP; the plugging of such wells is authorized. Fill placed for roads and other similar activities is not authorized by this NWP. The NWP does not authorize any permanent structures. The discharge of drilling mud and cuttings may require a permit under Section 402 of the Clean Water Act. (Sections 10 and 404)

7. *Outfall Structures and Associated Intake Structures.* Activities related to the construction or modification of outfall structures and associated intake structures, where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted by, or that are otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System

Program (Section 402 of the Clean Water Act). The construction of intake structures is not authorized by this NWP, unless they are directly associated with an authorized outfall structure.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

8. *Oil and Gas Structures on the Outer Continental Shelf.* Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of the Interior, Minerals Management Service. Such structures shall not be placed within the limits of any designated shipping safety fairway or traffic separation scheme, except temporary anchors that comply with the fairway regulations in 33 CFR 322.5(l). The district engineer will review such proposals to ensure compliance with the provisions of the fairway regulations in 33 CFR 322.5(l). Any Corps review under this NWP will be limited to the effects on navigation and national security in accordance with 33 CFR 322.5(f). Such structures will not be placed in established danger zones or restricted areas as designated in 33 CFR part 334, nor will such structures be permitted in EPA or Corps designated dredged material disposal areas.

*Notification:* The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Section 10)

9. *Structures in Fleeting and Anchorage Areas.* Structures, buoys, floats and other devices placed within anchorage or fleeting areas to facilitate moorage of vessels where the U.S. Coast Guard has established such areas for that purpose. (Section 10)

10. *Mooring Buoys.* Non-commercial, single-boat, mooring buoys. (Section 10)

11. *Temporary Recreational Structures.* Temporary buoys, markers, small floating docks, and similar structures placed for recreational use during specific events such as water skiing competitions and boat races or seasonal use, provided that such structures are removed within 30 days after use has been discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually. (Section 10)

12. *Utility Line Activities.* Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss

of greater than 1/2 acre of waters of the United States.

*Utility lines:* This NWP authorizes the construction, maintenance, or repair of utility lines, including outfall and intake structures, and the associated excavation, backfill, or bedding for the utility lines, in all waters of the United States, provided there is no change in pre-construction contours. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication. The term "utility line" does not include activities that drain a water of the United States, such as drainage tile or french drains, but it does apply to pipes conveying drainage from another area.

Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

*Utility line substations:* This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with a power line or utility line in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than 1/2 acre of waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

*Foundations for overhead utility line towers, poles, and anchors:* This NWP authorizes the construction or maintenance of foundations for overhead utility line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than

a larger single pad) are used where feasible.

**Access roads:** This NWP authorizes the construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, provided the total discharge from a single and complete project does not cause the loss of greater than  $\frac{1}{2}$ -acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (e.g., at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize utility lines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (See 33 CFR part 322). Overhead utility lines constructed over section 10 waters and utility lines that are routed in or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

This NWP also authorizes temporary structures, fills, and work necessary to conduct the utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if any of the following criteria are met: (1) The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a

jurisdictional area (i.e., water of the United States), and it runs parallel to a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than  $\frac{1}{10}$ -acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials. (See general condition 27.) (Sections 10 and 404)

**Note 1:** Where the proposed utility line is constructed or installed in navigable waters of the United States (i.e., section 10 waters), copies of the pre-construction notification and NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the utility line to protect navigation.

**Note 2:** Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work, accordance with the requirements for temporary fills.

**Note 3:** Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to Section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit (see NWP 15).

**13. Bank Stabilization.** Bank stabilization activities necessary for erosion prevention, provided the activity meets all of the following criteria:

(a) No material is placed in excess of the minimum needed for erosion protection;

(b) The activity is no more than 500 feet in length along the bank, unless this criterion is waived in writing by the district engineer;

(c) The activity will not exceed an average of one cubic yard per running foot placed along the bank below the plane of the ordinary high water mark or the high tide line, unless this criterion is waived in writing by the district engineer;

(d) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless this criterion is waived in writing by the district engineer;

(e) No material is of the type, or is placed in any location, or in any manner, to impair surface water flow

into or out of any water of the United States;

(f) No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored trees and treetops may be used in low energy areas); and, (g) The activity is not a stream channelization activity.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the bank stabilization activity: (1) Involves discharges into special aquatic sites; (2) is in excess of 500 feet in length; or (3) will involve the discharge of greater than an average of one cubic yard per running foot along the bank below the plane of the ordinary high water mark or the high tide line. (See general condition 27.) (Sections 10 and 404)

**14. Linear Transportation Projects.** Activities required for the construction, expansion, modification, or improvement of linear transportation projects (e.g., roads, highways, railways, trails, airport runways, and taxiways) in waters of the United States. For linear transportation projects in non-tidal waters, the discharge cannot cause the loss of greater than  $\frac{1}{2}$ -acre of waters of the United States. For linear transportation projects in tidal waters, the discharge cannot cause the loss of greater than  $\frac{1}{3}$ -acre of waters of the United States. Any stream channel modification, including bank stabilization, is limited to the minimum necessary to construct or protect the linear transportation project; such modifications must be in the immediate vicinity of the project.

This NWP also authorizes temporary structures, fills, and work necessary to construct the linear transportation project. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

This NWP cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars.



**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The loss of waters of the United States exceeds  $\frac{1}{10}$  acre; or (2) there is a discharge in a special aquatic site, including wetlands. (See general condition 27.) (Sections 10 and 404)

**Note:** Some discharges for the construction of farm roads or forest roads, or temporary roads for moving mining equipment, may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4).

**15. U.S. Coast Guard Approved Bridges.** Discharges of dredged or fill material incidental to the construction of bridges across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills, provided such discharges have been authorized by the U.S. Coast Guard as part of the bridge permit. Causeways and approach fills are not included in this NWP and will require a separate section 404 permit. (Section 404)

**16. Return Water From Upland Contained Disposal Areas.** Return water from an upland contained dredged material disposal area. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d), even though the disposal itself occurs on the upland and does not require a section 404 permit. This NWP satisfies the technical requirement for a section 404 permit for the return water where the quality of the return water is controlled by the state through the section 401 certification procedures. The dredging activity may require a section 404 permit (33 CFR 323.2(d)), and will require a section 10 permit if located in navigable waters of the United States. (Section 404)

**17. Hydropower Projects.** Discharges of dredged or fill material associated with hydropower projects having: (a) Less than 5000 kW of total generating capacity at existing reservoirs, where the project, including the fill, is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; or (b) a licensing exemption granted by the FERC pursuant to Section 408 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and Section 30 of the Federal Power Act, as amended.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Section 404)

**18. Minor Discharges.** Minor discharges of dredged or fill material

into all waters of the United States, provided the activity meets all of the following criteria:

(a) The quantity of discharged material and the volume of area excavated do not exceed 25 cubic yards below the plane of the ordinary high water mark or the high tide line;

(b) The discharge will not cause the loss of more than  $\frac{1}{10}$  acre of waters of the United States; and

(c) The discharge is not placed for the purpose of a stream diversion.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge or the volume of area excavated exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line, or (2) the discharge is in a special aquatic site, including wetlands. (See general condition 27.) (Sections 10 and 404)

**19. Minor Dredging.** Dredging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States (i.e., section 10 waters). This NWP does not authorize the dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist but may not be present in a given year), anadromous fish spawning areas, or wetlands, or the connection of canals or other artificial waterways to navigable waters of the United States (see 33 CFR 322.5(g)). (Sections 10 and 404)

**20. Oil Spill Cleanup.** Activities required for the containment and cleanup of oil and hazardous substances that are subject to the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR part 300) provided that the work is done in accordance with the Spill Control and Countermeasure Plan required by 40 CFR 112.3 and any existing state contingency plan and provided that the Regional Response Team (if one exists in the area) concurs with the proposed containment and cleanup action. This NWP also authorizes activities required for the cleanup of oil releases in waters of the United States from electrical equipment that are governed by EPA's polychlorinated biphenyl spill response regulations at 40 CFR part 761. (Sections 10 and 404)

**21. Surface Coal Mining Operations.** Discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations provided the activities are already authorized, or are

currently being processed as part of an integrated permit processing procedure, by the Department of Interior (DOI), Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977.

**Notification:** The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

**22. Removal of Vessels.** Temporary structures or minor discharges of dredged or fill material required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This NWP does not authorize maintenance dredging, shoal removal, or riverbank snagging.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The vessel is listed or eligible for listing in the National Register of Historic Places; or (2) the activity is conducted in a special aquatic site, including coral reefs and wetlands. (See general condition 27.) If condition 1 above is triggered, the permittee cannot commence the activity until informed by the district engineer that compliance with the "Historic Properties" general condition is completed. (Sections 10 and 404)

**Note 1:** If a removed vessel is disposed of in waters of the United States, a permit from the U.S. EPA may be required (see 40 CFR 229.3). If a Department of the Army permit is required for vessel disposal in waters of the United States, separate authorization will be required.

**Note 2:** Compliance with general condition 17, Endangered Species, and general condition 18, Historic Properties, is required for all NWPs. The concern with historic properties is emphasized in the notification requirements for this NWP because of the likelihood that submerged vessels may be historic properties.

**23. Approved Categorical Exclusions.** Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where:

(a) That agency or department has determined, pursuant to the Council on Environmental Quality's implementing regulations for the National Environmental Policy Act (40 CFR part 1500 et seq.), that the activity is categorically excluded from environmental documentation, because it is included within a category of actions which neither individually nor

cumulatively have a significant effect on the human environment; and

(b) The Office of the Chief of Engineers (Attn: CECW-CO) has concurred with that agency's or department's determination that the activity is categorically excluded and approved the activity for authorization under NWP 23.

The Office of the Chief of Engineers may require additional conditions, including pre-construction notification, for authorization of an agency's categorical exclusions under this NWP.

**Notification:** Certain categorical exclusions approved for authorization under this NWP require the permittee to submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). The activities that require pre-construction notification are listed in the appropriate Regulatory Guidance Letters. (Sections 10 and 404)

**Note:** The agency or department may submit an application for an activity believed to be categorically excluded to the Office of the Chief of Engineers (Attn: CECW-CO). Prior to approval for authorization under this NWP of any agency's activity, the Office of the Chief of Engineers will solicit public comment. As of the date of issuance of this NWP, agencies with approved categorical exclusions are the: Bureau of Reclamation, Federal Highway Administration, and U.S. Coast Guard. Activities approved for authorization under this NWP as of the date of this notice are found in Corps Regulatory Guidance Letter 05-07, which is available at: <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/rglsindx.htm>. Any future approved categorical exclusions will be announced in Regulatory Guidance Letters and posted on this same Web site.

**24. Indian Tribe or State Administered Section 404 Programs.** Any activity permitted by a state or Indian Tribe administering its own section 404 permit program pursuant to 33 U.S.C. 1344(g)-(l) is permitted pursuant to Section 10 of the Rivers and Harbors Act of 1899. (Section 10)

**Note 1:** As of the date of the promulgation of this NWP, only New Jersey and Michigan administer their own section 404 permit programs.

**Note 2:** Those activities that do not involve an Indian Tribe or State section 404 permit are not included in this NWP, but certain structures will be exempted by Section 154 of Pub. L. 94-587, 90 Stat. 2917 (33 U.S.C. 591) (see 33 CFR 322.3(a)(2)).

**25. Structural Discharges.** Discharges of material such as concrete, sand, rock, etc., into tightly sealed forms or cells where the material will be used as a structural member for standard pile supported structures, such as bridges, transmission line footings, and

walkways, or for general navigation, such as mooring cells, including the excavation of bottom material from within the form prior to the discharge of concrete, sand, rock, etc. This NWP does not authorize filled structural members that would support buildings, building pads, homes, house pads, parking areas, storage areas and other such structures. The structure itself may require a section 10 permit if located in navigable waters of the United States. (Section 404)

26. [Reserved]

**27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities.** Activities in waters of the United States associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas and the restoration and enhancement of non-tidal streams and other non-tidal open waters, provided those activities result in net increases in aquatic resource functions and services.

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to: the removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms; the installation of current deflectors; the enhancement, restoration, or establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or establish stream meanders; the backfilling of artificial channels and drainage ditches; the removal of existing drainage structures; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.

This NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands and streams, on the project site provided there are net increases in aquatic resource functions and services.

Except for the relocation of non-tidal waters on the project site, this NWP does not authorize the conversion of a stream or natural wetlands to another aquatic habitat type (e.g., stream to wetland or vice versa) or uplands. This NWP does not authorize stream channelization. This NWP does not

authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

**Reversion.** For enhancement, restoration, and establishment activities conducted: (1) In accordance with the terms and conditions of a binding wetland enhancement, restoration, or establishment agreement between the landowner and the U.S. Fish and Wildlife Service (FWS), the Natural Resources Conservation Service (NRCS), the Farm Service Agency (FSA), the National Marine Fisheries Service (NMFS), the National Ocean Service (NOS), or their designated state cooperating agencies; (2) as voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or (3) on reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the OSM or the applicable state agency, this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (i.e., prior to the restoration, enhancement, or establishment activities). The reversion must occur within five years after expiration of a limited term wetland restoration or establishment agreement or permit, and is authorized in these circumstances even if the discharge occurs after this NWP expires. The five-year reversion limit does not apply to agreements without time limits reached between the landowner and the FWS, NRCS, FSA, NMFS, NOS, or an appropriate state cooperating agency. This NWP also authorizes discharges of dredged or fill material in waters of the United States for the reversion of wetlands that were restored, enhanced, or established on prior-converted cropland that has not been abandoned or on uplands, in accordance with a binding agreement between the landowner and NRCS, FSA, FWS, or their designated state cooperating agencies (even though the restoration, enhancement, or establishment activity did not require a section 404 permit). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit. Before conducting any reversion activity the permittee or the appropriate Federal

or state agency must notify the district engineer and include the documentation of the prior condition. Once an area has reverted to its prior physical condition, it will be subject to whatever the Corps Regulatory requirements are applicable to that type of land at the time. The requirement that the activity result in a net increase in aquatic resource functions and services does not apply to reversion activities meeting the above conditions. Except for the activities described above, this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion.

**Reporting:** For those activities that do not require pre-construction notification, the permittee must submit to the district engineer a copy of: (1) The binding wetland enhancement, restoration, or establishment agreement, or a project description, including project plans and location map; (2) the NRCS or USDA Technical Service Provider documentation for the voluntary wetland restoration, enhancement, or establishment action; or (3) the SMCRA permit issued by OSM or the applicable state agency. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP.

**Notification.** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27), except for the following activities:

(1) Activities conducted on non-Federal public lands and private lands, in accordance with the terms and conditions of a binding wetland enhancement, restoration, or establishment agreement between the landowner and the U.S. FWS, NRCS, FSA, NMFS, NOS, or their designated state cooperating agencies;

(2) Voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or

(3) The reclamation of surface coal mine lands, in accordance with an SMCRA permit issued by the OSM or the applicable state agency.

However, the permittee must submit a copy of the appropriate documentation. (Sections 10 and 404)

**Note:** This NWP can be used to authorize compensatory mitigation projects, including mitigation banks and in-lieu fee programs.

However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition, since compensatory mitigation is generally intended to be permanent.

**28. Modifications of Existing Marinas.** Reconfiguration of existing docking facilities within an authorized marina area. No dredging, additional slips, dock spaces, or expansion of any kind within waters of the United States is authorized by this NWP. (Section 10)

**29. Residential Developments.** Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development).

The discharge must not cause the loss of greater than  $\frac{1}{2}$ -acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

**Subdivisions:** For residential subdivisions, the aggregate total loss of waters of United States authorized by this NWP cannot exceed  $\frac{1}{2}$  acre. This includes any loss of waters of the United States associated with development of individual subdivision lots.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

**30. Moist Soil Management for Wildlife.** Discharges of dredged or fill material into non-tidal waters of the United States and maintenance activities that are associated with moist soil management for wildlife for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage habitat and feeding areas for wildlife. Such activities include, but are not limited to, plowing or discing to impede succession, preparing seed beds, or establishing fire breaks. Sufficient

riparian areas must be maintained adjacent to all open water bodies, including streams to preclude water quality degradation due to erosion and sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, or similar features associated with the management areas. The activity must not result in a net loss of aquatic resource functions and services. This NWP does not authorize the conversion of wetlands to uplands, impoundments, or other open water bodies. (Section 404).

**Note:** The repair, maintenance, or replacement of existing water control structures or the repair or maintenance of dikes may be authorized by NWP 3. Some such activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4).

**31. Maintenance of Existing Flood Control Facilities.** Discharges of dredged or fill material resulting from activities associated with the maintenance of existing flood control facilities, including debris basins, retention/detention basins, levees, and channels that: (i) were previously authorized by the Corps by individual permit, general permit, by 33 CFR 330.3, or did not require a permit at the time they were constructed, or (ii) were constructed by the Corps and transferred to a non-Federal sponsor for operation and maintenance. Activities authorized by this NWP are limited to those resulting from maintenance activities that are conducted within the "maintenance baseline," as described in the definition below. Discharges of dredged or fill materials associated with maintenance activities in flood control facilities in any watercourse that have previously been determined to be within the maintenance baseline are authorized under this NWP. This NWP does not authorize the removal of sediment and associated vegetation from natural water courses except when these activities have been included in the maintenance baseline. All dredged material must be placed in an upland site or an authorized disposal site in waters of the United States, and proper siltation controls must be used.

**Maintenance Baseline:** The maintenance baseline is a description of the physical characteristics (e.g., depth, width, length, location, configuration, or design flood capacity, etc.) of a flood control project within which maintenance activities are normally authorized by NWP 31, subject to any case-specific conditions required by the district engineer. The district engineer will approve the maintenance baseline

based on the approved or constructed capacity of the flood control facility, whichever is smaller, including any areas where there are no constructed channels, but which are part of the facility. The prospective permittee will provide documentation of the physical characteristics of the flood control facility (which will normally consist of as-built or approved drawings) and documentation of the approved and constructed design capacities of the flood control facility. If no evidence of the constructed capacity exists, the approved capacity will be used. The documentation will also include best management practices to ensure that the impacts to the aquatic environment are minimal, especially in maintenance areas where there are no constructed channels. (The Corps may request maintenance records in areas where there has not been recent maintenance.) Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5. Except in emergencies as described below, this NWP cannot be used until the district engineer approves the maintenance baseline and determines the need for mitigation and any regional or activity-specific conditions. Once determined, the maintenance baseline will remain valid for any subsequent reissuance of this NWP. This NWP does not authorize maintenance of a flood control facility that has been abandoned. A flood control facility will be considered abandoned if it has operated at a significantly reduced capacity without needed maintenance being accomplished in a timely manner.

**Mitigation:** The district engineer will determine any required mitigation one-time only for impacts associated with maintenance work at the same time that the maintenance baseline is approved. Such one-time mitigation will be required when necessary to ensure that adverse environmental impacts are no more than minimal, both individually and cumulatively. Such mitigation will only be required once for any specific reach of a flood control project. However, if one-time mitigation is required for impacts associated with maintenance activities, the district engineer will not delay needed maintenance, provided the district engineer and the permittee establish a schedule for identification, approval, development, construction and completion of any such required mitigation. Once the one-time mitigation described above has been completed, or a determination made that mitigation is not required, no

further mitigation will be required for maintenance activities within the maintenance baseline. In determining appropriate mitigation, the district engineer will give special consideration to natural water courses that have been included in the maintenance baseline and require compensatory mitigation and/or best management practices as appropriate.

**Emergency Situations:** In emergency situations, this NWP may be used to authorize maintenance activities in flood control facilities for which no maintenance baseline has been approved. Emergency situations are those which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if action is not taken before a maintenance baseline can be approved. In such situations, the determination of mitigation requirements, if any, may be deferred until the emergency has been resolved. Once the emergency has ended, a maintenance baseline must be established expeditiously, and mitigation, including mitigation for maintenance conducted during the emergency, must be required as appropriate.

**Notification:** The permittee must submit a pre-construction notification to the district engineer before any maintenance work is conducted (see general condition 27). The pre-construction notification may be for activity-specific maintenance or for maintenance of the entire flood control facility by submitting a five-year (or less) maintenance plan. The pre-construction notification must include a description of the maintenance baseline and the dredged material disposal site. (Sections 10 and 404)

**32. Completed Enforcement Actions.** Any structure, work, or discharge of dredged or fill material remaining in place or undertaken for mitigation, restoration, or environmental benefit in compliance with either:

(i) The terms of a final written Corps non-judicial settlement agreement resolving a violation of Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or the terms of an EPA 309(a) order on consent resolving a violation of Section 404 of the Clean Water Act, provided that:

(a) The unauthorized activity affected no more than 5 acres of non-tidal waters or 1 acre of tidal waters;

(b) The settlement agreement provides for environmental benefits, to an equal or greater degree, than the environmental detriments caused by the

unauthorized activity that is authorized by this NWP; and

(c) The district engineer issues a verification letter authorizing the activity subject to the terms and conditions of this NWP and the settlement agreement, including a specified completion date; or

(ii) The terms of a final Federal court decision, consent decree, or settlement agreement resulting from an enforcement action brought by the United States under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or

(iii) The terms of a final court decision, consent decree, settlement agreement, or non-judicial settlement agreement resulting from a natural resource damage claim brought by a trustee or trustees for natural resources (as defined by the National Contingency Plan at 40 CFR subpart G) under Section 311 of the Clean Water Act, Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, Section 312 of the National Marine Sanctuaries Act, Section 1002 of the Oil Pollution Act of 1990, or the Park System Resource Protection Act at 16 U.S.C. 19jj, to the extent that a Corps permit is required.

Compliance is a condition of the NWP itself. Any authorization under this NWP is automatically revoked if the permittee does not comply with the terms of this NWP or the terms of the court decision, consent decree, or judicial/non-judicial settlement agreement. This NWP does not apply to any activities occurring after the date of the decision, decree, or agreement that are not for the purpose of mitigation, restoration, or environmental benefit. Before reaching any settlement agreement, the Corps will ensure compliance with the provisions of 33 CFR part 326 and 33 CFR 330.6(d)(2) and (e). (Sections 10 and 404)

**33. Temporary Construction, Access, and Dewatering.** Temporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard. This NWP also authorizes temporary structures, work, and discharges, including cofferdams, necessary for construction activities not otherwise subject to the Corps or U.S. Coast Guard permit requirements. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. The use of dredged

material may be allowed if the district engineer determines that it will not cause more than minimal adverse effects on aquatic resources. Following completion of construction, temporary fill must be entirely removed to upland areas, dredged material must be returned to its original location, and the affected areas must be restored to pre-construction elevations. The affected areas must also be revegetated, as appropriate. This permit does not authorize the use of cofferdams to dewater wetlands or other aquatic areas to change their use. Structures left in place after construction is completed require a section 10 permit if located in navigable waters of the United States. (See 33 CFR part 322.)

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). The pre-construction notification must include a restoration plan showing how all temporary fills and structures will be removed and the area restored to pre-project conditions. (Sections 10 and 404)

**34. Cranberry Production Activities.** Discharges of dredged or fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations. The cumulative total acreage of disturbance per cranberry production operation, including but not limited to, filling, flooding, ditching, or clearing, must not exceed 10 acres of waters of the United States, including wetlands. The activity must not result in a net loss of wetland acreage. This NWP does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes of this NWP, the cumulative total of 10 acres will be measured over the period that this NWP is valid.

**Notification:** The permittee must submit a pre-construction notification to the district engineer once during the period that this NWP is valid, and the NWP will then authorize discharges of dredge or fill material at an existing operation for the permit term, provided the 10-acre limit is not exceeded. (See general condition 27.) (Section 404)

**35. Maintenance Dredging of Existing Basins.** Excavation and removal of accumulated sediment for maintenance of existing marina basins, access channels to marinas or boat slips, and boat slips to previously authorized depths or controlling depths for ingress/egress, whichever is less, provided the

dredged material is deposited at an upland site and proper siltation controls are used. (Section 10)

**36. Boat Ramps.** Activities required for the construction of boat ramps, provided the activity meets all of the following criteria:

(a) The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or in the form of pre-cast concrete planks or slabs, unless the 50 cubic yard limit is waived in writing by the district engineer;

(b) The boat ramp does not exceed 20 feet in width, unless this criterion is waived in writing by the district engineer;

(c) The base material is crushed stone, gravel or other suitable material;

(d) The excavation is limited to the area necessary for site preparation and all excavated material is removed to the upland; and,

(e) No material is placed in special aquatic sites, including wetlands.

The use of unsuitable material that is structurally unstable is not authorized. If dredging in navigable waters of the United States is necessary to provide access to the boat ramp, the dredging may be authorized by another NWP, a regional general permit, or an individual permit.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge into waters of the United States exceeds 50 cubic yards, or (2) the boat ramp exceeds 20 feet in width. (See general condition 27.) (Sections 10 and 404)

**37. Emergency Watershed Protection and Rehabilitation.** Work done by or funded by:

(a) The Natural Resources Conservation Service for a situation requiring immediate action under its emergency Watershed Protection Program (7 CFR part 624);

(b) The U.S. Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 509.13);

(c) The Department of the Interior for wildland fire management burned area emergency stabilization and rehabilitation (DOI Manual part 620, Ch. 3);

(d) The Office of Surface Mining, or states with approved programs, for abandoned mine land reclamation activities under Title IV of the Surface Mining Control and Reclamation Act (30 CFR subchapter R), where the activity does not involve coal extraction; or

(e) The Farm Service Agency under its Emergency Conservation Program (7 CFR part 701).

In general, the prospective permittee should wait until the district engineer issues an NWP verification before proceeding with the watershed protection and rehabilitation activity. However, in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the emergency watershed protection and rehabilitation activity may proceed immediately and the district engineer will consider the information in the pre-construction notification any comments received as a result of agency coordination to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). (Sections 10 and 404)

**38. Cleanup of Hazardous and Toxic Waste.** Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority. Court ordered remedial action plans or related settlements are also authorized by this NWP. This NWP does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

**Note:** Activities undertaken entirely on a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act.

**39. Commercial and Institutional Developments.** Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of commercial and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, storm water management facilities, and recreation facilities such as playgrounds and playing fields. Examples of commercial developments include retail stores, industrial facilities, restaurants,

business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The construction of new golf courses, new ski areas, or oil and gas wells is not authorized by this NWP.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

**40. Agricultural Activities.** Discharges of dredged or fill material into non-tidal waters of the United States for agricultural activities, including the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized land clearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities.

This NWP also authorizes the construction of farm ponds in non-tidal waters of the United States, excluding perennial streams, provided the farm pond is used solely for agricultural purposes. This NWP does not authorize the construction of aquaculture ponds.

This NWP also authorizes discharges of dredged or fill material into non-tidal waters of the United States to relocate existing serviceable drainage ditches constructed in non-tidal streams.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize the relocation of greater than 300 linear feet of existing serviceable drainage ditches constructed in non-tidal streams, unless for drainage ditches constructed in intermittent and ephemeral streams, this 300 linear foot limit is waived in writing by the district engineer.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Section 404)

**Note:** Some discharges for agricultural activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4). This NWP authorizes the construction of farm ponds that do not qualify for the Clean Water Act Section 404(f)(1)(C) exemption because of the recapture provision at Section 404(f)(2).

**41. Reshaping Existing Drainage Ditches.** Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of currently serviceable drainage ditches constructed in waters of the United States, for the purpose of improving water quality by regrading the drainage ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, and increase uptake of nutrients and other substances by vegetation. The reshaping of the ditch cannot increase drainage capacity beyond the original as-built capacity nor can it expand the area drained by the ditch as originally constructed (i.e., the capacity of the ditch must be the same as originally constructed and it cannot drain additional wetlands or other waters of the United States). Compensatory mitigation is not required because the work is designed to improve water quality.

This NWP does not authorize the relocation of drainage ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage ditch must be approximately the same as the location of the centerline of the original drainage ditch. This NWP does not authorize stream channelization or stream relocation projects.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity, if more than 500 linear feet of drainage ditch will be reshaped. (See general condition 27.) (Section 404)

**42. Recreational Facilities.** Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of recreational facilities. Examples of recreational facilities that may be authorized by this NWP include playing fields (e.g., football fields, baseball fields), basketball courts, tennis courts, hiking trails, bike paths, golf courses, ski areas, horse paths, nature centers, and campgrounds (excluding recreational vehicle parks). This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables that are directly related to the recreational activity, but it

does not authorize the construction of hotels, restaurants, racetracks, stadiums, arenas, or similar facilities.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Section 404)

**43. Stormwater Management Facilities.** Discharges of dredged or fill material into non-tidal waters of the United States for the construction and maintenance of stormwater management facilities, including the excavation of stormwater ponds/facilities, detention basins, and retention basins; the installation and maintenance of water control structures, outfall structures and emergency spillways; and the maintenance dredging of existing stormwater management ponds/facilities and detention and retention basins.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds this 300 linear foot limit is waived in writing by the district engineer. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize discharges of dredged or fill material for the construction of new stormwater management facilities in perennial streams.

**Notification:** For the construction of new stormwater management facilities, or the expansion of existing stormwater management facilities, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) Maintenance activities do not require pre-construction notification if they are limited to restoring the original design capacities of the stormwater management facility. (Section 404)

**44. Mining Activities.** Discharges of dredged or fill material into non-tidal waters of the United States for mining activities, except for coal mining activities. The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into

non-tidal wetlands adjacent to tidal waters.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification. (Sections 10 and 404)

**45. Repair of Uplands Damaged by Discrete Events.** This NWP authorizes discharges of dredged or fill material, including dredging or excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by storms, floods, or other discrete events. This NWP authorizes bank stabilization to protect the restored uplands. The restoration of the damaged areas, including any bank stabilization, must not exceed the contours, or ordinary high water mark, that existed before the damage occurred. The district engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this NWP. The work must commence, or be under contract to commence, within two years of the date of damage, unless this condition is waived in writing by the district engineer. This NWP cannot be used to reclaim lands lost to normal erosion processes over an extended period.

Minor dredging is limited to the amount necessary to restore the damaged upland area and should not significantly alter the pre-existing bottom contours of the waterbody.

**Notification:** The permittee must submit a pre-construction notification to the district engineer (see general condition 27) within 12-months of the date of the damage. The pre-construction notification should include documentation, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. (Sections 10 and 404)

**Note:** Uplands lost as a result of a storm, flood, or other discrete event can be replaced without a section 404 permit, if the uplands are restored to the ordinary high water mark (in non-tidal waters) or high tide line (in tidal waters). (See also 33 CFR 328.5.)

**46. Discharges in Ditches.** Discharges of dredged or fill material into non-tidal ditches that are: (1) Constructed in uplands, (2) receive water from an area determined to be a water of the United States prior to the construction of the ditch, (3) divert water to an area determined to be a water of the United States prior to the construction of the ditch, and (4) are determined to be

waters of the United States. The discharge must not cause the loss of greater than one acre of waters of the United States.

This NWP does not authorize discharges of dredged or fill material into ditches constructed in streams or other waters of the United States, or in streams that have been relocated in uplands. This NWP does not authorize discharges of dredged or fill material that increase the capacity of the ditch and drain those areas determined to be waters of the United States prior to construction of the ditch.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Section 404)

**47. Pipeline Safety Program Designated Time Sensitive Inspections and Repairs.** Activities required for the inspection, repair, rehabilitation, or replacement of any currently serviceable structure or fill for pipelines that have been identified by the Pipeline and Hazardous Materials Safety Administration's Pipeline Safety Program (PHP) within the U.S. Department of Transportation as time-sensitive (see 49 CFR parts 192 and 195) and additional maintenance activities done in conjunction with the time-sensitive inspection and repair activities. All activities must meet the following criteria:

(a) Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable when temporary structures, work and discharges, including cofferdams, are necessary for construction activities or access fills or dewatering of construction sites;

(b) Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided that the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect);

(c) Temporary fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate;

(d) In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench so that there is no change in preconstruction contours;

(e) To the maximum extent practicable, the restoration of open waters must be to the pre-construction course, condition, capacity, and location of the waterbody;

(f) Any exposed slopes and stream banks must be stabilized immediately upon completion of the project;

(g) Additional maintenance activities done in conjunction with the time-sensitive inspection or repair must not result in additional losses of waters of the United States; and,

(h) The permittee is a participant in the Pipeline Repair and Environmental Guidance System (PREGS).

**Reporting:** The permittee must submit a post construction report to the PHP within seven days after completing the work. The report must be submitted electronically to PHP via PREGS. The report must contain the following information: Project sites located in waters of the United States, temporary access routes, stream dewatering sites, temporary fills and temporary structures identified on a map of the pipeline corridor; photographs of the pre- and post-construction work areas located in waters of the United States; and a list of best management practices employed for each pipeline segment shown on the map. (Section 10 and 404)

**Note:** Division engineers may modify this NWP by adding regional conditions to protect the aquatic environment, as long as those regional conditions do not require pre-construction notification or other actions that would delay time sensitive inspections and repairs. Examples of appropriate regional conditions include best management practices.

**48. Existing Commercial Shellfish Aquaculture Activities.** This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures necessary for the continued operation of the existing commercial aquaculture activity. This NWP also authorizes discharges of dredged or fill material necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked.

This NWP does not authorize new operations or the expansion of the project area for an existing commercial shellfish aquaculture activity. This NWP does not authorize the cultivation of new species (i.e., species not previously cultivated in the waterbody). This NWP



does not authorize attendant features such as docks, piers, boat ramps, stockpiles, staging areas, or the deposition of shell material back into waters of the United States as waste.

**Reporting:** For those activities that do not require pre-construction notification, the permittee must submit a report to the district engineer that includes the following information: (1) The size of the project area for the commercial shellfish aquaculture activity (in acres); (2) the location of the activity; (3) a brief description of the culture method and harvesting method(s); (4) the name(s) of the cultivated species; and (5) whether canopy predator nets are being used. This is a subset of the information that would be required for pre-construction notification. This report may be provided by letter or using an optional reporting form provided by the Corps. Only one report needs to be submitted during the period this NWP is valid, as long as there are no changes to the operation that require pre-construction notification. The report must be submitted to the district engineer within 90 days of the effective date of this NWP.

**Notification:** The permittee must submit a pre-construction notification to the district engineer if: (1) The project area is greater than 100 acres; or (2) there is any reconfiguration of the aquaculture activity, such as relocating existing operations into portions of the project area not previously used for aquaculture activities; or (3) there is a change in species being cultivated; or (4) there is a change in culture methods (e.g., from bottom culture to off-bottom culture); or (5) dredge harvesting, tilling, or harrowing is conducted in areas inhabited by submerged aquatic vegetation. (See general condition 27.) (Sections 10 and 404)

**Note:** The permittee should notify the applicable U.S. Coast Guard office regarding the project.

#### 49. Coal Remining Activities.

Discharges of dredged or fill material into non-tidal waters of the United States associated with the remining and reclamation of lands that were previously mined for coal, provided the activities are already authorized, or are currently being processed as part of an integrated permit processing procedure, by the Department of Interior (DOI) Office of Surface Mining (OSM), or by states with approved programs under Title IV or Title V of the Surface Mining Control and Reclamation Act of 1977. Areas previously mined include reclaimed mine sites, abandoned mine land areas, or lands under bond

forfeiture contracts. The permittee must clearly demonstrate to the district engineer that the reclamation plan will result in a net increase in aquatic resource functions. As part of the project, the permittee may conduct coal mining activities in an adjacent area, provided the newly mined area is less than 40 percent of the area being remined plus any unmined area necessary for the reclamation of the remined area.

**Notification:** The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

**50. Underground Coal Mining Activities.** Discharges of dredged or fill material into non-tidal waters of the United States associated with underground coal mining and reclamation operations provided the activities are authorized, or are currently being processed as part of an integrated permit processing procedure, by the Department of Interior (DOI), Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977.

This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize coal preparation and processing activities outside of the mine site.

**Notification:** The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 27.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification. (Sections 10 and 404)

**Note:** Coal preparation and processing activities outside of the mine site may be authorized by NWP 21.

#### C. Nationwide Permit General Conditions

**Note:** To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as appropriate, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP.

1. **Navigation.** (a) No activity may cause more than a minimal adverse effect on navigation.

(b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. **Aquatic Life Movements.** No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. Culverts placed in streams must be installed to maintain low flow conditions.

3. **Spawning Areas.** Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

4. **Migratory Bird Breeding Areas.** Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

5. **Shellfish Beds.** No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWPs 4 and 48.

6. **Suitable Material.** No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).

7. **Water Supply Intakes.** No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement

of public water supply intake structures or adjacent bank stabilization.

8. *Adverse Effects From Impoundments.* If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

9. *Management of Water Flows.* To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization and storm water management activities, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).

10. *Fills Within 100-Year Floodplains.* The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

11. *Equipment.* Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance.

12. *Soil Erosion and Sediment Controls.* Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow.

13. *Removal of Temporary Fills.* Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

14. *Proper Maintenance.* Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety.

15. *Wild and Scenic Rivers.* No activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official

study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency in the area (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service).

16. *Tribal Rights.* No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

17. *Endangered Species.* (a) No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements.

(c) Non-federal permittees shall notify the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. The district engineer will determine whether the proposed activity "may affect" or will have "no effect" to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. In cases where the non-Federal applicant has identified listed

species or critical habitat that might be affected or is in the vicinity of the project, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have "no effect" on listed species or critical habitat, or until Section 7 consultation has been completed.

(d) As a result of formal or informal consultation with the FWS or NMFS the district engineer may add species-specific regional endangered species conditions to the NWPs.

(e) Authorization of an activity by a NWP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the U.S. FWS or the NMFS, both lethal and non-lethal "takes" of protected species are in violation of the ESA. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. FWS and NMFS or their world wide Web pages at <http://www.fws.gov/> and <http://www.noaa.gov/fisheries.html> respectively.

18. *Historic Properties.* (a) In cases where the district engineer determines that the activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of Section 106 of the National Historic Preservation Act. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the authorized activity may have the potential to cause effects to any historic properties listed, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties may be affected by the proposed work or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of or potential for the presence of historic resources can be sought from the State

Historic Preservation Officer or Tribal Historic Preservation Officer, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted and these efforts, the district engineer shall determine whether the proposed activity has the potential to cause an effect on the historic properties. Where the non-Federal applicant has identified historic properties which the activity may have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects or that consultation under Section 106 of the NHPA has been completed.

(d) The district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA Section 106 consultation is required. Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). If NHPA section 106 consultation is required and will occur, the district engineer will notify the non-Federal applicant that he or she cannot begin work until Section 106 consultation is completed.

(e) Prospective permittees should be aware that section 110k of the NHPA (16 U.S.C. 470h-2(k)) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of Section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, explaining the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate

Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

19. *Designated Critical Resource Waters.* Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, state natural heritage sites, and outstanding national resource waters or other waters officially designated by a state as having particular environmental or ecological significance and identified by the district engineer after notice and opportunity for public comment. The district engineer may also designate additional critical resource waters after notice and opportunity for comment.

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWP 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, and 50 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with general condition 27, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

20. *Mitigation.* The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that adverse effects on the aquatic environment are minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed  $\frac{1}{10}$  acre and require pre-construction notification, unless the district engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-

specific waiver of this requirement. For wetland losses of  $\frac{1}{10}$  acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in minimal adverse effects on the aquatic environment. Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, wetland restoration should be the first compensatory mitigation option considered.

(d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation, such as stream restoration, to ensure that the activity results in minimal adverse effects on the aquatic environment.

(e) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of  $\frac{1}{2}$  acre, it cannot be used to authorize any project resulting in the loss of greater than  $\frac{1}{2}$  acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that a project already meeting the established acreage limits also satisfies the minimal impact requirement associated with the NWPs.

(f) Compensatory mitigation plans for projects in or near streams or other open waters will normally include a requirement for the establishment, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, riparian areas may be the only compensatory mitigation required. Riparian areas should consist of native species. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland

compensatory mitigation for wetland losses.

(g) Permittees may propose the use of mitigation banks, in-lieu fee arrangements or separate activity-specific compensatory mitigation. In all cases, the mitigation provisions will specify the party responsible for accomplishing and/or complying with the mitigation plan.

(h) Where certain functions and services of waters of the United States are permanently adversely affected, such as the conversion of a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse effects of the project to the minimal level.

21. *Water Quality.* Where States and authorized Tribes, or EPA where applicable, have not previously certified compliance of an NWP with CWA Section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The district engineer or State or Tribe may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

22. *Coastal Zone Management.* In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). The district engineer or a State may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

23. *Regional and Case-By-Case Conditions.* The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

24. *Use of Multiple Nationwide Permits.* The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United

States for the total project cannot exceed  $\frac{1}{3}$ -acre.

25. *Transfer of Nationwide Permit Verifications.* If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

"When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below."

(Transferee)

(Date)

26. *Compliance Certification.* Each permittee who received an NWP verification from the Corps must submit a signed certification regarding the completed work and any required mitigation. The certification form must be forwarded by the Corps with the NWP verification letter and will include:

(a) A statement that the authorized work was done in accordance with the NWP authorization, including any general or specific conditions;

(b) A statement that any required mitigation was completed in accordance with the permit conditions; and

(c) The signature of the permittee certifying the completion of the work and mitigation.

27. *Pre-Construction Notification.* (a) *Timing.* Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, as a general rule, will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review

process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity:

(1) Until notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or

(2) If 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 17 that listed species or critical habitat might be affected or in the vicinity of the project, or to notify the Corps pursuant to general condition 18 that the activity may have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that is "no effect" on listed species or "no potential to cause effects" on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or Section 106 of the National Historic Preservation (see 33 CFR 330.4(g)) is completed. Also, work cannot begin under NWPs 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee cannot begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) *Contents of Pre-Construction Notification:* The PCN must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed project;

(3) A description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity. The description should be sufficiently detailed to allow the district engineer to

determine that the adverse effects of the project will be minimal and to determine the need for compensatory mitigation. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the project and when provided result in a quicker decision.);

(4) The PCN must include a delineation of special aquatic sites and other waters of the United States on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters of the United States, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many waters of the United States. Furthermore, the 45 day period will not start until the delineation has been submitted to or completed by the Corps, where appropriate;

(5) If the proposed activity will result in the loss of greater than  $\frac{1}{10}$  acre of wetlands and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(6) If any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, for non-Federal applicants the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work. Federal applicants must provide documentation demonstrating compliance with the Endangered Species Act; and

(7) For an activity that may affect a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, for non-Federal applicants the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property. Federal applicants must provide documentation demonstrating compliance with Section 106 of the National Historic Preservation Act.

(c) *Form of Pre-Construction Notification:* The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it is a PCN and must include all of

the information required in paragraphs (b)(1) through (7) of this general condition. A letter containing the required information may also be used.

(d) *Agency Coordination:* (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

(2) For all NWP 48 activities requiring pre-construction notification and for other NWP activities requiring pre-construction notification to the district engineer that result in the loss of greater than  $\frac{1}{2}$ -acre of waters of the United States, the district engineer will immediately provide (e.g., via facsimile transmission, overnight mail, or other expeditious manner) a copy of the PCN to the appropriate Federal or state offices (U.S. FWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Office (THPO)), and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the district engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(3) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by Section 305(b)(4)(B) of the

Magnuson-Stevens Fishery Conservation and Management Act.

(4) Applicants are encouraged to provide the Corps multiple copies of pre-construction notifications to expedite agency coordination.

(5) For NWP 48 activities that require reporting, the district engineer will provide a copy of each report within 10 calendar days of receipt to the appropriate regional office of the NMFS.

(e) *District Engineer's Decision:* In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If the proposed activity requires a PCN and will result in a loss of greater than  $\frac{1}{10}$  acre of wetlands, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for projects with smaller impacts. The district engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed work are minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, after considering mitigation, the district engineer will notify the permittee and include any conditions the district engineer deems necessary. The district engineer must approve any compensatory mitigation proposal before the permittee commences work. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the district engineer to be minimal, the district engineer will provide a timely written response to the applicant. The response will state that the project can proceed under the terms and conditions of the NWP.

If the district engineer determines that the adverse effects of the proposed work are more than minimal, then the district engineer will notify the applicant either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (2) that the project is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse effects occur to the aquatic environment, the activity will be authorized within the 45-day PCN period. The authorization will include the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level. When mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan.

28. *Single and Complete Project.* The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

#### D. Further Information

1. District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP.

2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.

3. NWPs do not grant any property rights or exclusive privileges.

4. NWPs do not authorize any injury to the property or rights of others.

5. NWPs do not authorize interference with any existing or proposed Federal project.

#### E. Definitions

*Best management practices (BMPs):* Policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural.

*Compensatory mitigation:* The restoration, establishment (creation), enhancement, or preservation of aquatic resources for the purpose of compensating for unavoidable adverse impacts which remain after all

appropriate and practicable avoidance and minimization has been achieved.

*Currently serviceable:* Useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

*Discharge:* The term "discharge" means any discharge of dredged or fill material and any activity that causes or results in such a discharge.

*Enhancement:* The manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

*Ephemeral stream:* An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

*Establishment (creation):* The manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area.

*Historic Property:* Any prehistoric or historic district, site (including archaeological site), building, structure, or other object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria (36 CFR part 60).

*Independent utility:* A test to determine what constitutes a single and complete project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

*Intermittent stream:* An intermittent stream has flowing water during certain

times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

*Loss of waters of the United States:* Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. The loss of stream bed includes the linear feet of stream bed that is filled or excavated. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities eligible for exemptions under Section 404(f) of the Clean Water Act are not considered when calculating the loss of waters of the United States.

*Non-tidal wetland:* A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(b). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (i.e., spring high tide line).

*Open water:* For purposes of the NWPs, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of standing or flowing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of "open waters" include rivers, streams, lakes, and ponds.

*Ordinary High Water Mark:* An ordinary high water mark is a line on the shore established by the fluctuations of water and indicated by physical characteristics, or by other appropriate means that consider the characteristics of the surrounding areas (see 33 CFR 328.3(e)).

**Perennial stream:** A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

**Practicable:** Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

**Pre-construction notification:** A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

**Preservation:** The removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

**Re-establishment:** The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area.

**Rehabilitation:** The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

**Restoration:** The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: Re-establishment and rehabilitation.

**Riffle and pool complex:** Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a coarse substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

**Riparian areas:** Riparian areas are lands adjacent to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects waterbodies with their adjacent uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 20.)

**Shellfish seeding:** The placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (i.e., spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.

**Single and complete project:** The term "single and complete project" is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete project must have independent utility (see definition). For linear projects, a "single and complete project" is all crossings of a single water of the United States (i.e., a single waterbody) at a specific location. For linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

**Stormwater management:** Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse

effects of changes in land use on the aquatic environment.

**Stormwater management facilities:** Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and best management practices, which retain water for a period of time to control runoff and/or improve the quality (i.e., by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

**Stream bed:** The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

**Stream channelization:** The manipulation of a stream's course, condition, capacity, or location that causes more than minimal interruption of normal stream processes. A channelized stream remains a water of the United States.

**Structure:** An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

**Tidal wetland:** A tidal wetland is a wetland (i.e., water of the United States) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(b) and 33 CFR 328.3(f), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line, which is defined at 33 CFR 328.3(d).

**Vegetated shallows:** Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

**Waterbody:** For purposes of the NWP, a waterbody is a jurisdictional



water of the United States that, during a year with normal patterns of precipitation, has water flowing or standing above ground to the extent that an ordinary high water mark (OHWM) or other indicators of jurisdiction can be determined, as well as any wetland area

(see 33 CFR 328.3(b)). If a jurisdictional wetland is adjacent—meaning bordering, contiguous, or neighboring—to a jurisdictional waterbody displaying an OHWM or other indicators of jurisdiction, that waterbody and its adjacent wetlands are considered

together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of “waterbodies” include streams, rivers, lakes, ponds, and wetlands.

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