

**DEPARTMENT OF DEFENSE****Department of the Army, Corps of Engineers****Proposal To Reissue and Modify Nationwide Permits; Notice****AGENCY:** Army Corps of Engineers, DoD.**ACTION:** Notice of intent and request for comments.

**SUMMARY:** The Corps of Engineers is soliciting comments for the reissuance of the existing Nationwide Permits (NWP), General Conditions, and definitions with some modifications. The Corps of Engineers (Corps) reissued NWPs on December 13, 1996, **Federal Register** notice (61 FR 65874–65922). These NWPs will expire February 11, 2002, except as discussed below.

In the December 13, 1996, issue of the **Federal Register**, the Corps announced its intention to replace NWP 26 with activity-specific NWPs before the expiration date of NWP 26. In the March 9, 2000, **Federal Register** notice (65 FR 12818–12899), the Corps published five new NWPs, modified six existing NWPs, modified six General Conditions, and added two new General Conditions to replace NWP 26. The five new NWPs (i.e., 39, 41, 42, 43, 44) and six modified NWPs (i.e., NWPs 3, 7, 12, 14, 27, and 40) will expire five years from their effective date of June 7, 2000. In order to reduce the confusion regarding the expiration of the NWPs and the administrative burden, it is the Corps intent to reissue all NWPs and General Conditions contained within this Notice, including those not scheduled to expire on February 11, 2002. Thus, all issued, reissued and modified NWPs, and General Conditions contained within this notice will become effective and expire on the same date. The reissuance process starts with today's publication of the proposed NWPs in the **Federal Register** and concurrent release of public notices by Corps District offices for a 45-day comment period.

**DATES:** Comments on the reissuance of the proposed NWPs must be received by September 24, 2001. The public hearing will be held at 1 p.m. on September 12, 2001.

**ADDRESSES:** Send comments to HQUSACE, ATTN: CECW–OR, 441 "G" Street, NW, Washington, DC 20314–1000. The public hearing will be held at the GAO Building, 441 "G" Street, NW, Washington, DC 20314–1000, 7th floor auditorium.

**FOR FURTHER INFORMATION CONTACT:** Mr. Rich White or Mr. Sam Collinson, at

(202) 761–4599 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:** In regard to the public hearing referenced, the public should enter on the "G" Street side of the building. All attendees are required to show photo identification and must be escorted to the auditorium by Corps personnel. All attendees arriving between one-half hour before and one-half hour after 1 p.m. will be escorted to the hearing. Those arriving later than the allotted time will be unable to enter the building.

The public is invited to provide comments on this notice to reissue and modify NWPs to the address below. The Corps is also preparing a voluntary Programmatic Environmental Impact Statement (PEIS) on the NWP Program. On July 31, 2001, the PEIS will be announced in the **Federal Register** and available on the Corps Institute for Water Resources (IWR) web page at <http://www.iwr.usace.army.mil/iwr/Regulatory/regulintro.htm>. Comment on the PEIS should be sent to IWR as indicated on the IWR web page or the **Federal Register** notice.

**Background**

Section 404(e) of the Clean Water Act (CWA) is the statutory authority for the Secretary of the Army, after notice and opportunity for public hearing, to issue general permits on a nationwide basis for any category of activities involving discharges of dredged or fill material into waters of the United States (US). Such activities authorized by NWPs must be similar in nature, cause only minimal adverse environmental effects when performed separately, and have only minimal cumulative adverse effect on the aquatic environment. The Nationwide Permit (NWP) Program is designed to provide timely authorization for the regulated public while concurrently protecting the Nation's aquatic resources.

The protection and restoration of the aquatic environment is an integral part of the Corps mission and a primary focus of the Regulatory Program. The NWP Program allows the Corps to maintain protection of the aquatic environment, while allowing the Corps to focus limited resources towards more extensive evaluation of projects with the potential for causing environmentally damaging adverse effects. Impacts to the aquatic environment may also receive additional protection through regional conditions, case-specific special conditions, and case-specific discretionary authority to require standard Individual Permits (i.e. for

higher quality aquatic resource). General Permits, including NWPs, protect the aquatic environment because permit applicants will reduce project impacts to meet the restrictive requirements of the general permit. The NWP Program allows the Corps to authorize activities with minimal adverse environmental impacts in a timely manner and maintain protection of the aquatic environment.

This proposal to reissue existing NWPs is a reflection of the Corps unequivocal commitment to its environmental protection mission and to aquatic resource protection. For example, twenty-one of the NWPs contain provisions within the terms and conditions that establishes a threshold level requiring "notification" to the Corps before a regulated activity is authorized to commence. This provision gives the Corps the opportunity to thoroughly evaluate NWP authorizations to ensure that the activity will have no more than a minimal adverse effect on the aquatic environment, individually and cumulatively. This "notification" includes submitting to the Corps an application containing detailed or conceptual descriptions of proposed activities, and the impacts to aquatic systems. A "notification" to the Corps may be required for filling aquatic areas, such as stream beds (whether perennial, intermittent, or ephemeral) and wetlands. The Corps reviews each "notification" and this case-by-case review typically results in case specific conditions requiring mitigation to ensure that impacts to the aquatic environment are no more than minimal. It may also result in the Corps asserting discretionary authority to require an Individual Permit if the Corps determines, based on the information provided in the notification, that adverse impacts will be more than minimal, either individually or cumulatively. Excavation in waters of the US requires a permit (and may require "notification") if the activity involves a discharge of dredged material resulting in more than "incidental fallback" (66 FR, 4550–4575).

In addition to the "notification" provision, regional conditions may be developed by District Engineers to take into account regional differences in aquatic resource functions and values across the country and to put mechanisms into place to protect them. After identifying the geographic extent of "higher" quality aquatic systems, District Engineers can either change "notification" thresholds, or require "notification" for all activities within a particular watershed or waterbody to

ensure that NWP use and authorization only occurs for activities with minimal adverse effects, individually and cumulatively. Furthermore, Corps Division Engineers can suspend or revoke the use of certain NWPs within the bounds of high value aquatic systems if the use of NWPs would result in more than minimal adverse effects to the aquatic environment, individually or cumulatively.

Although minimal adverse effects are anticipated for the NWP Program, the use of NWPs may still affect the aquatic environment. Therefore, General Condition 19, "Mitigation", describes how District Engineers will require compensatory mitigation with other aquatic resources or vegetated buffers in order to offset the authorized impacts to the extent necessary to ensure minimal adverse effects on the aquatic environment. The purpose of this condition is twofold; one, to maintain national goals of no net loss of functions and values, and two, to offset any cumulative adverse effects to the aquatic environment. The Corps has determined that the NWP authorizations, along with the ability to place regional conditions or case-specific conditions, or require Individual Permits as appropriate, will not cause more than minimal individual or cumulative adverse effects to waters of the US. Compensatory mitigation can be accomplished through the restoration, creation, enhancement, and/or preservation of aquatic resources either by individual projects constructed by the permittee, or the use of mitigation banks, in lieu fee programs, or other consolidated mitigation efforts.

#### **Vegetated Buffers**

An important component of compensatory mitigation is the establishment and maintenance of vegetated buffers adjacent to open and flowing waters. Vegetated buffers adjacent to open waters or streams may consist of either uplands or wetlands, both of which help protect and enhance local water quality and aquatic habitat features for a particular waterbody. Vegetated buffers can be established by maintaining an existing vegetated area adjacent to open or flowing waters, or by planting native trees, shrubs, and herbaceous perennials in areas with little existing perennial native vegetation.

The use of vegetated buffers as mitigation for NWP activities is discussed in General Condition 19. Vegetated buffers next to streams and other open waters provide many of the same functions that wetlands provide. In fact, many vegetated buffers will be

wetlands. Due to their proximity to open waters, vegetated buffers are more effective at protecting open waters than wetlands distant from those open waters. The following is a list of the functions provided by vegetated buffers published in the July 21, 1999, **Federal Register** notice to reissue NWPs. In general, vegetated buffers next to streams and open waters provide the following functions: (1) Reduce adverse effects to water quality by removing nutrients and pollutants from surface runoff; (2) reduce concentrations of nutrients and pollutants in subsurface water that flows into streams and other open waters; (3) moderate storm flows to streams, which reduces downstream flooding and degradation of aquatic habitat; (4) stabilize soil (through plant roots), which reduces erosion in the vicinity of the open waterbody; (5) provide shade to the waterbody, which moderates water temperature changes and provides a more stable aquatic habitat for fish and other aquatic organisms; (6) provide detritus, which is a food source for many aquatic organisms; (7) provide large woody debris from riparian zones, which furnishes cover and habitat for aquatic organisms and may cause the formation of pools in the stream channel; (8) provide habitat to a wide variety of aquatic and terrestrial species; (9) trap sediments, thereby reducing degradation of the substrate that provides habitat for fish and other aquatic organisms (e.g., some fish species depend upon gravel stream beds for spawning habitats); and (10) provide corridors for movement and dispersal of many species of wildlife. In addition, vegetated buffers next to streams may provide additional flood storage capacity and groundwater recharge functions.

The Corps statutory authority to require vegetated buffers next to streams and other open waters originates in the goal of the CWA which is to restore and maintain the chemical, physical and biological integrity of Nation's waters. This goal is stated in Section 101 of the CWA and is applicable to all sections of the CWA, including Section 404. The establishment of vegetated buffers next to streams and other open waters helps maintain the chemical, physical, and biological integrity of our waters. The Corps believes that requiring vegetated buffers along flowing streams and other open waters is one of the most important forms of compensatory mitigation. Requiring the establishment of vegetated buffers by the Corps, as mitigation, is one of the best ways that the Corps can ensure the CWA Section

101 goals are met. For all of these reasons, the Corps is proposing to revise General Condition 19 to allow a waiver of the requirement of one-for-one wetlands mitigation, in cases where the Corps determines that some other form of mitigation, such as establishment of vegetated buffers, is more appropriate. The Corps requests comments on this proposed revision.

#### **NEPA Compliance**

The Corps recognizes that there has been, and continues to be, substantial interest by the public regarding the potential environmental effects associated with the implementation of the Corps NWP Program. The Corps is committed to ensuring that no more than minimal adverse effects on the aquatic environment, individually and cumulatively, will occur and we will continue to carefully evaluate potential environmental effects of the program as we move to reissue the NWPs. The Corps has prepared Environmental Assessments (EA) for each issued or reissued NWP in the past, including those issued in 1996 and 2000. Those EAs each resulted in a Finding of No Significant Impact (FONSI). The Corps will again prepare EAs for each proposed reissuance of a NWP in this proposal to determine whether an Environmental Impact Statement (EIS) should be prepared. These EAs will consider the environmental effects of each NWP from a national perspective and each Corps District and Division Engineer will supplement the EAs to evaluate regional environmental effects. Where more than minimal adverse effects on the aquatic environment may occur, Corps Division Engineers will establish regional conditions to further protect the aquatic environment and ensure that any adverse effects will be no more than minimal.

We are continuing to improve data collection and monitoring efforts associated with the NWP Program. Our efforts include accumulating information on the verified uses of the NWPs, acreage impacts, affected resource types, the geographic location of the activities, and the type of mitigation provided. This information is important, and was used as the Corps made permitting and policy decisions regarding the continued role of the Corps NWP Program. The objective is to ensure that the NWP Program continues to authorize only those activities with no more than minimal individual and cumulative adverse effects on the aquatic environment.

The Corps determined that preparation of an EIS was not required, in both 1996 and 2000, for issuing any

of the specific NWP. In addition, the Corps made a FONSI on June 23, 1998, for the NWP Program. This finding is determined on the basis that the NWP Program has limitations and procedures that ensure the Corps authorizes only those activities that have no more than minimal adverse effects on the aquatic environment, both individually and cumulatively. This threshold (i.e. no more than minimal adverse effects) is lower than the threshold for requiring an EIS (a copy of the FONSI is available on our web page at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/nw98fons.htm>).

The Corps is committed to ensuring and demonstrating that the NWP Program, as a whole, authorizes only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment. Consistent with this commitment, in March of 1999, the Corps began preparation of a PEIS to evaluate procedures and processes, provided information on the overall environmental impacts of the NWP Program using available data from the Corps databases, and evaluate how the Corps uses NWP, Regional General Permits, Letters of Permission, or other mechanisms to authorize projects. Thus, environmental impacts, alternative methods of operating the NWP Program, as well as shifting authorizations that are currently done under the NWP Program to other permitting methods, will be evaluated. The Corps recognizes that the PEIS will provide information useful to those commenting on the proposed reissuance of the NWP, and thus will make the draft PEIS available for comment by July 31, 2001, and will provide for a 30 day overlap in the comment periods of today's NWP package and the draft PEIS. The draft PEIS will be announced in the **Federal Register**, and will be available on the Corps Institute for Water Resources web page <http://www.iwr.usace.army.mil/iwr/Regulatory/regulintro.htm>. We anticipate final PEIS completion by early 2002.

#### **Executive Order 11988—Floodplain Management**

The Corps believes that the NWP Program, with its national, regional and case-by-case limitations, procedures and mitigation, fully complies with Executive Order 11988. This includes the "Floodplain Management Guidelines for Implementing Executive Order 11988" issued by the U.S. Water Resources Council, and "Further Advice on Executive Order 11988 Floodplain Management" issued by the Interagency Task Force on Floodplain Management.

"Further Advice on Executive Order 11988 Floodplain Management" states that class review of repetitive actions proposed in 100-year floodplains can be conducted in full compliance with Executive Order 11988. The Corps is currently conducting a formal class review of the NWP and will summarize the results of the review in the preamble to the final rule.

#### **Process for Reissuing the NWP**

The Corps is proposing to reissue all NWP, General Conditions, and definitions with some modifications. We are proposing to modify NWP 14, 21, 27, 31, 37, 39, 40, 42, and 43. In addition, we are proposing to modify General Conditions 4, 9, 13, 19, 21, 26, and add a new General Condition 27.

The Corps reissued NWP on December 13, 1996, with most of the NWP contained within that notice set to expire February 11, 2002. On June 7, 2000, the Corps issued five new NWP to replace NWP 26, modified six existing NWP, modified six General Conditions, and added two new General Conditions. The five new and six modified NWP will expire five years from their effective date of June 7, 2000. In order to reduce the confusion regarding when three separate sets of NWP expire, it is the Corps intent to consolidate all issued, reissued and modified NWP, and General Conditions contained within this notice will become effective and expire on the same date.

The reissuance process starts with today's publication of the proposed NWP in the **Federal Register** and concurrent release of public notices by Corps District Offices for a 45-day comment period. There will be a public hearing in Washington, D.C. to solicit comments on the proposed NWP. We will review the comments received in response to this **Federal Register** notice and the public hearing with a task force that includes Corps Regulatory field personnel. This process will take approximately 60-days. Upon completion of our initial review of the comments, we will complete a draft of the final NWP and solicit comments from interested Federal agencies. The final version of the NWP will be published in the **Federal Register** by November 13, 2001. The NWP will then become effective by February 11, 2002. This schedule provides a 90-day period for the state 401/CZM agencies to complete their certification decisions. Also within this 90-day period, the Corps will finalize its regional conditions and certify that the NWP, with any regional conditions or geographic revocations, will only

authorize activities with minimal adverse effects on the aquatic environment, both individually and cumulatively. The NWP will become effective at the end of the 90-day period. The Corps regional conditioning and 401/CZM certification processes are discussed elsewhere in this notice.

#### **Regional Conditioning of Nationwide Permits**

The Corps is committed to reissuing NWP that result in no more than minimal adverse effects on the aquatic environment. An important element in achieving this goal is the successful implementation of the regional conditioning process. The coordinated involvement of tribes, state and Federal agencies, Corps Districts, and solicitation of public comments, assist the Corps in identifying appropriate regional conditions on the reissued NWP. Moreover, effective regional conditioning protects aquatic systems at the local level and helps ensure that Corps Districts remain in compliance with statutory requirements that NWP have no more than minimal adverse effects on the aquatic environment, both individually and cumulatively.

There are two types of regional conditions. Conditions added as a result of states Section 401 Water Quality Certification/Coastal Zone Management Act (401/CZM) concurrence. Second, by Corps Divisions, in coordination with Corps Districts, state and Federal agencies, tribes, and the public. In accordance with Corps regulations at 33 CFR 330.5 (c) & (d), any state 401/CZM conditions for an NWP become regional conditions for that NWP. The Corps District public notices concerning the final NWP must include any 401/CZM regional conditions. Division Engineers will add Corps required regional conditions to NWP after a public notice comment period.

Each Corps District will issue a public notice for the proposed reissuance of NWP approximately concurrent with this **Federal Register** notice. The public notice will include (1) Corps proposed regional conditions, if any, that are applicable to any of the proposed NWP; and (2) the existing Corps regional conditions, if any. This initial public notice will also request comments or suggestions for additional Corps regional conditions for the NWP. The initial public notice may also include, for informational purposes only, any state or tribal 401/CZM regional conditions. However, the public does not have the opportunity to comment on the state or tribal 401/CZM regional conditions through the Corps. A separate state or tribal process

involves the public regarding state or tribal 401/CZM certifications, including 401/CZM regional conditions. Each Corps District will announce the final state or tribal 401/CZM determinations, including any 401/CZM regional conditions in the final NWP public notice.

The initial public notices will request that the general public and other agencies submit comments on the NWPs and any regional conditions proposed by the Corps. These comments should suggest additional implementation of Corps regional conditions in specific watersheds or waterbodies, or possibly suspending or revoking NWPs in certain geographic areas, specific watersheds or waterbodies. Comments should have data to support the need to the extent practicable.

Before the effective date of NWPs, each Division Engineer will prepare supplemental decision documents addressing the regional conditions for each NWP. Each decision document will include a statement by the Division Engineer, certifying that any Corps regional conditions imposed on the NWPs will ensure that those NWPs will authorize only activities with minimal adverse effects. After the Division Engineer establishes the Corps regional conditions, each Corps District will issue final public notices announcing the final 401/CZM determinations, including 401/CZM regional conditions and Corps regional conditions. Each Corps District may propose additional Corps regional condition in future public notices, as they determine necessary.

Corps regional conditions can be applied to large geographic areas. Examples include a state or county, particular watersheds or waterbody (e.g. Lower Kaskaskia River basin or Carlyle Lake), or a specific type of water of the US (e.g., Meramec Spring) focusing on issues relating to the aquatic environment within each Corps District. The regional conditions are used to ensure that the effects of the NWP Program on the aquatic environment are minimal, both individually and cumulatively. Examples of Corps regional conditions that may be used by Corps Districts to restrict the use of the NWPs include:

- Restricting the types of waters of the US where the NWPs may be used (e.g., fens, hemi-marshes, bottomland hardwoods, etc.) or prohibiting the use of some or all of the NWPs in those types of waters or in specific watersheds;
- Restricting or prohibiting the use of NWPs in areas covered by a Special Area Management Plan, or an Advanced

Identification study with associated Regional General Permits;

- Adding "notification" requirements to NWPs to require pre-construction notification (PCN) for all work in certain watersheds or certain types of waters of the US, or lowering the PCN threshold;
- Reducing the acreage thresholds in certain types of waters of the US;
- Revoking certain NWPs on a geographic or watershed basis;
- Restricting activities authorized by NWPs to certain times of the year in certain waters of the US, to minimize the adverse effects of those activities on areas used by fish or shellfish for spawning, nesting wildlife, or other ecologically cyclical events.

The Corps regional conditions implemented by each Corps District do not supersede the General Conditions of the NWP Program. The General Conditions address the Endangered Species Act, the National Historic Preservation Act of 1966, the Wild and Scenic Rivers Act, Section 401 Water Quality Certification, Coastal Zone Management, navigation, and other applicable laws. Given the extent of the coordination already mandated by Federal law, the addition of regional conditions at the state, tribal, watershed, or geographic level will help ensure that important public interest factors are considered when evaluating projects for NWP authorization.

Comments on regional issues and regional conditions must be sent to the appropriate District Engineer, as indicated below:

#### Alabama

Mobile District Engineer, ATTN: CESAM-OP-S, 109 St. Joseph Street, Mobile, AL 36602-3630

#### Alaska

Alaska District Engineer, ATTN: CEPOA-CO-R, P.O. Box 898, Anchorage, AK 99506-0898

#### Arizona

Los Angeles District Engineer, ATTN: CESPL-CO-R, P.O. Box 2711, Los Angeles, CA 90053-2325

#### Arkansas

Little Rock District Engineer, ATTN: CESWL-CO-P, P.O. Box 867, Little Rock, AR 72203-0867

#### California

Sacramento District Engineer, ATTN: CESPK-CO-O, 1325 J Street, Sacramento, CA 95814-4794

#### Colorado

Albuquerque District Engineer, ATTN: CESPA-CO-R, 4101 Jefferson Plaza NE, Room 313, Albuquerque, NM 87109

#### Connecticut

New England District Engineer, ATTN: CENAE-OD-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-CO-R, P.O. Box 4970, Jacksonville, FL 32202-4412

#### Georgia

Savannah District Engineer, ATTN: CESAS-OP-F, P.O. Box 889, Savannah, GA 31402-0889

#### Hawaii

Honolulu District Engineer, ATTN: CEPOH-ET-PO, Building 230, Fort Shafter, Honolulu, HI 96858-5440

#### Idaho

Walla Walla District Engineer, ATTN: CENWW-OP-RF, 210 N. Third Street, City-County Airport, Walla Walla, WA 99362-1876

#### Illinois

Rock Island District Engineer, ATTN: CEMVR-RD, P.O. Box 004, Rock Island, IL 61204-2004

#### Indiana

Louisville District Engineer, ATTN: CELRL-OR-F, P.O. Box 59, Louisville, KY 40201-0059

#### Iowa

Rock Island District Engineer, ATTN: CEMVR-RD, P.O. Box 2004, Rock Island, IL 61204-2004

#### Kansas

Kansas City District Engineer, ATTN: CENWK-OD-P, 700 Federal Building, 601 E. 12th Street, Kansas City, MO 64106-2896

#### Kentucky

Louisville District Engineer, ATTN: CELRL-OR-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-OD-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-OD-R, 696 Virginia Road, Concord, MA 01742-2751

**Michigan**

Detroit District Engineer, ATTN: CELRE-CO-L, P.O. Box 1027, Detroit, MI 48231-1027

**Minnesota**

St. Paul District Engineer, ATTN: CEMVP-CO-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-P, 700 Federal Building, 601 E. 12th Street, Kansas City, MO 64106-2896

**Montana**

Omaha District Engineer, ATTN: CENWO-OP-R, 215 N. 17th Street, Omaha, NE 68102-4978

**Nebraska**

Omaha District Engineer, ATTN: CENWO-OP-R, 215 N. 17th Street, Omaha, NE 68102-4978

**Nevada**

Sacramento District Engineer, ATTN: CESPK-CO-O, 1325 J Street, Sacramento, CA 95814-2922

**New Hampshire**

New England District Engineer, ATTN: CENAE-OD-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: CESWA-CO-R, 4101 Jefferson Plaza NE, Room 313, Albuquerque, NM 87109

**New York**

New York District Engineer, ATTN: CENAN-OP-R, 26 Federal Plaza, New York, NY 10278-9998

**North Carolina**

Wilmington District Engineer, ATTN: CESAW-CO-R, P.O. Box 1890, Wilmington, NC 28402-1890

**North Dakota**

Omaha District Engineer, ATTN: CENWO-OP-R, 215 North 17th Street, Omaha, NE 68102-4978

**Ohio**

Huntington District Engineer, ATTN: CELRH-OR-F, 502 8th Street, Huntington, WV 25701-2070

**Oklahoma**

Tulsa District Engineer, ATTN: CESWT-OD-R, P.O. Box 61, Tulsa, OK 74121-0061

**Oregon**

Portland District Engineer, ATTN: CENWP-PE-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-OD-R, 696 Virginia Road, Concord, MA 01742-2751

**South Carolina**

Charleston District Engineer, ATTN: CESAC-CO-P, P.O. Box 919, Charleston, SC 29402-0919

**South Dakota**

Omaha District Engineer, ATTN: CENWO-OP-R, 215 North 17th Street, Omaha, NE 68102-4978

**Tennessee**

Nashville District Engineer, ATTN: CELRN-OR-F, P.O. Box 1070, Nashville, TN 37202-1070

**Texas**

Ft. Worth District Engineer, ATTN: CESWF-OD-R, P.O. Box 17300, Ft. Worth, TX 76102-0300

**Utah**

Sacramento District Engineer, ATTN: CESPK-CO-O, 1325 J Street, CA 95814-2922

**Vermont**

New England District Engineer, ATTN: CENAE-OD-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 98124-2255

**West Virginia**

Huntington District Engineer, ATTN: CELRH-OR-F, 502 8th Street, Huntington, WV 25701-2070

**Wisconsin**

St. Paul District Engineer, ATTN: CEMVP-CO-R, 190 Fifth Street East, St. Paul, MN 55101-1638

**Wyoming**

Omaha District Engineer, ATTN: CENWO-OP-R, 215 North 17th Street, NE 68102-4978

**District of Columbia**

Baltimore District Engineer, ATTN: CENAB-OP-R, P.O. Box 1715, Baltimore, MD 21203-1715

**Pacific Territories**

Honolulu District Engineer, ATTN: CEPOH-ET-PO, Building 230, Fort Shafter, Honolulu, HI 96858-5440

**Puerto Rico & Virgin Islands**

Jacksonville District Engineer, ATTN: CESAJ-CO-R, P.O. Box 4970, Jacksonville, FL 32202-4412

**Tribal, State and CZM Certification of Nationwide Permits**

Tribal or state Water Quality Certification pursuant to Section 401 of the CWA, or waiver thereof, is required for activities authorized by NWP's which may result in a discharge into waters of the US. In addition, any state with a Federally approved Coastal Zone Management (CZM) plan must agree with the Corps determination that activities authorized by NWP's which are within, or will affect any land or water uses or natural resources of the state's coastal zone, are consistent with the CZM plan. Section 401 Water Quality Certifications and/or CZM consistency determinations may be conditioned, denied, or issued for parts of the NWP's.

The Corps believes that, in general, the activities authorized by the NWP's will not violate tribal or state water quality standards and will be consistent with state CZM plans. The NWP's are conditioned to ensure that adverse environmental effects will be minimal and are the types of activities that would be routinely authorized, if evaluated under the Individual Permit process. The Corps recognizes that in some tribes or states there will be a need to add regional conditions, or individual tribal or state review for some activities to ensure compliance with water quality standards or consistency with CZM plans. As a practical matter, the Corps intends to work with tribes or states to ensure that NWP's include the necessary conditions so that the tribe or state can issue 401 Water Quality Certifications or CZM consistency agreements. Therefore, each Corps District will initiate discussions with their respective tribe or state, as appropriate, following publication of this proposal to discuss issues of concern and identify regional modification and other approaches to the scope of waters, activities, discharges, and "notification", as appropriate, to resolve these issues. Note some states have adopted State Programmatic General Permits (SPGP) and the NWP's have been wholly or partially revoked. Concurrent with today's proposal, Corps Districts may be proposing modification or revocation of the NWP's in states where SPGP's will be

used in place of some or the entire NWP Program.

### Section 401 of the Clean Water Act (CWA)

This **Federal Register** notice serves as the Corps application to the tribes, states, or EPA, where appropriate, for Section 401 Water Quality Certification of the activities authorized by these NWPs. The tribes, states, and EPA, where appropriate, are requested to issue, deny, or waive certification pursuant to 33 CFR 330.4(c) for these NWPs.

If a state denies a Section 401 Water Quality Certification for an NWP within that state, then the Corps will deny NWP authorization for the affected activities within that state without prejudice. However, when applicants request approval of such activities, and the Corps determines that those activities meet the terms and conditions of the NWP, the Corps will issue provisional NWP verification letters. The provisional verification letter will contain general and regional conditions as well as any project specific conditions the Corps determines are necessary. The Corps will notify the applicant that they must obtain a project specific Section 401 Water Quality Certification, or waiver thereof, before starting work in waters of the US. Anyone wanting to perform such activities where a "notification" is not required must first obtain a project specific Section 401 Water Quality Certification or waiver thereof from the state before proceeding under the NWP. This requirement is provided at 33 CFR 330.4(c).

### Section 307 of the Coastal Zone Management Act (CZMA)

This **Federal Register** notice serves as the Corps determination that the activities authorized by these NWPs are, to the maximum extent practicable, consistent with states' CZM Programs. This determination is contingent upon the addition of state CZM conditions and/or regional conditions, or the issuance by the state of an individual consistency concurrence, where necessary. The states are requested to agree or disagree with the consistency determination following 33 CFR 330.4(d) for these NWPs.

The Corps CZMA consistency determination only applies to NWP authorizations for activities that are within, or affect, any land, water uses or natural resources of a state's coastal zone. NWP authorizations for activities that are not within or would not affect a states' coastal zone are not contingent on such states' agreement or

disagreement with the Corps consistency determinations.

If a state disagrees with the Corps consistency determination for an NWP, then the Corps will deny authorization for the activities within or that would affect the coastal zone without prejudice. However, when applicants request approval of such activities, and the Corps determines that those activities meet the terms and conditions of the NWP, the Corps will issue provisional NWP verification letters. The provisional verification letter will contain general and regional conditions as well as any project specific conditions the Corps determines are necessary. The Corps will notify the applicant that they must obtain a project specific CZMA consistency determination before starting work in waters of the US. Anyone wanting to perform such activities where "notification" is not required must present a consistency certification to the appropriate state agency for concurrence. Upon concurrence with such consistency certifications by the state, the activity would be authorized by the NWP. This requirement is provided at 33 CFR 330.4(d).

### Discussion for Comment

#### *Nationwide Permits*

We are proposing to reissue, without any changes to the terms and conditions, all NWPs and NWP General Conditions not discussed in the following preamble. The following discussion focuses only on specific NWP or NWP General Condition changes or modifications being proposed for the reissued permits.

#### 14. Linear Transportation Projects

The Corps is proposing to simplify NWP 14. We are proposing to simplify the terms and conditions for authorizing discharges of dredged or fill material for public and private projects in tidal and non-tidal waters. We propose to treat both public and private transportation projects the same for tidal and non-tidal waters. We believe that the impacts to the aquatic environment for transportation projects will be essentially the same whether the project is public or private, although on average we would expect the private transportation projects to be smaller. However, we continue to believe that a distinction needs to be made for such projects concerning tidal and non-tidal waters. Therefore, we are proposing to retain the smaller acreage limit in the existing permit for tidal waters. For all linear transportation projects in non-tidal waters, the acreage limit would be

1/2-acre, and for tidal waters, the acreage limit would be 1/3-acre. This change would allow private transportation projects in non-tidal waters to have a maximum acreage of 1/2-acre instead of the current 1/3-acre. Our proposal will simplify three categories of waters (tidal, private, and public non-tidal) into two categories (tidal and non-tidal). There would be no change in acreage limits for other transportation projects.

To eliminate varying interpretations of the 200 linear-foot prohibition, we are proposing to remove this prohibition from the NWP. Although we propose simplifying the basis for use of this permit, we do not anticipate any significant practical effect from this change as the limiting factor contained in the terms and conditions of NWP 14 is generally the acreage limitation. The "notification" threshold (i.e. 1/10-acre for areas without special aquatic sites, and all proposed projects that would involve fill in special aquatic sites) allows the Corps to do a case-by-case review. This will ensure that any NWP 14 activity that exceeds this threshold will have a minimal adverse effect on the aquatic environment. Very few projects exceeding 200 linear-feet would remain below the 1/10-acre "notification" threshold. For example, a 200" by 22" wide transportation crossing would impact 4,400 sq. ft. (i.e., 1/10-acre). Because the Corps will review, case-by-case, every project involving 1/10-acre of impact (and every project of any size involving special aquatic sites), the 200 linear-foot prohibition is largely superfluous. In a few isolated cases, it may preclude use of the permit in situations where impacts are minimal, and for this reason (as well as simplification) we are proposing to remove it.

Some agencies have expressed concern with development pressure in coastal areas, and the importance of the tidal ecosystems. We agree with the importance of tidal ecosystems and we are not proposing to increase acreage thresholds in tidal waters. We do not believe that standardizing acreage limits for public and private projects in non-tidal waters and removing the linear-foot prohibition will cause more than minimal adverse effect when considered in conjunction with the 1/10-acre "notification" provision contained in the terms and conditions of the NWP. We believe that this "notification" requirement and the NWP General Conditions, in addition to other mechanisms such as regional conditions developed by Corps Districts, will ensure that authorized impacts have no more than minimal adverse effect on the aquatic environment.

Features of the proposed work that are integral to the linear transportation project, such as interchanges, stormwater detention basins, rail spurs or water quality enhancement measures, may also be authorized by this permit. This permit may not be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or hangars.

For all linear transportation projects, the Corps has the authority to assert discretionary authority when evaluating the magnitude of adverse effects on the aquatic environment (33 CFR 330.1(d), 330.4(e) & 330.5). The Corps Districts will determine on a case-by-case basis whether this NWP may be used for a single and complete project, or whether an Individual Permit may be required. The definition of the term "single and complete project" for linear projects can be found at 33 CFR 330.2(i). Corps Districts may also exercise discretionary authority over any project that, in the determination of the District Engineer, has the potential to result in more than minimal impact on the aquatic environment, after considering any mitigation. The Corps request comments on raising the acreage threshold to 1/2-acre for private roads in non-tidal waters, and removing the 200 linear-foot prohibition.

#### 21. Surface Coal Mining Activities

The Corps is proposing two changes to this NWP to ensure the proper focus of the NWP and to ensure adequate mitigation will be required resulting in no more than minimal adverse effects on the aquatic environment. Both of these changes will increase protection of the aquatic environment. First, the Corps is proposing to require a specific determination by the District Engineer on a case-by-case basis that the activity complies with the terms and conditions of this NWP and that adverse environmental effects are minimal both individually and cumulatively after consideration of any required mitigation before any project can be authorized. Second, the Corps is also proposing to add clarification to NWP 21 that the Corps will require mitigation when evaluating surface coal mining activities, in accordance with General Condition 19. In addition, the Corps Section 404 review will address the direct and indirect effects to the aquatic environment from the regulated discharge of fill material.

The existing permit relies primarily on any state-required mitigation under the Surface Mining Control and Reclamation Act (SMCRA) to address

impacts to the aquatic environment. The Corps has determined that this is not appropriate, as the requirements of SMCRA differ from those of the CWA and reliance on SMCRA authorization may not result in adequate mitigation of adverse aquatic impacts. Therefore, the reissued permit provides for Corps determination of appropriate mitigation in accordance with General Condition 19. Corps review is limited to the direct, indirect, and cumulative effects of fills in waters of the US. In order to ensure that appropriate mitigation is performed, and that no activities are authorized that result in greater than minimal adverse impacts, either individually or cumulatively, the revised permit also requires not only notification, but also explicit authorization by the Corps before the activity can proceed. The Corps believes that both of these changes will strengthen environmental protection for projects authorized by this permit. The Corps request comments on these proposed changes.

*Definition of Fill:* On April 20, 2000, the Corps and EPA issued a joint proposal to revise the definition of fill found at 33 CFR 323.2(e) and 40 CFR 232.2. The proposed revision would clarify that fill material means material (including, but not limited to rock, sand and earth) that has the effect of: (i) Replacing any portion of water of the US with dry land; or (ii) Changing the bottom elevation of any portion of a water of the US.

The proposed "Rule" would clarify that placement of coal mining overburden in waters of the US is considered a discharge of fill material. The agencies received approximately seventeen thousand comments on the proposed rule and are still evaluating these comments. Unless and/or until a final "Rule" is issued, the scope of coverage of this permit is determined by the current regulations and any changes to those regulations would affect only the scope of covered discharges, not the terms and conditions of the permit itself.

*Bragg Settlement Agreement:* On December 23, 1998, a settlement agreement in litigation that challenged the use of NWPs in West Virginia to regulate so-called "valley fills" associated with certain types of coal mining in that state. *Bragg v. Robertson*, Civil Action No. 2:98-0636 (S.D. W.Va.). That agreement was approved by the Court on June 17, 1999. 54F.Supp. 2d 653. While on appeal, the Fourth Circuit Court of Appeals vacated a subsequent decision issued by the District Court addressing SMCRA claims in the case (see 248 F.3d 275), that decision left

intact the 1998 settlement agreement. See 248 F.3d at 288, n.1 (noting District Court's approval of the settlement agreement). A portion of the settlement agreement states that excess rock resulting from a surface coal mining and reclamation operation which would bury a stream segment draining a watershed of 250 acres or more will generally be considered to have more than minimal adverse effects on waters of the US. Consistent with the terms of this agreement, to which the Corps is a party, the Corps will generally use its discretionary authority to require Individual Permits for coal mining activities in West Virginia that exceed the 250-acre watershed threshold. The Corps notes that this agreement was negotiated among various Federal agencies and the State of West Virginia, and relates to certain types of coal mining operations in that state. The Corps believes there are many different types of coal mining operations in other parts of the country and that the conditions of the settlement agreement may not be applicable to many of these other operations. For this reason, the terms of the agreement have not been incorporated into the permit, which by definition is nationwide in scope.

Further, we are gathering data to better understand the effects of valley fills on the aquatic environment. Therefore, at this time we are not adding additional conditions from the agreement to the NWP itself. As additional scientific data is gathered, the terms of the agreement and/or may be revised. Thus, we do not believe that we should add specific conditions from the settlement agreement to this NWP which has a term of five years. However, the Corps wishes to reiterate that it will abide by all terms of the agreement as long as it remains in effect.

It is important to the Corps that surface coal mining activities authorized by this NWP do not cause more than minimal adverse effects to the aquatic environment after considering mitigation. As such, the District Engineer will ensure that the discharge of fill material in waters of the US associated with coal mining activities are having no more than minimal adverse effects on the aquatic environment. The Corps requests comments on the proposal to reissue this NWP with two additional provisions to strengthen environmental protection. The Corps also specifically solicits comment on the appropriate of establishing environmental thresholds for determining the applicability of NWP 21, such as the acres of the watershed impacted, the nature and length of the streams, and the



environmental functions and values of the streams, among other things.

#### 27. Wetland and Riparian Restoration and Creation Activities

The Corps is not proposing any substantive change to the terms and conditions or the types of activities authorized by this NWP; we are only proposing to simplify the four categories of lands covered into three. We are proposing to combine two provisions; (a)(2) Any Federal land and (a)(4) Any private or public land. The two provisions would be listed as provision (a)(3) Any other public, private or tribal land. Initially, these two provisions were meant to cover cases which (a)(1) & (3) did not. The current structure of this NWP resulted when all Federal and privately owned lands were included in the December 13, 1996, **Federal Register** Notice (61 FR 65874–65922). The notice should have combined (a)(2) and (a)(4) at that time. Provision (a)(3) Reclaimed surface coal mine lands will be listed as provision (a)(2). This change will not affect how or if any activities will be authorized by this NWP.

#### 31. Maintenance of Existing Flood Control Facilities

The Corps is proposing to modify NWP 31 to clarify Corps policy and requirements regarding mitigation for maintenance activities. We intend to clarify documentation requirements for the baseline determination, and allow maintenance of areas that are a part of the flood control facility without constructed channels provided that the Corps approves Best Management Practices (BMPs) to ensure that environmental effects are minimal.

The Corps policy is that temporary impacts due to routine maintenance activities generally do not require mitigation to ensure that the impacts will be minimal. Although, in some cases, mitigation for maintenance activities is necessary to ensure that impacts will be minimal. However, it is neither necessary nor appropriate to impose recurring mitigation requirements for discharges of dredged or fill material associated with cyclic maintenance activities in flood control facilities. Cyclic maintenance is inherent in the continued operation of flood control facilities, and regulated discharges of dredged or fill material will inevitably occur as a result of this activity. In recognition of these facts, we propose to revise NWP 31 to explicitly authorize such discharges, and to proactively prescribe mitigation for such reasonably foreseeable, but unspecified, discharges associated with routine maintenance. We propose to accomplish

this by establishing the prerequisite approval of a “maintenance baseline” as a threshold requirement for NWP 31 eligibility in all cases other than emergency situations. The “maintenance baseline” is a description of the physical characteristics (e.g., dimensions, configuration, etc.) of the flood control facility and attendant features, within which regulated discharges associated with maintenance activities that will not increase those physical characteristics are eligible for authorization under NWP 31. The maintenance baseline will include all constructed channels and features, and areas in which no construction has occurred but which have been incorporated, as is, in the design of the flood control facility.

We are proposing to clarify that mitigation requirements should be determined and imposed as part of the approval of the maintenance baseline. Such requirements will be based on the identification and assessment of recurring discharges associated with routine maintenance, and of reasonably foreseeable temporary discharges. Recurring discharges associated with permanent features of a flood control project may only be authorized under this NWP as part of the approval of the original maintenance baseline, or as part of the approval of a revised maintenance baseline. In these cases, mitigation that specifically offsets the adverse effects of the recurring discharge in waters of the US should be required.

In addition, it is possible that future maintenance operations will require non-recurring discharges for temporary features such as staging areas, access fills for maintenance equipment, and interim storage areas for debris and excavated materials. To the extent that the need for such temporary discharges can reasonably be anticipated, a generic assessment of adverse effects should be conducted, and commensurate mitigation should be required as part of the approval of the maintenance baseline. We are proposing that minor discharges associated with such projects, such as drippings and small volume soil disturbances from excavation or earth-moving equipment, or from vehicle tires or tracks, are adequately mitigated by BMPs, and no additional mitigation will be required concerning such discharges. Note that some such discharges may meet the definition of “incidental fallback” and are not regulated under Section 404 of the CWA.

Flood control facilities are, by nature, intended to avoid or reduce the effects of floods on life and property. Thus, we are proposing to revise the permit to

allow the use of this NWP in emergency situations to authorize discharges associated with maintenance activities in flood control facilities for which no maintenance baseline has been approved. Emergency situations are those that 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, we are proposing that the determination of mitigation requirements may be deferred until the emergency maintenance is accomplished. However, in such cases a maintenance baseline will be determined and appropriate mitigation required once the emergency has passed. The emergency exception is not intended to be a substitute for advanced planning of maintenance activities. Such planning generally allows the activities to be conducted in a manner that reflects appropriate flood control needs and eliminates unnecessary adverse impacts to aquatic resources. Factors such as the functions and values of the aquatic resource impacted and the maintenance history of the facility will be considered in determining whether emergency maintenance can be authorized under this NWP. In cases where use of this permit is determined to be inappropriate, the Corps retains discretion to authorize emergency activities through an Individual Permit under its existing regulations.

In proposing these modifications of NWP 31, we are reflecting existing Corps policy regarding the maintenance of Corps-constructed Civil Works flood control projects and ecosystem restoration projects. Two key features of the Corps Civil Works project policy are to acknowledge that routine maintenance activities and resultant discharges are inherent parts of the project operation, and to address all foreseeable adverse effects through the establishment of “one-time” mitigation requirements as part of the initial authorization process. Consistent with this policy, we are proposing to modify NWP 31. We are proposing to require the approval of a maintenance baseline and determine a one-time mitigation requirement as appropriate at the time an original maintenance baseline is approved, or when any revision of the maintenance baseline is approved. In some cases, the District Engineer may determine that mitigation is not necessary for such projects in order to ensure minimal adverse impacts. In situations where mitigation requirements were considered but not



required, the discharges associated with any subsequent maintenance activities, provided they do not exceed the maintenance baseline, will not require mitigation.

The Corps also is proposing to clarify the documentation required for a determination of a maintenance baseline. In the past, our District offices and the flood control agencies have not been certain of the requirements to document the maintenance baseline. We have clarified that the flood control agency needs to document the physical characteristics and design capacity of the existing flood control facility. This can be done by submitting as-built or approved drawings and evidence of the flood control facility design capacities for approval as the maintenance baseline.

The NWP 31 will allow floodways that do not have constructed channels to be maintained. However, the flood control agency would need to establish BMPs to ensure that the adverse effects on the aquatic environment would be minimal. These areas are a part of the overall flood control project and need to be maintained despite the absence of constructed channels or hard surfaces. We believe that by establishing BMPs as part of the maintenance baseline for these areas we can ensure that these maintenance activities have minimal impacts. The Corps requests comments on the proposed changes to this NWP.

This NWP 31 does not establish a need for a Corps permit where a need does not otherwise exist. For example, some flood control projects may qualify for exemptions under Section 404(f)(1)(B) of the CWA. The 404(f)(1)(B) exemption provides for the "maintenance, including the emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, rip rap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures."

### 37. Emergency Watershed Protection and Rehabilitation

This NWP is limited to Natural Resource Conservation Service (NRCS) and U.S. Forest Service (USFS) Programs. We received a request from the Department of the Interior (DOI) to include the Wildland Fire Management Burned Area Emergency Stabilization and Rehabilitation Program (DOI Manual, Part 620, Ch. 3) to this NWP. Their letter stated, "the Department of the Interior has similar responsibilities as the Forest Service, such as suppression of wildland fires and the rehabilitation of the burned land." The letter went on to also state "that the

Department of the Interior operated both jointly and independently of the Forest Service, concerning emergency rehabilitation of public land."

As such, the Corps is proposing to modify this NWP to authorize work conducted or funded by the DOI emergency wildland fire rehabilitation Program. Including the different bureaus of the DOI that are included in this program (i.e. Bureau of Land Management (BLM), Bureau of Indian Affairs (BIA), National Park Service (NPS), US Fish and Wildlife Service (USFWS), Bureau of Reclamation (BOR)) will allow for effective management of public lands when conducting emergency wildland fire rehabilitation work. Including the DOI in this NWP allows the option for authorization of their emergency rehabilitation work that is conducted independently of the existing USFS Program.

In addition, NRCS is currently developing a PEIS which will result in modification of the existing Emergency Watershed Protection Program regulations. At this stage in the PEIS development, specific terminology is not finalized. Therefore, NRCS has recommended that the NWP 37 language be made more general by deleting the term "exigency," which may be changed in the NRCS regulations. This will ensure that the permit language remains consistent with the NRCS terminology and that necessary activities will continue to be authorized during recovery efforts caused by national disasters.

### 39. Residential, Commercial, and Institutional Developments

The Corps is proposing these changes to this NWP: (1) Simplify the subdivision provision, without substantively changing its effects, (2) delete the one-cfs restriction on stream impacts, and (3) allow a project specific waiver of the 300 linear-foot prohibition following a written determination by the Corps that any adverse environmental effects would be no more than minimal (discussed separately in the context of all affected permits below). We are proposing to reduce confusion associated with the "subdivision" provision by simplifying the language. The current subdivision provision is confusing and difficult to implement. We propose simplifying the language to read, "for residential subdivisions, the aggregate total loss of waters of the US associated with NWP 39 can not exceed 1/2-acre. This includes any loss of waters associated with the development of individual lots within the subdivision."

The impacts and full extent of fill needed for residential subdivisions

including any fill for all the lots within the subdivision will be considered initially to avoid any piecemeal approach by developers. In evaluating proposed residential community developments under NWP 39, the Corps will review the overall development plan. Where the Corps determines that total impact, including all platted lots, would clearly exceed the 1/2-acre limit, the Corps will require an Individual Permit. NWP 39 may be used more than once for a project, but the aggregate total impacts authorized may not exceed 1/2-acre. For example, if NWP 39 were used for the roads, utilities and one lot fill, and the aggregate total impacts were 1/4-acre, then the total of any subsequent use of NWP 39 within that subdivision (e.g. for individual lot fills by a subsequent homeowner) could not exceed 1/4-acre.

If additional land is purchased adjacent to the authorized residential subdivision, and future development is proposed (i.e., an additional phase or unit) then that second phase would be considered a separate project. NWP 39 could be used on this second phase (an additional new subdivision with independent utility from the first subdivision) as it was on phase one (i.e., a maximum of 1/2-acre of impacts could be authorized for phase two). However, if the Corps determines that the "phasing" of a project has been deliberately structured in advance to avoid exceeding the 1/2-acre limit, it will prohibit the use of this NWP for subdivisions that result in the loss of more than 1/2-acre of waters in total.

The Corps believes that a provision of NWP 39 (Part k) regarding stream impacts downstream of the point on a stream where the average annual flow is one-cfs unnecessarily limits the use of this permit in some cases where impacts are still minimal (e.g., a stream that has been severely degraded by livestock grazing). The Corps receives a "notification" for all activities involving 1/10-acre impact, for any project effecting more than 300 linear-feet of stream bed and all projects affecting open waters. Collectively, these provisions make it unlikely that a project affecting a stream with flow exceeding one-cfs will escape notification and individual review. The Corps believes its case-by-case review of these projects will ensure protection of the aquatic environment. As such, we are proposing to remove this provision from NWP 39. The Corps requests comment on the proposed revisions.

### 42. Recreational Facilities

In addition to the proposed change discussed below regarding this NWP (see next section), we are requesting

suggestions regarding criteria, standards and BMPs that should be applied to this NWP for recreational facilities.

Suggestions that will be considered must ensure that adverse effects on the aquatic environment are minimal and will integrate the recreational facility into the natural landscape. We will consider adopting such criteria, standards, or BMPs, where appropriate into the permit itself or through implementation of guidance. These suggestions may be generic for all recreational facilities or may be for specific types of recreation facilities.

Project Specific Waiver of 300-Linear Feet Prohibition in NWPs 39, 40, 42, and 43

For these four permits, the Corps is proposing to allow a waiver, on a case-by-case basis, of the prohibition on impacts exceeding 300 linear-feet of streambed provided the Corps determines that the impacts to the aquatic environment will be minimal. To understand why, it is important to realize that the CWA's geographic jurisdiction extends to the uppermost portions of tributary systems. Some streams extend for thousands of feet, but are extremely small. For example, a stream may consist of a drainage-way (which may have been straightened in the past by human activity) that is a six-inch wide by one-inch deep area running for several thousand feet throughout a grassy upland field. Such a stream may only have water flowing for a few days after a rain event. In some cases, this type of stream provides few, if any, aquatic functions and loss of more than 300 linear-feet of such a stream would not constitute more than minimal impacts. This is especially true if the District Engineer has reviewed the project and required appropriate mitigation measures, which ensure that the project does not have more than minimal adverse effect on the aquatic environment. In cases where the Corps is aware or becomes aware of areas that provide higher level of aquatic functions, the Corps will ensure proper protection of the aquatic environment.

As a result, the Corps believes the 300 linear-foot prohibition for activities involving residential, commercial, and institutional developments, relocation of existing serviceable drainage ditches constructed in non-tidal streams, recreation facilities, discharges or excavation for the construction of new stormwater management facilities, or for the maintenance of existing stormwater management facilities could in some cases unnecessarily restrict authorization of an otherwise minimal impact activity. Therefore, we are

proposing to allow a waiver of the 300 linear-foot prohibition on a project specific basis.

To make use of this waiver, the applicant must first notify the Corps in accordance with the "notification" General Condition that the applicant would like to exceed the 300 linear-foot limitation on impacts to streambeds. The District Engineer may waive the prohibition and authorize impacts exceeding 300 linear-feet to streams, but only if the District Engineer determines that the activity complies with the other terms and conditions of the NWP, and the adverse environmental effects on the aquatic environment will be minimal both individually and cumulatively. In making this determination, the District Engineer will consider factors such as the length of stream impacted and their water quality conditions, functions, and designations, the size of the watershed drained by those streams, potential impacts to flood retention/desynchronization functions, biological resources, known public concern, and any required mitigation. The Corps believes that Individual Permits will usually be required for projects that exceed the 300-foot limitation, and will track the exercise of the waiver provision. Note that this waiver provision is more restrictive than the notification required in other NWPs, because following notification, the Corps must make a case-specific determination that any impacts will be minimal, and notify the project proponent in writing of this determination. If the written verification by the Corps is not received, the project is not authorized.

Allowing a case-specific waiver of the prohibition provides flexibility where the adverse effects are minimal as discussed above. Given the Corps limited human resources and an increasing demand for aquatic resource protection, this flexibility allows efficiency in processing proposed projects with impacts to aquatic areas that are relatively low value, such as degraded waters of the US. This waiver provision is not intended to "relax" aquatic resource protection. It is intended to allow the Corps to focus limited resources more intensively on areas of higher quality aquatic ecosystems, or areas where impacts are likely to be more than minimal.

Although the Corps is proposing to allow a limited project-specific waiver of the 300 linear-foot prohibition on stream impacts, other conditions restrict some streambed impacts such as, channelization, special aquatic site, and shellfish beds. We continue to discourage extensive channelizing or

relocation of streambeds because of potential adverse effects on the stream and the potential to intensify downstream flooding. The District Engineers will evaluate on a case-by-case basis the need for requested authorizations to channelized or relocate streambeds for extensive lengths. Channelization of streams can have adverse impacts downstream, which under General Condition 21 must be reduced to the minimum necessary and mitigated. If it is determined by the District Engineer that the project will result in more than minimal adverse effect on the aquatic environment, the District Engineer will not grant a waiver and an Individual Permit will be required.

#### *Nationwide Permits General Conditions*

#### 4. Aquatic Life Movements

Recently, there has been confusion on the part of some members of the public over the meaning of this General Condition to suggest that if any portion of waters of the US are filled, then that would substantially disrupt the movement of aquatic life. Such an interpretation would have the effect of prohibiting virtually all discharges of dredged or fill material under NWPs. This would defeat the entire purpose of the NWP Program and that has never been our intent. Thus, we propose to clarify this General Condition.

It was not the Corps intent for this condition to be interpreted as prohibiting use of NWPs simply because aquatic life can not move into an area that was filled. Obviously, filled areas will not be used by aquatic life as if they were unfilled areas. Rather, it was always the Corps intent that this General Condition restrict the use of NWPs when the discharge of dredged or fill material into waters of US would prevent the necessary life-cycle movements of aquatic life to remaining waters of the US. For example, fills which block the movement of an anadromous fish species to an area of substantial importance as nursery grounds for juveniles. Under this General Condition, such fills would not be authorized. Our concern is not with preventing any movement within water, but with preventing movement that would substantially effect the life cycle of the aquatic life.

The condition does not automatically restrict all filling (i.e. fill placed in the upper limits of a stream may be authorized when the fill does not interfere with necessary aquatic life movement). Of course, if the loss of such waters of the US would have more than minimal adverse effects on the

aquatic environment, then NWP's could not be used to authorize such fills. However, in such cases, the decision to require an Individual Permit would not be based on this General Condition.

#### 9. Water Quality

The Corps is proposing to clarify this condition as it relates to detailed studies and documentation requirements. The changes will not reduce protection of the aquatic environment. Although the language of this condition could be interpreted to require detailed studies and design to develop water quality plans for every permit action, that was never our intent. While we do believe that inclusion of water quality management measures in project design is very important, we do not believe that comprehensive design and planning should be a requirement of Corps NWP's, except in a few cases.

In most cases, the Corps relies on state or local water quality programs. Where such programs do exist, the Corps will normally review the project to ensure that appropriate water quality features, such as stormwater retention ponds, are designed into the project. In some cases, the Corps may require more extensive design features to ensure that open water and downstream water quality are not substantially degraded. Normally, we believe that the permittee will comply with the requirements of this condition by obtaining state or local water quality approval or complying with state or local water quality practices, where such practices exist. We are proposing to add language that clarifies that permittees may meet the requirement of this condition by complying with state or local water quality practices.

#### 13. Notification

The Corps is proposing, under Contents of Notification, to provide applicants the option to provide drawings, sketches or plans sufficient for Corps review of the project to determine if the project meets the terms of a NWP. We do not intend this supplemental documentation to be detailed engineering drawings or plans. Simply, this additional information is for the Corps to review in order to efficiently determine that the project meets the terms and conditions of the NWP. Often drawings or sketches can be used to more clearly show that the project complies with the terms of an NWP. The Corps expects that most "notifications" will include a sketch that will expedite the Corps review. Applicants are encouraged to supply such drawings, but such drawings are not required for a complete

"notification" unless the Corps determines on a case-by-case basis that a sketch or drawing is necessary to show that the activity complies with the terms of the NWP.

We are proposing to add additional language to the "notification" requirement for NWP's 21, 39, 40, 42, and 43. For all projects using NWP 21, and for projects using NWP's 39, 40, 42, and 43 that propose impacting intermittent or perennial stream beds in excess of 300 linear-feet, the Corps must be notified and explicit authorization obtained before the project can proceed. In the case of NWP 21, this authorization would be based on a determination by the District Engineer that the adverse effects of the project on the aquatic environments were minimal, both individually and cumulatively, after considering mitigation. In the case of NWP's 39, 40, 42, and 43, this authorization would require a waiver of the 300 linear-foot prohibition, again based on a determination by the District Engineer that adverse effects on the aquatic environment are minimal, individually and cumulatively. These regulations are similar to the provision under NWP 13 for Bank Stabilization, in that the District Engineer must verify that the project complies with the terms and conditions of the NWP. The District Engineer must also determine that the adverse environmental effects to the aquatic environment are minimal both individually and cumulatively after considering mitigation. If the applicant has not received an explicit Corps waiver in writing for the activity, then impacts exceeding 300 linear-feet to stream beds are not authorized by NWP's 39, 40, 42, and 43.

Although the Corps is proposing to allow a waiver of the 300 linear-foot prohibition [to a "notification" requirement], we still discourage extensive channelizing or relocation of stream beds because of potential adverse effects on the stream and the potential to intensify downstream flooding. The District Engineers will evaluate on a case-by-case basis the need for requested authorizations to channelize or relocate stream beds for extensive lengths. More than minimal channelization of streams can have adverse impacts downstream and therefore under General Condition 21 the impacts must be reduced to the minimum necessary and mitigated. If the District Engineer determines that the project will result in more than minimal adverse effect on the aquatic environment, the District Engineer will not issue a waiver and an Individual Permit will be required.

We are also proposing to delete for NWP's 12, 14, 29, 39, 40, 42, 43, and 44 the requirement to provide "notification" to the Corps for permanent above grade fills in waters of the US. This change is being proposed to be consistent with the proposed changes to General Condition 26 for "Fills within 100-year Floodplains", as discussed below. This "notification" provision that the Corps is proposing to remove is not needed because of "notification" requirements elsewhere in these NWP's that the Corps is retaining.

#### 19. Mitigation

We are proposing to revise this condition to allow a case-by-case waiver of the requirement of one-for-one mitigation of adverse impacts to wetlands. This change is intended to allow Corps Districts to require the mitigation for project impacts that best protects the aquatic environment. In the case of wetland destruction, one-for-one replacement or restoration is often the most environmentally appropriate form of mitigation, and the Corps will continue to require this form of mitigation in the majority of cases. However, the Corps believes the one-for-one acreage requirement as currently written is too restrictive in that it does not allow the Corps to mitigate aquatic impacts to streams and other non-wetland aquatic resources.

Districts should have flexibility to require mitigation ratios on a case-by-case basis based on the aquatic ecosystem needs of the area. In many cases, authorized impacts may be in relatively low quality wetlands and opportunities may exist for protection, restoration or enhancement of other, higher quality aquatic resources. Districts need the flexibility to determine the best type and location for environmentally effective compensatory mitigation. In order to waive the one-for-one requirement, the District Engineer will need to determine that another form of mitigation is more environmentally appropriate.

The Corps is retaining in the proposed General Condition the preference for restoration of wetlands over preservation, when one-for-one mitigation of wetland losses is required. However, the Corps is aware that some researchers have questioned the premise that restoration is generally preferable to preservation and requests comment on whether this preference should be dropped, in order to further facilitate consideration of the most environmentally appropriate mitigation on a project specific basis.

The aquatic environment must be looked at in a holistic manner. The decision on required mitigation should factor in the total aquatic environmental assets in an area. In many cases, vegetated buffers may be more critical than replacing wetland losses acre for acre for maintaining the integrity of the aquatic environment and addressing water quality concerns. Use of vegetated buffers is an acceptable and often a better approach to protecting the integrity of the overall waters of the US in a particular area, rather than mitigating only for wetland losses in-kind. As discussed earlier in more detail, the use of vegetated buffers may be more beneficial as mitigation for direct or secondary impacts to aquatic resources associated with the regulated activity. In some cases, it may be helpful to evaluate mitigation measures needed to offset the unavoidable impacts of a permitted activity using a habitat functional analysis program, such as the Habitat Evaluation Program (HEP), the hydrogeomorphic method (HGM), or other appropriate model. The results of the functional assessment may then be considered in designing the project mitigation plan. The Corps requests comments on its proposal to allow a case-by-case waiver of the one-for-one wetlands mitigation requirement when the District Engineer determines that some other form of mitigation would be more environmentally appropriate.

#### 21. Management of Water Flows

The Corps is proposing to clarify this condition. Authorized activities or improvements to aquatic systems typically will cause deviation from pre-construction flow conditions. NWP's authorize only those activities that will have minimal adverse effect on the aquatic system including water flows. Typically, well-established design features are included as part of projects without a need for detailed engineering studies. State or local agencies often require these design features. Consequently, we believe that detailed studies and monitoring would not normally be required by this condition.

Where appropriate, the Corps will review projects to ensure that design features that address flows are included, such as limited channelization, proper design for culverts, and retention ponds, but generally will not require detailed studies of post-project flow. However, in some cases, detailed studies may be required where there is a potential for substantial impacts.

#### 26. Fills Within the 100-year Floodplain

The Corps is proposing to modify this condition to require that all projects

authorized by NWP's must comply with any applicable Federal Emergency Management Agency (FEMA) state or local floodplain management requirements. We are also proposing to delete the "notification" requirement and the requirement to document that the project meets FEMA approved requirements. The Corps has found that requiring applicants to document that they have met FEMA approved requirements has done little to change or enhance compliance with these requirements. We believe that a General Condition clearly requiring that permittees comply with FEMA approved requirements will be just as effective. General Condition 26 is applicable only to discharges of dredged or fill material in the mapped FEMA floodway or floodplain (mapping may be by FEMA or a state or local government under FEMA rules). For purposes of this General Condition, 100-year floodplains will be identified through the existing or local Flood Insurance Rate Maps or FEMA-approved state or local floodplain maps.

For NWP's 12, 14 and 29, we believe that compliance with FEMA-approved state or local floodplain management requirements (i.e., part 26(c)), compliance with General Condition 21 which addresses management of flows, and case-by-case review by the Corps of projects through the "notification" process, will ensure that impacts in floodplains are adequately addressed. As such, we propose to remove the prohibitions in 26(a) and 26(b) for these three permits. Condition 26(a) prohibits discharges resulting in above grade fills in the floodplain below the headwaters, and 26(b) prohibit discharges resulting in above grade fills in the floodway (which is narrower than the floodplain). We believe District Engineers need flexibility to address above grade fills in the floodway/ floodplain for projects using these three NWP's on a project-specific basis. The Corps requests comments on its proposed changes to this General Condition.

We have retained the prohibition against using NWP's 39, 40, 42, and 44 in the mapped floodway above the headwaters (26(b)). We have also retained the prohibition against authorizing above grade fills in the mapped floodplains by NWP's 39, 40, 42, 43, and 44 below the headwaters (26(a)). However, we believe that some activities authorized by these NWP's provide additional flood storage inherent in the project design (e.g., golf courses). As such, we believe that for projects increasing flood storage capacity, some discretion should be used in the floodplain below

headwaters. We are requesting comments on allowing projects to proceed under this condition below headwaters where the project provides additional flood storage.

As we have stated earlier in the preamble, we believe the NWP Program, with its national, regional and case-by-case limitations, procedures and mitigation, and the expanded requirements that all projects in the floodplain comply with FEMA approved management requirements, fully complies with Executive Order 11988. This includes the "Floodplain Management Guidelines for Implementing Executive Order 11988" issued by the U.S. Water Resources Council, and "Further Advice on Executive Order 11988 Floodplain Management" issued by the Interagency Task Force on Floodplain Management. "Further Advice on Executive Order 11988 Floodplain Management" states that class review of repetitive actions proposed in 100-year floodplains can be conducted in full compliance with Executive Order 11988. The Corps is currently conducting a formal review of the NWP's, and will summarize the results of this review in the preamble to the final rule.

#### 27. Construction Period

The NWP's authorize many activities that have no more than minimal adverse effects on the aquatic environment and generally involve projects that need a relatively short period for construction. For some projects, obtaining a Corps permit is one of the many steps necessary to complete that project. It may be two, three or more years after obtaining the Corps permit before the work can be completed. Under the existing NWP's, if such projects obtain a Corps NWP verification near the expiration date of the NWP, the permittee can not necessarily rely on that permit to continue in effect through the lengthy and costly process of developing and planning the project. This causes uncertainty regarding the NWP authorization for the project because the construction phase was not completed before the NWP authorization expired. Many logistical issues may delay construction projects sometimes for considerable periods.

Corps regulations at 33 CFR 330.6(b) provide that those construction activities commenced or that are under contract to commence while an NWP is in effect will remain authorized, provided the activity is completed within 12-months from the date the NWP's have expired, been modified, or revoked. This approach was developed for non-reporting NWP activities to

provide a period that permittees could rely on and finish a project that qualified for a NWP without notifying the Corps. It was also developed at a time when NWPs were issued with little or no changes. The Corps believes that this provision does not adequately address NWPs for which the permittee notifies the Corps before project commencement.

We are proposing a new General Condition for activities for which the Corps has received notification and a construction schedule has been reviewed, and verification issued by the Corps. The condition allows the Corps to establish project completion dates beyond the expiration of the NWPs. District Engineers may extend authorization of an activity by a NWP for a reasonable period to allow for project completion, however always maintaining discretionary authority provided in accordance with 33 CFR 330.4(e) and 330.5(c), or (d). If no pre-approved construction period is established then all work must be completed before the NWP expires, or is modified, or revoked, or by 12-months after if project was commenced or under contract to commence by that date.

This condition helps eliminate needless financial or logistical burden to the regulated public. NWP time limits unnecessarily restrict authorization to what may be unreasonable periods for completion of many construction activities near the end of the permit cycle, with no beneficial effects for protecting the aquatic environment. The Corps expects each District Engineer to assess each pre-approved construction period to identify aquatic areas and/or activities where the approval of an extended schedule could lead to substantial impacts with more than minimal adverse effects on the aquatic environment. In cases where approval of an extended schedule would lead to a greater than minimal adverse impacts, an extended schedule will not be approved. The Corps requests comment on this new General Condition.

*Executive Order 13212—Actions To Expedite Energy-Related Projects*

President George W. Bush signed Executive Order 13212 (66 FR 28357–28358, May 22, 2001) on May 18, 2001, directing new policy actions to expedite the increased supply and availability of energy to our Nation. This policy applies to all executive departments and agencies. The order directs all agencies to take appropriate actions, to the extent consistent with applicable law, to expedite projects that will increase energy production, transmission, or conservation of energy, while

maintaining protection of the environment. For energy-related projects, agencies shall expedite their review of permits, or take other actions as necessary to accelerate the completion of such projects, while maintaining safety, public health and environmental protections. Agencies shall take such actions to the extent permitted by law and regulation, and where appropriate.

General Permits, such as NWPs or Regional Permits provide us the opportunity to expeditiously permit activities that have minimal adverse effect, both individually and cumulatively, on the aquatic environment. As such, the Corps is requesting comments to modify or change the proposed NWPs contained within this notice, in reference to Executive Order 13212. We will consider adopting such modifications or changes, where appropriate. These suggestions may be generic to all NWPs, or for a specific NWP.

*Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (Statement of Energy Effects)*

The NWP Program is designed to regulate certain activities having minimal impacts with little, if any, delay or paperwork. NWPs allow smaller, repetitive, low impact projects with minimal effects on the aquatic environment, to be reviewed and authorized in a shorter period than larger complex projects that require an Individual Permit review. Many energy related projects, such as petroleum pipelines and electric utility lines, are expeditiously authorized by Nationwide Permits. The changes the Corps is proposing to the Nationwide Permits will maintain the expedited process for these energy related projects. Therefore, the Corps concludes that the proposed NWPs will not significantly affect the supply, distribution, and use of energy and fully complies with Executive Order 13211.

Accordingly, the Corps is proposing to reissue the existing Nationwide Permits and general conditions with minimal modifications as follows:

Dated: July 23, 2001.

**Hans A. Van Winkle,**

*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*

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5. Scientific Measurement Devices
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*Nationwide Permit General Conditions*

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#### A. 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 (USCG) (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 navigable water of the US has been previously authorized (see 33 CFR 322.5(g)). (Section 10)

3. *Maintenance.* Activities related to:

(i) 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 which are necessary to make repair, rehabilitation, or replacement are permitted, provided the adverse environmental effects resulting from such repair, rehabilitation, or replacement are minimal. Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction. 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.

(ii) Discharges of dredged or fill material, including excavation, into all waters of the US to remove 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, provided the permittee notifies the District Engineer in accordance with General Condition 13. 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. The placement of riprap must be the minimum necessary to protect the structure or to ensure the safety of the structure. All excavated materials must be deposited and retained in an upland area unless otherwise specifically approved by the District Engineer under separate authorization. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the District Engineer.

(iii) Discharges of dredged or fill material, including excavation, into all waters of the US for activities associated with the restoration of upland areas damaged by a storm, flood, or other discrete event, including the construction, placement, or installation of upland protection structures and minor dredging to remove obstructions in a water of the US. (Uplands lost as a result of a storm, flood, or other discrete event can be replaced without a Section 404 permit provided the uplands are restored to their original

pre-event location. This NWP is for the activities in waters of the US associated with the replacement of the uplands.) The permittee must notify the District Engineer, in accordance with General Condition 13, within 12-months of the date of the damage and the work must commence, or be under contract to commence, within two years of the date of the damage. The permittee should provide evidence, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. The restoration of the damaged areas cannot exceed the contours, or ordinary high water mark, that existed before the damage. 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 permit. Minor dredging to remove obstructions from the adjacent waterbody is limited to 50 cubic yards below the plane of the ordinary high water mark, and is limited to the amount necessary to restore the pre-existing bottom contours of the waterbody. The dredging may not be done primarily to obtain fill for any restoration activities. The discharge of dredged or fill material and all related work needed to restore the upland must be part of a single and complete project. This permit cannot be used in conjunction with NWP 18 or NWP 19 to restore damaged upland areas. This permit cannot be used to reclaim historic lands lost, over an extended period, to normal erosion processes. This permit does not authorize maintenance dredging for the primary purpose of navigation and beach restoration. This permit does not authorize new stream channelization or stream relocation projects. Any work authorized by this permit must not cause more than minimal degradation of water quality, more than minimal changes to the flow characteristics of the stream, or increase flooding (See General Conditions 9 and 21). (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 Section 404(f) exemption for maintenance. For example, the repair and maintenance of concrete-lined channels are exempt from Section 404 permit requirements.

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, clam and oyster digging; and small fish attraction devices such as open water

fish concentrators (sea kites, etc.). This NWP authorizes shellfish seeding provided this activity does not occur in wetlands or 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.). This NWP does not authorize artificial reefs or impoundments and semi-impoundments of waters of the US 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 and further for discharges of 10 to 25 cubic yards provided the permittee notifies the District Engineer in accordance with the "Notification" General Condition. (Sections 10 and 404)

6. *Survey Activities.* Survey activities including core sampling, seismic exploratory operations, plugging of seismic shot holes and other exploratory-type bore holes, soil survey, sampling, and historic resources surveys. 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 is not authorized by this NWP; the plugging of such wells is authorized. Fill placed for roads, pads 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 CWA. (Sections 10 and 404)

7. *Outfall Structures and Maintenance.* Activities related to:

(i) construction of outfall structures and associated intake structures where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted, or are otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System Program (Section 402 of the CWA), and

(ii) maintenance excavation, including dredging, to remove accumulated sediments blocking or restricting outfall and intake structures, accumulated sediments from small impoundments associated with outfall

and intake structures, and accumulated sediments from canals associated with outfall and intake structures, provided that the activity meets all of the following criteria:

a. The permittee notifies the District Engineer in accordance with General Condition 13;

b. The amount of excavated or dredged material must be the minimum necessary to restore the outfalls, intakes, small impoundments, and canals to original design capacities and design configurations (i.e., depth and width);

c. The excavated or dredged material is deposited and retained at an upland site, unless otherwise approved by the District Engineer under separate authorization; and

d. Proper soil erosion and sediment control measures are used to minimize reentry of sediments into waters of the US.

The construction of intake structures is not authorized by this NWP, unless they are directly associated with an authorized outfall structure. For maintenance excavation and dredging to remove accumulated sediments, the notification must include information regarding the original design capacities and configurations of the facility and the presence of special aquatic sites (e.g., vegetated shallows) in the vicinity of the proposed work. (Sections 10 and 404)

8. *Oil and Gas Structures.* 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 DOI, Minerals Management Service (MMS). 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). (Where such limits have not been designated, or where changes are anticipated, District Engineers will consider asserting discretionary authority in accordance with 33 CFR 330.4(e) and will also review such proposals to ensure they comply with the provisions of the fairway regulations in 33 CFR 322.5(l). Any Corps review under this permit 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. (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 USCG 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 and repair of utility lines and associated facilities in waters of the US as follows:

(i) *Utility lines:* 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 US, provided there is no change in preconstruction 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 (see Note 1, below). Material resulting from trench excavation may be temporarily sidecast (up to three months) into waters of the US, 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 not to exceed a total of 180 days, where appropriate. In wetlands, the top 6" to 12" of the trench should normally be backfilled with topsoil from the trench. Furthermore, the trench cannot be constructed in such a manner as to drain waters of the US (e.g., backfilling with extensive gravel layers, creating a french drain effect). For example, utility line trenches can be backfilled with clay blocks to ensure that the trench does not drain the waters of the US through which the utility line is installed. Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

(ii) *Utility line substations:* The construction, maintenance, or expansion of a substation facility associated with a power line or utility



line in non-tidal waters of the US, excluding non-tidal wetlands adjacent to tidal waters, provided the activity does not result in the loss of greater than 1/2-acre of non-tidal waters of the US.

(iii) *Foundations for overhead utility line towers, poles, and anchors:* The construction or maintenance of foundations for overhead utility line towers, poles, and anchors in all waters of the US, 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.

(iv) *Access roads:* 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 US, excluding non-tidal wetlands adjacent to tidal waters, provided the discharges do not cause the loss of greater than 1/2-acre of non-tidal waters of the US. Access roads shall be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes the adverse effects on waters of the US and as near as possible to preconstruction contours and elevations (e.g., at grade corduroy roads or geotextile/gravel roads). Access roads constructed above preconstruction contours and elevations in waters of the US must be properly bridged or culverted to maintain surface flows.

The term "utility line" does not include activities which drain a water of the US, such as drainage tile, or french drains; however, it does apply to pipes conveying drainage from another area. For the purposes of this NWP, the loss of waters of the US includes the filled area plus waters of the US that are adversely affected by flooding, excavation, or drainage as a result of the project. Activities authorized by paragraph (i) and (iv) may not exceed a total of 1/2-acre loss of waters of the US. Waters of the US temporarily affected by filling, flooding, excavation, or drainage, where the project area is restored to preconstruction contours and elevation, is not included in the calculation of permanent loss of waters of the US. This includes temporary construction mats (e.g., timber, steel, geotextile) used during construction and removed upon completion of the work. Where certain functions and values of waters of the US are permanently adversely affected, such as the conversion of a forested wetland to a herbaceous wetland in the permanently maintained utility line right-of-way, mitigation will be required to reduce the adverse effects of the project to the minimal level.

Mechanized land clearing necessary for the construction, maintenance, or repair of utility lines and the construction, maintenance and expansion of utility line substations, foundations for overhead utility lines, and access roads is authorized, provided the cleared area is kept to the minimum necessary and preconstruction contours are maintained as near as possible. The area of waters of the US that is filled, excavated, or flooded must be limited to the minimum necessary to construct the utility line, substations, foundations, and access roads. Excess material must be removed to upland areas immediately upon completion of construction. This NWP may authorize utility lines in or affecting navigable waters of the US even if there is no associated discharge of dredged or fill material (See 33 CFR Part 322).

*Notification:* The permittee must notify the District Engineer in accordance with General Condition 13, if any of the following criteria are met:

- (a) Mechanized land clearing in a forested wetland for the utility line right-of-way;
- (b) A Section 10 permit is required;
- (c) The utility line in waters of the US, excluding overhead lines, exceeds 500 feet;
- (d) The utility line is placed within a jurisdictional area (i.e., water of the US), and it runs parallel to a stream bed that is within that jurisdictional area;
- (e) Discharges associated with the construction of utility line substations that result in the loss of greater than 1/10-acre of waters of the US; or
- (f) Permanent access roads constructed above grade in waters of the US for a distance of more than 500 feet.
- (g) Permanent access roads constructed in waters of the US with impervious materials. (Sections 10 and 404)

**Note 1:** 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; except for pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the US, which are considered to be bridges, not utility lines, and may require a permit from the USCG pursuant to Section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material associated with such pipelines will require a Corps permit under Section 404.

**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 and the area restored to preconstruction contours,

elevations, and wetland conditions. Temporary access roads for construction may be authorized by NWP 33.

**Note 3:** Where the proposed utility line is constructed or installed in navigable waters of the US (i.e., Section 10 waters), copies of the PCN 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.

13. *Bank Stabilization.* Bank stabilization activities necessary for erosion prevention provided the activity meets all of the following criteria:

- a. No material is placed more than the minimum needed for erosion protection;
- b. The bank stabilization activity is less than 500 feet in length;
- 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;
- d. No material is placed in any special aquatic site, including wetlands;
- 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 wetland area;
- 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 part of a single and complete project.

Bank stabilization activities in excess of 500 feet in length or greater than an average of one cubic yard per running foot may be authorized if the permittee notifies the District Engineer in accordance with the "Notification" General Condition 13 and the District Engineer determines the activity complies with the other terms and conditions of the NWP and the adverse environmental effects are minimal both individually and cumulatively. This NWP may not be used for the channelization of waters of the US. (Sections 10 and 404)

14. *Linear Transportation Projects.* Activities required for the construction, expansion, modification, or improvement of linear transportation crossings (e.g., highways, railways, trails, airport runways, and taxiways) in waters of the US, including wetlands, if the activity meets the following criteria:

- a. This NWP is subject to the following acreage limits:
  - (1) For linear transportation projects in non-tidal waters, provided the discharge does not cause the loss of greater than 1/2-acre of waters of the US;
  - (2) For linear transportation projects in tidal waters, provided the discharge does not cause the loss of greater than 1/3-acre of waters of the US.

b. The permittee must notify the District Engineer in accordance with General Condition 13 if any of the following criteria are met:

(1) The discharge causes the loss of greater than  $\frac{1}{10}$ -acre of waters of the US; or

(2) There is a discharge in a special aquatic site, including wetlands;

c. The notification must include a compensatory mitigation proposal to offset permanent losses of waters of the US to ensure that those losses result only in minimal adverse effects to the aquatic environment and a statement describing how temporary losses will be minimized to the maximum extent practicable;

d. For discharges in special aquatic sites, including wetlands, and stream riffle and pool complexes, the notification must include a delineation of the affected special aquatic sites;

e. The width of the fill is limited to the minimum necessary for the crossing;

f. This permit does not authorize stream channelization, and the authorized activities must not cause more than minimal changes to the hydraulic flow characteristics of the stream, increase flooding, or cause more than minimal degradation of water quality of any stream (see General Conditions 9 and 21);

g. This permit 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; and

h. The crossing is a single and complete project for crossing waters of the US. Where a road segment (i.e., the shortest segment of a road with independent utility that is part of a larger project) has multiple crossings of streams (several single and complete projects) the Corps will consider whether it should use its discretionary authority to require an Individual Permit. (Sections 10 and 404)

**Note:** Some discharges for the construction of farm roads, forest roads, or temporary roads for moving mining equipment may be eligible for an exemption from the need for a Section 404 permit (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 US, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills provided such discharges have been authorized by the USCG as part of the bridge permit. Causeways and approach fills are not included in this NWP and will require an individual or regional Section 404 permit. (Section 404)

16. *Return Water From Upland Contained Disposal Areas.* Return water from upland, contained dredged material disposal area. The dredging itself may require a Section 404 permit (33 CFR 323.2(d)), but will require a Section 10 permit if located in navigable waters of the US. 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. (Section 404)

17. *Hydropower Projects.* Discharges of dredged or fill material associated with (a) small hydropower projects at existing reservoirs where the project, which includes the fill, are licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; and has a total generating capacity of not more than 5000 kW; and the permittee notifies the District Engineer in accordance with the "Notification" General Condition; or (b) hydropower projects for which the FERC has granted an exemption from licensing 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; provided the permittee notifies the District Engineer in accordance with the "Notification" General Condition. (Section 404)

18. *Minor Discharges.* Minor discharges of dredged or fill material into all waters of the US if 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, including any excavated area, will not cause the loss of more than  $\frac{1}{10}$ -acre of a special aquatic site, including wetlands. For the purposes of this NWP, the acreage limitation includes the filled area and excavated area plus special aquatic sites that are adversely affected by flooding and special aquatic sites that are drained so that they would no longer be a water of the US as a result of the project;

c. If the discharge, including any excavated area, exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line or if the discharge is in a special aquatic site, including wetlands, the permittee

notifies the District Engineer in accordance with the "Notification" General Condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands (also see 33 CFR 330.1(e)); and

d. The discharge, including all attendant features, both temporary and permanent, is part of a single and complete project and is not placed for the purpose of a stream diversion. (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 US (i.e., Section 10 waters) as part of a single and complete project. 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 US (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 which 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 part 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. (Sections 10 and 404)

21. *Surface Coal Mining Activities.* Discharges of dredged or fill material into waters of the US associated with surface coal mining and reclamation operations provided the coal mining activities are authorized by the 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 and provided the permittee notifies the District Engineer in accordance with the "Notification" General Condition. In addition, to be authorized by this NWP, the District Engineer must determine that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are minimal both individually and cumulatively and must notify the project sponsor of this determination in writing. The Corps, at the discretion of

the District Engineer, may require a bond to ensure success of the mitigation, if no other Federal or state agency has required one. For discharges in special aquatic sites, including wetlands, and stream riffle and pool complexes, the notification must also include a delineation of affected special aquatic sites, including wetlands. (also, see 33 CFR 330.1(e))

Mitigation: In determining the need for as well as the level and type of mitigation, the District Engineer will ensure no more than minimal adverse effects to the aquatic environment occur. As such, District Engineers will determine on a case-by-case basis the requirement for adequate mitigation to ensure the effects to aquatic systems are minimal. In cases where OSM or the state has required mitigation for the loss of aquatic habitat, the Corps may consider this in determining appropriate mitigation under Section 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 the removal of vessels listed or determined eligible for listing on the National Register of Historic Places unless the District Engineer is notified and indicates that there is compliance with the "Historic Properties" General Condition. This NWP does not authorize maintenance dredging, shoal removal, or riverbank snagging. Vessel disposal in waters of the US may need a permit from EPA (see 40 CFR 229.3). (Sections 10 and 404)

23. *Approved Categorical Exclusions.* Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where that agency or department has determined, pursuant to the Council on Environmental Quality Regulation for Implementing the Procedural Provisions of the National Environmental Policy Act (NEPA) (40 CFR part 1500 *et seq.*), that the activity, work, or discharge 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 the Office of the Chief of Engineers (ATTN: CECW-OR) has been furnished notice of the agency's or department's application for the categorical exclusion and concurs with that determination. Before approval for purposes of this NWP of any agency's categorical exclusions, the Chief of Engineers will solicit public

comment. In addressing these comments, the Chief of Engineers may require certain conditions for authorization of an agency's categorical exclusions under this NWP. (Sections 10 and 404)

24. *State Administered Section 404 Program.* Any activity permitted by a state 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. Those activities that do not involve a Section 404 state permit are not included in this NWP, but certain structures will be exempted by Section 154 of Public Law 94-587, 90 Stat. 2917 (33 U.S.C. 591) (see 33 CFR 322.3(a)(2)). (Section 10)

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 US. (Section 404)

26. [Reserved]

27. *Stream and Wetland Restoration Activities.* Activities in waters of the US associated with the restoration of former waters, the enhancement of degraded tidal and non-tidal wetlands and riparian areas, the creation of tidal and non-tidal wetlands and riparian areas, and the restoration and enhancement of non-tidal streams and non-tidal open water areas as follows:

(a) The activity is conducted on:

(1) Non-Federal public lands and private lands, in accordance with the terms and conditions of a binding wetland enhancement, restoration, or creation agreement between the landowner and the U.S. Fish and Wildlife Service (FWS) or the Natural Resources Conservation Service (NRCS) or voluntary wetland restoration, enhancement, and creation actions documented by the NRCS pursuant to NRCS regulations; or

(2) 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 (the future reversion does not apply to streams or

wetlands created, restored, or enhanced as mitigation for the mining impacts, nor naturally due to hydrologic or topographic features, nor for a mitigation bank); or

(3) Any other public, private or tribal lands;

(b) Notification: For activities on any public or private land that are not described by paragraphs (a)(1) or (a)(2) above, the permittee must notify the District Engineer in accordance with General Condition 13; and

(c) Planting of only native species should occur on the site.

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 creation of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or create 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; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation; mechanized land clearing to remove undesirable vegetation; and other related activities.

This NWP does not authorize the conversion of a stream to another aquatic use, such as the creation of an impoundment for waterfowl habitat. This NWP does not authorize stream channelization. This NWP does not authorize the conversion of natural wetlands to another aquatic use, such as creation of waterfowl impoundments where a forested wetland previously existed. However, this NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands, on the project site provided there are net gains in aquatic resource functions and values. For example, this NWP may authorize the creation of an open water impoundment in a non-tidal emergent wetland, provided the non-tidal emergent wetland is replaced by creating that wetland type on the project site. 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 creation projects conducted under paragraphs (a)(3), 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. For restoration, enhancement, and creation projects conducted under paragraphs (a)(1) and (a)(2), 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 creation activities). The reversion must occur within five years after expiration of a limited term wetland restoration or creation agreement or permit, even if the discharge occurs after this NWP expires. This NWP also authorizes the reversion of wetlands that were restored, enhanced, or created on prior-converted cropland that has not been abandoned, in accordance with a binding agreement between the landowner and NRCS or FWS (even though the restoration, enhancement, or creation activity did not require a Section 404 permit). The five-year reversion limit does not apply to agreements without time limits reached under paragraph (a)(1). 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 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 will be at that future date. (Sections 10 and 404)

**Note:** Compensatory mitigation is not required for activities authorized by this NWP, provided the authorized work results in a net increase in aquatic resource functions and values in the project area. This NWP can be used to authorize compensatory mitigation projects, including mitigation banks, provided the permittee notifies the District Engineer in accordance with General Condition 13, and the project includes compensatory mitigation for impacts to waters of the US caused by the authorized work. However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition. NWP 27 can be used to authorized impacts at a mitigation bank, but only in circumstances where it has been approved under the Interagency Federal Mitigation Bank Guidelines.

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 US is authorized by this NWP. (Section 10)

29. *Single-family Housing:* Discharges of dredged or fill material into non-tidal waters of the US, including non-tidal wetlands for the construction or expansion of a single-family home and attendant features (such as a garage, driveway, storage shed, and/or septic field) for an Individual Permittee provided that the activity meets all of the following criteria:

a. The discharge does not cause the loss of more than 1/4-acre of non-tidal waters of the US, including non-tidal wetlands;

b. The permittee notifies the District Engineer in accordance with the "Notification" General Condition;

c. The permittee has taken all practicable actions to minimize the on-site and off-site impacts of the discharge. For example, the location of the home may need to be adjusted on-site to avoid flooding of adjacent property owners;

d. The discharge is part of a single and complete project; furthermore, that for any subdivision created on or after November 22, 1991, the discharges authorized under this NWP may not exceed an aggregate total loss of waters of the US of 1/4-acre for the entire subdivision;

e. An individual may use this NWP only for a single-family home for a personal residence;

f. This NWP may be used only once per parcel;

g. This NWP may not be used in conjunction with NWP 14 or NWP 18, for any parcel; and,

h. Sufficient vegetated buffers must be maintained adjacent to all open water bodies, streams, etc., to preclude water quality degradation due to erosion and sedimentation.

For the purposes of this NWP, the acreage of loss of waters of the US includes the filled area previously permitted, the proposed filled area, and any other waters of the US that are adversely affected by flooding, excavation, or drainage as a result of the project. This NWP authorizes activities only by individuals; for this purpose, the term "individual" refers to a natural person and/or a married couple, but does not include a corporation, partnership, or similar entity. For the purposes of this NWP, a parcel of land is defined as "the entire contiguous quantity of land in possession of, recorded as property of, or owned (in any form of ownership, including land owned as a partner, corporation, joint tenant, etc.) by the same individual (and/or that individual's spouse), and comprises not only the area of wetlands

sought to be filled, but also all land contiguous to those wetlands, owned by the individual (and/or that individual's spouse) in any form of ownership." (Section 10 and 404)

30. *Moist Soil Management for Wildlife.* Discharges of dredged or fill material and maintenance activities that are associated with moist soil management for wildlife performed on non-tidal Federally-owned or managed and state-owned or managed property, 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: The repair, maintenance or replacement of existing water control structures; the repair or maintenance of dikes; and plowing or discing to impede succession, prepare seed beds, or establish fire breaks. Sufficient vegetated buffers must be maintained adjacent to all open water bodies, streams, etc., to preclude water quality degradation due to erosion and sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, etc. associated with the management areas. This NWP does not authorize converting wetlands to uplands, impoundments or other open water bodies. (Section 404)

31. *Maintenance of Existing Flood Control Facilities.* Discharge of dredge or fill material resulting from activities associated with the maintenance of existing flood control facilities, including debris basins, retention/detention basins, 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 it was 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. Activities including the discharges of dredged or fill materials, associated with maintenance activities in flood control facilities in any watercourse that has previously been determined to be within the maintenance baseline, are authorized under this NWP. The NWP does not authorize the removal of sediment and associated vegetation from the natural water courses except to the extent that these 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 US, and proper siltation controls must be used. (Activities of any kind that result in only incidental fallback, or only the cutting and removing of vegetation above the ground, e.g., mowing, rotary cutting, and chainsawing, where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material, do not require a Section 404 permit in accordance with 33 CFR 323.2(d)(2)(ii)).

**Notification:** After the maintenance baseline is established, and before any maintenance work is conducted, the permittee must notify the District Engineer in accordance with the "Notification" General Condition. The 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.

**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. If no evidence of the constructed capacity exist, the approved constructed capacity will be used. 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 design capacities of the flood control facility. The documentation will also include BMPs 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 can not 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 permit does not authorize maintenance of a flood control facility 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 BMPs 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. (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 CWA 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 CWA, provided that:

a. The unauthorized activity affected no more than 5 acres of non-tidal wetlands or 1 acre of tidal wetlands;

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 U.S. under Section 404 of the CWA and/or Section 10 of the Rivers and Harbors Act of 1899. For either (i) or (ii) above, 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 or fails to complete the work by the specified completion date. 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 USCG, or for other construction activities not subject to the Corps or USCG regulations. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must be of materials, and placed in a manner, that will not be eroded by expected high flows. The use of dredged material may be allowed if it is determined by the District Engineer

that it will not cause more than minimal adverse effects on aquatic resources. Temporary fill must be entirely removed to upland areas, or dredged material returned to its original location, following completion of the construction activity, and the affected areas must be restored to the pre-project conditions. Cofferdams cannot be used to dewater wetlands or other aquatic areas to change their use. Structures left in place after cofferdams are removed require a Section 10 permit if located in navigable waters of the US (See 33 CFR part 322). The permittee must notify the District Engineer in accordance with the "Notification" General Condition. The notification must also include a restoration plan of reasonable measures to avoid and minimize adverse effects to aquatic resources. The District Engineer will add Special Conditions, where necessary, to ensure environmental adverse effects is minimal. Such conditions may include: limiting the temporary work to the minimum necessary; requiring seasonal restrictions; modifying the restoration plan; and requiring alternative construction methods (e.g. construction mats in wetlands where practicable.). (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 provided that the activity meets all of the following criteria:

a. The cumulative total acreage of disturbance per cranberry production operation, including but not limited to, filling, flooding, ditching, or clearing, does not exceed 10 acres of waters of the US, including wetlands;

b. The permittee notifies the District Engineer in accordance with the "Notification" General Condition. The notification must include a delineation of affected special aquatic sites, including wetlands; and,

c. The activity does 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. (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. Additionally, dredging boat slips to

previously authorized depths or dredging to controlling depths for ingress/egress, provided the dredged material is disposed of at an upland site and proper siltation controls are used. (Section 10)

36. *Boat Ramps.* Activities required for the construction of boat ramps provided:

a. The discharge into waters of the US does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or placement of pre-cast concrete planks or slabs. (unsuitable material that causes unacceptable chemical pollution or is structurally unstable is not authorized);

b. The boat ramp does not exceed 20 feet in width;

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.

Another NWP, Regional General Permit, or Individual Permit may authorize dredging to provide access to the boat ramp after obtaining a Section 10 if located in navigable waters of the US. (Sections 10 and 404)

37. *Emergency Watershed Protection and Rehabilitation.* Work done by or funded by:

a. The NRCS which is a situation requiring immediate action under its emergency Watershed Protection Program (7 CFR part 624); and

b. Work done or funded by the USFS under its Burned-Area Emergency Rehabilitation Handbook (FSH 509.13); or

c. Work done or funded by the DOI for wildland fire management burned area emergency stabilization and rehabilitation (DOI Manual Part 620, Ch. 3);

For all of the above provisions, the District Engineer must be notified in accordance with the General Condition 13. (Also, see 33 CFR 330.1(e)). (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 provided the permittee notifies the District Engineer in accordance with the "Notification" General Condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. 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. 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 CWA or Section 10 of the Rivers and Harbors Act. (Sections 10 and 404)

39. *Residential, Commercial, and Institutional Developments.* Discharges of dredged or fill material into non-tidal waters of the US, excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of residential, 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, stormwater management facilities, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development). The construction of new ski areas or oil and gas wells is not authorized by this NWP.

Residential developments include multiple and single unit developments. 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 activities listed above are authorized, provided the activities meet all of the following criteria:

a. The discharge does not cause the loss of greater than  $\frac{1}{10}$ -acre of non-tidal waters of the US, excluding non-tidal wetlands adjacent to tidal waters;

b. The discharge does not cause the loss of greater than 300 linear-feet of a stream bed, unless this criterion is waived in writing pursuant to a determination by the District Engineer, as specified below, that the project complies with all terms and conditions of this NWP and that any adverse impacts of the project on the aquatic environment are minimal, both individually and cumulatively;

c. The permittee must notify the District Engineer in accordance with General Condition 13, if any of the following criteria are met:

(1) The discharge causes the loss of greater than  $\frac{1}{10}$ -acre of non-tidal waters of the US, excluding non-tidal wetlands adjacent to tidal waters; or

(2) The discharge causes the loss of any open waters, including perennial or intermittent streams, below the ordinary high water mark (see Note, below); or

(3) The discharge causes the loss of greater than 300 linear feet of perennial or intermittent stream bed. In such case, to be authorized the District Engineer must determine that the activity complies with the other terms and conditions of the NWP, determine adverse environmental effects are minimal both individually and cumulatively, and waive the limitation on stream impacts in writing before the permittee may proceed;

d. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of affected special aquatic sites;

e. The discharge is part of a single and complete project;

f. The permittee must avoid and minimize discharges into waters of the US at the project site to the maximum extent practicable. The notification, when required, must include a written statement explaining how avoidance and minimization of losses of waters of the US were achieved on the project site. Compensatory mitigation will normally be required to offset the losses of waters of the US. (See General Condition 19.) The notification must also include a compensatory mitigation proposal for offsetting unavoidable losses of waters of the US. If an applicant asserts that the adverse effects of the project are minimal without mitigation, then the applicant may submit justification explaining why compensatory mitigation should not be required for the District Engineer's consideration;

g. When this NWP is used in conjunction with any other NWP, any combined total permanent loss of waters of the US exceeding  $\frac{1}{10}$ -acre requires that the permittee notify the District Engineer in accordance with General Condition 13;

h. Any work authorized by this NWP must not cause more than minimal degradation of water quality or more than minimal changes to the flow characteristics of any stream (see General Conditions 9 and 21);

i. For discharges causing the loss of  $\frac{1}{10}$ -acre or less of waters of the US, the permittee must submit a report, within 30 days of completion of the work, to the District Engineer that contains the following information: (1) The name, address, and telephone number of the permittee; (2) The location of the work;

(3) A description of the work; (4) The type and acreage of the loss of waters of the US (e.g.,  $\frac{1}{12}$ -acre of emergent wetlands); and (5) The type and acreage of any compensatory mitigation used to offset the loss of waters of the US (e.g.,  $\frac{1}{12}$ -acre of emergent wetlands created on-site); and

j. If there are any open waters or streams within the project area, the permittee will establish and maintain, to the maximum extent practicable, wetland or upland vegetated buffers next to those open waters or streams consistent with General Condition 19. Deed restrictions, conservation easements, protective covenants, or other means of land conservation and preservation are required to protect and maintain the vegetated buffers established on the project site.

Only residential, commercial, and institutional activities with structures on the foundation(s) or building pad(s), as well as the attendant features, are authorized by this NWP. The compensatory mitigation proposal that is required in paragraph (e) of this NWP may be either conceptual or detailed. The wetland or upland vegetated buffer required in paragraph (i) of this NWP will be determined on a case-by-case basis by the District Engineer for addressing water quality concerns. The required wetland or upland vegetated buffer is part of the overall compensatory mitigation requirement for this NWP. If the project site was previously used for agricultural purposes and the farm owner/operator used NWP 40 to authorize activities in waters of the US to increase production or construct farm buildings, NWP 39 cannot be used by the developer to authorize additional activities. This is more than the acreage limit for NWP 39 impacts to waters of the US (i.e., the combined acreage loss authorized under NWPs 39 and 40 cannot exceed  $\frac{1}{2}$ -acre, see General Condition 15).

**SUBDIVISIONS:** For residential subdivisions, the aggregate total loss of waters of US authorized by NWP 39 can not exceed  $\frac{1}{2}$ -acre. This includes any loss of waters associated with development of individual subdivision lots. (Sections 10 and 404)

**Note:** Areas where wetland vegetation is not present should be determined by the presence or absence of an ordinary high water mark or bed and bank. Areas that are waters of the US based on this criterion would require a PCN although water is infrequently present in the stream channel (except for ephemeral waters, which do not require PCNs).

**40. Agricultural Activities.** Discharges of dredged or fill material into non-tidal waters of the US, excluding non-tidal

wetlands adjacent to tidal waters, for improving agricultural production and 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 US; and similar activities, provided the permittee complies with the following terms and conditions:

a. For discharges into non-tidal wetlands to improve agricultural production, the following criteria must be met if the permittee is an United States Department of Agriculture (USDA) Program participant:

(1) The permittee must obtain a categorical minimal effects exemption, minimal effect exemption, or mitigation exemption from NRCS in accordance with the provisions of the Food Security Act of 1985, as amended (16 U.S.C. 3801 *et seq.*);

(2) The discharge into non-tidal wetlands does not result in the loss of greater than  $\frac{1}{2}$ -acre of non-tidal wetlands on a farm tract;

(3) The permittee must have NRCS-certified wetland delineation;

(4) The permittee must implement an NRCS-approved compensatory mitigation plan that fully offsets wetland losses, if required; and

(5) The permittee must submit a report, within 30 days of completion of the authorized work, to the District Engineer that contains the following information: (a) The name, address, and telephone number of the permittee; (b) The location of the work; (c) A description of the work; (d) The type and acreage (or square feet) of the loss of wetlands (e.g.,  $\frac{1}{3}$ -acre of emergent wetlands); and (e) The type, acreage (or square feet), and location of compensatory mitigation (e.g.  $\frac{1}{3}$ -acre of emergent wetland on farm tract; credits purchased from a mitigation bank); or

b. For discharges into non-tidal wetlands to improve agricultural production, the following criteria must be met if the permittee is not a USDA Program participant (or a USDA Program participant for which the proposed work does not qualify for authorization under paragraph (a) of this NWP):

(1) The discharge into non-tidal wetlands does not result in the loss of greater than  $\frac{1}{2}$ -acre of non-tidal wetlands on a farm tract;

(2) The permittee must notify the District Engineer in accordance with General Condition 13, if the discharge results in the loss of greater than  $\frac{1}{10}$ -acre of non-tidal wetlands;



(3) The notification must include a delineation of affected wetlands; and

(4) The notification must include a compensatory mitigation proposal to offset losses of waters of the US; or

c. For the construction of building pads for farm buildings, the discharge does not cause the loss of greater than 1/2-acre of non-tidal wetlands that were in agricultural production prior to December 23, 1985, (i.e., farmed wetlands) and the permittee must notify the District Engineer in accordance with General Condition 13; and

d. Any activity in other waters of the US is limited to the relocation of existing serviceable drainage ditches constructed in non-tidal streams. This NWP does not authorize the relocation of greater than 300 linear-feet of existing serviceable drainage ditches constructed in non-tidal streams unless the District Engineer waives this criterion in writing, and the District Engineer has determined that the project complies with all terms and conditions of this NWP, and that any adverse impacts of the project on the aquatic environment are minimal, both individually and cumulatively. For impacts exceeding 300-linear feet of impacts to existing serviceable ditches, the permittee must notify the District Engineer in accordance with the "Notification" General Condition 13; and

e. The term "farm tract" refers to a parcel of land identified by the Farm Service Agency. The Corps will identify other waters of the US on the farm tract. NRCS will determine if a proposed agricultural activity meets the terms and conditions of paragraph a. of this NWP, except as provided below. For those activities that require notification, the District Engineer will determine if a proposed agricultural activity is authorized by paragraphs b., c., and/or d. of this NWP. USDA Program participants requesting authorization for discharges of dredged or fill material into waters of the US authorized by paragraphs (c) or (d) of this NWP, in addition to paragraph (a), must notify the District Engineer in accordance with General Condition 13 and the District Engineer will determine if the entire single and complete project is authorized by this NWP. Discharges of dredged or fill material into waters of the US associated with completing required compensatory mitigation are authorized by this NWP. However, total impacts, including other authorized impacts under this NWP, may not exceed the 1/2-acre limit of this NWP. This NWP does not affect, or otherwise regulate, discharges associated with agricultural activities when the discharge qualifies for an exemption

under Section 404(f) of the CWA, even though a categorical minimal effects exemption, minimal effect exemption, or mitigation exemption from NRCS pursuant to the Food Security Act of 1985, as amended, may be required. Activities authorized by paragraphs a. through d. may not exceed a total of 1/2-acre on a single farm tract. If the site was used for agricultural purposes and the farm owner/operator used either paragraphs a., b., or c. of this NWP to authorize activities in waters of the US to increase agricultural production or construct farm buildings, and the current landowner wants to use NWP 39 to authorize residential, commercial, or industrial development activities in waters of the US on the site, the combined acreage loss authorized by NWPs 39 and 40 cannot exceed 1/2-acre (see General Condition 15). (Section 404)

41. *Reshaping Existing Drainage Ditches.* Discharges of dredged or fill material into non-tidal waters of the US, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of currently serviceable drainage ditches constructed in waters of the US. The reshaping of the ditch cannot increase drainage capacity beyond the original design capacity. Nor can it expand the area drained by the ditch as originally designed (i.e., the capacity of the ditch must be the same as originally designed and it cannot drain additional wetlands or other waters of the US). Compensatory mitigation is not required because the work is designed to improve water quality (e.g., by regrading the drainage ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, increase uptake of nutrients and other substances by vegetation, etc.).

Notification: The permittee must notify the District Engineer in accordance with General Condition 13 if greater than 500 linear feet of drainage ditch will be reshaped. Material resulting from excavation may not be permanently sidecast into waters but may be temporarily sidecast (up to three months) into waters of the US, 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 sidecasting not to exceed a total of 180 days, where appropriate. This NWP does not apply to reshaping drainage ditches constructed in uplands, since these areas are not waters of the US, and thus no permit from the Corps is required, or to the maintenance of existing drainage ditches to their original dimensions and configuration,

which does not require a Section 404 permit (see 33 CFR 323.4(a)(3)). This NWP does not authorize the relocation of drainage ditches constructed in waters of the US; 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. (Section 404)

42. *Recreational Facilities.* Discharges of dredged or fill material into non-tidal waters of the US, excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of recreational facilities, provided the activity meets all of the following criteria:

a. The discharge does not cause the loss of greater than 1/2-acre of non-tidal waters of the US, excluding non-tidal wetlands adjacent to tidal waters;

b. The discharge does not cause the loss of greater than 300 linear-feet of a stream bed, unless this criterion is waived in writing pursuant to a determination by the District Engineer, as specified below, that the project complies with all terms and conditions of this NWP and that any adverse impacts of the project on the aquatic environment are minimal, both individually and cumulatively;

c. The permittee notifies the District Engineer in accordance with the "Notification" General Condition 13 for discharges exceeding 300 linear feet of impact to perennial or intermittent stream beds. In such cases, to be authorized the District Engineer must determine that the activity complies with the other terms and conditions of the NWP, determine the adverse environmental effects are minimal both individually and cumulatively, and waive this limitation in writing before the permittee may proceed;

d. For discharges causing the loss of greater than 1/10-acre of non-tidal waters of the US, the permittee notifies the District Engineer in accordance with General Condition 13;

e. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of affected special aquatic sites;

f. The discharge is part of a single and complete project; and

g. Compensatory mitigation will normally be required to offset the losses of waters of the US. The notification must also include a compensatory mitigation proposal to offset authorized losses of waters of the US.

For the purposes of this NWP, the term "recreational facility" is defined as a recreational activity that is integrated into the natural landscape and does not

substantially change preconstruction grades or deviate from natural landscape contours. For the purpose of this permit, the primary function of recreational facilities does not include the use of motor vehicles, buildings, or impervious surfaces. Examples of recreational facilities that may be authorized by this NWP include hiking trails, bike paths, horse paths, nature centers, and campgrounds (excluding trailer parks). This NWP may authorize the construction or expansion of golf courses and the expansion of ski areas, provided the golf course or ski area does not substantially deviate from natural landscape contours. Additionally, these activities are designed to minimize adverse effects to waters of the US and riparian areas through the use of such practices as integrated pest management, adequate stormwater management facilities, vegetated buffers, reduced fertilizer use, etc. The facility must have an adequate water quality management plan in accordance with General Condition 9, such as a stormwater management facility, to ensure that the recreational facility results in no substantial adverse effects to water quality. 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. This NWP does not authorize other buildings, such as hotels, restaurants, etc. The construction or expansion of playing fields (e.g., baseball, soccer, or football fields), basketball and tennis courts, racetracks, stadiums, arenas, and the construction of new ski areas are not authorized by this NWP. (Section 404)

**43. Stormwater Management Facilities.** Discharges of dredged or fill material into non-tidal waters of the US, excluding non-tidal wetlands adjacent to tidal waters, for the construction and maintenance of stormwater management facilities, including activities for 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, provided the activity meets all of the following criteria:

a. The discharge for the construction of new stormwater management facilities does not cause the loss of greater than 1/2-acre of non-tidal waters of the US, excluding non-tidal wetlands adjacent to tidal waters;

b. The discharge does not cause the loss of greater than 300 linear-feet of a stream bed, unless this criterion is waived in writing pursuant to a determination by the District Engineer, as specified below, that the project complies with all terms and conditions of this NWP and that any adverse impacts of the project on the aquatic environment are minimal, both individually and cumulatively;

c. For discharges causing the loss of greater than 300 linear feet of perennial or intermittent stream beds, the permittee notifies the District Engineer in accordance with the "Notification" General Condition 13. In such cases, to be authorized the District Engineer must determine that the activity complies with the other terms and conditions of the NWP, determine the adverse environmental effects are minimal both individually and cumulatively, and waive this limitation in writing before the permittee may proceed;

d. The discharges of dredged or fill material for the construction of new stormwater management facilities in perennial streams is not authorized;

e. For discharges or excavation for the construction of new stormwater management facilities or for the maintenance of existing stormwater management facilities causing the loss of greater than 1/10-acre of non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, provided the permittee notifies the District Engineer in accordance with the "Notification" General Condition 13. In addition, the notification must include:

(1) A maintenance plan. The maintenance plan should be in accordance with state and local requirements, if any such requirements exist;

(2) For discharges in special aquatic sites, including wetlands and submerged aquatic vegetation, the notification must include a delineation of affected areas; and

(3) A compensatory mitigation proposal that offsets the loss of waters of the US. Maintenance in constructed areas will not require mitigation provided such maintenance is accomplished in designated maintenance areas and not within compensatory mitigation areas (i.e., District Engineers may designate non-maintenance areas, normally at the downstream end of the stormwater management facility, in existing stormwater management facilities). (No mitigation will be required for activities that are exempt from Section 404 permit requirements);

f. The permittee must avoid and minimize discharges into waters of the

US at the project site to the maximum extent practicable, and the notification must include a written statement to the District Engineer detailing compliance with this condition (i.e. why the discharge must occur in waters of the US and why additional minimization cannot be achieved);

g. The stormwater management facility must comply with General Condition 21 and be designed using BMPs and watershed protection techniques. Examples may include forebays (deeper areas at the upstream end of the stormwater management facility that would be maintained through excavation), vegetated buffers, and siting considerations to minimize adverse effects to aquatic resources. Another example of a BMP would be bioengineering methods incorporated into the facility design to benefit water quality and minimize adverse effects to aquatic resources from storm flows, especially downstream of the facility, that provide, to the maximum extent practicable, for long term aquatic resource protection and enhancement;

h. Maintenance excavation will be in accordance with an approved maintenance plan and will not exceed the original contours of the facility as approved and constructed; and

i. The discharge is part of a single and complete project. (Section 404)

**44. Mining Activities.** Discharges of dredged or fill material into:

(i) Isolated waters; streams where the annual average flow is 1 cubic foot per second or less, and non-tidal wetlands adjacent to headwater streams, for aggregate mining (i.e., sand, gravel, and crushed and broken stone) and associated support activities;

(ii) Lower perennial streams, excluding wetlands adjacent to lower perennial streams, for aggregate mining activities (support activities in lower perennial streams or adjacent wetlands are not authorized by this NWP); and/or

(iii) Isolated waters and non-tidal wetlands adjacent to headwater streams, for hard rock/mineral mining activities (i.e., extraction of metalliferous ores from subsurface locations) and associated support activities, provided the discharge meets the following criteria:

a. The mined area within waters of the US, plus the acreage loss of waters of the US resulting from support activities, cannot exceed 1/2-acre;

b. The permittee must avoid and minimize discharges into waters of the US at the project site to the maximum extent practicable, and the notification must include a written statement detailing compliance with this

condition (i.e., why the discharge must occur in waters of the US and why additional minimization cannot be achieved);

c. In addition to General Conditions 17 and 20, activities authorized by this permit must not substantially alter the sediment characteristics of areas of concentrated shellfish beds or fish spawning areas. Normally, the mandated water quality management plan should address these impacts;

d. The permittee must implement necessary measures to prevent increases in stream gradient and water velocities and to prevent adverse effects (e.g., head cutting, bank erosion) to upstream and downstream channel conditions;

e. Activities authorized by this permit must not result in adverse effects on the course, capacity, or condition of navigable waters of the US;

f. The permittee must use measures to minimize downstream turbidity;

g. Wetland impacts must be compensated through mitigation approved by the Corps;

h. Beneficiation and mineral processing for hard rock/mineral mining activities may not occur within 200 feet of the ordinary high water mark of any open waterbody. Although the Corps does not regulate discharges from these activities, a CWA Section 402 permit may be required;

i. All activities authorized must comply with General Conditions 9 and 21. Further, the District Engineer may require modifications to the required water quality management plan to ensure that the authorized work results in minimal adverse effects to water quality;

j. Except for aggregate mining activities in lower perennial streams, no aggregate mining can occur within stream beds where the average annual flow is greater than 1 cubic foot per second or in waters of the US within 100 feet of the ordinary high water mark of headwater stream segments where the average annual flow of the stream is greater than 1 cubic foot per second (aggregate mining can occur in areas immediately adjacent to the ordinary high water mark of a stream where the average annual flow is 1 cubic foot per second or less);

k. Single and complete project: The discharge must be for a single and complete project, including support activities. Discharges of dredged or fill material into waters of the US for multiple mining activities on several designated parcels of a single and complete mining operation can be authorized by this NWP provided the 1/2-acre limit is not exceeded; and

l. Notification: The permittee must notify the District Engineer in accordance with General Condition 13. The notification must include: (1) A description of waters of the US adversely affected by the project; (2) A written statement to the District Engineer detailing compliance with paragraph (b), above (i.e., why the discharge must occur in waters of the US and why additional minimization cannot be achieved); (3) A description of measures taken to ensure that the proposed work complies with paragraphs (c) through (f), above; and (4) A reclamation plan (for aggregate mining in isolated waters and non-tidal wetlands adjacent to headwaters and hard rock/mineral mining only).

This NWP does not authorize hard rock/mineral mining, including placer mining, in streams. No hard rock/mineral mining can occur in waters of the US within 100 feet of the ordinary high water mark of headwater streams. The term's "headwaters" and "isolated waters" are defined at 33 CFR 330.2(d) and (e), respectively. For the purposes of this NWP, the term "lower perennial stream" is defined as follows: "A stream in which the gradient is low and water velocity is slow, there is no tidal influence, some water flows throughout the year, and the substrate consists mainly of sand and mud." (Sections 10 and 404)

### C. Nationwide Permit General Conditions

The following General Conditions must be followed in order for any authorization by an NWP to be valid:

1. *Navigation.* No activity may cause more than a minimal adverse effect on navigation.

2. *Proper Maintenance.* Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.

3. *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.

4. *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.

5. *Equipment.* Heavy equipment working in wetlands must be placed on mats, or other measures must be taken to minimize soil disturbance.

6. *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)). Additionally, any case specific conditions added by the Corps or by the state or tribe in its Section 401 Water Quality Certification and Coastal Zone Management Act consistency determination.

7. *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).

8. *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.

9. *Water Quality.* (a) In certain states and tribal lands an individual 401 Water Quality Certification must be obtained or waived (See 33 CFR 330.4(c)).

(b) For NWPs 12, 14, 17, 18, 32, 39, 40, 42, 43, and 44, where the state or tribal 401 certification (either generically or individually) does not require or approve water quality management measures, the permittee must provide water quality management measures that will ensure that the authorized work does not result in more than minimal degradation of water quality (or the Corps determines that compliance with state or local standards, where applicable, will ensure no more than minimal adverse effect on water quality). An important component of water quality management includes stormwater management that minimizes degradation of the downstream aquatic system, including water quality (refer to General Condition 21 for stormwater management requirements). Another important component of water quality management is the establishment and maintenance of vegetated buffers next to open waters, including streams (refer to

General Condition 19 for vegetated buffer requirements for the NWP).

This condition is only applicable to projects that have the potential to affect water quality. While appropriate measures must be taken, in most cases it is not necessary to conduct detailed studies to identify such measures or to require monitoring.

10. *Coastal Zone Management.* In certain states, an individual state coastal zone management consistency concurrence must be obtained or waived (see Section 330.4(d)).

11. *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. 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 is located in the 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 may affect Federally-listed endangered or threatened species or designated critical habitat, the 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.

(b) 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 USFWS 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 USFWS and NMFS or their world wide web pages at <http://www.fws.gov/r9endspp/endspp.html> and [http://www.nfms.gov/prot\\_res/esahome.html](http://www.nfms.gov/prot_res/esahome.html) respectively.

12. *Historic Properties.* No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the District Engineer has complied with the provisions of 33 CFR Part 325, Appendix C. The prospective permittee must notify the

District Engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places (see 33 CFR 330.4(g)). For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the notification must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

13. *Notification.*

(a) *Timing;* where required by the terms of the NWP, the prospective permittee must notify the District Engineer with a preconstruction notification (PCN) as early as possible. The District Engineer must determine if the notification is complete within 30 days of the date of receipt and can request additional information necessary for the evaluation of the PCN 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 notification 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 notified in writing by the District or Division Engineer that an Individual Permit is required; or

(3) Unless 45 days have passed from the District Engineer's receipt of the complete notification and the prospective permittee has not received written notice from the District or Division Engineer. 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 Notification:* The notification 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) Brief 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. 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.); and

(4) For NWPs 7, 12, 14, 18, 21, 34, 38, 39, 41, 42, and 43, the PCN must also include a delineation of affected special aquatic sites, including wetlands, vegetated shallows (e.g., submerged aquatic vegetation, seagrass beds), and riffle and pool complexes (see paragraph 13(f));

(5) For NWP 7 (Outfall Structures and Maintenance), the PCN must include information regarding the original design capacities and configurations of those areas of the facility where maintenance dredging or excavation is proposed.

(6) For NWP 14 (Linear Transportation Crossings), The PCN must include a compensatory mitigation proposal to offset permanent losses of waters of the US and a statement describing how temporary losses of waters of the US will be minimized to the maximum extent practicable.

(7) For NWP 21 (Surface Coal Mining Activities), the PCN must include an Office of Surface Mining (OSM) or state-approved mitigation plan, if applicable.

(8) For NWP 27 (Stream and Wetland Restoration), the PCN must include documentation of the prior condition of the site that will be reverted by the permittee.

(9) For NWP 29 (Single-Family Housing), the PCN must also include:

(i) Any past use of this NWP by the Individual Permittee and/or the permittee's spouse;

(ii) A statement that the single-family housing activity is for a personal residence of the permittee;

(iii) A description of the entire parcel, including its size, and a delineation of wetlands. For the purpose of this NWP, parcels of land measuring 1/4-acre or less will not require a formal on-site delineation. However, the applicant shall provide an indication of where the wetlands are and the amount of wetlands that exists on the property. For parcels greater than 1/4-acre in size, formal wetland delineation must be prepared in accordance with the current

method required by the Corps. (See paragraph 13(f));

(iv) A written description of all land (including, if available, legal descriptions) owned by the prospective permittee and/or the prospective permittee's spouse, within a one mile radius of the parcel, in any form of ownership (including any land owned as a partner, corporation, joint tenant, co-tenant, or as a tenant-by-the-entirety) and any land on which a purchase and sale agreement or other contract for sale or purchase has been executed;

(10) For NWP 31 (Maintenance of Existing Flood Control Projects), the prospective permittee must either notify the District Engineer with a PCN prior to each maintenance activity or submit a five year (or less) maintenance plan. In addition, the PCN must include all of the following:

(i) Sufficient baseline information identifying the approved channel depths and configurations and existing facilities. Minor deviations are authorized, provided the approved flood control protection or drainage is not increased;

(ii) A delineation of any affected special aquatic sites, including wetlands; and,

(iii) Location of the dredged material disposal site.

(11) For NWP 33 (Temporary Construction, Access, and Dewatering), the PCN must also include a restoration plan of reasonable measures to avoid and minimize adverse effects to aquatic resources.

(12) For NWPs 39, 43 and 44, the PCN must also include a written statement to the District Engineer explaining how avoidance and minimization for losses of waters of the US were achieved on the project site.

(13) For NWP 39 and NWP 42, the PCN must include a compensatory mitigation proposal to offset losses of waters of the US or justification explaining why compensatory mitigation should not be required.

(14) For NWP 40 (Agricultural Activities), the PCN must include a compensatory mitigation proposal to offset losses of waters of the US.

(15) For NWP 43 (Stormwater Management Facilities), the PCN must include, for the construction of new stormwater management facilities, a maintenance plan (in accordance with state and local requirements, if applicable) and a compensatory mitigation proposal to offset losses of waters of the US.

(16) For NWP 44 (Mining Activities), the PCN must include a description of all waters of the US adversely affected by the project, a description of measures

taken to minimize adverse effects to waters of the US, a description of measures taken to comply with the criteria of the NWP, and a reclamation plan (for all aggregate mining activities in isolated waters and non-tidal wetlands adjacent to headwaters and any hard rock/mineral mining activities).

(17) For activities that may adversely affect Federally-listed endangered or threatened species, the PCN must include the name(s) of those endangered or threatened species that may be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work.

(18) For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, 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.

(c) *Form of Notification:* The standard Individual Permit application form (Form ENG 4345) may be used as the notification but must clearly indicate that it is a PCN and must include all of the information required in (b) (1)-(18) of General Condition 13. A letter containing the requisite information may also be used.

(d) *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. The prospective permittee may submit a proposed mitigation plan with the PCN to expedite the process. 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. 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 is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed. 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 days of receiving a complete PCN and determine whether the conceptual or specific 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 proposal 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 proposal that would reduce the adverse effects on the aquatic environment to the minimal level. When conceptual mitigation is included, or a mitigation plan is required under item (2) above, no work in waters of the US will occur until the District Engineer has approved a specific mitigation plan.

(e) *Agency Coordination:* 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.

For activities requiring notification to the District Engineer that result in the loss of greater than 1/2-acre of waters of the US, the District Engineer will provide immediately (e.g., via facsimile transmission, overnight mail, or other expeditious manner) a copy to the

appropriate Federal or state offices (USFWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO), 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 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 notification that the resource agencies' concerns were considered. As required by Section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act, the District Engineer will provide a response to NMFS within 30 days of receipt of any Essential Fish Habitat conservation recommendations. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification.

(f) *Wetland Delineations*: Wetland delineations must be prepared in accordance with the current method required by the Corps (For NWP 29 see paragraph (b)(9)(iii) for parcels less than  $\frac{1}{4}$ -acre in size). The permittee may ask the Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 45-day period will not start until the wetland delineation has been completed and submitted to the Corps, where appropriate.

14. *Compliance Certification*. Every permittee who has received NWP verification from the Corps will submit a signed certification regarding the completed work and any required mitigation. The certification will be forwarded by the Corps with the authorization letter and will include: (a) A statement that the authorized work was done in accordance with the Corps 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.

15. *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 US authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit (e.g. 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 US for the total project cannot exceed  $\frac{1}{3}$ -acre).

16. *Water Supply Intakes*. No activity, including structures and work in navigable waters of the US or discharges of dredged or fill material, may occur in the proximity of a public water supply intake except where the activity is for repair of the public water supply intake structures or adjacent bank stabilization.

17. *Shellfish Beds*. No activity, including structures and work in navigable waters of the US or discharges of dredged or fill material, may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4.

18. *Suitable Material*. No activity, including structures and work in navigable waters of the US or discharges of dredged or fill material, may consist of unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.) and material used for construction or discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the CWA).

19. *Mitigation*. The District Engineer will consider the factors discussed below when determining the acceptability of appropriate and practicable mitigation necessary to offset adverse effects on the aquatic environment that are more than minimal.

(a) The project must be designed and constructed to avoid and minimize adverse effects to waters of the US 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 impacts requiring a PCN, 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. Consistent with National policy, the District Engineer will establish a preference for restoration of wetlands when permittees are required to meet the one-for-one compensatory mitigation ratio, with preservation used only in exceptional circumstances.

(d) Compensatory mitigation (i.e., replacement or substitution of aquatic resources for those impacted) will not be used to increase the acreage losses allowed by the acreage limits of some of the NWPs. For example,  $\frac{1}{4}$ -acre of wetlands cannot be created to change a  $\frac{3}{4}$ -acre loss of wetlands to a  $\frac{1}{2}$ -acre loss associated with NWP 39 verification. However,  $\frac{1}{2}$ -acre of created wetlands can be used to reduce the impacts of a  $\frac{1}{2}$ -acre loss of wetlands to the minimum impact level in order to meet the minimal impact requirement associated with NWPs.

(e) To be practicable, the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of the overall project purposes. Examples of mitigation that may be appropriate and practicable include, but are not limited to: reducing the size of the project; establishing and maintaining wetland or upland vegetated buffers to protect open waters such as streams; and replacing losses of aquatic resource functions and values by creating, restoring, enhancing, or preserving similar functions and values, preferably in the same watershed.

(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., easements, deed restrictions) of vegetated buffers to open waters. In many cases, vegetated buffers will be the only compensatory mitigation required. Vegetated buffers should consist of native species. The width of the vegetated buffers required will address documented water quality or aquatic habitat loss concerns. Normally, the vegetated buffer will be 25 to 50 feet wide on each side of the stream, but the District Engineers may require slightly wider vegetated buffers to address documented water quality or habitat loss concerns. Where both wetlands and open waters exist on the project site, the Corps will determine the appropriate compensatory mitigation (e.g., stream buffers or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where vegetated buffers are determined to be the most appropriate form of compensatory mitigation, the District Engineer may waive the mitigation requirement for wetland impacts.

(g) Compensatory mitigation proposals submitted with the "notification" may be either conceptual or detailed. If conceptual plans are approved under the verification, then the Corps will condition the verification

to require detailed plans be submitted and approved by the Corps prior to construction of the authorized activity in waters of the US.

(h) Permittees may propose the use of mitigation banks, in-lieu fee arrangements or separate activity-specific compensatory mitigation. In all cases that require compensatory mitigation, the mitigation provisions will specify the party responsible for accomplishing and/or complying with the mitigation plan.

20. *Spawning Areas*. Activities, including structures and work in navigable waters of the US or discharges of dredged or fill material, in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., excavate, fill, or smother downstream by substantial turbidity) of an important spawning area are not authorized.

21. *Management of Water Flows*. To the maximum extent practicable, the activity must be designed to maintain preconstruction downstream flow conditions (e.g., location, capacity, and flow rates). Furthermore, the activity must not permanently restrict or impede the passage of normal or expected high flows (unless the primary purpose of the fill is to impound waters) and the structure or discharge of dredged or fill material must withstand expected high flows. The activity must, to the maximum extent practicable, provide for retaining excess flows from the site, provide for maintaining surface flow rates from the site similar to preconstruction conditions, and provide for not increasing water flows from the project site, relocating water, or redirecting water flow beyond preconstruction conditions. Stream channelizing will be reduced to the minimal amount necessary, and the activity must, to the maximum extent practicable, reduce adverse effects such as flooding or erosion downstream and upstream of the project site, unless the activity is part of a larger system designed to manage water flows. In most cases, it will not be a requirement to conduct detailed studies and monitoring of water flow.

This condition is only applicable to projects that have the potential to affect waterflows. While appropriate measures must be taken, it is not necessary to conduct detailed studies to identify such measures or require monitoring to ensure their effectiveness. Normally, the Corps will defer to state and local authorities regarding management of water flow.

22. *Adverse Effects From Impoundments*. If the activity creates an

impoundment of water, adverse effects to the aquatic system due to the acceleration of the passage of water, and/or the restricting its flow shall be minimized to the maximum extent practicable. This includes structures and work in navigable waters of the US, or discharges of dredged or fill material.

23. *Waterfowl Breeding Areas*. Activities, including structures and work in navigable waters of the US or discharges of dredged or fill material, into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

24. *Removal of Temporary Fills*. Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.

25. *Designated Critical Resource Waters*. Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally listed threatened and endangered species, coral reefs, 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) Except as noted below, discharges of dredged or fill material into waters of the US are not authorized by NWP's 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters. Discharges of dredged or fill materials into waters of the US may be authorized by the above NWP's in National Wild and Scenic Rivers if the activity complies with General Condition 7. Further, such discharges may be authorized in designated critical habitat for Federally listed threatened or endangered species if the activity complies with General Condition 11 and the USFWS or the NMFS has concurred in a determination of compliance with this condition.

(b) For NWP's 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 13, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The District Engineer may authorize activities under these NWP's only after it is determined that the impacts to the critical resource waters will be no more than minimal.

26. *Fills Within 100-Year Floodplains*. For purposes of this General Condition, 100-year floodplains will be identified through the existing Federal Emergency Management Agency's (FEMA) Flood Insurance Rate Maps or FEMA-approved local floodplain maps.

(a) *Discharges in Floodplain; Below Headwaters*. Discharges of dredged or fill material into waters of the US within the mapped 100-year floodplain, below headwaters (i.e. five cfs), resulting in permanent above-grade fills, are not authorized by NWP's 39, 40, 42, 43, and 44.

(b) *Discharges in Floodway; Above Headwaters*. Discharges of dredged or fill material into waters of the US within the FEMA or locally mapped floodway, resulting in permanent above-grade fills, are not authorized by NWP's 39, 40, 42, and 44.

(c) The permittee must comply with any applicable FEMA-approved state or local floodplain management requirements.

27. *Construction Period*. For activities that have not been verified by the Corps and the project was commenced or under contract to commence by the expiration date of the NWP (or modification or revocation date), the work must be completed within 12-months after such date (including any modification that affects the project).

For activities that have been verified and the project was commenced or under contract to commence within the verification period, the work must be completed by the date determined by the Corps.

For projects that have been verified by the Corps, an extension of a Corps approved completion date may be requested. This request must be submitted at least one month before the previously approved completion date.

#### D. Further Information

1. District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP.

2. NWP's do not obviate the need to obtain other Federal, state, or local permits, approvals, or authorizations required by law.

3. NWP's do not grant any property rights or exclusive privileges.

4. NWP's do not authorize any injury to the property or rights of others.

5. NWP's do not authorize interference with any existing or proposed Federal project.

#### E. Definitions

*Best Management Practices (BMPs)*: BMPs are 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. A BMP policy may affect the limits on a development.

**Compensatory Mitigation:** For purposes of Section 10/404, compensatory mitigation is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

**Creation:** The establishment of a wetland or other aquatic resource where one did not formerly exist.

**Enhancement:** Activities conducted in existing wetlands or other aquatic resources that increase one or more aquatic functions.

**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.

**Farm Tract:** A unit of contiguous land under one ownership that is operated as a farm or part of a farm.

**Flood Fringe:** That portion of the 100-year floodplain outside of the floodway (often referred to as "floodway fringe").

**Floodway:** The area regulated by Federal, state, or local requirements to provide for the discharge of the base flood so the cumulative increase in water surface elevation is no more than a designated amount (not to exceed one foot as set by the National Flood Insurance Program) within the 100-year floodplain.

**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 US:** Waters of the US that include the filled area and other waters that are permanently adversely affected by flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent above-grade, at-grade, or below-grade fills 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 US is the threshold measurement of the impact to existing waters for determining whether a project may qualify for an NWP. It is not the net threshold calculated after considering compensatory mitigation used to offset losses of aquatic functions and values. The loss of stream bed includes the linear feet of perennial or intermittent stream that is filled or excavated. Waters of the US temporarily filled, flooded, excavated, or drained, but restored to preconstruction contours and elevations after construction, are not included in the measurement of loss of waters of the US.

**Non-tidal Wetland:** A non-tidal wetland is a wetland (i.e., a water of the US) 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:** An area that, during a year with normal patterns of precipitation, has standing or flowing water for sufficient duration to establish an ordinary high water mark. Aquatic vegetation within the area of standing or flowing water is non-emergent, vegetated shallows, sparse, or absent. This term includes rivers, streams, lakes, and ponds.

**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.

**Permanent Above-grade Fill:** A discharge of dredged or fill material into waters of the US, including wetlands, that results in a substantial increase in ground elevation and permanently converts part or all of the waterbody to dry land. Structural fills authorized by NWPs 3, 25, 36, etc. are not included.

**Preservation:** The protection of ecologically important wetlands or other aquatic resources in perpetuity through the implementation of appropriate legal and physical mechanisms. Preservation

may include protection of upland areas adjacent to wetlands as necessary to ensure protection and/or enhancement of the overall aquatic ecosystem.

**Restoration:** Re-establishment of wetland and/or other aquatic resource characteristics and function(s) at a site where they have ceased to exist, or exist in a substantially degraded state.

**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.

**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 (see definition of independent utility). For linear projects, the "single and complete project" (i.e., a single and complete crossing) will apply to each crossing of a separate water of the US (i.e., a single waterbody) at that location. An exception is 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.

**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 BMPs, 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 channel to increase the rate of water flow through the stream channel. Manipulation may include deepening, widening, straightening, armoring, or other activities that change the stream cross-section or other aspects of stream channel geometry to increase the rate of water flow through the stream channel. A channelized stream remains a water of the US, despite the modifications to increase the rate of water flow.

*Tidal Wetland:* A tidal wetland is a wetland (i.e., water of the US) 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 (i.e., spring high tide line) and are inundated by tidal waters two times per lunar month, during spring high tides.

*Vegetated Buffer:* A vegetated upland or wetland area next to rivers, streams, lakes, or other open waters which separates the open water from developed areas, including agricultural land. Vegetated buffers provide a variety of aquatic habitat functions and values (e.g., aquatic habitat for fish and other aquatic organisms, moderation of water temperature changes, and detritus for aquatic food webs) and help improve or maintain local water quality. A vegetated buffer can be established by maintaining an existing vegetated area or planting native trees, shrubs, and herbaceous plants on land next to open waters. Mowed lawns are not considered vegetated buffers because they provide little or no aquatic habitat functions and values. The establishment

and maintenance of vegetated buffers is a method of compensatory mitigation that can be used in conjunction with the restoration, creation, enhancement, or preservation of aquatic habitats to ensure that activities authorized by NWP's result in minimal adverse effects to the aquatic environment. (See General Condition 19.)

*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:* A waterbody is any area that in a normal year has water flowing or standing above ground to the extent that evidence of an ordinary high water mark is established. Wetlands contiguous to the waterbody are considered part of the waterbody.

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