

DEPARTMENT OF DEFENSE**Department of the Army, Corps of Engineers****33 CFR Chapter II**

[COE-2015-0017]

RIN 0710-AA73

Issuance and Reissuance of Nationwide Permits**AGENCY:** Army Corps of Engineers, DoD.**ACTION:** Final rule.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is reissuing 50 existing nationwide permits (NWP), general conditions, and definitions, with some modifications. The Corps is also issuing two new NWPs and one new general condition. The effective date for the new and reissued NWPs is March 19, 2017. These NWPs will expire on March 18, 2022. The NWPs will protect the aquatic environment and the public interest while effectively authorizing activities that have no more than minimal individual and cumulative adverse environmental effects.

DATES: These NWPs, general conditions, and definitions will go into effect on March 19, 2017.

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

FOR FURTHER INFORMATION CONTACT: Mr. David Olson at 202-761-4922 or access the U.S. Army Corps of Engineers Regulatory Home Page at <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits.aspx>.

SUPPLEMENTARY INFORMATION:**Executive Summary**

The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWPs) to authorize certain activities that require Department of the Army permits under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. The purpose of this regulatory action is to reissue 50 existing NWPs and to issue two new NWPs. In addition, one new general condition is being issued. The NWPs can only be issued for a period of no more than five years and cannot be extended. These 52 NWPs go into effect on March 19, 2017 and expire on March 18, 2022.

The NWPs authorize activities that have no more than minimal individual and cumulative adverse environmental

effects. The NWPs authorize a variety of activities, such as aids to navigation, utility line crossings, erosion control activities, road crossings, stream and wetland restoration activities, residential developments, mining activities, commercial shellfish aquaculture activities, and agricultural activities. The two new NWPs authorize the removal of low-head dams and the construction and maintenance of living shorelines. Some NWP activities may proceed without notifying the Corps, as long as those activities comply with all applicable terms and conditions of the NWPs, including regional conditions imposed by division engineers. Other NWP activities cannot proceed until the project proponent has submitted a pre-construction notification to the Corps, and for most NWPs that require pre-construction notifications the Corps has 45 days to notify the project proponent whether the activity is authorized by NWP.

Background

The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWPs) to authorize activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 that will result in no more than minimal individual and cumulative adverse environmental effects. The NWPs can only be issued for a period of five years or less, unless the Corps reissues those NWPs (see 33 U.S.C. 1344(e) and 33 CFR 330.6(b)). We are reissuing 50 existing NWPs and issuing two new NWPs. These NWPs will go into effect on March 19, 2017, and will expire on March 18, 2022. Division engineers will add regional conditions to these NWPs to ensure that, on a regional basis, these NWPs only authorize activities that have no more than minimal individual and cumulative adverse environmental effects.

Section 404(e) of the Clean Water Act provides 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. The Secretary's authority to issue general permits has been delegated to the Chief of Engineers and his or her designated representatives. Nationwide permits are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities in jurisdictional waters and wetlands that have no more than minimal adverse environmental impacts (see 33 CFR

330.1(b)). Activities authorized by NWPs and other general permits must be similar in nature, cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment (see 33 U.S.C. 1344(e)(1)). Nationwide permits can also be issued to authorize activities pursuant to Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(f)). The NWP program is designed to provide timely authorizations for the regulated public while protecting the Nation's aquatic resources.

The phrase "minimal adverse environmental effects when performed separately" refers to the direct and indirect adverse environmental effects caused by a specific activity authorized by an NWP. The phrase "minimal cumulative adverse effect on the environment" refers to the collective direct and indirect adverse environmental effects caused by the all the activities authorized by a particular NWP during the time period that NWP is in effect (which can be no more than 5 years) in a specific geographic region. The appropriate geographic area for assessing cumulative effects is determined by the decision-making authority for the general permit. For each NWP, Corps Headquarters prepares national-scale cumulative effects analyses. Division engineers consider cumulative effects on a regional basis (e.g., a state, Corps district, or other geographic area) when determining whether to modify, suspend, or revoke NWPs on a regional basis (see 33 CFR 330.5(c)). When evaluating NWP pre-construction notifications (PCNs), district engineers evaluate cumulative adverse environmental effects in an appropriate geographic area (e.g., watershed, ecoregion, Corps district geographic area of responsibility, other geographic region).

When Corps Headquarters issues or reissues an NWP, it conducts a national-scale cumulative impact assessment in accordance with the National Environmental Policy Act (NEPA) definition of "cumulative impact" at 40 CFR part 1508.7. The NEPA cumulative effects analysis prepared by Corps Headquarters for an NWP examines the impact on the environment which results from the incremental impact of its action (i.e., the activities that will be authorized by that NWP) and adds that incremental impact to "other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions" (40 CFR 1508.7). In addition to environmental impacts caused by activities authorized

regional conditions, or the suspension or revocation of the applicable NWP, to the division engineer. The division engineer will follow the procedures at 33 CFR 330.5(c) to modify, suspend, or revoke those NWP(s) in the appropriate geographic area. The Corps uses the Department of Defense American Indian and Alaska Native Policy to guide its interactions with tribes. The Corps also had developed additional policies, which are available at: <http://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/>.

One commenter said that this general condition should be invoked for NWPs 3, 13, and 48 because the activities authorized by these NWPs affect salmon or shellfish and the natural resources upon which they depend. One commenter requested establishment of a dispute resolution procedures for tribal consultation and clarification on how the NWP PCN will be handled when a tribe objects to the proposed activity.

This general condition applies to NWPs 3, 13, and 48, as well as all of the other NWPs. If a tribe has concerns with how a Corps district is implementing these NWPs, the tribe should raise those concerns to the district. Disagreements concerning interpretation of treaties may need to be resolved by other parties.

One commenter said that Corps divisions and districts should be provided support to promote tribal involvement and collaborative decision-making. One commenter stated that the proposed general condition is limited because it refers only to "reserved treaty rights." This commenter remarked that the general condition should also include other treaty rights that are explicit retained. This commenter said that "reserved treaty rights" are those rights that the tribe did not specifically relinquish in the treaty, in other words, the treaty is silent on them. This commenter also said that, according to the Department of Defense American Indian and Alaska Native Policy, the Corps' fiduciary duties to tribes also apply to tribal lands and protected tribal resources. This commenter recommended revising this general condition to be consistent with the Department of Defense policy cited above and to require PCNs for proposed activities that might affect protected tribal resources, tribal rights (including treaty rights), and tribal lands.

During the past three rulemakings for the NWPs (2007 and 2012 and this rulemaking for 2017), Corps Headquarters issued memoranda to its division and district offices that requested that Corps districts consult with tribes on the NWPs to develop

regional conditions, coordination procedures, and other measures to ensure that the NWPs have no more than minimal adverse effects on tribal trust resources and tribal rights. For the 2017 NWPs, the memorandum was issued on March 10, 2016. We have revised general condition 17 to read as follows: "No activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands." We have removed the phrase "or its operation" because the Corps may not have the legal authority to regulate the operation of the facility or structure after the authorized activity is completed.

The principles in the Department of Defense American Indian and Alaska Native Policy apply to Department of Defense actions, which includes actions undertaken by the Corps such as the issuance of NWPs and other types of DA permits to authorize activities it regulates. The Corps' responsibilities for protecting tribal rights (including treaty rights), protected tribal resources, and tribal lands applies only to the activities it has the authority to regulate. For the NWPs, those activities are discharges of dredged or fill material into waters of the United States that the Corps has the authority to regulate under section 404 of the Clean Water Act and structures and work in navigable waters of the United States that the Corps has the authority to regulate under section 10 of the Rivers and Harbors Act of 1899. The Corps does not have the legal authority to regulate or impose conditions on actions or activities outside of its jurisdiction, such as activities in upland areas or operation and maintenance activities that do not require DA authorization.

The terms "tribal rights," "protected tribal resources," and "tribal lands" are defined in the Department of Defense American Indian and Alaska Native Policy. Tribal rights are defined as: "Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies." Protected tribal resources are defined as: "Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources." Tribal lands are defined as: "Any lands title to which is either: (1) held in trust by the United States for the benefit of any

Indian tribe or individual; or (2) held by any Indian tribe or individual subject to restrictions by the United States against alienation." To make these definitions readily accessible to users of the NWPs, we have added these definitions to the "Definitions" section of the NWPs (Section F).

There are presently 567 federally-recognized tribes, including Alaska Native tribes, and 370 ratified treaties.³ In addition, each tribe is a distinct and separate government, and consultations may vary among tribes. Consultation procedures with tribes will vary, because different tribes have different customs and organization. Also, consultation with tribes is the responsibility of the federal government, not prospective permittees. Given the number of federally-recognized tribes, the number of ratified treaties, the fact that each tribe is a distinct and separate government, and that different consultation approaches are necessary for different tribes, we cannot expect most prospective permittees understand applicable treaties, what the protected tribal resources are, and other relevant factors to know when to submit PCNs for proposed NWP activities that might cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. A more effective approach for addressing tribal rights, protected tribal resources, and tribal lands is the regional conditioning process and the development of coordination procedures between Corps districts and tribes.

Prior to the publication of the June 1, 2016, proposed rule in the **Federal Register**, Corps districts initiated government-to-government consultations for the 2017 NWPs, to identify regional conditions to protect tribal rights, protected tribal resources, or tribal lands. These consultations may also result in the development of coordination procedures between Corps districts and tribes to review PCNs to ensure that those NWP activities do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands. Division engineers can add regional conditions to one or more NWPs to require PCNs for proposed activities in a geographic region that have the potential to cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands.

This general condition is adopted with the modifications discussed above.

³ <http://www.bia.gov/FAQs/index.htm>, accessed October 18, 2016.

GC 18. *Endangered Species*. We proposed to modify paragraph (a) of this general condition to define the terms “direct effects” and “indirect effects.” We also proposed to modify paragraph (b) to clarify that federal agencies only need to submit documentation of compliance with section 7 of the Endangered Species Act (ESA) when the terms and conditions of the NWP, or regional conditions imposed by the division engineer, require the submission of a PCN. In addition, we proposed to modify paragraph (d) to clarify that the district engineer may add activity-specific conditions to an NWP authorization after conducting formal or informal ESA Section 7 consultation.

Many commenters stated their support for adding the definitions of direct effects and indirect effects to paragraph (a) of this general condition. One commenter asked how “direct effects” and “indirect effects” will be considered in this general condition. One commenter said that this general condition should be revised to eliminate the open-ended review process for the ESA. One commenter said that the Corps should only be required to address aquatic species under this general condition.

The definitions of “direct effects” and “indirect effects” were added to paragraph (a) of this general condition to ensure that both direct and indirect effects to listed species and designated critical habitat are considered when making “might affect” and “may affect” determinations. Endangered Species Act section 7 consultations are not open-ended processes, although they take time to complete. Formal ESA section 7 consultations end with the issuance of biological opinions. Informal ESA section 7 consultations end when the U.S. FWS and/or NMFS issue their written concurrences, or when they state that they do not concur with the district engineer’s “may affect, not likely to adversely affect” determination for a proposed NWP activity. If the U.S. FWS and/or NMFS do not provide written concurrence with the district engineer’s “may affect, not likely to adversely affect” determination, then formal ESA section 7 consultation is required unless the applicant modifies the proposed activity to allow the district engineer to make a “no effect” determination. If the district engineer makes a “no effect” determination for a proposed NWP activity, then ESA section 7 consultation is not required. Activities authorized by NWPs and other forms of DA authorization can affect terrestrial endangered and threatened species, and district

engineers are required to conduct ESA section 7 consultations for NWP activities that may affect those terrestrial listed species.

Several commenters stated their support for the proposed changes to paragraph (b) regarding federal permittee requirements. One commenter objected to the proposed modification, stating that the Corps has an independent duty to ensure that NWP activities are in compliance with ESA section 7 for activities conducted by federal permittees. A few commenters requested clarification of the provision in paragraph (b) that states that the district engineer will verify that the appropriate documentation has been submitted, in terms of another federal agency’s compliance with section 7 of the ESA. These commenters asked which actions will be verified, and what the appropriate documentation should be. Several commenters asked when state transportation agencies can be considered as federal permittees under 23 U.S.C. 139(c)(3). One commenter said that state departments of transportation with NEPA authority should be allowed to be treated as federal agencies with respect to NWP requirements, such as ESA compliance. One commenter asked whether the term “non-federal permittee” applies to state mining regulatory authorities acting under SMCRA.

We have retained the proposed changes in paragraph (b) of this general condition. The appropriate documentation to provide to district engineers to demonstrate a federal permittee’s compliance with ESA section 7 can be a biological opinion issued by the U.S. FWS and/or NMFS, a written concurrence from the U.S. FWS and/or NMFS for an informal ESA section 7 consultation, or a written “no effect” determination made by the federal permittee. Unless a state agency is a department of transportation which the Federal Highway Administration has assigned its responsibilities pursuant to 23 U.S.C. 327, it remains the Corps’ responsibility to make ESA section 7 effect determinations for activities authorized by the NWPs that will be conducted by non-federal permittees. The delegation of responsibilities to state departments of transportation through 23 U.S.C. 139(c)(3) only applies to NEPA responsibilities, not to ESA responsibilities. Responsible entities under the Department of Housing and Urban Development’s Community Development Block Grant program can take responsibility for ESA section 7 compliance under the provisions of 24 CFR part 58. The project proponent that

needs to obtain SMCRA authorization from the state mining regulatory authority is a non-federal permittee that must comply with paragraph (c) of this general condition.

A few commenters expressed support for the requirement for non-federal applicants to submit PCNs when listed species or their designated critical habitat “might be affected or is in the vicinity of the project.” A couple of commenters said that the Corps cannot rely solely on information provided by non-federal applicants regarding potential effects to listed species, stating that it is insufficient for meeting the requirements of the ESA. Several commenters asked for clarification of the difference between “might affect” and “may affect.” Several commenters said that the term “in the vicinity” should be clarified. One commenter requested definitions for “vicinity” and “affected.” One commenter stated that by not defining “in the vicinity” there is potential for non-compliance with section 7 of the ESA. One commenter said that PCNs should only be required for proposed activities that could affect designated critical habitat. One commenting agency said that the proposed changes to this general condition will result in a requirement for that agency to submit a few hundred more PCNs each year. A few commenters stated that submittal of PCNs by non-federal applicants only when any listed species or designated critical habitat “might be affected” fails to include candidate species and is not in compliance with conferencing regulations under Section 7 of the ESA.

The purpose of the PCN requirements in paragraph (c) of general condition 18 is to establish a low reporting threshold to ensure that PCNs are submitted for any proposed NWP that has the potential to affect listed species or designated critical habitat. When the district engineer receives the PCN, he or she will evaluate the information in the PCN, plus other available information, to determine whether the proposed activity may affect listed species or designated critical habitat and thus require ESA section 7 consultation. This paragraph of the general condition is written so that prospective permittees do not decide whether ESA section 7 consultation is required. If the project proponent conducts an activity that affects listed species or designated critical habitat, but did not submit the PCN required by paragraph (c), the activity is not authorized by NWP. That activity is an unauthorized activity and the Corps will take appropriate action to respond to the unauthorized activity.

As explained in the preamble to the June 1, 2016, proposed rule, we established the “might affect” threshold in 33 CFR part 330.4(f)(2) and paragraph (c) of general condition 18 because it is more stringent than the “may affect” threshold for section 7 consultation in the U.S. FWS’s and NMFS’s ESA section 7 regulations at 50 CFR part 402. The word “might” is defined as having “less probability or possibility” than the word “may” (Merriam-Webster’s Collegiate Dictionary, 10th edition). As we also discussed in the June 1, 2016, proposed rule, we cannot explicitly define the term “in the vicinity” for the purposes of general condition 18 because the “vicinity” is dependent on a variety of factors, such as species distribution, ecology, life history, mobility, and, if applicable, migratory patterns, as well as habitat characteristics and species sensitivity to various environmental components and potential stressors. The vicinity is also dependent on the NWP activity and the types of direct and indirect effects that might be caused by that NWP activity. If a non-federal project proponent conducts an activity and does not comply with general condition 18 or any other applicable general condition, then the activity is not authorized by NWP. The district engineer will take appropriate action for the unauthorized activity.

Because of the requirements of ESA section 7 and the U.S. FWS’s and NMFS’s implementing regulations at 50 CFR part 402, we cannot limit PCNs to NWP activities that might affect designated critical habitat. We acknowledge that as more species are listed as endangered or threatened, and more critical habitat is designated, there will be increases in the number of PCNs submitted to Corps districts each year. For species proposed to be listed as endangered or threatened, or for proposed critical habitat, ESA section 7 conferences are not required except for proposed actions that are likely to jeopardize the continued existence of any proposed species or adversely modify or destroy proposed critical habitat. The district engineer has the discretion to confer with the U.S. FWS and/or NMFS if he or she determines that a proposed NWP activity is likely to jeopardize the continued existence of the proposed species or destroy or adversely modify the proposed critical habitat. Because the NWPs only authorize activities that result in no more than minimal adverse environmental effects, and the threshold for ESA section 7 conferences is high (*i.e.*, likely to jeopardize proposed species or adversely modify or destroy

proposed critical habitat), we believe that conferences will only be necessary in rare circumstances for proposed NWP activities and do not need to address conferences in this general condition. District engineers will conduct conferences for proposed NWP when necessary.

One commenter said that a PCN should only be required if there are potential impacts to listed species and/or designated critical habitat, and a PCN should not be required for the potential presence of a listed species. One commenter stated that a PCN should only be required when ESA section 7 consultation is required. One commenter stated that a PCN not be required in Northern long-eared bat habitat when there is no effect to the species, specifically when no clearing is involved. This commenter said that based on the term “in the vicinity” in paragraph (c), non-federal applicants would be required to submit a PCN for every NWP activity within this species’ broad range. One commenter said that the Corps should require PCNs for proposed NWP activities that would take place within 10 river miles of ESA-listed species. One commenter stated that non-federal applicants should be allowed to satisfy the PCN requirement by demonstrating that ESA section 7 consultation has already been satisfactorily completed.

Under paragraph (c) of general condition 18, and 33 CFR 330.4(f)(2), PCNs are required if any listed species or designated critical habitat might be affected by the proposed NWP activity or is in the vicinity of the proposed NWP activity, or if the proposed NWP activity is located in designated critical habitat. The district engineer reviews the PCN and determines whether ESA section 7 consultation is required, because under section 7(a)(2) of the ESA, federal agencies are responsible for ensuring that actions they authorize are not likely to jeopardize the continued existence of listed species, or destroy or adversely modify designated critical habitat. The prospective permittee does not decide whether ESA section 7 consultation is required for NWP activities; that is the Corps’ responsibility. The prospective permittee’s responsibility is to submit a PCN to the district engineer when there is a possibility that the proposed NWP activity might affect listed species or designated critical habitat. We acknowledge that the requirements of general condition 18 will result in more PCNs for listed species that have large ranges, but those requirements are necessary to comply with ESA section 7(a)(2). A PCN threshold of 10 river

miles within the location of ESA-listed species would not be an effective PCN threshold, especially for mobile listed species. As discussed below, we have added a new paragraph (f) to general condition 18 to allow ESA compliance through a valid ESA section 10(a)(1)(B) incidental take permit. If the applicant does not have a valid ESA section 10(a)(1)(B) incidental take permit, and the proposed NWP activity may affect listed species or designated critical habitat, then the Corps is required to conduct ESA section 7 consultation.

A few commenters recommended that an ESA section 7 consultation should be completed in 45 days or less after the date of receipt of a complete PCN. A few commenters stated that if the applicant cannot commence the NWP activity even if the 45-day review period has passed, unless the Corps makes a “no effect” determination or ESA section 7 consultation is completed, this general condition places a burden on applicant. One of these commenters suggested that the Corps either adhere to the 45-day review period for complete PCNs or revise this general condition to state that these ESA section 7 consultations will take no more than 90 days. One commenter stated that for linear projects, the Corps should not issue NWP verifications for any crossings of waters of the United States until ESA section 7 consultation is completed for those crossings that require section 7 consultation. This commenter also said the general condition should prohibit the prospective permittee from beginning construction of the linear project until after those consultations are completed.

If formal ESA section 7 consultation is required, there are timeframes that are mandated by section 7(b) of the ESA. The NWPs cannot change those timeframes. If informal ESA section 7 consultation is conducted, there are no timeframes for completion, but written concurrence from the U.S. FWS and/or NMFS is required before informal consultation is concluded. If the U.S. FWS or NMFS will not provide their written concurrence, or explicitly disagrees that the proposed activity “may affect, is not likely to adversely affect” listed species or critical habitat, then formal ESA section 7 consultation is necessary to fulfill the consultation requirements of ESA section 7(a)(2). As stated in paragraph (c) of general condition 18, if the district engineer determines that the proposed NWP activity may affect listed species or designated critical habitat, the activity is not authorized by NWP until the district engineer completes ESA section 7 consultation or determines that the

proposed NWP will have “no effect” on listed species or designated critical habitat.

District engineers have discretion in timing the issuance of NWP verifications for NWP activities that require PCNs. Linear projects often have crossings that require PCNs and crossings that do not require PCNs. For those linear projects, the PCN must also identify the use of NWP(s), regional general permit(s), or individual permit(s) to authorize other separate and distant crossings that require DA authorization (see paragraph (b)(4) of general condition 32). If some or all of the other separate and distance crossings are authorized by NWP without a requirement to submit a PCN (and they do not trigger the PCN requirements in paragraph (c) of general conditions 18 or 20, or other general conditions), then those activities are authorized by NWP unless the district engineer exercises his or her authority at 33 CFR 330.5(d) to suspend or revoke those NWP authorizations. There are also likely to be substantial segments of linear projects that are sited in uplands over which the Corps has no control and responsibility. The entity constructing the linear project can begin construction in the uplands prior to receiving the NWP verification or other DA authorizations.

Several commenters said they support allowing district engineers to add species-specific conditions to NWP verifications. One commenter asked whether district engineers would add species-specific conditions to the NWP itself or to the NWP verification letters. One commenter stated that Corps districts should not be allowed to add activity-specific conditions to NWPs when there are regional conditions related to the protection of listed species.

District engineers have the authority to modify NWPs by adding conditions to the NWP authorization (see 33 CFR 330.5(d)). This includes conditions to protect listed species and designated critical habitat. The conditions are written in the NWP verification letter, but they apply to the NWP authorization. In their NWP verification letters, district engineers may reference regional conditions or add those regional conditions to the NWP authorization to ensure that the permittee is aware of those conditions and to make those conditions easier to enforce.

One commenter said that the Corps is required to seek concurrence from the U.S. FWS and/or NMFS for any “no effect” determination. One commenter voiced support for using regional

programmatic consultations to comply with section 7 of the ESA. A few commenters suggested that the Corps develop an informational guidance document and Web site dedicated to region-specific listed species under the jurisdiction of U.S. FWS, similar to what was developed by the NMFS.

Federal agencies are not required to seek concurrence from the U.S. FWS or NMFS for their ESA section 7 “no effect” determinations (see page 3–12 of the 1998 Endangered Species Consultation Handbook issued by the U.S. FWS and NMFS). For the 2017 NWPs, we plan on developing a general information guidance document to assist NWP users in complying with general condition 18. This document will be posted on the Corps Headquarters regulatory program Web site at: <http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>.

One commenter recommended changing this general condition to require non-federal applicants to submit a list of endangered and threatened species and designated critical habitat locations for the subject county in which the proposed NWP activity will occur, especially for NWPs 3, 12, 13, 14, 21, 39, 44, and 48.

Paragraph (c) of this general condition requires a non-federal permittee to submit a PCN if any listed species or designated critical habitat might be affected or is in the vicinity of the proposed NWP activity, or if the proposed NWP activity is located in designated critical habitat. Other activities authorized by other NWPs might trigger the PCN requirement in paragraph (c), so we will not modify this general condition to focus on the eight NWPs identified by the commenter.

One commenter said that the Corps should include the entire linear project in its action area instead of limiting the action area to the crossings of waters of the United States. This commenter asserted that the Corps’ approach for ESA compliance for linear projects does not comply with the ESA. One commenter stated that compensatory mitigation should be required for unavoidable adverse impacts to federally-listed species when NWP activities use treated wood below the water line. One commenter said that the Corps must conduct an activity-specific NEPA analysis when it implements an incidental take statement as a condition of the Corps’ NWP verification and that the Corps’ implementation of the incidental take statement should cover the entire linear project, not just crossings of waters of the United States.

The U.S. FWS’s and NMFS’s ESA section 7 regulations at 50 CFR 402.02 define the term “action area” as “. . . all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” When the Corps initiates ESA section 7 consultation on proposed activity that it determines “may affect” listed species or designated critical habitat, it consults on the direct and indirect effects caused by the proposed NWP activity. In paragraph (a) of this general condition, we define the terms “direct effects” and “indirect effects.” Indirect effects can be some distance from the direct effects of the proposed NWP activity. The Corps’ approach to conducting ESA section 7 consultations for linear projects complies with the ESA. Section 7(a)(2) consultations for linear projects may include the effects of interdependent and interrelated activities. Interrelated and interdependent activities are not federal actions, because they are not authorized, funded, or carried out by the Corps or other federal agency. Including interrelated and interdependent activities in a formal ESA Section 7 consultation and biological opinion does not grant the Corps any authority to regulate those activities and their effects on listed species and critical habitat. Therefore, the Corps does not have the legal authority to enforce conditions that the U.S. FWS and/or NMFS might impose on those interrelated and interdependent activities in an incidental take statement in a biological opinion. The FWS and NMFS would be responsible for enforcing those provisions of the incidental take statement that apply to the upland activities outside of the Corps’ jurisdiction.

District engineers will determine on a case-by-case basis whether compensatory mitigation is required for unavoidable adverse impacts to federally-listed species. The Corps only adopts and incorporates those provisions of an incidental take statement that apply to the actions authorized by the Corps. If the incidental take statement in a biological opinion has provisions that apply to activities in upland areas outside of the Corps’ action areas for linear projects, where the Corps does not have the authority to control those upland activities, the Corps will not incorporate those provisions in its NWP authorization. The U.S. FWS and NMFS can use their authorities to enforce provisions of the incidental take statement that apply to upland linear project segments that are outside of the

Corps' control and responsibility. From the Corps' perspective, those upland linear project segments are not federal actions, and therefore the Corps is not responsible for preparing NEPA documents for those actions.

Several commenters recommended using Habitat Conservation Plans to streamline compliance with this general condition if the prospective permittee has been issued an ESA section 10 permit that also authorizes incidental take that may result from the proposed NWP activity. Several commenters said that PCNs should not be required for non-federal permittees when their "take" of listed species is authorized by ESA section 10 permits and is addressed through HCPs with incidental take statements. A few commenters said that a non-federal permittee should be able to proceed with the proposed NWP activity 15 days after providing the district engineer with the ESA section 10(a)(1)(B) incidental take permit and HCP. One commenter said the PCN requirement of this general condition should be satisfied through a programmatic notification submitted to the district engineer, if more than one activity to be authorized by NWP has been the subject of a prior ESA section 7 consultation.

We have added a new paragraph (f) to this general condition, to cover circumstances in which the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit and approved Habitat Conservation Plan for a project or group of projects that includes the proposed NWP activity. A group of projects may be covered by an ESA section 10(a)(1)(B) and large-scale (e.g., county) Habitat Conservation Plan. Whenever the U.S. Fish and Wildlife Service or the National Marine Fisheries Service issues an ESA section 10(a)(1)(B) incidental take permit, they conduct an intra-Service consultation under ESA section 7(a)(2). The intra-Service ESA section 7(a)(2) consultation conducted for the ESA section 10(a)(1)(B) permit and Habitat Conservation Plan will include their opinion whether the proposed project or group of projects is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. We believe that adding this paragraph to general condition 18 reduces duplication and also fulfills the Corps' obligations under ESA section 7(a)(2). The district engineer will coordinate with the FWS and/or NMFS as appropriate to determine whether the agency that issued the ESA section 10(a)(1)(B) incidental take permit

considered the proposed NWP activity and the associated incidental take in its internal ESA section 7 consultation for that ESA section 10(a)(1)(B) permit.

We cannot eliminate the PCN requirement for non-federal permittees that is established by 33 CFR 330.4(f)(2). The PCN requirement is necessary to allow the district engineer to determine, after coordinating with the agency that issued the ESA section 10(a)(1)(B) incidental take permit (i.e., the FWS and/or NMFS), whether the ESA section 10(a)(1)(B) incidental take permit and the internal ESA section 7 consultation for that incidental take permit covers the proposed NWP activity and its anticipated incidental take. The district engineer should respond to the complete PCN to notify the non-federal applicant whether the ESA section 10(a)(1)(B) permit covers the proposed NWP activity or whether additional ESA section 7(a)(2) consultation is necessary, to ensure from the Corps' perspective, that the proposed NWP activity is not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adversely modification of designated critical habitat. We also cannot state in the revised general condition that the prospective permittee can proceed with the NWP activity within 15 days of providing the district engineer with a copy of the ESA section 10(a)(1)(B) incidental take permit and Habitat Conservation Plan, because district engineers have 45-days to review complete PCNs and there are other exceptions to the 45-day review period. For example, if the proposed NWP activity is determined by the district engineer to have the potential to cause effects to historic properties, consultation will be required to fulfill the requirements of section 106 of the National Historic Preservation Act. Activities authorized by NWPs 21, 49, and 50 require written verifications before proceeding with the authorized work. We cannot replace the PCN requirement individual NWP activities with a programmatic notification, because each proposed NWP activity needs to be evaluated to determine if ESA section 7 consultation is required.

One commenter expressed concern that the requirements of this general condition result in ESA section 7 consultations occurring in the absence of a real potential for listed species conflicts. One commenter said that ESA section 7 consultations should only occur if the site for the proposed activity has an occurrence of listed species or the site is located in designated critical habitat. One commenter stated that the requirements of general condition 18

should only apply to activities in jurisdictional areas that might affect endangered species.

For a non-federal permittee, this general condition requires a PCN if any listed species or designated critical habitat might be affected or is in the vicinity of the proposed NWP activity, or if the proposed NWP activity is located in designated critical habitat. The district engineer will review the PCN to determine if the proposed NWP activity may affect listed species or designated critical habitat and thus require ESA section 7 consultation. If the district engineer determines the proposed NWP activity will have no effect on listed species or designated critical habitat, he or she will issue the NWP verification letter if the proposed activity complies with all other applicable terms and conditions of the NWP and will result in no more than minimal adverse environmental effects. When making an effect determination for the purposes of ESA section 7, the district engineer considers the direct and indirect effects caused by the proposed NWP activity. An NWP activity conducted in jurisdictional waters and wetlands can have indirect effects on listed species or designated critical habitat outside of those jurisdictional waters and wetlands, and thus require the district engineer to conduct ESA section 7 consultation.

This general condition is adopted with the modifications discussed above.

GC 19. *Migratory Birds and Bald and Golden Eagles*. We proposed to modify this general condition to state that the permittee is responsible for ensuring that his or her action complies with the Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act, instead of stating that the permittee is responsible for obtaining any "take" permits from the U.S. Fish and Wildlife Service. There may be situations where such "take" permits are not required and compliance with these acts may be achieved through other means.

Several commenters stated their support for the proposed modification. Two commenters said that the proposed modification will increase burdens on applicants and create delays in the NWP verification process. This general condition does not require any action by district engineers and will not delay their reviews of PCNs and voluntary requests for NWP verifications. Permittees are responsible for contacting the local office of the U.S. Fish and Wildlife Service to determine if they need to take action to reduce impacts to migratory birds or bald or golden eagles, or obtain incidental take permits under these two laws.

This general condition is adopted as proposed.

GC 20. *Historic Properties*. Parallel with the proposed modifications of paragraph (b) of general condition 18, we also proposed to modify paragraph (b) of general condition 20 to state that federal permittees only need to submit documentation of their compliance with section 106 of the National Historic Preservation Act (NHPA) if the proposed NWP activity requires pre-construction notification because of other terms and conditions, including regional conditions imposed by division engineers.

One commenter asked how district engineers will determine if NWP activities will affect historic properties and who is expected to satisfy the requirements of section 106 of the NHPA. One commenter recommended revising paragraph (a) as follows: "In cases where the district engineer is notified, or determines based on scoping performed in accordance with 36 CFR 800.4(a), that the activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized until the district engineer finds that the requirements of Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations (36 CFR part 800) have been satisfied."

District engineers will review PCNs and determine whether proposed NWP activities have the potential to affect historic properties. If the district engineer determines that the proposed NWP activity has no potential to cause effects on historic properties, section 106 consultation is not required. If the district engineer determines that the proposed NWP activity will result in either "no historic properties affected," "no adverse effects," or "adverse effects," he or she will conduct NHPA section 106 consultation with the appropriate consulting parties. The NWPs, via the requirements of general condition 20, provide general guidance on historic properties and compliance with NHPA section 106, but further details on the section 106 process are provided in other Corps regulations and guidance, and do not need to be included in the text of paragraph (a) of this general condition.

Several commenters supported the proposed change to paragraph (b) regarding federal permittees' compliance with section 106 of the NHPA. One commenter suggested modifying paragraph (b) to state that if the district engineer identifies deficiencies in the federal permittee's section 106 compliance, then he or she

will consult further with the federal agency and other parties to resolve those deficiencies. Several commenters stated that paragraph (b) exempts non-lead federal agencies from fulfilling their section 106 responsibilities. One commenter said that paragraph (b) results in the Corps designating another agency as the NHPA section 106 compliance lead without the agreement of the other agency. One commenter requested further clarification to address situations where no other federal lead agency has the responsibility.

Federal permittees have an independent obligation to comply with section 106 of the NHPA. If an NWP activity that will be conducted by a federal permittee requires a PCN and the district engineer determines while reviewing the PCN that the federal permittee's section 106 compliance documentation is insufficient, then he or she will notify the federal permittee that additional section 106 consultation may be necessary. Paragraph (b) of this general condition is not equivalent to a lead federal agency concept. The purpose of paragraph (b) is to avoid duplicative consultation efforts, because federal agencies have their own obligation to comply with NHPA section 106. When a federal permittee is conducting an NWP activity, it is either conducting the same undertaking as the Corps (*i.e.*, the permitted activity), or a larger undertaking that involves other activities that the Corps does not have the authority to regulate. If there is no federal permittee, then paragraph (c) of this general condition would apply.

One commenter recommended revising the fourth sentence of paragraph (b) as follows: "If the appropriate documentation is not submitted, then additional consultation under section 106 may be necessary to fulfill the requirements of the NHPA and relevant regulations have been complied with." This commenter suggested adding the following sentence after the fourth sentence: "If the district engineer identifies deficiencies, then the district engineer will consult further with the federal agency and other parties to resolve them."

The last sentence of paragraph (b) makes it clear that if there are deficiencies in the federal permittee's documentation of section 106 compliance, it is the federal permittee's responsibility to address those deficiencies. The Corps is not required to conduct that additional consultation on behalf of the federal permittee.

One commenter said that paragraph (c) should be modified to make it clear who is responsible for making an effect determination for the purposes of

section 106 of the NHPA. Several comments stated that by referencing "current procedures" in paragraph (c) of this general condition, the Corps suggests to prospective permittees that compliance with the Corps' current regulations and guidance fulfills its section 106 NHPA responsibilities. Several commenters recommended revising this general condition to require non-federal applicants to provide documentation in their PCNs from qualified professionals to state that standard procedures have been followed to identify historic properties. One commenter said that the third sentence in paragraph (c) should include "designated tribal representative" because not all federally recognized tribes have Tribal Historic Preservation Officers.

We have modified paragraph (c) by adding two sentences to make it clear that it is the district engineer's responsibility to make section 106 effects determinations: "Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of section 106 of the NHPA: No historic properties affected, no adverse effect, and adverse effect." We are retaining the fourth sentence in paragraph (c) to refer to our current procedures for addressing the requirements of section 106 of the NHPA, which are Appendix C to 33 CFR part 325, the April 25, 2005, interim guidance in which we adapt the applicable provisions of 36 CFR part 800 to augment Appendix C, and the January 31, 2007, interim guidance in which we provide further guidance on adapting the applicable provisions of 36 CFR part 800 to Appendix C.

Modifying paragraph (c) to require non-federal applicants to provide documentation from qualified professionals goes beyond the "good faith effort" required to identify historic properties for minor activities authorized by the NWPs. The magnitude and nature of the undertaking and the degree of federal involvement are considerations for determining what is required to identify historic properties (see 36 CFR 800.4(b)(1)), and for many NWP activities these are both minimal. For activities that have the potential to cause effects to historic properties, applicants often hire consultants to assist in the section 106 process. We have modified the third sentence of paragraph (c) to include "designated

tribal representative” as an option for assistance regarding information on the location of potential historic resources, consistent with 36 CFR 800.2(c)(2)(i)(B).

Several commenters stated that this general condition does not provide sufficient guidance to non-federal applicants to ensure compliance with section 106 because the information requirements for PCNs are vague and set a low threshold. These commenters expressed concern that district engineers will not have sufficient information from applicants or may not receive PCNs at all. Several commenters stated that this general condition and its PCN requirements unlawfully delegates to non-federal entities the Corps’ responsibility to comply with section 106 of the NHPA.

We are not delegating responsibilities to comply with Section 106, but as a permitting agency we can require certain information from project proponents. This general condition requires prospective permittees to submit PCNs for proposed activities that might have the potential to cause effects to historic properties. In this general condition, we changed the word “may” to “might” to be consistent with the language in paragraph (c) of general condition 18, endangered species, because it serves a similar purpose. As with paragraph (c) of general condition 18, paragraph (c) of general condition 20 places the responsibility of determining whether NHPA section 106 is necessary. The district engineer will evaluate the PCN, and if he or she determines that the proposed NWP activity has the potential to cause effects to historic properties, he or she will initiate section 106 consultation with the appropriate consulting parties. For the section 106 consultation, the district engineer will make one of three effect determinations: “no historic properties affected,” “no adverse effect,” and “adverse effect.”

We have made changes to paragraphs (c) and (d) to more clearly articulate the district engineer’s process for complying with NHPA section 106 for NWP activities undertaken by non-federal permittees. We have moved the second sentence from paragraph (d) to paragraph (c). We have also added two new sentences to paragraph (c). The first new sentence states that section 106 consultation is required when the district engineer determines the proposed activity has the potential to cause effects to historic properties. The second new sentence states that the district engineer will consult with consulting parties identified under 36 CFR 800.2(c) when he or she determines the proposed activity may result in “no historic properties affected,” “no

adverse effects” on historic properties, or “adverse effects” on historic properties. We have also made some edits to the last sentence of paragraph (c) to provide additional clarity.

At the beginning of the first sentence of paragraph (d), we added the phrase “For non-federal permittees,” to make it clear that paragraph (d) applies to non-federal permittees. In what is now the second sentence of paragraph (d), we deleted the phrase “and will occur” because if section 106 consultation is required, the district engineer will do that section 106 consultation.

One commenter said that PCNs should be required for all NWP activities that involve ground disturbance. One commenter stated that this condition sets a lower threshold for requiring review than Appendix C to 33 CFR part 325 and should be revised. One commenter stated that general condition 20 and 32, and their reliance on compliance by permittees, often results in the Corps’ failure to consult with federally recognized tribes in a government-to-government relationship.

Requiring PCNs for all NWP activities that involve ground disturbance would result in many additional PCNs for activities that have no potential to cause effects to historic properties. The intent of paragraph (c) is to require non-federal permittees to submit PCNs for any proposed NWP activity that might have the potential to cause effects to historic properties. The PCN requirement gives district engineers the opportunity to make effect determinations for the purposes of complying with section 106 of the NHPA. General condition 20 only addresses historic properties and the requirements of section 106 of the NHPA. As discussed above, general condition 20 does not delegate the Corps’ section 106 responsibilities to permittees. In addition, we have made substantial changes to general condition 17, tribal rights, to address the Corps’ fiduciary responsibilities towards tribes, which extend beyond historic properties. General condition 17 addresses tribal rights (including treaty rights), protected tribal resources, and tribal lands. District engineers will consult with tribes on NWP activities that have the potential to cause effects to historic properties of significance to those tribes.

Two commenters said they support paragraph (e) and its implementation of section 110(k) for intentional adverse effects. One commenter noted that the NHPA was recodified and the citation to section 110(k) should be corrected to 54 U.S.C. 306113. We have revised the first sentence of paragraph (e) to refer to 54 U.S.C. 306113.

Several commenters said that this general condition unlawfully limits the scope of the Corps’ “permit area.” One commenter stated that 33 CFR part 325, Appendix C is not approved by the Advisory Council on Historic Preservation (ACHP) as a program alternative, as required by 36 CFR 800.14. This commenter said that Appendix C is an internal Corps process that does not fulfill the requirements of section 106 of NHPA. One commenter recommended that the Corps continue working with the ACHP in order to bring its regulations into compliance with the NHPA. One commenter stated that Appendix C violates tribal consultation requirements, and more importantly, meaningful consultation with tribes.

General condition 20 does not use the term “permit area.” When evaluating PCNs, district engineers will determine the appropriate scope of analysis for the purposes of NHPA section 106 using its current procedures for addressing the requirements of that statute. The ACHP’s regulations at 36 CFR 800.14(a) states that an “agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council’s regulations pursuant to section 110(a)(2)(E) of the act.” Both 36 CFR 800.14(a) and NHPA section 110(a)(2)(E) state that a federal agency’s program alternative has to be “consistent” with the ACHP’s regulations. Neither of those provisions state that those program alternative have to be “approved” by the ACHP. The Corps complies with section 106 of the NHPA through Appendix C and the interim guidance documents April 25, 2005, and January 31, 2007. We continue to work with the ACHP on this matter. The 2005 and 2007 interim guidance documents were issued to make the regulatory program’s NHPA section 106 procedures consistent with the ACHP’s regulations. The Corps complies with tribal consultation requirements and its fiduciary responsibilities to tribes through the Department of Defense American Indian and Alaska Native Policy and the Corps’ November 1, 2012, Tribal Consultation Policy.

Several commenters said that certain state departments of transportation have been assigned responsibilities by the Federal Highway Administration under the authority in 23 U.S.C. 327 to conduct compliance under section 7 of the Endangered Species Act. These commenters stated that this practice needs to be recognized in general condition 20 for historic properties, because these departments of

transportation are considered “federal permittees” and their own procedures apply for compliance with section 106. Several commenters indicated that some Corps districts re-coordinate with State Historic Preservation Officers that were already contacted by state transportation agencies during their review process.

If a state agency is a department of transportation to which the Federal Highway Administration has assigned its responsibilities pursuant to 23 U.S.C. 327, then that state agency would be responsible for section 106 compliance under paragraph (b) of this general condition. We do not need to make any changes to the text of this general condition to recognize this assignment of authority. If a PCN is required, non-federal applicants, including state departments of transportation that have not been assigned authority under 23 U.S.C. 327 are asked to provide any documentation which may expedite the review process for NHPA section 106. For NWP activities conducted by non-federal permittees, it is the Corps’ responsibility to comply with the requirements of section 106.

One commenter stated that reliance on general conditions 20 and 32, is not a substitute for activity-specific compliance with section 106 of the NHPA. This commenter said that the Corps should conduct a section 106 review out prior to reissuing the NWPs. One commenter said that the general condition should state that the Corps is not obligated to delay issuance of an NWP verification until after an official agreement is obtained from a state.

General condition 20 provides the means for activity-specific compliance with section 106 of the NHPA. General condition 32 describes the general PCN requirements for the NWPs. As discussed in another section of this final rule, we have determined that the issuance or reissuance of the NWPs by Corps Headquarters has no potential to cause effects to historic properties. The NWPs authorize activities over a five-year period, after they are issued and go into effect. When the Corps issues or reissues NWPs, there are no specific NWP activity sites identified; when the NWPs go into effect several weeks after they issued or reissued, they could potentially authorize activities in jurisdictional waters and wetlands anywhere in the United States. In other words, during the rulemaking process for the issuance or reissuance of the NWPs there are no specific historic properties on which to conduct NHPA section 106 consultation. General condition 20 requires completion of NHPA section 106 consultations, and when section 106 consultation is

required, the Corps cannot issue an NWP verification letter until after the consultation has been completed.

Several commenters requested clarification of how PCN requirements will be defined to promote a consistent and streamlined approach and a clearer understanding of general condition 20. Several commenters stated that the PCN review timeframe should be limited to 45 days, or a maximum of 90 days when it is necessary to complete section 106 consultation. These commenters said that if the applicant has not gotten a response from the Corps within those timeframes, the applicant should be permitted to proceed with the NWP activity. One commenter said that the Corps should eliminate the open-ended review process for section 106 of the NHPA.

For those NWP activities that require NHPA section 106 consultation, we acknowledge that it will take longer for district engineers to issue NWP verifications because we have to provide sufficient time for consulting parties to provide comments on our “no historic properties affected,” “no adverse effects,” and “adverse effect” determinations. Compliance with section 106 of the NHPA is mandatory, not optional. General condition 20 states that if section 106 consultation is required, the project proponent cannot conduct the NWP activity until section 106 consultation is completed. The review process for section 106 of the NHPA is not open-ended; it concludes after the applicable procedures are followed and the district engineer can make his or her decision on the NWP PCN.

One commenter said that linear undertakings should not be segmented separately and reviewed as individual crossings. This commenter stated that, for linear projects, the Corps should include all areas where historic properties may be directly and indirectly affected by the undertaking, if any historic properties are present.

For linear projects, where the crossings of waters of the United States involve discharges of dredged or fill material into waters of the United States and/or structures or work in a navigable waters of the United States, the undertakings for the purposes of section 106 of the NHPA are the crossings that require DA authorization. The Corps does not have the authority to regulate upland segments of linear projects, and therefore those upland segments are not undertakings for the purposes of section 106 of the NHPA. The ACHP’s regulations at 36 CFR 800.16(y) define “undertaking” as: “a project, activity, or program funded in whole or in part

under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.” By including “activity” in its definition of “undertaking,” the ACHP’s definition recognizes that federal agencies may not issue permits or licenses for entire projects, and those federal agencies might only issue permits or licenses for specific components of entire projects.

For linear projects, from the Corps’ perspective, the crossings of waters of the United States authorized by NWPs or other types of DA permits, are the undertakings. For those crossings that require DA authorization, district engineers consider the direct and indirect effects of those crossings on historic properties that are caused by the discharges of dredged or fill material into waters of the United States and/or structure or work in navigable waters of the United States. If the operation and maintenance of those linear projects do not involve activities that require DA authorization, then the Corps is not required to evaluate the effects of those operation and maintenance activities on historic properties. The Corps’ scope of analysis for the purposes of section 106 of the NHPA is the same regardless of whether the activities regulated by the Corps are authorized by NWPs or other general permits, or by individual permits.

This general condition is adopted with the modifications discussed above.

GC 21. *Discovery of Previously Unknown Remains and Artifacts.* We did not propose any changes to this general condition. One commenter expressed support for general condition 21, but requested that this condition require the permittee to cease work in the area of the discovery of the previously unknown historic, cultural, or archeological remains and artifacts. This commenter noted that the wording of this general condition only allows for recovery activities or eligibility determinations, while failing to address other types of measures that might be determined necessary to avoid, minimize, or mitigate adverse effects to historic properties. One commenter said that general condition 21 is not a substitute for compliance with section 106 of the NHPA in individual cases. This commenter asserted that in absence of a section 106 review process that is carried out prior to reissuance of the NWPs, the Corps fails to meet the requirements of 36 CFR part 800.

General condition 21 requires permittees to avoid, to the maximum extent practicable, construction

activities that may affect the remains and artifacts until coordinated has been completed. This condition permits construction activities to continue outside of the discovery, while protecting the area of the discovery until coordination is complete. If these remains and artifacts are determined, after NHPA section 106 consultation, to be historic properties, other types of measures to avoid, minimize, or mitigate adverse effects to those historic properties may be implemented on a case-by-case basis. The district engineer can ask the project proponent to stop work, but the Corps does not have the authority to require the project proponent to stop work in the event of the discovery of previously unknown historic, cultural, or archeological remains and artifacts.

The purpose of this general condition is to address previously unknown remains and artifacts that are revealed during while the authorized NWP activity is being conducted. If the artifacts or remains were known at the time the district engineer reviewed the PCN or voluntary request for NWP verification, he or she would have made an eligibility determination, and if necessary, conducted NHPA section 106 consultation. Section 106 consultation was either not done because the remains or artifacts were unknown at the time the NWP PCN or voluntary request for NWP verification was being evaluated by the district engineer, or section 106 consultation was done for known historic properties included in, or eligible for inclusion in, the National Register of Historic Places. When the discovery of the previously unknown remains and artifacts are reported to the district engineer, he or she will initiate federal, tribal, and state coordination to determine whether the artifacts or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places. Section 106 consultation will be conducted when necessary for these discoveries. General condition 21 is not a substitute for section 106 consultation.

This general condition is adopted as proposed.

GC 22. Designated Critical Resource Waters. We did not propose any changes to this general condition, except to add proposed new NWP B to paragraph (b). We did not receive any comments on this general condition. Since we are issuing proposed new NWP B as NWP 54, we have added NWP 54 to paragraph (b).

This general condition is adopted with the modification discussed above.

GC 23. Mitigation. We proposed to modify the opening paragraph of this

general condition and paragraph (b) to clarify that mitigation can be required by district engineers to ensure that activities authorized by NWPs will result in no more than minimal individual and cumulative adverse environmental effects. Also, we proposed to modify paragraph (d) to state that compensatory mitigation for stream losses should be provided through rehabilitation, enhancement, or preservation, to be consistent with 33 CFR 332.3(e)(3), which states that streams are difficult-to-replace resources. In paragraph (e), we proposed to modify the first sentence to state that compensatory mitigation provided through riparian areas can be accomplished by restoration, enhancement, or maintenance of those areas. In addition, we proposed to modify paragraph (f)(1) to state that if the district engineer determines compensatory mitigation is required for the proposed NWP activity, the preferred mechanism for providing compensatory mitigation is either mitigation bank credits or in-lieu credits. In the June 1, 2016, proposed rule we also requested comment on ways to improve how compensatory mitigation conducted under the NWP program is implemented to offset direct, indirect, and cumulative effects.

Several commenters said that the Corps should only require compensatory mitigation for activities that require individual permits. Many commenters said that project proponents should not be allowed to use compensatory mitigation to reduce the impacts of their activities to qualify for NWP authorization. Several commenters expressed support for allowing applicants an option to prepare a mitigation plan to reduce adverse environmental effects to no more than minimal to qualify for NWP authorization. One commenter stated that district engineers should continue to be allowed flexibility in determining when compensatory mitigation is to be required for NWP activities, especially when many aquatic resources are already heavily degraded.

The Corps' regulations at 33 CFR 330.1(e)(3) state that district engineers can require mitigation to ensure that activities authorized by NWPs result in no more than individual and cumulative adverse environmental effects. Under the procedure in 33 CFR 330.1(e)(3), district engineers offer prospective permittees the opportunity to submit mitigation proposals to reduce the adverse environmental effects caused by NWP activities. The mitigation required under the authority of 33 CFR 330.1(e)(3) can be compensatory

mitigation, but it can also be additional on-site avoidance and minimization of adverse impacts to jurisdictional waters and wetlands. District engineers have the discretion to determine when compensatory mitigation is to be required for NWP activities, and consider the degree of functions being performed by the jurisdictional waters and wetlands that will be adversely affected by the NWP activities (see paragraph 2 of Section D, District Engineer's Decision).

One commenter stated that compensatory mitigation should only be required for impacts to jurisdictional waters. One commenter suggested that compensatory mitigation should not be required for restoration activities. One commenter said that the reference to the aquatic environment in general condition 23 should be retained.

It is implicit in general condition 23 that compensatory mitigation is only required for NWP activities that impact jurisdictional waters and wetlands. However, under general condition 32 a complete PCN requires a delineation of wetlands, other special aquatic sites, and other waters, and some of those wetlands, other special aquatic sites, and other waters might not be subject to Clean Water Act jurisdiction. Therefore, if compensatory mitigation is required for a proposed NWP activity, and there was no approved jurisdictional determination issued for the project site, there may be occasions where compensatory mitigation was required for impacts to waters and wetlands, where some of those waters and wetlands might not be subject to Clean Water Act jurisdiction. If a project proponent wants an approved jurisdictional determination for a parcel where he or she might be proposing an NWP activity, the project proponent should request and receive that approved jurisdictional determination prior to submitting a PCN for the proposed NWP activity.

In general, compensatory mitigation is not required for restoration activities. In NWP 27, which authorizes aquatic habitat restoration, enhancement, and establishment activities, there is a provision that states that compensatory mitigation is not required for activities authorized by that NWP because they result in net increases in aquatic resource functions and services. We added a similar provision to new NWP 53, which authorizes the removal of low-head dams to restore rivers and streams and improve public safety. The NWP regulations, as well as section 404(e) of the Clean Water Act, refer to adverse environmental effects, so mitigation for NWP activities is

intended to help ensure that activities authorized by NWP's cause no more than minimal adverse environmental effects.

One commenter stated that compensatory mitigation should be required for all unavoidable impacts to wetlands, special aquatic sites, and all stream types (ephemeral, intermittent and perennial). One commenter said that mitigation should only be completed on-site to better compensate for the loss at that location. A few commenters expressed their support for maintaining existing thresholds for compensatory mitigation requirements.

Compensatory mitigation is only required when necessary to ensure that activities authorized by NWP's result in no more than minimal individual and cumulative adverse environmental effects. Avoidance and minimization are other forms of mitigation that may also result in NWP activities causing no more than minimal adverse environmental effects. Under the sequence articulated in 33 CFR 330.1(e)(3), the district engineer first evaluates the PCN and determines whether the proposed activity will cause no more than minimal adverse environmental effects. If the district engineer determines the proposed activity will result in more than minimal adverse environmental effects, he or she will offer the project proponent the opportunity to submit a mitigation proposal to reduce the adverse environmental effects so that they are no more than minimal, individually and cumulatively. If the district engineer determines the mitigation proposal will reduce the adverse environmental effects, so that the net adverse environmental effects are no more than minimal, he or she will add conditions to the NWP authorization to require the project proponent to implement the mitigation proposal. If the district engineer determines that the mitigation proposal will not reduce the adverse environmental effects so that they are no more than minimal, he or she will exercise discretionary authority and instruct the project proponent on how to apply for an individual permit. On-site compensatory mitigation is often not an ecologically effective means of providing compensatory mitigation for impacts to jurisdictional wetlands because hydrologic conditions on the project site are likely to have been altered as a result of the permitted activity (NRC 2001). In the 2008 mitigation rule (33 CFR part 332), there is a framework for evaluating compensatory mitigation options to reduce risk and uncertainty in compensatory mitigation decision-

making (see 33 CFR 332.3(a) and (b)). In this general condition, we have not made any changes to the compensatory mitigation thresholds for the NWP's.

One commenter said that the Corps should require all applicants to take all practicable steps to avoid and minimize adverse impacts. Paragraph (a) requires permittees to design their NWP activities to avoid and minimize adverse effects, including both temporary and permanent adverse effects, to the maximum extent practicable on the project site.

One commenter said that mitigation measures should be required for losses of streams and open waters, including mitigation measures to improve floodplain connectivity and to provide flood storage. Another commenter stated that mitigation should be required for impacts to native aquatic vegetation such as eelgrass and kelp. A few commenters said that preservation of high quality aquatic resources should be a priority option for mitigation.

District engineers have the authority to require mitigation for losses of streams and other open waters (see paragraphs (d) and (e) of this general condition). That mitigation may result in the restoration of floodplain connectivity and the provision of one or more floodplain functions. District engineers also have the discretion to require compensatory mitigation for impacts to vegetated estuarine and marine habitats that are caused by NWP activities. We agree that preservation can be used to provide compensatory mitigation, as long as the preservation proposal complies with 33 CFR 332.3(h).

Many commenters said that the $\frac{1}{10}$ -acre threshold for wetland mitigation should be retained. One commenter suggested increasing the threshold for requiring wetland compensatory mitigation to one acre. Many commenters said that wetland compensatory mitigation should not be required if wetland fills are unavoidable. One commenter stated that district engineers should not be allowed to waive the wetland compensatory mitigation requirement.

We have retained the $\frac{1}{10}$ -acre threshold for requiring wetland compensatory mitigation for wetland losses, with the district engineer's discretion to waive that compensatory mitigation requirement or require wetlands compensatory mitigation for wetland losses of less than $\frac{1}{10}$ -acre. For many NWP activities, wetland losses authorized by NWP result in no more than minimal individual and cumulative adverse environmental effects without the need to require

wetland compensatory mitigation. The NWP's authorize unavoidable impacts to wetlands, and wetland compensatory mitigation is sometimes necessary to ensure that NWP activities result in no more than minimal adverse environmental effects.

One commenter stated that stream mitigation should only be required if it is practicable. One commenter recommended requiring compensatory mitigation for all losses of stream beds. One commenter said that compensatory mitigation should not be allowed to reduce adverse impacts of losses of stream bed. One commenter suggested establishing a threshold of 500 linear feet for requiring stream compensatory mitigation. One commenter suggested that paragraph (d) should state that the district engineer may require stream mitigation, instead of stating that the district engineer "should" require stream mitigation. A few commenters stated that the Corps should not require compensatory mitigation to offset all losses of stream bed. Several commenters said that compensatory mitigation should not be required for losses of intermittent or ephemeral streams. One commenter said that stream creation or establishment should be acceptable compensatory mitigation. One commenter asked which types of projects can be done to mitigate for the loss of stream length.

Similar to wetland compensatory mitigation, compensatory mitigation for losses of stream bed is only required when district engineers determine such compensatory mitigation is necessary to ensure that activities authorized by NWP's result in no more than minimal individual and cumulative adverse environmental effects. Stream mitigation can reduce the adverse environmental effects of NWP activities so that they are no more than minimal. District engineers have the discretion to require compensatory mitigation for losses of perennial, intermittent, and ephemeral streams. In general, stream compensatory mitigation should be accomplished through rehabilitation, enhancement, and preservation because the Corps' regulations consider streams to be difficult-to-replace aquatic resources (see 33 CFR 332.3(e)(3)). We have added the phrase "if practicable" to the last sentence of paragraph (d) to state that stream rehabilitation, enhancement, or preservation activities should be practicable. Stream compensatory mitigation for NWP activities should not be provided through establishment/creation approaches because establishment/creation activities have not been

demonstrated to effectively provide stream ecological functions.

Stream restoration and enhancement can be done using a variety of techniques, such as dam removal and modification, culvert replacement or modification, fish passage structures when connectivity cannot be restored or improved by dam removal or culvert replacement, levee removal or setbacks, reconnecting floodplains and other riparian habitats, road removal, road modifications, reducing sediment and pollution inputs to streams, replacing impervious surfaces with pervious surfaces, restoring adequate in-stream or base flows, restoring riparian areas, fencing streams and their riparian areas to exclude livestock, improving in-stream habitat, recreating meanders, and replacing hard bank stabilization structures with bioengineering bank stabilization measures (Roni et al. 2013). Stream restoration projects should focus on restoring ecological processes, through activities such as dam removal, watershed best management practices, improving the riparian zone, and reforestation, instead of focusing on the manipulation the structure of the stream channel (Palmer et al. 2014).

One commenter said that the Corps should require use of a science-based assessment tool that is capable of measuring lost stream functions caused by impacts and stream functions gained from through restoration and/or enhancement activities. One commenter stated that paragraph (d) would allow for continued, unchecked and unmitigated losses of open waters or streams that support salmon or shellfish.

We agree that science-based assessment tools should be used to assess losses of stream function or condition caused by NWP activities, and to assess increases in stream function or condition resulting from stream compensatory mitigation projects. Science-based stream assessment tools can also be used develop ecological performance standards for stream compensatory mitigation projects. However, we recognize that those tools are not available in many areas of the country. Activities authorized by NWPs will result in some losses of streams and other waters that support salmon or shellfish, and district engineers have the discretion to require compensatory mitigation to ensure that the adverse environmental effects resulting from those activities are no more than minimal.

One commenter stated that riparian mitigation requirements should be consistent with the jurisdiction where the mitigation is occurring. Another

commenter said that the restoration of riparian areas should not be allowed as a compensatory mitigation option. One commenter stated that buffers should be wider than 25 feet.

Riparian mitigation requirements are determined by district engineers on a case-by-case basis. District engineers can develop local guidelines for riparian mitigation. The restoration of riparian areas is important for rivers, streams, and other open waters, because those riparian areas provide substantial contributions to the ecological functions and services performed by rivers, streams, and other open waters. Paragraph (e) of general condition 23 allows district engineers to require riparian areas a little wider than 25 feet if there are documented water quality or habitat concerns. There are limits to the widths of riparian areas required by district engineers, because compensatory mitigation requirements for NWPs and other DA authorizations must be roughly proportional to the permitted impacts (see 33 CFR 320.4(r)(2) and 33 CFR 332.3(f)(1)). We have modified paragraph (e) to state that compensatory mitigation provided through riparian areas can be accomplished by maintenance/protection of those riparian areas. A well-developed, functional riparian does not need to be restored if it provides ecological functions in its present state.

Several commenters said that paragraph (f)(1) of general condition 23 should be modified to make it clear that the use of mitigation banks or in-lieu fee programs is not mandatory if they are impractical when compared to other mitigation alternatives. One commenter objected to the change in paragraph (f)(1) to establish a preference for the use of mitigation bank or in-lieu fee program credits to provide compensatory mitigation for NWP activities. One commenter said that the proposed modification of paragraph (f)(1) places mitigation banks and in-lieu fee programs on the same level, contrary to the 2008 mitigation rule. This commenter also said that permittees should be allowed to do permittee-responsible mitigation when it is justified. One commenter said that permittee-responsible mitigation remain a viable option, as it may be more ecologically and financially appropriate for some projects. One commenter said that the applicant should be allowed to propose any mitigation option he or she thinks is appropriate, instead of following the hierarchy in 33 CFR 332.3(b). One commenter expressed support for the mitigation hierarchy in 33 CFR 332.3(b). A few commenters

object to the hierarchy of mitigation banks being the first consideration. One commenter said that the Corps should select the most environmentally preferable method for wetland mitigation, rather than using the hierarchy listed in the 2008 rule.

As stated in proposed paragraph (f)(1), the use of mitigation bank and in-lieu fee program credits to provide compensatory mitigation for NWP activities is preferred, not required. This preference is based on the hierarchical framework for considering compensatory mitigation options for NWPs and other DA permits that is provided in 33 CFR 332.3(b). That framework was developed to manage risk and uncertainty in aquatic resource compensatory mitigation projects. The proposed paragraph (f)(1) was also made in recognition of the higher risk and uncertainty associated with permittee-responsible mitigation, especially on-site permittee-responsible mitigation where changes to hydrology and other site characteristics caused by the permitted activity make it more difficult to achieve the intended objectives of a compensatory mitigation project (NRC 2001). As stated in the 2001 NRC report, third-party mitigation approaches such as mitigation banks and in-lieu fee programs have some advantages over permittee-responsible mitigation. Paragraph (f)(1) does not supersede the framework established in 33 CFR 332.3(b); it merely reflects Conclusion 5 in the 2001 NRC report. Paragraph (f)(1) does not preclude the use of permittee-responsible mitigation, if such compensatory mitigation is approved by the district engineer after contemplating the considerations discussed in 33 CFR 332.3(a) and (b).

One commenter stated that the proposed change to general condition 23 is unclear as to whether a mitigation plan is required or not. This commenter said that proposed paragraphs (f)(3) and (f)(5) conflict with each other. Another commenter stated that proposed paragraphs (f)(1) and (f)(2) conflict with each other. One commenter said that the public should be involved in the approval process for mitigation plans.

General condition 23 does not require submission of a mitigation plan unless the district engineer determines compensatory mitigation is required to ensure that the proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects. If the prospective permittee proposes to use mitigation bank or in-lieu fee program credits to provide compensatory mitigation for the proposed NWP activity the mitigation plan only needs to provide the baseline

information and a description of the number of credits to be provided (see 33 CFR 332.4(c)(1)(ii)). General condition 32 does not require a mitigation plan for a complete PCN.

We added a new paragraph (f)(2) to state that the amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects. Paragraphs (f)(4) and (f)(6) of general condition 23 (paragraphs (f)(3) and (f)(5) in the proposed rule) do not conflict with each other. They are consistent with 33 CFR 332.4(c)(2)(ii), which addresses the preparation and approval process for mitigation plans for general permit activities. Paragraph (f)(4) describes the requirements for mitigation plans for permittee-responsible mitigation required for NWP activities. Paragraph (f)(6) reflects the flexibility in 33 CFR 332.4(c)(2)(ii) in allowing elements of a compensatory mitigation project to be addressed through permit conditions instead of being addressed in the mitigation plan. We have modified paragraph (f)(3) (proposed paragraph (f)(2)) to apply this paragraph to permittee-responsible mitigation, because mitigation bank credits and in-lieu fee program credits may not be explicitly linked to restoration activities. In addition, the review and approval of mitigation banks and in-lieu fee programs, as well as credit releases from approved mitigation banks and approved in-lieu fee project sites, undergo a rigorous review by the Corps and the other agencies participating in the interagency review process associated with mitigation banks and in-lieu fee programs. There is no public review process for the review of mitigation plans. The district engineer will review the proposed mitigation plan and determine whether it is sufficient for ensuring the NWP activity will cause no more than minimal adverse environmental effects.

One commenter said that when a permittee is a public agency (e.g., a flood control district or county) and it is required to do permittee-responsible mitigation, when the district engineer requires site protection he or she should acknowledge that the public agency can fulfill this obligation with public ownership or in fee easement over the property. One commenter stated that when a public entity conducts mitigation on public property, the site protection requirement be relaxed. One commenter said that, for a compensatory mitigation site, county ownership or a park designation should fulfill the site protection requirement.

The Corps' compensatory mitigation regulations address site protection at 33 CFR 332.7(a) and those regulations allow a range of site protection options, including alternatives to more commonly used site protection instruments such as conservation easements and deed restrictions/restrictive covenants. For a permittee-responsible mitigation project conducted by a public agency or by a state or local government agency, site protection can be provided by agency ownership of the mitigation site, as long as that agency commits to managing and protecting the mitigation site including the aquatic resources and other natural resources on the property. The public agency may also provide site protection by purchasing an easement for the property used for the permittee-responsible mitigation project as long as that easement protects the aquatic resources and other resources on the site over other uses of the land. Section 332.7(a) states that for government property, "long-term protection may be provided through federal facility management plans or integrated natural resources management plans." Other types of land management plans may also be acceptable approaches to protecting permittee-responsible mitigation sites on publicly-owned lands, and the district engineer should evaluate the public agency's proposed plan for protecting and managing the mitigation site, to determine if that proposed plan satisfies the requirements of 33 CFR 332.7(a). However, if the public agency or state or local government agency decides, in the future, that it has to or wants to use the mitigation site for other purposes, because of changes in statutes, regulations, or agency needs or missions, then the agency will be required to provide alternative compensatory mitigation (see 33 CFR 332.7(a)(4)). In addition, the party responsible for providing the compensatory mitigation must notify the district engineer 60 days prior to taking any action that would void or modify the site protection instrument or site management plan (see 33 CFR 332.7(a)(3)).

Several commenters requested a more thorough explanation of compensatory mitigation monitoring requirements for NWP activities. One commenter asked for guidance on the monitoring requirements for aquatic habitat rehabilitation, enhancement or restoration activities. This commenter stated that monitoring requirements should be commensurate with impacts.

Monitoring requirements for compensatory mitigation projects are

determined by district engineers on a case-by-case basis. General requirements for monitoring are provided at 33 CFR 332.6. Monitoring is required to ensure that the compensatory mitigation project site is meeting its performance standards, and to determine if measures such as remediation or adaptive management are necessary to ensure that the compensatory mitigation project is accomplishing its objectives. Monitoring requirements will vary, depending on the specific characteristics of the compensatory mitigation project, such as the compensatory mitigation mechanism (e.g., restoration, enhancement, establishment, or preservation), the type of aquatic resource being provided as compensatory mitigation (e.g., forested wetlands, perennial stream), and the ecosystem development characteristics of the compensatory mitigation project. Either the approved mitigation plan or permit conditions will specify the monitoring requirements for a particular compensatory mitigation project. Monitoring requirements are commensurate with the characteristics of the compensatory mitigation project, not the impacts authorized by NWP or other types of DA permits.

One commenter stated that mitigation should always be at a 2:1 ratio to ensure that more aquatic habitat is replaced. One commenter said that a national mitigation ratio be used for the NWPs.

The amount of compensatory mitigation to be provided for an NWP activity is determined by the district engineer. Factors used to determine the amount of compensatory required by the district engineer are provided at 33 CFR 332.3(f)(2). Those factors include: The method of compensatory mitigation (e.g., rehabilitation), the likelihood of ecological success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and its functions, and/or the distance between the affected aquatic resource and the compensation site. The rationale for the required amount of compensatory mitigation must be documented in the administrative record for NWP verification. A national mitigation ratio cannot be established for the entire country, because those decisions require case-by-case analysis by district engineers. The amount of compensatory mitigation necessary to offset impacts to jurisdictional waters or wetlands authorized by an NWP or other type of DA permit must be roughly proportional to the permitted impacts.

One commenter said that off-site mitigation should not be allowed and on-site avoidance and minimization should be required instead. A few commenters stated that mitigation banking is a way to avoid alternatives analysis procedures.

Off-site compensatory mitigation is an appropriate option for providing compensatory mitigation for NWP activities, as long as the off-site compensatory mitigation project is approved by the district engineer. Off-site compensatory mitigation includes off-site permittee-responsible mitigation, mitigation banks, and in-lieu fee programs. Paragraph (a) of general condition 23 requires on-site avoidance and minimization to the maximum extent practicable for both permanent and temporary adverse effects caused by NWP activities. Compensatory mitigation requirements, including the use of mitigation banks to provide any required compensatory mitigation, are determined after the prospective permittee has complied with the on-site avoidance and minimization requirements in paragraph (a) of this general condition. Alternatives analyses are not required for NWP activities.

Several commenters expressed support for not requiring compensatory mitigation for non-jurisdictional activities, such as tree clearing for overhead power lines that do not involve discharges of dredged or fill material into waters of the United States. One commenter requested examples of activities that are beyond the scope of the district engineer's authority or discretion to require compensatory mitigation.

We have retained the provisions in paragraph (i) as proposed. Because the purpose of mitigation, including compensatory mitigation, in the NWP program is to reduce the adverse environmental effects caused by an NWP activity to ensure that they are no more than minimal, individually and cumulatively, compensatory mitigation requirements established by the district engineer must relate to the direct and indirect effects caused by the NWP activity. That would be the discharges of dredged or fill material in waters of the United States and/or the structures of work in navigable waters of the United States.

Several commenters stated that compensatory mitigation for NWP activities is not effective in offsetting adverse impacts. One commenter stated that post-permit compensatory mitigation cannot be used to make the no more than minimal adverse environmental effects determination, because it is legally impermissible and

because the Corps lacks sufficient evidence to conclude that mitigation will render the impacts caused by NWP activities to be no more than minimal. One commenter said that mitigation under the NWPs does not compensate for losses of functions and services, and instead results in adverse impacts. One commenter stated the Corps should establish and manage a database to understand the impact of the NWP program, including the effectiveness of mitigation actions.

The restoration, enhancement, preservation, and in some circumstances, the establishment of aquatic resources has been demonstrated to increase or maintain ecological functions and services, which offset losses of ecological functions and services caused by activities authorized by NWPs and other types of DA permits. For difficult-to-replace aquatic resources, such as streams, bogs, and springs, compensatory mitigation should be provided through in-kind rehabilitation, enhancement, or preservation (see 33 CFR 332.3(e)(3)) because these types of aquatic resources cannot be established by manipulating uplands. When a district engineer receives a permittee-responsible mitigation proposal from the applicant, he or she carefully evaluates that proposal to determine whether it will be ecologically successful and fulfill its objectives in providing certain aquatic resource functions and services. If the permittee-responsible mitigation project is approved, the district engineer requires monitoring to ensure that it is meeting its ecological performance standards and is developing into the target aquatic resource. If the permittee-responsible mitigation project is not meeting its ecological performance standards, the district engineer will work with the permittee to identify actions, including adaptive management, to make adjustments to the mitigation project so that it meets its objectives. If the permittee-responsible mitigation project fails, the permittee may be required to provide alternative compensatory mitigation.

If the required compensatory mitigation is to be provided through mitigation bank or in-lieu fee program credits, oversight by the district engineer, with input from federal and state resource agencies and other agencies, helps ensure that mitigation banks and in-lieu fee projects produce the required amount and type of restored, enhanced, established, and preserved aquatic resources and other natural resources. Mitigation banks and in-lieu fee projects are required to have credit release schedules, which are

linked to ecological performance standards and other requirements, to ensure that the mitigation bank or in-lieu fee project is meeting its objectives in providing the desired aquatic resources and functions and services. Monitoring and adaptive management are also required for mitigation banks and in-lieu fee projects.

For the issuance or reissuance of the NWPs, the decision documents for those NWPs describe, in general terms, the mitigation measures taken for NWP activities to ensure they result in no more than minimal individual and cumulative adverse effects. That is a general discussion because of the wide variation of aquatic resource types across the country, the functions and services they provide, and the methods for restoring, enhancing, and in certain circumstances, establishing those aquatic resource. The decision documents also provide a general discussion of studies on aquatic resource restoration and enhancement that demonstrate that these activities can provide increases of aquatic resource functions. To fulfill the requirements of NEPA, the decision document includes an environmental assessment, with a mitigated finding of no significant impact. Mitigated findings of no significant impact are appropriate for fulfilling NEPA requirements (see the Council on Environmental Quality's January 14, 2011, guidance entitled "Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact").

The Corps tracks authorized impacts and permittee-responsible mitigation in its Regulatory program automated information, ORM. The Corps tracks credits produced by approved mitigation banks and in-lieu fee programs in the Regulatory In-Lieu Fee and Banking Information System (RIBITS), which is available at: https://ribits.usace.army.mil/ribits_apex/f?p=107:2:

One commenter stated that upland buffers should be accepted as compensatory mitigation for NWP activities. One commenter asked how district engineers assess indirect impacts to wetlands authorized by NWPs. One commenter asked when compensatory mitigation is to be required for temporary impacts. One commenter said that district engineers should not require any more stringent methods of compensatory mitigation than what is provided in the 2008 mitigation rule.

Upland buffers can be used to provide compensatory mitigation for NWPs (see

33 CFR 332.3(i)). District engineers can use rapid ecological assessment tools to assess indirect effects to wetland caused by activities authorized by NWP. If rapid ecological assessment tools or other tools are not available or practical to use, then district engineers will use their judgement in evaluating those indirect impacts. Compensatory mitigation is required for temporary impacts when the district engineer determines such compensatory mitigation is necessary to ensure the NWP activity results in no more than minimal adverse environmental effects. Paragraph (f) of this general condition states that compensatory mitigation projects must comply with the applicable provisions of 33 CFR part 332, so the compensatory mitigation requirements for the NWP program are the same as for other types of DA permits.

One commenter stated that compensatory mitigation requirements should be determined by district engineers, because they are familiar with the regional conditions and the mitigation needs of their geographic areas of responsibility. Several commenters stated that compensatory mitigation should be required after the 404(b)(1) Guidelines had been followed. One commenter said that the Corps should focus on a consistent nationwide criteria for when compensatory mitigation is required. One commenter said that compensatory mitigation is unnecessary and impractical for the vast majority of NWP activities. One commenter said that compensatory mitigation should be required for all losses of waters of the United States.

Compensatory mitigation requirements for NWP activities are determined by district engineers on a case-by-case basis. The Corps complied with the 404(b)(1) Guidelines when it issued or reissued the NWPs. For a specific activity authorized by an NWP, a separate 404(b)(1) Guidelines analysis is not required. There is a national standard for when compensatory mitigation required, and that standard is found in 33 CFR 330.1(e)(3), which was established in 1991 (see the November 22, 1991, issue of the **Federal Register** at 56 FR 59110). Approximately 90 percent of the activities authorized by NWP through written verifications issued by district engineers do not require compensatory mitigation (see Table 5 in U.S. Army Corps of Engineers and U.S. EPA (2015)). Compensatory mitigation is only required when necessary to ensure that NWP activities result in no more than minimal adverse environmental effects (see 33 CFR 330.1(e)(3)). If the district engineer

reviews the PCN and determines that the NWP activity will cause no more than minimal adverse environmental effects and complies with all applicable terms and conditions, he or she will issue the NWP verification without requiring compensatory mitigation.

One commenter suggested that the entire project should be considered when determining compensatory mitigation requirements. A few commenters said there should not be a threshold for requiring compensatory mitigation, but compensatory mitigation should be required regardless of the impact amount. One commenter objected to increasing compensatory mitigation requirements for the NWPs. One commenter said that compensatory mitigation requirements should be based on impacts to functions, not on a limit threshold.

Compensatory mitigation must be “directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable” (33 CFR 320.4(r)(2)). The term “proposal” refers to the activity that requires DA authorization. The Corps does not have the authority to enforce permit conditions, including compensatory mitigation requirements, for activities it does not regulate. For the NWP program, the threshold for requiring compensatory mitigation is in 33 CFR 330.1(e)(3), and under that regulation compensatory mitigation is only required when necessary to ensure the authorized activity will cause no more than minimal individual and cumulative adverse environmental effects. The June 1, 2016, proposed rule did not propose to increase compensatory mitigation requirements for the NWPs, but we did seek comments on how to improve compensatory mitigation in the NWP program (see 81 FR 35211). Compensatory mitigation requirements are based on the functions lost as a result of the NWP activity. For wetland losses greater than $\frac{1}{10}$ -acre, district engineers have the discretion to not require compensatory mitigation, if those wetland losses will result in no more than minimal adverse environmental effects without compensatory mitigation. District engineers also have discretion to require compensatory mitigation for losses of less than $\frac{1}{10}$ -acre, such as when the wetlands lost as a result of the NWP activity are highly functional.

Several commenters said that if a district engineer issues a written waiver of a linear foot limit or other NWP limit, then compensatory mitigation should not be required for the waiver because the district engineer already determined

that the authorized activity results in no more than minimal adverse environmental effects because of best management practices and other minimization techniques. Another commenter stated that mitigation should always be required for activities that are authorized by a waiver. One commenter said that compensatory mitigation should not be required to receive a waiver. One commenter stated that if compensatory mitigation is required for a district engineer’s waiver of the 300 linear foot limit for losses of intermittent or ephemeral stream bed, compensatory mitigation should only be required for the linear feet of losses of stream bed that exceed the 300 linear foot limit.

For a district engineer to issue a waiver, it may be necessary to require compensatory mitigation so that the adverse environmental effects caused by the activity are no more than minimal, individually and cumulatively. The district engineer evaluates the waiver request, and if agency coordination is required for the waiver request, the agency comments to make the determination whether the adverse environmental effects will be no more than minimal. If the district engineer decides the adverse environmental effects will be more than minimal, he or she will offer the project proponent the opportunity to submit a mitigation plan to reduce the adverse environmental effects so that they are no more than minimal. If the district engineer determines the mitigation proposal will reduce the adverse environmental effects so that NWP authorization is appropriate, and add conditions to the NWP authorization to require the permittee to implement the mitigation proposal. If the district engineer decides the mitigation proposal will not sufficiently reduce the adverse environmental effects so that they are no more than minimal, he or she will exercise discretionary authority and require an individual permit. Therefore, whether a waiver request requires compensatory mitigation is at the discretion of the district engineer. The district engineer will decide how much compensatory mitigation is necessary to ensure that the NWP activity with the written waiver of the applicable NWP limit will cause no more than minimal individual and cumulative adverse environmental effects.

Several commenters stated that when district engineers make compensatory mitigation decisions for NWP activities, they should take into consideration whether the affected waters are man-made or natural. One commenter said that mitigation should not be required

for man-made storm water conveyance systems. This commenter stated that if wetlands develop in these features and mitigation is required, the permittee should not be required to prepare a mitigation plan that fulfills the requirements of 33 CFR 332.4(c). One commenter suggested that compensatory mitigation requirements should be reduced when the regulatory requirements of another agency cause a linear transportation project to impact aquatic resources.

District engineers can take into account the type of aquatic resource, and whether it is natural or man-made, when deciding if compensatory mitigation should be required. If the man-made stormwater conveyance systems are not waters of the United States under the current regulations and guidance for identifying waters of the United States, then mitigation should not be required for activities in those systems, especially if the Corps does not regulate those activities. The Corps determines, on a case-by-case basis, when compensatory mitigation is to be required for NWP activities in a linear transportation project, regardless of whether another agency's requirements precluded alternatives for that linear transportation project that would have avoided or minimized impacts to jurisdictional waters or wetlands.

This general condition is adopted with the modifications discussed above.

GC 24. *Safety of Impoundment Structures.* We did not propose any changes to this general condition and no comments were received. This general condition is adopted as proposed.

GC 25. *Water Quality.* We did not propose any changes to this general condition and no comments were received. This general condition is adopted as proposed.

GC 26. *Coastal Zone Management.* We did not propose any changes to this general condition and no comments were received. This general condition is adopted as proposed.

GC 27. *Regional and Case-by-Case Conditions.* We did not propose any changes to this general condition. We did not receive any comments on it. This general condition is adopted as proposed.

GC 28. *Use of Multiple Nationwide Permits.* We did not propose any changes to this general condition. One commenter said that combining NWPs should be prohibited. One commenter suggested adding regional general permits to this general condition. Two commenters recommended prohibiting the use of multiple NWPs and other DA permits that authorize numerous encroachments in close proximity to

navigable waters. One of these commenters stated that regardless of whether project components are independent of one another, they are likely to cause cumulative impacts within the navigable waterway, and those impacts need to be evaluated together.

The purpose of this general condition is to ensure that acreage limits are not exceeded when two or more NWPs are combined to authorize a single and complete project. When an NWP is combined with a regional general permit to authorize a single and complete activity, it is the district engineer's determination whether the adverse environmental effects will be no more than minimal. Both NWPs and regional general permits must comply with the same standard established under section 404(e) of the Clean Water Act. When district engineers evaluate proposed NWP activities, they consider the cumulative effects of the use of those NWPs on a regional basis. They also consider the cumulative effects of activities authorized by their regional general permits, and may modify, suspend, or revoke their regional general permits when they determine those general permits are resulting in activities that have more than minimal cumulative adverse environmental effects. During the evaluation of applications for individual permits, district engineers conduct cumulative impact analyses to comply with NEPA requirements, if they are preparing environmental assessments or environmental impact statements. If the proposed activity requires an individual permit and involves discharges of dredged or fill material into waters of the United States, the district engineer will also conduct a cumulative effects analysis under the 404(b)(1) Guidelines.

This general condition is adopted as proposed.

GC 29. *Transfer of Nationwide Permit Verifications.* We did not propose any changes to this general condition and no comments were received. This general condition is adopted as proposed.

GC 30. *Compliance Certification.* We proposed to modify this general condition to add a timeframe for submitting the completed certification document. The proposed modification states that the completed certification should be sent to the district engineer within 30 days of completing the authorized activity or the completion of the implementation of any required compensatory mitigation.

Several commenters said they supported the proposed modification, and some suggested an extension to the 30-day timeframe. Two commenters

stated that the 30-day timeframe is not long enough and should be extended to 90 days because permittees have internal reviews and need more time to carefully certify the compliance certification document. One of these commenters asked what is considered "implementation" of the compensatory mitigation project. One commenter said the proposed modification would provide important information to the Corps to ensure that the program is causing no more than minimal adverse environmental impacts. One commenter recommended assigning a timeframe to ensure the receipt of a compliance certification. One commenter agreed with the 30-day timeframe but expressed concerns regarding what would happen if the due date is missed.

We believe that 30 days is sufficient time for permittees to submit their compliance certifications to district engineers. These certifications should be simple statements that do not require much work to prepare. If the proposed 30-day period would be increased to 90 days, it is likely that it would result in more permittees forgetting to submit their certifications. For the purposes of this general condition, implementation of the required compensatory mitigation refers to the completion of construction of the permittee-responsible mitigation project. If the permittee-responsible mitigation project is solely preservation of aquatic resources, then it would be the execution of the site protection mechanism and other required measures for the preservation compensatory mitigation. If mitigation bank or in-lieu fee program credits will be used to fulfill compensatory mitigation requirements, the implementation refers to securing those credits. If the permittee fails to submit the compliance certification on time, there would be non-compliance with this general condition. The district engineer may take appropriate action to address that non-compliance.

One commenter stated that this general condition should be modified to state that the completed certification should be submitted within 30 days of completing the authorized activity or completing the implementation of the required compensatory mitigation. One commenter said the 2012 general condition should be retained and require submission of the certification within 30 days of project completion. This commenter remarked that there is frequently a time lapse between completing the compensatory mitigation requirement and completing the NWP activity.

In general, the required compensatory mitigation should be implemented in

advance of, or concurrent with, the authorized activity (see 33 CFR 332.3(m)). However, if the district engineer allows the required compensatory mitigation to be constructed or otherwise implemented after the authorized activity occurs, then the compliance certification would have to be sent to the district engineers within 30 days of completing the required compensatory mitigation. In 2012, general condition 30 did not have a timeframe for submitting the compliance certification. That is why we proposed to add a timeframe so that the compliance certification process would no longer be open-ended with no due date. We have modified this general condition to add the phrase “whichever occurs later” to the end of the last sentence, to make it clear that the compliance certification must be submitted within 30 days of whatever action occurs last. For example, if the permittee implements the required compensatory mitigation before conducting the NWP activity, the compliance certification would be required to be submitted to the district engineer within 30 days of the NWP activity being constructed.

This general condition is adopted with the modification discussed above.

GC 31. *Activities Affecting Structures or Works Built by the United States.* We proposed this new general condition to address activities that are required under Section 14 of the Rivers and Harbors Act of 1899 (33 U.S.C. 408) to secure permission from the Secretary of the Army for the alteration or occupation or use of structures or works built by the United States (*i.e.*, U.S. Army Corps of Engineers federally authorized Civil Works projects). The authority to issue these section 408 permissions has been delegated to Corps Headquarters, Corps divisions, or Corps districts depending on the case-specific circumstances for a 408 permission request. Some of these activities also require authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899, and may be eligible for one or more NWPs.

Several commenters said they support the proposed new general condition and several commenters said they opposed the new general condition. One commenter asked how long a typical section 408 permission review takes and how it would affect the 45-day default authorization for the NWPs. One commenter requested clarification on when the 45-day clock starts for PCNs submitted under general condition 31. Several commenters stated that the general condition should be modified so

that it only applies to major section 408 reviews, not to minor section 408 reviews. A few commenters said that a PCN should not be required for an activity that requires section 408 permission, if the NWP activity does not otherwise require a PCN.

We do not have any statistics on how long section 408 reviews typically take. As stated in the text of this general condition, the proposed NWP activity is not authorized by NWP until the appropriate Corps office issues the 408 permission. In other words, if the proposed NWP activity requires section 408 permission the 45-day default authorization does not apply. If a PCN is required under general condition 31, the activities cannot be authorized by NWP until the Corps issues the 408 permission, or determines that a 408 permission is not required. We have modified the last sentence of this general condition to change “Corps district office” to “Corps office” because some section 408 permissions are issued by Corps Headquarters. To ensure that NWP activities that will alter or temporarily or permanently occupy or use USACE projects obtain the required 408 permissions before the project proponent conducts those NWP activities, the general condition must apply to both major and minor section 408 reviews. The PCN requirement is necessary to give district engineers the opportunity to add conditions to the NWP authorization to protect the USACE project and to ensure that any needed internal coordination is done.

One commenter said that Engineer Circular 1165–2–216 should not be treated as a binding rule in the final NWPs. One commenter stated that guidance should be issued to Corps districts on ways to streamline 408 reviews so that they do not delay NWP verifications. One commenter asked whether section 408 and section 404 reviews could be concurrent with each other. One commenter said that section 408 and section 404 reviews should be independent of each other.

The NWP regulations already state that the “NWPs do not authorize interference with any existing or proposed Federal project” (see 33 CFR 330.4(b)(5)). Engineer Circular 1165–2–216 provides the procedures to ensure that activities, including NWP activities, do not interfere with USACE projects. It has been extended for one year while the Corps considers updates and revisions to the Engineer Circular. General condition 31 adds further assurance that activities authorized by the NWPs will not interfere with existing or proposed USACE projects. The 408 permission process must be

completed before the NWP verification can be issued. The 408 permission process might require the project proponent to modify his or her proposed activity to avoid or reduce its impact on the USACE project. Where possible, the section 408 and the NWP PCN reviews are conducted concurrently. The section 408 and NWP PCN reviews are independent of each other and they often occur in different Corps offices.

One commenter requested a list of rivers where section 408 permissions are required. One commenter said that the Corps should establish a Web site with a list of federal projects so applicants can determine when section 408 permissions are required. Additional information on the section 408 permission process and the timing of the issuance of authorizations by Regulatory Program offices is provided in Engineer Circular 1165–2–216, which is available at: <http://www.usace.army.mil/Missions/CivilWorks/Section408.aspx>.

The project proponent should contact the appropriate Corps district office if he or she is uncertain whether the proposed activity might alter or temporarily or permanently occupy or use a USACE project.

This general condition is adopted with the modification discussed above.

GC 32. *Pre-Construction Notification.* We proposed to modify paragraph (b) by adding a new paragraph (b)(3) to state that the PCN should identify the specific NWP(s) the project proponent wants to use to authorize the proposed activity. In addition, we proposed to modify paragraph (b)(4) to require a description of mitigation measures the applicant intends to use to reduce adverse environmental effects caused by the proposed activity. For linear projects, we proposed to change paragraph (b)(4) to make it clear that the PCN should identify all crossings of waters of the United States that require DA authorization. We also proposed to modify paragraph (b)(4) to require, for linear projects, that the PCN include the quantity of proposed losses of waters of the United States for each single and complete crossing of those waters. Please see the June 1, 2016, proposed rule for additional discussion on the proposed changes to this general condition.

Several commenters said they supported the proposed changes to general condition 32 and several commenters said they objected to those proposed changes. One commenter stated that the Corps should avoid changes to the PCN requirements that would result in delays. A few

commenters stated that mitigation and single and complete project requirements should not be included in general condition 32. A couple of commenters stated that without detailed information provided in PCNs, district engineers will not be able to assess whether or not adverse impacts from proposed NWP activities are no more than minimal, and the public has no ability to assess the full extent of impacts resulting from the NWP program.

Other than new general condition 31, we have not made any changes to the PCN requirements for the NWPs that would increase the time it takes for district engineers to make decisions on those PCNs. Some of the proposed changes, such as providing the opportunity for the project proponent to describe mitigation measures in the PCN that would help the district engineer reach a “no more than minimal adverse environmental effects” determination, will help reduce PCN processing times. The proposed changes to general condition 32 regarding linear projects are also intended to provide information that would facilitate the district engineer’s review.

One commenter said that PCNs should be required for all NWP activities to provide the public with the opportunity to comment on those activities, to provide information on other proposed activities that may contribute to cumulative impacts. One commenter stated that PCNs should be required for all activities in Clean Water Act section 303(d) impaired waters, and each of those PCNs should include a statement explaining how the proposed activity avoids contributing to the existing water quality impairment. One commenter said that PCNs should be required for all proposed NWP activities located in 100-year floodplains.

Activities authorized by NWPs and other general permits do not require a public notice and comment process; the public notice and comment process occurs during the development of the NWP, regional general permit, or programmatic general permit. Requiring the solicitation of public comment on case-specific NWP activities would be contrary to the streamlined process envisioned by section 404(e) of the Clean Water Act. The Corps tracks the use of the NWPs, especially the NWP PCNs and the activities voluntarily reported to Corps district offices that do not require PCNs, to assess the NWP program’s incremental contribution to cumulative environmental effects. Division engineers can add regional conditions to one or more NWPs for activities in Clean Water Act section

303(d) waters, for those NWPs that might contribute further to the impairment of those waters. Fills in 100-year floodplains must comply with the requirements of general condition 10 and do not require additional PCNs.

A few commenters stated that the PCN process should not be used to ensure that NWP activities will result in no more than minimal adverse environmental effects. One commenter said that there no evidence that PCNs will ensure that project impacts are no more than minimal. Two commenters stated that PCNs are an essential mechanism for ensuring NWP activities result in only minimal impacts.

The PCN process has been used for many years to provide flexibility in the NWP program and to ensure that NWP activities have no more than minimal individual and cumulative adverse environmental effects. Nothing in the text of section 404(e) of the Clean Water Act indicates that the Corps cannot use a PCN process for general permits. The PCN process provides an opportunity for the district engineer to do a site- and activity-specific evaluation of a proposed NWP activity, and take into account the characteristics of the project site and proposed activity to determine whether the proposed NWP activity will cause no more than minimal individual and cumulative adverse environmental effects. The PCN process also gives the district engineer the opportunity to add activity-specific conditions to the NWP authorization to satisfy the “no more than minimal adverse environmental effects” requirement for the NWPs. If there was no PCN process available for the NWPs, then there would be no activity-specific conditions added to the NWP authorization, including no compensatory mitigation or other mitigation requirements. In addition, there would be no opportunity to comply with section 7 of the Endangered Species Act or section 106 of the National Historic Preservation Act.

One commenter asked whether the Corps would notify the applicant in circumstances when individual water quality certifications are required for NWP activities. One commenter stated that NWP activities that require PCNs and NWP activities that do not require PCNs are not “similar in nature” and should not be authorized by the same NWP.

If water quality certification has not been previously issued by the state, tribe, or U.S. EPA for the NWP, an individual water quality certification is required (see general condition 25). The district engineer may issue a provisional NWP verification, which explicitly

states to the prospective permittee that the proposed activity is not authorized by NWP until he or she obtains an individual water quality certification or a waiver. An NWP authorizes a category of activities that is similar in nature, and whether a PCN is required or not does not alter that category. The PCN process is simply a process whereby district engineers review proposed activities that have the potential to result in more than minimal adverse environmental effects. In response to a PCN, the district engineer can conditions, including mitigation requirements, to ensure that authorized activities cause no more than minimal adverse environmental effects. The district engineer can also exercise discretionary authority and require an individual permit for the proposed activity.

A few commenters said that the final NWPs should provide clear direction to Corps districts to not use additional information requests to delay reviews. A few commenters stated that the Corps should adhere to a 45-day review period for all PCNs that are not subject to activity-specific conditions requiring additional procedures. One commenter stated that PCN review periods should be expedited for time-sensitive maintenance and inspection work for energy projects. Another commenter said that the Corps should allow emergency projects to proceed immediately and conduct after-the-fact review and approvals.

Paragraph (a) is written to provide direction to district engineers to make only one additional information request. Except for certain NWPs (*i.e.*, NWPs 21, 49, and 50) and for the requirements of certain general conditions (*e.g.*, general conditions 18, 20, and 31), activities that require PCNs are authorized after 45 days have passed after district engineers receive complete PCNs unless the district engineer exercises his or her authority to modify, suspend, or revoke the NWP authorization (see 33 CFR 330.1(e)(1)). District engineers can place priority on processing NWP PCNs for time-sensitive maintenance and inspection activities associated with energy projects. There are other regulatory program procedures for emergency situations and those procedures are found 33 CFR 325.2(e)(4).

One commenter said that Corps Headquarters should provide district offices with more guidance and direction on complying with the review timelines for NWP PCNs. A few commenters stated that Corps Headquarters should issue guidance to its districts to make it clear that requests for additional information are limited to

one request, and limited to the information required by paragraph (b) of general condition 32. One commenter said that the final rule should state that district engineers are limited to a single information request. One commenter suggested adding a provision to general condition 32 to require PCN completeness determinations to be made within 15 days.

We do not believe that any additional guidance is necessary. General condition 32 and Section D, District Engineer's decision, clearly articulate the process for reviewing PCNs. Paragraph (a) of general condition 32 describes the process for requesting additional information for PCNs to make them complete. Additional information may be required from the applicant to conduct other procedures associated with the PCN process, such as information necessary to conduct ESA section 7 consultation or information needed for NHPA section 106 consultation. General condition 32 states that, as a general rule, the district engineer should make only one request for information to make the PCN complete. We recognize that there may be some situations where a piece of information needed to make the PCN complete was not identified, and the district engineer can request that information to proceed with the evaluation of the PCN. If that flexibility is not provided, the district engineer may be left with the option of suspending or revoking the NWP authorization because he or she was not allowed by the NWP rule to request that piece of additional information. We believe that 30 days is necessary to make completeness determinations for PCNs.

One commenter said that applicants should not be allowed to proceed with NWP activities that require PCNs without receiving a written verification from the Corps. A few commenters said that the statement explaining that the 45-day PCN review period may be extended if general conditions 18, 20, and/or 31 apply to an NWP activity leaves the PCN review period open ended, and disagreed with that approach. One commenter stated that extending the PCN review period beyond 45 days does not follow the congressional mandate to provide a streamlined permitting process. This commenter stated that extensions to the PCN review period should require documentation and substantiation as to why an extension is necessary, and then only be granted for specific and predictable periods of time. This commenter suggested creating timelines for the consultations and coordination

procedures that extend the PCN review period to ensure that they occur in a timely manner.

The NWP regulations at 33 CFR part 330 provide a 45-day default authorization for most NWP activities. There are exceptions for certain NWPs, such as NWPs 21, 49, and 50, and for certain general conditions. If ESA section 7 consultation and/or NHPA section 106 consultation is required for a proposed NWP activity, the project proponent cannot proceed with the NWP activity until after those consultations have been completed and the district engineer notifies the project proponent. Activities authorized by the Corps are required to comply with ESA section 7 and NHPA section 106, and those consultations will be completed as soon as practicable. Section 404(e) of the Clean Water Act does not provide any exemptions from complying with ESA section 7 and/or NHPA section 106. The Corps only conducts those consultations where it is required to do so, and the consultation documentation is included in the administrative record for those NWP PCNs. For ESA section 7 consultations, the consultation process does not end until the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service issues their biological opinion for a formal consultation or its written concurrence for a request for informal consultation. For NHPA section 7 consultations, the consultation process does not end until after the applicable steps in the consultation process identified in 36 CFR part 800 have been completed.

One commenter said that the 45-day review should include a pre-application meeting to determine if NWP authorization is appropriate for a proposed activity. One commenter suggested that to avoid delays in PCN reviews, Corps districts should assign one project manager to an individual company to review all of that company's permit applications, and that the project manager would be funded by that company. One commenter recommended applying the 2001 memorandum entitled "Fees in the Section 106 Process" to the PCN coordination process, if the Corps intends to maintain the current coordination timelines.

Pre-application meetings can provide information that will be helpful in processing the NWP PCN, when the PCN is submitted to the district engineer. However, pre-application meetings are optional. Under 33 U.S.C. 2352, the Corps may accept and expend funds contributed by a non-federal public entity or a public-utility company or natural gas company to

expedite the evaluation of applications for Department of the Army permits for that entity or company. Guidance on that process is provided in guidance issued by the Corps on August 14, 2015, that is entitled: "Implementation Guidance for Section 1006 of the Water Resources Reform and Development Act of 2014 and Guidance on the Use of Funding Agreements within the Regulatory Program." A copy of that guidance is available at: http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/WRDA_214_reg_guide_2015.pdf. As stated in the Advisory Council on Historic Preservation's June 6, 2001, memorandum, neither the National Historic Preservation Act nor the Advisory Council's regulations for implementing the act requires federal agencies to pay for any aspect of consultation, including consultation with tribes, for the purposes of the NHPA section 106 process.

One commenter said that the information requirements for PCNs make the NWPs more like individual permits in terms of the amount of information required. Several commenters recommended requiring more project-specific information requirements for PCNs. One commenter stated that PCNs should include a requirement for alternatives information. One commenter said that PCNs should include detailed mitigation plans. A couple of commenters stated that PCNs should include information about drinking water intakes in the vicinity of proposed NWP activities.

While the NWPs may require a moderate amount of information for a complete PCN, that information is necessary for the district engineer to make his or her determination whether a proposed NWP activity will result in no more than minimal adverse environmental effects. Providing this information to the district engineer early in the NWP authorization process means that little or no information should be needed later in the process, in contrast to individual permits in which a minor amount of information is required to issue public notices, and additional information is provided during the individual permit evaluation process to assist the district engineer in making his or her decision. Pre-construction notifications do not require alternatives analyses because specific activities authorized by general permits do not require alternatives analyses under the 404(b)(1) guidelines (see 40 CFR 230.7(b)(1)). In addition, NEPA documentation, including a NEPA alternatives analysis, is not required for

a specific general permit activity because NEPA compliance was completed by Corps Headquarters when it issued the general permit. Detailed mitigation plans are not required for NWP PCNs because the district engineer first reviews the PCN to determine whether the proposed activity is authorized by NWP, or whether compensatory mitigation or other mitigation is necessary to ensure that the proposed activity will result in no more than minimal adverse environmental effects. If the district engineer decides that compensatory mitigation is needed for the proposed activity to qualify for NWP authorization, then he or she will tell the project proponent that a mitigation plan that satisfies the requirements of 33 CFR 332.4 is required. When district engineers review PCNs, they ensure that the proposed activities comply with all applicable general conditions, including general condition 7, water supply intakes. Because of that review process, we do not believe it is necessary to require PCNs to identify water supply intakes in proximity of proposed NWP activities.

Three commenters expressed support for having the applicant identify which NWP they are applying for. One of these commenters said that this will allow for streamlining the permitting process, and avoid delays in processing. One commenter said that the district engineer should be required to verify the particular NWP identified in the PCN, instead of saying that the district engineer should verify the activity under that NWP. One commenter suggested that applicant's choice of NWP that most readily authorizes the activity should be added to paragraph (b)(3). One commenter asked whether or not the Corps would notify the applicant that the district engineer is evaluating the proposed activity under a different NWP than what the applicant identified in the PCN. One commenter said that paragraph (b)(3) should state that the district engineer can or should advise the permittee of another NWP that could allow the proposed activity to be authorized more efficiently.

We are retaining proposed paragraph (b)(3), to identify the specific NWP or NWPs that the project proponent wants to use. The district engineer is not required to verify the specific NWP(s) identified in the PCN if any of the specific NWP(s) are clearly not applicable. For example, if the prospective permittee request NWP 27 authorization for a bank stabilization activity then the district engineer can issue an NWP 13 verification if the proposed activity complies with the

terms and conditions of NWP 13. An applicant will normally specify the NWP or NWPs that will most readily authorize his or her proposed activity, unless there is reason for requesting verification under another NWP or NWPs. If the district engineer decides after reviewing the PCN that the proposed activity does not qualify for the NWP identified by the project proponent, he or she does not have to notify the applicant that the PCN is being evaluated under another NWP. If the district engineer decides that the proposed activity does not qualify for authorization under any NWP, he or she will notify the applicant and provide instructions on how to apply for authorization under an individual permit or a regional general permit.

Two commenters stated that there is no benefit to having the applicant identify in their PCNs which NWP he or she is proposing to use. These commenters said that regardless of which NWP the applicant identifies, the Corps should authorize the activity under the NWP most appropriate to the project purpose. A couple of commenters said proposed paragraph (b)(3) is unclear whether the proposed activity will be verified under the NWP identified by the applicant because it has less stringent conditions, or whether it would be verified under the most appropriate NWP based on the purpose of the proposed activity and the most pertinent conditions. A few commenters said that the Corps should evaluate proposed activities under the most pertinent NWP(s), even if the applicant has specified a different NWP.

There is some degree of redundancy in the NWPs, where a proposed activity is eligible for authorization more than one NWP. At the end of the day, the standard is the same for all NWPs: NWP activities must result in no more than minimal individual and cumulative adverse environmental effects. So if a proposed activity meets the terms of the requested NWP, and any applicable regional conditions, then the district engineer should issue the NWP verification under the NWP identified in the PCN. In the NWP regulations at 33 CFR 330.2(h), "terms" are defined as: ". . . the limitations and provisions included in the description of the NWP itself" (see 33 CFR 330.2(h)). The NWP general conditions are the same for all of the NWPs. The category of activity authorized by the NWP is the relevant consideration, not the project purpose.

One commenter said that PCNs for proposed NWP activities in FEMA-mapped floodways should require a floodway analysis. Another commenter stated that PCNs for proposed NWP

activities located within 100-year floodplains should include require information on floodplain values, hazards, and FEMA-approved maps, and any applicable FEMA-approved state or local floodplain management requirements. One commenter suggested that PCNs should require certification by individuals that meet the Secretary of the Interior's Professional Qualifications Standards to state whether the proposed activity has potential to cause effects to historic properties or whether consultation with tribes needs to be conducted.

We do not believe that it is necessary for a PCN to include a floodway analysis if the proposed NWP activity is located in a FEMA-mapped floodway. That information can be requested and analyzed by the appropriate federal, tribal, state, or local floodplain management authority. District engineers will review PCNs to determine whether they will have more than minimal adverse effects to floodplain values, or cause more than minimal increases in flood hazards. Such information does not need to be provided in the PCN. In accordance with general condition 20, non-federal permittees are required to submit PCNs if the proposed NWP activity might have the potential to cause effects to historic properties. Because the requirement to comply with the consultation requirements of section 106 of the NHPA fall on the Corps for its undertakings, and to consult with tribes when necessary to fulfill its trust obligations to tribes, the PCN does not need to include the certification suggested by the commenter.

A few commenters objected to including proposed mitigation measures in PCNs. Three commenters said that requiring the PCN to include mitigation measures is unnecessary, burdensome, and duplicative. Two commenters requested removal of the proposed requirement, because this information is applicable to proposed activities reviewed under individual permit procedures, instead of NWP activities. One commenter requested flexibility in the amount of detail required for describing mitigation measures in the PCN. One commenter said paragraph (b)(4) should refer to on-site mitigation measures and define those measures as avoidance, minimization, repair, restoration, or reduction of impacts over time to avoid confusion with compensatory mitigation. Two commenters stated that for restoration projects that qualify for NWP authorization, compensatory mitigation should not be required.

The mitigation measures in paragraph (b)(4) may include describing avoidance and minimization of impacts to jurisdictional waters and wetlands on the project site. The prospective permittee is not required to propose any mitigation measures in his or her PCN. The prospective permittee can choose not to propose any mitigation measures. A description of mitigation measures is optional, and the project proponent is encouraged to describe, in the PCN, mitigation measures that will assist the district engineer in reaching a decision, earlier in the process, that the proposed activity will result in no more than minimal adverse environmental effects. The level of detail for the proposed mitigation measures described in the PCN is up to the project proponent. Otherwise, the district engineer may review the PCN and determine that mitigation is necessary to ensure that the proposed activity will cause no more than minimal adverse environmental effects and notify the prospective permittee that a mitigation plan is required. That will add more time to the district engineer's review process. It is the prospective permittee's decision whether to suggest mitigation measures up front in the PCN or wait for the district engineer's request for a mitigation proposal.

The term "mitigation measures" in paragraph (b)(4) refer to all five forms of mitigation identified in paragraph (b) of general condition 23, mitigation. The prospective permittee also has the option of proposing to do compensatory mitigation, especially if he or she believes that the district engineer will require compensatory mitigation for the proposed NWP activity. As stated in NWP 27 and 54, compensatory mitigation is not required for the restoration activities authorized by those NWPs.

A few commenters objected to a requirement to state the proposed quantity of losses of waters of the United States for each single and complete crossing of waters of the United States for linear projects. One commenter said that for linear projects that have multiple crossings of waterbodies, and only some of those crossings require PCNs, the applicant must discuss the impacts of all crossings, not just those that require PCNs. This commenter also stated that the applicant should not be allowed to construct crossings that do not require PCNs until the Corps district issues its verification for the crossings that require PCNs.

In paragraph (b)(4), we have changed the phrase "waters of the United States" to "wetlands, other special aquatic sites,

and other waters" to be consistent with paragraph (b)(5) of this general condition. As discussed below, neither approved jurisdictional determinations or preliminary jurisdictional determinations are not required for NWP PCNs, and if the project proponent wants an approved or preliminary jurisdictional determination for the project site, he or she should request and receive that approved or preliminary jurisdictional determination prior to submitting an NWP PCN.

Two commenters said there is inconsistent language in the PCN requirements for linear projects. They said the paragraph (b)(4) first states that the PCN must include "the anticipated amount of loss of water of the United States expected to result from the NWP activity" and later states that for single and complete linear projects, the PCN "must include the quantity of proposed losses of waters of the United States for each single and complete crossing of waters of the United States." In the third sentence of paragraph (b)(4), we have changed the word "proposed" to "anticipated" to be consistent with the first sentence of this paragraph.

One commenter stated that an approved jurisdictional determination should not be required for an NWP PCN, and that the final NWPs should clarify how approved and preliminary jurisdictional determinations relate to the NWP PCN process. One commenter said that the Corps' jurisdictional determination process under Regulatory Guidance Letter 08-02 should not require a jurisdictional determination to be performed prior to starting the NWP PCN review process. One commenter stated that the requirement for a full delineation of waters of the United States is a significant cause of delay and cost in light of the uncertainties regarding the 2015 final rule defining waters of the United States. This commenter also said that because delineations are only required to be included with a PCN when proposed impacts are 1/10-acre or greater, all of the wetland impacts cannot be evaluated. One commenter said the Corps should field verify every delineation it receives with a PCN. This commenter also stated that if the Corps cannot verify every delineation, we should randomly select delineations to verify.

An approved or preliminary jurisdictional determination is not required for a complete PCN, or for the district engineer to issue an NWP verification. For a complete PCN, the prospective permittee must submit a delineation of wetlands, other special aquatic sites, and other waters on the

project site. The project site is not necessarily the entire parcel of land; it may be a portion of that land if the proposed NWP activity is limited to that portion of the parcel. The delineation of wetlands, other special aquatic sites, and other waters on the project site is necessary for the Corps' evaluation of the NWP PCN and its determination on whether the proposed activity will result in no more than minimal adverse environmental effects. The need for the delineation is independent of whatever regulation defining "waters of the United States" is in place at the time the PCN is submitted. As stated above, neither an approved jurisdictional determination nor a preliminary jurisdictional determination is required to process the PCN, and requests for approved and preliminary jurisdictional determinations will be processed by Corps districts as separate actions. Since 1991, the NWPs have had a requirement for submission of a delineation of affected special aquatic sites, including wetlands (see 56 FR 59145). All NWP PCNs require a delineation of wetlands, other special aquatic sites, and other waters. There is not a 1/10-acre threshold for requiring a delineation with the PCN. District engineers have the option of verifying the accuracy of the delineation, or making the decision on the NWP verification without doing a verification of the delineation.

Paragraph (b)(5) only requires a delineation of wetlands, other special aquatic sites, and other waters to provide information to the district engineer to make his or her determination whether the proposed activity qualifies for NWP authorization. In the third sentence of this paragraph, we have replaced the phrase "waters of the United States" with "wetlands, other special aquatic sites, and other waters" to make it clear that the delineation submitted with the PCN does not require a jurisdictional determination. The delineation only needs to identify wetlands, other special aquatic sites, and other waters on the site and their approximate boundaries, so that the district engineer can evaluate the proposed activity's impacts to those wetlands, other special aquatic sites, and other waters. For a complete PCN, that delineation does not have to be verified by the Corps district. If the district engineer finds errors in the delineation, he or she may make corrections to the delineation or require the applicant to make those corrections, but those corrections should not delay the decision on the NWP verification or the decision to exercise discretionary authority.

If the project proponent wants an approved jurisdictional determination to help him or her determine whether the proposed activity might qualify for NWP authorization, to identify jurisdictional waters and wetlands to provide in support of his or her PCN, or to avoid having to do compensatory mitigation for losses of wetlands, other special aquatic sites, or other waters that are not subject to Clean Water Act jurisdiction, the project proponent must submit a separate request for an approved jurisdictional determination. An NWP PCN and a request for an approved jurisdictional determination are separate actions, and if a project proponent submits a request for an approved jurisdictional determination with his or her NWP PCN, the district engineer will process those requests separately. General condition 32 does not require an approved jurisdictional determination for NWP PCNs; only a delineation of wetlands, other special aquatic sites, and other waters is required to make the PCN. With certain exceptions identified in the NWPs (*e.g.*, NWPs 21, 49, and 50) and some general conditions (*e.g.*, general conditions 18 and 20), the decision on an NWP PCN must be made within 45 days of receipt of a complete PCN. There is no required timeframe for responding to requests for approved jurisdictional determinations, although the Corps strives to respond to those requests within 60 days.

One commenter said that paragraph (b)(5) should be modified to state that National Wetland Inventory mapping is not appropriate for determining wetland boundaries, every wetland delineation submitted with a PCN must be based on an actual field investigation, and streams identified on a U.S. Geological Survey (USGS) map are not adequate documentation for a delineation. One commenter suggested adding text to paragraph (b)(5) to state that a USGS topographic quadrangle shall be sufficient to delineate intermittent and ephemeral streams on the project site, and that failure to list or map any stream bed that is not shown on a USGS topographic quadrangle as an intermittent or ephemeral stream shall not be a reason for the district engineer determining the delineation is not complete. This commenter asserted that if a stream is not mapped on a USGS topographic quadrangle map, it should not be considered jurisdictional under the Clean Water Act.

We understand that various published maps, especially published maps generated by remote sensing, do not show all wetlands or accurately depict wetland boundaries, or show all streams. The remote sensing approaches

used by the U.S. FWS for its National Wetland Inventory maps result in errors of omission that exclude wetlands that are difficult to identify through photointerpretation (Tiner 1997). These errors of omission are due to wetland type and the size of target mapping units (Tiner 1997). Likewise, many small streams, especially headwater streams, are not mapped on 1:24,000 scale U.S. Geological Survey (USGS) topographic maps (Leopold 1994) or included in other inventories (Meyer and Wallace 2001), including the National Hydrography Dataset (Elmore et al. 2013). Many small streams and rivers are not identified through maps produced by aerial photography or satellite imagery because of inadequate image resolution or trees or other vegetation obscuring the visibility of those streams from above (Benstead and Leigh 2012). However, we do not believe it is necessary to explicitly state in the text of paragraph (b)(5) that National Wetland Inventory maps or USGS topographic maps may, or may not, be adequate for preparing the delineation of wetlands, other special aquatic sites, or other waters for the PCN. A stream may be a jurisdictional water of the United States even if it is not shown on a USGS topographic map.

One commenter suggested adding the term "natural" before "lakes and ponds" in paragraph (b)(5), stating that there is no need to delineate artificial waterbodies or any area that is wet due to irrigation, whether or not they are prior converted cropland. One commenter suggested adding text to this paragraph to state that a jurisdictional determination is not required to make a PCN complete, because a jurisdictional determination is not necessary for the Corps to issue an NWP verification.

Some artificial waterbodies may be waters of the United States. For example, a lake that was created by impounding a jurisdictional river would likely be subject to Clean Water Act jurisdiction. If an area is not a wetland, another type of special aquatic site, or other water, then it does not need to be included in the delineation for the PCN. If the project proponent is uncertain whether a particular artificial waterbody or area of irrigated land is subject to Clean Water Act jurisdiction, and wants a definitive determination from the Corps, then he or she can request an approved jurisdictional determination. Areas of prior converted cropland will be identified on a case-by-case basis. As explained above, we modified paragraph (b)(5) to remove the term "waters of the United States" so that there is no implication that a jurisdictional determination is

necessary before the Corps issues an NWP verification.

One commenter expressed support for requiring PCNs to include a mitigation statement. One commenter stated that the mitigation information for a PCN should state that mitigation includes on-site avoidance and minimization measures.

We have not made any changes to paragraph (b)(6). The delineation required by paragraph (b)(5) will document the on-site avoidance and minimization measures on the project site.

One commenter stated that proposed paragraph (b)(8) does not address undiscovered historic properties. Undiscovered historic properties are addressed by general condition 21. If the historic properties are unknown at the time the PCN is submitted, then the prospective permittee cannot be expected to include that information in the PCN. If the non-federal project proponent thinks there might be historic properties that could potentially be affected by the NWP activity, then he or she should submit a PCN and the district engineer will determine whether NHPA section 106 consultation is necessary. We have modified paragraph (b)(10) by changing "Corps district" to "Corps office" because a 408 permission might be issued by Corps Headquarters.

Several commenters encouraged the Corps to develop and use an online PCN application tool for electronic submission of PCNs and supporting documents. A few commenters recommended that the Corps develop an on-line PCN submittal tool and that the tool be made available to states agencies such as water quality certification agencies. One commenter stated that the Corps should continue to allow paper PCNs to be submitted to Corps districts.

At this time, we are not prepared to develop and deploy a national on-line PCN application. Some Corps districts have developed local tools that allow electronic submission of NWP PCNs and supporting documentation. We have modified the last sentence of paragraph (c) as follows: "Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals." The general condition still allows for paper PCNs to be submitted to Corps districts.

A few commenters stated that agency coordination should be completed within 30 or 60 days. One commenter suggested increasing the agency coordination period to 30 days, and to require an individual permit for any proposed NWP activity that requires a waiver and any agency objects to the

district engineer issuing that waiver. One commenter said that local government agencies should be included in the agency coordination procedures in paragraph (d). Another commenter recommended including tribes in agency coordination procedures.

The purpose of the agency coordination process in paragraph (d) is seek input from other federal and state agencies for certain proposed NWP activities to determine whether those activities will result in no more than minimal individual and cumulative adverse environmental effects. We believe that the current timeframe (up to 25 days) is sufficient for federal and state agencies to provide their views for the “no more than minimal adverse environmental effects” determination. The final decision whether a proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects lies solely with the district engineer. District engineers can include local government agencies in agency coordination for proposed NWP activities. As a result of the consultations Corps districts are conducting with tribes on the 2017 NWPs, Corps districts can include interested tribes in agency coordination on proposed NWP activities.

Two commenters stated that under paragraph (d)(3) of general condition 32, the Corps cannot unilaterally impose timelines on State Historic Preservation Officers (SHPOs) or Tribal Historic Preservation Offices (THPOs), because section 106 consultation is not limited to 15 days. A couple of commenters said that 10 calendar days for the SHPO or THPO to submit comments back to the Corps is not reasonable, and that timeframe is in compliance with 36 CFR part 800, which provides 30 days for SHPOs and THPOs to provide their comments. One commenter stated that the Corps does not have the authority to impose a 10-day review period on THPOs, and cannot assume that a tribe has no comments or objections based on a lack of response within that 10-day period. One commenter stated that paragraph (d)(3) should read, “State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative.”

If NHPA section 106 consultation is required, that consultation will be conducted under the requirements in general condition 20, historic properties. For NHPA section 106 consultations conducted to comply with general condition 20, the Corps will comply with the timeframes in 36 CFR part 800, consistent with the Corps’

2005 and 2007 interim guidance. Because paragraph (d) is limited to minimal adverse environmental effects determinations, we are removing coordination with SHPOs and THPOs from this paragraph. As discussed above, district engineers can adopt and implement coordination procedures with tribes to seek their views on proposed NWP activities that require PCNs.

One commenter stated that agency coordination should be required for bank stabilization projects over 200 linear feet. One commenter stated that agency coordination should continue to be required for NWP 48 activities that require PCNs.

We are retaining the agency coordination threshold of 500 linear feet for NWP 13 activities, because that is consistent with the applicable waiver provision in paragraph (b) of NWP 13. We have removed the agency coordination requirement for NWP 48 activities, as we proposed to do in the June 1, 2016, proposed rule.

One commenter noted that paragraph (d) uses the term “activity” instead of “single and complete project” and said that the district engineer would be required to do agency coordination when verifying a linear project with an overall loss greater than 1/2-acre.

Each separate and distant crossing that qualifies for NWP authorization is considered to be a separate NWP authorization. Therefore, the aggregate total of losses of waters of the United States is not used to determine whether agency coordination is required under paragraph (d) of general condition 32. Since each single and complete project authorized by NWPs 12 or 14 has a 1/2-acre limit (or a 1/3-acre limit for losses of tidal waters authorized by NWP 14), then NWP 12 or 14 activities will not require agency coordination.

A few commenters expressed their support for the proposed PCN form. Several commenters said that the Corps should have included the proposed PCN form with the proposed rule to issue and reissue the NWPs, so that the public can provide comments on the proposed form. One commenter stated that the comment period for the proposed PCN form should be extended by 60 days following the availability of the proposed form.

The proposed PCN form is a separate action from this rulemaking to issue and reissue NWPs. In the June 1, 2016, the public was provided the opportunity to submit comments on the proposed PCN form and we received several comments. The comment period for the proposed PCN form was 30 days while

the comment period on the proposed NWPs was 60 days.

One commenter noted that some districts have joint application forms with state agencies, and this commenter said that these districts should find a way to integrate the information required for NWP PCNs on the NWP PCN form with their current joint application forms.

If the NWP PCN form is approved, districts that have joint application forms with state agencies can continue to provide applicants the option to use those joint application forms. Those joint application forms can also be modified to incorporate features of the approved NWP PCN form.

This general condition is adopted with the modifications discussed above.

District Engineer’s Decision

Discussion of Proposed Modifications to Section D, “District Engineer’s Decision”

We proposed to modify paragraph 1 to state that if an applicant requests authorization under one or more specific NWPs, the district engineer should issue the verification letter for those NWPs, if the proposed activity meets the terms and conditions of those NWP(s), unless he or she exercises discretionary authority to require an individual permit. We proposed to modify paragraph 2 to clarify that a condition assessment can also be used to help determine whether a proposed activity will result in no more than minimal adverse environmental effects. In the second sentence of paragraph 3, we proposed to change the text to state that applicants may also propose compensatory mitigation to offset impacts to other types of waters, such as streams. We also proposed to clarify that mitigation measures other than compensatory mitigation may also be used to ensure that a proposed NWP activity results in no more than minimal adverse environmental effects.

A number of commenters objected to the proposed change, stating that the district engineer should be able to determine which NWP should be used to authorize the proposed activity. One commenter said it was unclear what a condition assessment involves and whether the Corps or the applicant would prepare the condition assessment. One commenter said that there should be additional time to comply with general conditions 18 and 20. One commenter stated that paragraph 2 of Section D should include cumulative effects as one of the factors that the district engineer considers when making an adverse environmental

effects determination. The current wording implies that only direct and indirect effects are to be considered. One commenter said that district engineers should be required to evaluate entire pipelines and conduct an analysis of cumulative effects that is posted for public comment.

The modification of paragraph 1 of this section states that the district engineer should issue the NWP verification under the NWP requested by the applicant, if the proposed activity meets the terms and conditions of that NWP. If the proposed activity does not meet the terms and conditions of the NWP identified in the PCN, and another NWP would authorize the proposed activity, then the district engineer can authorize the proposed activity under the NWP that he or she identified. However, if the proposed activity meets the terms and conditions of two different NWPs, and the applicant submitted a PCN that identified one of those NWPs, then the district engineer should issue the NWP verification under the NWP the applicant identified in his or her PCN. We have modified paragraph 1 to add a reminder that for those NWPs that have a 1/2-acre limit with a waivable 300 linear foot limit for losses of intermittent or ephemeral stream bed, then the loss of stream bed plus any other losses of jurisdictional waters and wetlands cannot exceed 1/2-acre.

A condition assessment is a type of rapid ecological assessment that examines the relative ability of an aquatic resource to support and maintain a community of organisms having a species composition, diversity, and functional organization comparable to reference aquatic resources in the region (see 33 CFR 332.2). In most circumstances, the prospective permittee would conduct the condition assessment and provide the results to the district engineer. In some cases, the district engineer may conduct the condition assessment. The extended time frames for complying with general conditions 18 and 20 are already addressed by paragraph 4.

We have modified paragraphs 1 and 2 of this section to state that the district engineer will consider, in addition to the direct and indirect effects, the cumulative effects of the NWP activities. The district engineer may require mitigation, including compensatory mitigation, to ensure that the cumulative adverse effects of the NWP activity or activities or no more than minimal. The district engineer's cumulative effects analysis does not have to be an exhaustive analysis, because the required NEPA cumulative

effects analysis was done by Corps Headquarters in the decision document supporting the issuance or reissuance of the applicable NWP(s). If the applicable NWP(s) authorize discharges of dredged or fill material into waters of the United States, in the national decision document issued by Corps Headquarters there is a cumulative effects analyses to satisfy the requirements of the 404(b)(1) Guidelines. For pipelines and other linear projects, the cumulative effects of the activities authorized by NWPs for the overall project, within an appropriate geographic region, will be evaluated by district engineers. Unless the pipeline is constructed entirely in waters of the United States and involves activities that require DA authorization, the Corps is not required to evaluate the entire pipeline, or linear project. If the Corps is only authorizing the segments of the linear project, such as a pipeline, that cross jurisdictional waters and wetlands and involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States, then its analysis will focus on the regulated crossings of waters of the United States.

Further Information

In item 5, we proposed to add a cross-reference to proposed new general condition 31. If the Corps issues a section 408 permission, then the NWP activity would not be considered as interfering with the federal project. We received no comments on the proposed change, and we have adopted that change.

Definitions

In the June 1, 2016, proposed rule, we proposed changes to some of the NWP definitions. One commenter recommended removing the definitions from the NWPs and adding them to the Code of Federal Regulations so that they would apply to the entire regulatory program. One commenter stated that the definition of "independent utility" should be added to NWP 12 because this commenter said there is no rational basis for treating linear and non-linear projects differently.

The definitions in Section F were developed for use with the NWPs that are issued or reissued for the 5-year period those NWPs will be in effect. Incorporating those definitions into the Code of Federal Regulations so that they would apply to individual permits, regional general permits, and programmatic general permits would reduce flexibility in the regulatory program. Regional general permits and programmatic general permits may take

different approaches to administering general permit programs, especially general permits intended to reduce duplication with other federal, tribal, state, or local agency regulatory programs.

There is a rational basis for distinguishing between linear projects and non-linear projects. For linear projects, impacts to jurisdictional waters and wetlands caused by activities authorized by NWPs are scattered throughout a large landscape that encompasses the point of origin and terminal point of the linear projects, and all of the crossings of jurisdictional waters and wetlands in between the origin and terminus. Under most circumstances, those crossings impact distinctly different waterbodies, although there may be cases where there are multiple crossings of the same waterbody at separate and distant locations. For a long linear project, a large number different waterbodies may be impacted by crossings that are a substantial distance from each other. In contrast, for a non-linear project, the impacts to jurisdictional waters and wetlands are concentrated within a much smaller landscape unit (usually a single parcel of land) that is defined by the boundaries of the non-linear project (e.g., the boundaries of the residential or commercial development). For a non-linear project, the impacts of activities authorized by NWPs or other DA permits usually occur to a single waterbody and its tributaries and adjacent wetlands. As a general concept, cumulative impacts accrue to a single waterbody as a result of multiple impacts occurring over time, which include direct impacts to the waterbody and the indirect effects of activities occurring in the watershed of that waterbody. For a linear project, the incremental contribution of a linear project crossing of a waterbody to the cumulative impacts for that particular waterbody is small. For a linear project, the sum of the authorized impacts occur to the various waterbodies crossed by that linear project. A non-linear project may have a larger incremental contribution to the cumulative impacts for a particular waterbody, because all of the authorized impacts will occur in or near that waterbody.

We received a few comments suggesting that we provide a definition of "temporary." We believe that district engineers should have the discretion to determine on a case-by-case basis what constitutes a temporary impact versus a permanent impact. A district engineer can issue guidelines for his or her district on what constitutes a temporary fill or a temporary structure or work.

The length of time to consider an impact to be “temporary” depends on a variety of factors, including how soon the temporary structures and fills need to be removed after construction has been completed. In some cases they might need to be removed shortly after construction is completed. In other cases more time might be necessary to allow the completed structures and fills to stabilize prior to removing any temporary structures or fills. The appropriate length of time would depend on various factors, such as resource type, hydrodynamics, soils, geology, plant communities, and season. Providing a national definition of “temporary” would be less protective of the environment because it would constrain local decision making. For example, if the authorized structure or fill is not allowed sufficient time to stabilize, it may collapse or be washed away after the temporary structures or fills are removed.

A couple of commenters asked for definitions of “repair,” “replacement,” and “previously authorized.” One of these commenters also requested definitions of “modification” and “riprap.” One commenter requested a definition of “minimal adverse effect.”

We do not see a need to define the terms “repair,” “replacement,” “previously authorized,” “modification,” and “riprap.” The commonly understood definitions of these terms apply to the NWPs, and they do not warrant the development of new definitions. The term “minimal adverse effect” cannot be defined because it is a subjective term, with “minimal” and “adverse effect” dependent on the perspective of the person conducting the evaluation or assessment. In paragraph 2 of Section D, District Engineer’s Decision, we have provided a list of factors district engineers should consider when making their “no more than minimal adverse environmental effects” determinations for proposed NWP activities.

Best management practices (BMPs). We did not propose any changes to this definition. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Compensatory mitigation. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Currently serviceable. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Direct effects. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Discharge. We proposed to modify this definition to make it clear that the use of the term “discharge” in the NWPs refers to “discharges of dredged or fill material” and not to discharges of other types of pollutants. Point source discharges of other types of pollutants are regulated under Section 402 of the Clean Water Act.

Several commenters said they support the proposed change. One commenter stated that the Corps regulates under section 404 of the Clean Water Act, some but not all excavation activities. One commenter said that the 2015 final rule defining “waters of the United States” should not be referenced in this definition.

Under the definition of “discharge of dredged material” at 33 CFR 323.2(d), we regulate certain excavation activities in waters of the United States. The NWP definition of “discharge” refers to regulated discharges of dredged or fill material into waters of the United States. The definition of “discharge” does not refer to the 2015 final rule.

Ecological reference. To help implement the new provision of NWP 27 that requires aquatic habitat restoration, enhancement, and establishment activities to result in aquatic habitat that resembles an ecological reference, we are adding a definition of “ecological reference” using the concepts discussed in the preamble discussion of NWP 27.

Enhancement. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Ephemeral stream. We did not propose any changes to this definition. One commenter requested clarification on how ephemeral streams are to be identified and the mitigation requirements for impacts to ephemeral streams.

Ephemeral streams are distinguished from perennial and intermittent streams by their flow regimes, which are explained in the definition (*i.e.*, they have flowing water only during, and for a short duration after, precipitation events in a typical year). Compensatory mitigation requirements for losses of ephemeral streams authorized by NWPs are determined on a case-by-case basis by district engineers. This definition is adopted as proposed.

Establishment (creation). We did not receive any comments on the proposed definition. The definition is adopted as proposed.

High Tide Line. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Historic property. We did not receive any comments on the proposed

definition. The definition is adopted as proposed.

Independent utility. We did not propose any changes to this definition. A few commenters requested clarification that the concepts of independent utility and “single and complete” applies to both linear and non-linear projects. One commenter recommended including linear projects in this definition. One commenter said that the test to determine a “single and complete non-linear project” in this definition conflicts with proposed Note 2 in NWP 12 and proposed Note 1 in NWP 14.

The concept of independent utility does not apply to the definition of “single and complete linear project” because the crossings of waters of the United States between the point of origin of a linear project and its terminal point are necessary for the linear project to fulfill its purpose of transporting goods, services, and/or people from the point of origin to the terminal point. In other words, each of those crossings of waters of the United States for the single and complete linear project does not have independent utility. Therefore, it would not be appropriate to include linear projects in this definition, for the reasons explained above. This definition does not conflict with Note 2 of NWP 12 or Note 1 of NWP 14. The term “independent utility” was removed from both of those Notes.

This definition is adopted as proposed.

Indirect effects. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Intermittent stream. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Loss of waters of the United States. We proposed to modify this definition to clarify that loss of stream bed can be measured by area (*e.g.*, acres, square feet) or by linear feet. For the NWPs that authorize discharges of dredged or fill material into waters of the United States that result in the loss of stream bed through filling or excavation, specified NWP limits may be expressed in acres, linear feet, or both.

One commenter supported the proposed changes to this definition. A few commenters said they support the proposed modification on quantification of losses of stream bed in acres. A few commenters objected to that proposed modification. A few commenters expressed disagreement that excavation in stream beds results in a loss of waters of the United States. One commenter said that this definition should not

include stream modification and bank stabilization. One commenter asked whether the use of timber mats in waters of the United States counts towards the limits of the NWP.

We have retained acres as an option for quantifying loss of stream bed. The physical, chemical, and biological processes that occur in aquatic ecosystems and other types of aquatic resources take place over the area of stream bed. For example, gross primary production and ecosystem respiration in rivers and streams is represented in grams per square meter per day, secondary production in rivers and streams is quantified in grams per square meter per year, and river nitrogen and phosphorous yields are expressed in kilograms per hectare per year. (Allan and Castillo 2007). For streams, quantifying impacts and compensatory mitigation as linear feet does not take into account the width of the stream, which is important to indicate the area of stream that performs ecological functions and services (e.g., Bronner et al. 2013). The definition of “loss of waters of the United States” is intended to assist in the determination whether a proposed NWP activity will result in more than minimal adverse environmental effects, so it examines activities that cause adverse effects to jurisdictional waters and wetlands, even if those activities do not convert those waters or wetlands to uplands so that those wetlands area lost. Excavation of stream bed changes the stream bed and the functions it provides. Stream modification and bank stabilization activities can cause losses of stream bed, such as the filling of stream bed to construct the bank stabilization activity. Temporary use of timber mats in waters of the United States as a best management practice to minimize the adverse effects of activities authorized by NWPs does not count towards the NWP limits because that use of timber mats does not result in a loss of waters of the United States.

One commenter said that the word “excavation” should be deleted from this definition. One commenter asked for clarification whether excavation activities that remove material from waters of the United States, but do not restore the impact area to pre-construction contours and elevations, cause a loss of waters of the United States. One commenter asked how excavation activities are considered in the first sentence of this definition, which refers to waters of the United States that are temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations. A few commenters

asserted that the proposed definition is arbitrary and capricious, particularly if it is applied to NWP 12 activities.

Excavation activities in jurisdictional waters and wetlands may require DA authorization, if they result in regulable discharges of dredged or fill material. District engineers apply the definitions at 33 CFR 323.2(c)–(f) to determine whether an excavation activity results in a discharge of dredged or fill material that requires DA authorization. For the purposes of this definition, regulated excavation activities in rivers and streams cause a loss of waters of the United States. The fifth sentence of this definition states that waters of the United States that are temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not considered to result in a loss of waters of the United States. Nationwide permit 12, as well as the other NWPs issued under section 404 of the Clean Water Act, authorizes discharges of dredged or fill material into waters of the United States that can result in permanently or temporarily filling, flooding, excavation, or draining waters of the United States. In other words, NWP 12 is treated no differently than other section 404 NWPs when it comes to applying the definition of “loss of waters of the United States.”

A few commenters agreed with the proposed clarification that states that non-regulated activities are not to be included when calculating losses of waters of the United States. Several commenters said this definition should include the conversion of forested wetlands. One commenter stated that the definition should be modified to state that vegetation cutting does not cause a loss of waters of the United States. One commenter stated that this definition should include permanent losses of wetlands from conversion activities as losses of waters of the United States.

The conversion of forested wetlands to emergent wetlands, other types of wetlands, or to open waters may be a loss of waters of the United States if that conversion involves activities that require DA authorization. For example, mechanized landclearing in a forested wetland that results in a regulated discharge of dredged material and converts the forested wetland to an emergent wetland requires DA authorization. In contrast, if a forested wetland is altered by cutting the trees above their crowns without removing the tree trunks and roots and causing a regulated discharge of dredged material, then that activity would not be

considered a “loss of waters of the United States” under this definition.

This definition is adopted as proposed.

Navigable waters. We are adding this definition to clarify that if the term “navigable waters” is used in the text of an NWP, then the NWP authorizes activities in navigable waters of the United States subject to section 10 of the Rivers and Harbors Act of 1899. Navigable waters of the United States are defined at 33 CFR part 329.

Non-tidal wetland. We proposed to modify this definition to refer to 33 CFR 328.3(c)(4). One commenter said that the 2015 final rule defining “waters of the United States” should not be referenced in this definition.

We have removed the second sentence of this definition, which cited the definition of “wetland” promulgated in the 2015 final rule defining “waters of the United States.” This definition is adopted with the modification discussed above.

Open water. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Ordinary high water mark. We proposed to change the regulation citation in this definition to 33 CFR part 328.3(c)(6), which was based on the 2015 final rule defining “waters of the United States.” One commenter supported the proposed change, and one commenter did not agree with the proposed change. One commenter said that the 2015 final rule defining “waters of the United States” should not be referenced in this definition.

We have removed the reference to 33 CFR 328.3(c)(6) from this definition. This definition is adopted with the modification discussed above.

Perennial stream. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Practicable. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Pre-construction notification. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Preservation. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Protected tribal resources. We have added this definition to assist with compliance with general condition 17, tribal rights. This definition was taken from the 1998 Department of Defense American Indian and Alaska Native Policy.

Re-establishment. We did not receive any comments on the proposed

definition. The definition is adopted as proposed.

Rehabilitation. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Restoration. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Riffle and pool complex. We did not propose any changes to this definition. One commenter stated that a more specific definition should be provided for the NWP's because this definition should not apply to a single pool in the vicinity of a bridge, with some cobbles near the pool.

This definition was taken from the 404(b)(1) Guidelines (40 CFR 230.45). This definition refers to "riffle and pool complexes." A single pool with some cobbles is not a riffle and pool complex. This definition is adopted as proposed.

Riparian areas. We proposed to change the word "adjacent" to "next" in the first sentence of this definition because riparian areas border rivers, streams, and other bodies of water.

One commenter supported the proposed modification and one commenter opposed the proposed modification. One commenter asked for further explanation why we proposed to change "adjacent" to "next" and ask whether this modification would change the meaning of "riparian area." This commenter said she was uncertain whether the proposed change would result in more or fewer riparian areas requiring mitigation or alter the type of mitigation required.

The proposed modification is intended to make this definition clearer, because riparian areas abut streams, lakes, and estuarine-marine shorelines. The Corps regulatory program has long defined adjacent wetlands as wetlands that are bordering, contiguous, or neighboring. Riparian areas are bordering or contiguous to streams, lakes, and estuarine-marine shorelines. Because "neighboring" ecosystems or habitats features may be adjacent to, but separated from, streams, lakes, and estuarine-marine shorelines by roads, levees, or other man-made features we believe the word "next" is a more precise term than "adjacent." This change will not alter the mitigation requirements for the NWP's, or change the implementation of paragraph (e) of general condition 23, mitigation. That paragraph addresses the restoration, enhancement, and protection/maintenance of riparian areas as compensatory mitigation for NWP activities.

This definition is adopted as proposed.

Shellfish seeding. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Single and complete linear project. We did not propose any changes to this definition. One commenter recommended changing this definition so that it is the same as the definition of "single and complete non-linear project." One commenter stated that use of the term "single and complete" indicates that if one crossing depends on another crossing being constructed, then those crossings will be considered together. One commenter said that the term "separate and distinct" should be used instead of "separate and distant."

The Corps' regulations at 33 CFR 330.2(i) provide different approaches to applying the concept of "single and complete project" to linear projects versus non-linear projects. These differences are explained in the definitions of "single and complete linear project" and "single and complete non-linear project" in Section F of the NWP's. For linear projects, the concept of "single and complete project" means that each separate and distant crossing may be authorized by an NWP. When the district engineer evaluates the PCN for a linear project, he or she considers the cumulative effects of those crossings that require DA authorization (see paragraph 1 of Section D, "District Engineer's Decision"). The correct terminology is "separate and distant," "not separate and distinct" (see 33 CFR 330.2(i)).

Several commenters said that the definition of "distant" is ambiguous and should be further defined. Several commenters requested that the Corps define "separate and distant," and requested that the Corps provide thresholds for determining when crossings are separate and distant. One commenter asked how the term "separate and distant" would be applied to determine if the linear project requires an individual permit. One commenter stated that allowing authorization of "separate and distant crossings" under one NWP or separate NWP's is dependent on how the prospective permittee determines the end points of each waterbody crossing.

District engineers will use their discretion to determine what constitutes "distant" for the purposes of determining that separate and distant crossings of waters of the United States qualify for separate NWP authorization. We cannot establish thresholds at a national level because "separate and distant" depends on a variety of factors and is best determined on a case-by-case basis. Factors considered by district

engineers may include topography, local hydrology, the distribution of waters and wetlands in the landscape, geology, soils, and other appropriate factors. District engineers will determine when proposed crossings of waters of the United States are not separate and distant and require individual permits because they exceed the acreage or other limits for an NWP. The district engineer's determination that crossings of waters of the United States are separate and distant is dependent on landscape factors, including the distribution of jurisdictional waters and wetlands in the landscape, and not on the prospective permittee's identification of end points for each waterbody crossing.

One commenter stated that the ability to use multiple NWP's to authorize individual segments of linear projects should be eliminated, including pipelines and bank stabilization activities, because that practice violates numerous laws. One commenter stated that the Corps violates the Clean Water Act by treating each crossing of waters of the United States as a single and complete project. That commenter said that a small segment of a pipeline or transmission line crossing a water of the United States would have no independent utility. One commenter said that the definition of "single and complete linear project" should be amended to prohibit piecemealing of activities to meet NWP limits. Two commenters asserted that authorizing each single and complete crossing with an NWP fails to account for cumulative impacts of the linear project.

The Corps' practices for authorizing linear projects by NWP does not violate any laws. The NWP regulations for the Corps' practices were promulgated in 1991 and are still in effect. The definitions in the NWP's are consistent with the NWP regulations issued in 1991. Section 404(e) of the Clean Water Act does not provide any direction on general permit authorization for regulated activities for crossings of waters of the United States for linear projects. As explained elsewhere in this preamble, for a single and complete linear project the separate and distant crossings of waters of the United States do not have independent utility because they are necessary for transporting the goods or services from the point of origin to the terminal point. The definition of "single and complete linear project" does not allow piecemealing. Under paragraph (b)(4) of general condition 32, PCN's for linear projects are required to include those crossings of waters of the United States that require NWP PCN's as well as those

crossings that will utilize the NWP and do not require PCNs. When the district engineer reviews the PCN, he or she considers the cumulative effects of both the NWP activities that require PCNs and the NWP activities that do not require PCNs.

One commenter stated that there should be no changes to the way “single and complete” and “separate and distant” are applied to the NWPs, because any change may result in more individual permits being required for linear projects that have previously been authorized by a NWP.

We have not made any changes to the proposed definition. This definition is adopted as proposed.

Single and complete non-linear project. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stormwater management. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stormwater management facilities. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stream bed. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stream channelization. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Structure. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Tidal wetland. We proposed to change the regulation citations to refer to the provisions in the 2015 final rule defining “waters of the United States.” One commenter supported the proposed change and one commenter opposed the proposed change. One commenter said this definition should not reference the 2015 final rule.

We have modified this definition by removing the second sentence from the proposed definition. We also deleted the phrase “, which is defined at 33 CFR 328.3(c)(7)” from the end of the last sentence. These two changes remove the regulation references that were in the 2015 final rule. We also modified the first sentence of this definition by adding the word “jurisdictional” before the second use of the word “wetland” and deleting the parenthetical (*i.e.*, water of the United States). This definition is adopted with these modifications.

Tribal land. We have added this definition to assist with compliance with general condition 17, tribal rights. This definition was taken from the 1998

Department of Defense American Indian and Alaska Native Policy.

Tribal rights. We have added this definition to assist with compliance with general condition 17, tribal rights. This definition was taken from the 1998 Department of Defense American Indian and Alaska Native Policy, but uses the term tribal lands instead of Indian lands.

Vegetated shallows. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Waterbody. We proposed to modify this definition by revising the second sentence as follows to reference the 2015 final rule defining “waters of the United States”: “If a wetland is adjacent to a waterbody determined to be a water of the United States under 33 CFR part 328.3(a)(1)–(5), that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR part 328.4(c)(2)).”

Several commenters said that if the Corps intends to use the term “waterbody” interchangeably with “water of the United States” in the NWP program, then we should delete the definition of “waterbody” from the NWPs and use the term “waters of the United States” instead. In the alternative, these commenters stated that this definition could be modified to avoid using concepts from the 2015 final rule defining “waters of the United States” and removing those regulation references. Several commenters said that this definition should not utilize the 2015 final rule’s definitions of “adjacent” and “neighboring.” One commenter asserted that the term “waterbody” should be removed from the NWPs.

We have modified this definition by removing the phrase “under 33 CFR 328.3(a)(1)–(5)” from the second sentence. We have retained the reference to 33 CFR 328.4(c)(2) because that provision of the Corps’ regulations was not addressed by the 2015 final rule. The definition of “waterbody” needs to be retained because either the terms “waterbody” or “waterbodies” are used 18 times in the text of the NWPs and general conditions. A waterbody is a single aquatic unit and for a river or stream it includes wetlands adjacent to the river or stream.

This definition is adopted with the modification discussed above.

Administrative Requirements

Plain Language

In compliance with the principles in the President’s Memorandum of June 1, 1998, (63 FR 31855) regarding plain

language, this preamble is written using plain language. The use of “we” in this notice refers to the Corps. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

Paperwork Reduction Act

The paperwork burden associated with the NWP relates exclusively to the preparation of the PCN. The Corps estimates that applicants will submit 31,448 PCNs per year. Paragraph (b) of general condition 32 identifies the information that should be submitted with a PCN, and some NWPs identify additional information to be included in the PCN. While different NWPs require different information to be included in a PCN, the Corps estimates that a PCN takes, on average, 11 hours to complete. That results in an average, annual paperwork burden of 345,928 hours.

The NWPs would increase the total paperwork burden associated with this program but decrease the net burden on the public. This is due to the fact that there is new paperwork burden associated with the inclusion of two new NWP (both of which have PCN requirements). Since, however, this time would otherwise be spent on completing an individual permit application, which we estimate also takes, on average, 11 hours to complete, the net effect on the public is zero.

The only real change to the public’s paperwork burden from this final rule is a decrease due primarily to a modification to the PCN requirements for NWPs 33 and 48, the modification to paragraph (b) of NWP 3, and, to a lesser extent, a minor increase associated with the minor changes we made to the content required for a complete PCN (see paragraph (b) of general condition 32).

Specifically, we anticipate a reduction in paperwork burden from the final rule to require PCNs only for NWP 33 activities in section 10 waters. There will also be a paperwork reduction because of the change to the PCN thresholds for NWP 48, by eliminating the requirement to submit a PCN for dredged harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation. We estimate that the changes to NWP 33 would result in 210 fewer PCNs, with an estimated reduction of paperwork burden of 2,310 hours. The changes to the PCN thresholds for NWP 48 are expected to result in a reduction of 50 PCNs per year in waters where there are no listed species or critical habitat that would otherwise trigger the requirement to submit PCNs because of general condition 18. We estimate that 50 fewer PCNs will be required for NWP

48 activities, with a reduction of paperwork burden of 550 hours. We estimate that 50 fewer PCNs will be required for NWP 3(b) activities because the placement of riprap to protect the structure or fill will be authorized by NWP 13 and will not likely require a PCN. Therefore, the estimated net change in paperwork burden for this rule is an increase of 792 hours per year. Prospective permittees who are required to submit a PCN for a particular NWP, or who are requesting verification that a particular activity qualifies for NWP authorization, may use the current standard Department of the Army permit application form.

The following table summarizes the projected changes in paperwork burden for two alternatives relative to the

paperwork burden under the 2012 NWP. The first alternative is to reissue 50 NWP and issue two new NWP. The second alternative would result if these NWP are not issued and reissued and regulated entities would have to obtain standard individual permits to comply with the permit requirements of section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899. The 302 standard individual permits included in the row for the 2012 NWP represent the standard individual permits that would be required for activities that would be authorized by the changes to NWP 3, 43, 45, and 52 and the two new NWP (NWP 53 and 54). The estimated 15 activities that would require authorization by standard individual permit under the 2017 NWP

represent surface coal mining activities that were authorized by paragraph (a) of the 2012 NWP 21 that will not be completed before the 2012 NWP expires and would thus require standard individual permits to complete the surface coal mining activity. We estimate that imposing a cap of 1,000 linear feet on bulkheads in NWP 13 will result in 10 bulkheads requiring individual permits each year. The modification of NWP 13 to make it clear that it authorizes stream barbs will reduce the number of individual permits by an estimated 10 per year. Those two changes to NWP 13 will result in no net changes in number of the number of individual permits required for bank stabilization activities each year.

	Number of NWP PCNs per year	Number of NWP activities not requiring PCNs per year	Number of SIPs per year	Estimated changes in NWP PCNs per year	Estimated changes in number of NWP activities not requiring PCNs per year	Estimated changes in number of SIPs per year
2012 NWP	31,555	31,415	302			
2017 NWP	31,448	31,979	15	- 82	+492	- 292
SIPs required if NWP not reissued	0	0	49,838			

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number.

Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), we must determine whether the regulatory action is “significant” and therefore subject to review by OMB and the requirements of the Executive Order. The Executive Order defines “significant regulatory action” as one that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the

President’s priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, we have determined under item (4) that this rule is a “significant regulatory action” and the draft final rule was submitted to OMB for review.

Executive Order 13132

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires the Corps to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” The issuance and modification of NWP does not have federalism implications. We do not believe that the final NWP will have substantial direct effects on the States, on the relationship between the federal government and the States, or on the distribution of power and responsibilities among the various levels of government. These NWP will not impose any additional substantive obligations on State or local governments. Therefore, Executive Order 13132 does not apply to this rule.

One commenter stated that completing PCNs puts an administrative and financial burden on local governments, and requested that the Corps evaluate this impact in

accordance with the National Environmental Policy Act, or revise the PCN requirements.

Local governments that want to do activities that require DA authorization under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899 must apply for permits from the Corps unless the proposed activity qualifies for authorization under a general permit that does not require notification to the Corps. If the proposed activity does not qualify for general permit authorization, the local government must submit an individual permit application. If the proposed activity potentially qualifies for NWP authorization, but requires submission of a PCN to the district engineer, then the local government must submit a PCN. As stating in our Regulatory Impact Analysis, the direct costs to permit applicants for obtaining NWP authorization are less than the direct costs of obtaining individual permit authorization.

Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment

rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of the issuance and modification of NWP's on small entities, a small entity is defined as: (1) A small business based on Small Business Administration size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

The statutes under which the Corps issues, reissues, or modifies nationwide permits are section 404(e) of the Clean Water Act (33 U.S.C. 1344(e)) and section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403). Under section 404 of the Clean Water Act, Department of the Army (DA) permits are required for discharges of dredged or fill material into waters of the United States. Under section 10 of the Rivers and Harbors Act of 1899, DA permits are required for any structures or other work that affect the course, location, or condition of navigable waters of the United States. Small entities proposing to discharge dredged or fill material into waters of the United States and/or construct structures or conduct work in navigable waters of the United States must obtain DA permits to conduct those activities, unless a particular activity is exempt from those permit requirements. Individual permits and general permits can be issued by the Corps to satisfy the permit requirements of these two statutes. Nationwide permits are a form of general permit issued by the Chief of Engineers.

Nationwide permits automatically expire and become null and void if they are not modified or reissued within five years of their effective date (see 33 CFR 330.6(b)). Furthermore, section 404(e) of the Clean Water Act states that general permits, including NWP's, can be issued for no more than five years. If the current NWP's are not reissued, they will expire on March 18, 2017, and small entities and other project proponents would be required to obtain alternative forms of DA permits (*i.e.*, standard individual permits, letters of permission, or regional general permits) for activities involving discharges of dredged or fill material into waters of

the United States or structures or work in navigable waters of the United States. Regional general permits that authorize similar activities as the NWP's may be available in some geographic areas, but small entities conducting regulated activities outside those geographic areas would have to obtain individual permits for activities that require DA permits.

When compared to the compliance costs for individual permits, most of the terms and conditions of the NWP's are expected to result in decreases in the costs of complying with the permit requirements of section 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act. The anticipated decrease in compliance cost results from the lower cost of obtaining NWP authorization instead of standard individual permits. Unlike standard individual permits, NWP's authorize activities without a requirement for public notice and comment on each proposed activity.

Another requirement of Section 404(e) of the Clean Water Act is that general permits, including nationwide permits, authorize only those activities that result in no more than minimal adverse environmental effects, individually and cumulatively. The terms and conditions of the NWP's, such as acreage or linear foot limits, are imposed to ensure that the NWP's authorize only those activities that result in no more than minimal adverse effects on the aquatic environment and other public interest review factors.

After considering the economic impacts of the NWP's on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. Small entities may obtain required DA authorizations through the NWP's, in cases where there are applicable NWP's authorizing those activities and proposed activities will result in only minimal individual and cumulative adverse environmental effects. The terms and conditions of these NWP's will not impose substantially higher costs on small entities than those of the 2012 NWP's. If an NWP is not available to authorize a particular activity, then another form of DA authorization, such as an individual permit or a regional general permit, must be secured. However, as noted above, we expect a slight to moderate increase in the number of activities than can be authorized through NWP's, because we are issuing two new NWP's. Because those activities required authorization through other forms of DA authorization (*e.g.*, individual permits or regional general permits) we expect a concurrent decrease in the numbers of individual permit and regional general

permit authorizations required for these activities.

In the June 1, 2016, proposed rule we requested comments on the potential impacts of the NWP's on small entities. One commenter said that the proposed NWP's do not comply with the Regulatory Flexibility Act because the Corps failed to conduct the required analysis to certify will not have a significant impact on small businesses. We believe our Regulatory Flexibility Act analysis satisfies the requirements of that Act.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under Section 202 of the UMRA, the agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "federal mandates" that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating a rule for which a written statement is needed, Section 205 of the UMRA generally requires the agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows an agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted. Before an agency establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed, under Section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that the NWP's do not contain a federal mandate that may result in expenditures of \$100 million or more for State, local, and

Tribal governments, in the aggregate, or the private sector in any one year. These NWP's are generally consistent with current agency practice, do not impose new substantive requirements and therefore do not contain a federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. Therefore, this final rule is not subject to the requirements of Sections 202 and 205 of the UMRA. For the same reasons, we have determined that the NWP's contain no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the issuance and modification of the NWP's is not subject to the requirements of Section 203 of UMRA.

Executive Order 13045

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the proposed rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

The NWP's are not subject to this Executive Order because they are not economically significant as defined in Executive Order 12866. In addition, the NWP's do not concern an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children.

Executive Order 13175

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires agencies to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." The phrase "policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Tribes, on the relationship between the federal government and the Tribes, or on the distribution of power and responsibilities between the federal government and Tribes."

The issuance of these NWP's is generally consistent with current agency practice and will not have substantial direct effects on tribal governments, on the relationship between the federal government and the Tribes, or on the distribution of power and responsibilities between the federal government and Tribes. Therefore, Executive Order 13175 does not apply to this final rule. However, in the spirit of Executive Order 13175, we specifically requested comments from Tribal officials on the proposed rule. Their comments were fully considered during the preparation of this final rule. We have modified general condition 17 to more fully address tribal rights. Each Corps district conducted government-to-government consultation with Tribes, to identify regional conditions or other local NWP modifications to protect aquatic resources of interest to Tribes, as part of the Corps' responsibility to protect tribal trust resources and ensure that activities authorized by NWP's do not cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, and tribal lands.

One commenter stated that they disagreed with our determination that the proposal to reissue and issue the NWP's is not subject to E.O. 13175 because the NWP's are regulations under that Executive Order.

While the NWP's are regulations, we believe the final NWP's will not have substantial direct effects on tribal governments, on the relationship between the federal government and the Tribes, or on the distribution of power and responsibilities between the federal government and Tribes. We have taken, and will continue to take, measures (such as Corps districts consulting with Tribes on specific NWP activities that may have adverse effects on tribal rights) to ensure that the NWP's will not have substantial direct effects on tribal governments, on the relationship between the federal government and the Tribes, or on the distribution of power and responsibilities between the federal government and Tribes. General condition 17 has been modified to state that no NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. Tribes use NWP's for activities they conduct that require DA authorization under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899. For example, Tribes that conduct commercial shellfish aquaculture activities have used NWP 48, and Tribes that conduct aquatic

habitat restoration activities have used NWP 27.

For the 2017 NWP's, Corps districts conducted consultations with Tribes to identify regional conditions to ensure that NWP activities comply with general conditions 17 and 20. Through those consultations, district engineers can also develop coordination procedures with Tribes to provide opportunities to review proposed NWP activities and provide their views on whether those activities will cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. When a Corps district receives a pre-construction notification that triggers a need to consult with one or more Tribes, that consultation will be completed before the district engineer makes his or her decision on whether to issue the NWP verification. If, after considering mitigation, the district engineer determines the proposed NWP activity will have more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands, he or she will exercise discretionary authority and require an individual permit. Division engineers can modify, suspend, or revoke one or more NWP's in a region to protect tribal rights. A district engineer can modify, suspend, or revoke an NWP to protect tribal rights, protected tribal resources, and tribal lands.

Environmental Documentation

A decision document, which includes an environmental assessment and Finding of No Significant Impact (FONSI) has been prepared for each NWP. The final decision documents for these NWP's are available at: www.regulations.gov (docket ID number COE-2015-0017). They are also available by contacting Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street NW., Washington, DC 20314-1000.

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. We will submit a report containing the final NWP's and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days

after it is published in the **Federal Register**. The NWP's are not a "major rule" as defined by 5 U.S.C. 804(2).

Executive Order 12898

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

The NWP's are not expected to negatively impact any community, and therefore are not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.

Executive Order 13211

These NWP's are not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because they are not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Authority

We are issuing new NWP's, modifying existing NWP's, and reissuing NWP's without change under the authority of Section 404 of the Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*).

Date: December 21, 2016.

Donald E. Jackson,

Major General, U.S. Army, Deputy Commanding General for Civil and Emergency Operations.

Nationwide Permits, Conditions, Further Information, and Definitions

A. Index of Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions

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B. Nationwide Permits

1. *Aids to Navigation.* The placement of aids to navigation and regulatory markers that are approved by and installed in accordance with the requirements of the U.S. Coast Guard (see 33 CFR, chapter I, subchapter C, part 66).

(Authority: Section 10 of the Rivers and Harbors Act of 1899 (Section 10))

2. *Structures in Artificial Canals.* Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)).

(Authority: Section 10)

3. *Maintenance.* (a) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized. This NWP also authorizes the removal of previously authorized structures or fills. Any stream channel modification is limited to the minimum necessary for the repair, rehabilitation, or replacement of the structure or fill; such modifications, including the removal of material from the stream channel, must be immediately adjacent to the project. This NWP also authorizes

the removal of accumulated sediment and debris within, and in the immediate vicinity of, the structure or fill. This NWP also authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the district engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(b) This NWP also authorizes the removal of accumulated sediments and debris outside the immediate vicinity of existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.). The removal of sediment is limited to the minimum necessary to restore the waterway in the vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend farther than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization.

(c) This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the maintenance activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After conducting the maintenance activity, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

(d) This NWP does not authorize maintenance dredging for the primary purpose of navigation. This NWP does

not authorize beach restoration. This NWP does not authorize new stream channelization or stream relocation projects.

Notification: For activities authorized by paragraph (b) of this NWP, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 32). The pre-construction notification must include information regarding the original design capacities and configurations of the outfalls, intakes, small impoundments, and canals.

(Authorities: Section 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act (Sections 10 and 404))

Note: This NWP authorizes the repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Clean Water Act section 404(f) exemption for maintenance.

4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.* Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, and clam and oyster digging, fish aggregating devices, and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This NWP does not authorize artificial reefs or impoundments and semi-impoundments of waters of the United States for the culture or holding of motile species such as lobster, or the use of covered oyster trays or clam racks.

(Authorities: Sections 10 and 404)

5. *Scientific Measurement Devices.* Devices, whose purpose is to measure and record scientific data, such as staff gages, tide and current gages, meteorological stations, water recording and biological observation 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. Upon completion of the use of the device to measure and record scientific data, the measuring device and any other structures or fills associated with that device (e.g., foundations, anchors, buoys, lines, etc.) must be removed to the maximum extent practicable and the site restored to pre-construction elevations.

(Authorities: Sections 10 and 404)

6. *Survey Activities.* Survey activities, such as core sampling, seismic exploratory operations, plugging of seismic shot holes and other

exploratory-type bore holes, exploratory trenching, soil surveys, sampling, sample plots or transects for wetland delineations, and historic resources surveys. For the purposes of this NWP, the term “exploratory trenching” means mechanical land clearing of the upper soil profile to expose bedrock or substrate, for the purpose of mapping or sampling the exposed material. The area in which the exploratory trench is dug must be restored to its pre-construction elevation upon completion of the work and must not drain a water of the United States. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. This NWP authorizes the construction of temporary pads, provided the discharge does not exceed 1/10-acre in waters of the U.S. Discharges and structures associated with the recovery of historic resources are not authorized by this NWP. Drilling and the discharge of excavated material from test wells for oil and gas exploration are not authorized by this NWP; the plugging of such wells is authorized. Fill placed for roads and other similar activities is not authorized by this NWP. The NWP does not authorize any permanent structures. The discharge of drilling mud and cuttings may require a permit under section 402 of the Clean Water Act.

(Authorities: Sections 10 and 404)

7. Outfall Structures and Associated Intake Structures. Activities related to the construction or modification of outfall structures and associated intake structures, where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted by, or otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System Program (section 402 of the Clean Water Act). The construction of intake structures is not authorized by this NWP, unless they are directly associated with an authorized outfall structure.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(Authorities: Sections 10 and 404)

8. Oil and Gas Structures on the Outer Continental Shelf. Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of the Interior, Bureau of Ocean Energy Management. Such structures shall not be placed within the limits of any designated shipping safety

fairway or traffic separation scheme, except temporary anchors that comply with the fairway regulations in 33 CFR 322.5(l). The district engineer will review such proposals to ensure compliance with the provisions of the fairway regulations in 33 CFR 322.5(l). Any Corps review under this NWP will be limited to the effects on navigation and national security in accordance with 33 CFR 322.5(f), as well as 33 CFR 322.5(l) and 33 CFR part 334. Such structures will not be placed in established danger zones or restricted areas as designated in 33 CFR part 334, nor will such structures be permitted in EPA or Corps-designated dredged material disposal areas.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(Authority: 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 such areas have been established for that purpose.

(Authority: Section 10)

10. Mooring Buoys. Non-commercial, single-boat, mooring buoys.

(Authority: 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 managers must approve each buoy or marker individually.

(Authority: Section 10)

12. Utility Line Activities. Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.

Utility lines: This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of utility lines, including outfall and intake structures. There must be no change in pre-construction contours of waters of the United States. 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 internet, radio, and television communication. The term “utility line” does not include activities that drain a water of the United States, such as drainage tile or french drains, but it does apply to pipes conveying drainage from another area.

Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

Utility line substations: This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with a power line or utility line in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than 1/2-acre of waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

Foundations for overhead utility line towers, poles, and anchors: This NWP authorizes the construction or maintenance of foundations for overhead utility line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

Access roads: This NWP authorizes the construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not cause the

loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (e.g., at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize utility lines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (See 33 CFR part 322). Overhead utility lines constructed over section 10 waters and utility lines that are routed in or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

This NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas

affected by temporary fills must be revegetated, as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if any of the following criteria are met: (1) The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials. (See general condition 32.)

(Authorities: Sections 10 and 404)

Note 1: Where the utility line is constructed or installed in navigable waters of the United States (i.e., section 10 waters) within the coastal United States, the Great Lakes, and United States territories, a copy of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the utility line to protect navigation.

Note 2: For utility line activities crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Utility line activities must comply with 33 CFR 330.6(d).

Note 3: Utility lines consisting of aerial electric power transmission lines crossing navigable waters of the United States (which are defined at 33 CFR part 329) must comply with the applicable minimum clearances specified in 33 CFR 322.5(i).

Note 4: 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, in accordance with the requirements for temporary fills.

Note 5: Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States

associated with such pipelines will require a section 404 permit (see NWP 15).

Note 6: This NWP authorizes utility line maintenance and repair activities that do not qualify for the Clean Water Act section 404(f) exemption for maintenance of currently serviceable fills or fill structures.

Note 7: For overhead utility lines authorized by this NWP, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

Note 8: For NWP 12 activities that require pre-construction notification, the PCN must include 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, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

13. Bank Stabilization. Bank stabilization activities necessary for erosion control or prevention, such as vegetative stabilization, bioengineering, sills, rip rap, revetment, gabion baskets, stream barbs, and bulkheads, or combinations of bank stabilization techniques, provided the activity meets all of the following criteria:

(a) No material is placed in excess of the minimum needed for erosion protection;

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects (an exception is for bulkheads—the district engineer cannot issue a waiver for a bulkhead that is greater than 1,000 feet in length along the bank);

(c) The activity will not exceed an average of one cubic yard per running foot, as measured along the length of the treated bank, below the plane of the ordinary high water mark or the high tide line, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(d) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless the district engineer waives this criterion by

making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(e) No material is of a type, or is placed in any location, or in any manner, that will impair surface water flow into or out of any waters of the United States;

(f) No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored native trees and treetops may be used in low energy areas);

(g) Native plants appropriate for current site conditions, including salinity, must be used for bioengineering or vegetative bank stabilization;

(h) The activity is not a stream channelization activity; and

(i) The activity must be properly maintained, which may require repairing it after severe storms or erosion events. This NWP authorizes those maintenance and repair activities if they require authorization.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to construct the bank stabilization activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the bank stabilization activity: (1) Involves discharges into special aquatic sites; or (2) is in excess of 500 feet in length; or (3) will involve the discharge of greater than an average of one cubic yard per running foot as measured along the length of the treated bank, below the plane of the ordinary high water mark or the high tide line. (See general condition 32.)

(Authorities: Sections 10 and 404)

14. Linear Transportation Projects. Activities required for crossings of waters of the United States associated with the construction, expansion, modification, or improvement of linear

transportation projects (e.g., roads, highways, railways, trails, airport runways, and taxiways) in waters of the United States. For linear transportation projects in non-tidal waters, the discharge cannot cause the loss of greater than 1/2-acre of waters of the United States. For linear transportation projects in tidal waters, the discharge cannot cause the loss of greater than 1/3-acre of waters of the United States. Any stream channel modification, including bank stabilization, is limited to the minimum necessary to construct or protect the linear transportation project; such modifications must be in the immediate vicinity of the project.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to construct the linear transportation project. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

This NWP cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The loss of waters of the United States exceeds 1/10-acre; or (2) there is a discharge in a special aquatic site, including wetlands. (See general condition 32.)

(Authorities: Sections 10 and 404)

Note 1: For linear transportation projects crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Linear transportation projects must comply with 33 CFR 330.6(d).

Note 2: Some discharges for the construction of farm roads or forest roads, or temporary roads for moving mining equipment, may qualify for an exemption under section 404(f) of the Clean Water Act (see 33 CFR 323.4).

Note 3: For NWP 14 activities that require pre-construction notification, the PCN must include 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, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

15. U.S. Coast Guard Approved Bridges. Discharges of dredged or fill material incidental to the construction of a bridge across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills, provided the construction of the bridge structure has been authorized by the U.S. Coast Guard under section 9 of the Rivers and Harbors Act of 1899 or other applicable laws. Causeways and approach fills are not included in this NWP and will require a separate section 404 permit.

(Authority: Section 404 of the Clean Water Act (Section 404))

16. Return Water From Upland Contained Disposal Areas. Return water from an upland contained dredged material disposal area. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d), even though the disposal itself occurs in an area that has no waters of the United States and does not require a section 404 permit. This NWP satisfies the technical requirement for a section 404 permit for the return water where the quality of the return water is controlled by the state through the section 401 certification procedures. The dredging activity may require a section 404 permit (33 CFR 323.2(d)), and will require a section 10 permit if located in navigable waters of the United States.

(Authority: Section 404)

17. Hydropower Projects. Discharges of dredged or fill material associated with hydropower projects having: (a) Less than 5000 kW of total generating capacity at existing reservoirs, where the project, including the fill, is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; or (b) a licensing exemption granted by the FERC pursuant to section 408 of the Energy Security Act of 1980 (16 U.S.C.

2705 and 2708) and section 30 of the Federal Power Act, as amended.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(**Authority:** Section 404)

18. *Minor Discharges.* Minor discharges of dredged or fill material into all waters of the United States, provided the activity meets all of the following criteria:

(a) The quantity of discharged material and the volume of area excavated do not exceed 25 cubic yards below the plane of the ordinary high water mark or the high tide line;

(b) The discharge will not cause the loss of more than $\frac{1}{10}$ -acre of waters of the United States; and

(c) The discharge is not placed for the purpose of a stream diversion.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge or the volume of area excavated exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line, or (2) the discharge is in a special aquatic site, including wetlands. (See general condition 32.)

(**Authorities:** Sections 10 and 404)

19. *Minor Dredging.* Dredging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States (*i.e.*, section 10 waters). This NWP does not authorize the dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist but may not be present in a given year), anadromous fish spawning areas, or wetlands, or the connection of canals or other artificial waterways to navigable waters of the United States (see 33 CFR 322.5(g)). All dredged material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization.

(**Authorities:** Sections 10 and 404)

20. *Response Operations for Oil or Hazardous Substances.* Activities conducted in response to a discharge or release of oil or hazardous substances that are subject to the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR part 300) including containment, cleanup, and mitigation efforts, provided that the

activities are done under either: (1) The Spill Control and Countermeasure Plan required by 40 CFR 112.3; (2) the direction or oversight of the federal on-scene coordinator designated by 40 CFR part 300; or (3) any approved existing state, regional or local contingency plan provided that the Regional Response Team (if one exists in the area) concurs with the proposed response efforts. This NWP also authorizes activities required for the cleanup of oil releases in waters of the United States from electrical equipment that are governed by EPA's polychlorinated biphenyl spill response regulations at 40 CFR part 761. This NWP also authorizes the use of temporary structures and fills in waters of the U.S. for spill response training exercises.

(**Authorities:** Sections 10 and 404)

21. *Surface Coal Mining Activities.* Discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations, provided the following criteria are met:

(a) The activities are already authorized, or are currently being processed by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 or as part of an integrated permit processing procedure by the Department of the Interior, Office of Surface Mining Reclamation and Enforcement;

(b) The discharge must not cause the loss of greater than $\frac{1}{2}$ -acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal individual and cumulative adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed $\frac{1}{2}$ -acre. This NWP does not authorize discharges into tidal waters or non-tidal wetlands adjacent to tidal waters; and

(c) The discharge is not associated with the construction of valley fills. A "valley fill" is a fill structure that is typically constructed within valleys associated with steep, mountainous terrain, associated with surface coal mining activities.

Notification: The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 32.)

(**Authorities:** Sections 10 and 404)

22. *Removal of Vessels.* Temporary structures or minor discharges of dredged or fill material required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This NWP does not authorize maintenance dredging, shoal removal, or riverbank snagging.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The vessel is listed or eligible for listing in the National Register of Historic Places; or (2) the activity is conducted in a special aquatic site, including coral reefs and wetlands. (See general condition 32.) If condition 1 above is triggered, the permittee cannot commence the activity until informed by the district engineer that compliance with the "Historic Properties" general condition is completed.

(**Authorities:** Sections 10 and 404)

Note 1: If a removed vessel is disposed of in waters of the United States, a permit from the U.S. EPA may be required (see 40 CFR 229.3). If a Department of the Army permit is required for vessel disposal in waters of the United States, separate authorization will be required.

Note 2: Compliance with general condition 18, Endangered Species, and general condition 20, Historic Properties, is required for all NWPs. The concern with historic properties is emphasized in the notification requirements for this NWP because of the possibility that shipwrecks may be historic properties.

23. *Approved Categorical Exclusions.* Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where:

(a) That agency or department has determined, pursuant to the Council on Environmental Quality's implementing regulations for the National Environmental Policy Act (40 CFR part 1500 *et seq.*), that the activity is categorically excluded from the requirement to prepare an environmental impact statement or environmental assessment analysis, because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment; and

(b) The Office of the Chief of Engineers (Attn: CECW-CO) has concurred with that agency's or department's determination that the activity is categorically excluded and approved the activity for authorization under NWP 23.

The Office of the Chief of Engineers may require additional conditions,

including pre-construction notification, for authorization of an agency's categorical exclusions under this NWP.

Notification: Certain categorical exclusions approved for authorization under this NWP require the permittee to submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 32). The activities that require pre-construction notification are listed in the appropriate Regulatory Guidance Letters.

(Authorities: Sections 10 and 404)

Note: The agency or department may submit an application for an activity believed to be categorically excluded to the Office of the Chief of Engineers (Attn: CECW-CO). Prior to approval for authorization under this NWP of any agency's activity, the Office of the Chief of Engineers will solicit public comment. As of the date of issuance of this NWP, agencies with approved categorical exclusions are: the Bureau of Reclamation, Federal Highway Administration, and U.S. Coast Guard. Activities approved for authorization under this NWP as of the date of this notice are found in Corps Regulatory Guidance Letter 05-07, which is available at: <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl05-07.pdf>. Any future approved categorical exclusions will be announced in Regulatory Guidance Letters and posted on this same Web site.

24. Indian Tribe or State Administered Section 404 Programs. Any activity permitted by a state or Indian Tribe administering its own section 404 permit program pursuant to 33 U.S.C. 1344(g)-(l) is permitted pursuant to section 10 of the Rivers and Harbors Act of 1899.

(Authority: Section 10)

Note 1: As of the date of the promulgation of this NWP, only New Jersey and Michigan administer their own section 404 permit programs.

Note 2: Those activities that do not involve an Indian Tribe or State section 404 permit are not included in this NWP, but certain structures will be exempted by Section 154 of Public Law 94-587, 90 Stat. 2917 (33 U.S.C. 591) (see 33 CFR 322.4(b)).

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 separate section 10 permit if located in navigable waters of the United States.

(Authority: Section 404)

26. [Reserved]

27. Aquatic Habitat Restoration, Enhancement, and Establishment Activities. Activities in waters of the United States associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas, the restoration and enhancement of non-tidal streams and other non-tidal open waters, and the rehabilitation or enhancement of tidal streams, tidal wetlands, and tidal open waters, provided those activities result in net increases in aquatic resource functions and services.

To be authorized by this NWP, the aquatic habitat restoration, enhancement, or establishment activity must be planned, designed, and implemented so that it results in aquatic habitat that resembles an ecological reference. An ecological reference may be based on the characteristics of an intact aquatic habitat or riparian area of the same type that exists in the region. An ecological reference may be based on a conceptual model developed from regional ecological knowledge of the target aquatic habitat type or riparian area.

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to: The removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms, as well as discharges of dredged or fill material to restore appropriate stream channel configurations after small water control structures, dikes, and berms, are removed; the installation of current deflectors; the enhancement, rehabilitation, or re-establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to enhance, rehabilitate, or re-establish stream meanders; the removal of stream barriers, such as undersized culverts, fords, and grade control structures; the backfilling of artificial channels; the removal of existing drainage structures, such as drain tiles, and the filling, blocking, or reshaping of drainage ditches to restore wetland hydrology; the installation of structures or fills necessary to restore or enhance wetland or stream hydrology; the construction of small nesting islands; the construction of open water areas; the construction of

oyster habitat over unvegetated bottom in tidal waters; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; re-establishment of submerged aquatic vegetation in areas where those plant communities previously existed; re-establishment of tidal wetlands in tidal waters where those wetlands previously existed; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.

This NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands and streams, on the project site provided there are net increases in aquatic resource functions and services.

Except for the relocation of non-tidal waters on the project site, this NWP does not authorize the conversion of a stream or natural wetlands to another aquatic habitat type (e.g., the conversion of a stream to wetland or vice versa) or uplands. Changes in wetland plant communities that occur when wetland hydrology is more fully restored during wetland rehabilitation activities are not considered a conversion to another aquatic habitat type. This NWP does not authorize stream channelization. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

Compensatory mitigation is not required for activities authorized by this NWP since these activities must result in net increases in aquatic resource functions and services.

Reversion. For enhancement, restoration, and establishment activities conducted: (1) In accordance with the terms and conditions of a binding stream or wetland enhancement or restoration agreement, or a wetland establishment agreement, between the landowner and the U.S. Fish and Wildlife Service (FWS), the Natural Resources Conservation Service (NRCS), the Farm Service Agency (FSA), the National Marine Fisheries Service (NMFS), the National Ocean Service (NOS), U.S. Forest Service (USFS), or their designated state cooperating agencies; (2) as voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or (3) on reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit

issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) or the applicable state agency, this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (*i.e.*, prior to the restoration, enhancement, or establishment activities). The reversion must occur within five years after expiration of a limited term wetland restoration or establishment agreement or permit, and is authorized in these circumstances even if the discharge occurs after this NWP expires. The five-year reversion limit does not apply to agreements without time limits reached between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS, or an appropriate state cooperating agency. This NWP also authorizes discharges of dredged or fill material in waters of the United States for the reversion of wetlands that were restored, enhanced, or established on prior-converted cropland or on uplands, in accordance with a binding agreement between the landowner and NRCS, FSA, FWS, or their designated state cooperating agencies (even though the restoration, enhancement, or establishment activity did not require a section 404 permit). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit. Before conducting any reversion activity the permittee or the appropriate Federal or state agency must notify the district engineer and include the documentation of the prior condition. Once an area has reverted to its prior physical condition, it will be subject to whatever the Corps Regulatory requirements are applicable to that type of land at the time. The requirement that the activity results in a net increase in aquatic resource functions and services does not apply to reversion activities meeting the above conditions. Except for the activities described above, this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion.

Reporting. For those activities that do not require pre-construction notification, the permittee must submit to the district engineer a copy of: (1) The binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement, or a project

description, including project plans and location map; (2) the NRCS or USDA Technical Service Provider documentation for the voluntary stream enhancement or restoration action or wetland restoration, enhancement, or establishment action; or (3) the SMCRA permit issued by OSMRE or the applicable state agency. The report must also include information on baseline ecological conditions on the project site, such as a delineation of wetlands, streams, and/or other aquatic habitats. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing any activity (see general condition 32), except for the following activities:

(1) Activities conducted on non-Federal public lands and private lands, in accordance with the terms and conditions of a binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS, or their designated state cooperating agencies;

(2) Voluntary stream or wetland restoration or enhancement action, or wetland establishment action, documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or

(3) The reclamation of surface coal mine lands, in accordance with an SMCRA permit issued by the OSMRE or the applicable state agency.

However, the permittee must submit a copy of the appropriate documentation to the district engineer to fulfill the reporting requirement.

(Authorities: Sections 10 and 404)

Note: This NWP can be used to authorize compensatory mitigation projects, including mitigation banks and in-lieu fee projects. However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition, since compensatory mitigation is generally intended to be permanent.

28. Modifications of Existing Marinas. Reconfiguration of existing docking facilities within an authorized marina area. No dredging, additional slips, dock spaces, or expansion of any kind within waters of the United States is authorized by this NWP.

(Authority: Section 10)

29. Residential Developments. Discharges of dredged or fill material

into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development).

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

Subdivisions: For residential subdivisions, the aggregate total loss of waters of United States authorized by this NWP cannot exceed 1/2-acre. This includes any loss of waters of the United States associated with development of individual subdivision lots.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(Authorities: Sections 10 and 404)

30. Moist Soil Management for Wildlife. Discharges of dredged or fill material into non-tidal waters of the United States and maintenance activities that are associated with moist soil management for wildlife for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage habitat and feeding areas for wildlife. Such activities include, but are not limited to, plowing or discing to impede succession, preparing seed beds, or establishing fire breaks. Sufficient riparian areas must be maintained adjacent to all open water bodies, including streams, to preclude water quality degradation due to erosion and

sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, or similar features associated with the management areas. The activity must not result in a net loss of aquatic resource functions and services. This NWP does not authorize the conversion of wetlands to uplands, impoundments, or other open water bodies.

(Authority: Section 404)

Note: The repair, maintenance, or replacement of existing water control structures or the repair or maintenance of dikes may be authorized by NWP 3. Some such activities may qualify for an exemption under section 404(f) of the Clean Water Act (see 33 CFR 323.4).

31. *Maintenance of Existing Flood Control Facilities.* Discharges of dredged or fill material resulting from activities associated with the maintenance of existing flood control facilities, including debris basins, retention/detention basins, levees, and channels that: (i) Were previously authorized by the Corps by individual permit, general permit, or 33 CFR 330.3, or did not require a permit at the time they were constructed, or (ii) were constructed by the Corps and transferred to a non-Federal sponsor for operation and maintenance. Activities authorized by this NWP are limited to those resulting from maintenance activities that are conducted within the "maintenance baseline," as described in the definition below. Discharges of dredged or fill materials associated with maintenance activities in flood control facilities in any watercourse that have previously been determined to be within the maintenance baseline are authorized under this NWP. To the extent that a Corps permit is required, this NWP authorizes the removal of vegetation from levees associated with the flood control project. This NWP does not authorize the removal of sediment and associated vegetation from natural water courses except when these activities have been included in the maintenance baseline. All dredged and excavated material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. Proper sediment controls must be used.

Maintenance Baseline: The maintenance baseline is a description of the physical characteristics (e.g., depth, width, length, location, configuration, or design flood capacity, etc.) of a flood control project within which maintenance activities are normally authorized by NWP 31, subject to any case-specific conditions required by the

district engineer. The district engineer will approve the maintenance baseline based on the approved or constructed capacity of the flood control facility, whichever is smaller, including any areas where there are no constructed channels but which are part of the facility. The prospective permittee will provide documentation of the physical characteristics of the flood control facility (which will normally consist of as-built or approved drawings) and documentation of the approved and constructed design capacities of the flood control facility. If no evidence of the constructed capacity exists, the approved capacity will be used. The documentation will also include best management practices to ensure that the adverse environmental impacts caused by the maintenance activities are no more than minimal, especially in maintenance areas where there are no constructed channels. (The Corps may request maintenance records in areas where there has not been recent maintenance.) Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5. Except in emergencies as described below, this NWP cannot be used until the district engineer approves the maintenance baseline and determines the need for mitigation and any regional or activity-specific conditions. Once determined, the maintenance baseline will remain valid for any subsequent reissuance of this NWP. This NWP does not authorize maintenance of a flood control facility that has been abandoned. A flood control facility will be considered abandoned if it has operated at a significantly reduced capacity without needed maintenance being accomplished in a timely manner. A flood control facility will not be considered abandoned if the prospective permittee is in the process of obtaining other authorizations or approvals required for maintenance activities and is experiencing delays in obtaining those authorizations or approvals.

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 effects 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 (see Note, below). 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 mitigation and/or best management practices as appropriate.

Emergency Situations: In emergency situations, this NWP may be used to authorize maintenance activities in flood control facilities for which no maintenance baseline has been approved. Emergency situations are those which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if action is not taken before a maintenance baseline can be approved. In such situations, the determination of mitigation requirements, if any, may be deferred until the emergency has been resolved. Once the emergency has ended, a maintenance baseline must be established expeditiously, and mitigation, including mitigation for maintenance conducted during the emergency, must be required as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer before any maintenance work is conducted (see general condition 32). The pre-construction notification may be for activity-specific maintenance or for maintenance of the entire flood control facility by submitting a five-year (or less) maintenance plan. The pre-construction notification must include a description of the maintenance baseline and the disposal site for dredged or excavated material.

(Authorities: Sections 10 and 404)

Note: If the maintenance baseline was approved by the district engineer under a prior version of NWP 31, and the district engineer imposed the one-time compensatory mitigation requirement on maintenance for a specific reach of a flood control project authorized by that prior version of NWP 31, during the period this version of NWP 31 is in effect (March 19, 2017, to March 18, 2022) the district engineer will not require additional compensatory mitigation for maintenance activities authorized by this

NWP in that specific reach of the flood control project.

32. *Completed Enforcement Actions.* Any structure, work, or discharge of dredged or fill material remaining in place or undertaken for mitigation, restoration, or environmental benefit in compliance with either:

(i) The terms of a final written Corps non-judicial settlement agreement resolving a violation of Section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899; or the terms of an EPA 309(a) order on consent resolving a violation of section 404 of the Clean Water Act, provided that:

(a) The activities authorized by this NWP cannot adversely affect more than 5 acres of non-tidal waters or 1 acre of tidal waters;

(b) The settlement agreement provides for environmental benefits, to an equal or greater degree, than the environmental detriments caused by the unauthorized activity that is authorized by this NWP; and

(c) The district engineer issues a verification letter authorizing the activity subject to the terms and conditions of this NWP and the settlement agreement, including a specified completion date; or

(ii) The terms of a final Federal court decision, consent decree, or settlement agreement resulting from an enforcement action brought by the United States under section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or

(iii) The terms of a final court decision, consent decree, settlement agreement, or non-judicial settlement agreement resulting from a natural resource damage claim brought by a trustee or trustees for natural resources (as defined by the National Contingency Plan at 40 CFR subpart G) under Section 311 of the Clean Water Act, Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, Section 312 of the National Marine Sanctuaries Act, section 1002 of the Oil Pollution Act of 1990, or the Park System Resource Protection Act at 16 U.S.C. 19jj, to the extent that a Corps permit is required.

Compliance is a condition of the NWP itself; non-compliance of the terms and conditions of an NWP 32 authorization may result in an additional enforcement action (e.g., a Class I civil administrative penalty). Any authorization under this NWP is automatically revoked if the permittee does not comply with the terms of this NWP or the terms of the court decision, consent decree, or judicial/non-judicial settlement

agreement. This NWP does not apply to any activities occurring after the date of the decision, decree, or agreement that are not for the purpose of mitigation, restoration, or environmental benefit. Before reaching any settlement agreement, the Corps will ensure compliance with the provisions of 33 CFR part 326 and 33 CFR 330.6(d)(2) and (e).

(Authorities: Sections 10 and 404)

33. *Temporary Construction, Access, and Dewatering.* Temporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard. This NWP also authorizes temporary structures, work, and discharges, including cofferdams, necessary for construction activities not otherwise subject to the Corps or U.S. Coast Guard permit requirements. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. The use of dredged material may be allowed if the district engineer determines that it will not cause more than minimal adverse environmental effects. Following completion of construction, temporary fill must be entirely removed to an area that has no waters of the United States, dredged material must be returned to its original location, and the affected areas must be restored to pre-construction elevations. The affected areas must also be revegetated, as appropriate. This permit does not authorize the use of cofferdams to dewater wetlands or other aquatic areas to change their use. Structures left in place after construction is completed require a separate section 10 permit if located in navigable waters of the United States. (See 33 CFR part 322.)

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the activity is conducted in navigable waters of the United States (i.e., section 10 waters) (see general condition 32). The pre-construction notification must include a restoration plan showing how all temporary fills and structures will be removed and the area restored to pre-project conditions.

(Authorities: Sections 10 and 404)

34. *Cranberry Production Activities.* Discharges of dredged or fill material for dikes, berms, pumps, water control

structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations. The cumulative total acreage of disturbance per cranberry production operation, including but not limited to, filling, flooding, ditching, or clearing, must not exceed 10 acres of waters of the United States, including wetlands. The activity must not result in a net loss of wetland acreage. This NWP does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes of this NWP, the cumulative total of 10 acres will be measured over the period that this NWP is valid.

Notification: The permittee must submit a pre-construction notification to the district engineer once during the period that this NWP is valid, and the NWP will then authorize discharges of dredge or fill material at an existing operation for the permit term, provided the 10-acre limit is not exceeded. (See general condition 32.)

(Authority: Section 404)

35. *Maintenance Dredging of Existing Basins.* The removal of accumulated sediment for maintenance of existing marina basins, access channels to marinas or boat slips, and boat slips to previously authorized depths or controlling depths for ingress/egress, whichever is less. All dredged material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. Proper sediment controls must be used for the disposal site.

(Authority: Section 10)

36. *Boat Ramps.* Activities required for the construction of boat ramps, provided the activity meets all of the following criteria:

(a) The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or in the form of pre-cast concrete planks or slabs, unless the district engineer waives the 50 cubic yard limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(b) The boat ramp does not exceed 20 feet in width, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(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 an area that has no waters of the United States; and,

(e) No material is placed in special aquatic sites, including wetlands.

The use of unsuitable material that is structurally unstable is not authorized. If dredging in navigable waters of the United States is necessary to provide access to the boat ramp, the dredging must be authorized by another NWP, a regional general permit, or an individual permit.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge into waters of the United States exceeds 50 cubic yards, or (2) the boat ramp exceeds 20 feet in width. (See general condition 32.)

(Authorities: Sections 10 and 404)

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

(a) The Natural Resources Conservation Service for a situation requiring immediate action under its emergency Watershed Protection Program (7 CFR part 624);

(b) The U.S. Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 2509.13);

(c) The Department of the Interior for wildland fire management burned area emergency stabilization and rehabilitation (DOI Manual part 620, Ch. 3);

(d) The Office of Surface Mining, or states with approved programs, for abandoned mine land reclamation activities under Title IV of the Surface Mining Control and Reclamation Act (30 CFR subchapter R), where the activity does not involve coal extraction; or

(e) The Farm Service Agency under its Emergency Conservation Program (7 CFR part 701).

In general, the prospective permittee should wait until the district engineer issues an NWP verification or 45 calendar days have passed before proceeding with the watershed protection and rehabilitation activity. However, in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the emergency watershed protection and rehabilitation activity may proceed immediately and the district engineer will consider the information in the pre-construction notification and any comments received as a result of agency coordination to

decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

Notification: Except in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 32).

(Authorities: Sections 10 and 404)

38. Cleanup of Hazardous and Toxic Waste. Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority. Court ordered remedial action plans or related settlements are also authorized by this NWP. This NWP does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(Authorities: Sections 10 and 404)

Note: Activities undertaken entirely on a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act.

39. Commercial and Institutional Developments. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of commercial and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, storm water management facilities, wastewater treatment facilities, and recreation facilities such as playgrounds and playing fields. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The construction of new golf courses and new ski areas is not authorized by this NWP.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(Authorities: Sections 10 and 404)

Note: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

40. Agricultural Activities. Discharges of dredged or fill material into non-tidal waters of the United States for agricultural activities, including the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized land clearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities.

This NWP also authorizes the construction of farm ponds in non-tidal waters of the United States, excluding perennial streams, provided the farm pond is used solely for agricultural purposes. This NWP does not authorize the construction of aquaculture ponds.

This NWP also authorizes discharges of dredged or fill material into non-tidal waters of the United States to relocate existing serviceable drainage ditches constructed in non-tidal streams.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. The loss of stream bed plus any

other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(Authorities: Section 404)

Note: Some discharges for agricultural activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4). This NWP authorizes the construction of farm ponds that do not qualify for the Clean Water Act section 404(f)(1)(C) exemption because of the recapture provision at section 404(f)(2).

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

This NWP does not authorize the relocation of drainage ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage ditch must be approximately the same as the location of the centerline of the original drainage ditch. This NWP does not authorize stream channelization or stream relocation projects.

(Authority: Section 404)

42. Recreational Facilities. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of recreational facilities. Examples of recreational facilities that may be authorized by this NWP include playing fields (*e.g.*, football fields, baseball fields), basketball courts, tennis courts, hiking trails, bike paths, golf courses, ski areas, horse paths, nature centers, and campgrounds (excluding

recreational vehicle parks). This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables that are directly related to the recreational activity, but it does not authorize the construction of hotels, restaurants, racetracks, stadiums, arenas, or similar facilities.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(Authority: Section 404)

43. Stormwater Management Facilities. Discharges of dredged or fill material into non-tidal waters of the United States for the construction of stormwater management facilities, including stormwater detention basins and retention basins and other stormwater management facilities; the construction of water control structures, outfall structures and emergency spillways; the construction of low impact development integrated management features such as bioretention facilities (*e.g.*, rain gardens), vegetated filter strips, grassed swales, and infiltration trenches; and the construction of pollutant reduction green infrastructure features designed to reduce inputs of sediments, nutrients, and other pollutants into waters to meet reduction targets established under Total Daily Maximum Loads set under the Clean Water Act.

This NWP authorizes, to the extent that a section 404 permit is required, discharges of dredged or fill material into non-tidal waters of the United States for the maintenance of stormwater management facilities, low impact development integrated management features, and pollutant reduction green infrastructure features. The maintenance of stormwater management facilities, low impact development integrated management features, and pollutant reduction green

infrastructure features that are not waters of the United States does not require a section 404 permit.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre. This NWP does not authorize discharges of dredged or fill material for the construction of new stormwater management facilities in perennial streams.

Notification: For discharges into non-tidal waters of the United States for the construction of new stormwater management facilities or pollutant reduction green infrastructure features, or the expansion of existing stormwater management facilities or pollutant reduction green infrastructure features, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) Maintenance activities do not require pre-construction notification if they are limited to restoring the original design capacities of the stormwater management facility or pollutant reduction green infrastructure feature. (Authority: Section 404)

44. Mining Activities. Discharges of dredged or fill material into non-tidal waters of the United States for mining activities, except for coal mining activities, provided the activity meets all of the following criteria:

(a) For mining activities involving discharges of dredged or fill material into non-tidal wetlands, the discharge must not cause the loss of greater than 1/2-acre of non-tidal wetlands;

(b) For mining activities involving discharges of dredged or fill material in non-tidal open waters (*e.g.*, rivers, streams, lakes, and ponds) the mined area, including permanent and temporary impacts due to discharges of dredged or fill material into jurisdictional waters, must not exceed 1/2-acre; and

(c) The acreage loss under paragraph (a) plus the acreage impact under paragraph (b) does not exceed 1/2-acre.

The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects.

The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed ½-acre.

This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction-notification to the district engineer prior to commencing the activity. (See general condition 32.) If reclamation is required by other statutes, then a copy of the final reclamation plan must be submitted with the pre-construction notification.

(Authorities: Sections 10 and 404)

45. Repair of Uplands Damaged by Discrete Events. This NWP authorizes discharges of dredged or fill material, including dredging or excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by storms, floods, or other discrete events. This NWP authorizes bank stabilization to protect the restored uplands. The restoration of the damaged areas, including any bank stabilization, must not exceed the contours, or ordinary high water mark, that existed before the damage occurred. The district engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this NWP. The work must commence, or be under contract to commence, within two years of the date of damage, unless this condition is waived in writing by the district engineer. This NWP cannot be used to reclaim lands lost to normal erosion processes over an extended period.

This NWP does not authorize beach restoration or nourishment.

Minor dredging is limited to the amount necessary to restore the damaged upland area and should not significantly alter the pre-existing bottom contours of the waterbody.

Notification: The permittee must submit a pre-construction notification to the district engineer (see general condition 32) within 12 months of the date of the damage; for major storms, floods, or other discrete events, the district engineer may waive the 12-month limit for submitting a pre-construction notification if the

permittee can demonstrate funding, contract, or other similar delays. The pre-construction notification must include documentation, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration.

(Authority: Sections 10 and 404)

Note: The uplands themselves that are lost as a result of a storm, flood, or other discrete event can be replaced without a section 404 permit, if the uplands are restored to the ordinary high water mark (in non-tidal waters) or high tide line (in tidal waters). (See also 33 CFR 328.5.) This NWP authorizes discharges of dredged or fill material into waters of the United States associated with the restoration of uplands.

46. Discharges in Ditches. Discharges of dredged or fill material into non-tidal ditches that are: (1) Constructed in uplands, (2) receive water from an area determined to be a water of the United States prior to the construction of the ditch, (3) divert water to an area determined to be a water of the United States prior to the construction of the ditch, and (4) determined to be waters of the United States. The discharge must not cause the loss of greater than one acre of waters of the United States.

This NWP does not authorize discharges of dredged or fill material into ditches constructed in streams or other waters of the United States, or in streams that have been relocated in uplands. This NWP does not authorize discharges of dredged or fill material that increase the capacity of the ditch and drain those areas determined to be waters of the United States prior to construction of the ditch.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(Authority: Section 404)

47. [Reserved]

48. Commercial Shellfish Aquaculture Activities. Discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States necessary for new and continuing commercial shellfish aquaculture operations in authorized project areas. For the purposes of this NWP, the project area is the area in which the operator is authorized to conduct commercial shellfish aquaculture activities, as identified through a lease or permit issued by an appropriate state or local government agency, a treaty, or any easement, lease, deed, contract, or other legally binding agreement that establishes an enforceable property

interest for the operator. A “new commercial shellfish aquaculture operation” is an operation in a project area where commercial shellfish aquaculture activities have not been conducted during the past 100 years.

This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures into navigable waters of the United States. This NWP also authorizes discharges of dredged or fill material into waters of the United States necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked.

This NWP does not authorize:

(a) The cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody;

(b) The cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990;

(c) Attendant features such as docks, piers, boat ramps, stockpiles, or staging areas, or the deposition of shell material back into waters of the United States as waste; or

(d) Activities that directly affect more than ½-acre of submerged aquatic vegetation beds in project areas that have not been used for commercial shellfish aquaculture activities during the past 100 years.

Notification: The permittee must submit a pre-construction notification to the district engineer if: (1) The activity will include a species that has never been cultivated in the waterbody; or (2) the activity occurs in a project area that has not been used for commercial shellfish aquaculture activities during the past 100 years. If the operator will be conducting commercial shellfish aquaculture activities in multiple contiguous project areas, he or she can either submit one PCN for those contiguous project areas or submit a separate PCN for each project area. (See general condition 32.)

In addition to the information required by paragraph (b) of general condition 32, the pre-construction notification must also include the following information: (1) A map showing the boundaries of the project area(s), with latitude and longitude coordinates for each corner of each project area; (2) the name(s) of the species that will be cultivated during the period this NWP is in effect; (3) whether canopy predator nets will be used; (4) whether suspended cultivation techniques will be used; and (5) general water depths in the project area(s) (a detailed survey is not required). No

more than one pre-construction notification per project area or group of contiguous project areas should be submitted for the commercial shellfish operation during the effective period of this NWP. The pre-construction notification should describe all species and culture activities the operator expects to undertake in the project area or group of contiguous project areas during the effective period of this NWP. If an operator intends to undertake unanticipated changes to the commercial shellfish aquaculture operation during the effective period of this NWP, and those changes require Department of the Army authorization, the operator must contact the district engineer to request a modification of the NWP verification; a new pre-construction notification does not need to be submitted.

(Authorities: Sections 10 and 404)

Note 1: The permittee should notify the applicable U.S. Coast Guard office regarding the project.

Note 2: To prevent introduction of aquatic nuisance species, no material that has been taken from a different waterbody may be reused in the current project area, unless it has been treated in accordance with the applicable regional aquatic nuisance species management plan.

Note 3: The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 defines "aquatic nuisance species" as "a nonindigenous species that threatens the diversity or abundance of native species or the ecological stability of infested waters, or commercial, agricultural, aquacultural, or recreational activities dependent on such waters."

49. Coal Remining Activities. Discharges of dredged or fill material into non-tidal waters of the United States associated with the remining and reclamation of lands that were previously mined for coal. The activities must already be authorized, or they must currently be in process as part of an integrated permit processing procedure, by the Department of the Interior Office of Surface Mining Reclamation and Enforcement, or by states with approved programs under Title IV or Title V of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Areas previously mined include reclaimed mine sites, abandoned mine land areas, or lands under bond forfeiture contracts.

As part of the project, the permittee may conduct new coal mining activities in conjunction with the remining activities when he or she clearly demonstrates to the district engineer that the overall mining plan will result

in a net increase in aquatic resource functions. The Corps will consider the SMCRA agency's decision regarding the amount of currently undisturbed adjacent lands needed to facilitate the remining and reclamation of the previously mined area. The total area disturbed by new mining must not exceed 40 percent of the total acreage covered by both the remined area and the additional area necessary to carry out the reclamation of the previously mined area.

Notification: The permittee must submit a pre-construction notification and a document describing how the overall mining plan will result in a net increase in aquatic resource functions to the district engineer and receive written authorization prior to commencing the activity. (See general condition 32.)

(Authorities: Sections 10 and 404)

50. Underground Coal Mining Activities. Discharges of dredged or fill material into non-tidal waters of the United States associated with underground coal mining and reclamation operations provided the activities are authorized, or are currently being processed as part of an integrated permit processing procedure, by the Department of the Interior, Office of Surface Mining Reclamation and Enforcement, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize coal preparation and processing activities outside of the mine site.

Notification: The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 32.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification.

(Authorities: Sections 10 and 404)

Note: Coal preparation and processing activities outside of the mine site may be authorized by NWP 21.

51. Land-Based Renewable Energy Generation Facilities. Discharges of dredged or fill material into non-tidal waters of the United States for the construction, expansion, or modification of land-based renewable energy production facilities, including attendant features. Such facilities include infrastructure to collect solar (concentrating solar power and photovoltaic), wind, biomass, or geothermal energy. Attendant features may include, but are not limited to roads, parking lots, and stormwater management facilities within the land-based renewable energy generation facility.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the discharge results in the loss of greater than 1/10-acre of waters of the United States. (See general condition 32.)

(Authorities: Sections 10 and 404)

Note 1: Utility lines constructed to transfer the energy from the land-based renewable energy generation facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate single and complete linear project. Those utility lines may be authorized by NWP 12 or another Department of the Army authorization.

Note 2: If the only activities associated with the construction, expansion, or modification of a land-based renewable energy generation facility that require Department of the Army authorization are discharges of dredged or fill material into waters of the United States to construct, maintain, repair, and/or remove utility lines and/or road crossings, then NWP 12 and/or NWP 14 shall be used if those activities meet the terms and conditions of NWPs 12 and 14, including any applicable regional conditions and any case-specific conditions imposed by the district engineer.

Note 3: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

52. *Water-Based Renewable Energy Generation Pilot Projects.* Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction, expansion, modification, or removal of water-based wind, water-based solar, wave energy, or hydrokinetic renewable energy generation pilot projects and their attendant features. Attendant features may include, but are not limited to, land-based collection and distribution facilities, control facilities, roads, parking lots, and stormwater management facilities.

For the purposes of this NWP, the term “pilot project” means an experimental project where the water-based renewable energy generation units will be monitored to collect information on their performance and environmental effects at the project site.

The discharge must not cause the loss of greater than 1/2-acre of waters of the United States, including the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

The placement of a transmission line on the bed of a navigable water of the United States from the renewable energy generation unit(s) to a land-based collection and distribution facility is considered a structure under Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(b)), and the placement of the transmission line on the bed of a navigable water of the United States is not a loss of waters of the United States for the purposes of applying the 1/2-acre or 300 linear foot limits.

For each single and complete project, no more than 10 generation units (e.g., wind turbines, wave energy devices, or hydrokinetic devices) are authorized. For floating solar panels in navigable waters of the United States, each single and complete project cannot exceed 1/2-acre in water surface area covered by the floating solar panels.

This NWP does not authorize activities in coral reefs. Structures in an anchorage area established by the U.S. Coast Guard must comply with the requirements in 33 CFR 322.5(l)(2). Structures may not be placed in established danger zones or restricted areas designated in 33 CFR part 334, Federal navigation channels, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard (see 33 CFR 322.5(l)(1)), or EPA or Corps designated open water dredged material disposal areas.

Upon completion of the pilot project, the generation units, transmission lines, and other structures or fills associated with the pilot project must be removed to the maximum extent practicable unless they are authorized by a separate Department of the Army authorization, such as another NWP, an individual permit, or a regional general permit. Completion of the pilot project will be identified as the date of expiration of the Federal Energy Regulatory Commission (FERC) license, or the expiration date of the NWP authorization if no FERC license is required.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(Authorities: Sections 10 and 404)

Note 1: Utility lines constructed to transfer the energy from the land-based collection facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate single and complete linear project. Those utility lines may be authorized by NWP 12 or another Department of the Army authorization.

Note 2: An activity that is located on an existing locally or federally maintained U.S. Army Corps of Engineers project requires separate approval from the Chief of Engineers or District Engineer under 33 U.S.C. 408.

Note 3: If the pilot project generation units, including any transmission lines, are placed in navigable waters of the United States (i.e., section 10 waters) within the coastal United States, the Great Lakes, and United States territories, copies of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration, National Ocean Service, for charting the generation units and associated transmission line(s) to protect navigation.

Note 4: Hydrokinetic renewable energy generation projects that require authorization by the Federal Energy Regulatory Commission under the Federal Power Act of 1920 do not require separate authorization from the Corps under section 10 of the Rivers and Harbors Act of 1899.

Note 5: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

53. *Removal of Low-Head Dams.* Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States associated with the removal of low-head dams.

For the purposes of this NWP, the term “low-head dam” is defined as a dam built across a stream to pass flows from upstream over all, or nearly all, of the width of the dam crest on a continual and uncontrolled basis. (During a drought, there might not be water flowing over the dam crest.) In general, a low-head dam does not have a separate spillway or spillway gates but it may have an uncontrolled spillway. The dam crest is the top of the dam from left abutment to right abutment, and if present, an uncontrolled spillway. A low-head dam provides little storage function.

The removed low-head dam structure must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization.

Because the removal of the low-head dam will result in a net increase in ecological functions and services provided by the stream, as a general rule compensatory mitigation is not required for activities authorized by this NWP. However, the district engineer may determine for a particular low-head dam removal activity that compensatory mitigation is necessary to ensure the authorized activity results in no more than minimal adverse environmental effects.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(Authorities: Sections 10 and 404)

Note: This NWP does not authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters to restore the stream in the vicinity of the low-head dam, including the former impoundment area. Nationwide permit 27 or other Department of the Army permits may authorize such activities. This NWP does not authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters to stabilize stream banks. Bank stabilization activities may be authorized by NWP 13 or other Department of the Army permits.

54. *Living Shorelines*. Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction and maintenance of living shorelines to stabilize banks and shores in coastal waters, which includes the Great Lakes, along shores with small fetch and gentle slopes that are subject to low- to mid-energy waves. A living shoreline has a footprint that is made up mostly of native material. It incorporates vegetation or other living, natural "soft" elements alone or in combination with some type of harder shoreline structure (e.g., oyster or mussel reefs or rock sills) for added protection and stability. Living shorelines should maintain the natural continuity of the land-water interface, and retain or enhance shoreline ecological processes. Living shorelines must have a substantial biological component, either tidal or lacustrine fringe wetlands or oyster or mussel reef structures. The following conditions must be met:

(a) The structures and fill area, including sand fills, sills, breakwaters, or reefs, cannot extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes, unless the district engineer waives this criterion by making a written determination concluding that the activity will result in no more than minimal adverse environmental effects;

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the activity will result in no more than minimal adverse environmental effects;

(c) Coir logs, coir mats, stone, native oyster shell, native wood debris, and other structural materials must be adequately anchored, of sufficient weight, or installed in a manner that prevents relocation in most wave action or water flow conditions, except for extremely severe storms;

(d) For living shorelines consisting of tidal or lacustrine fringe wetlands, native plants appropriate for current site conditions, including salinity, must be used if the site is planted by the permittee;

(e) Discharges of dredged or fill material into waters of the United States, and oyster or mussel reef structures in navigable waters, must be the minimum necessary for the establishment and maintenance of the living shoreline;

(f) If sills, breakwaters, or other structures must be constructed to protect fringe wetlands for the living shoreline, those structures must be the

minimum size necessary to protect those fringe wetlands;

(g) The activity must be designed, constructed, and maintained so that it has no more than minimal adverse effects on water movement between the waterbody and the shore and the movement of aquatic organisms between the waterbody and the shore; and

(h) The living shoreline must be properly maintained, which may require periodic repair of sills, breakwaters, or reefs, or replacing sand fills after severe storms or erosion events. Vegetation may be replanted to maintain the living shoreline. This NWP authorizes those maintenance and repair activities, including any minor deviations necessary to address changing environmental conditions.

This NWP does not authorize beach nourishment or land reclamation activities.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the construction of the living shoreline. (See general condition 32.) The pre-construction notification must include a delineation of special aquatic sites (see paragraph (b)(4) of general condition 32). Pre-construction notification is not required for maintenance and repair activities for living shorelines unless required by applicable NWP general conditions or regional conditions.

(Authorities: Sections 10 and 404)

Note: In waters outside of coastal waters, nature-based bank stabilization techniques, such as bioengineering and vegetative stabilization, may be authorized by NWP 13.

C. Nationwide Permit General Conditions

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as applicable, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP. Every person who may wish to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR 330.1 through 330.6 apply to every NWP authorization. Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

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

(b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. *Aquatic Life Movements*. No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. If a bottomless culvert cannot be used, then the crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

3. *Spawning Areas*. Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

4. *Migratory Bird Breeding Areas*. Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

5. *Shellfish Beds*. No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWPs 4 and 48, or is a shellfish seeding or habitat restoration activity authorized by NWP 27.

6. *Suitable Material*. No activity may use unsuitable material (e.g., trash,

debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).

7. *Water Supply Intakes.* No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.

8. *Adverse Effects From Impoundments.* If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

9. *Management of Water Flows.* To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization, storm water management activities, and temporary and permanent road crossings, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).

10. *Fills Within 100-Year Floodplains.* The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

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

12. *Soil Erosion and Sediment Controls.* Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow, or during low tides.

13. *Removal of Temporary Fills.* Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

14. *Proper Maintenance.* Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable NWP general conditions, as well as any activity-specific conditions added by the district engineer to an NWP authorization.

15. *Single and Complete Project.* The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

16. *Wild and Scenic Rivers.* (a) No NWP 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.

(b) If a proposed NWP activity will 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, the permittee must submit a pre-construction notification (see general condition 32). The district engineer will coordinate the PCN with the Federal agency with direct management responsibility for that river. The permittee shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

(c) Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service). Information on these rivers is also available at: <http://www.rivers.gov/>.

17. *Tribal Rights.* No NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.

18. *Endangered Species.* (a) No activity is authorized under any NWP which is likely to directly or indirectly 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 directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless ESA section 7 consultation addressing the effects of the proposed activity has been completed. Direct effects are the immediate effects on listed species and critical habitat caused by the NWP activity. Indirect effects are those effects on listed species and critical habitat that are caused by the NWP activity and are later in time, but still are reasonably certain to occur.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. If pre-construction notification is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under section 7 of the ESA.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that might be affected by the proposed activity or that utilize the designated critical habitat that might be affected by the proposed activity. The district engineer will determine whether the proposed activity "may affect" or will have "no effect" to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the activity, and has so notified the Corps,

the applicant shall not begin work until the Corps has provided notification that the proposed activity will have “no effect” on listed species or critical habitat, or until ESA section 7 consultation has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(d) As a result of formal or informal consultation with the FWS or NMFS the district engineer may add species-specific permit conditions to the NWP.

(e) Authorization of an activity by an 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 FWS or the NMFS, the Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word “harm” in the definition of “take” means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

(f) If the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed NWP activity, the non-federal applicant should provide a copy of that ESA section 10(a)(1)(B) permit with the PCN required by paragraph (c) of this general condition. The district engineer will coordinate with the agency that issued the ESA section 10(a)(1)(B) permit to determine whether the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation conducted for the ESA section 10(a)(1)(B) permit. If that coordination results in concurrence from the agency that the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation for the ESA section 10(a)(1)(B) permit, the district engineer does not need to conduct a separate ESA section 7 consultation for the proposed NWP activity. The district engineer will notify the non-federal applicant within 45 days of receipt of a complete pre-construction notification whether the ESA section 10(a)(1)(B)

permit covers the proposed NWP activity or whether additional ESA section 7 consultation is required.

(g) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the FWS and NMFS or their world wide Web pages at <http://www.fws.gov/> or <http://www.fws.gov/ipac> and <http://www.nmfs.noaa.gov/pr/species/esa/> respectively.

19. *Migratory Birds and Bald and Golden Eagles.* The permittee is responsible for ensuring their action complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting appropriate local office of the U.S. Fish and Wildlife Service to determine applicable measures to reduce impacts to migratory birds or eagles, including whether “incidental take” permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.

20. *Historic Properties.* (a) In cases where the district engineer determines that the activity may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of section 106 of the National Historic Preservation Act. If pre-construction notification is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation is not submitted, then additional consultation under section 106 may be necessary. The respective federal agency is responsible for fulfilling its obligation to comply with section 106.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties might have the potential to be affected by the

proposed NWP activity or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of, or potential for, the presence of historic properties can be sought from the State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted in the PCN and these identification efforts, the district engineer shall determine whether the proposed NWP activity has the potential to cause effects on the historic properties. Section 106 consultation is not required when the district engineer determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of section 106 of the NHPA: no historic properties affected, no adverse effect, or adverse effect. Where the non-Federal applicant has identified historic properties on which the activity might have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that NHPA section 106 consultation has been completed.

(d) For non-federal permittees, the district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. If NHPA section 106 consultation is required, the district engineer will notify the non-Federal applicant that he or she cannot begin the activity until section 106 consultation is completed. If the non-

Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that section 110k of the NHPA (54 U.S.C. 306113) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

21. *Discovery of Previously Unknown Remains and Artifacts.* If you discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by this permit, you must immediately notify the district engineer of what you have found, and to the maximum extent practicable, avoid construction activities that may affect the remains and artifacts until the required coordination has been completed. The district engineer will initiate the Federal, Tribal, and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

22. *Designated Critical Resource Waters.* Critical resource waters include, NOAA-managed marine sanctuaries and marine monuments, and National Estuarine Research Reserves. The district engineer may designate, after notice and opportunity for public comment, additional waters officially designated by a state as having particular environmental or ecological significance, such as outstanding national resource waters or state natural heritage sites. The district engineer may

also designate additional critical resource waters after notice and opportunity for public comment.

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NHPAs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, and 52 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NHPAs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and 54, notification is required in accordance with general condition 32, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NHPAs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

23. *Mitigation.* The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (*i.e.*, on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10-acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. For wetland losses of 1/10-acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects.

(d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation to ensure that the activity results in no

more than minimal adverse environmental effects. Compensatory mitigation for losses of streams should be provided, if practicable, through stream rehabilitation, enhancement, or preservation, since streams are difficult-to-replace resources (see 33 CFR 332.3(e)(3)).

(e) Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (*e.g.*, conservation easements) of riparian areas next to open waters. In some cases, the restoration or maintenance/protection of riparian areas may be the only compensatory mitigation required. Restored riparian areas should consist of native species. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns.

Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to restore or maintain/protect a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or maintaining/protecting a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (*e.g.*, riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of minimization or compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(f) Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in no more than minimal adverse environmental effects. For the NHPAs, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2) and (3)). However, if an appropriate number and type of mitigation bank or in-lieu credits are not available at the time the PCN is submitted to the district engineer, the

district engineer may approve the use of permittee-responsible mitigation.

(2) The amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.1(e)(3)). (See also 33 CFR 332.3(f)).

(3) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, aquatic resource restoration should be the first compensatory mitigation option considered for permittee-responsible mitigation.

(4) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)).

(5) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan only needs to address the baseline conditions at the impact site and the number of credits to be provided.

(6) Compensatory mitigation requirements (e.g., resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan (see 33 CFR 332.4(c)(1)(ii)).

(g) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of 1/2-acre, it cannot be used to authorize any NWP activity resulting in the loss of greater than 1/2-acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that an NWP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the NWPs.

(h) Permittees may propose the use of mitigation banks, in-lieu fee programs, or permittee-responsible mitigation.

When developing a compensatory mitigation proposal, the permittee must consider appropriate and practicable options consistent with the framework at 33 CFR 332.3(b). For activities resulting in the loss of marine or estuarine resources, permittee-responsible mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee-responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.

24. Safety of Impoundment Structures. To ensure that all impoundment structures are safely designed, the district engineer may require non-Federal applicants to demonstrate that the structures comply with established state dam safety criteria or have been designed by qualified persons. The district engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

25. Water Quality. Where States and authorized Tribes, or EPA where applicable, have not previously certified compliance of an NWP with CWA section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The district engineer or State or Tribe may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

26. Coastal Zone Management. In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence

must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). The district engineer or a State may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

27. Regional and Case-By-Case Conditions. The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

28. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/3-acre.

29. Transfer of Nationwide Permit Verifications. If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

(Transferee)

(Date)

30. Compliance Certification. Each permittee who receives an NWP verification letter from the Corps must provide a signed certification documenting completion of the authorized activity and implementation of any required compensatory mitigation. The success of any required permittee-responsible mitigation,

including the achievement of ecological performance standards, will be addressed separately by the district engineer. The Corps will provide the permittee the certification document with the NWP verification letter. The certification document will include:

(a) A statement that the authorized activity was done in accordance with the NWP authorization, including any general, regional, or activity-specific conditions;

(b) A statement that the implementation of any required compensatory mitigation was completed in accordance with the permit conditions. If credits from a mitigation bank or in-lieu fee program are used to satisfy the compensatory mitigation requirements, the certification must include the documentation required by 33 CFR 332.3(l)(3) to confirm that the permittee secured the appropriate number and resource type of credits; and

(c) The signature of the permittee certifying the completion of the activity and mitigation.

The completed certification document must be submitted to the district engineer within 30 days of completion of the authorized activity or the implementation of any required compensatory mitigation, whichever occurs later.

31. *Activities Affecting Structures or Works Built by the United States.* If an NWP activity also requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers (USACE) federally authorized Civil Works project (a "USACE project"), the prospective permittee must submit a pre-construction notification. See paragraph (b)(10) of general condition 32. An activity that requires section 408 permission is not authorized by NWP until the appropriate Corps office issues the section 408 permission to alter, occupy, or use the USACE project, and the district engineer issues a written NWP verification.

32. *Pre-Construction Notification.* (a) *Timing.* Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, if the PCN is determined to be incomplete, notify the prospective permittee within that 30 day period to request the additional information necessary to make the PCN complete. The request must specify the information needed to

make the PCN complete. As a general rule, district engineers will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity until either:

(1) He or she is 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) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or are in the vicinity of the activity, or to notify the Corps pursuant to general condition 20 that the activity might have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is "no effect" on listed species or "no potential to cause effects" on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)) has been completed. Also, work cannot begin under NWPs 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) *Contents of Pre-Construction Notification:* The PCN must be in writing and include the following information:

- (1) Name, address and telephone numbers of the prospective permittee;
- (2) Location of the proposed activity;

(3) Identify the specific NWP or NWP(s) the prospective permittee wants to use to authorize the proposed activity;

(4) A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; and 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, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures. For single and complete linear projects, the PCN must include the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (e.g., a conceptual plan), but do not need to be detailed engineering plans);

(5) The PCN must include a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial, intermittent, and ephemeral streams, on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters on the project site, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many wetlands, other special aquatic sites, and other waters. Furthermore, the 45 day period will not start until the delineation has

been submitted to or completed by the Corps, as appropriate;

(6) If the proposed activity will result in the loss of greater than $\frac{1}{10}$ -acre of wetlands and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied, or explaining why the adverse environmental effects are no more than minimal and why compensatory mitigation should not be required. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(7) For non-Federal permittees, if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat, the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed activity or utilize the designated critical habitat that might be affected by the proposed activity. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with the Endangered Species Act;

(8) For non-Federal permittees, if the NWP activity might have the potential to cause effects to a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, the PCN must state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with section 106 of the National Historic Preservation Act;

(9) For an activity that will 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, the PCN must identify the Wild and Scenic River or the "study river" (see general condition 16); and

(10) For an activity that requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers federally authorized civil works project, the pre-construction notification must include a statement confirming that the project proponent has submitted a written request for section 408

permission from the Corps office having jurisdiction over that USACE project.

(c) *Form of Pre-Construction Notification:* The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it is an NWP PCN and must include all of the applicable information required in paragraphs (b)(1) through (10) of this general condition. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals.

(d) *Agency Coordination:* (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the activity's adverse environmental effects so that they are no more than minimal.

(2) Agency coordination is required for: (i) All NWP activities that require pre-construction notification and result in the loss of greater than $\frac{1}{2}$ -acre of waters of the United States; (ii) NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 activities that require pre-construction notification and will result in the loss of greater than 300 linear feet of stream bed; (iii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iv) NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.

(3) When agency coordination is required, the district engineer will immediately provide (e.g., via email, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (FWS, state natural resource or water quality agency, EPA, and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will have 10 calendar days from the date the material is transmitted to notify the district engineer via telephone, facsimile transmission, or email that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse environmental effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district

engineer will fully consider agency comments received within the specified time frame concerning the proposed activity's compliance with the terms and conditions of the NWPs, including the need for mitigation to ensure the net adverse environmental effects of the proposed activity are no more than minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(4) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

(5) Applicants are encouraged to provide the Corps with either electronic files or multiple copies of pre-construction notifications to expedite agency coordination.

D. District Engineer's Decision

1. In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If a project proponent requests authorization by a specific NWP, the district engineer should issue the NWP verification for that activity if it meets the terms and conditions of that NWP, unless he or she determines, after considering mitigation, that the proposed activity will result in more than minimal individual and cumulative adverse effects on the aquatic environment and other aspects of the public interest and exercises discretionary authority to require an individual permit for the proposed activity. For a linear project, this determination will include an evaluation of the individual crossings of waters of the United States to determine whether they individually satisfy the

terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings authorized by NWP. If an applicant requests a waiver of the 300 linear foot limit on impacts to streams or of an otherwise applicable limit, as provided for in NWPs 13, 21, 29, 36, 39, 40, 42, 43, 44, 50, 51, 52, or 54, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in only minimal individual and cumulative adverse environmental effects. For those NWPs that have a waivable 300 linear foot limit for losses of intermittent and ephemeral stream bed and a 1/2-acre limit (*i.e.*, NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52), the loss of intermittent and ephemeral stream bed, plus any other losses of jurisdictional waters and wetlands, cannot exceed 1/2-acre.

2. When making minimal adverse environmental effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity. He or she will also consider the cumulative adverse environmental effects caused by activities authorized by NWP and whether those cumulative adverse environmental effects are no more than minimal. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (*e.g.*, partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (*e.g.*, watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional or condition assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse environmental effects determination. The district engineer may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns.

3. If the proposed activity requires a PCN and will result in a loss of greater than 1/10-acre of wetlands, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for NWP

activities with smaller impacts, or for impacts to other types of waters (*e.g.*, streams). The district engineer will consider any proposed compensatory mitigation or other mitigation measures the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed activity are no more than minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are no more than minimal, after considering mitigation, the district engineer will notify the permittee and include any activity-specific conditions in the NWP verification the district engineer deems necessary. Conditions for compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k). The district engineer must approve the final mitigation plan before the permittee commences work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. 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 proposed compensatory mitigation plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure the NWP activity results in no more than minimal adverse environmental effects. If the net adverse environmental effects of the NWP activity (after consideration of the mitigation proposal) are determined by the district engineer to be no more than minimal, the district engineer will provide a timely written response to the applicant. The response will state that the NWP activity can proceed under the terms and conditions of the NWP, including any activity-specific conditions added to the NWP authorization by the district engineer.

4. If the district engineer determines that the adverse environmental effects of the proposed activity are more than minimal, then the district engineer will notify the applicant either: (a) That the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) that the activity is

authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal; or (c) that the activity 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 environmental effects, the activity will be authorized within the 45-day PCN period (unless additional time is required to comply with general conditions 18, 20, and/or 31, or to evaluate PCNs for activities authorized by NWPs 21, 49, and 50), with activity-specific conditions that state the mitigation requirements. The authorization will include the necessary conceptual or detailed mitigation plan or a requirement that the applicant submit a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal. When compensatory mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan or has determined that prior approval of a final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation.

E. Further Information

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

2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.

3. NWPs do not grant any property rights or exclusive privileges.

4. NWPs do not authorize any injury to the property or rights of others.

5. NWPs do not authorize interference with any existing or proposed Federal project (see general condition 31).

F. Definitions

Best management practices (BMPs): Policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural.

Compensatory mitigation: The restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and

practicable avoidance and minimization has been achieved.

Currently serviceable: Useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

Direct effects: Effects that are caused by the activity and occur at the same time and place.

Discharge: The term “discharge” means any discharge of dredged or fill material into waters of the United States.

Ecological reference: A model used to plan and design an aquatic habitat and riparian area restoration, enhancement, or establishment activity under NWP 27. An ecological reference may be based on the structure, functions, and dynamics of an aquatic habitat type or a riparian area type that currently exists in the region where the proposed NWP 27 activity is located. Alternatively, an ecological reference may be based on a conceptual model for the aquatic habitat type or riparian area type to be restored, enhanced, or established as a result of the proposed NWP 27 activity. An ecological reference takes into account the range of variation of the aquatic habitat type or riparian area type in the region.

Enhancement: The manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

Ephemeral stream: An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

Establishment (creation): The manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area.

High Tide Line: The line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation

lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

Historic Property: Any prehistoric or historic district, site (including archaeological site), building, structure, or other object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria (36 CFR part 60).

Independent utility: A test to determine what constitutes a single and complete non-linear 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.

Indirect effects: Effects that are caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.

Intermittent stream: An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

Loss of waters of the United States: Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an

NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. The loss of stream bed includes the acres or linear feet of stream bed that are filled or excavated as a result of the regulated activity. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities that do not require Department of the Army authorization, such as activities eligible for exemptions under section 404(f) of the Clean Water Act, are not considered when calculating the loss of waters of the United States.

Navigable waters: Waters subject to section 10 of the Rivers and Harbors Act of 1899. These waters are defined at 33 CFR part 329.

Non-tidal wetland: A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (i.e., spring high tide line).

Open water: For purposes of the NWPs, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of flowing or standing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of “open waters” include rivers, streams, lakes, and ponds.

Ordinary High Water Mark: An ordinary high water mark is a line on the shore established by the fluctuations of water and indicated by physical characteristics, or by other appropriate means that consider the characteristics of the surrounding areas.

Perennial stream: A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

Practicable: Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Pre-construction notification: A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may

be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

Preservation: The removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

Protected tribal resources: Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources.

Re-establishment: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

Rehabilitation: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource.

Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

Restoration: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: Re-establishment and rehabilitation.

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a coarse substrate in riffles results in a rough flow, a turbulent

surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

Riparian areas: Riparian areas are lands next to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects riverine, lacustrine, estuarine, and marine waters with their adjacent wetlands, non-wetland waters, or uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 23.)

Shellfish seeding: The placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (*i.e.*, spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.

Single and complete linear project: A linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which often involves multiple crossings of one or more waterbodies at separate and distant locations. The term "single and complete project" is defined as that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the United States (*i.e.*, a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

Single and complete non-linear project: For non-linear projects, the term "single and complete project" is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete non-linear project must have independent utility (see definition of "independent utility").

Single and complete non-linear projects may not be "piecemealed" to avoid the limits in an NWP authorization.

Stormwater management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and best management practices, which retain water for a period of time to control runoff and/or improve the quality (*i.e.*, by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

Stream channelization: The manipulation of a stream's course, condition, capacity, or location that causes more than minimal interruption of normal stream processes. A channelized stream remains a water of the United States.

Structure: An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

Tidal wetland: A tidal wetland is a jurisdictional wetland that is inundated by tidal waters. 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.

Tribal lands: Any lands title to which is either: (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or (2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

Tribal rights: Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas

that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: For purposes of the NWP, a waterbody is a jurisdictional water of the United States. If a wetland is adjacent to a waterbody determined to

be a water of the United States, that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of “waterbodies” include streams, rivers, lakes, ponds, and wetlands.

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