

**DEPARTMENT OF DEFENSE****Department of the Army****Corps of Engineers****Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits**

**AGENCY:** Army Corps of Engineers, DOD.  
**ACTION:** Final Notification.

**SUMMARY:** The Corps of Engineers is reissuing the existing nationwide permits (NWP) and conditions, some with modifications, and issuing two new NWPs. As with all general permits, NWPs include specific project limitations which ensure that adverse effects will be no more than minimal and that the aquatic environment will be protected. At the same time, if a permit applicant can design a project in a way that meets the limitations of the NWP, the Corps will provide an expedited review and decision for the project. General permits, including NWPs, are an essential part of the Corps regulatory program, and provide us with the method we use to authorize 80% of the activities we regulate. An effective NWP program is essential to administration of the Corps regulatory program. The Corps, however, is increasingly aware of the concerns regarding the level of adverse effects being authorized by NWPs, particularly NWP 26. As a result, we have taken a critical look at the NWP program to better ensure that projects that truly have minimal impacts will continue to be authorized, while ensuring that only minimal individual and cumulative adverse effects will result from the Corps authorizing projects under the program. For example, we have made substantial changes to NWP 26, with an ultimate approach of more clearly defining the activities regulated through activity-specific replacement general permits. The interim changes to NWP 26 we have made will greatly increase environmental protection while increasing the review time for a relatively small percentage of the total number of activities authorized each year. We have also become increasingly aware of the concerns that NWPs, particularly NWP 26, need to be modified to reflect regional differences in aquatic ecosystem functions and values and to more effectively reflect the desire of the states to develop partnerships to protect the aquatic environment. We, therefore, have directed our districts to carefully review all of the NWPs, particularly NWP 26, to revoke applicable NWPs in high value aquatic ecosystems, and to add

regional conditions to limit the applicability of the NWPs to ensure that no more than minimal adverse effects occur in each district. We are also directing the districts to work with the states to develop mutually agreeable conditions that will result in a greater level of state Section 401 water quality certifications being issued for the NWPs. We are directing our districts to develop local procedures with their counterparts in the U.S. Fish and Wildlife Service and National Marine Fisheries Service which will ensure that the Corps bases its "affect" and "jeopardy" decisions on the best available information. We are also initiating formal programmatic consultation under section 7 of the Endangered Species Act regarding the procedures associated with administering the NWP program. We believe that the changes described above, along with many others we have included in this reissuance of the NWPs, will substantially increase protection of the aquatic environment, ensure that no more than minimal adverse effects will occur, and maintain the regulatory flexibility necessary to administer a reasonable regulatory program.

**EFFECTIVE DATE:** February 11, 1997.

**ADDRESS:** Information can be obtained by writing to: Office of the Chief of Engineers, ATTN: CECW-OR, 20 Massachusetts Avenue NW., Washington, DC 20314-1000.

**FOR FURTHER INFORMATION:** Contact Mr. Sam Collinson or Mr. John Studt, at (202) 761-0199 or access the U.S. Army Corps of Engineers Regulatory Home Page at: <http://wetland.usace.mil/>

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

The White House Office on Environmental Policy announced the President's Wetlands Plan on August 24, 1993. The plan sets forth a comprehensive package of improvements to Federal wetlands protection programs. A major goal of the plan is that the programs be fair, flexible, and effective. To achieve this goal, the Corps regulatory program must continue to provide effective protection for wetlands and other aquatic resources, while conveying to the public a clear understanding of regulatory requirements. In its implementation, the regulatory program must be administratively efficient, flexible yet predictable, and avoid unnecessary impacts to private property, the regulated public, and the environment.

There were 37 existing nationwide permits. Thirty-six of the NWPs were published in the November 22, 1991,

Federal Register (FR) at 33 CFR part 330, appendix A (56 FR 59110). They became effective on January 21, 1992, and expire on January 21, 1997. One additional NWP, the Single-Family Housing NWP (NWP 29), was proposed in the Federal Register on July 27, 1995, (60 FR 38650) and became effective on September 25, 1995. NWP 29 would expire on September 25, 2000.

In the preamble of the Final Rule at 33 CFR part 330, as published in the Federal Register (56 FR 59110) on November 22, 1991, we indicated that upon expiration of the existing NWPs, we would issue the NWPs separately from the regulations governing their use and rescind 33 CFR part 330, appendix A. The NWPs will now be published using the procedures adopted on November 22, 1991, for issuance, reissuance, modification, and revocation of NWPs (see 33 CFR 330.5). The NWPs will no longer appear in the Code of Federal Regulations (CFR) but will be published in the Federal Register and announced, with regional conditions, in the public notices issued by Corps district offices, and included on the Internet.

We are reissuing all the existing NWPs; however, several have been modified, as have several NWP conditions as published in the Federal Register (56 FR 59110) on November 22, 1991. Many of the proposed clarifications are a result of the modification of the definition of "discharge of dredged material" at 33 CFR 323.2(d), as published in the Federal Register (58 FR 45008) on August 25, 1993 (i.e., the excavation rule). The definition was revised to include the following language that clarified which excavation activities are regulated: "(iii) Any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation" (See 33 CFR 323.2(d) for the complete definition of "discharge of dredged material").

We are also issuing, in accordance with the President's Wetlands Plan, two new NWPs to authorize those additional regulated activities with minimal adverse effects that resulted from the excavation rule. These new NWPs include: NWP 30, Moist Soil Management for Wildlife; and NWP 31, Maintenance of Existing Flood Control Projects.

The Corps believes that, when the changes to the nationwide permits and their conditions are considered as a whole, the average approval time for

projects requiring a Department of the Army permit will not substantially change. However, the individual approval time for some projects will be longer while for others it may be shorter. In addition, we believe that the approval time for a vast majority of activities authorized by nationwide permits will not be affected by these changes.

We have made a final determination that this action does not constitute a major Federal action significantly affecting the quality of the human environment. Environmental documentation and a Finding of No Significant Impact (FONSI) have been prepared for each NWP. This documentation includes an environmental assessment and, where relevant, a section 404(b)(1) Guidelines compliance review. Copies of these documents are available for inspection at the office of the Chief of Engineers, at each Corps district office, and on the Corps Home Page at <http://wetland.usace.mil/>. Based on these documents the Corps has determined that the proposed NWPs comply with the requirements for issuance under general permit authority.

The 36 nationwide permits issued or reissued effective January 21, 1991 will expire on January 21, 1997; however, all of these permits are being reissued with an effective date of February 11, 1997. There will be a period between January 21, 1997 and February 11, 1997 where these 36 NWPs will not be in effect. Between today and February 11, 1997 the permittee may submit Pre-construction Notifications (PCNs) required by the terms of certain NWPs, in accordance with the NWP "Notification" General Condition. However, the 30 day (45 day for NWP 26) time period in the notification condition will not start until February 11, 1997. Further, Corps districts will review PCNs during this period and will verify projects as soon as possible after February 11, 1997. Nationwide Permit 29, Single Family Housing, is revoked and reissued with new conditions on the same effective date, February 11, 1997, and therefore, there will not be a period of time where NWP 29 is not in effect. Permittees may submit PCNs at any time, however, the 30 day time period for the reissued NWP 29 will not start until February 11, 1997. In addition, two new nationwide permits, NWP 30 and 31, are being issued with the same effective date. All of the issued and reissued nationwide permits, with the exception of NWP 26, will expire in 5 years on February 11, 2002 unless otherwise modified, reissued or revoked. Nationwide Permit 26 will

automatically expire 2 years from today's date unless otherwise modified or revoked.

Many of the nationwide permits have been modified in the course of reissuance. The continued adequacy of an authorization under a nationwide permit, following its expiration, is dependant upon whether that permit has been reissued with or without modification. A nationwide permit is considered to have been modified if either the permit scope or limitations have been modified, or if one of the nationwide permit conditions which applies directly to the activity has been modified. In those cases where the nationwide permit is being reissued without change, and General Condition 4 does not directly apply, the verification remains valid as issued. In those cases where the previously used nationwide permit is being reissued with modification (NWPs 6, 12, 14, 21, 26, 27, 32) or General Condition 4 directly applies to the activity, activities which commence (i.e., under construction, or are under contract to commence) in reliance upon the earlier NWP, prior to January 21, 1997, will remain authorized provided the activity is completed prior to January 21, 1998, unless discretionary authority has been exercised on a case-by-case basis to modify, suspend, or revoke the authorization in accordance with 33 CFR 330.4(e) and 33 CFR 330.5 (c) or (d). Activities completed under the authorization of a nationwide permit that was in effect at the time the activity was completed continue to be authorized by that nationwide permit. DE's will, in accordance with 33 CFR 330.6(a), provide applicants with the above information in their responses to requests for verification of compliance with nationwide permits. These procedures are specified in 33 CFR 330.6(b).

#### Discussion of Public Comments and Changes

##### I. Overview

Approximately 4,000 comment documents addressing the proposed nationwide permits were received in response to the June 17, 1996, Federal Register announcement (61 FR 30780), district public notices, one national public hearing, and 6 regional public hearings. The Corps has reviewed and considered all the comments. Many of the comments expressed support for the nationwide permit program while many others opposed the program. Most comment letters provided permit specific comments, providing information and recommending changes

to both the permits and permit conditions. A few commenters provided comments specific to 33 CFR part 330, our regulations governing implementation of the nationwide permit program. These comments were also reviewed and have been made a part of the record. However, no changes have been proposed for 33 CFR part 330 and, therefore, it is not being revised at this time.

##### II. General Comments

###### Regionalization of Nationwide Permits

The Corps proposed a process to regionalize the nationwide permits, particularly NWP 26, in order to reflect the differences in aquatic ecosystem functions and values that exist across the country. We envisioned a process where we would solicit the views of the various stakeholders regarding the nationwide permits and develop region-specific approaches for each district to best protect the environment while providing fair, reasonable, and timely decisions for the regulated public. The final permits we are issuing today reflect a clear decision to proceed in a way that does regionalize the program, particularly NWP 26. We are issuing NWP 26 for an interim period of two years, during which we will gather interested parties at the national level as well as the district and division levels, to develop replacement permits for NWP 26. The replacement permits will be activity-specific rather than the geographic based approach of NWP 26. By developing activity-specific NWPs to replace the existing NWP 26, we will be able to more clearly and effectively address the potential impacts to the aquatic environment, as well as more effectively address specific applicant group needs.

Once the Corps establishes activity-specific replacement permits that have clear national conditions to ensure the aquatic environment is protected and the impacts will be no more than minimal, each district, working with the Corps divisions, will establish regional conditions for the activity specific replacement permits. This may result in the revocation of certain NWPs in aquatic environments of particularly high value, and the addition of regional limitations to specifically address needs for protection of specific environmental assets. Of course, we will continue to encourage all districts to develop programmatic general permits (PGP) with states and other regional authorities that effectively regulate the waters of the United States. When such permits are developed and issued, it is often appropriate for the Corps district

to revoke the nationwide permits in the area covered by the (PGP), provided the PGP provides at least the level of protection of the aquatic environment that the Corps does through its administration of the NWP program.

During the next two years, as the Corps develops the activity-specific replacement permits, the revised NWP 26 will be in effect. We have substantially changed NWP 26, with additional nationwide limitations and conditions, in order to provide substantially improved protection of the aquatic environment, and to ensure that only minimal adverse effects will result from use of the NWP. These additional limitations and conditions are discussed in detail in the preamble for NWP 26 below, as are the specific means by which we have directed the districts and divisions to regionalize NWP 26. In summary, we have directed our districts working with the divisions and Federal and state natural resource agencies to add region-specific conditions to all NWPs, paying particular attention to NWP 26, which will add an additional layer of protection to the changes we have put into place at the national level. This process will also involve public notice and comment to ensure that all interested parties have the opportunity to be involved in the process.

#### Reissuance Process

A few commenters also commented on the process we used for reissuance of the NWPs. One commenter felt that the Corps should have requested comments and suggestions from the public prior to issuance of the proposed nationwide permits. A few expressed concern that the Corps Special Public Notices, announcing the proposed nationwide permits and requesting comments, did not include sufficient information to generate meaningful comment by the public. These commenters felt that the public notices should have included such information as: The text of all nationwide permits proposed for reissuance, legal and biological justification for reissuance, the location of records regarding use and impacts of the nationwide permits, potential additional impacts due to reissuance or modification of the permits, the extent and effectiveness of existing mitigation permit conditions, the effect of the proposed changes in the permits, and the possible benefits to the nation of eliminating specific NWPs. These commenters also felt that the comment period was not adequate for so many permits at one time and recommended the Corps publish individual public notices for each permit, three per

month, with 90 day review periods for each public notice.

The Corps believes that the process provided adequate information and time for public review and comment. We provided concise information regarding the proposed revisions to the nationwide permits and included the names, addresses and phone numbers of points of contact for requesting additional information. To include the information requested by a few reviewers as outlined above was not considered to be productive and the publication would be too voluminous and costly for publication and distribution to the general public. Information requests received during the review period were given priority and information was provided in as timely a manner as was possible. We extended the original 45 day review period by 14 days and added 6 regional public hearings to the originally scheduled hearing in Washington, D.C., in order to provide as much opportunity for the public to comment as was reasonable. In response we received approximately 4,000 letters of comment, and most of the public hearings were well attended. The Corps also believes it is much more efficient and less burdensome on all parties involved to collectively review all the nationwide permits at one time. To publish three notices a month for 90 days each would require more than a year to address all 39 NWPs and place a continuous review burden on the commenting public for the entire period. Such a process would also result in significant inefficiencies in the utilization of Corps limited resources for implementing the program.

#### Accounting

A substantial number of commenters stated that the Corps of Engineers should establish a system of record keeping to quantify impacts and mitigation, and that such records would be necessary to document that the nationwide permits have only minimal adverse environmental effects. Many commenters stated that the acreage lost due to nationwide permits is not known and the Corps cannot support a conclusion that the effects of the nationwide permits are not significant. A number of commenters stated that reporting should be required for all nationwide permits while others called for reporting for any permit which might have more than minimal impact. Comments indicated that, at a minimum, data reported should include the location and size of any wetlands, and should be collected by activity, nationwide permit number and acreage

for each aquatic type. A large number of commenters asked that the records be published quarterly or annually and one suggested they be made available on the Internet.

The Corps has collected and reviewed specific data to assist in making program-wide determinations and decisions regarding the NWP program. While we believe that the data currently being collected for most nationwide permits is sufficient for these purposes, we are increasing the information we will regularly collect in the future. In particular, we are making changes to NWP 26 that will substantially increase the data base regarding that permit. Many districts also collect additional data relative to the use of nationwide permits for use in regionally conditioning the nationwide permits and evaluating specific actions on a case-by-case basis. We do not have the resources necessary for field verification of all nationwide authorizations and associated mitigation efforts. While we do not believe it is necessary to publish periodic reports regarding the nationwide permit program, information and data collected is available for public review upon request. Each district does periodically publish a "Permits Issued and Denied" report which is currently sent to standard mailing lists. The Corps is planning to provide access to such information and data via the Internet.

#### Enforcement

Most of those who commented on the enforcement of nationwide permits expressed the belief that the Corps has not enforced permit conditions or verified that projects are eligible for the nationwide permit issued. One commenter stated that lax enforcement gives violators an economic advantage over those who comply with the law. Commenters stated that the Corps must develop a system to monitor activities, verify applicant information, and enforce conditions. Several comments suggested conducting random inspections and penalizing violators. Other proposals included recommendations that we develop a process to allow citizens to petition the Corps to address a situation where conditions are not being met, or to allow citizens to sue the Corps to enforce conditions.

The Corps has limited human resources to manage the entire Regulatory Program. Since properly developed and coordinated nationwide permits have minimal individual or cumulative adverse effects, we direct the majority of our efforts to projects with a greater potential for impact to the environment. Every application

received is reviewed and a determination is made whether the project is authorized by an existing general permit or requires a standard individual permit (IP) evaluation process. The Corps does inspect a selected number of permitted activities, including nationwide permit activities, each year to encourage and verify compliance with all terms and conditions of the permit (individual or general). The Corps does follow up on reports of alleged violations of the Clean Water Act (CWA) and/or the Rivers and Harbors Act of 1899 (RHA) and pursues resolution of those actions. The Corps currently accepts and investigates suspected violations reported by citizens. Furthermore, each district has an enforcement program and administers it in a manner to provide the most effective compliance with the CWA, to include spot checks, monitoring, reporting, etc.

Notwithstanding the above, we agree that we need to do more to ensure compliance. Therefore, the Corps is, with the reissuance of the NWP, instituting a program that will require every verified permittee to certify, in writing, that they constructed the project in accordance with the permitted plans, including any mitigation. The Corps is reviewing its enforcement and compliance program to determine if additional guidance is necessary.

#### Stacking of NWPs

Many commenters indicated that the use of multiple NWPs for a single project (a practice referred to as "stacking") should be eliminated or restricted because it allows opportunity for greater than minimal adverse effects to result under nationwide permit authorizations.

The purpose of the NWP program is to authorize activities that cause only minimal individual and cumulative adverse environmental effects with a minimum of administrative processing. While being responsive to applicants and protective of the aquatic environment are considerations that must be balanced, the Corps understands fully that the statutory threshold of "minimal adverse effects" is controlling, whether the action involves the use of one or more NWP. We believe that, under certain circumstances, NWPs can be used in combination and result in only minimal individual and cumulative adverse environmental effects. In this regard, our regulations provide for multiple use of NWPs (but each one only once for a single and complete project) provided that the combined adverse effects are

minimal. If an activity, otherwise eligible for a nationwide permit, is an integral part of a project for which a standard individual permit is required, it cannot be authorized by an NWP. Most combinations of NWPs allowing discharges of dredged or fill material in waters of the United States (including wetlands and other special aquatic sites), require a PCN to the District Engineer (DE). The PCN process requires the District Engineer to determine whether the activity or combination of activities will result in more than minimal individual or cumulative adverse environmental effects. With this notice we are directing all District Engineers to conduct very critical reviews of projects involving stacking to ensure that no more than minimal adverse effects will occur.

While the Corps allows, under certain specific circumstances, the multiple use of NWPs for single and complete projects, many NWPs are generally "stand alone" project authorizations (e.g., NWP 21 would authorize all activities associated with the project) without the need for other NWPs. Some other NWPs, while they are occasionally used with other NWPs, generally are not (e.g., NWP 28 for modification of an existing marina is mostly used alone); however, occasionally it may be used with NWP 3 for repair of an existing structure or with NWP 13 for some bank stabilization. Generally, only 7 of the 37 NWPs are used more than occasionally with certain other NWPs for authorizing projects. These 7 NWPs are 3, 12, 13, 18, 19, 26, and 33. We believe that of those 7 NWPs, those with the potential to have more than minimal impacts, when used with certain other NWPs, are NWPs 18 and 26 in combination with each other and with NWPs 14 and 29. Consequently, to ensure that the multiple use of nationwide permits does not result in more than minimal adverse effects, the Corps will restrict the multiple use (i.e., stacking of those nationwide permits) as follows. NWP 14 has been modified so that it cannot be combined with NWP 18 or NWP 26 for the purpose of extending the limitations of any of the three permits. For example, NWPs 14 and 26 cannot be combined to authorize a fill of 3 $\frac{1}{3}$  acres. Furthermore, NWP 18 cannot be combined with NWP 26 to increase the threshold or the limitations of NWP 26. NWP 29 is already conditioned that it cannot be used in conjunction with NWP 14, NWP 18, or NWP 26. We have also limited the impacts allowed when stacking any NWP with NWP 26 or NWP 29. Whenever any other NWP is used in conjunction with NWP 26, the

total acreage of impacts to waters of the United States, for all NWPs combined, cannot exceed 3 acres. Similarly, whenever any other NWP is used in conjunction with NWP 29, the total acreage of impacts to the waters of the United States, for all NWPs combined, cannot exceed  $\frac{1}{2}$  acre. We believe that these limitations will eliminate abuse of stacking while allowing appropriate multiple use of some nationwide permits. For example, the Corps could authorize a 0.3 acre road crossing to a 2.5 acre NWP 26 fill project, with appropriate avoidance and mitigation.

Finally, we have added General Condition 15 "Multiple Use of Nationwide Permits" that requires a Corps-only PCN in any case where any NWP 12 through 40 is combined with any other NWP 12 through 40 for a single and complete project. For example, if an applicant wishes to combine the use of NWP 14 for a road that does not involve fill in wetlands and NWP 13 for a bulkhead less than 500 feet in length, a Corps-only notification will be required; even though, the use of these NWPs for the projects described do not require a PCN if constructed independently. However, the change noted above will ensure that for combinations that have the potential to result in more than minimal adverse environmental effects, a Corps-only PCN will be required.

#### State Section 401 Water Quality Certification

Many commenters expressed opposition to the Corps practice of issuing provisional verifications of authorization under nationwide permits for which section 401 water quality certifications have been denied by the state. They expressed the belief that it put undue pressure on the states to certify the projects. Some also commented that it was unfair to require the states to issue, deny, or waive water quality certification within 60 days of receipt of an individual request for certification. Some felt that if a state denied water quality certification for a nationwide permit, the Corps should not authorize any projects under that particular NWP and that the projects should be evaluated under the individual permit procedures. Others believed that administration of sections 401 and 404 should be merged for NWP 26.

It is important to emphasize at the outset that it is the intent of the Corps to work closely with states and Tribes (or EPA where appropriate) during the next 60 days to facilitate State 401 Water Quality Certification. The Corps is committing to meet with the states

and Tribes at the District level, with the goal of ensuring that issuance of each of the NWP's in today's package is consistent with Water Quality Standards established by the states, Tribes, and EPA. This process will include discussion and incorporation of appropriate terms and conditions that would ensure consistency with state/Tribal Water Quality Standards.

We believe that the procedures in 33 CFR part 330 regarding state 401 water quality certification are appropriate and provide a reasonable approach for the state to ensure their water quality standards will be met. Moreover, we believe denial of a 401 water quality certification for a nationwide permit should not be the sole basis for requiring an individual permit application for activities that would otherwise comply with the terms and conditions of that nationwide permit. Denial of state water quality certification for a nationwide permit does not necessarily mean that unacceptable adverse environmental effects will occur on a case-by-case basis. Rather, it indicates that the state is not confident that state standards will be met in all cases. It follows then that, based on the state's denial, the Corps denies authorization, without prejudice, for those activities for which the state denied section 401 water quality certification. Those activities cannot proceed under an NWP or an IP unless the state subsequently issues or waives a water quality certification for that activity. Thus, when the state determines that state standards are met in a specific case (i.e., an individual 401 water quality certification is issued or is waived), the nationwide permit authorization should be available to the prospective permittee. Finally, this approach is based on our desire to develop effective partnerships with states where workload is shared, regulatory duplication is reduced, and neither the Corps nor the states determine how the other party discharges its regulatory responsibilities.

Given the concern regarding the potential water quality impacts of NWP 26, the Corps will also provide an additional opportunity for review for this NWP. In those circumstances where a state has denied section 401 water quality certification for activities between 1/3 and one acre, EPA may request that the Corps provide EPA with PCNs for those proposed activities in the state. Specifically, if the Regional Administrator requests PCNs in those states that have denied water quality certification, the Corps will provide PCNs to EPA consistent with the

notification general condition. EPA will work with the other Federal resource agencies to determine which PCNs they wish to receive, and will forward them as appropriate. We anticipate that in most states the agencies will not be receiving PCNs for discharges between 1/3 and one acre because of the Corps commitment to work with the states to ensure, to the best of our ability, that Section 401 water quality certification will be granted.

Several commenters stated that the Corps ought to prevent the states from requiring verification of authorization from the Corps under section 404 prior to receiving 401 certification or waiver thereof. Other commenters stated that the Corps should limit the states' review under section 401 to only 21 days. The Corps believes it would be inappropriate for us to instruct the states on implementation of their responsibilities under section 401, but rather we will work with the states to resolve concerns regarding impacts to the Nation's waters and implementation of our respective regulatory programs on a programmatic basis. This will include discussions between the states and the Corps on a reasonable period of time for the states to act on an individual Section 401 water quality certification.

One commenter recommended an additional general condition requiring that projects otherwise eligible for nationwide permits also be consistent with the requirements of section 303 of the Clean Water Act. The states, as part of their review and evaluation under section 401 of the Clean Water Act, are responsible for ensuring compliance with several sections of the Clean Water Act, including section 303. Therefore, we have proposed no changes for this provision.

#### Publication of the Nationwide Permits in the CFR

Many commenters were opposed to publishing the NWPs only in the Federal Register (FR) and suggested that they be published in both the Code of Federal Regulations (CFR) and FR. Many indicated that using the CFR is easier and more accessible and that the FR would make it more difficult and even a burden for the public to obtain a full list of available NWPs. One commenter stated that the Corps failed to provide an explanation of why it proposes to publish the NWPs only in the FR. One comment indicated that most county and university law libraries have the CFR, but not back issues of the FR; that only libraries with Federal document depositories have FRs and very few carry back issues. One commenter pointed out that although

FRs are found on databases or CD Rom (e.g., Environmental Law Reporters) they usually have only the prior year on database. Therefore, they would have no access until the nationwide permits are over one year old.

One commenter requested that the final announcement include a summary of nationwide permits valid in each state to provide those who work in multiple states with a "one-stop reference" of potential nationwide permits.

The final nationwide permits have not been included in the CFR and are being published herein, following procedures similar to those for individual permits and regional general permits, because NWPs are permits, not regulations, and therefore, are not appropriate for publication in the Code of Federal Regulations. While publication in the CFR would provide a ready reference, publication of the final decisions on the nationwide permits are announced in the Federal Register and will also be published through regional public notices issued by District Engineers. Moreover, publication of the nationwide permits in the CFR does not provide an accurate representation of the nationwide permits for any particular area. Such CFR publication would not include the state 401 position nor regional conditions imposed by the local Corps district and division offices. Furthermore, the CFR is only published once a year. Therefore, the reissued NWPs would not be published until July 1997. In addition, it is our intention to ensure that all of the pertinent statutes, regulations and other guidance, as well as the nationwide permits including district regional conditions, be made available on the Internet in the near future.

#### Compliance With the National Environmental Policy Act

Numerous commenters stated that issuance of the NWPs in their proposed form would constitute a major Federal action which would have a significant effect on the human environment, thus requiring preparation of an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA). Numerous commenters also contended that the Corps decision documents are inadequate, do not provide enough information, and are based on insufficient data to appropriately evaluate the impacts of the NWPs. Many of the comments received indicated the Corps should prepare an EIS to ensure that adverse effects are minimal. One commenter added that, at a minimum, an EIS should be prepared for NWPs 26

and 29. Other commenters listed the following NWP's as needing an EIS: NWP's 12, 13, 14, 21, 34, and 40.

Several commenters requested that the Corps prepare a cumulative impact analysis now and make it part of an EIS. Several different commenters provided the following estimates of cumulative impacts occurring under the existing NWP program as acres of wetlands lost: 70,000 acres per year; 82,000 acres from 1988 to 1996 nationwide from 27 of the 36 Corps districts and only from NWP's that were reported to the Corps (included in this figure was an estimate of 4,333 acres of vernal pools lost in California); in 1994 more than 90,000 wetland filling activities proceeded under Corps general permits; nearly one-half million activities; the sum of the small, 0.5-acre, wet areas, like the prairie potholes and vernal pools, impacted is biologically significant; the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) Pre-construction Notification (PCN) database from 1992 to 1996 indicated a loss of 5,500 acres in the southeast region of the United States (Florida had more than 2,000 acres, Georgia, more than 1,000 and coastal Texas 300 acres in Harris County alone).

Several commenters raised the issue of alternatives analysis. One commenter recommended that a full range of reasonable alternatives be explored in the decision documentation, to include not only alternative formulations of the individual NWP's, but also alternative approaches to NWP's, in general. The commenter states that Programmatic General Permits (PGPs), including state PGPs, have already been demonstrated to be effective in several northeastern states. One commenter requested that the decision documents incorporate the regional conditions.

The Corps has collected data relevant to the usage of nationwide permits and associated impacts and we believe that our data demonstrate that the adverse effects from the previous NWP's were minimal. These data show that for Fiscal Year 1995 (FY95) a total of 43,775 activities were authorized with written Corps verifications under all of the NWP's nationwide (this total does not include those for NWP 27, which allows for creation, enhancement and restoration of wetlands and are, therefore, anomalous to this data set). These authorizations under all of the NWP's adversely affected approximately 6,500 acres of wetlands and the Corps received approximately 7,800 acres of mitigation in return. It is estimated that there were approximately 87,000 activities authorized by all of the NWP's

nationwide that did not require a PCN, or were otherwise verified in writing by the Corps. We estimate that these unverified authorizations adversely effected an additional 4,300 acres of wetlands. Although this is less than many have suggested, we are consciously striving to reduce this loss through the changes to the program set forth here today. Moreover, the provisions and limitations of the nationwide permit program ensure that those activities authorized by NWP's will have less than minimal adverse environmental effects. Notwithstanding our continued belief that adverse effects of the NWP program have been minimal and the fact that the NWP's we are issuing today will substantially reduce potential effects, the Corps will collect additional data on the reissued NWP's, to document more fully the impacts. For all NWP's that involve a PCN, we will collect data on the acreage of impact and acreage of mitigation. We are also adding a condition to NWP 26 that will require all permittees to notify the Corps of the acres of impact of their project.

The Corps evaluation of the impacts on the aquatic environment resulting from the Nationwide Permit (NWP) program indicates that the cumulative adverse environmental effects are minimal and not significant. This is based on our belief that cumulative impacts must be viewed in the context of the individual watersheds. We believe that past regional conditions placed on NWP's, particularly NWP 26, in many districts have substantially reduced cumulative impacts on a watershed basis. Districts have revoked NWP 26 in many high value watersheds and placed additional notification or other limitations on NWP 26 to ensure minimal adverse environmental effects to specific watersheds. Although these past regional protections have substantially reduced adverse environmental impacts, we believe additional protections are needed to continue to ensure that only minimal adverse environmental effects will occur. Some of the additional protections we are implementing include substantially reducing the acreage limits under NWP 26, ensuring that stacking of NWP's impacts a maximum of 3 acres and only after a review by the Corps, substantially increasing the number of instances where a Corps review is necessary, and requiring increased and more detailed data collection to better monitor NWP activity. Moreover, we are more strongly directing the Corps districts and divisions to add regional conditions for high value watersheds, and additional

generalized regional conditions that will ensure that only minimal impacts will occur. This will also ensure that cumulative impacts will not be significant.

In that the adverse effects will be less than minimal, it also follows that they will not result in "significant impacts on the human environment," the threshold requiring an EIS as defined within regulations implementing NEPA. Thus, no EIS is required prior to finalization of these nationwide permits. Formal documentation of the Corps analysis and determinations have been prepared in compliance with NEPA and the Clean Water Act. This documentation includes an environmental assessment and, where relevant, a section 404(b)(1) Guidelines compliance analysis. Copies of these documents are available for inspection at the office of the Chief of Engineers and at each Corps district office. Additionally, Division Engineers will supplement the national NWP decision documentation to discuss regional conditions and regional revocation requirements, which further ensure that the impacts are minimal. These supplements will be available for inspection at the appropriate district offices. We have prepared a programmatic alternatives analysis for each NWP which discusses administrative alternatives to issuing each NWP.

#### General Permit Criteria

Several commenters requested that the Corps define what constitutes "minimal" adverse effects and "similar in nature" and prove or guarantee that the NWP's meet the legal requirement that wetland fills have no more than minimal adverse effects before the NWP's are reissued. One commenter stated that the Corps simply ignores the requirement of section 404(e) for activities that are "similar in nature" and have no more than minimal adverse effects on aquatic resources such as wetlands. Another commenter recognized that generally the NWP's are conditioned to ensure that adverse effects will be minimal, but was nevertheless concerned that there are many serious exceptions, noting NWP's 26, 29, 34, and 40. One commenter argued that some of the NWP's covering activities that are similar in nature could affect wetlands that were not similar, including NWP's 7, 12, 13, 14, 16, 17, 19, 21, 25, 26, 29, 33, 34, 37, and 40. Most commenters indicated that NWP 26 was of most concern and others commented that, without mitigation, there could be a cumulative effect. Several commenters recommended that

the Corps first obtain data to determine the extent of the project impacts. Without such data, they maintain that it is difficult to accurately assess if wetland fills authorized by the NWP comply with the Clean Water Act requirements for no more than minimal individual or cumulative adverse environmental effects.

We have determined that it is not appropriate to define the term "minimal" at the national level, because what constitutes minimal adverse environmental effects can vary significantly from resource to resource, state to state, county to county, and watershed to watershed, as well as district to district. Moreover, the term "minimal" must be defined based on the effects of the specific project in the immediate vicinity, and in the watershed where the activity will occur. Simply listing the acres lost nationally is not instructive regarding minimal adverse effects. Therefore, the determination of "minimal" adverse environmental effects is left to the discretion of the DE. The district represents the most knowledgeable office concerning the aquatic resources within that particular region, and the DE is therefore the most capable of assessing relative impacts that would result from activities authorized under the NWP program. We believe that each nationwide permit authorizes similar activities within the definition for general permits as defined in 33 CFR 322.2(f) and 323.2(h), and with each district's capability to identify impacts associated with these activities and the ability of the DE to require project specific mitigation or to exercise discretionary authority, activities authorized under these NWPs will have less than minimal adverse effects. The Corps divisions have had the authority, based on recommendations from the Corps districts, to reduce potential adverse effects by imposing regional conditions or revoking the applicability of specific NWPs in high value aquatic areas. The Corps divisions have used this authority in many cases. However, we are, in this notice, further emphasizing to all Corps districts and divisions that they should use this authority within their geographical areas to further ensure that only minimal individual and cumulative adverse effects will occur. We expect that each division will, based on the recommendations from each district, restrict the use of several nationwide permits to ensure protection of high value aquatic systems under its authority. Moreover, districts will ensure that adverse effects under NWP

26 are minimal by requiring mitigation for most projects above  $\frac{1}{3}$  acre. This determination is further reinforced by the NEPA and Section 404 evaluations discussed above. The collection of detailed data for the purpose of addressing cumulative impacts is also addressed above under "Compliance with the National Environmental Policy Act."

#### Endangered Species

The Corps believes that the procedures that we have in place ensure proper coordination under section 7 of the Endangered Species Act (ESA) as well as ensuring that threatened and endangered species will not be jeopardized and their critical habitat will not be destroyed. We also believe that current local procedures in Corps districts are effective in ensuring that the ESA is fully complied with under the nationwide permit program. Finally, we have incorporated several additional assurances into the program which have resulted from informal consultation with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS).

Under the current Corps regulations for our NWP program (33 CFR 330.4(f)), each district must consider all information made available to it, and information that it has in its own records, to determine whether any listed threatened or endangered species or critical habitat may be affected by a specific permit action. Based upon this consideration and evaluation, the district will initiate consultation with the FWS or NMFS, as appropriate, if the district determines that the regulated activity may affect, or if the district believes that the action is not likely to adversely affect, any endangered species. Consultation may occur under the NWP process or the district may assert its discretionary authority to require an individual permit for the action and initiate ESA consultation during the individual permit process. If the ESA consultation is conducted under the NWP process without the district asserting its discretionary authority and require an IP, then the applicant will be notified that he cannot proceed until the consultation is complete. If the district determines that the activity would have no effect on any endangered species, then the district would proceed to issue a NWP verification letter. The Corps verification letter will explicitly state that the Corps has made a determination of no effect on endangered species.

Corps districts have, in most cases, established informal or formal procedures with their local counterparts

in the FWS and NMFS through which the agencies share information regarding endangered species. Information developed, shared, and used by the local Corps and FWS/NMFS offices result in the Corps becoming aware of potential adverse effects on ESA-listed species. In most cases, maps and computer data bases are available on the local level that identify locations of populations of endangered or threatened species and their critical habitat. Moreover, for cases which involve a level of potential adverse effects that require a PCN process of coordination with the other agencies, the Corps is now specifically requesting any information that the FWS or NMFS may have on endangered species as part of the PCN consultation. Thus, based on location of the project, an additional level of review now exists for these types of projects. Furthermore, the Corps is now requiring additional PCNs in additional areas and for additional types of activities to ensure that the potential NWP effects will be minimal, for example, the lowered threshold levels of NWP 26. This provides for an additional level of review for many more activities. Any information provided through the PCN process will be used by the district to make its "may affect," "not likely to adversely affect" or "no affect" determination.

In addition to the procedures listed above, each NWP verification includes General Condition 11, which states that "no activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species \* \* \* or which is likely to destroy or adversely modify the critical habitat of such species." Also, to avoid possible confusion on the part of some applicants, Condition 11 has been modified to clarify that this NWP does not authorize the taking of Federally listed threatened or endangered species. This should help ensure that applicants do not mistake the Corps permit as a Federal authorization that would allow the taking of Federally listed threatened or endangered species.

Although the Corps continues to believe that these existing procedures ensure that the Nationwide Permit Program complies with the ESA, we will take the following additional steps to provide further assurance. First, although not required, the Corps will initiate programmatic formal section 7 consultation with the FWS and NMFS as a precaution to further ensure that there is no adverse effect on listed species. We intend that formal consultation will be concluded as soon as possible but not to exceed two years from the date of issuing the revised and

reissued NWP. Second, the Corps will direct the district offices, in writing, to meet with appropriate local representatives of the FWS and NMFS and to establish or modify existing procedures to ensure that the Corps has the latest information regarding the existence and location of any Federally listed threatened or endangered species or their critical habitat in its district. This will ensure that districts have the best information available to make decisions regarding whether an activity may affect an endangered species and thus whether or not to initiate consultation. The Corps districts can also establish through local procedures, regional conditions or other means of additional consultation for areas of particular concern that a permitted activity may affect an endangered species. The Corps believes that the procedures that we have in place ensure proper coordination under section 7 of the ESA, as well as ensuring that threatened and endangered species will not be jeopardized, and that their critical habitat will not be destroyed.

While we are issuing/reissuing this entire package of NWPs (except for NWP 26) for a period of five years, we will be working over the next twenty-four months to collect data, monitor use of these NWPs, and conduct formal consultation under section 7 of the ESA. This two year process is intended to provide us with more detailed information on the types of activities being authorized, the nature and extent of wetlands and other waters being affected by the NWPs, and potential effects to the Nation's Federally listed threatened and endangered species. Immediately following the conclusion of this two year process, we will use the results of this data collection, analysis, and consultation to reevaluate the NWPs being issued/reissued today to determine what modifications are necessary. We will provide to the public, by notice in the Federal Register, the results of our data collection and consultation. In addition, we will provide the opportunity for public comment on changes to the NWP program that might be necessary to ensure compliance with the CWA, ESA and NEPA. In the interim, we would welcome any comments or information that the public might wish to provide relevant to our data collection and consultation process.

### III. Comments and Responses on Specific Nationwide Permits

**1. Aids to Navigation:** Two commenters supported reissuance of this NWP and no changes were

proposed. NWP 1 is reissued without change.

**2. Structures in Artificial Canals:** No changes to this permit were proposed by the Corps. One commenter suggested the term "artificial canal" be defined and that the definition exclude historic sloughs or channels. Another commenter suggested that the term "structures" is too vague and requested clarification on the interpretation of "principally residential canals," whether this NWP authorizes the removal of structures, and whether it can be used in place of or in association with NWP 13 for bank stabilization.

While the term artificial canal could be misinterpreted by some to include channelized natural areas, this is clearly not the Corps interpretation. Should a Corps district find that individuals are using NWP 2 in such areas, the district would take appropriate action to bring such activities into compliance through proper procedures. In accordance with 33 CFR 322.5(g), structures in previously authorized canals would have been considered under applications for the original canal work. In grandfathered canals or in cases where structures may not have been considered, the DE may use discretionary authority to evaluate structures if more than minimal adverse effects are anticipated. Artificial canals within principally residential developments would be used primarily for personal or recreational egress and ingress rather than for commercial use. The Corps procedures, as outlined in the general condition for historic properties, comply with the requirements of 33 CFR part 325 appendix C, which implements 36 CFR part 800 and fully satisfies the requirements of National Historic Preservation Act (NHPA). This nationwide permit is not to be used for bank stabilization projects; such projects should be reviewed for authorization under NWP 13. In case(s) of independent utility, NWP 2 may be used in conjunction with NWP 13 provided individual or cumulative adverse effects are not more than minimal. We anticipate that the impacts resulting from the removal of structures in artificial canals would be similar to the impacts derived from the original installation. Consequently, removal activities are authorized by this NWP. NWP 2 is reissued without change.

**3. Maintenance:** The Corps proposed no changes to this nationwide permit. One commenter recommended that the NWP not allow restoration that clearly adversely affects fish and wildlife. Several commenters recommended that no deviation from the original design be

authorized by the permit since changes could result in significant adverse effects, while one commenter suggested eliminating the qualification for "minor deviation in the structure's configuration." Another commenter requested a list of types of authorized activities and that "minor" be defined. Another commenter asked for inclusion of bridge/culvert replacement that complies with flood-proofing and structural design standards.

The experience with NWP 3 has been very good; navigable waters have not been obstructed and impacts are very minor. Furthermore, in many cases, use of NWP 3 actually enhances the aquatic environment. For example, replacing a seawall that is damaged often results in eliminating chronic turbidity caused by erosion. Because all structures and fills require maintenance periodically and because infrastructure repair following national disasters is critical to the public welfare, we believe this nationwide permit is necessary. We are retaining the provision allowing "minor deviations" in order to provide the flexibility necessary to keep pace with construction technology, building codes and public safety. Activities with deviations resulting in more than minimal adverse effects would not be authorized by this nationwide permit, nor would activities having more than minimal adverse effects on fish and wildlife. The qualifications attached to the "minor deviations" provision are considered necessary in order to ensure adverse effects are avoided and minimized to the extent possible. This NWP is not limited by type of facility. "Minor" is not specifically defined, because the variety of structures and fills included makes defining the word impracticable. "Minor" is meant to refer to a level of project deviation which will result in a level of adverse environmental effects associated with the change that are no more than minimal. Bridge and culvert replacement in compliance with local requirements and design standards would normally be authorized under the permit if they meet the limitations and conditions of the permit.

One commenter requested that NWP 3 authorize activities previously authorized by 33 CFR 330.3 and equivalent authorizations at the state level or constructed prior to the excavation rule. NWP 3 specifically states in the first sentence that 33 CFR 330.3-authorized activities are included. Similar authorizations under state laws can vary considerably and may not be consistent with NWP 3; thus a blanket authorization is not appropriate. This nationwide permit is tied to structures



and fills only, and cannot be used to authorize the repair, rehabilitation or replacement of excavated facilities. The term "structure" does not include unconfined waterways, such as streams and non-lined drainage ditches. The term does include such activities as bank protection measures, ditches and canals lined with man-made and placed materials.

Several commenters recommended that fills and structures required by special conditions in a previously issued permit be covered. The NWP does authorize maintenance of such structures or fills that were previously authorized. This NWP does not authorize activities that were not previously authorized by the Corps.

Another commenter suggested that ESA coordination occur after catastrophic events when new habitat can be created but then damaged by repair activities. General Condition 11 and ESA section 7 require coordination for endangered species. Consideration of improved habitat is made under section 7.

Another commenter felt maintenance/operation plans should be approved before the work is conducted. We believe that this would create an unnecessary burden on the applicant and the Corps for authorization of maintenance and repair activities with less than minimal adverse effects.

One commenter believed that the two year construction time period should be extended, while another felt that two years is long enough. In our judgment, two years has proven to be a reasonable period that does not jeopardize environmental protection due to changing conditions. The permit includes provisions for the DE to extend the period if warranted.

Another commenter felt that this NWP should not be allowed in floodplains. We believe the floodplain capacity would not be appreciably changed for structures or fill maintenance and repair within the limits of this NWP.

One commenter suggested limiting the impact area and another suggested the PCN procedure be applied to this NWP. Since NWP 3 only authorizes structures and fills that are existing, the impacts have already occurred. Maintaining them creates little or no added adverse effects, which ensures that effects would be less than minimal. Therefore, we believe neither of these limitations should be applied. NWP 3 is reissued without change.

**4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities:** As part of the proposed modification of this permit, we were

clarifying that the permit does not authorize the use of covered oyster trays or clam racks. One commenter questioned whether the prohibition on clam racks included "clam bags" and was concerned about the scope of "covered oyster trays and clam racks." This commenter was also concerned about the harvesting of natural live rock, the inclusion of open water pens in the definition of "impoundments or semi-impoundments for culture of motile specimens," or qualitative limitations to define "small fish attraction devices"; and whether bottom dredging of sea grass areas or "bottom tending gear" for commercial purposes were authorized by this permit. One commenter suggested that the permit should specifically exclude commercial scale net pen culture in addition to oyster trays and clam racks. Another commenter asserted that shellfish beds should not be authorized under this permit. This commenter also stated that the exclusion of authorization of covered racks and the location of racks in wetlands of sites that support aquatic vegetation was not sufficient. The commenter cited information that described changes in species diversity associated with the location of racks on and in intertidal mudflats. One commenter stated that the permit should be modified to authorize the releases of scallop and hard clam seed into eelgrass cover. One commenter urged that small aquaculture projects be excluded from this permit, while another commenter stated that fish hatcheries should be specifically excluded. A few commenters suggested that the installation of fish ladders be included under the permit. One commenter was concerned about issuance of permits in areas that have been customary boating channels.

Each of the comments on this nationwide permit are expressions of concern for unique situations in specific regions of the Nation. It is not possible to address all the possible limitations and conditions that may be appropriate at a local or regional level. Nor can we address all the possible variations in terminology, such as "clam bags." Therefore, we believe it is more reasonable and practicable for such comments to be addressed through regional conditions and the provisions for discretionary authority at the division and district levels. Corps districts have the authority, working with the divisions, to restrict use of this NWP in high value areas, such as particularly vulnerable seagrass beds, if they deem such restrictions to be necessary. The one change proposed by

the Corps was not objected to and received some comments of support. Therefore, that change has been made to the permit in its reissuance.

Another commenter suggested that the permit be modified to include "sites where submerged aquatic vegetation may not be present in a given year."

Although we believe that the NWP language includes such sites in the terminology "\* \* \* or sites that support submerged aquatic vegetation \* \* \*" (i.e., a site may not have submerged aquatic vegetation present, but could support such vegetation), we have clarified this in the NWP. NWP 4 is reissued with the proposed changes and the clarification stated above.

**5. Scientific Measurement Devices:** The Corps proposed no changes to this NWP. A few commenters were concerned that the structures permitted by this NWP could preclude or substantially obstruct movement of aquatic organisms including migratory fish. One commenter was concerned that this NWP does not provide any limit on the size or use of the structures authorized and suggested that a maximum size be included (e.g., 1000 square feet). This commenter also recommended that the NWP be conditioned that the structure be used exclusively for purposes associated with scientific measurement to preclude anyone from using this NWP to circumvent the permit process. One commenter recommended that the 25 cubic yard threshold be maintained but to eliminate the PCN requirement.

We believe the concern for impeding the passage of fish or shellfish is addressed by General Condition 4. Due to the varying structures involved in scientific measuring devices, imposing a size limitation would be difficult and unwarranted. A condition will be added stating that any structure authorized by this NWP must be exclusively used for purposes associated with scientific measurements. We have also modified the PCN requirement so that applicants will need to notify only the Corps. NWP 5 is reissued with the modifications described above.

**6. Survey Activities:** The Corps-proposed changes to this nationwide included allowing discharges associated with the placement of structures necessary to complete a survey for historic resources and soil surveys. Most commenters supported the proposed changes. A few commenters requested that the placement of survey markers such as benchmarks and monuments be authorized under this NWP. One commenter felt that mechanical clearing of survey lines should be included, but limited to 8 to 10 foot widths. A few

commenters requested that limited discharges and structures necessary for the recovery of artifacts and information be included in the NWP rather than excluded as proposed. Many commenters asked for the exclusion of seismic exploratory operations involving the use of explosives, such as "3-D" operations, due to the extensive scope and environmental impacts of such activities. It was proposed that the term "core sampling" be changed to "soil, rock and sediment sampling" and changing "exploratory-type bore holes" to "exploratory-type holes" because while most sampling of rock may be by coring, much of the soil sampling is by other methods (i.e., augering, hand shovel, backhoe, etc). Other commenters asked that the permit language specifically indicate that no permanent structures are authorized, all fills be removed and that the area be restored to its original state.

The placement of survey markers such as benchmarks and monuments is authorized under NWP 18 within limitations. Activities necessary for the recovery of artifacts and information are not authorized by this NWP which is intended for authorization of survey activities only to ensure the minimal adverse effects limitation is not exceeded. Operations involving the use of explosives such as 3-D operations with blast shock during seismic tests, or mechanical landclearing activities, have not been categorically excluded. These activities are either unique to, or differ between, geographical regions of the Nation; therefore, regional conditions are the best way to address concerns about minimizing the effects of 3-D seismic surveying. Corps districts will be directed to coordinate with any Federal, state, or tribal authority expressing a concern about 3-D seismic surveying for the purpose of developing regional conditions to address those concerns, as appropriate. Of course, use of towed explosive, pneumatic or seismic devices that do not involve construction, excavation or other work in sediments do not require any permit from the Corps. We have conditioned this NWP to clarify that it does not authorize any permanent structures or fills. The current wording of the NWP does include, but is not limited to, the use of augers, shovels, backhoes, and other small equipment, as well as core drills. NWP 6 is reissued with the proposed changes and the clarification stated above.

**7. Outfall Structures:** The Corps proposed no changes to this NWP. A number of commenters objected to reauthorization of this NWP or stated that work in tidal wetlands or areas

supporting anadromous fishes should be excluded. Commenters stated that outfalls have caused the loss of wetlands and may trap or entrain fish. Several commenters stated that the NWP should contain a requirement to include measures in the design to prevent such fish loss. One comment indicated that work in areas that may be contaminated should be excluded. Another stated that activities authorized by this NWP have significant adverse environmental effects.

Regional conditioning of the nationwide permit and the provisions for discretionary authority at the division and district levels will provide tools necessary to protect fish, wetlands, and water quality, and to address any other environmental effects that potentially are more than minimal.

One commenter requested elimination of the notification requirement when the construction of the outfall requires less than 25 cubic yards. Several commenters called for retaining the notification requirement.

The notification requirement will be retained to allow review of proposed projects for greater than minimal adverse environmental effects and impacts to navigation.

Several commenters stated that this permit violates section 404(e) of the Clean Water Act because the discharge structures may not be similar in size or in the material discharged. One commenter called for authorizing all intake structures under this NWP.

The activities authorized by this NWP are similar because they are similar in scope and purpose and are reviewed and approved pursuant to the National Pollutant Discharge Elimination System (NPDES) under section 402 of the Clean Water Act. The relationship of these projects to section 402 assists the Corps in arriving at a minimal adverse effects determination. The inclusion of all intake structures under the NWP would make such a determination not possible. NWP 7 is reissued without change.

**8. Oil and Gas Structures:** The Corps proposed minor changes to this nationwide permit to clarify that Corps review for taking discretionary authority is limited to the effects on navigation and national security. One commenter was concerned that work could occur in environmentally sensitive areas. Another commenter suggested that pipelines be excluded from use of this NWP. A few commenters believed that this NWP should not be reissued because of potential impacts associated with oil and gas exploration and that this NWP does not meet the "similar in nature" or "minimum effects" threshold of section 404(e) of the Clean Water Act.

One commenter recommended that a PCN be required for this NWP. A few commenters believed that individual state 401 water quality certification should be required for these activities.

The Corps believes this NWP is very restrictive. The only structures that can be authorized under this NWP are those within areas leased by the Department of the Interior, Minerals Management Service. The general environmental concerns are addressed in the required NEPA documentation the Service must prepare prior to issuing a lease. Further, the Corps involvement is only to review impacts on navigation and national security as stated in 33 CFR 322.5(f). NWP 8 is reissued with the proposed clarifications.

**9. Structures in Fleeting and Anchorage Areas:** The Corps proposed no changes to this NWP. One commenter requested clarification of the term "structures" and the definition of "fleeting and anchorage areas," and expressed concern for secondary impacts of vessel discharges, and impacts from shading submerged aquatic vegetation by the structures.

The NWP is specific to the purpose of moorage of vessels, thus structures will be small compared to the vessels. Fleeting and anchorage areas are determined by the U.S. Coast Guard and indicated on navigation charts. They are for concentrating vessels in an area that minimizes navigation impacts to other vessels while the former vessels wait for unloading cargo, etc. Shading impacts are not expected as these areas are usually in deep water and the structures and buoys seldom produce measurable shading. NWP 9 is reissued without change.

**10. Mooring Buoys:** The Corps did not propose changes to this NWP. One commenter expressed concerns about the limitations or specifications on the size or number of mooring buoys, and the environmental restrictions on location.

Comments regarding specific areas that should be excluded or other special restrictions that are needed to protect special areas such as shellfish beds or submerged aquatic vegetation should be dealt with by contacting the appropriate district and requesting the addition of regional conditions. Based on our experience, we do not anticipate that the mooring buoys and anchorage systems will have more than minimal adverse effects, either individually or cumulatively. NWP 10 is reissued without change.

**11. Temporary Recreational Structures:** The Corps proposed no changes to this NWP. A few commenters were concerned that the NWP may

cause removal of riparian vegetation and alter the nearby shore aquatic environment, and that the Corps should define "temporary," "small floating docks" and "seasonal". A commenter requested that the NWP be expanded for certain commercial activities other than jet ski, parasailing, and similar rentals, provided the activity is of temporary duration.

We disagree with the approach of attempting to define national time limitations on temporary or seasonal structures because of the seasonal variations for different recreational activities from region to region. Regional conditions can be developed for the NWP and/or the District Engineer may use discretionary authority, on a case-by-case basis, if duration, structure size, or location require such action. Limiting the NWP to discrete events would greatly reduce its utility. This nationwide permit was proposed to authorize temporary recreational structures which overall would have only minimal adverse effects. Given this, and the discretionary authority provisions, the Corps believes that the NWP adequately balances the need for temporary recreational structures in waters of the United States, while protecting riparian and aquatic resources. NWP 11 is reissued without change.

**12. Utility Line Backfill and Bedding:** The Corps proposed rewording of this NWP to include discharge of dredged material from the trench excavation, and requested comments establishing limitations for special aquatic sites. A large number of comments addressed NWP 12. Based on the comments we received and the Corps internal evaluation of the implementation of NWP 12, we have made substantial changes to this permit. We have added a PCN review for four situations: for any activity that would be authorized under NWP 12 that involves more than 500 linear feet in waters of the United States; for any project that involves mechanized landclearing of forested areas; for any utility line that is placed parallel to a water of the United States; and for any activity involving authorization under section 10 of the Rivers and Harbors Act of 1899. We believe that these increased limitations will ensure that no more than minimal adverse effects to the aquatic environment will occur.

The comments were closely split between supporting issuance without changes and supporting issuance with limitations. Several commenters were opposed to reissuance based on environmental impacts. Many commenters, requesting limitations,

made suggestions on those limits: 200 linear feet, 1,000 linear feet in forested wetlands, 6 inch diameter utility line, 0.33 and 0.5 of an acre. Some commenters suggested PCN procedures above particular limits: 6 inch diameter line, 0.5 of an acre. The allowed duration of side casting also received suggestions: no side casting, 14 days, 30 days. Work with a maximum width of 30 feet was suggested by two commenters.

The variation in wetland values across the nation dictates that a limitation, or threshold for PCN, not overly restrict use of the NWP or unnecessarily add administrative burden to any large geographic area. Potential impacts will vary with the construction methods. The acreage limitation presents the possibility that high value wetlands could suffer more adverse effect at less acreage than the limitation/PCN threshold, but low value or easily recovering wetlands would require unnecessary added administrative procedure when exceeding an acreage limitation/threshold. An acreage limit of 0.33 acres would allow a nearly 2½ mile long utility line trench that was one foot wide. This could be a minimal impact in some areas, but may require an individual permit in other geographic areas and/or wetland types or values.

Based on careful review of all the comments, we have determined that certain limitations should be established and that certain activities will require a Corps-only PCN. We have added section 10 to this permit to allow districts to authorize projects that cross navigable waters. To ensure the navigable capacity of such waters will not be adversely affected, we have also established a PCN for any authorization that involves work in section 10 waters. We have also explicitly stated that mechanized landclearing, including landclearing of forested wetlands, for overhead utility lines may be authorized under NWP 12. To ensure that only minimal adverse effects will occur, we have established a PCN requirement for any utility line that will require landclearing of forested wetlands. We have also included the requirement for a PCN whenever a utility line is placed parallel to a stream bed. Finally, in order to ensure that only minimal adverse effects will occur, we have established a PCN requirement for any use of NWP 12 that exceeds 500 linear feet in waters of the United States.

Several commenters recommended that stream crossings be allowed only if perpendicular to the stream. One commenter suggested that bank stabilization must occur by segments

rather than at the completion of the entire project. Another stated that laying utility lines on bottoms of streams should be discouraged. Several recommended that alternative routes be examined more thoroughly. We have added several PCN requirements, including one for situations where a utility line is proposed to be placed parallel to a stream bed. Generally, utility lines are placed perpendicular to a stream and we are, with this notice, directing the Corps districts to critically evaluate any projects that may be proposed to be placed parallel to a water of the United States. Moreover, we believe that it should be an exceptional case where a district authorizes a utility line within, or within wetlands parallel to, a stream bed for more than 100 feet. With the added PCN review, by the Corps, for any project that should be subject to a generalized alternative analysis (i.e., more than simply adjusting the alignment slightly to ensure minimal adverse effects), the district will use its discretionary authority to require an IP.

Several commenters believe that this permit should not be used in combination with other permits (see additional discussion on stacking permits). This restriction would be too limiting for many projects that have minimal adverse effects for the entire project including utility lines. At times, utility lines are considered "single and complete projects" as they support existing developments but will also support other future development. We have added a PCN for any stacking of NWP 12 with any other NWP.

Several commenters appeared to be confused with the word "subaqueous". Two commenters suggested slightly different wordings and deleting "subaqueous". The term subaqueous referred to below the surface of the ground (wetland) or water surface; a line laid on the surface does not require a section 404 permit but any mechanized landclearing to lay such a line would. We have dropped "subaqueous" as we feel the reference is not needed and confusing. One commenter desired authorizing maintenance of landclearing. Most maintenance consists of cutting the wetland vegetation above the soil, which is not regulated under section 404 when the soil is not disturbed. If maintenance of a utility line corridor involves landclearing as defined in 33 CFR 323.2(d)(1), it would require additional authorization.

One commenter was confused about the "single and complete project" requirement for an NWP combined with an individual permit in relation to the required section 10 permit for utility

lines crossing navigable waters. The NWP authorization covers the excavation and backfill portion in conjunction with the remaining single and complete portion of the line that continues beyond the navigable water, usually in wetlands. "Single and complete" for a linear project under the NWPs is defined at 33 CFR 330.2(i); briefly, a linear project is single and complete at each widely separate water crossing. Also, the navigable water portion of the structure (utility line) required a permit under section 10 because it was not included in NWP 12 authorization. Although we have added section 10 to NWP 12, the single and complete provision for linear projects remains in effect.

In the past, NWP 12 has not included Section 10 authorization, which has added an individual permit procedure (usually a Letter of Permission) to the authorization of a utility line in navigable waters. The Corps has decided to add section 10 authorization to minimize the administrative procedures and decrease the time needed for authorization. However, we are requiring a PCN for review of navigation impacts and requiring procedures for notifying the National Oceanic Atmospheric Administration for charting the utility line to protect navigation.

A few commenters were confused by the term "parallels a water." The Corps had suggested, in the proposal, that care should be taken during the placement of a utility line parallel to a waterbody. We are concerned with the potential adverse effects associated with the placement of a utility line parallel to a waterbody and, therefore, have modified and clarified this language. We have removed the proposed language and have added a PCN requirement for the placement of a utility line within a water of the United States parallel to a stream and have clarified that "parallel to a stream" means installation of a utility line lengthwise to the bed of the stream. Furthermore, we have added a PCN requirement for proposed projects that would involve placing utility lines along stream beds (see discussion above). Two commenters suggested clarifying whether the NWP included discharges for access roads and foundations for structures supporting overhead transmission lines. Structural fills for overhead utility line supports are often permitted by NWP 25. Access roads could be authorized by NWP 14 or 26 in some cases. The Corps has clarified that mechanized landclearing is authorized for overhead utility lines as long as the width is kept to the minimum necessary. Furthermore, as

discussed above, we have added a Corps-only PCN for landclearing forested areas. Access roads and foundations for overhead lines are not authorized. NWP 12 is reissued with modifications as discussed above.

**13. Bank Stabilization:** The Corps proposed no changes to this NWP. Two commenters wanted to keep the current language of the nationwide permit with no changes, while another expressed general support. Several commenters objected to limitations on length of project area or quantities of fill, particularly for flood control structures. A few commenters stated that the limitation of one cubic yard of fill per linear foot should not include any earthen backfill to return the bank to a former footprint, and that the limitation should apply only to fills that encroach into the pre-existing waterway. Their reasoning is that this would allow reconstruction of failed levees and road embankments and would not result in a loss of wetlands or jurisdiction relative to the pre-failure condition. These commenters also note that the prohibition of any fill in any special aquatic site is a restriction that unduly constrains projects and often renders this NWP inapplicable. They recommend that impacts to special aquatic sites of up to 0.1 acres be allowed without notification, and that greater acreage be allowed with notification. These commenters further recommend that use of biotechnological slope protection or other methods relying on vegetative stabilization be allowed greater PCN thresholds to encourage such usage.

We believe expansion of the scope of this NWP would result in a potential for more than minimal adverse effects. The permit is designed specifically for the protection of existing bank lines at the time of protection and does not authorize filling to restore the original bank line or any other intermediate alignment of the bank. Adjustment in the alignment of the bank is allowed only for reasonable and practical design and construction considerations within the limitations of NWP 13.

Two commenters recommended removing the special aquatic site restriction for ephemeral watercourses when there is no flow under the premise that such areas are defined as wetlands under a broad definition. These commenters also recommend that the nationwide permit recognize that there is likely to be a construction zone 30 feet or greater along the bank within jurisdictional areas where project impacts will be incurred for installation of bank protection.

We disagree that wetlands in ephemeral systems are necessarily of lesser value than other waters simply because they do not contain water at all times of the year. Therefore, removal of special aquatic site restrictions is not warranted. We do recognize that certain bank stabilization projects necessitate keying in the toe of the slope to ensure adequate protection, and that such work requires a construction footprint that will impact additional areas beyond the waters of the United States. If any such adverse effects are likely to be more than minimal for a particular waterbody, the Corps will add regional conditions to ensure that only minimal adverse effects will occur.

One commenter stated that notification is an unnecessary level of Federal review, and that it usurps the states' authority to assess site-specific impacts to water quality under section 401.

This is not an expansion of authority because notification has been a condition of this nationwide permit since its last re-authorization in January 1991. Likewise, it does not usurp the authorities of the states pursuant to section 401 of the Clean Water Act. A state may condition its 401 water quality certification for this NWP so that it will review projects over 500 feet in length, and issue or deny site-specific section 401 certification.

Many commenters were opposed to the reissuance of this nationwide permit because they perceived it to be used in ways inappropriate to its intended use, such as a precursor to channelization of watercourses. Specifically, they suggested that permittees might use this nationwide permit to construct flood control works, and how riprapping affects existing hydrology with adverse effects on habitat and adjoining properties. Several commenters stated that this nationwide permit should specifically exclude channelization, noting that bank stabilization projects can adversely affect habitats adjacent to jurisdictional waters that may support plant or animal populations that are equally limited. We agree that channelization is an inappropriate use of this nationwide permit. It is the responsibility of each district to determine whether a particular project is contributing to greater than minimal cumulative adverse effects, and to exercise discretionary authority if they believe such effects are occurring.

Several commenters noted that this nationwide permit should be used selectively on a regional or watershed basis to prevent cumulative adverse effects in sensitive habitats. Others stated that this nationwide permit needs

better monitoring and compensatory mitigation, or should always require compensatory mitigation. One commenter stated that this nationwide permit should not be used in conjunction with any other nationwide permit.

We believe the provisions for regional conditioning and asserting discretionary authority will ensure that greater than minimal adverse effects do not occur. Mitigation is being required where appropriate to achieve minimal adverse effects, but we do not believe that all bank stabilization projects require mitigation because many projects have minimal effects, in fact often positive effects, on aquatic resources without mitigation. For example, riprap on an eroding barren bank will typically increase habitat diversity and reduce turbidity in downstream waters.

One commenter stated that because erosion has occurred after some projects permitted under this nationwide permit were constructed, the Corps should not reissue it unless it can demonstrate that such projects will perform as expected. Another commenter noted how some projects of inadequate design integrity would eventually wash downstream with potentially adverse effects on water quality, aquatic habitat, public safety, and aesthetics.

The Corps evaluates projects to determine if they are in compliance with Clean Water Act requirements, including whether the project will only result in minimal adverse effects for NWP, and to ensure that they are not contrary to public health or safety. We believe that the bank stabilization methods employed are generally effective even in cases where there is no reporting to the Corps. Although a washout of shore protection could occur, such unusual flows would also wash out unprotected shorelines and structures or natural features such as trees, rocks, and the like, all of which would wash downstream.

One commenter questioned whether this nationwide permit could be used in lieu of NWP 2 for stabilization projects in artificial canals. Another commenter recommended that this nationwide permit should be used only on artificial canals.

NWP 13 can be used in lieu of NWP 2 where appropriate. However, restricting its use only to artificial canals would unduly restrict its utility.

Several commenters recommended retaining the notification requirements, particularly for those projects in excess of 500 linear feet. Several commenters called for lowering the PCN threshold to 100, 200 or 300 feet to more appropriately address cumulative

impacts. One commenter suggested that the cubic yardage limit for notification be 100,000 cubic yards. Several commenters stated that the nationwide permit should specifically mention the types of bank stabilization allowed, with an emphasis on methods that did not include landscaping. Many others recommended excluding certain materials such as gravel, asphalt, tires, automobiles, building rubble, poured concrete, driven sheet piles, and structural timber bulkheads. Two commenters stated that projects authorized under this nationwide permit should not include seawalls or bulkheads on open or natural shorelines and should not allow backfilling for the purpose of creating fast land or reclamation. Three commenters stated that use of concrete rubble should only be used if it meets acceptable riprap standards for size and density, is free of contaminants, is faced with acceptable rock riprap, and has all rebar cut flush with the surface.

We believe the terms and conditions that prohibit discharges in special aquatic sites (including wetlands) prohibit the use of unsuitable and toxic materials, limit the shore stabilization to 1 cubic yard per linear foot, and require that the proposed stabilization be the minimum necessary, are sufficient to alleviate these concerns. In some cases where the adverse effects could be more than minimal (i.e., discharges on more than 500 feet of shoreline, and/or greater than one cubic yard per linear foot of shoreline) notification to the DE is required. Also, where potentially high value aquatic resources may be impacted with less than 500 feet of bank protection, the Corps division can regionally condition NWP 13. The intent is to accommodate a wide range of users, techniques and materials with minimal time delay and maximum protection of valuable wetland resources. NWP 13 is reissued without change.

**14. Road Crossing:** The Corps proposed no changes to this NWP. Many commenters suggested that this NWP should not be reissued or should be modified for a number of reasons including the following: it should not be used for large road projects with multiple wetland crossings; the breadth of the road crossings are not constrained; the acreage allowance should be reduced; and this NWP is most frequently stacked with other NWP, causing adverse effects to exceed minimal. A few commenters recommended that a maximum acreage impact limit be applied to large road projects with multiple crossings of waters of the United States (including

wetlands and other special aquatic sites).

The Corps regulatory policy regarding linear projects and what constitutes a single and complete crossing is well established (RGL 88-6). Individual channels in a braided stream or individual arms of a large, irregularly-shaped wetland or lake, etc., are not separate waterbodies. For linear projects, the single and complete project requirement for individual NWP will be applied to a waterbody at a single location. That is, each waterbody impacted by a roadway will be considered a single and complete crossing at that location. Where a roadway intersects a single waterbody such as a meandering river at separate but distinct locations, each crossing is considered a single and complete crossing. The purpose of the "single and complete" language is to preclude situations where one project will repeatedly crisscross one waterbody when such multiple crossings can be practicably avoided.

Several commenters expressed support for this NWP as proposed. Others indicated that there should be no limits on the length or area of a crossing. Two commenters suggested that the NWP 26, 1 to 10 acre provision be incorporated and that acreage be the only controlling limit. Two other commenters recommended the length be increased to 400 linear feet and one suggested that the acreage be increased to acre. A few commenters opposed the inclusion of the "Notification" general condition in this NWP.

We carefully considered the suggestions to limit the width of the roadway as well as to expand the length and maximum acreage for the roadway. We concluded, however, that the limits in the NWP as proposed represent a tested balance. With regard to stacking NWP 14 with other NWP, we have conditioned this NWP to not allow NWP 18 or NWP 26 to be combined with it for the purpose of expanding the allowable road crossing footprint. In addition, a Corps-only PCN is required any time this NWP is combined with any other NWP. (See discussion on "Stacking of NWP" in section II above.) NWP 14 is reissued with the modification discussed above.

**15. U.S. Coast Guard Approved Bridges:** The Corps proposed no changes to this NWP. A few commenters expressed concerns about the impacts associated with the construction of access fills, fill removal, and restoration of preconstruction grades. Another commenter was concerned about revegetation with native species after completion of such preconstruction

grade restoration activities. One commenter encouraged inclusion of conditions to require excavation and removal of old approach fills when they have been replaced. Another commenter stated that the impacts related to Coast Guard bridges can be significant and that issuance of the NWP contributes to an incomplete and less than thorough review by the Coast Guard. A few commenters felt that the Corps had inappropriately delegated Section 404 responsibility to another agency.

Based on the requirement of this NWP and the ability of the DE to assert discretionary authority should the nature of the impacts warrant, we believe that this NWP is an efficient means to regulate the construction of bridges. The regulations also allow for the development and inclusion of conditions to address particular project aspects such as removal of old approach fills, revegetation specifications, etc. The comments regarding the delegation of regulatory authority are apparently based on the misinterpretation of the permit language. The Coast Guard has been given the task of reviewing such bridge construction pursuant to section 9 of the Rivers and Harbors Act of 1899. A Department of the Army permit pursuant to section 404 of the Clean Water Act is still required for the discharge of dredged or fill material into waters of the United States associated with the construction of the proposed bridges and causeways. NWP 15 is reissued without change.

**16. Return Water From Upland Contained Disposal Areas:** The only change the Corps proposed to this NWP was a change in wording to note that, in certain circumstances, dredging may now require a section 404 permit. One commenter requested that the NWP require an NPDES permit. A couple of commenters recommended that the NWP not be applicable to dredged material taken from areas of known sediment contamination or where there is reason to believe that the discharge is contaminated. A few commenters stated that water quality violations could result from the NWP unless it is limited to the activities authorized by, and operating in conformance with, currently valid permits or exemptions. One commenter suggested that all return water be tested for contaminants. A couple of commenters thought that the original text and the clarification were unclear without specifying when the activity may require a section 404 permit relative to the excavation rule, or when a section 10 permit may be required.

This NWP authorizes the return of effluent to waters of the United States

from upland contained disposal areas, and is not intended to address the dredging activity. However, a Department of the Army permit pursuant to section 10 is required for structures or work in, or affecting, navigable waters of the United States, as that term is defined in 33 CFR parts 322 and 329. A Section 404 permit is required for any addition or redeposition of dredged material associated with any activity that destroys or degrades a water of the United States as defined in parts 323 and 328, unless the discharger demonstrates to the satisfaction of the Corps or EPA, as appropriate, prior to the discharge, that the activity will not have such an effect. The effluent subject to NWP 16 has been administratively defined as a discharge of dredged material. Based upon Corps experience and knowledge of dredging and disposal operations, we believe that the technology is readily available to control the quality of the return water from contained upland disposal sites. Any adverse environmental effects resulting from this type of activity would be minimal, provided the effluent meets established water quality standards and adequate monitoring of the activity is performed to assure compliance with these standards. With this in mind, it is our intent to provide the states an opportunity to review each activity under this NWP authorization to assure compliance with state water quality standards. We see no need to require additional state review unless the water quality certification for the NWP has been denied. The prospective permittee must receive an individual certification or waiver from states that have denied water quality certification for the NWP authorization. The Corps has no authority to determine NPDES program requirements. NWP 16 is reissued with the proposed changes.

**17. Hydropower Projects:** The Corps proposed no changes to this NWP. The comments received addressing NWP 17 were all related to the potential impacts associated with hydropower projects and stated the position that NWP 17 is contrary to the NWP program's provision allowing only activities of similar nature and of minimal impacts.

We are maintaining the notification requirement for this NWP to enable us to assess the nature of the impacts associated with each project and whether to exert discretionary authority. In addition, the Federal Energy Regulatory Commission has the responsibility of examining environmental impacts for those small hydropower projects at existing

reservoirs. NWP 17 is reissued without change.

**18. Minor Discharges:** The Corps proposed a modification to the wording of this NWP to clarify how the Corps measures excavation activities for the purpose of determining compliance with the NWP. This was based on existing guidance developed after the Corps revised the definition of "discharge of dredged material" at 33 CFR 323.2(d) to clarify when the Corps regulates incidental discharges of dredged material associated with excavation activities. (See August 25, 1993, Federal Register, 58 FR 45008.) Based on this existing procedure, this clarification does not affect the number and type of activities that are regulated under this NWP. When measuring the quantity of the discharge of dredged or fill material, the Corps will include the volume of any excavated area (i.e., the volume of the substrate excavated) which is below the plane of the ordinary high water mark (OHWM) or high tide line (HTL). Many commenters expressed uncertainty regarding how to measure the 25 cubic yards of discharge authorized by this NWP. Some commenters requested that the allowable area of impact be increased to 2/10 acres. The Corps continues to believe that the current volume and acreage limits are, and have proven to be, appropriate to ensure that the adverse effects are no more than minimal for the purpose of authorization by this NWP and is not changing those limits. We are providing the following guidance to clarify how NWP 18 quantities are measured.

How to determine quantities under NWP 18: NWP 18 applies to all waters of the United States. For projects that are:

Below and waterward of the OHWM or HTL:

**Volume:** The cubic yardage of any dredged or fill material placed; plus, The cubic yardage of the substrate excavated.

**Acreage:** The acreage of any areas that are filled, excavated, flooded and drained.

Landward of the OHWM or HTL:

**Volume:** Not applicable. Only acreage limits apply.

**Acreage:** The acreage of any areas that are filled, excavated, flooded and drained.

For projects that are both below and waterward of the OHWM or HTL and that are landward of the OHWM or HTL, the acreage is the sum of the two acreages as determined above, while the volume is that measured below and waterward of the OHWM or HTL. For example, a permittee may place 50

cubic yards in a wetland landward of the OHWM provided the fill does not exceed  $\frac{1}{10}$  of an acre and the District Engineer determines that the impacts are minimal. In this example, there was no material placed below and waterward of the OHWM or HTL, therefore the cubic yard (volume) limit was zero and not exceeded. Furthermore, the total acreage was less than  $\frac{1}{10}$  acres. NWP 18 may be combined with NWP 19 to authorize activities in navigable waters of the United States (i.e., Section 10 waters). NWP 18 is issued as proposed.

**19. Minor Dredging:** The Corps proposed a modification to this NWP to authorize, under section 404 of the Clean Water Act, the incidental discharges associated with the dredging activities in navigable waters of the United States. This was necessary after the Corps revised the definition of "discharge of dredged material" at 33 CFR 323.2(d) to clarify when the Corps regulates incidental discharges of dredged material associated with excavation activities. (See August 25, 1993, Federal Register, 58 FR 45008.) This clarification does not affect the number and type of activities that are regulated under this NWP. Many commenters supported keeping the quantity limit at the existing level. We agree and continue to believe that the 25 cubic yard limit is acceptable. We have allowed and will continue to allow NWPs 18 and 19 to be used for the same project in section 10 navigable waters of the United States. NWP 19 cannot be used in section 404-only waters. We believe that the requirement of NWP 19 that prohibits excavation in wetlands, coral reefs, sites supporting submerged aquatic vegetation, and anadromous fish spawning areas, and the requirement of NWP 18 that requires notification in special aquatic sites, including wetlands, and the requirement of NWP 18 that requires notification in excess of 10 cubic yards, will ensure that impacts resulting from these activities will be minimal. For example no more than 35 cubic yards could be excavated from navigable waters of the United States without a notification to the Corps. Furthermore, no activity between 35 and 50 cubic yards of combined excavation and discharge could occur without a notification to the Corps and a Corps determination that the adverse effects would be minimal. NWP 19 is issued as proposed.

**20. Oil Spill Cleanup:** The Corps proposed no changes to this NWP. One commenter suggested a regional condition to require that activities be conducted in conformance with the National Response Team Integrated

Contingency Plan Guidance. Even though this guidance is used to assist an applicant to develop one plan to satisfy several applicable laws, it is strictly voluntary on the applicant's part to develop one consolidated response plan. The Corps believes it is most important to verify that the response is conducted in accordance with the Spill Control and Countermeasure Plan required by 40 CFR 112.3 and any existing state contingency plan, and that the regional response team (if one exists) concurs with the proposed containment and cleanup effort. This NWP authorizes the structures and fills used to effect the oil spill cleanup. Other Federal and state agencies have lead responsibility to administer oil pollution laws. NWP 20 is reissued without change.

**21. Surface Coal Mining Activities:** The Corps proposed the consideration of expanding this NWP for mining activities on previously mined lands that have not been subject to restoration. Several comments supported the proposed inclusion of previously mined areas and a few expressed opposition. Some commenters stated that this proposal should not apply to wetlands restored under the Surface Mining Control and Reclamation Act (SMCRA) of 1977 or NWP 27. Another commenter questioned whether the NWP applies to pre-1977 SMCRA. Comments about mitigation presented a wide range of possibilities: Support for on-site mitigation after completion of mining; mitigation ratio should be set at 1:1 on-site as proposed; flexibility is needed to apply mitigation on-site and/or off-site; and mitigate off-site before mining begins; mitigate concurrent with mining. One commenter stated that restricting the mitigation to on-site would economically stop a mining operation. Many commenters opposed the bond, stating that this is already required by the SMCRA and at least some state agencies.

The re-mining of abandoned areas requires application under Title V of the SMCRA. As with new mining, the Office of Surface Mining (OSM) coordinates such proposals with the Federal and state resource agencies and determines whether or what mitigation is required. The Corps has decided that specific language referencing re-mining abandoned mines is not required within the nationwide permit text. The NWP, as worded, will allow re-mining of abandoned mines. The Corps will strongly encourage re-mining of abandoned mines where the wetlands are of low value, rather than mining new areas with wetlands that were not previously disturbed. The Corps will

review the Title V application for compliance with the NWP. The Corps will only require a bond for mitigation when OSM or the state agency has not required a bond. Requiring a bond in certain cases is consistent with existing policy. (See 33 CFR 325.4).

One commenter expressed concern over the area impacted (i.e., ancillary activities). The NWP specifically applies only to the coal excavation area. Additionally, any facilities, such as buildings, to be placed in waters of the United States would require separate authorization by the Corps.

Several commenters desired restrictions such as set-backs, no stream relocations, no impacts to wetlands which would be difficult to replace, and acreage limits. Another requested an exemption from mitigation for certain chemical compositions of the wetland soil. We believe that each case will be so specific that it is best reviewed case-by-case.

A couple of commenters stated that the Corps was delegating its authority to the OSM and that this NWP did not comply with section 404(e). Minimizing duplication of Federal regulation is one of the goals of the President's Wetland Plan and is one of the principal purposes of NWP 21. We believe that the Corps should not duplicate the intensive review performed by OSM in coordination with other Federal and state resource agencies. OSM complies with the same Federal environmental laws, such as National Environmental Policy Act, Fish and Wildlife Coordination Act, Endangered Species Act, and National Historic Preservation Act as the Corps does in executing its regulatory program. The Corps reviews the Title V information to assure that the impact analysis and mitigation are in compliance with the Corps policy and regulations. The NWP authorization is not valid until the mining activity has been authorized by OSM or by a state with an approved Title V program. To assure that the Corps receives a complete application, we have revised the NWP to include a requirement for an OSM or state-approved mitigation plan. NWP 21 is reissued with the modifications described above.

**22. Removal of Vessels:** The Corps proposed no changes to this NWP. However, a few commenters requested that the term "minor fills" be the same as that for Nationwide Permit 18, and one commenter requested that this NWP require a PCN that would specifically require contacting the State Historic Preservation Officer (SHPO) to ensure against damage to vessels potentially eligible for listing in the National Register. Another commenter requested

notification to the SHPO since the Abandoned Shipwreck Act gives states title to, and management authority of, certain shipwrecks.

The criteria described in Nationwide Permit 18 for minor discharges of dredged or fill material could be used as a guide in evaluating the environmental impacts, but is not meant to be a definition of "minor fill". This term is intended to be subject to the DE's interpretation on a case-by-case basis as a project is being evaluated. The existing language of NWP 22 does not allow its use for any ship or vessel that is listed or eligible for listing unless the district determines that the activity complies with the National Historic Preservation Act. The Corps will, in any particular case, coordinate with the SHPO regarding historic properties, including concerns with regard to the Abandoned Shipwreck Act. We believe that the restrictions within this NWP in conjunction with General Condition 12 and the Corps regulations at 33 CFR 330.4(g), are sufficient to protect against damage to historic properties. NWP 22 is reissued with no changes.

**23. Approved Categorical Exclusions:** The Corps proposed no changes to this NWP. A few commenters supported expansion of Nationwide Permit 23 to cover state environmental program approvals, especially for flood control work, and all emergency work by a public agency.

State programs are not required to comply with NEPA and states have varying environmental protection programs. Therefore, the Corps cannot base a nationwide permit on state approvals as NEPA Categorical Exclusions (CE). Regional and programmatic general permits are effective tools that can be developed at the district level for state programs that meet or exceed the Federal CWA requirements. Emergency work can normally be authorized under other nationwide permits such as NWP 3 and 37, or the Corps emergency permit authority.

A few commenters requested the NWP be regionalized with regional conditions and asked that districts publish public notices for proposed CEs and lists of approved CEs. The Division Engineers have the authority to add regional conditions to any nationwide permit and are currently in the process of considering recommendations for conditions on these nationwide permits. All CEs are available in the Federal Register and we intend to make them available on our Internet homepage which is currently being developed.

A number of commenters opposed continuation of the existing nationwide

permit. They stated that the permit is often misused, especially by the Highway Departments. Most of these commenters called for revision of NWP 23 to require periodic review (every 5 years at the renewal of the general permit) and assessment of approved CEs (citing new knowledge and outdated agency Environmental Assessments), limits on the area of wetlands that may be impacted (similar to Nationwide Permit 26), and limiting (to 25–50 feet) or excluding stream channelization. Some commenters called for excluding bridges and culverts in those streams that support fish, and excluding stacked concrete slabs that create low water dams.

The Corps does, upon being furnished a notice of an agency's CE, solicit public comment, and review the CE for approval for authorization by this nationwide permit. We may include conditions for authorization as a part of that approval. This is an ongoing process and the U.S. Coast Guard has recently updated their CEs and requested approval for authorization under the NWP. RGL 96–1 has already been issued for Coast Guard CEs and we will soon publish our findings and determinations in the Federal Register. We will continue to monitor the CEs approved for authorization under this nationwide permit and make adjustments through changes in conditions, new approvals, and removal of previously approved CEs when warranted. General Condition 4 prohibits substantial disruption of movement of aquatic life species indigenous to the waterbody.

Some commenters called for not renewing Nationwide Permit 23 due to misuse, violations of 404(e), and illegal delegation to other agencies of the Corps determination of which projects are subject to Clean Water Act review.

We believe the Corps current review process of the lead agency's decision ensures that the CE is not misapplied. The Corps does not necessarily approve all of an agency's CEs. Only those consistent with the NWP program are approved. Furthermore, in the recent action on the Coast Guard CEs, the Corps requires a PCN for some actions with the potential to result in more than minimal impacts.

One commenter requested that we require a cultural resources inventory before approving CEs.

Compliance with cultural resource requirements is the responsibility of the lead Federal agency. CEs are developed in accordance with NEPA. All other Federal environmental laws and regulations, including the cultural resource and historic preservation laws,

must still be satisfied by the agency proposing the CE. NWP 23 is reissued without change.

**24. State Administered Section 404 Programs:** The Corps proposed no changes to this NWP and the only commenter providing comments specific to the permit expressed support for this nationwide permit as written. NWP 24 is reissued without change.

**25. Structural Discharge:** Corps proposed clarification that this NWP may be utilized for general navigation purposes. A few commenters recommended issuance of this NWP as proposed. One commenter stated that this NWP should not be reissued because it has not been demonstrated that the adverse environmental effects are only minimal, and that individual permits provide greater protection to environmental resources. We believe the impacts resulting from the portion of these projects regulated by the Corps are typically very small and localized. Any project can be further conditioned to ensure that adverse effects are minimal or mitigated appropriately, if necessary. If it is determined that any particular project would not qualify for this NWP because adverse effects are not minimal, the DE can exercise discretionary authority and instruct the applicant on the procedures to seek authorization under an IP.

One commenter requested clarification of the significance of changing the previously worded "piers and docks" to "mooring cells". Another commenter stated that "docks and piers" should be specifically included, noting the current authorization does include such wording.

We recognize that piers and docks are not mentioned in this NWP; however, they would be covered if their construction methods entailed discharge of material into tightly sealed forms or cells. We do not feel it necessary to specifically include piers and docks, because their construction often requires driving piles, which typically does not require a Section 404 permit. The structure itself may require a Section 10 permit if located in navigable waters of the United States.

One commenter stated that this NWP should include well pads for monitoring, and surveillance wells used for monitoring pollutants and groundwater parameters of aquifers.

We do not believe it is necessary or appropriate to include such uses under this NWP, because Nationwide Permit 18, covering Minor Discharges, would be more suitable.

One commenter noted that this NWP does not propose any limitations. Several others recommended limitations



on this NWP, including no more than 20 mooring cells, size thresholds such as less than 8,000 square feet for pile-supported structures, or spacing between piles of at least six feet. Two commenters stated that this NWP should authorize the side-casting of material for placement of the forms or construction of pile caps. One commenter stated that mechanized landclearing for access to the project site for the placement of structural members should be authorized by this NWP. One commenter recommended that this NWP specifically not authorize river boat mooring cells for gambling purposes.

We believe that the actual footprint of project impacts typical of the types discussed in the NWP are limited sufficiently such that further limitations are not necessary. However, each district may implement special conditions or regional general conditions on a case-by-case basis as deemed necessary. We agree that side-casting of material for construction of pile caps is appropriate provided it is kept to the minimum necessary, that material is not placed in such a manner that it is dispersed by currents or other forces, and that preconstruction contours are maintained. However, we do not believe that mechanized landclearing to access the project site should be authorized under this NWP. Finally, we do not see the significance of differentiating between mooring cells used for general navigation purposes versus those that may be used for mooring of gambling vessels. NWP 25 is reissued with the proposed clarification.

**26. Headwaters and Isolated Waters Discharges:** The Corps proposed two options to change the previous thresholds associated with this NWP and committed to regional conditioning of the NWP to ensure minimal adverse effects. Numerous comments were received and are addressed by categories in the following text. Based on the recommendations from the public and other agencies, as well as the Corps internal review of implementation of NWP 26 over the past 5 years, we have made substantial changes to the permit. We have reduced the thresholds of NWP 26 to  $\frac{1}{3}$  and 3 acres, added a limitation for linear waterbodies of 500 linear feet, and stated that we believe that most projects above  $\frac{1}{3}$  acre will result in mitigation requirements to offset adverse effects to the aquatic environment. We believe that these additional limitations that we have placed on NWP 26 will greatly improve the environmental protection afforded by Corps review of projects under this NWP and will better ensure that no

more than minimal adverse effects will occur. In addition to the substantial limitations that we have placed within the terms and limitations of the NWP 26 at the national level, we are directing our districts to carefully evaluate the aquatic systems in their districts and, working with the Corps divisions and the other Federal and state agencies, add additional limitations as necessary for added protection of the aquatic environment. These changes are detailed below in our discussion of the comments we received.

**General:** More than 500 commenters provided comments specifically addressing NWP 26. Numerous commenters expressed opposition to NWP 26, expressing concern that NWP 26 authorizes activities that are not similar in nature and activities that have greater than minimal impacts both individually and cumulatively, concluding that NWP 26, in many cases, is therefore, "illegal". Many of these commenters believe that the NWP should be deleted while many acknowledge a necessity for such a nationwide permit, but feel that the NWP must be modified to respond to the growing concerns for the potential cumulative effects resulting from activities authorized by this permit.

Many of these commenters also expressed concern that wetlands impacted by NWP 26 (those above headwaters and isolated wetlands) are as valuable, if not more so, than other wetlands to which NWP 26 does not apply. These commenters state that there is no scientific evidence that supports the concept that these wetlands are of less value and refer to a 1995 National Academy of Sciences' National Research Council Report, which states: "the scientific basis for policies that attribute less importance to headwater areas and isolated wetlands than to other wetlands is weak." Some of these commenters also commented that there is no scientific basis for the threshold limits.

Numerous commenters expressed the view that the NWP has worked well, that there is no evidence to indicate that it is resulting in more than minimal adverse effects and that the loss or further limiting of NWP 26 would result in increased regulatory burdens on the public, less regulatory certainty, unacceptable work load increases for the Corps, increased processing times, project delays, and an overall lessening of the regulatory program's ability to protect waters of the United States.

The Corps proposed 3 options for acreage limits that would define when a PCN must be submitted. These options were:

Option 1: 1 to 10 Acres (no change)

Option 2:  $\frac{1}{2}$  to 5 acres

Option 3:  $\frac{1}{3}$  to 3 acres

**Thresholds:** Approximately 70% of the more than 400 comment letters on these threshold options expressed a preference for Option 1, no change in the thresholds of 1 and 10 acres.

Many of these commenters suggested that a lowering of the thresholds would result in a lessening of the practice by developers of minimizing their wetland fills to fit under the thresholds because the thresholds would be too low to meet. The result then being, that they would be forced into the PCN or individual permit process and would apply for non-minimized fills. Many commenters also estimated that the Corps work load would increase significantly, thus causing the Corps to be less effective in its mission to protect wetlands. A few commenters believed that in those cases where mitigation is required for all fills (often a state or county requirement), that the effect of causing developers to reduce fill areas to even smaller fills (by lowering the threshold to  $\frac{1}{3}$  of an acre) could be more, smaller mitigation sites.

A few commenters preferred changing the thresholds to option 2.

Approximately 30% of those commenting on this subject preferred option 3, ( $\frac{1}{3}$  & 3 acres). Most of these commenters expressed the view that the current thresholds are allowing more than minimal adverse effects and that the lower levels would better assure that the NWP would not result in more than minimal adverse effects.

A few commenters recommended that the thresholds be increased to enhance flexibility and program efficiencies.

The Corps acknowledges the concerns, expressed principally by natural resource agencies and environmental groups, for the potential level of adverse effects resulting from NWP 26 in its present form. The Corps also acknowledges the concerns of the regulated public for the potential lessening of regulatory certainty and flexibility in the program through further limitation of the scope of NWP 26.

The Corps agrees that the level of cumulative adverse effects under NWP 26 must be reduced and more effectively mitigated. We will later discuss the manner in which the Corps has addressed the concerns regarding impacts to the aquatic environment. We also believe it is important to understand the history and derivation of the Corps NWP program.

In 1977, the Corps developed the headwaters and isolated waters

nationwide permit (NWP 26) as we extended section 404 jurisdiction to all waters of the United States (including isolated and headwaters areas). Prior to 1977, the Corps did not require Section 404 permits for discharges of dredged or fill material into waters in these geographic areas. Over the past 19 years NWP 26 has been revised in an attempt to ensure that activities are not authorized under NWP 26 if such activities would result in more than minimal adverse effects, either individually or cumulatively, to the waters of the United States, including wetlands. While the Corps had to assure compliance with this statutory requirement (Clean Water Act section 404(e)), it also had to consider the environmental and programmatic implications of an extremely heavy regulatory workload.

The most recent data and scientific literature indicate that isolated and headwater wetlands often play an ecological role that is as important as other types of wetlands in protecting water quality, reducing flood flows, and providing habitat for many species of fish and wildlife. For example, in many parts of the Nation, isolated and headwater wetlands comprise a significant portion of the functioning wetlands that remain in existence. As previously noted, the National Academy of Sciences concluded in its 1995 report on wetlands that there is no scientific basis for policies that attribute less importance to headwater areas and isolated wetlands than to other wetlands.

In light of our internal evaluation of NWP 26, and a careful consideration of all comments regarding its reissuance, we have determined that a modified approach to NWP 26 and eventual replacement of NWP 26 is necessary in order to ensure that in the future no more than minimal adverse effects occur to the waters of the United States, both individually and cumulatively. This determination is supported fully by the majority of comments from the public and other Federal and state resource agencies. Therefore, NWP 26 will be immediately modified and eventually replaced with a new approach to authorizing activities with minimal adverse effects. This new approach will take into account the Corps workload and a desire to reduce unnecessary regulatory burdens.

The approach that we are implementing today will ensure that only activities resulting in minimal adverse effects go forward under NWP 26, while maintaining flexibility and expedited permitting for applicants proposing such projects. Based on the

desire to develop a more specific data base on the specific types of activities authorized under NWP 26 and an improved data base on impacts of projects authorized under NWP 26, we have determined that a phased approach to NWP 26 is necessary. In this regard, we are, with this notice, issuing a modified NWP 26 for a period of two years rather than the normal 5 year period for all other nationwide permits. During this two year period, which starts with today's date, the Corps will collect additional data on the types of activities regulated and develop, propose, and issue new nationwide permits to replace the revised NWP 26. Although we recognize the ecological importance of isolated and headwater wetlands and the potential for impacts to these resources by NWP 26, we believe it is necessary to reissue NWP 26, in its more restrictive and environmentally sensitive form, during the two year phase out period to ensure fairness to the regulated public and to allow for development of activity specific replacement NWPs. The replacement permits, which will be activity specific, will be published for public review and comment approximately 18 months from today (approximately May 1998). The Corps is entering this initiative with a completely open view to the final outcome and would welcome any comments from the public over the next six months regarding specific categories of activities that should be considered for new nationwide permits. Such comments should be directed to the address listed in the ADDRESS section of this notice. For example, NWP 29 is an activity-based NWP for single family residences with a 1/2 acre fill limitation. Another example could be fills associated with the expansion of existing commercial developments, with acreage limit specific conditions, and a PCN to evaluate the potential for more than minimal impacts. In taking this approach, the Corps will evaluate the types of activities that are currently authorized under NWP 26 and identify appropriate limitations for the activity-specific NWPs to ensure that the "minimal adverse effects" requirement of section 404 (e) is met. It is also important to note that the public will have an opportunity to formally comment on the proposed replacement permits once they are officially proposed in approximately 18 months.

During the two year period that may be required to issue activity-specific permits to replace NWP 26, we believe that certain modifications to NWP 26 are necessary. Thus, we are changing

the threshold limits to 1/3 and 3 acres. Using these thresholds, the maximum fill allowable under NWP 26 will be 3 acres. Discharges over 1/3 acre will require a PCN. Although a number of projects between 3 and 10 acres will now need individual permits, we believe that the increase in workload will be manageable. Moreover, a key element of the Corps' ability to manage the increased workload is the requirement of a Corps-only PCN for fills between 1/3 and 1 acre. While we do not believe that the notification of other agencies is necessary for activities in the 1/3 to 1 acre range, we will provide quarterly NWP 26 data to the Federal resource agencies for their programmatic review. The Corps will also coordinate its evaluation of those proposed activities that involve issues relevant to other Federal agency expertise (e.g., endangered species, water quality standards). In addition, the Federal resource agencies will be provided a copy of the PCN for fills over 1 acre and given an opportunity to comment to the Corps before the work is verified as authorized under NWP 26.

The Corps will continue to work closely with Federal and state resource agencies to add necessary regional conditions and procedures to the revised NWP 26. As with all nationwide permits, we will emphasize the requirement to avoid and minimize impacts on-site.

In summary, the revisions proposed today for NWP 26, and its planned replacement with activity-specific general permits, recognize fully the requirement to ensure that adverse effects to the waters of the United States are no more than minimal and the need to provide an expedited review process for truly minor activities. In taking the phased approach, we allow for an orderly transition from the previous NWP 26 to a set of activity-specific replacement nationwide permits. It is our intent to make this change in a manner that minimizes disruption and confusion for the regulated public, while at the same time improving environmental protection.

To further ensure that geographical areas or waters do not receive greater than minimal adverse effects through the excessive use of NWP 26, we are with this notice directing district and Division Engineers to carefully review areas under their authority with a view toward additional regional limitations to NWP 26. We believe that every district has high value aquatic areas where NWP 26 must be further limited or revoked.

Further, Division Engineers may revoke the NWP for specific geographical areas. District engineers

also have the authority to exercise discretionary authority and require an IP on a case-by-case basis when they determine that the "minimal adverse effects levels" will be exceeded. Furthermore, we are directing district and Division Engineers to further reduce impacts by requiring mitigation for most projects from 1/3 to 3 acres through the PCN process. In most cases, mitigation for impacts below 1 acre will be most beneficial through mitigation banks and "in lieu fee" programs. In lieu fee programs allow permittees to obtain mitigation through funds paid to groups who will use these funds to restore, create, enhance, and preserve wetlands. Such groups include states, counties and land trusts. Such in lieu fee approach is currently in place and very successful in the state of Ohio. Our Huntington district, in conjunction with the state, established a fee structure for NWP 26 authorizations. The fees go to Ohio Department of Natural Resources and are used to acquire, restore and manage former wetlands.

*Review Period:* A large percentage of those who commented on the proposal to increase the 30 day pre-construction notification period, expressed opposition to the proposal. They commented that 30 days is adequate and that an increase in the review period would only result in reviewers delaying their review rather than conducting more extensive reviews; that more extensive reviews, if conducted, are unnecessary for projects of NWP 26 magnitude, and that the proposal would result in an unnecessary extension in the processing time of what is currently a good expedited process. Approximately 30% of the commenters felt that the increase should be implemented in order to provide for more thorough review. One commenter recommended the elimination of the "de facto" authorization provision, because there is no logic to allowing the elimination of wetlands as a result of administrative situations.

Having given full consideration to the comments received and discussed the topic at length with the resource agencies involved, we have concluded that it is necessary to extend the review period to 45 days while maintaining the "de facto" authorization provision. Increasing the review period by only 15 days will, we believe, allow adequate and efficient review of the increased number of NWP 26 applications expected due to the lowering of the PCN thresholds, and will not place an unfair burden on the regulated public. The de facto authorization provision is considered necessary to provide a reasonable control on the review period

for these relatively minor actions and to provide as much regulatory certainty as possible to the regulated public.

*Regionalization:* Many Commenters supported the concept of regionalization of the NWPs by districts either because of the opportunity to provide additional protection to sensitive ecological areas, as well as more appropriately to provide protection for regionally differing environments.

Many commenters were opposed to the concept of regionalization of the NWPs by districts because of concern that districts would, unnecessarily, further limit the applicability of the NWPs when they have been found by the Corps to authorize less than minimal adverse effects nationwide.

The Corps believes there are benefits to be gained through regional conditioning of NWP 26, both for natural resource protection and for the regulated public. Guidance being provided to the districts and divisions will require that the districts provide opportunity for full public review and comment in the process for establishing regional conditions, and will require that they consider modifications of the acreage limits and limitations of use, based on types of aquatic resources and activities. They will also consider potential impacts to the regulated public, to district workloads, and the ability of the district to effectively implement the regulatory program. Further definition of the permit, through regional conditions, will provide the regulated public with increased certainty and predictability while at the same time further ensuring against use of the permit under circumstances that may cause greater than minimal adverse effects. The fact that districts and divisions do regionalize NWP 26 through regional conditions to protect certain aquatic systems is one of the reasons that the Corps has determined that only minimal adverse effects occur nationwide.

*Notification:* Several commenters felt that all actions permitted under NWP 26 should be reported to the Corps to provide the Corps with full knowledge of the extent and impacts of such actions. In general, these same commenters also suggested that the Corps keep more extensive records of this information and make it readily available to the general public.

One commenter expressed concern for the lack of data collected by the Corps with regard to the use of NWP 26 and the corresponding lack of analysis to support the determination that NWP 26 results in no more than minimal adverse effects. A few commenters expressed the belief that the Corps is not fulfilling an

earlier commitment to monitor and evaluate the impacts of NWP 26.

The reduction of the PCN threshold from 1 to 1/3 acre will significantly increase the percentage of activities reported to the Corps and provide an adequate level of information for continued monitoring of authorizations under NWP 26. Notification will have essentially three threshold limits. We have established a reporting requirement for all impacts up to the minimum threshold of 1/3 acre. This report, which will include basic information such as the name of the permittee, location of the activity, description of the work, and the types and size of the impacted area, will be required within 30 days of the completion of the work. We are encouraging support of, and participation in, this important information gathering process so the Corps can better determine ways to protect wetlands in a fair, flexible and effective manner. Next, we will require a "Corps-only" notification for impacts between 1/3 and 1 acre. These PCNs will be reviewed by the Corps to assure compliance with permit conditions, and to determine what level and type of mitigation should be required. Finally, authorization under NWP 26 will require full resource agency coordination under the notification procedures for impacts between 1 and 3 acres. For all the PCNs, the Corps review will ensure that no more than minimal adverse effects will occur and that appropriate mitigation will be required.

The Corps collected data from its district offices on the use of all NWPs for Fiscal Year 1995, including NWP 26. The data shows that 13,837 activities were authorized by NWP 26, impacting approximately 5020 acres of wetlands, with an average of 0.36 acres of impact per NWP 26 authorization. The Corps received approximately 5809 acres of mitigation for these impacts, yielding a mitigation ratio of approximately 1.15:1. To ensure continued monitoring of NWP 26 and all other NWPs, the Headquarters office will begin collecting quarterly data from the field beginning in the second quarter of fiscal year 1997. The data parameters will include, at a minimum, the use of the NWPs, both actual and estimated (for those with non-reporting thresholds), impact acreage, resource types, geographic locations (e.g., counties) and mitigation received. These parameters will be further set forth in guidance to the districts following the publication of this Federal Register notice and after coordination with the other Federal resource agencies.

*Mitigation:* Several commenters suggested that a threshold be set for requiring mitigation. Some recommended a threshold of one acre be set, above which mitigation would be required and one recommended mitigation be provided at a 2:1 ratio. A review of NWP 26 verifications provided in fiscal year 1995 indicates that more than an acre of mitigation was provided for every acre filled. We believe that this fulfills the national goal of no net loss in wetlands. We do not believe it is appropriate to require mitigation in every case or at a standardized ratio nationwide. We believe mitigation determinations are better established on a local and/or case-by-case basis. Therefore, we have not required a specific ratio as a general condition of NWP 26. However, we do believe that most actions involving fill of 1/3 acres or more will have some level of mitigation, based on the Corps determination of aquatic functions and values lost. Corps districts may establish fixed ratios for particular waterbodies or specific types of waters in their areas. Districts may also set specific in lieu fee schedules within their areas.

Many commenters raised concerns that, by applying compensatory mitigation in the context of a NWP, the Corps authorizes activities that, but for the mitigation, may have more than minimal adverse environmental effects. Those commenters were concerned that the CWA requires that only activities with minimal effects may be authorized by a general permit. Activities that have more than minimal adverse effects are subject to the individual permit process and the associated analysis of alternatives, individual public notice procedures, and other aspects of individual review that help to ensure that potential adverse effects are fully avoided and minimized before any activity is approved.

Given these concerns, the Corps will be considering whether or not modifications to the mitigation provisions of the regulations are appropriate and will be meeting with other Federal agencies to discuss this issue. In the interim, the Corps is seeking specific comment on the use of compensatory mitigation in the context of the Nationwide Permit program and any recommendations for modification to the mitigation provisions. Should the Corps determine that revision to this policy is appropriate, a rulemaking process to change the regulations at 33 CFR part 330 may be necessary. This process would include notice and full opportunity for public participation.

*Subdivisions:* One commenter recommended deleting all wording on

subdivisions except that which clarifies the single-use applicability of NWP 26. More specifically the commenter recommends deletion of the exemption provisions of the NWP 26 subdivision rules.

One commenter suggested that "commercial," "industrial," and "office" subdivisions should not be held to the same restrictions as residential development because of their more extensive level of planning and design.

One commenter suggested that the October 5, 1984, date for subdivision exception be changed to January 21, 1992.

We have evaluated these comments and continue to believe that the subdivision language in NWP 26 is appropriate. We do not agree that, as a general matter, commercial office or industrial projects are necessarily subject to better planning than many large residential developments.

*Environmental Impact Statement:* A number of commenters recommended that an Environmental Impact Statement (EIS) or study be conducted prior to the re-issuance of NWP 26, because of their perception that the use of the NWP is causing or will cause extensive impacts to wetlands.

The Corps collected data from its district offices on the use of all NWPs for Fiscal Year 1995, including NWP 26. These data show that 13,837 activities were authorized by NWP 26 impacting approximately 5,020 acres of wetlands, with an average of 0.36 acres of impact per NWP 26 authorization. The Corps received approximately 5,809 acres of mitigation for these impacts, yielding a mitigation ratio of approximately 1.15:1. To ensure continued monitoring of NWP 26 and all other NWPs, the Headquarters office will begin collecting quarterly data from the field beginning in the second quarter of Fiscal Year (FY) 1997. The data parameters will include, at a minimum, the use of the NWPs, both actual and estimated (for those with non-reporting thresholds), impact acreage, resource types, geographic locations (e.g., counties) and mitigation received. These parameters will be further set forth in guidance to the districts following the publication of this Federal Register notice and after coordination with the other Federal resource agencies.

Furthermore, the Corps has conducted an analysis of the environmental impacts associated with the re-authorization of this permit in compliance with the requirements of NEPA. This analysis has been documented in an Environmental Assessment in accordance with NEPA and resulted in a Finding of No

Significant Impact in accordance with NEPA. Therefore, an EIS is not required. The Corps believes that the modified NWP 26 structure, along with regional conditions and case specific discretionary authority, will ensure that adverse effects are no more than minimal on a watershed basis. We believe that it is inappropriate to simply sum the total acres of impact nationwide and assume significant impacts. We believe that environmental effects must be viewed on a watershed basis. With the substantial level of mitigation required by the Corps for impacts to the higher value wetlands, we believe that the environmental effects are not significant.

*Corps Workload:* The Corps agrees with the majority of commenters that a general permit, such as NWP 26, is necessary for fair, effective, and efficient implementation of the Corps regulatory program. Although the final NWP 26 we are issuing today will increase the Corps workload, we believe that overall workload will remain manageable.

To evaluate the effects of the current changes to NWP 26 on Corps workload, we analyzed data collected during surveys of the Corps districts during FY94 and FY95. Additionally, data from quarterly reports was used to determine IP workload. We estimate that the changes we are implementing today will increase the number of PCNs for NWP 26 (due to the lowering of the PCN threshold) by nearly 10,000, compared to the estimated 2,700 evaluated in 1996. However, the vast majority of the additional 10,000 additional PCNs will be Corps-only evaluations. We estimate that the NWP 26 we are issuing will result in approximately 500 additional individual permits nationally (approximately a 10% increase over Fiscal Year 1996). This increase will be due to applicants requesting IP authorization of projects with impacts greater than 3 acres, but which would have qualified for verification under the old NWP 26 guidelines. The Corps would not be in a position to evaluate all, or even a majority, of the activities we currently authorize under NWP 26 without severe impacts to the Corps responsiveness to the regulated public. The Corps regulatory program verified approximately 14,000 NWP 26 actions (including both those projects for which a PCN was required and those for which no PCN was required but verification was requested) and evaluated 5,040 IP actions in FY96. The workload associated with the additional processing of just the 14,000 currently verified NWP 26 cases as IPs, would increase the IP work load by a factor of 4 to approximately 29,000. An IP

workload increase of this magnitude would render the program ineffective, and would be a disservice to the American public and overall environmental protection. Additionally, it is estimated by Corps districts that another 20,000 NWP 26 activities were accomplished during FY96 without the requirement for reporting to the Corps. Complete elimination of NWP 26 would result in an increase in the IP workload by approximately seven fold. This level of increase would greatly extend the processing time for IPs, make Corps resources unavailable for jurisdictional determinations and enforcement actions, and severely reduce our ability to continue to protect the aquatic environment.

*Others:* The Corps intends to initiate substantial improvements to its data collection for all NWPs, particularly NWP 26. Furthermore, during the two year period that NWP 26 is currently issued, the Corps will collect data on the types of activities as well as impacts to the aquatic environment and mitigation required. We are also instituting a self reporting requirement for fills below 1/3 acre. The Corps will continue to collect data on acres of impact and mitigation on a permanent basis.

A few commenters recommended including a linear footage limitation on headwater systems of 200–500 feet (consistent with other NWP limitations) for application to linear wetlands and headwater streams.

We concur with this comment and have placed such a limitation on NWP 26 for activities directly affecting (filling or excavating) more than 500 linear feet of the stream bed of creeks and streams. Therefore, no activity that adversely effects greater than 500 linear feet of the stream bed can be authorized under NWP 26. The threshold of 500 linear feet was chosen to maintain consistency within the NWP program (500 linear feet is the PCN threshold for NWPs 12 and 13). We believe this additional limitation will enhance the program's ability to ensure that projects with potentially greater than minimal impacts will not be authorized under the NWP.

One commenter suggested that if wetlands are the driving force in lowering acreage limits, then lower acreage limits should only be set for impacts to wetlands and that it may be appropriate to raise the acreage limitations for projects that affect only ephemeral drainage areas. A few other commenters similarly recommended that the term "headwaters" include all naturally ephemeral streams regardless of their mean annual flow, in that they

only exceed the average annual flow criteria because of high peak flows during the winter months, which artificially skew the average flow rates.

We believe the existing definition for headwaters, as currently written in 33 CFR 330.2(b), adequately provides for the consideration of ephemeral tributary systems and accommodates this comment. In addition, headwaters whether vegetated or not provide important flood storage and water quality values to the overall aquatic system. If some ephemeral drainage areas are truly low value the districts can develop and issue regional general permits to expand coverage.

Several commenters expressed the concern that NWP 26 reduces the program's protection of vernal pools and requested that the filling of vernal pools not be allowed under NWP 26.

We believe the provisions for "discretionary authority" at both the division and district levels is adequate to accommodate the concerns for unique waters.

One commenter stated that the NWP does not meet the regulatory requirements of the Natural Resources Conservation Service's Wetland Conservation Provisions (Swampbuster program) and continues the application of inconsistent standards on the communities regulated by the section 404 and Swampbuster programs.

The Corps finds no conflicts between this NWP and programs administered by the Natural Resource Conservation Service and is working closely with the NRCS to provide consistency in our programs. Since the standards for the two programs are different, as are the program goals, some differences will exist. We are committed to minimizing the differences to the extent possible.

One commenter stated that Corps districts differ in the methodologies used to calculate or determine where the "5 cubic feet per second" point is on waterways and that the methodology should be standardized. The commenter also recommended that there be a designated record keeping method and that the information be distributed or made available to the public.

We believe that the definition of headwaters is adequate to establish consistency in determination methodologies. The determination is normally an analytical one; however, abbreviated or simplified estimating methods are considered appropriate on a regional basis. We do intend to establish standard reporting methods for data collection.

One commenter felt that there is a need to clarify the definition of "single and complete project" for this NWP,

suggesting that the permit should be applied differently (perhaps different thresholds) for projects that differ in purpose and size.

The Corps has provided guidance to the field regarding the definition of "single and complete project" and believes it would be inappropriate and inconsistent to modify that guidance for this permit. NWP 26 is designed to address minor filling activities with less than minimal impacts. Neither the magnitude of the project, nor the level or public interest, nor the nature of the applicant, are relevant considerations to the decision on whether the project's adverse effects are minimal. Our definition of "single and complete" project does not allow piecemealing projects regardless of the type of project.

One commenter requested a definition of special aquatic sites.

The definition of "special aquatic sites" is provided in the section 404(b)(1) Guidelines (40 CFR 230.3(q–1)). No further definition is considered necessary for the purposes of this nationwide permit.

A few commenters recommended that the Corps coordinate all applications with natural resources agencies, including applications for activities under one acre in size.

The Corps believes that activities involving less than 1 acre of waters of the United States are generally minor in nature, and that multiple Federal agency review is not necessary. The Corps staff is well trained in the biological and environmental sciences and is fully qualified to assess potential impacts. The Corps experience with agency response to the existing PCN for 1–10 acres indicates that the natural resource agencies, which also have limited human resources, provide very few site specific substantive responses at the lower end of the 1–10 acre range. Thus, we would expect even fewer comments for projects with impacts below 1 acre. Also, the additional administrative workload associated with agency coordination would seriously impact the Corps ability to focus on projects with greater impact.

A few commenters recommended the Corps strictly enforce the requirement for all NWP 26 applicants to submit a wetland delineation with the pre-discharge notification.

The Corps strives to implement the program in as reasonable and flexible a manner as possible so as not to impose unnecessary burdens on members of the regulated public. We do require wetland delineations to the extent necessary to identify the resources being affected and the necessity for adequate mitigation when appropriate. The level of

refinement of such wetland delineations is left to the discretion of the districts on a case-by-case basis. NWP 26 is reissued with modifications as discussed above.

**27. Wetland and Riparian Restoration and Creation Activities:** The Corps proposed to modify this NWP to allow projects to occur on any Federal lands. We also requested comments on whether to allow creation of wetlands and their subsequent reversion on reclaimed surface coal mined lands, to eliminate the 5 year window of reversion opportunity and allow the reversion to occur at any time in the future, to allow use of NWP 27 for any voluntary restoration/creation project, to include enhancement as an option, and to require a written agreement in all cases.

There were several commenters for and an equal number of commenters against the proposed modification of the permit to allow projects to occur on all Federal lands. One commenter felt that the proposed permit would grant more flexibility on Federal lands. Another commenter felt that the Corps should not require review and approval of an Operation and Maintenance Plan for projects on Federal lands or carried out by Federal agencies since the Corps does not review or approve such plans for projects on private lands. We believe that all Federal agencies should be encouraged to participate in wetland restoration and creation projects and have modified the permit for all Federal lands. Because the permit is limited to restoration, enhancement and creation activities and because authorizations for those projects occurring on Federal land will not provide the opportunity for reversion of the wetlands without a permit from the Corps, we concur that an Operations and Maintenance Plan approval is unnecessary and we have not included this requirement in the final permit.

Several commenters supported the consideration of expanding the permit to allow for the creation of wetlands and their subsequent reversion on reclaimed surface coal mined lands, provided the wetlands were voluntarily created under an OSM permit or an applicable state program permit. A few were opposed to this idea. Some stated that wetlands created due to hydrologic or topographic features of the landscape that may occur during reclamation should not be excluded. One commenter stated that the existence of a Surface Mining Control and Reclamation Act (SMCRA) permit document and a certification that reclamation has been performed in accordance with permit requirements, should be sufficient to

document the fact that the wetland construction was voluntary and non-mitigative. The Corps believes the potential for gaining several thousand acres of additional created wetlands through this provision warrants modification of the permit as outlined in the proposal. The permit wording has been changed to include wetlands voluntarily created under an OSM permit or applicable state program permit, with limitations not allowing its use for wetlands created as mitigation, nor to wetlands or waters that would be created naturally due to hydrologic or topographic features, nor to wetlands created for a mitigation bank. Reversion of such voluntary wetlands in the future is authorized by this NWP subject to the terms and conditions of this NWP.

A few comments were received regarding the consideration for eliminating the 5 year window of reversion opportunity and allowing the reversion to occur at any time in the future. Some commenters felt that the 5 year window of reversion opportunity should be retained, while others felt it should be removed. Some commented that removal of the 5 year limitation on the window would attract more conversion of abandoned coal mining sites to wetlands. The 5 year window for reversion of wetlands was adopted for written agreements that had limited terms, for wetland restoration and creation, between landowners and the Natural Resources Conservation Service (NRCS) and the U.S. Fish and Wildlife Service (FWS). For example, upon the expiration of such a 20 year agreement that landowner could revert the wetland back to the prior condition of that land. In most cases, the reversion would involve activities that require a permit from the Corps. We believe that in order to authorize these reversion activities by the NWP for an agreement that had expired, there needed to be a time limit after the agreement expired, to complete any reversion, or an IP would be necessary. The 1996 Farm Bill (Pub. L. 104-127) has included provisions for NRCS to document voluntary wetland restoration, enhancement, and creation activities that can be reverted to the prior condition at any time. In order to support and encourage such voluntary restoration, enhancement, and creation activities, we are authorizing those activities and the reversion of such wetlands to their prior condition by this NWP. While in these cases there will not be a 5 year reversion limit, since the agreement/documentation does not have a time limit, we are requiring a notice to the Corps with adequate

documentation by NRCS of the prior condition.

Some commenters felt that the permit should be expanded to include any voluntary restoration or creation projects, to include private parties on private lands without signed agreements with either the NRCS or the FWS. A large number of commenters expressed opposition and an equally large number of commenters expressed support for allowing the permit to authorize projects on non-Federal public lands. Some commenters stated that activities on state fish and wildlife management areas, conducted by a state agency, should be included in this permit. One commenter felt that the Corps should grant state agencies a statewide exemption for managing wildlife populations. Some stated that they would support expanding use of this permit to voluntary restoration and creation activities by state and local government agencies provided those agencies demonstrate a long-term commitment to maintenance of the created or restored area. The Corps believes that including authorization for all creation, enhancement, and restoration activities on any lands (Federal, non-Federal public lands and private lands) would provide a less burdensome permit process and provide additional incentives for wetland creation, enhancement, and restoration projects. The nationwide permit has been modified to include authorization for public and private entities to conduct creation, enhancement, and restoration activities on any lands, but with no opportunity for reversion of those wetlands without a permit from the Corps, provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. This NWP cannot be used to authorize the reversion of such wetlands.

With regard to whether or not to include enhancement as an option, one commenter stated that while most enhancement projects have little adverse effect to wetland functions, measures considered by some parties to be enhancement may at times be considered by others to have unacceptable negative effects on wetland functions and values. Another commenter stated that the inclusion of enhancement without technical criteria for project review may increase the risk of existing areas of wetland being converted to other wetland types. The existing NWP provided for enhancement of wetlands, but this was not clearly stated, by providing for "restoration of \* \* \* degraded non-tidal wetlands." Further, we believe that

this NWP should authorize the enhancement of degraded wetlands. We agree, and do not intend, for this NWP to allow "enhancement" for the conversion of one wetland type to another. We have included enhancement projects but have limited enhancement under this NWP to improving degraded wetlands.

We concur with these comments and believe that to ensure no more than minimal impacts will result from the authorization, we cannot include enhancement within the scope of this NWP.

Several commenters felt that there was a need for a binding agreement in all cases, even where voluntary restoration is occurring under other Federal or state programs without a written agreement, while others felt that binding agreements were not necessary. One commenter stated that the written agreements do not have to be easements or contracts, which may dissuade many landowners from participating, that the agreements could be management agreements which become conditions to the permit. One commenter stated that for voluntary restoration and creation projects involving a Federal or state agency, an agreement should be required, and for a voluntary project that does not include Federal or state cost sharing or technical assistance, no agreement should be required provided hydrologic and vegetative baseline conditions are documented. We have concluded that the requirement for a binding agreement is not necessary in all cases. However, where the authorization provides opportunity for reversion of the created or restored wetland to its non-wetland state (i.e., in those cases involving private parties entering into contracts/agreements with, or documentation of prior condition by, the NRCS or FWS under special wetland programs or an OSM or applicable state program permit), then a binding agreement, documentation, or permit by NRCS, FWS, or OSM or applicable state agency, which clearly documents the prior condition, must be required. We have clarified in the NWP that reversion can only occur where such instruments, which clearly document the prior condition, are excepted. In all other cases, where the reversion opportunity is not included and a permit will be required for alteration of the restored, enhanced or created wetland or no binding agreement or documentation of the prior conditions will be required.

A few commenters stated that there was no need to document baseline conditions. Some commenters felt that in cases of purely voluntary efforts, there does not appear to be a compelling

need for rigorous documentation of the baseline conditions. Others felt that this permit should include conditions that require documentation of existing use, hydrology and vegetation baseline conditions and allow reversion to previous use provided it does not exceed the previous conditions. Some felt that the format for documenting baseline conditions should be standardized, while others felt that the baseline condition could be documented in a pre-discharge notification, by way of a wetlands and waters of the United States delineation. Some commenters suggested that this permit should not authorize conversion to pre-restoration conditions where baseline conditions cannot be documented. The Corps believes it is only necessary to document prior (baseline) conditions for those cases where there would be an opportunity for reversion of the restored or created wetland to their original condition. Furthermore, for those cases where the opportunity to revert the wetland to a non-wetland status is available, documentation of the prior condition is required though NRCS, FWS or OSM programs. The Corps agrees that the prior condition must be documented in such cases. Consequently, prior conditions will be documented in those cases allowing reversion of wetland to non-wetlands. If that documentation cannot be provided at the time the reversion is requested, then an IP would be required for any reversion. In those cases where a permit from the Corps will be required for alteration of the created or restored wetland, we do not believe that the prior condition need be documented.

Some commenters stated that notification to all resource agencies should be included with this permit and further that the Corps should be required to notify all interested persons that could be affected by the restoration or creation activities. Others advocated limitations such as requiring notification with agency coordination for activities exceeding  $\frac{1}{3}$  acre. Some commenters were afraid that restoration of wetlands to create waterfowl feeding areas could, as an example, adversely impact other species, which could be identified through agency coordination. The Corps believes, based on the changes and modifications discussed above and the scope of the authorized activities, that the activities and impacts authorized by this NWP will not only be minor in nature, but will result in positive contributions to the national goal of increasing wetland areas. We believe notifications to the agencies and

all affected parties would be unnecessarily burdensome to all the parties and would be excessively duplicative governmental review without commensurate environmental benefits.

One commenter suggested that the permit not authorize discharges into open water. The Corps has not limited the permit to not apply to open water. To do so would excessively limit the use of the nationwide permit. It is anticipated that most activities authorized under this permit will be in channels, ditches and some small impacted streams. It is unlikely that fills in larger open water areas such as lakes or rivers would occur, particularly with the requirement that impacts be less than minimal.

Another asked that this preamble clarify the relationship between this NWP and the proposed new NWPs A for Moist Soil Management and NWP B for Food Security Act Minimal Effect Exemptions. This NWP is for the restoration, enhancement, or creation of wetlands while NWP 30 Moist Soil Management (proposed NWP A) is for management of wetlands and proposed NWP B is for wetland mitigation created for the loss of wetlands on agricultural lands.

Another commenter suggested clarification of the term "non-tidal" in the context of this permit, suggesting that term should only apply to naturally non-tidal wetlands and not to formerly tidal wetlands which have been diked and are now freshwater wetlands. The term tidal is defined in the Corps regulations at 33 CFR 328.3. Non-tidal refers to the existing conditions and would include former tidal areas that no longer meet the definition of tidal waters.

One commenter also suggested that this NWP apply to compensatory wetland mitigation for Federal aid transportation projects, and another recommended that this permit not apply to projects that are primarily stormwater treatment projects. Compensatory wetland mitigation activities required under Corps permits (such as those for FHWA projects) are normally authorized by the permit requiring the compensatory mitigation and this NWP would generally not apply. This NWP authorizes the restoration, enhancement, and creation of wetlands and does not address their need. If wetlands are created for stormwater treatment projects they would be authorized, if they meet the terms and conditions of this NWP. However, generally reversion of such wetlands would normally not be authorized by

this NWP. NWP 27 is reissued with changes discussed above.

**28. Modifications of Existing Marinas:** The Corps proposed no changes to this NWP. One commenter stated that compliance with state permits or exemptions would be required where submerged state-owned lands were included in the modification of an existing facility. The intent is not to allow any additional slips or docks, thus additional water quality, navigational or safety impacts would not occur. We recognize the need for compliance with all existing applicable regulations. The issuance of this NWP would not obviate the need to obtain other Federal, state, or local authorizations required by law. NWP 28 is reissued without change.

**29. Single-Family Housing NWP:** The Corps proposed modifying the notification process for this nationwide permit to provide for resource agency coordination during the notification review process.

**General:** A large number of commenters opposed reissuance of NWP 29, expressing the opinion that the permit does not conform to the requirements for general permits, violates the Fish and Wildlife Coordination Act and is not in compliance with the National Environmental Policy Act. One commenter stated the belief that the permit is inconsistent with Florida statutes.

The Corps believes that NWP 29 is in compliance with all Federal laws and regulations. The permit is for actions that are similar in nature, both in size and type (less than 1/2 acre, single family residences). With the general, regional, and specific conditions, the district's opportunity to review each case through the notification process, and the district's opportunity to exercise discretionary authority, we are confident that individual and cumulative adverse effects will not exceed minimal. Initial development and issuance of the permit along with this reissuance has been done in full compliance with 33 CFR part 330, which includes compliance with the Fish and Wildlife Coordination Act and NEPA. If the permit is in some way not consistent with state law, the state can deny its section 401 water quality certification. Furthermore, issuance of any Corps permit does not allow applicants to violate state, local or other Federal laws.

One commenter opposed the NWP because the program usually prohibited houses in wetlands before this NWP. Another commenter expressed opposition based on the belief that the issuance of the permit will increase

property values and cause taxes to increase.

The Corps regulatory program has never prohibited fills for the construction of homes. IPs were required, however, which in some cases may have resulted in denials due to the availability of practicable alternatives available to the applicant. However, most projects were permitted following the review and analysis associated with the IP process for single family residences. Moreover, virtually every IP that was issued involved only on-site avoidance, minimization, and, in a few cases, compensatory mitigation, because offsite alternatives for this type of project are not generally viewed as practicable. The IP process continues to be required for proposals which exceed the 1/2 acre or the minimal effects limitations of the permit or where the Corps district uses its discretionary authority. The effects of the permit on property values relative to state and local taxation programs are unknown to the Corps and is not an issue for consideration by the Corps regulatory program.

A couple of commenters expressed the opinion that the NWP was created only for political reasons in that there was no natural resource protection basis for its creation. The permit was initially issued and is being reissued to provide regulatory relief to small landowners for projects with minimal adverse effects on the aquatic environment. While an important goal of the Corps regulatory program is to protect the Nation's aquatic resources, providing timely and efficient decision-making and rendering fair and reasonable decisions for the applicant are also established goals of the program. We believe this permit is consistent with the goals of the regulatory program, including protection of the aquatic environment. Virtually every single family residence application for fill was, in the past, authorized as long as impacts on-site were minimized. The Corps assures this same level of protection of the aquatic environment through the NWP 29 PCN process.

Many commenters supported reissuance of NWP 29, but these commenters were split with regard to whether the notification of the actions should be provided to resource agencies prior to authorization. One commenter recommended that we carefully avoid unnecessary regulatory oversight with notification. The Corps has concluded that the notification procedures for this permit should include agency coordination. The permit has been reworded to effect this change.

Some commenters recommended that the permit be temporary because it attempts to assist small landowners who had unknowingly purchased wetlands or purchased the land prior to wetlands regulation. The commenters recommended we not reissue the permit after the year 2001, at which time the regulatory program will have been in place for almost 30 years. The Corps is reissuing for a period of 5 years and all NWPs will be reviewed for reissuance prior to their expiration in the year 2001.

**Permit Limitations & Definitions:**

Several commenters suggested the modifying the limits of the permit and recommended the following: Limit fills to 1/4 and 1/10 of an acre; exclude use in open water areas; require mitigation for fills over 50 cubic yards; and, disallow use for fills in mitigation sites. One commenter recommended the permit be limited to a specific number of 1/2 acre authorizations allowed per wetland. Another suggested establishing limits based on ecosystem rather than ownership. Two commenters recommended that we prohibit discharges within 100 feet of streams supporting anadromous fish. One commenter recommended excluding certain regional waters. One commenter stated that it was a major oversight to allow this NWP to apply to non-tidal wetlands adjacent to the ocean. One commenter commented that the permit should be limited to authorization of primary residences only and another recommended that mitigation be required as a condition of the permit.

After careful consideration of all the comments, and based on our experience with NWP 29 over the past year, the Corps has determined that the acreage limitation should be retained at 1/2 acre, a limit should be imposed to require a "no fill" buffer between the fill and any free flowing stream, river, or other flowing waterbody and/or the normal spring high tide in tidal areas. Data collected on the use of NWP 29 over the last year has shown that the average impact per NWP 29 across the nation was approximately 0.19 acres. The data also shows that during none of the quarters did the average impact acreage go above 0.25 acres. Additionally, it should be noted that the average acreage requested was only 0.31. For all of Fiscal year 1996, the Corps authorized 333 projects for a total of 62 acres of fill nationwide. The total acreage of fill requested by applicants was 101 acres, thus the Corps review reduced the requested impacts by 40%. Furthermore, mitigation may be required for higher value wetlands. Of course, as with all NWPs, the Corps



districts will ensure that the fill is the minimum needed on a case-by-case basis. If additional levels of protection are necessary, Corps District and Division Engineers will add regional conditions as they did in several districts in 1995. As with other NWP, such regional conditions could revoke NWP 29 in certain high value aquatic areas or add region specific limitations on the use of NWP 29.

One commenter requested a clearer definition of "non-tidal" to ensure adequate protection of marine and estuarine habitats. The commenter pointed out that the definition differs between the Rivers and Harbors Act (mean high water) and the Clean Water Act (Spring high tides or other high tides with periodic frequency), and recommended the adoption of the CWA definition.

The definition of tidal waters can be found in 33 CFR 328.3(f) and is defined as those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun (the high tide line). 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 hydrologic, wind, or other effects. The high tide line includes the normal spring high tides. The limits of Corps jurisdiction in non-tidal waters of the United States can be found in 33 CFR 328.4(c). This regulation does not mean that wetlands adjacent to tidal wetlands are also tidal wetlands, but rather that in coastal areas, Corps jurisdiction extends to the limits of these "non-tidal wetlands" that are adjacent to tidal wetlands. Consequently, this NWP is applicable to wetlands that are adjacent to wetlands subject to spring high tides. However, divisions can, as some did in 1995, provide regional conditions to exclude high value wetlands adjacent to tidal waters.

Several commenters requested either elimination or a more detailed definition of the term "attendant features". They suggested that swimming pools, tennis courts, barns, small businesses and septic fields should not be allowed. The purpose of this permit is to reduce the regulatory burden associated with the construction of single-family homes while maintaining environmental protection. When building single-family homes we recognize that, besides the foundation of the house itself, there are activities associated with a house that are considered necessary, customary, or normal to home sites. We believe these "attendant features" should normally be authorized with the house. We would

not accomplish the purpose of this permit if we were to authorize the house only and process an IP for the attendant features. Attendant features, for the purpose of this permit, include features that are reasonable, necessary appurtenances constructed in conjunction with single-family housing activities. Examples include a garage, driveway, storage shed, septic field, and yard. Examples of inappropriate attendant features not covered by this permit include a barn, which may be covered by NWP 40, or a small business. Such features would not be directly related to a single-family home. While we believe that a yard is an appropriate attendant feature of a single-family home, we have not identified a size that will work for all NWP 29s. Therefore, we will work with the applicant to ensure that acceptable, but not excessive, yards are authorized. This NWP only authorizes activities from the perspective of the Corps regulatory authorities, other Federal, state, and local permits, approval, or authorizations may also be required. The permittee would be responsible for obtaining all necessary authorizations, including building permits, prior to placing a septic system, yard, or any other fills in wetlands. Additionally, water quality is a concern addressed by applicable state agencies as well as the Corps. It is the permittee's responsibility to obtain any necessary water quality approvals or authorizations prior to the discharge of fill. Furthermore, while properly designed, constructed, and operated septic systems can be placed on fill in many wetlands, the septic system must be approved by the appropriate state or local agency. The Corps has determined the extent of the attendant features to be applied on a nationwide basis. If an individual district concludes that a particular feature should not be authorized under this permit, then the Division Engineer must regionally condition the permit to exclude the feature. Furthermore, additional restrictions may be placed by states in 401 water quality certification or CZM consistency determination. On a case-by-case basis, where a particular feature is not appropriate at a specific site, the District Engineer may condition the NWP or require an individual permit.

As a Corps district evaluates each request under NWP 29, they will consider the proposed home and attendant features in the context of the functions and values of the waters of the United States as well as local zoning and regulatory set-backs and requirements. If uplands are available

on the applicant's property to reasonably accommodate the home and attendant features, after considering property line set-backs and other requirements, the Corps will not authorize the project under NWP 29 and instruct the applicant to apply for an IP. If fill for the home and for attendant features is needed, the Corps will determine the amount of fill based on the aquatic functions and values to be impacted. Specifically, attendant features such as a yard, tennis court, or swimming pool may be limited, or not authorized, if the project is located in high value wetlands. The Corps will generally require septic systems to be located as far as possible from open waters, and will otherwise attempt to ensure that septic systems will not adversely affect the quality of surface waters.

*Effects & Cumulative Effects:* One commenter expressed concerns for adverse effects on floodplains resulting from issuance of the permit. Two commenters expressed concern for water quality impacts due to the typical location of NWP 29 activities within watersheds. Several commenters expressed the belief that this permit encourages housing development in wetlands, and several expressed general concerns for the cumulative impacts.

Because the activities associated with the use of this permit could be located within the floodplain or a waterbody, there is potential for increased flooding and reduced flow. The notification process allows the district to evaluate the proposed impacts, including potential flooding impacts, compare them to existing impacts within the wetland system or watershed, and determine if the project has more than minimal individual or cumulative adverse effects. The district will use its discretionary authority to place conditions on a proposed activity to avoid or minimize these potential impacts. If the activity is determined to have more than minimal adverse effects, the district will require mitigation or an individual permit. The district and division offices may identify specific geographic areas, such as a subdivision, or a particular aquatic system, where there may be concerns regarding cumulative impacts to a watershed. If such impacts are identified, the division will revoke this NWP in specific geographic areas or develop regional conditions that apply to that specific area. Many districts and divisions have already revoked NWPs, including NWP 29, or imposed such regional conditions in many geographic areas or wetland or water types.

*Coordination:* One commenter asked that we require Endangered Species Act and Historic Preservation Act coordination prior to authorization under this permit. One commenter requested that we require compliance with Federal, state, and local regulations. The Corps believes that the provisions of Nationwide Permit Conditions 11 and 12, which address endangered species and historic properties, as well as the procedures in 33 CFR part 330, are adequate for guarding against unacceptable impacts in these areas of concern. Moreover, by issuing a verification letter the Corps has made a determination of "no affect" on endangered species and "no adverse affect" on historic properties. The issuance of a Federal permit does not obviate the need for applicants to comply with all other Federal, state and local laws and regulations, and it is incumbent upon the applicant to comply with all applicable requirements.

*Subdivisions:* One commenter suggested applying the current 1/2 acre limitation for subdivisions created on or after November 22, 1991, to all subdivisions regardless of the date they were created. One commenter requested a more elaborate discussion on what constitutes a subdivision. Another recommended the subdivision date be 1977 when the scope of the Corps regulatory jurisdiction was expanded and 404(e) was first enacted, or 1984 when many property owners were made aware of the need to obtain permits. Another commenter suggested limiting the permit to those persons who purchased their properties prior to enactment of Section 404 of the Clean Water Act. One commenter asked what constitutes "creation" of a subdivision, is it the date the subdivision was first drawn on a piece of paper or the date it was approved by a planning jurisdiction? One commenter requested the addition of a subdivision rule (interpreted to mean a more detailed discussion of subdivisions within the permit).

November 22, 1991, is the date on which the current NWP program regulations, including issuance of, reissuance of and modifications to the previous NWPs were published in the Federal Register. It was in these regulations that the terms surrounding subdivisions for the purpose of NWP 26 were outlined and awareness of the subdivision clause was heightened. With few exceptions, we believe this date would be fair to all parties. We do not believe that the November 22, 1991, date penalizes any one group of individuals and that is the date which

has been in use since issuance of the nationwide permit on September 25, 1995. The subdivision date refers to when a parcel was subdivided into smaller parcels, not when the subdivided smaller parcels are sold. Therefore, individual parcel owners are not penalized based on when they purchased property. The term "creation" refers to the date the tract of land, after being subdivided, is officially approved by the appropriate state or local governing agency. The conceptual subdivision of land is not acceptable.

One commenter recommended that the permit be conditioned to not allow for multiple ownerships by family members to circumvent the subdivision clause. We believe that the conditions limiting the use of this permit to single-family residences, personal residence, once per parcel, and not more than 1/2 acre total per subdivision created after November 22, 1991, are adequate conditions to limit use of the permit and ensure compliance with the "minimal effects" criteria for general permits. Multiple ownership by the same family within a subdivision created after November 22, 1991, would not allow for any greater fill than single ownership of the subdivision, in that the total aggregate fill could not exceed 1/2 acre. NWP 29 is reissued with the modifications discussed above.

*30. Moist Soil Management for Wildlife:* This NWP was proposed by the Corps as a new nationwide permit (proposed new nationwide permit A) to authorize activities necessary to manage, construct, and/or maintain habitat and feeding areas for wildlife on Federally-owned or managed and state-owned or managed property.

Many commenters supported the NWP as proposed. Several of the commenters felt that the NWP should include activities on privately-owned lands managed by Federal agencies. These are agencies with expertise in the subject area and are responsible for managing the lands in concert with the objectives of the Federal wetlands programs such as NRCS and FWS or state plans. A few commenters stated that wetland areas under permanent easement and deed restrictions should be covered by the NWP. One commenter stated that privately-owned lands should not be included. This permit was proposed by the Corps specifically for application to Federal and state resource agency activities. It is intended that the permit apply to managed lands as well as lands owned by these Federal and state agencies. The techniques listed in the permit are not "all inclusive," but meant to be representative of the types

of activities included. The list has not been expanded for the sake of brevity.

A few commenters asserted that discing or plowing are activities that are not, and should not be, subject to regulation. Mowing and bush hogging are two examples of vegetation removal, which if done so as not to substantially disturb the root system, are not regulated under section 404. (See 33 CFR 323.2(d)(2)(I)). While discing and plowing activities are exempt from regulation pursuant to CWA section 404(f)(1) when conducted in conjunction with ongoing farming activities, such activities are not exempt for the purposes of wildlife management. Thus, this permit specifically authorizes these activities.

A few commenters were concerned about implementing adequate review measures and suggested that the Corps include a Federal and state wildlife agency PCN to ensure that any conversion of wetland types would be minimal or an IP would be required. Because these agencies have extensive expertise in wetland management and are responsible for managing the lands in concert with the objectives of Federal and state wetlands programs, we believe the PCN processes would result in unnecessary and duplicative governmental review. Furthermore, we have added an additional restriction to the NWP to not authorize converting wetlands to open waterbodies. Proposed Nationwide Permit A is issued as proposed and discussed above as NWP 30.

*31. Maintenance of Existing Flood Control Projects. General:* This NWP was proposed by the Corps as a new nationwide permit (proposed new nationwide permit D) to authorize the excavation and removal of accumulated sediment and associated vegetation for maintenance of existing flood control facilities. The majority of those commenting on this proposed NWP were in support of its issuance. Most viewed this permit as one that would greatly improve the local sponsor's ability to perform critical flood control maintenance activities. Several commenters felt that, especially for some projects, using this NWP would violate 404(e) because maintenance work would have more than minimal adverse effects on fish and wildlife resources. Their concern was for use of the permit for older flood control projects now supporting fish and wildlife habitat. Many of these commenters felt that maintenance dredging in some areas could result in perpetuating past mistakes and, for older projects, it may be impossible to determine the original dimensions.

Many commenters felt that flood control channels that develop and support wildlife need public review and agency comment and a PCN requirement will not substitute for public review as required by the Clean Water Act.

We believe that with the limitations and conditions included within the final permit, the NWP will comply with the "minimal effects" criteria for general permits. Safeguards for the protection of valuable habitat have been included within the permit, particularly in the procedure for the District Engineer (DE) to determine the maintenance baseline and the provisions allowing for the DE to require mitigation.

*Recommendation for Expanding the Permit's Scope:* Numerous comments recommended expanding the scope of this NWP. Some of the recommended inclusions were state and city flood control maintenance activities; maintenance of stormwater management facilities; water conservation facilities; retention/detention basins and channels constructed by municipalities, watershed management organizations, and watershed districts (in compliance with surface water management practices required by the state); any Federal, state, or locally funded flood control project; irrigation facilities; any facility where an NEPA document has been prepared; drainage system inlets and outlets; manmade channels or structural projects developed under authorization of Federal or state governments; and any facility that was constructed through excavation prior to the Excavation Rule. One commenter stated that any "improved channel" or detention facility constructed before July 1975 or after July 1975 if it met exemption from 404 regulations or fell under 404 regulations and was authorized by the Corps should qualify for this NWP.

Many of the facilities included in the above recommendations would be included in the final wording, which authorizes maintenance of existing flood control facilities previously authorized by the Corps regulatory program or constructed by the Corps and transferred to a local sponsor for operation and maintenance. However, this NWP was proposed for maintenance of "flood control" facilities. In order to expand the scope of this NWP to include other types of facilities such as irrigation and drainage projects, we would need to propose such a change for public comment and opportunities for a public hearing. Therefore, we are not expanding the scope of this NWP to include other types of facilities. However, we will seek public comment regarding other

types of activities that should be authorized by NWP and, if appropriate, we would propose an NWP for such facilities.

Two commenters suggested that this NWP include construction of cofferdams and access roads necessary to conduct maintenance of the flood control facilities rather than require separate notification under NWP 33. We believe this permit should be limited to maintenance activities of existing flood control facilities and that temporary construction activities would more appropriately be authorized by IPs or NWP 33, which has a specific notification requirement for a restoration plan.

*Recommendation for Limiting the Permit's Scope:* A few commenters recommended restricting this NWP to only on-going flood control projects. One of these commenters specifically suggested that the NWP should be worded to state that for a project to qualify for this NWP, it must have been maintained within the past 3 years unless otherwise stated in the original permit. One commenter suggested using the safeguards contained in NWP 3—that this NWP applies only to the repair, rehabilitation, or replacement of currently serviceable water management projects authorized under Federal, state, or local governments, provided the environmental effects resulting from such repair, rehabilitation, or replacement are minimal. One commenter suggested a 5 acre threshold for this NWP, and another felt that any threshold would be arbitrary and instead recommended that this determination be made based on the quality of the existing aquatic resource and how the site will be impacted by the proposed excavation activity.

We included provisions within the NWP to limit maintenance activities to an established maintenance baseline, to be determined by the DE. The process prescribed for determining the baseline includes consideration of the facility's maintenance history, and other factors designed to identify the purpose and need for the proposed maintenance, and that the proposed maintenance activity is not excessive to achieve that need. We believe that specific threshold limits would be inappropriate and unnecessarily restrict projects that should qualify for this NWP.

*Pre-Construction Notification:* Many commenters were opposed to having any preconstruction notification requirements. They felt that it would be duplicating the efforts of other entities for the Corps to review flood control projects that adhere to the original schedule for maintaining the facility.

One commenter added that requiring a PCN would be contrary to the Corps goals to avoid unnecessary regulatory controls and reduce unnecessary paperwork and delays for permittees. Several commenters were concerned that additional coordination could pose a threat to public health and safety if flood control districts were impeded in any way to maintaining a facility. Two commenters specifically requested that there be no PCN requirement for the facilities designed and constructed to comply with local or state water quantity and/or quality control requirements when the depth and area of dredging is in accordance with the originally approved design plans. Another commenter suggested that no PCN be required for emergency maintenance performed as a result of a local, state or Federally declared disaster.

Numerous commenters provided recommendations for thresholds of when to require a PCN, ranging from 100 to 100,000 cubic yards or at a 1 acre threshold. One commenter suggested that a 25 cubic yards limit be used in streams supporting anadromous fish. Another threshold to require a PCN was whenever previous maintenance activities occurred more than 5 years earlier. One commenter suggested using 50 cubic yards as the PCN threshold stating that under 50 cubic yards the applicant could use NWP 18/19. Another commenter suggested 10 acres or 1 acre/mile of channel/year. Another commenter recommended that the impacted area threshold be 10 acres minimum for each unlined basin and 25 acres minimum for each soft bottom channel reach before a PCN was required. One commenter interpreted the preamble to imply that only unlined basins and channels would require a PCN and that the regulation itself should reiterate that requirement.

Following the DE's determination of the maintenance baseline, which requires a notice to the Corps, a PCN is required for maintenance activities. We believe that there is a need for notification for maintenance activities to ensure compliance with the permit conditions and to monitor maintenance of the flood control facility. The PCN is required prior to each maintenance activity or a maintenance plan can be submitted just not to exceed 5 years. The Corps prefers the submittal of a 5 year maintenance plan. This is a new NWP. The Corps will monitor this NWP. If appropriate, the Corps would consider proposing to reduce or eliminate the PCN requirement. Furthermore, if the project is effectively abandoned due to lack of proper maintenance, a new

determination of a maintenance baseline would be required before this NWP could be used for subsequent maintenance.

*Recommendations for Permit Conditions:* Several commenters recommended that this NWP be conditioned to preclude maintenance work that would result in wetland and/or riparian habitat impacts. One commenter suggested the following wording be added to both the preamble and the permit itself: "In circumstances where the DE determines that the channel proposed for maintenance provides other significant social or ecological functions and values that may be jeopardized, the Corps will exercise its discretionary authority to require an individual permit." One commenter suggested that the following conditions be added to this NWP: (1) All excavation must have been previously addressed in the project's original EIS; (2) the excavation is still necessary to obtain the project's original goals; and (3) the benefit of attaining those project goals still justify the cost of the environmental impacts that result from the removal at this time (as opposed to the time when the original EIS was completed).

We believe the objectives of these recommendations are essentially achieved through the application of the final wording of the permit, the requirement to establish a maintenance baseline, the nationwide permit general and section 404 only conditions, and the opportunity for the DE to exercise discretionary authority and/or require mitigation for resource impacts.

One commenter requested that the Corps delete the requirement for an applicant to specify the disposal site. The reason for this is that, in many cases, the disposal site is not known until after the bids for the project are submitted, which may occur after the NWP has been verified. This commenter suggested that the requirement be replaced by a commitment from the applicant to dispose of material at an upland site. Other commenters recommended that the NWP be expanded to allow the disposal material in jurisdictional areas where the applicant can show a beneficial use for its disposal. Another commenter recommended that the location of the disposal site be identified only if it is within the Corps jurisdiction. One commenter suggested that the NWP specifically state that this NWP does not authorize side casting excavated material into waters of the United States, agitation dredging, or where dredged material testing is required.

The NWP does not require that the disposal site be specified in advance, however, it does require that dredged material to be placed in upland areas or currently authorized disposal areas in waters of the United States. Use of the disposal site must also be in compliance with all Federal, state and local requirements, as must every aspect of the project, or the NWP is not valid.

One commenter added that should such work be allowed, there should be a requirement to mitigate for unavoidable impacts to fish and wildlife resources. Another commenter was concerned that mitigation would be required for projects, especially for those constructed prior to the enactment of the Clean Water Act in 1972, causing an undue financial burden on applicants.

The final NWP includes provisions for the DE to determine the need for mitigation when determining the maintenance baseline. In determining the need for mitigation, the District Engineer will consider the following factors: any original mitigation required, the current environmental setting and any impacts of the maintenance project that were not mitigated in the original construction. The District Engineer will not delay needed maintenance for completion of any required mitigation, provided the DE and the applicant establish a schedule for the identification, approval, development, construction and completion of such required mitigation.

One commenter requested that they not be required to submit a new wetland delineation every five years because of the significant cost this would cause for local agencies. The Corps general policy is that wetland delineations are verified for no more than 5 years. In those cases where wetland delineations are required, the delineation must have been verified within the 5 year period. Once a delineation has been completed and verified, subsequent updates and verifications should, in most cases, be substantially less costly and time consuming. A wetland delineation would be required to establish the maintenance baseline. However, for normal maintenance, a wetland delineation would not generally be required, but may be on a case-by-case basis.

*Time Limits and Maintenance Baseline:* Many commenters requested that no time limits be set for maintenance intervals, only demonstration of need. One commenter pointed out that in some cases it may take a flood event to know that a facility needs maintenance, and little would be gained by disqualifying projects on the

basis of long maintenance intervals. Another commenter added that it would be unfair to penalize older facilities that have received little maintenance over the years. A few commenters suggested that the baseline should be the design conditions with no set time limits for maintenance cycles, since such a time limit would be arbitrary and would not relate to the ecological value of a local project site. One commenter recommended that the baseline condition for measurement of impacts should be the "as-built" or newly constructed condition.

We concur that no time limits should be set for maintenance intervals and that it would be unfair to penalize older facilities. We have included design conditions and the "as-built" conditions as considerations in establishing the maintenance baseline. Details on the procedure and considerations for establishing the maintenance baseline are included within the NWP description presented later in this document under the "Nationwide Permits and Conditions" section. However, maintenance work to maintain the approved flood control capacity must be accomplished. If the project or the design capacity is effectively abandoned or reduced due to lack of proper maintenance, a new determination of a maintenance baseline would be required.

*Regionalization:* Two commenters suggested that maintenance of existing flood control projects should be exempted from regulation. A few commenters suggested replacing this NWP with each District developing river specific regional permits. One commenter suggested that this NWP would be more appropriate as a programmatic general permit because it would result in the same streamlining of the process while allowing for a public agency to administer a jurisdiction-wide channel maintenance program under pre-determined criteria for that state.

The activities authorized under this permit are not exempted under the Clean Water Act and are therefore regulated under section 404 of the Clean Water Act. We believe that it is appropriate to authorize the maintenance activities specified in the final NWP; however, districts can and are encouraged to identify appropriate regional conditions to ensure minimal impacts. We also agree that programmatic general permits could be a viable alternative in those cases where another program meets the objectives and requirements of the Corps regulatory program.

*Endangered Species Act:* A few commenters raised a concern over

possible impacts to Federally threatened and endangered species and recommended that sufficient evaluation with the federal agencies be completed before allowing a project to qualify for this NWP.

We believe the nationwide general permit condition addressing the avoidance of impacts to endangered species and compliance with the Endangered Species act is sufficient for protecting against such impacts. Furthermore, by verifying an activity is authorized under NWP 31, the Corps district will have made a "no affect" determination based on review of available data. If a project may affect an individual species, the Corps will initiate consultation under § 330.4(f). Furthermore, endangered species, if not already addressed in a Corps permit or Corps constructed project, would be addressed as a part of the determination of the maintenance baseline.

*Definitions and Clarifications:* A few commenters suggested that the title of this NWP be changed to "Maintenance of Existing Flood Control Facilities" rather than "Projects" to avoid any implications that it does not apply to existing or locally funded "facilities." One commenter suggested that the word "previously" be deleted from the text because "previously" raises the question of whether or not the NWP applies to flood control facilities authorized and constructed subsequent to the effective date of the NWP, or only to those existing "previously". One commenter suggested that "previously authorized" be changed to "initially constructed" since the depths and configurations often have changed from the basic authorization.

We have changed the word "projects" to "facilities" as suggested. The term "previously" has been retained. We intend to include maintenance activities associated with flood control facilities in future Corps standard individual permits. We have modified the NWP to require the DE to consider the difference between the project authorized and actually constructed in his determination of the maintenance baseline.

One commenter felt that the term "flood control" project was too vague and needed to be clarified as to what could be considered a flood control project. We believe the term is sufficiently defined within the language of the final NWP.

Several commenters requested that clarifying language be added to the preamble stating that areas that were constructed in uplands are outside the purview of the Corps regulatory process provided they are maintained. Corps

regulations for implementation of the regulatory program state that the Corps does not normally regulate artificial water bodies constructed in dry land, but reserves the right on a case-by-case basis to determine that a particular waterbody within this category is within the purview of our regulatory authorities. More detail on these provisions can be found at 33 CFR 328.3 and in the preamble to those regulations in 51 FR 41217. We will continue to monitor this need and provide additional clarification as necessary.

A few commenters requested that "natural" channels be defined to avoid misinterpretation. One commenter further suggested that "natural" be defined as a watercourse that has not been modified in order to increase its hydraulic capacity or simply a previously unaltered water course. Another commenter suggested that the wording of this NWP be revised to state that "this NWP authorizes the removal of sediment and associated vegetation from flood control facilities, including natural channels. We believe the text of the final NWP, which reads: "Only constructed channels within stretches of natural rivers that have been previously authorized as part of a flood control facility could be authorized for maintenance under this NWP," sufficiently clarifies those areas which can be maintained under this NWP.

One commenter felt the term "maintenance" is vague and that specific types of maintenance activities allowed should be fully described and limited to that which does not impact the environment and water quality. We believe the requirement for establishing a maintenance baseline satisfies this concern. It will establish the limits of the maintenance on a case-by-case basis.

*32. Completed Enforcement Actions:* The Corps proposed several changes to the NWP. We proposed expanding the scope beyond judicial enforcement actions to include agreements resulting from Corps negotiated settlements. We also proposed clarification that compliance with the underlying judicial or administrative decision or agreement is a condition of the NWP itself, and we proposed that EPA administrative settlement agreements could also be authorized by this permit.

Several commenters favored the addition of Corps non-judicial settlements to the scope of activities authorized by this permit. One commenter specifically stated that it would eliminate unproductive duplication of the Corps evaluation efforts. Another added that it would both streamline the process and expedite restoration work. A few

commenters added that little is served by going through an individual permit process once the Corps is satisfied with restoration and mitigation being offered or required to resolve a violation. One commenter saw the benefit of enhanced negotiation with the Corps without judicial actions. A few commenters supported extending NWP 32 coverage to activities authorized under EPA administrative settlements as well as Corps settlements. Conversely, numerous commenters recommended that this NWP not be expanded or reissued. Many commenters were only opposed to the expansion of the NWP. Some believed that by including Corps-negotiated settlement agreements permit approvals would be made behind closed doors without the opportunity for public or resource agency comment and therefore would preclude the due process of public participation. One commenter was concerned that it would eliminate the opportunity for section 401 water quality certification for after-the-fact permit (ATF) activities that may have violated state water quality standards. The Corps will not forego its normal and required enforcement procedures at 33 CFR part 326 and 33 CFR 330.6(d)(2) and 330.6(e) prior to reaching a settlement agreement. The Corps has concluded that including agreements resulting from Corps negotiated settlements and EPA administrative settlement agreements would result in substantial work load reductions and eliminate duplicative efforts without any loss in resource protection. Corps settlement agreements receive thorough evaluation and are normally coordinated with the resource agencies. In those cases where the state does not certify this permit, the applicant will be required to obtain individual section 401 certification prior to the Corps final approval of the resolution.

Several commenters suggested ways to further expand this NWP and one commenter opposed any threshold restriction, provided the net environmental benefit was positive. Another commenter believed the NWP should be expanded to permit future impacts beyond those only for the purpose of mitigation, restoration, or environmental benefit. Some believed the thresholds of five acres of non-tidal or one acre of tidal wetlands were arbitrary and too high. Others believed that authorizing enforcement actions by NWP would violate the "similar in nature" and "minimal impact" standard of 404(e) of the Clean Water Act. One commenter suggested that unless the Corps settlement involved complete

restoration, it would be impossible to determine that the activities to be authorized under this NWP would be minimal impacts or to assess the cumulative impacts. The Corps has concluded that the existing thresholds and scope of the permit cannot be expanded because we could not ensure compliance with the "minimal effects" threshold for general permits. We have also concluded that the five acre and one acre thresholds are adequate for meeting the "minimal effects" criteria. The Corps believes that complete restoration will be achieved, except where full restoration is either not practicable or would result in unnecessary adverse environmental effects. Therefore, we do not believe greater than "minimal adverse effects" would result from this permit.

One commenter believed that the automatic revocation of the NWP, in case the permittee failed to comply with the settlement agreement or judicial decree, was too harsh and that they should be allowed to follow the normal revocation process. We do not believe this condition is too harsh given that the permittee, who violated the CWA and reached a settlement agreement with the government, once again violated the CWA. We believe that those individuals should be, once again, subject to enforcement/compliance regulations.

One commenter believed NWP 32 encourages citizens to break the law and noted there is no restoration for the impacts created by the violation. A number of commenters opposed this NWP because there were no limits as to potential impacts. One commenter stated this NWP would eliminate the 404(b)(1) needs and alternative analysis for projects up to five-acres. As stated in the proposed NWP, thresholds were established for the maximum size of the impact area and whenever possible, restoration of these areas will be required to minimize the impacts as appropriate and practicable. This NWP is mostly intended for those cases where the enforcement resolution has been reached and an ATF permit process is required. Although a 404(b)(1) off-site alternatives analysis is not required for an NWP authorization, on-site avoidance is required. Further, off-site alternatives may be considered, where appropriate, during the enforcement resolution prior to processing the ATF or this NWP authorization. NWP 32 is reissued with the changes discussed above.

**33. Temporary Construction, Access and Dewatering:** The Corps proposed adding the provision from recent guidance stating that this NWP could be used for construction activities not

subject to either the Corps or U.S. Coast Guard regulations. We also proposed allowing the use of on-site dredged material for temporary fills, and deleting the last sentence of the permit, which stated that the permit did not authorize activities associated with mining activities or construction of marina basins which had not been authorized by the Corps.

The several comments received on this permit were nearly equally split between support for and position to reissue the permit. Many comments expressed concern about adverse impacts from structures and fill remaining in place without monitoring or enforcement. The Corps designed this permit to provide a shortened administrative process for construction-required activities that were not anticipated when the main project was authorized by another Corps permit (usually an individual permit) or by a Coast Guard permit. We have added authorization of activities where neither a Corps nor a Coast Guard permit is required but a temporary impact to waters of the United States occurs in association with work in the immediate area for an otherwise upland project. Structures or fills that remain in place cannot be permitted by this NWP. The NWP now clarifies that all activities authorized by this NWP must be removed or authorized by another permit.

One comment recommended that all fills and restoration be completed within 90 days of project completion. We have clarified the requirements of PCN (General Condition 13) such that the restoration plan will include a timetable for removal of the temporary structures and fills.

One comment concerned the interpretation of "or for other construction activities not subject to the Corps or U.S. Coast Guard regulations" as including maintenance which the commenter states is not regulated under 33 CFR 324.4(a)(2). The Corps NWP 33 is clear in its intent to authorize only activities that support some primary activity that has been permitted or does not need a permit. The exemption referenced authorizes maintenance and reconstruction of facilities, which means that it exempts only that part of the facility that was constructed in jurisdictional waters. NWP 33 authorizes access or construction techniques to perform the exempt reconstruction if that access or technique requires structures or fill outside the footprint of the facility.

One commenter recommended a dredging limitation the same as that required for NWP 19. The Corps

believes that this is too restrictive for a temporary impact and would excessively lessen the use of this NWP.

A few commenters expressed concern for special aquatic sites with suggestions that: the permit require the impacted wetland be restored in 2 years, the impacted site be self-mitigating, the Corps ensure that wetland impacts can be reversed, and a maximum impact of 1/2 acre. We believe that all of these restrictions are not necessary. Through the PCN process the Corps will ensure that impacts are minimized to the maximum extent practicable.

Another comment expressed concern regarding downstream flooding. The NWP states that near normal downstream flows must be maintained and flooding minimized. Section 404-only Condition 6 also prohibits altering expected high flows.

One commenter suggested limiting restoration to special aquatic sites. The Corps has not adopted this recommendation because temporary structural fills in other waters of the United States, which are not special aquatic sites, also must be restored under this NWP. Another commenter suggested that there no be a notification for cofferdams and access ramps under some unspecified size. Another asked for the PCN to start at 100 cubic yards or 0.1 of an acre impact. We believe this is inappropriate as another permit has been issued for the main project and cumulative impacts need to be considered, including potential alteration of the purpose of the project. Also, even small cofferdams may have more than minimal impacts depending upon the resources of the waterbody. Construction activities for projects not requiring a permit may be authorized by non-notification NWPs if they apply.

Two other commenters recommended that signs be erected to warn boaters of construction activities and that this NWP not be used for river boat casino construction. These are very localized issues that can be dealt with through regional conditioning by the districts and divisions. If the Corps is aware of high recreation use, placing warning signs may be an appropriate condition for some specific NWP authorizations. NWP 33 is reissued with the proposed changes.

**34. Cranberry Production Activities:** The Corps proposed no changes to this NWP. Several commenters supported reissuance, but the great majority of those commenting on the permit requested revoking this NWP, based principally on perceived environmental impacts and because, according to the commenters, most cranberry producing states have denied water quality

certification. The Corps realizes that decreases of habitat value and water quality functions may occur in the conversion; however, the NWP requires mitigation to ensure no net loss of wetlands by acreage. Additionally, any district may regionally condition the NWP to restrict its use in particularly valuable wetlands. Some states, as noted by several commenters, have denied 401 water quality certification to ensure that the state can regulate impacts of local concern. Washington State, for example, initially denied certification for all actions under this NWP. Three years ago the state issued certification except for forested wetlands and areas that had never been in cranberry production historically. Denial by many states does not imply that a NWP is causing more than minimal adverse effects, but simply that the state may have concerns regarding water quality.

A few commenters requested removing the no net loss requirement for purposes of water quality and more efficient harvesting through the construction of dikes. The Corps believes that the mitigation required is necessary to ensure that no more than minimal adverse effects will occur. The Corps believes that extensive construction of dikes would likely result in more than minimal adverse effects, and thus requires evaluation through the individual permit process.

One commenter stated that upland alternatives should be selected. Although it has been demonstrated that cranberries can be cultivated in former uplands (cranberry bogs are wetlands because of the hydrology that must be maintained), this is technically difficult and typically would not be practicable. This is particularly true recognizing that many operators are small family businesses.

One commenting organization stated that Section 401 did not apply to cranberry bog construction because it is a non-point pollution source. The activities regulated by the Corps under NWP 34 involve discharges of dredged or fill material associated with expansion, enhancement or modification of the cranberry bogs. These discharges of dredged or fill material are the same as any other fill pad or land leveling operation. These types of activities are point source discharges and a 401 water quality certification is required.

Two commenters recommended adding taro production to this NWP. Taro is grown in Hawaii and other South Pacific islands. We believe this is a region-specific problem and the Corps Honolulu District has the option of

developing a regional general permit, if appropriate.

In order to verify compliance with the terms of this NWP, we have added the requirement to provide a wetland delineation with the notification. NWP 34 is reissued with the modifications described above.

*35. Maintenance Dredging of Existing Basins:* The Corps proposed no changes to this NWP. One commenter indicated that clarification is needed to unambiguously define and limit what is meant by canals, basins and slips. This is a section 10 NWP and the term canal in this instance is related to navigation. Therefore, flood control or other canals that do not normally support navigation are not covered by this NWP. The term basin is also intended to relate to navigation, such as a marina. A marina basin is defined as the open water portion of a marina which is normally bounded on one or more sides by uplands or structures (i.e., bulkheads, walkways, floating or stationary piers and/or breakwaters). A slip is the open water area where an individual boat is moored and is normally bounded on one or more sides by uplands or structures (e.g., bulkheads, walkways, piers, piling, etc.). We have modified the permit by replacing the term "canals" with the term "channels". We have made this change to clarify our intent to allow maintenance dredging of navigational channels connected to marina basins.

One commenter suggested that the NWP be broadened to include maintenance dredging of previously authorized intake and discharge structures and canals for electric power plants. The commenter added that this activity is infrequent, typically requiring maintenance dredging no more often than every five to ten years. We are not adding such canals because their primary purpose is not to support navigation.

A few commenters expressed concern about the method of disposal related to waste discharge requirements of boats using the area and 401 water quality certification. The states review water quality concerns under section 401 of the Clean Water Act and boats must meet discharge requirements established by the Coast Guard. Moreover, this NWP is not for construction of marinas, but for maintenance dredging of their basins and access canals.

One commenter suggested that each Corps district incorporate seasonal restrictions to limit impacts to anadromous fish. Another commenter stated that the NWP should not be used to remove natural gravel deposits or woody debris caused by flooding which

may directly impact stream flow and may affect anadromous fish. We believe that these issues can be addressed through regional conditions to this NWP or by activity-specific conditions required by the DE, where necessary. One commenter expressed concern over the possibility of resuspension of pollutants accumulated in the sediments of marina basins during such maintenance activities. The Corps shares these concerns and is therefore, with this publication, requiring that the Division Engineers, through the recommendation of the DEs, regionally condition this NWP to exclude marinas where there is a high potential for resuspension of pollutants that may adversely affect water quality. NWP 35 is reissued with clarifications discussed above.

*36. Boat Ramps:* The Corps proposed no changes to this NWP. One commenter suggested that this NWP be subject to notification requirements. Another commenter suggested that the NWP would encourage the construction of individual boat ramps. A few commenters suggested that mitigation be required for lost special aquatic sites and habitat. A few commenters requested additional conditions to avoid impacts to endangered species and fish spawning seasons, to place unpolluted fill material, and to limit construction periods. A few commenters suggested modifications to the size limits of this NWP.

The Corps notes that no discharge of fill material would be allowed into special aquatic sites under this nationwide permit, and the boat ramps authorized are very small. Given this and the discretionary authority provisions, we believe that the notification requirement is not necessary to ensure minimal adverse effects. The NWP, as written, adequately balances the need for public access to the nation's waterways while protecting aquatic resources. The NWP specifies that unsuitable material that causes unacceptable chemical pollution, or is structurally unstable, is not authorized. We believe the general and special conditions in regard to endangered species and spawning areas, respectively, are adequate. Additional measures have been added by the Corps as regional conditions to address specific issues. NWP 36 is reissued without change.

*37. Emergency Watershed Protection:* The Corps proposed no changes to this NWP. A few commenters wrote to state their general support for this nationwide permit. Several commenters believe that the NRCS is misusing and abusing the Emergency Waters Protection Program

(EWPP) and have suggested imposing a time limit after the occurrence of the natural disaster/emergency situation for the project to qualify for this nationwide permit. It is not always possible to immediately determine the full scope of the damages caused by an individual event. The Corps considers whether or not the material to be removed was a result of a flood event through the PCN process. It is the responsibility of the NRCS, not the Corps, to determine whether the project complies with their program authority. It is the Corps responsibility to review the project and concur that the proposal will result in only minimal impacts and otherwise comply with the terms and conditions of the NWP. Some commenters suggested that we expand this nationwide permit to include all emergency response work as a result of a state or Federal Disaster Declaration and eliminate the notification requirement. After each natural disaster/emergency situation, those responsible for performing this work must coordinate with all appropriate agencies to ensure not only an expeditious response to the situation, but compliance with all applicable laws. Most work of this type is authorized under Nationwide Permit 3. For EWPP projects, notification will continue to be required to ensure that the terms and conditions are met and only minimal adverse effects will occur. NWP 37 is reissued without change.

**38. Cleanup of Hazardous and Toxic Waste:** The Corps proposed clarification as to which projects approved under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) do not require authorization under sections 10 and 404.

Four commenters noted that CERCLA does not absolve the Corps of its responsibilities under section 404 or section 10, and/or recommended inclusion of language that states that section 404(b)(1) compliance is still necessary unless EPA specifically grants a waiver of "applicable or relevant and appropriate requirements" compliance. One of these commenters also stated that the final permit should indicate specifically the substantive requirements that would apply to CERCLA actions under this nationwide, and whether the Corps intends to encompass all CERCLA actions. One commenter recommended deleting the last sentence of the proposed language regarding CERCLA exemptions. EPA notes that the new language proposed for nationwide permit 38 regarding CERCLA exemptions refers to section 121(e)(1) of CERCLA for activities

carried out under that section, which only exempts from permit requirements activities that are conducted "entirely on site." They recommend modifying the last sentence of the proposed language to read "Activities undertaken entirely on a CERCLA site by authority of CERCLA \* \* \*." They further note that section 121(e)(1) contains the restriction that the activity must be "carried out in compliance with this section." We concur with this clarification and have added the suggested language.

One commenter stated that nationwide permit 38 illegally delegates the Corps responsibility to protect wetlands to other Federal and state agencies that have very different missions. The Corps has not delegated any regulatory responsibility. The applicant must notify the Corps according to the notification procedures and coordination with other pertinent agencies would be conducted. Appropriate measures to mitigate adverse environmental impacts would be required by the Corps if necessary to ensure that the adverse effects are minimal. This commenter also states that the proposed exemption for EPA-approved or required projects under Superfund that do not require a section 404 or section 10 permit has no statutory basis in the CWA or CERCLA. We note that section 121(e)(1) does specifically allow for exemptions from section 404 and section 10, provided the activities are conducted entirely on-site.

This commenter also notes that no limits are imposed by this nationwide permit and that this violates section 404(e). We disagree. First, there are multiple environmental reviews involved in CERCLA clean up activities. Second, a large project can have minimal adverse effects depending on the functions and values of the impacted waterbody. This commenter further questioned the validity of the information provided in the Federal Register notice on types of potential contamination sources, assumptions made regarding quality of containment technologies, compliance with NEPA by lack of appropriate specificity, and lack of demonstration of compliance with the 404(b)(1) Guidelines by leaving all standards of approval to EPA or state or local regulators. The commenter also encourages the Corps to remain involved to ensure appropriate implementation of section 404 and section 10 requirements with the other parties involved. We believe that the information and project specific evaluation is best left to a case-by-case review by EPA and the Corps through the PCN process. We further note that

under EPA's CERCLA guidance, provisions of the section 404(b)(1) Guidelines are considered by EPA.

This commenter recommended nationwide permit 38 not be reissued and that the Corps should conduct its regulatory responsibilities concurrently with the other agencies.

We believe that the NWP ensures that wetlands functions and values are appropriately protected. We also believe that the nationwide permit as written provides for such concurrent evaluation, coordination, and oversight.

One commenter recommended not reissuing this nationwide permit or narrowing it to avoid allowing the dredging of hazardous and/or toxic materials that have settled in river bottoms. One commenter recommended that projects that may affect wetlands or other special aquatic sites include a mitigation plan sufficient to offset impacts. Another commenter noted that specific mitigation requirements are not mentioned under this nationwide permit, and notes that mitigation for lost functions and values should be required if such functions and values were present on the site prior to cleanup. One commenter stated that this nationwide permit should be limited to projects impacting less than one acre of waters of the United States. The notification procedure allows the relevant agencies to provide comments regarding concerns regarding potential contamination issues or to identify mitigation needs. If the Corps determines the project is likely to result in more than minimal adverse effects, appropriate mitigation will be required to reduce adverse environmental effects below the minimal level, or the DE may notify the applicant that the project does not qualify for authorization under the nationwide permit and instruct the applicant to seek authorization under an individual permit. Restricting this nationwide permit to projects of less than one acre of impacts to jurisdictional waters of the United States would unduly limit its application. We do not believe that such a restriction is warranted provided appropriate mitigation is required by the Corps through the PCN process.

One commenter supported the proposal to clarify the scope of this nationwide permit by recognizing that activities conducted under the authority of CERCLA do not require section 404 or section 10 permits and recommended that language be provided that expressly notes that the notification procedure is not applicable for activities conducted under CERCLA authority. The language of the NWP explicitly states that Corps section 404 and section 10 permits are



not required. Thus, notification to the Corps is not necessary for those projects undertaken under authority of CERCLA.

Two commenters recommended that nationwide permit 38 include activities undertaken under authorities other than CERCLA, such as Resource Conservation and Recovery Act (RCRA) or state Superfund programs. As stated in the current and proposed wording, actions performed, ordered, or sponsored by a government agency with established legal or regulatory authority are authorized under this nationwide permit.

One commenter noted that section 401 water quality certification and the Coastal Zone Management Act (CZMA) consistency could be granted without additional regional conditions. Such determinations will be made by each individual state. NWP 38 is reissued with the clarification discussed above.

*39. Reserved.*

*40. Farm Buildings:* The Corps proposed correcting the reference to the "minimization" condition to reflect its current title, "mitigation" condition. We also proposed deletion of "agricultural related structures necessary for farming activities" to clarify that we intend the NWP to only authorize farm buildings such as agricultural sheds, supply storage, and barns on a farm or ranch. The NWP is not intended to authorize production nor warehousing type facilities.

One commenter recommended that saltflats or saltponds be added to the wetland types excluded from this NWP due to their inherent values for sediment retention and wintering shorebird and waterfowl habitats. Two commenters recommended deleting the reference to exclusion of prairie potholes, playa lakes and vernal pools to include all wetlands converted or in agricultural production prior to December 23, 1985. The commenter also recommended deletion of the term "farmed wetlands" to remove a potential source of confusion, and recommended adding the phrase "and agricultural related facilities necessary for farming activities" at the end of the first sentence.

We believe these suggestions would serve to expand this nationwide permit to allow any and all "agricultural related facilities." Restricting this nationwide permit to farm buildings is the intent. We do not believe it is necessary to include any and all possible facilities to be found on farms across the United States. Restrictions on farmed wetlands are appropriate because they are still jurisdictional waters of the United States. The 404(f) exemptions for normal farming

activities involve working the land and farm machinery access, not construction of buildings. Prior-converted croplands are not jurisdictional unless wetland characteristics develop upon abandonment of the land. Exclusion of prairie potholes, playa lakes and vernal pools from the scope of the permit is appropriate because of the high ecological values typically associated with these waters. While we recognize the high resource values inherent in many saltflats and salt ponds, these areas typically are not farmed and their exclusion should be considered on a regional basis by the Corps districts.

Several commenters stated that this NWP violates the minimal impact standard of section 404(e). One commenter supported the proposed change provided there were further clarifications of purpose. Specifically, this commenter recommended the permit language should refer to "foundations and building pads for farm buildings," it should refer to farmed wetlands as those wetlands that were in agricultural crop production prior to December 23, 1985, and are currently in agricultural use, and it should refer to discharges associated with a "single and complete project." Another commenter noted that the permit language allows discharges into jurisdictional wetlands that were in agricultural production prior to this date, but there is no explicit requirement that the area still be in agricultural production. Many stated the proposal to limit this nationwide permit to only "farm buildings" was not simply a clarification, but a reduction in coverage of the NWP, and were opposed to the modification without data supporting the need for change. One commenter recommended limiting this NWP to only farm homes and limiting impacts to only 0.1 acre. Many commenters also noted that the placement of non-water dependent structures in wetlands is inappropriate. One commenter recommended that any discharge into jurisdictional wetlands be compensated by an approved mitigation plan coordinated with the appropriate resource agencies. One commenter had no objection to issuance as proposed provided it was regionally conditioned to apply only to isolated wetlands. One commenter recommended that this NWP not be reissued due to impacts to wetlands already sustained in his region, and because the NWP language provides no guidance on how the one-acre limit is interpreted, provides no definitions of terms such as "necessary," "agriculturally related," and "minimum".

The NWP only applies to farmed wetlands that are currently in agricultural production. We believe that the acreage limitations will ensure that impacts to farmed wetlands will be minimized. We further believe that notification and delineation of special aquatic sites is unnecessary because this nationwide permit applies only to farmed wetlands that are currently in agricultural production.

Many commenters opposed the reissuance of this NWP without further clarification of the intent. The majority of the concerns related to the potential for housing animals or agricultural chemicals in or adjacent to wetlands with the attendant concerns for contamination of local water sources from runoff and requested that such structures be excluded. One commenter noted that this NWP does not require notification to the Corps or other agency and could potentially render a potable water source unfit for human consumption. Three commenters requested language that made it clear that the permittee would still be required to obtain all other required permits such as waste water and waste management permits. One commenter recommended reissuance of this NWP only if it were conditioned for best management practices for size thresholds, pollutant discharge standards, and monitoring protocols. The Corps shares the concerns for potential adverse effects to water quality from runoff and leaching of agricultural chemicals and animal waste products. Therefore, we have added a Corps-only PCN requirement for the placement of any farm building within 500 feet of a flowing stream or waterbody. This PCN will be used by the DE to determine if adverse effects to water quality may result from the placement of the farm building. If the DE concludes that the project, as designed, may adversely effect water quality, additional protective measures, including relocation of the proposed project, may be required.

*Proposed New Nationwide Permit A. Moist Soil Management for Wildlife:* This proposed permit is discussed above in the "Discussion of Public Comments and Changes" section and included below in the "Nationwide Permits and Conditions" section as Nationwide Permit 30: "Moist Soil Management for Wildlife".

*Proposed New Nationwide Permit B. Food Security Act Minimal Effect Exemptions:* The majority of comments on NWP B recommended waiting for review of the regulations implementing the 1996 Amendments to the Food Security Act of 1985 (FSA) before

issuing this nationwide permit. The Corps had anticipated that the regulations would be final by July 1, 1996; however, it was not published final until after the end of the comment period for the proposed nationwide permits. Therefore, we intend to re-propose NWP B in the Federal Register at a future date. Of the many comments received, approximately half requested that this nationwide permit not be issued, mostly based on perceptions that the permit would result in adverse impacts to wetlands, while the other half supported it. The comments already received will be considered along with those received in response to our future notice of proposed issuance of this nationwide permit.

*Proposed New Nationwide Permit C. Mining Operations:* A large number of comments were received on this proposed permit. Through our review of this proposal we found sand and gravel mining operations and recreational mining activities vary greatly across the country, not only in scope but in types and levels of impacts as well. We believe that the development of regional general permits, including programmatic general permits based on state or regional programs, will provide a more effective process for dealing with the differing conditions of various geographical areas of the country. It would not be productive to attempt to specify limits to reduce the individual and cumulative impacts of a NWP for in stream mining to a minimal level when a majority of the proponents indicate that the permit is of little value unless the allowable level of impact is increased. Corps districts and divisions will be encouraged to develop regional general permits for these activities. Proposed nationwide permit C is not issued.

*Proposed New Nationwide Permit D. Maintenance of Existing Flood Control Projects:* This proposed permit is discussed above in this "Discussion of Public Comments and Changes" section and included below in the "Nationwide Permits and Conditions" section as Nationwide Permit 31: "Maintenance of Existing Flood Control Projects".

#### IV. Comments and Responses on Nationwide Permit Conditions

##### A. General Conditions

*1. Navigation:* The Corps proposed no changes to this condition. There were no comments received on this condition. This condition is adopted without change.

*2. Proper Maintenance:* The Corps proposed no changes to this condition. Two commenters suggested adding the

word "facilities," regarding those activities that are required to be maintained. The Corps authorizes maintenance of structures or fill within its jurisdiction under sections 10 and/or 404. We do not regulate the maintenance of facilities built on the structure or fill. For example, if a business facility (building) on the upland is not "maintained," while the barge loading dock is properly maintained, the Corps would not take action regarding maintenance of the building. To avoid any confusion, the Corps has not added "facilities" to this condition. This condition is adopted without change.

*3. Erosion and Siltation:* The Corps proposed no changes to this condition. Several commenters suggested including state and local erosion and sediment control laws in the General Conditions. Corps permits do not override or obviate the need to comply with state and local erosion and siltation control laws. Additionally, the Corps has no authority to enforce state and local laws. Therefore, the Corps believes it is unnecessary and inappropriate to include state and local laws. This condition is adopted without change.

*4. Aquatic Life Movement:* The Corps proposed no changes to this condition. A few commenters indicated that projects authorized under an NWP that substantially disrupts aquatic life movements would not satisfy minimal impact criteria and should be considered only through individual permitting procedures. With the current wording of this condition, if a project proposed for an NWP does substantially disrupt aquatic life movement, this general condition is not met and the project cannot be authorized under a nationwide permit. Additionally, it was requested that the phrase "unless the activity's primary purpose is to impound water" be deleted. We believe there are impoundment projects which would substantially disrupt the movement of specific individuals of aquatic life, but which would not adversely affect the populations of the species nor have more than minimal impacts on the aquatic environment. This condition is adopted without change.

*5. Equipment:* One commenter suggested adding to this condition that all equipment be stored in uplands to the extent practicable. We believe this condition is sufficiently clear as stated and applies only to equipment "working in wetlands". Storage of equipment in wetlands is not addressed because it is not authorized. This condition is adopted without change.

*6. Regional and Case-by-Case Conditions:* The Corps proposed no changes to this condition. There were no comments received on this condition. We have added a statement that such conditions will also include those imposed by states or tribes under Section 401, which clarifies the current practice.

*7. Wild and Scenic Rivers:* We proposed to allow the use of NWPs in a component of the National Wild and Scenic Rivers system after coordination with the managing agency has resulted in a determination that the project will not adversely affect the status of the river. Most comments supported the proposed change. No objections to the proposed change were received. Several commenters requested that we add "U.S. Fish and Wildlife Service" after the "e.g." in the last line because they administer 2 rivers in the lower 48 states and 7 rivers in Alaska. We will add this to the nationwide permit condition. Comments were received requesting the addition of the following statement:

This has no effect on procedures established to notify river management and study agencies of pending applications for permits, including conditions negotiated for General Permits by the Corps and those agencies. The proposed activity shall not begin until the applicant has been notified by the District Engineer that the requirements of the Wild and Scenic Rivers Act have been met.

None of the nationwide permits or conditions override or obviate the need for any other Federal agency's requirements for permits or coordination. The Federal agency responsible for managing the affected waterway must determine whether all requirements of the Wild and Scenic Rivers Act have been met. The applicant may make all required coordination with the appropriate agency without involving the Corps of Engineers if there is no notification requirement for the nationwide permit authorizing the proposed project. If the responsible Federal agency determines the project, as proposed, does not comply with the Wild and Scenic Rivers Act, individual processing of the application is required. A comment was also received requesting that the Federal management agency be required to coordinate with the applicable state resource agency on projects proposed for authorization by nationwide permit in Wild and Scenic River areas or study areas and that any state permits required for a proposed project must be issued *before* the Corps provides authorization by a nationwide permit. The responsible Federal agency is required to complete all coordination

of activities as specified in their regulations. It is not appropriate for the Corps to instruct these agencies regarding their program requirements. This condition is adopted as proposed with the inclusion of the U.S. Fish and Wildlife as a Federal management agency.

**8. Tribal Rights:** The Corps proposed no changes to this condition. One commenter requested inclusion of language to protect cultural resources, including those protected by the Native American Graves and Repatriation Act, in addition to tribal rights. The Native American Graves and Repatriation Act does not apply directly to the Corps regulatory program. This law is applicable to federal agencies conducting work on federal lands but does not apply to private citizens conducting work on private lands. However, many Native American cultural resources are protected by tribal rights and therefore have been, and will continue to be, considered under this condition. This condition is adopted without change.

**9. Water Quality Certification:** The Corps proposed no changes to this condition. One commenter suggested that section 401 water quality certification and the section 404 authorization procedure should be combined for Nationwide Permit 26. If the appropriate State agency issues or waivers section 401 water quality certification for any Nationwide Permit, the authorization process has been effectively combined. The Clean Water Act specifically separates these authorizations so that States may place more stringent controls on projects to reduce water quality impacts as perceived by the State and not limit the review process to the Federal perspective. This condition is adopted without change.

**10. Coastal Zone Management:** The Corps proposed no changes to this condition. A few commenters indicated that the current announcement process for Nationwide Permits did not follow Federal consistency procedures and was not in compliance with Coastal Zone Management requirements. One commenter suggested conditions that would allow concurrence on consistency determinations and indicated that the Nationwide Permits should be revoked for a State where such conditions for Coastal Zone Management are not present. Many commenters stated that determination of inconsistency with Coastal Zone Management should invalidate a permit; and that a requirement for individual reviews should not be adopted. If a Coastal Zone Management concurrence

determination is not provided for a specific nationwide permit, the project may not proceed until and individual CZM consistency determination has been received for the specific proposed project. The Corps decision that the project will have minimal impact is not affected. However, the agency responsible for the concurrence determination will review each project on a case-by-case basis. If the project specific concurrence determination is denied, the project may not proceed and the NWP is denied without prejudice.

One commenter believed that a Coastal Zone Management concurrence determination should not apply to flood control maintenance activities more than 100 feet upstream of the designated Coastal Zone. The commenter stated that the project is outside the designated coastal zone, this condition does not apply. The Corps must determine whether or not the impacts of a project would affect a state's coastal zone. If project impacts would affect the States coastal zone, then a consistency concurrence is required. This condition is adopted without change.

**11. Endangered Species:** Although no changes to this condition were proposed, we have made the change of adding language specific to the take of endangered species as discussed below. Several commenters stated that the Corps must determine compliance with section 7 of the Endangered Species Act and that the applicant will not have sufficient knowledge to make such a determination. These commenters assert that by delegating the section 7 ESA responsibility, the Corps NWP program is not in compliance. A few commenters requested that the endangered species condition not apply to species "proposed for listing". Several commenters requested that a public notice be issued for all proposals to obtain public input and environmental review, or that a universal PCN should be shared with resource agencies. A few commenters were concerned that section 7 has never been implemented under the NWP process and that NMFS and USFWS should be consulted prior to final action. A few commenters recommended that the Corps clarify that authorization of a project by an NWP does not authorize the taking of an endangered or threatened species. We will add a statement to this condition to clarify this issue.

Issuing a public notice or sharing universal PCN's with resource agencies for input on all proposals would be unduly burdensome to the Corps and the regulated public, and would not necessarily enhance protection of endangered species. The Corps believes

that the procedures at 33 CFR 330.1(e) and this condition ensure compliance with the Endangered Species Act (See general discussion at the beginning of the preamble). Finally, the Corps does conduct section 7 consultations, on both standard individual permits and nationwide permits, to ensure ESA compliance and, as stated above, we are entering into formal programmatic section 7 consultation for the NWP program. The inclusion of species "proposed for listing" is identified under the Endangered Species Act and is used in that context. This condition is adopted as discussed above.

**12. Historic Properties:** The Corps proposed no changes to this condition. Several commenters do not believe this condition ensures compliance with section 106 of the National Historic Preservation Act (NHPA) or its implementing regulation (36 CFR part 800). These commenters encourage development of a process which will pre-identify and evaluate historic properties and cultural resources. Some commenters suggested limiting this condition to those activities which may "adversely" affect historic properties. We believe that the Corps procedures outlined in this condition comply with the requirements at 33 CFR 330.4(g) and at 33 CFR part 325, appendix C for protection of historic properties, which implements 36 CFR part 800, and fully satisfy the requirements of the NHPA. Furthermore, our experience with authorizing activities by nationwide permit supports our position. We do not believe an additional or revised process is necessary. To change the condition to reduce the threshold for initiating the historic property process from "may affect" to "may adversely affect" would not be appropriate or in compliance with Corps regulations. The "may affect" threshold provides for a process to determine the affect or no affect on historic properties. The "not adversely affect" determination would be decided during the process. If during that process a determination is made that the activity will not adversely affect then the project could be authorized by the NWP. This condition is adopted without change.

**13. Notification:** We proposed several changes to this condition. In summary, we proposed to: (1) Contact the agencies on behalf of the applicant, (2) discontinue PCN coordination with the agencies on NWPs 5, 7, 13, 17, 18, and 34, but allow Regional Directors or Administrators to request coordination, (3) increase the notification time period for NWP 26 from 30 to 45 days, and (4) notify the agencies on NWP 29 and proposed NWP D (now NWP 31). Many

commenters believe that notifying the agencies is not necessary, many others believe it is necessary. Some commenters like the proposed notification reductions, while others expressed concern. A number of commenters believe that there should be no notification requirements at all. The primary reasons given were that it would cause permit delays and that it was unnecessarily burdensome to the regulated public. Many other commenters believe there should be notifications. The reason for notifications are to assure minimal impacts, and to ensure compliance with the National Historic Preservation Act and the Endangered Species Act. We believe that although comments from the agencies are often helpful in the permit evaluation, the value added to the Corps decision for NWP 5, 7, 13, 17, 18, and 34 is not adequate to continue the process. We believe that the limited resources from all agencies are better utilized by focusing on projects with potentially greater environmental impacts.

Many commenters raised concern that, by applying compensatory mitigation in the context of a NWP, the Corps authorizes activities that, but for the mitigation, may have more than minimal adverse environmental effects. Those commenters were concerned that the CWA requires that only activities with minimal effects may be authorized by a general permit. Activities that have more than minimal adverse effects are subject to the individual permit process and the associated analysis of alternatives, individual public notice procedures, and other aspects of individual review that help to ensure that potential adverse effects are fully avoided and minimized before any activity is approved.

Given these concerns, the Corps will be considering whether or not modifications to the mitigation provisions of the regulations are appropriate and will be meeting with other Federal agencies to discuss this issue. In the interim, the Corps is seeking specific comment on the use of compensatory mitigation in the context of the Nationwide Permit program and any recommendations for modification to the mitigation provisions. Should the Corps determine that revision to this policy is appropriate, a rulemaking process to change the regulations at 33 CFR part 330 may be necessary. This process would include notice and full opportunity for public participation.

A few commenters suggested that NWP 12 needs delineation of special aquatic sites. We disagree. Fills associated with NWP 12 are temporary

in nature and the areas impacted are to be returned to original contours and elevations after the work is completed for projects not subject to the PCN process. The Corps evaluates those projects subject to the PCN process and will determine whether there are substantial problems regarding jurisdiction.

Several commenters requested we increase the time allowed for the agencies to respond. As noted in the preamble section on NWP 26 notification, we will allow the agencies an additional 7 calendar days by extending the maximum additional time the agency can request to 21 calendar days. The agency coordination times for all other NWPs will remain 5 and 14 days. We believe these modifications to the current times are responsive to the greatest area of concern, NWP 26, while not increasing delays for the regulated public where there is less potential for more than minimal adverse effects.

One commenter suggested that notification be required for NWP 23 because of the potential for large projects and significant wetland impacts. NWP 23 activities, by their definition, are actions "which neither individually or cumulatively have a significant effect on the human environment," have already gone through a NEPA analysis, and have already had a public review and comment period when they were first proposed for inclusion under NWP 23. Furthermore, in some specific cases a PCN is required in the individual Corps approval of another agency's categorical exclusions.

One commenter noted that there are no consequences for an incomplete notification, thus, it is not in the applicant's interest for him to raise all the issues that may affect his proposal. The commenter suggested that the resource agencies have information and resources that would help identify these issues and it would be advantageous to the program for the Corps to coordinate projects with them before making a complete determination. The consequences for submitting an incomplete notification is a delay in the Corps evaluation, and hence the authorization, of the project proposal. The Corps initial review of PCNs includes a determination on whether the PCN is complete. Since most applicants are trying to reduce the amount of delay as much as possible, we believe the incentive to submit a complete application is adequate.

A number of commenters provided recommendations for improving the coordination among agencies at the local level. The Corps is with this final

package we are issuing today directing substantial increases in coordination and communication at the district and division level. This increased coordination will be part of developing regional conditions for the reissued NWPs, developing replacement NWPs for NWP 26, endangered species compliance, and working with the States. However, we also suggest that individuals and agencies contact their respective Corps districts to provide those recommendations.

One commenter suggested that the Corps notify the applicant upon receiving the PCN and indicate whether it was complete and when a decision would be made. The applicant will be notified if the notification is incomplete and will be informed regarding what information is necessary for the notification to be considered complete.

Several agencies recommended PCN's for NWP 5, 7, 13, 17, 18, and 34. The commenters indicate that major impact projects have been proposed involving NWP 7 (outfalls) and NWP 13 (bank stabilization). A commenter requested that the following list of permits be coordinated with resource agencies: 7, 12, 13, 17, 18, 21, 26, 27, 29, 34, 35, and C. Another commenter requested agency notifications for 7, 13, 14, 18, 21, 26, 33, 37, 38, and the new NWPs. We have carefully reviewed all of the requests for changes to the NWPs for which notification under General Condition 13 has been requested. Based on this review, several NWPs will involve notification coordination with the resource agencies, several will be Corps-only review of the PCN, and several are subject to the optional process for agency coordination. Some projects authorized under NWP 7 or 13 involve major impacts outside of the waters of the United States. These major impacts are not within the Corps authority to regulate or control.

Several commenters suggested changing the terminology of PCN back to PDN. The terminology causes confusion because the regulated activity is a discharge and construction implies work on high ground. The term PCN (pre-construction notification) has been adopted over the term PDN (pre-discharge notification) because many of the NWPs are not authorizing a discharge, in Section 404 waters, but are authorizing work in navigable, Section 10, waters. Since these do not involve authorization of a "discharge", we believe the term "construction" is more appropriate for all NWPs. The Corps does not control or regulate activities in uplands, including when construction is initiated, beyond these limited

circumstances identified in 33 CFR part 324 appendix B, Scope of Analysis.

A number of commenters believe that the requirement for the applicant to notify the FWS and the SHPO speeds up their permit by allowing them to develop alternatives and mitigation measures. They believe that if the Corps is tasked with this responsibility, their permit will be delayed and the applicant would lose control of the schedule. They also believe that if the proposal is adopted, these agencies will not be willing to work directly with the applicant and will only work through the Corps. One commenter expressed concern that the reason for not requiring applicants to contact the SHPO was because the SHPO did not want to work directly with the applicants. The commenter suggested that this was counter-productive and that the Corps should explore ways to ensure that such organizations cooperate with the permit applicants early in the process. These agencies have requested that the Corps send the PCNs to them rather than direct contact between them and the applicant. This process ensures that these commenting agencies only review active, complete applications. This process does not preclude an applicant from contacting the agencies for information.

One commenter recommended that the SHPO be allowed a 30-day review to ensure that historic resources were adequately addressed. Another stated that the SHPO would not do the Corps work and that data on potential historic properties should accompany the transmittal of the PCN, and that any deadlines for response to the Corps begin after the receipt of adequate information. The Corps believes that the current process provides a reasonable amount of time for the SHPOs to provide their views. The intent of the PCN is to identify if there is a potential historic property problem, not to completely resolve such problems. If a problem regarding an effect on a historic property is identified during the PCN process, then the Corps will instruct the applicant that they cannot proceed with the project until coordination to resolve the problem is completed.

Several commenters stated that the notification process does not allow them to comment on proposed projects. They don't believe that the provisions in the CWA are being met, since the agencies and the public have no opportunity to comment. The Corps regulations establish a process for publishing proposed nationwide permits for public comment (33 CFR part 330). Based on this process, the Corps issues NWP that have procedural steps to ensure agency

coordination and the ability of the Corps district to require a full public interest review, where the Corps believes such review is necessary, through its discretionary authority.

A couple of commenters suggested a time threshold for Section 401 water quality certification that was in line with the other agency review times. The Corps regulations provide that project specific section 401 evaluations will generally be completed within 60 days. However, districts may, working with the States, extend this time period not to exceed 1 year. We do not propose to change this process.

One commenter suggested that extensions be provided to commenting agencies, or an IP be required, in situations where delays are caused by insufficient or inaccurate maps and depiction of proposed action. This commenter also indicated that the mitigation option of the contribution of monies to a wetland trust fund be more clearly discussed. This commenter also suggested that the Corps apply notification condition 13(b)(5) (restoration plan for temporary fill sites) to NWP 12 and 15, both of which allow the temporary placement of dredged or fill material. Finally, this commenter suggested that the Corps extend the initial comment period for resource agencies to 7 calendar days for all NWPs, and eliminate the prohibition on the Corps responding to agency comments. The Corps does not coordinate PCNs with resource agencies until the PCN is considered complete, so that the basic information is adequate for review. Furthermore, we believe it is essential to provide an answer to applicants within the PCN period of 30 days (45 days for NWP 26). We do not believe that it would be beneficial to explicitly define in lieu fee systems nor wetland land trusts. These vary around the country and we will expect our districts to ascertain whether or not a given situation will reasonably ensure quality and successful mitigation. We do not believe that any additional restrictions are necessary for either NWP 12 or NWP 15. We have already added substantial additional restrictions to NWP 12. Should a problem arise with NWP 15, either the Coast Guard or the Corps will address it on a case by case basis. We do not believe that it is necessary to extend the initial comment period for the resource agencies from 5 to 7 days. This period is simply to determine whether or not site specific, substantive comments will be provided. Finally, we do not believe that the notification process or environmental protection would be advanced by responding to resource agency

comments on PCNs. If any agency wishes to know how the Corps utilized their comments, that agency can call the Corps district and discuss the specific project. We encourage this type of informal coordination.

One commenter suggested that inclusion of different times regarding agency review and response to applicants for different nationwide permits would create a lot of confusion. We carefully considered the concern that variable comment periods might be confusing to the commenting agencies or the regulated public. However, under our revised NWP 26, we expect a substantial increase in the number of PCNs, and the Corps is directing its districts to carefully consider project impacts and potential mitigation on most of them. Therefore, we believe the additional time is necessary for NWP 26.

One commenter suggested that affected tribes be included in the notification process. We believe that since the tribes are inherently aware of all Corps regulatory matters on tribal lands, additional notification is unnecessary. Furthermore, we believe that NWP General Condition 8, "Tribal Rights," is sufficient to address tribal treaty rights issues, and District Engineers will notify the tribes regarding these treaty rights, as necessary.

We believe that the review of PCNs by the state does provide valuable information and we have retained that provision. However, the optional coordination procedure is made available for activities that we believe will typically be clearly minimal. We believe that allowing this optional procedure only for the Federal resource agencies will adequately ensure appropriate coordination.

A few commenters requested eliminating the provision authorizing discharges when a DE does not notify the applicant within a specified time frame. We believe that the PCN process allows the district adequate time to evaluate PCNs and provide the applicant with an answer. Moreover, we believe that we must have a definitive answer to the applicant at the end of the 30-day (45 days for NWP 26) PCN period. Creating extensions would result in substantial confusion.

One commenter recommended that wording of condition 13(f) be changed to read "\* \* \*" with the current methods required by the Memorandum of Agreement among USDA, EPA, and DOA." This commenter also stated that condition 13(g) mitigation, should specify that mitigation banks need to comply with the 1995 Federal

Guidance, should include a requirement to monitor compensatory mitigation projects for a specified period of time, abandoned mine lands should have no contaminants accumulated as a result of the mining operation, and compensatory mitigation should be accomplished prior to initiation of authorized work. We believe that compliance with existing conditions of the NWP and the fact that requirements for delineations and mitigation banks are implicitly clear, based on total program guidance, make additional guidance on these issues unnecessary. Regarding timing of compensatory mitigation, we believe it is more important to have potentially high-quality mitigation, such as can be provided with in lieu fees to states, locals interests or land trusts, rather than pushing for mitigation completion before impacts occur.

One commenter requested that individuals impacted by a nationwide permit should be notified. We have followed the clear provisions of 33 CFR 330 regarding notification of the nationwide permits.

Several commenters requested that the Corps return to the 1991 wording regarding including any conditions the District Engineer *deems necessary* under Condition 13(d), and that, if the new language is retained, a clear explanation of why this change was made should be provided. We have reviewed the proposed language as well as the 1991 language regarding conditions that will be placed on a PCN verification. We have decided that the original language, stating that the District Engineer will include conditions he deems necessary, is the appropriate language. This condition is adopted as discussed above.

**14. Compliance Certification:** The Corps has determined that in association with our efforts to collect more accurate data on project impacts and mitigation, and consistent with our intent to maximize permittee compliance, this condition is necessary. The condition requires the permittee to certify, in writing, that he has accomplished the work as authorized by the Corps, including any mitigation. The certification will help the Corps ensure permit compliance as well as continuously evaluate mitigation success.

**15. Multiple Use of Nationwide Permits:** In response to the concerns raised regarding the stacking of NWPs, the Corps has determined that a notification to the Corps, where any NWP 12 through 40 is combined with any other NWP 12 through 40, as part of a single and complete project, should be required to ensure that the effects

will be minimal. This notification will be reviewed by the Corps only. Coordination with the resource agencies is not required, but may be done on a case-by-case basis when determined by the District Engineer to be necessary. Furthermore, no notification is required to the Corps when any NWP 1 through 11 is combined with any other NWP. The issue of stacking of NWPs is discussed in more detail in the "Stacking of NWPs" section of this Preamble.

#### B. Section 404 Only Conditions

**1. Water Supply Intakes:** The Corps proposed no changes and there were no comments on this condition. The condition is adopted without change.

**2. Shellfish Production:** The Corps proposed no changes and there were no comments on this condition. The condition is adopted without change.

**3. Suitable Material:** The Corps proposed no changes to this condition. One commenter suggested that this condition should include a certification for the toxicity testing of the fill material. We believe the permittee is responsible for taking reasonable measures to ensure that suitable fill material is free from toxic pollutants. This suggestion would be an unreasonable requirement for minor projects with little likelihood of the potential for toxic pollutants in toxic amounts. Furthermore, the NWP restricts the use of certain materials. In addition, for those projects with a Preconstruction Notification, the DE will require testing if the DE has reason to believe the material may be contaminated. Another commenter suggested that asphalt be added to our list of unsuitable materials specifically mentioned in this condition. Since this has been a general misunderstanding throughout the country that has resulted in several violations, we agree with this commenter and have added this to the condition. This condition has been modified as discussed above.

**4. Mitigation:** The Corps proposed a change to this condition that would allow off-site mitigation in lieu of on-site mitigation, if it is the environmentally preferred option. Several commenters were opposed to the proposed change to this condition. They believed the change would result in one or more of the following: A more subjective evaluation would occur; the evaluation would focus solely on a project's benefit to the environment instead of the Corps process of balancing various public interest factors; the District Engineer would be required to evaluate one wetland type against another; and time requirements and

monetary costs would be increased for the applicants. Several other commenters were concerned that the proposed modification sidesteps the application of the mitigation sequencing process (avoidance, minimization, and compensation) and would allow evaluation of compensation concurrent with avoidance and minimization. Two commenters believed that the proposed evaluation process would allow "buy down" of impacts via compensation in order to result in a minimal net effect determination. Several commenters felt that mitigation should be eliminated as a condition since activities requiring mitigation, by definition, include more than minimal environmental impacts. One commenter stated that the proposal added no value in protecting or preserving wetlands. A few commenters supported the clarification and requirement for mitigation. One commenter recommended that the District Engineer have the ability to approve mitigation on-site, off-site, or at an established mitigation bank. Another commenter suggested that the U.S. Fish and Wildlife Service and U.S. Environmental Protection Agency should have the opportunity to comment on the results of the District Engineer's evaluation. One commenter criticized the general permit program for allowing wetland losses without avoidance of impacts or with no mitigation at all.

This condition requires that the permittee avoid and minimize discharges of dredged or fill material at the project site to the maximum extent practicable. This condition does not address the issue of requiring compensatory mitigation to reduce a project's impacts to the minimal effect level. This issue is discussed in the preamble in the discussion of General Condition 13. Furthermore, the "sequencing" requirement for individual permits for off-site avoidance under the section 404(b)(1) Guidelines does not apply to general permits. (See 40 CFR 230.7.) The proposed change was for allowing some projects, with minimal adverse effects, to be allowed less on-site avoidance and minimization than to the maximum extent practicable, provided off-site mitigation is provided such that there are more environmental benefits. We believe that where there is more environmental benefit from such mitigation, it should be allowed. The District Engineer will review and consider such a proposal, but will only approve it if the District Engineer determines that there is clear environment benefit. This condition is adopted as proposed.

5. *Spawning Areas*: The Corps proposed no changes to this condition. One commenter suggested that we ban discharges in spawning areas during spawning season. Another commenter suggested that discharges also be avoided during the incubation season. In addition to this condition, District and Division Engineers can and do add local restrictions, by regionally conditioning the NWP, to address certain activities along some waters at important times of the year for spawning activities. We believe that since these impacts vary from waterbody to waterbody and by type of activity, that it is best handled by specific regional conditions. This condition is adopted without change.

6. *Obstruction of High Flows*: The Corps proposed no changes to this condition. There were no comments on this condition. This condition is adopted without change.

7. *Adverse Effects From Impoundment*: The Corps proposed no changes to this condition. A couple of commenters suggested modifying this condition to require avoidance of impoundment impacts. We believe that this condition has been successful in ensuring that the impacts will be minimal and at the lowest level practicable. This condition is adopted without change.

8. *Waterfowl Breeding Areas*: The Corps proposed no changes to this condition. One commenter suggested disallowing any discharges within waterfowl breeding areas. Another commenter suggested that we include breeding areas for shorebirds and neotropical migratory songbirds. The Corps believes this would place an unreasonable and overly restrictive limitation on this NWP, and that the condition, as worded, provides sufficient protection. This condition is adopted without change.

9. *Removal of Temporary Fills*: The Corps proposed no changes to this condition. A few commenters suggested requiring the disturbed area be revegetated with indigenous plant species. We believe the conditions imposed on NWPs allowing for temporary fills will enable the area to revegetate naturally with native species once the area is restored to its preexisting elevation. This condition is adopted without change.

*Regional Conditioning of Nationwide Permits*: Concurrent with this Federal Register notice, District Engineers are issuing local public notices. In addition to the changes to some NWPs and NWP conditions required by the Chief of Engineers, the Division and District Engineers may propose regional

conditions or propose revocation of NWP authorization for all, some, or portions of the NWPs. Regional conditions may also be required by state Section 401 water quality certification or for state coastal zone consistency. District engineers will announce regional conditions or revocations by issuing local public notices. Information on regional conditions and revocation can be obtained from the appropriate District Engineer, as indicated below. Furthermore, this and additional information can be obtained on the internet at <http://wetland.usace.mil/>.

#### Alabama

Mobile District Engineer, ATTN: CESAM-OP-S, P.O. Box 2288, Mobile, AL 36628-0001

#### Alaska

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

#### Arizona

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

#### Arkansas

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

#### California

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

#### Colorado

Albuquerque District Engineer, ATTN: CESWA-CO-R, 4101 Jefferson Plaza NE, Rm 313, Albuquerque, NM 87109-3435

#### Connecticut

New England Division Engineer, ATTN: CENED-OD-R, 424 Trapelo Road, Waltham, MA 02254-9149

#### Delaware

Philadelphia District Engineer, ATTN: CENAP-OP-R, Wannamaker Building, 100 Penn Square, East Philadelphia, PA 19107-3390

#### Florida

Jacksonville District Engineer, ATTN: CESAJ-RD, P.O. Box 4970, Jacksonville, FL 32232-0019

#### Georgia

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

#### Hawaii

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

#### Idaho

Walla Walla District Engineer, ATTN: CENPW-OP-RF, Building 602, City-County Airport, Walla Walla, WA 99362-9265

#### Illinois

Rock Island District Engineer, ATTN: CENCR-OD-S, P.O. Box 2004, Rock Island, IL 61201-2004

#### Indiana

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

#### Iowa

Rock Island District Engineer, ATTN: CENCR-OD-S, P.O. Box 2204, Rock Island, IL 61201-2004

#### Kansas

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

#### Kentucky

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

#### Louisiana

New Orleans District Engineer, ATTN: CELMN-OD-S, P.O. Box 60267, New Orleans, LA 70160-0267

#### Maine

New England Division Engineer, ATTN: CENED-OD-R, 424 Trapelo Road, Waltham, MA 02254-9149

#### Maryland

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

#### Massachusetts

New England Division Engineer, ATTN: CENED-OD-R, 424 Trapelo Road, Waltham, MA 02254-9149

#### Michigan

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

#### Minnesota

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

#### Mississippi

Vicksburg District Engineer, ATTN: CELMV-CO-O, P.O. Box 80, Vicksburg, MS 39180-0080

#### Missouri

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

#### Montana

Omaha District Engineer, ATTN: CEMRO-OP-R, P.O. Box 5, Omaha, NE 68101-0005

#### Nebraska

Omaha District Engineer, ATTN: CEMRO-OP-R, 215 North 17th Street, Omaha, NE 68101-4978

#### Nevada

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

- New Hampshire  
New England Division Engineer, ATTN: CENED-OD-R, 424 Trapelo Road, Waltham, MA 02254-9149
- New Jersey  
Philadelphia District Engineer, ATTN: CENAP-OP-R, Wannamaker Building, 100 Penn Square East, Philadelphia, PA 19106-2991
- New Mexico  
Albuquerque District Engineer, ATTN: CESWA-CO-R, 4101 Jefferson Plaza NE, Rm 313, Albuquerque, NM 87109-3435
- New York  
New York District Engineer, ATTN: CENAN-OP-R, Jacob K. Javits Federal Building, New York, NY 10278-0090
- North Carolina  
Wilmington District Engineer, ATTN: CESA-W-CO-R, P.O. Box 1890, Wilmington, NC 28402-1890
- North Dakota  
Omaha District Engineer, ATTN: CEMRO-OP-R, 215 North 17th Street, Omaha, NE 68102-4978
- Ohio  
Huntington District Engineer, ATTN: CEORH-OR-F, 502 8th Street, Huntington, WV 25701-2070
- Oklahoma  
Tulsa District Engineer, ATTN: CESWT-OD-R, P.O. Box 61, Tulsa, OK 74121-0061
- Oregon  
Portland District Engineer, ATTN: CENPP-PL-R, P.O. Box 2946, Portland, OR 97208-2946
- Pennsylvania  
Baltimore District Engineer, ATTN: CENAB-OP-R, P.O. Box 1715, Baltimore, MD 21203-1715
- Rhode Island  
New England Division Engineer, ATTN: CENED-OD-R, 424 Trapelo Road, Waltham, MA 02254-9149
- South Carolina  
Charleston District Engineer, ATTN: CESAC-CO-P, P.O. Box 919, Charleston, SC 29402-0919
- South Dakota  
Omaha District Engineer, ATTN: CEMRO-OP-R, 215 North 17th Street, Omaha, NE 68102-4978
- Tennessee  
Nashville District Engineer, ATTN: CEORN-OR-F, P.O. Box 1070, Nashville, TN 37202-1070
- Texas  
Ft. Worth District Engineer, ATTN: CESWF-OD-R, P.O. Box 17300, Ft. Worth, TX 76102-0300
- Utah  
Sacramento District Engineer, ATTN: CESP-K-CO-O, 1325 J Street, CA 95814-4794
- Vermont  
New England Division Engineer, ATTN: CENED-OD-R, 424 Trapelo Road, Waltham, MA 02254-9149
- Virginia  
Norfolk District Engineer, ATTN: CENAO-OP-P, 803 Front Street, Norfolk, VA 23510-1096
- Washington  
Seattle District Engineer, ATTN: CENPS-OP-RG, P.O. Box 3755, Seattle, WA 98124-2255
- West Virginia  
Huntington District Engineer, ATTN: CEORH-OR-F, 502 8th Street, Huntington, WV 25701-2070
- Wisconsin  
St. Paul District Engineer, ATTN: CENCS-CO-R, 190 Fifth Street, East, St. Paul, MN 55101-1638
- Wyoming  
Omaha District Engineer, ATTN: CEMRO-OP-R, 215 North 17th Street, NE 68102-4978
- District of Columbia  
Baltimore District Engineer, ATTN: CENAB-OP-R, P.O. Box 1715, Baltimore, MD 21203-1715
- Pacific Territories  
Honolulu District Engineer, ATTN: CEPOD-ET-PO, Building 230, Fort Shafter, Honolulu, HI 96858-5440
- Puerto Rico & Virgin Is  
Jacksonville District Engineer, ATTN: CESAJ-RD, P.O. Box 4970, Jacksonville, FL 32232-0019
- Approved:  
Russell L. Fuhrman,  
*Major General, U.S. Army, Director of Civil Works.*
- Accordingly, these Nationwide Permits are issued as follows:
- Nationwide Permits and Conditions
- A. Index of the Nationwide Permits and Conditions*
- Nationwide Permits
1. Aids to Navigation
  2. Structures in Artificial Canals
  3. Maintenance
  4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities
  5. Scientific Measurement Devices
  6. Survey Activities
  7. Outfall Structures
  8. Oil and Gas Structures
  9. Structures in Fleeting and Anchorage Areas
  10. Mooring Buoys
  11. Temporary Recreational Structures
  12. Utility Line Discharges
  13. Bank Stabilization
  14. Road Crossings
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  16. Return Water from Upland Contained Disposal Areas
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  18. Minor Discharges
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  22. Removal of Vessels
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  26. Headwaters and Isolated Waters Discharges
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- B. Nationwide Permits and Conditions*
1. *Aids to Navigation:* The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard.



(See 33 CFR part 66, chapter I, subchapter C). (Section 10)

**2. Structures in Artificial Canals:** Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)). (Section 10)

**3. Maintenance:** The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area including those due to changes in materials, construction techniques, or current construction codes or safety standards which are necessary to make repair, rehabilitation, or replacement are permitted, provided the environmental effects resulting from such repair, rehabilitation, or replacement are minimal. Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction. This NWP authorizes the repair, rehabilitation, or replacement of those structures destroyed by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced or 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. Maintenance dredging and beach restoration are not authorized by this NWP. (Sections 10 and 404)

**4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities:** Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, clam and oyster digging; and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This NWP authorizes shellfish seeding provided this activity does not occur in wetlands or sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist, but may not be present in a given year.). This NWP does not authorize artificial reefs or impoundments and semi-

impoundments of waters of the United States for the culture or holding of motile species such as lobster, or the use of covered oyster trays or clam racks. (Sections 10 and 404)

**5. Scientific Measurement Devices:** Devices whose purpose is to measure and record scientific data such as staff gages, tide gages, water recording devices, water quality testing and improvement devices and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards and further for discharges of 10 to 25 cubic yards provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. (Sections 10 and 404)

**6. Survey Activities:** Survey activities including core sampling, seismic exploratory operations, plugging of seismic shot holes and other exploratory-type bore holes, soil survey and sampling, and historic resources surveys. Discharges and structures associated with the recovery of historic resources are not authorized by this NWP. Drilling and the discharge of excavated material from test wells for oil and gas exploration is not authorized by this NWP; the plugging of such wells is authorized. Fill placed for roads, pads and other similar activities is not authorized by this NWP. The NWP does not authorize any permanent structures. The discharge of drilling muds and cuttings may require a permit under section 402 of the Clean Water Act. (Sections 10 and 404)

**7. Outfall Structures.** Activities related to construction of outfall structures and associated intake structures where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted, or are otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System program (Section 402 of the Clean Water Act), provided that the permittee notifies the District Engineer in accordance with the "Notification" general condition. (Also see 33 CFR 330.1(e)). Intake structures per se are not included—only those directly associated with an outfall structure. (Sections 10 and 404)

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

or traffic separation scheme, except temporary anchors that comply with the fairway regulations in 33 CFR 322.5(l). (Where such limits have not been designated, or where changes are anticipated, District Engineers will consider asserting discretionary authority in accordance with 33 CFR 330.4(e) and will also review such proposals to ensure they comply with the provisions of the fairway regulations in 33 CFR 322.5(l). Any Corps review under this permit will be limited to the effects on navigation and national security in accordance with 33 CFR 322.5(f)). Such structures will not be placed in established danger zones or restricted areas as designated in 33 CFR part 334: nor will such structures be permitted in EPA or Corps designated dredged material disposal areas. (Section 10)

**9. Structures in Fleeting and Anchorage Areas.** Structures, buoys, floats and other devices placed within anchorage or fleeting areas to facilitate moorage of vessels where such areas have been established for that purpose by the U.S. Coast Guard. (Section 10)

**10. Mooring Buoys.** Non-commercial, single-boat, mooring buoys. (Section 10)

**11. Temporary Recreational Structures.** Temporary buoys, markers, small floating docks, and similar structures placed for recreational use during specific events such as water skiing competitions and boat races or seasonal use provided that such structures are removed within 30 days after use has been discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually. (Section 10)

**12. Utility Line Discharges.** Discharges of dredged or fill material associated with excavation, backfill or bedding for utility lines, including outfall and intake structures, provided there is no change in preconstruction contours. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. The term "utility line" does not include activities which drain a water of the United States, such as drainage tile; however, it does apply to pipes conveying drainage from another area. This NWP authorizes mechanized landclearing necessary for the installation of utility lines, including overhead utility lines, provided the cleared area is kept to the minimum necessary and preconstruction contours

are maintained. However, access roads, temporary or permanent, or foundations associated with overhead utility lines are not authorized by this NWP. Material resulting from trench excavation may be temporarily sidecast (up to three months) into waters of the United States, provided that the material is not placed in such a manner that it is dispersed by currents or other forces. The DE may extend the period of temporary side-casting not to exceed a total of 180 days, where appropriate. The area of waters of the United States that is disturbed must be limited to the minimum necessary to construct the utility line. In wetlands, the top 6" to 12" of the trench should generally be backfilled with topsoil from the trench. Excess material must be removed to upland areas immediately upon completion of construction. Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line. (See 33 CFR part 322).

**Notification:** The permittee must notify the district engineer in accordance with the "Notification" general condition, if any of the following criteria are met:

- (a) Mechanized landclearing in a forested wetland;
- (b) A Section 10 permit is required for the utility line;
- (c) The utility line in waters of the United States exceeds 500 feet; or,
- (d) The utility line is placed within a jurisdictional area (i.e., a water of the United States), and it runs parallel to a streambed that is within that jurisdictional area. (Sections 10 and 404)

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

- a. No material is placed in excess of the minimum needed for erosion protection;
- b. The bank stabilization activity is less than 500 feet in length;
- c. The activity will not exceed an average of one cubic yard per running foot placed along the bank below the plane of the ordinary high water mark or the high tide line;
- d. No material is placed in any special aquatic site, including wetlands;
- e. No material is of the type, or is placed in any location, or in any manner, so as to impair surface water flow into or out of any wetland area;
- f. No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored trees and treetops may be used in low energy areas); and,

g. The activity is part of a single and complete project.

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

**14. Road Crossings.** Fills for roads crossing waters of the United States (including wetlands and other special aquatic sites) provided the activity meets all of the following criteria:

- a. The width of the fill is limited to the minimum necessary for the actual crossing;
- b. The fill placed in waters of the United States is limited to a filled area of no more than 1/3 acre. Furthermore, no more than a total of 200 linear feet of the fill for the roadway can occur in special aquatic sites, including wetlands;
- c. The crossing is culverted, bridged or otherwise designed to prevent the restriction of, and to withstand, expected high flows and tidal flows, and to prevent the restriction of low flows and the movement of aquatic organisms;
- d. The crossing, including all attendant features, both temporary and permanent, is part of a single and complete project for crossing of a water of the United States; and,
- e. For fills in special aquatic sites, including wetlands, the permittee notifies the District Engineer in accordance with the "Notification" general condition. The notification must also include a delineation of affected special aquatic sites, including wetlands.

This NWP may not be combined with NWP 18 or NWP 26 for the purpose of increasing the footprint of the road crossing. Some road fills may be eligible for an exemption from the need for a Section 404 permit altogether (see 33 CFR 323.4). Also, where local circumstances indicate the need, District Engineers will define the term "expected high flows" for the purpose of establishing applicability of this NWP. (Sections 10 and 404)

**15. U.S. Coast Guard Approved Bridges.** Discharges of dredged or fill material incidental to the construction of bridges across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and

temporary construction and access fills provided such discharges have been authorized by the U.S. Coast Guard as part of the bridge permit. Causeways and approach fills are not included in this NWP and will require an individual or regional Section 404 permit. (Section 404)

**16. Return Water From Upland Contained Disposal Areas.** Return water from an upland, contained dredged material disposal area. The dredging itself may require a section 404 permit (33 CFR 323.2(d)), but will require a Section 10 permit if located in navigable waters of the United States. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d) even though the disposal itself occurs on the upland and thus does not require a Section 404 permit. This NWP satisfies the technical requirement for a Section 404 permit for the return water where the quality of the return water is controlled by the state through the Section 401 certification procedures. (Section 404)

**17. Hydropower Projects:** Discharges of dredged or fill material associated with (a) small hydropower projects at existing reservoirs where the project, which includes the fill, are licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; and has a total generating capacity of not more than 5000 KW; and the permittee notifies the District Engineer in accordance with the "Notification" general condition; or (b) hydropower projects for which the FERC has granted an exemption from licensing pursuant to section 408 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and section 30 of the Federal Power Act, as amended; provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. (Section 404)

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

- a. The quantity of discharged material and the volume of excavated area does not exceed 25 cubic yards below the plane of the ordinary high water mark or the high tide line;
- b. The discharge, including any excavated area, will not cause the loss of more than 1/10 acre of a special aquatic site, including wetlands. For the purposes of this NWP, the acreage limitation includes the filled area and excavated area plus special aquatic sites that are adversely affected by flooding and special aquatic sites that are

drained so that they would no longer be a water of the United States as a result of the project;

c. If the discharge, including any excavated area, exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line or if the discharge is in a special aquatic site, including wetlands, the permittee notifies the District Engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands (Also see 33 CFR 330.1(e)); and

d. The discharge, including all attendant features, both temporary and permanent, is part of a single and complete project and is not placed for the purpose of a stream diversion.

e. This NWP can not be used in conjunction with NWP 26 for any single and complete project. (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) as part of a single and complete project. This NWP does not authorize the dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist, but may not be present in a given year), anadromous fish spawning areas, or wetlands, or the connection of canals or other artificial waterways to navigable waters of the United States (see 33 CFR 322.5(g)). (Sections 10 and 404)

**20. Oil Spill Cleanup:** Activities required for the containment and cleanup of oil and hazardous substances which are subject to the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR part 300) provided that the work is done in accordance with the Spill Control and Countermeasure Plan required by 40 CFR part 112.3 and any existing State contingency plan and provided that the Regional Response Team (if one exists in the area) concurs with the proposed containment and cleanup action. (Sections 10 and 404)

**21. Surface Coal Mining Activities:** Activities associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the permittee

notifies the District Engineer in accordance with the "Notification" general condition. The notification must include an OSM or state approved mitigation plan. The Corps, at the discretion of the District Engineer, may require a bond to ensure success of the mitigation, if no other Federal or state agency has required one. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.1(e)) (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 the removal of vessels listed or determined eligible for listing on the National Register of Historic Places unless the District Engineer is notified and indicates that there is compliance with the "Historic Properties" general condition. This NWP does not authorize maintenance dredging, shoal removal, or river bank snagging. Vessel disposal in waters of the United States may need a permit from EPA (see 40 CFR 229.3). (Sections 10 and 404)

**23. Approved Categorical Exclusions:** Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where that agency or department has determined, pursuant to the Council on Environmental Quality Regulation for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR part 1500 et seq.), that the activity, work, or discharge is categorically excluded from environmental documentation because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment, and the Office of the Chief of Engineers (ATTN: CECW-OR) has been furnished notice of the agency's or department's application for the categorical exclusion and concurs with that determination. Prior to approval for purposes of this NWP of any agency's categorical exclusions, the Chief of Engineers will solicit public comment. In addressing these comments, the Chief of Engineers may require certain conditions for authorization of an agency's categorical exclusions under this NWP. (Sections 10 and 404)

**24. State Administered Section 404 Program.** Any activity permitted by a state administering its own section 404

permit program pursuant to 33 U.S.C. 1344(g)-(l) is permitted pursuant to section 10 of the Rivers and Harbors Act of 1899. Those activities which do not involve a section 404 state permit are not included in this NWP, but certain structures will be exempted by section 154 of Pub. L. 94-587, 90 Stat. 2917 (33 U.S.C. 591) (see 33 CFR 322.3(a)(2)). (Section 10)

**25. Structural Discharges:** Discharges of material such as concrete, sand, rock, etc. into tightly sealed forms or cells where the material will be used as a structural member for standard pile supported structures, such as bridges, transmission line footings, and walkways or for general navigation, such as mooring cells, including the excavation of bottom material from within the form prior to the discharge of concrete, sand, rock, etc. This NWP does *not* authorize filled structural members that would support buildings, homes, parking areas, storage areas and other such structures. Housepads or other building pads are also not included in this NWP. The structure itself may require a section 10 permit if located in navigable waters of the United States. (Section 404)

**26. Headwaters and Isolated Waters Discharges:** Discharges of dredged or fill material into headwaters and isolated waters provided that the activity meets all of the following criteria:

a. The discharge does not cause the loss of more than 3 acres of waters of the United States nor cause the loss of waters of the United States for a distance greater than 500 linear feet of the stream bed;

b. For discharges causing the loss of greater than 1/3 acre of waters of the United States, the permittee notifies the District Engineer in accordance with the "Notification" general condition;

c. For discharges causing a loss of 1/3 acre or less of waters of the United States the permittee must submit a report within 30 days of completion of the work, containing the information listed below;

d. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands (Also see 33 CFR 330.1(e)); and

e. The discharge, including all attendant features, both temporary and permanent, is part of a single and complete project. Note, this NWP will expire on February 11, 1999.

For the purposes of this NWP, the acreage of loss of waters of the United States includes the filled area plus waters of the United States that are adversely affected by flooding,

excavation or drainage as a result of the project. The 3 acre and  $\frac{1}{3}$  acre limits of NWP 26 are absolute, and cannot be increased by any mitigation plan offered by the applicant or required by the District Engineer. Whenever any other NWP is used in conjunction with this NWP, the total acreage of impacts to waters of the United States of all NWPs combined, can not exceed 3 acres.

**Subdivisions:** For any real estate subdivision created or subdivided after October 5, 1984, a notification pursuant to subsection (b) of this NWP is required for any discharge which would cause the aggregate total loss of waters of the United States for the entire subdivision to exceed  $\frac{1}{3}$  acre. Any discharge in any real estate subdivision which would cause the aggregate total loss of waters of the United States in the subdivision to exceed 3 acres is not authorized by this NWP; unless the District Engineer exempts a particular subdivision or parcel by making a written determination that: (1) The individual and cumulative adverse environmental effects would be minimal and the property owner had, after October 5, 1984, but prior to February 11, 1997, committed substantial resources in reliance on NWP 26 with regard to a subdivision, in circumstances where it would be inequitable to frustrate the property owner's investment-backed expectations, or (2) that the individual and cumulative adverse environmental effects would be minimal, high quality wetlands would not be adversely affected, and there would be an overall benefit to the aquatic environment. Once the exemption is established for a subdivision, subsequent lot development by individual property owners may proceed using NWP 26. For purposes of NWP 26, the term "real estate subdivision" shall be interpreted to include circumstances where a landowner or developer divides a tract of land into smaller parcels for the purpose of selling, conveying, transferring, leasing, or developing said parcels. This would include the entire area of a residential, commercial or other real estate subdivision, including all parcels and parts thereof.

**Report:** For discharges causing the loss of  $\frac{1}{3}$  acre or less of waters of the United States the permittee must submit a report within 30 days of completion of the work, containing the following information:

- (a) Name, address, and telephone number of the permittee;
- (b) Location of the work;
- (c) Description of the work; and,
- (d) Type and acreage (or square feet) of the loss of waters of the United States

(e.g.,  $\frac{1}{10}$  acre of marsh and 50 Square feet of a stream.) (Section 404)

**27. Wetland and Riparian Restoration and Creation Activities:** Activities in waters of the United States associated with the restoration of former non-tidal wetlands and riparian areas, the enhancement of degraded wetlands and riparian areas, and creation of wetlands and riparian areas; (i) On non-Federal public lands and private lands, in accordance with the terms and conditions of a binding wetland restoration or creation agreement between the landowner and the U.S. Fish and Wildlife Service or the Natural Resources Conservation Service (NRCS) or voluntary wetland restoration, enhancement, and creation actions documented by the NRCS pursuant to NRCS regulations; or (ii) on any Federal land; or (iii) on reclaimed surface coal mined lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining or the applicable state agency. (The future reversion does not apply to wetlands created, restored or enhanced as mitigation for the mining impacts, nor naturally due to hydrologic or topographic features, nor for a mitigation bank.); or (iv) on any public or private land, provided the permittee notifies the District Engineer in accordance with the "Notification" general condition.

Such activities include, but are not limited to: Installation and maintenance of small water control structures, dikes, and berms; backfilling of existing drainage ditches; removal of existing drainage structures; construction of small nesting islands; plowing or discing for seed bed preparation; and other related activities. This NWP applies to restoration projects that serve the purpose of restoring "natural" wetland hydrology, vegetation, and function to altered and degraded non-tidal wetlands and "natural" functions of riparian areas. This NWP does not authorize the conversion of natural wetlands to another aquatic use, such as creation of waterfowl impoundments where a forested wetland previously existed.

**Reversion:** For restoration, enhancement and creation projects conducted under paragraphs (ii) and (iv), 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 at that time would be required for any reversion. For restoration, enhancement and creation projects conducted under paragraphs (i) and (iii), this NWP also authorizes any

future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (i.e., prior to the restoration, enhancement, or creation activities) within five years after expiration of a limited term wetland restoration or creation agreement or permit, even if the discharge occurs after this NWP expires. The five year reversion limit does not apply to agreements without time limits reached under paragraph (i). 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. Prior to 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 back to its prior physical condition, it will be subject to whatever the Corps regulatory requirements will be at that future date. (Sections 10 and 404)

**28. Modifications of Existing Marinas:** Reconfiguration of existing docking facilities within an authorized marina area. No dredging, additional slips or dock spaces, or expansion of any kind within waters of the United States is authorized by this NWP. (Section 10)

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

a. The discharge does not cause the loss of more than  $\frac{1}{2}$  acre of non-tidal waters of the United States, including non-tidal wetlands;

b. The permittee notifies the District Engineer in accordance with the "Notification" general condition;

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

d. The discharge is part of a single and complete project; furthermore, that for any subdivision created on or after November 22, 1991, the discharges authorized under this NWP may not exceed an aggregate total loss of waters of the United States of  $\frac{1}{2}$  acre for the entire subdivision;

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

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

g. This NWP may not be used in conjunction with NWP 14, NWP 18, or NWP 26, for any parcel; and,

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

For the purposes of this NWP, the acreage of loss of waters of the United States includes the filled area previously permitted, the proposed filled area, and any other waters of the United States that are adversely affected by flooding, excavation, or drainage as a result of the project. Whenever any other NWP is used in conjunction with this NWP, the total acreage of impacts to waters of the United States of all NWPs combined, can not exceed 1/2 acres. This NWP authorizes activities only by individuals; for this purpose, the term "individual" refers to a natural person and/or a married couple, but does not include a corporation, partnership, or similar entity. For the purposes of this NWP, a parcel of land is defined as "the entire contiguous quantity of land in possession of, recorded as property of, or owned (in any form of ownership, including land owned as a partner, corporation, joint tenant, etc.) by the same individual (and/or that individual's spouse), and comprises not only the area of wetlands sought to be filled, but also all land contiguous to those wetlands, owned by the individual (and/or that individual's spouse) in any form of ownership". (Sections 10 and 404)

**30. Moist Soil Management for Wildlife:** Discharges of dredged or fill material and maintenance activities that are associated with moist soil management for wildlife performed on non-tidal Federally-owned or managed and State-owned or managed property, for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage habitat and feeding areas for wildlife. Such activities include, but are not limited to: The repair, maintenance or replacement of existing water control structures; the repair or maintenance of dikes; and plowing or discing to impede succession, prepare seed beds, or establish fire breaks. Sufficient vegetated buffers must be maintained adjacent to all open water bodies, streams, etc., to preclude water quality degradation due to erosion and sedimentation. This NWP does not

authorize the construction of new dikes, roads, water control structures, etc. associated with the management areas. This NWP does not authorize converting wetlands to uplands, impoundments or other open water bodies. (Section 404)

**31. Maintenance of Existing Flood Control Facilities:** Discharges of dredged or fill material for the maintenance of existing flood control facilities, including debris basins, retention/detention basins, and channels that were (i) previously authorized by the Corps by individual permit, general permit, or by 33 CFR 330.3 and constructed or (ii) constructed by the Corps and transferred to a local sponsor for operation and maintenance. The maintenance is limited to that approved in a maintenance baseline determination made by the district engineer (DE). The prospective permittee will provide the DE with sufficient evidence for the DE to determine the approved and constructed baseline. Subsequent to the determination of the maintenance baseline and prior to any maintenance work, the permittee must notify the DE in accordance with the "Notification" general condition.

All dredged material must be placed in an upland site or a currently authorized disposal site in waters of the United States, and proper siltation controls must be used. This NWP does not authorize the removal of sediment and associated vegetation from natural water courses. (Activities that involve only the cutting and removing of vegetation above the ground, e.g., mowing, rotary cutting, and chainsawing, where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material, does not require a Section 404 permit in accordance with 33 CFR 323.2(d)(2)(ii)). Only constructed channels within stretches of natural rivers that have been previously authorized as part of a flood control facility could be authorized for maintenance under this NWP.

**Maintenance Baseline:** Upon receipt of sufficient evidence, the DE will determine the maintenance baseline. The maintenance baseline is the existing flood control project that the DE has determined can be maintained under this NWP, subject to any case-specific conditions required by the DE. In determining the maintenance baseline, the DE will consider the following factors: The approved facility, the actual constructed facility, the Corps constructed project that was transferred, the maintenance history, if the facility has been functioning at a reduced

capacity and for how long, present vs. original flood control needs, and if sensitive/unique functions and values may be adversely affected. Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5. This NWP can not be used until the DE determines the maintenance baseline and the need for mitigation and any regional or activity-specific conditions. The maintenance baseline will only be determined once and will remain valid for any subsequent reissuance of this NWP. However, if the project is effectively abandoned or reduced due to lack of proper maintenance, a new determination of a maintenance baseline would be required before this NWP could be used for subsequent maintenance.

**Mitigation:** In determining the need for mitigation, the DE will consider the following factors: Any original mitigation required, the current environmental setting, and any adverse effects of the maintenance project that were not mitigated in the original construction. The DE will not delay needed maintenance for completion of any required mitigation, provided that the DE and the applicant establish a schedule for the identification, approval, development, construction and completion of such required mitigation. (Sections 10 and 404)

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

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

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

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

c. The District Engineer issues a verification letter authorizing the activity subject to the terms and conditions of this nationwide permit 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 CWA and/or section 10 of the Rivers and Harbors Act of 1899.

For both (i) or (ii) above, compliance is a condition of the NWP itself. Any authorization under this NWP is automatically revoked if the permittee does not comply with the terms of this NWP or the terms of the court decision, consent decree, or judicial/non-judicial settlement agreement or fails to complete the work by the specified completion date. This NWP does not apply to any activities occurring after the date of the decision, decree, or agreement that are not for the purpose of mitigation, restoration, or environmental benefit. Prior to reaching any settlement agreement the Corps will ensure compliance with the provisions of 33 CFR part 326 and 33 CFR 330.6 (d)(2) and (e). (Sections 10 and 404)

**33. Temporary Construction, Access and Dewatering:** Temporary structures, work and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites; provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard, or for other construction activities not subject to the Corps or U.S. Coast Guard regulations. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must be of materials, and placed in a manner, that will not be eroded by expected high flows. The use of dredged material may be allowed if it is determined by the District Engineer that it will not cause more than minimal adverse effects on aquatic resources. Temporary fill must be entirely removed to upland areas, or dredged material returned to its original location, following completion of the construction activity, and the affected areas must be restored to the pre-project conditions. Cofferdams cannot be used to dewater wetlands or other aquatic areas so as to change their use. Structures left in place after cofferdams are removed require a section 10 permit if located in navigable waters of the United States. (See 33 CFR part 322). The permittee must notify the District Engineer in accordance with the "Notification" general condition. The notification must also include a restoration plan of reasonable measures to avoid and minimize adverse effects to aquatic resources. The District Engineer will add special conditions, where necessary, to ensure that adverse environmental effects are minimal. Such conditions may include: Limiting the temporary work to the minimum necessary; requiring seasonal

restrictions; modifying the restoration plan; and requiring alternative construction methods (e.g., construction mats in wetlands where practicable.). (Sections 10 and 404)

**34. Cranberry Production Activities:** Discharges of dredged or fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations provided that the activity meets all of the following criteria:

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

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

c. The activity does not result in a net loss of wetland acreage.

This NWP does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes of this NWP, the cumulative total of 10 acres will be measured over the period that this NWP is valid. (Section 404)

**35. Maintenance Dredging of Existing Basins:** Excavation and removal of accumulated sediment for maintenance of existing marina basins, access channels to marina basins or boat slips, and boat slips to previously authorized depths or controlling depths for ingress/egress, whichever is less, provided the dredged material is disposed of at an upland site and proper siltation controls are used. (Section 10)

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

a. The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or placement of pre-cast concrete planks or slabs.

(Unsuitable material that causes unacceptable chemical pollution or is structurally unstable is not authorized);

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

c. The base material is crushed stone, gravel or other suitable material;

d. The excavation is limited to the area necessary for site preparation and all excavated material is removed to the upland; and,

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

Dredging to provide access to the boat ramp may be authorized by another NWP, regional general permit, or individual permit pursuant to section 10 if located in navigable waters of the United States. (Sections 10 and 404)

**37. Emergency Watershed Protection and Rehabilitation:** Work done by or funded by the Natural Resources Conservation Service qualifying as an "exigency" situation (requiring immediate action) under its Emergency Watershed Protection Program (7 CFR part 624) and work done or funded by the Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 509.13) provided the District Engineer is notified in accordance with the "Notification" general condition. (Also see 33 CFR 330.1(e)). (Sections 10 and 404)

**38. Cleanup of Hazardous and Toxic Waste:** Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. Court ordered remedial action plans or related settlements are also authorized by this NWP. This NWP does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste. Activities undertaken entirely on a 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. (Sections 10 and 404)

**39. Reserved.**

**40. Farm Buildings:** Discharges of dredged or fill material into jurisdictional wetlands (but not including prairie potholes, playa lakes, or vernal pools) that were in agricultural crop production prior to December 23, 1985, i.e., farmed wetlands, for foundations and building pads for farm buildings. The discharge will be limited to the minimum necessary but will in no case exceed 1 acre (see the "Mitigation" Section 404 only condition). The permittee must notify the District Engineer in accordance with the "Notification" general condition for any farm building within 500 linear feet of any flowing water. (Section 404)

### C. Nationwide Permit Conditions

#### General Conditions

The following general conditions must be followed in order for any authorization by a NWP to be valid:

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

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

3. *Erosion and Siltation Controls:* Appropriate erosion and siltation controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date.

4. *Aquatic Life Movements:* No activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area, unless the activity's primary purpose is to impound water.

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

6. *Regional and Case-by-Case Conditions:* The activity must comply with any regional conditions which 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 or tribe in its section 401 water quality certification.

7. *Wild and Scenic Rivers:* No activity may occur in a component of the National Wild and Scenic River System; or in a river officially designated by Congress as a "study river" for possible inclusion in the system, while the river is in an official study status; unless the appropriate Federal agency, with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely effect the Wild and Scenic River designation, or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency in the area (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service.)

8. *Tribal Rights:* No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

9. *Water Quality Certification:* In certain states, an individual Section 401

water quality certification must be obtained or waived (see 33 CFR 330.4(c)).

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

11. *Endangered Species:* (a) No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which is likely to destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the District Engineer if any listed species or critical habitat might be affected or is in the vicinity of the project, and shall not begin work on the activity until notified by the District Engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized.

(b) Authorization of an activity by a nationwide permit does not authorize the "take" of a threatened or endangered species as defined under the Federal Endangered Species Act. In the absence of separate authorization (e.g., an ESA section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, both lethal and non-lethal "takes" of protected species are in violation of the Endangered Species Act. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. Fish and Wildlife Service and National Marine Fisheries Service or their world wide web pages at <http://www.fws.gov/~r9endspp/endspp.html> and [http://kingfish.spp.mnfs.gov/tmcintyr/prot\\_res.html#ES](http://kingfish.spp.mnfs.gov/tmcintyr/prot_res.html#ES) and Recovery, respectively.

12. *Historic Properties:* No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the DE has complied with the provisions of 33 CFR part 325, appendix C. The prospective permittee must notify the District Engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity

is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places (see 33 CFR 330.4(g)).

#### 13. Notification:

(a) *Timing:* Where required by the terms of the NWP, the prospective permittee must notify the District Engineer with a Pre-Construction Notification (PCN) as early as possible and shall not begin the activity:

(1) Until notified by the District Engineer that the activity may proceed under the NWP with any special conditions imposed by the District or Division Engineer; or

(2) If notified by the District or Division Engineer that an individual permit is required; or

(3) Unless 30 days (or 45 days for NWP 26 only) have passed from the District Engineer's receipt of the notification and the prospective permittee has not received notice from the District or Division Engineer. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) *Contents of Notification:* The notification must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed project;

(3) Brief description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s) or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity; and

(4) For NWPs 14, 18, 21, 26, 29, 34, and 38, the PCN must also include a delineation of affected special aquatic sites, including wetlands (see paragraph 13(f));

(5) For NWP 21—*Surface Coal Mining Activities*, the PCN must include an OSM or state approved mitigation plan.

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

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

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

(iii) A description of the entire parcel, including its size, and a delineation of wetlands. For the purpose of this NWP, parcels of land measuring 0.5 acre or less will not require a formal on-site delineation. However, the applicant

shall provide an indication of where the wetlands are and the amount of wetlands that exists on the property. For parcels greater than 0.5 acre in size, a formal wetland delineation must be prepared in accordance with the current method required by the Corps. (See paragraph 13(f));

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

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

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

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

(iii) Location of the dredged material disposal site.

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

(c) *Form of Notification*: The standard individual permit application form (Form ENG 4345) may be used as the notification but must clearly indicate that it is a PCN and must include all of the information required in (b) (1)–(7) of General Condition 13. A letter may also be used.

(d) *District Engineer's Decision*: In reviewing the pre-construction notification for the proposed activity, the District Engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. The prospective permittee may, optionally, submit a proposed mitigation plan with the pre-construction notification to expedite the process and the District Engineer will consider any optional

mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed work are minimal. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects are minimal, the District Engineer will notify the permittee and include any conditions the DE deems necessary.

Any mitigation proposal must be approved by the District Engineer prior to commencing work. If the prospective permittee elects to submit a mitigation plan, the District Engineer will expeditiously review the proposed mitigation plan, but will not commence a second 30-day (or 45-day for NWP 26) notification procedure. If the net adverse effects of the project (with the mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant stating that the project can proceed under the terms and conditions of the nationwide permit.

If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then he will notify the applicant either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (2) that the project is authorized under the NWP subject to the applicant's submitting a mitigation proposal that would reduce the adverse effects to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions.

(e) *Agency Coordination*: The District Engineer will consider any comments from Federal and State agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

(i) For NWP 14, 21, 26 (between 1 and 3 acres of impact), 29, 33, 37, and 38. The District Engineer will, upon receipt of a notification, provide immediately, e.g., facsimile transmission, overnight mail or other expeditious manner, a copy to the appropriate offices of the Fish and Wildlife Service, State natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO), and, if appropriate, the National Marine Fisheries Service. With the exception of NWP 37, these agencies will then have 5 calendar days from the date the material is transmitted to telephone or fax the District Engineer

notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 10 calendar days (16 calendar days for NWP 26 PCNs) before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency. The District Engineer will indicate in the administrative record associated with each notification that the resource agencies' concerns were considered. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification.

(ii) *Optional Agency Coordination*. For NWPs 5, 7, 12, 13, 17, 18, 27, 31, and 34, where a Regional Administrator of EPA, a Regional Director of USFWS, or a Regional Director of NMFS has formally requested general notification from the District Engineer for the activities covered by any of these NWPs, the Corps will provide the requesting agency with notification on the particular NWPs. However, where the agencies have a record of not generally submitting substantive comments on activities covered by any of these NWPs, the Corps district may discontinue providing notification to those regional agency offices. The District Engineer will coordinate with the resources agencies to identify which activities involving a PCN that the agencies will provide substantive comments to the Corps. The District Engineer may also request comments from the agencies on a case by case basis when the District Engineer determines that such comments would assist the Corps in reaching a decision whether effects are more than minimal either individually or cumulatively.

(iii) *Optional Agency Coordination, 401 Denial*. For NWP 26 only, where the state has denied its 401 water quality certification for activities with less than 1 acre of wetland impact, the EPA regional administrator may request agency coordination of PCNs between  $\frac{1}{3}$  and 1 acre. The request may only include acreage limitations within the  $\frac{1}{3}$  to 1 acre range for which the state has denied water quality certification. In cases where the EPA has requested coordination of projects as described here, the Corps will forward the PCN to EPA only. The PCN will then be forwarded to the Fish and Wildlife Service and the National Marine Fisheries Service by EPA under agreements among those agencies. Any agency receiving the PCN will be bound



by the EPA timeframes for providing comments to the Corps.

(f) *Wetlands Delineations:* Wetland delineations must be prepared in accordance with the current method required by the Corps. For NWP 29 see paragraph (b)(6)(iii) for parcels less than 0.5 acres in size. The permittee may ask the Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 30-day period (45 days for NWP 26) will not start until the wetland delineation has been completed and submitted to the Corps, where appropriate.

(g) *Mitigation:* Factors that the District Engineer will consider when determining the acceptability of appropriate and practicable mitigation include, but are not limited to:

(i) To be practicable, the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of the overall project purposes;

(ii) To the extent appropriate, permittees should consider mitigation banking and other forms of mitigation including contributions to wetland trust funds, "in lieu fees" to organizations such as The Nature Conservancy, state or county natural resource management agencies, where such fees contribute to the restoration, creation, replacement, enhancement, or preservation of wetlands. Furthermore, examples of mitigation that may be appropriate and practicable include but are not limited to: Reducing the size of the project; establishing wetland or upland buffer zones to protect aquatic resource values; and replacing the loss of aquatic resource values by creating, restoring, and enhancing similar functions and values. In addition, mitigation must address wetland impacts, such as functions and values, and cannot be simply used to offset the acreage of wetland losses that would occur in order to meet the acreage limits of some of the NWPs (e.g., for NWP 26, 5 acres of wetlands cannot be created to change a 6-acre loss of wetlands to a 1 acre loss;

however, 2 created acres can be used to reduce the impacts of a 3-acre loss.)

14. *Compliance Certification:* Every permittee who has received a Nationwide permit verification from the Corps will submit a signed certification regarding the completed work and any required mitigation. The certification will be forwarded by the Corps with the authorization letter and will include: a. A statement that the authorized work was done in accordance with the Corps authorization, including any general or specific conditions; b. A statement that any required mitigation was completed in accordance with the permit conditions; c. The signature of the permittee certifying the completion of the work and mitigation.

15. *Multiple Use of Nationwide Permits:* In any case where any NWP number 12 through 40 is combined with any other NWP number 12 through 40, as part of a single and complete project, the permittee must notify the District Engineer in accordance with paragraphs a, b, and c on the "Notification" General Condition number 13. Any NWP number 1 through 11 may be combined with any other NWP without notification to the Corps, unless notification is otherwise required by the terms of the NWPs. As provided at 33 CFR 330.6(c) two or more different NWPs can be combined to authorize a single and complete project. However, the same NWP cannot be used more than once for a single and complete project.

#### *Section 404 Only Conditions*

In addition to the General Conditions, the following conditions apply only to activities that involve the discharge of dredged or fill material into waters of the U.S., and must be followed in order for authorization by the NWPs to be valid:

1. *Water Supply Intakes:* No discharge of dredged or fill material may occur in the proximity of a public water supply intake except where the discharge is for repair of the public water supply intake structures or adjacent bank stabilization.

2. *Shellfish Production:* No discharge of dredged or fill material may occur in areas of concentrated shellfish production, unless the discharge is directly related to a shellfish harvesting activity authorized by NWP 4.

3. *Suitable Material:* No discharge of dredged or fill material may consist of unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.) and material discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).

4. *Mitigation:* Discharges of dredged or fill material into waters of the United States must be minimized or avoided to the maximum extent practicable at the project site (i.e., on-site), unless the District Engineer approves a compensation plan that the District Engineer determines is more beneficial to the environment than on-site minimization or avoidance measures.

5. *Spawning Areas:* Discharges in spawning areas during spawning seasons must be avoided to the maximum extent practicable.

6. *Obstruction of High Flows:* To the maximum extent practicable, discharges must not permanently restrict or impede the passage of normal or expected high flows or cause the relocation of the water (unless the primary purpose of the fill is to impound waters).

7. *Adverse Effects From Impoundments:* If the discharge creates an impoundment of water, adverse effects on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow shall be minimized to the maximum extent practicable.

8. *Waterfowl Breeding Areas:* Discharges into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

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