

DEPARTMENT OF DEFENSE**Department of the Army, Corps of Engineers****Proposal To Issue and Modify Nationwide Permits**

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent and request for comments.

SUMMARY: To improve protection of the environment the Army Corps of Engineers is proposing changes to its Nationwide General Permit Program. On December 13, 1996, the Corps announced that it would phase out nationwide permit 26 (NWP 26) which covered certain activities in isolated waters and waters above the "headwaters" point on streams. Specifically, the Corps is proposing to issue 6 new nationwide permits (NWPs) and modify 6 existing NWPs to become effective when NWP 26 expires. In addition, the Corps is proposing to add one NWP condition and modify 6 existing NWP conditions, which will apply to all existing NWPs as well as the new and modified NWPs proposed in this notice. These NWPs are activity-specific, and most are restricted to discharges of dredged or fill material into non-tidal waters of the United States. In addition to improving protection of our aquatic resources, a principal objective is to ensure that those activities with truly minimal impacts are authorized in an efficient manner by a general permit. In this regard, we believe that these new and modified NWPs will authorize those activities with minimal impacts that are currently authorized by NWP 26. They will also authorize like activities with minimal impacts that occur below the headwaters. These NWPs will allow the Corps to improve overall environmental protection by allowing the Corps to prioritize its work in non-tidal waters based on the quality of impacted aquatic systems and the specific impacts of a proposed project. Although NWP 26 was originally scheduled to expire on December 13, 1998, the Corps is proposing to change the expiration date to March 28, 1999, to ensure that the Corps has adequate time to effectively involve the other agencies and the public in a new regional conditioning process. When the Corps first established the December 13, 1998, expiration date for NWP 26, we did not contemplate the extensive process needed to develop sound regional conditions. This extension is necessary since a lapse between the expiration of

NWP 26 and the effective date of the replacement NWPs is unacceptable and unnecessary.

The Corps is also proposing to modify its "single family home" NWP (NWP 29) to change the acreage limit to 1/4 acre, as discussed at the end of the preamble to this notice. In the interim, the Corps is suspending NWP 29 for single family housing activities that result in the loss of greater than 1/4 acre of non-tidal waters of the United States, including non-tidal wetlands. The Corps is also making available a revised environmental assessment for NWP 29.

The public is invited to provide comments on these proposals and is being given the opportunity to request a public hearing on these activity-specific NWPs.

DATES: Comments on the proposed new and modified NWPs and the proposed modification of NWP 29 must be received by August 31, 1998. Comments on the proposal to extend the expiration date of NWP 26 to March 28, 1999, must be received by July 31, 1998.

ADDRESSES: HQUSACE, CECW-OR, Washington, D.C. 20314-1000.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson or Mr. Sam Collinson, CECW-OR, at (202) 761-0199 or <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>.

SUPPLEMENTARY INFORMATION:**Background**

The protection and restoration of the aquatic environment is an integral part of the Army Corps of Engineers mission. In its recent Strategic Plan, the Corps made it clear that this part of its mission was equal to its more traditional missions of navigation and flood damage reduction. Over the past 10 years the Corps has made remarkable progress in improving environmental protection through its Regulatory Program. An example is the substantial improvements in the Nationwide Permit program. Through each of the last two five-year reauthorization cycles, the Corps has improved the NWP program. This proposal today takes an additional important step as the Corps phases out NWP 26.

While some may not appreciate fully the import of today's proposal on improving environmental protection, one must only discuss this issue with those who have implemented the NWPs for the past 20 years to gain an accurate account of the substantial progress today's action reflects. This proposal is a reflection of the Corps unequivocal commitment to its environmental mission and to wetlands protection.

The Corps is also committed to reducing regulatory burdens where possible. Consistent with the President's 1993 Wetlands Plan, the Corps, along with other Federal agencies, has made the Regulatory Program more fair, more flexible, and more effective. This NWP proposal also reflects this commitment.

The Corps of Engineers is proposing new and modified NWPs that will authorize those activities with minimal adverse effects on the aquatic environment that are currently authorized by NWP 26. This will ensure the NWP program is based on types of activities and continues to authorize work that has no more than minimal adverse effects on the aquatic environment. The Corps believes that the overall protection of the aquatic environment will be increased by these new and modified NWPs when compared to the existing NWP program. The proposed NWPs will help the Corps achieve its goal of managing its workload based on impacts to the aquatic environment as a whole, not on impacts to any particular geographic type of waters, such as isolated waters or headwater streams. The proposed new and modified NWPs, along with the existing NWPs, will allow the Corps to manage its workload by efficiently authorizing activities with minimal adverse effects and focusing its limited resources on aquatic areas of higher value. Higher value waters, including wetlands, will receive additional protection through increased regional conditioning of NWPs, case-specific special conditions, and case-specific discretionary authority to require a standard individual permit where necessary. These measures will ensure that impacts to these waters authorized by NWPs are no more than minimal. The Corps has established permit thresholds that will allow authorization of most projects that result in no more than minimal adverse effects on the aquatic environment. At the same time, the Corps has established PCN limits to ensure that any project that may have more than minimal adverse effects on the aquatic environment will be reviewed. Moreover, since a minimal adverse effect is still an effect on the aquatic environment, we will also require compensatory mitigation, when appropriate, to ensure that the goal of no net loss is achieved in the NWP program and that the cumulative adverse effects of these activities on the aquatic environment are minimal. Moreover, the Corps believes that the proposed NWPs, along with regional conditioning and the ability to place special conditions on NWP authorizations on a case-by-case

basis, will authorize no more than minimal individual and cumulative adverse effects to waters of the United States. Regional conditions will be required by each district to further restrict the use of the NWP in higher value aquatic systems.

In the June 17, 1996, issue of the **Federal Register**, the Corps proposed to reissue NWP 26 and requested comments on several options for modification of this NWP. In response to this notice, the Corps received more than 500 comments concerning NWP 26. Numerous commenters opposed reissuance of NWP 26. Some commenters acknowledged the necessity of NWP 26, but believed that the NWP must be modified to address potential cumulative adverse effects. Many commenters stated that NWP 26 has worked well and that the loss of NWP 26 would result in increased regulatory burdens on the public, less regulatory certainty, unacceptable workload 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. As a result of the Corps review, the Corps determined that NWP 26 should be replaced with activity-specific NWPs, but in the interim a substantially modified NWP 26 was reissued on December 13, 1996, for a period of two years. This phased approach was determined to be necessary to minimize disruption and confusion for the regulated public and improve environmental protection. For a complete discussion of the issues concerning the reissuance and modification of NWP 26, please refer to the December 13, 1996, issue of the **Federal Register** (61 FR 65874-65922).

The coordination process to develop the new and modified NWPs has taken longer than the Corps expected. Moreover, the Corps has established a very time intensive process to effectively engage other agencies and the public in developing regional conditions.

Due to the additional amount of time required to develop the proposed new and modified NWPs and regional conditions, the Corps is proposing to change the expiration date of NWP 26 to March 28, 1999. Extending the expiration date of NWP 26 will ensure fairness to the regulated public by continuing to provide an NWP for activities in headwaters and isolated waters that have minimal adverse environmental effects until the proposed activity-specific NWPs that will replace NWP 26 become effective. If NWP 26 were to expire on the

originally scheduled date of December 13, 1998, then most project proponents would have to apply for authorization through the individual permit process, although some activities may be authorized by other NWPs or regional general permits. For many activities with minimal adverse environmental effects, this would result in unnecessary burdens on the regulated public without added environmental benefits.

Section 404(e) of the Clean Water Act, which provides the statutory authority for the issuance of general permits, states that general permits (including nationwide permits) can be issued for no more than five years. Therefore, NWP 26 can be in effect for a 5 year period. However, the Corps decided that NWP 26 should expire when replacement NWPs become effective. We established a schedule for developing replacement NWPs by December 13, 1998, and announced that NWP 26 would expire then. The revised schedule to develop the new and modified NWPs now indicates that they will become effective on March 28, 1999. Based on this schedule, we are proposing to extend the expiration date of NWP 26 to March 28, 1999. The public is invited to provide comments on the proposal to extend the expiration date of NWP 26 within 30 days of the date of this notice. After the 30 day comment period, the Corps will make a decision on the proposal to extend the expiration date of NWP 26, and publish the decision in the **Federal Register**.

The replacement of NWP 26 with activity-specific NWPs will help implement the President's Wetlands Plan, which was issued by the White House Office on Environmental Policy on August 24, 1993. A major goal of this plan is that Federal wetlands protection programs be fair, flexible, and effective. To achieve this goal, the Corps regulatory program must continue to provide effective protection of wetlands and other aquatic resources and avoid unnecessary impacts to private property, the regulated public, and the environment. These proposed NWPs will more clearly address individual and cumulative impacts to the aquatic environment, ensure that those impacts are minimal, address specific applicant group needs, and provide more predictability and consistency to the regulated public. Throughout the process of developing the new and modified NWPs, the Corps recognized the concerns of natural resource agencies and environmental groups for the potential level of adverse effects on the aquatic environment resulting from these NWPs and the regulated public's

need for the certainty and flexibility in the NWP program.

The activity-specific NWPs proposed in this notice were developed based on information from several sources: (1) comments submitted in response to the December 13, 1996, **Federal Register** notice to issue, reissue, and modify the NWPs; (2) Corps internal recommendations; (3) data concerning the types of activities currently authorized by NWP 26; (4) discussions with other Federal agencies; and (5) discussions with both developmental and environmental stakeholders.

Since NWP 26 was modified and reissued, the Corps collected additional data on the types of activities authorized by NWP 26 to develop these new NWPs. From May 1, 1997, through December 31, 1997, 83% of the total activities authorized by NWP 26 fell into 10 categories. Residential development comprised approximately 24% of the activities authorized by NWP 26. Transportation activities accounted for 19% of the NWP 26 authorizations. Six percent to 8% of NWP 26 authorizations were for each the following activities: agricultural activities, retail developments, industrial developments, stormwater facilities, and impoundments. Institutional facilities, mining activities, and channel modification activities each comprised 2% to 5% of the NWP 26 authorizations during this time period.

In response to the December 13, 1996, **Federal Register** notice, several commenters recommended NWPs for activities that were specifically authorized by NWP 26. We also received comments that recommended modifications to existing NWPs to authorize additional activities. We considered all recommendations received and, where appropriate, developed a proposed new NWP or proposed modification of an existing NWP to authorize that activity. Some proposals involved activities that did not require a permit or were exempt from Section 404 or Section 10 permit requirements. Where we believed that it was not appropriate to develop an NWP for a particular recommended activity, our reasons are provided elsewhere in this notice.

In contrast to NWP 26, none of the proposed new NWPs and the proposed modifications of existing NWPs are restricted solely to activities in headwaters and isolated wetlands. However, most are limited to work in non-tidal waters of the United States, and do not authorize work in tidal waters (i.e., waters subject to the ebb and flow of the tide) or in non-tidal wetlands contiguous (i.e., connected by

surface waters) to tidal waters. Some of the proposed new and modified NWP's are applicable only in non-Section 10 waters and do not authorize work in tidal waters or in non-tidal navigable waters of the United States. The removal of the headwaters restriction will help improve consistency and reduce confusion by eliminating the need to determine where the median flow of a waterbody, on an annual basis, is less than 5 cubic feet per second. In this proposal, we have clarified that for all NWP's, the acreage of loss of waters of the United States, which is the threshold measurement of the gross impacts to existing waters for determining whether a project might qualify for an NWP, includes the filled area plus any waters of the United States that are adversely affected by flooding, excavation, or drainage as a result of the project. Furthermore, in most cases compensatory mitigation will be required for these losses.

Many of the proposed new and modified NWP's have preconstruction notification (PCN) requirements, which allow the Corps to review proposed activities on a case-by-case basis to: (1) place special conditions on specific projects to ensure that the authorized impacts will have minimal individual and cumulative adverse effects on the aquatic system; or (2) assert discretionary authority to require a standard individual permit. These provisions will ensure that the impacts authorized by the NWP's will be minimal. The PCN requirements differ for each NWP. The PCN threshold is based on a level of effects on the existing aquatic ecosystem that requires review by the District Engineer to ensure that those effects are minimal. Each district will identify any areas of high value waters that require lower PCN levels to ensure minimal adverse effects on the aquatic environment. With the national and district-added PCN thresholds, any activity below these limits will have minimal adverse effects on the aquatic environment. Many of the proposed NWP's have PCN requirements for activities that result in the loss, by filling or excavation, of greater than 500 linear feet of stream bed. The term "stream bed" is defined, for the purpose of the proposed new NWP's, as a water of the United States with flowing water (i.e., perennial and intermittent streams). Ephemeral stream beds are not subject to this 500 linear foot PCN requirement. However, Corps districts may regionally condition certain NWP's to require notification for activities that adversely affect ephemeral streams. District engineers

are responsible for determining if a particular stream bed is perennial, intermittent, or ephemeral, based on the definitions provided below. District engineers can assert discretionary authority and require an individual permit for those activities that they determine will have more than minimal individual or cumulative adverse effects on the aquatic environment. As with all NWP's, Corps districts will continue to require that applicants avoid and minimize impacts on-site.

Section 404(e) of the Clean Water Act requires that only activities with minimal adverse environmental effects, both individually and cumulatively, can be authorized by general permits. Activities with more than minimal adverse impacts are subject to the individual permit process and the associated alternatives analysis, individual public notice procedures, and other aspects of individual review that help ensure that potential adverse effects are fully avoided and minimized to the maximum extent practicable before an activity is authorized. On a national basis, the Corps prescribes terms and conditions for nationwide permits to ensure that the NWP's only authorize activities that have minimal individual and cumulative adverse effects on the aquatic environment. Furthermore, in certain situations to ensure that activities authorized by NWP's have minimal adverse effects, the Corps: (1) requires a specific review (i.e., a preconstruction notification) so that activity-specific conditions can be imposed where necessary; (2) adds regional conditions on a regional or geographic basis, to ensure that activities authorized by the NWP's have minimal adverse effects; or (3) exercises discretionary authority to require individual permits for those activities that would have more than minimal adverse effects on the aquatic environment.

District engineers will normally require compensatory mitigation to offset adverse environmental effects to the aquatic environment that result from activities authorized by these NWP's, thus ensuring no more than minimal cumulative adverse environmental effects and supporting the goal of no net loss of aquatic resource functions and values. Compensatory mitigation can be accomplished through individual mitigation projects, through mitigation banks and through in lieu fee programs. A focus of all mitigation for NWP impacts in and around flowing and other open waters will be to normally require vegetated buffers, including upland areas adjacent to open waters.

These buffer areas are vital for protecting and enhancing water quality.

Compensatory mitigation is necessary to offset losses of functions and values of aquatic systems caused by permitted activities. In 1997, the Corps required 28,631 acres of compensatory mitigation for 15,989 acres of impacts authorized by standard permits (which includes individual permits and letters of permission). During this same time period, the Corps required 24,819 acres of compensatory mitigation for 21,409 acres of impacts authorized by general permits, including nationwide permits and regional general permits. Restoration, enhancement, and creation comprise the bulk of compensatory mitigation efforts. Less than 5% of this compensatory mitigation is accomplished through preservation of aquatic resources. In some Corps districts, such as Savannah District, preservation of aquatic habitats is used to augment restoration, enhancement, and creation efforts. In the Savannah District, permittees are typically required to provide restoration, enhancement, and creation at a 1:1 ratio of impacts to mitigation, and provide additional preservation of aquatic resources, to ensure that there is no net loss of functions and values as a result of authorized activities.

Permittees who received an NWP 26 authorization before NWP 26 expires will have up to 12 months to complete the authorized activity, provided they have commenced construction, or are under contract to commence construction, prior to the date NWP 26 expires (see 33 CFR 330.6(b)). This provision applies to all NWP authorizations 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).

The existing NWP's, with the exception of NWP 26, will remain in effect until they expire on February 11, 2002, unless otherwise modified, reissued, or revoked. Some of the proposed NWP's can be used with existing NWP's to authorize projects with minimal individual or cumulative adverse effects on the aquatic environment. Any prohibitions or limitations regarding stacking of the proposed new or modified NWP's with existing NWP's or each other will be addressed in the proposed NWP's.

The Corps believes that substantial additional protection of the overall aquatic environment will result from modification of two NWP conditions. We are proposing to modify General Condition 9, previously entitled "Water

Quality Certification", to require that post-project conditions do not result in more than minimal degradation of downstream water quality. For certain NWP's, this General Condition will require the implementation of a water quality management plan to protect and enhance aquatic resources. The water quality management plan may consist of storm water management techniques and/or the establishment of vegetated buffer zones. In many cases, the Corps will be able to rely on State or local water quality plans. We are also proposing to modify former Section 404 Only Condition 6 by changing its title from "Obstruction of High Flows" to "Management of Water Flows" and modifying it to require that neither upstream nor downstream areas are more than minimally flooded or dewatered after the project is completed. This requirement will help ensure that post-construction effects on the aquatic environment and populated areas are further minimized. We are also modifying other conditions and consolidating the general and Section 404 only NWP conditions to a single list, as discussed below.

Ensuring the protection of threatened and endangered species is a high priority of the Department of the Army Regulatory Program, including the general permit program. Because of programmatic safeguards and individual project review, the Corps continues to believe the NWP program results in no effect on endangered species. Notwithstanding this position, we have requested formal programmatic consultation with the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) to ensure that the NWP program, including the proposed new and modified NWP's, has a formal process to develop any necessary additional procedures at the district level. This will ensure that the program will not jeopardize the continued existence of any Federally listed endangered species. The formal consultation will be initiated as soon as possible and completed by December 13, 1998.

In addition to the standard NWP condition for endangered species, the Corps has required regional conditions and activity-specific conditions to address specific endangered species. To further ensure compliance with the requirements of ESA, Corps districts have developed, and will continue to develop, local operating procedures (referred to as Standard Local Operating Procedures for Endangered Species, or SLOPES) to ensure that districts will continue to reach a project specific "may affect" determination when

necessary, and thus consult with FWS and NMFS, where appropriate. Furthermore, programmatic formal consultation has been initiated on NWP 29. We expect this consultation will be completed this summer. Corps districts will develop additional regional conditions and SLOPES this summer for the new and modified NWP's, to ensure that we fully comply with the Endangered Species Act.

Overall, the Corps believes that the proposed changes to the NWP program will substantially enhance protection of the aquatic environment while allowing activities with minimal individual and cumulative adverse effects on the aquatic environment to proceed with a minimum of delay. For example, where we have proposed higher acreage limits for mitigated losses, such as NWP B for master planned development activities, the applicant must fully protect all remaining waters in the project area and offset all losses of aquatic functions and values within the community. In this way, the overall aquatic environment will be maintained, and in many cases enhanced, by planning for treatment of stormwater, establishing and/or maintaining buffers around all aquatic areas, and placing deed restrictions on all unimpacted aquatic environments and associated buffer areas. In addition, some of these NWP's will authorize all secondary activities associated with the primary activity, such as infrastructure and recreational amenities, with the impacts for a residential development. This will discourage piecemealing by encouraging applicants to present the total project.

General Issues

In addition to seeking comments on the proposed new and modified NWP's, the Corps is soliciting comments on the following general issues related to the proposed NWP's: the scope of the new NWP's, acreage limitations and PCN thresholds on the proposed NWP's, assessing cumulative impacts on a watershed basis, and regional conditioning of the NWP's. The Corps is also seeking comments on other issues related to the NWP's, such as maintenance of landfill surfaces, maintenance and filling of ditches adjacent to roads and railways, maintenance of water treatment facilities, the use of mitigation banks in the NWP program, and expansion of NWP 31, which are discussed below in the section entitled "Other Suggested NWP's".

NEPA Compliance

The Corps recognizes that there has been, and continues to be, substantial

interest among the public regarding the potential environmental effects associated with the implementation of the Nationwide Permit program. With the last reissuance of the NWP's in December 1996, we reemphasized our commitment to improve data collection and monitoring efforts associated with the NWP program, and NWP 26 in particular. In many instances, these efforts have already provided critical information on the use of the NWP's, overall acreage impacts, affected resource types, the geographic location of the activities, and the type of mitigation provided. This information is critical in our efforts to make well-informed permitting and policy decisions regarding the continued role of the NWP program and to ensure that the program continues to authorize only those activities with minimal individual and cumulative effects.

We also recognize that this current process to develop replacement permits for NWP 26 provides an important opportunity to further expand the current tools available for evaluating and monitoring the environmental effects associated with this program. We are committed to ensuring and demonstrating that the NWP program as a whole, including the new NWP's proposed today, authorizes only those activities with minimal individual and cumulative environmental effects. Consistent with this commitment, the Corps will prepare a programmatic environmental impact statement (PEIS) for the entire NWP program. While a PEIS is not required for the reasons noted below, the PEIS will provide the Corps with a comprehensive mechanism to review the effects of the NWP program on the environment, with full participation of other Federal agencies, States, Tribes, and the public. The Corps will initiate the PEIS by mid-1999 and complete it by December 2000. The Corps plans to complete the PEIS prior to the next scheduled reissuance of the NWP's in December 2001.

The National Environmental Policy Act (NEPA) requires Federal agencies to prepare an Environmental Impact Statement (EIS) for major Federal actions that have a significant impact on the quality of the human environment. Notwithstanding our commitment to complete a PEIS, we have determined that the NWP program does not constitute a major Federal action significantly affecting the human environment and therefore the preparation of an EIS is not required by NEPA. The basis for this determination is that the NWP program authorizes only those activities that have minimal adverse environmental effects on the

aquatic environment, both individually and cumulatively, which is a much lower threshold than the threshold for requiring an EIS. We have prepared a Finding of No Significant Impact (FONSI) for the NWP program. Copies of the FONSI are available at the office of the Chief of Engineers, at each District office, and on the Corps home page at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>.

Similar to our determination for the overall NWP program, we have made a preliminary determination that the proposed new and modified NWPs do not constitute a major Federal action significantly affecting the quality of the human environment, because the NWPs authorize only those activities that have minimal adverse effects on the aquatic environment, both individually and cumulatively. In compliance with NEPA, preliminary environmental documentation has been prepared for each proposed NWP and each proposed modification of an existing NWP. This documentation includes a preliminary environmental assessment (EA), a preliminary FONSI, and, where relevant, a preliminary Section 404(b)(1) Guidelines compliance review for each proposed new and modified NWP. 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://www.usace.army.mil/inet/functions/cw/cecwo/reg/>. Based on these documents the Corps has provisionally determined that the proposed new and modified NWPs comply with the requirements for issuance under general permit authority.

Scope of the New NWPs

The applicable waters of the United States for the proposed and existing NWPs can be categorized in five ways: (1) all waters of the United States; (2) non-tidal waters; (3) non-tidal waters, excluding non-tidal wetlands contiguous to tidal waters; (4) non-Section 10 waters; and (5) non-Section 10 waters, excluding wetlands contiguous to Section 10 waters. The term "all waters of the United States" includes both Section 10 and Section 404 waters. "Non-tidal waters" are waters of the United States that are not subject to the ebb and flow of the tide (i.e., are located landward of the normal spring high tides), and may include non-tidal wetlands contiguous to tidal waters. "Non-tidal waters, excluding non-tidal wetlands contiguous to tidal waters" are limited to non-tidal waters and wetlands that are not connected by surface waters to tidal waters or are not part of a linear aquatic system with a

defined channel to the otherwise contiguous wetland (see the proposed definitions of "contiguous wetland" and "noncontiguous wetland", below). Where non-tidal waters and wetlands are contiguous to tidal waters, there are no uplands or other non-jurisdictional areas separating those non-tidal waters from the tidal waters. "Non-Section 10 waters" are limited to waters of the United States, including wetlands, located above the ordinary high water mark of Section 10 waters. Wetlands located below the ordinary high water mark in Section 10 waters are Section 10 waters. "Non-Section 10 waters, excluding wetlands contiguous to Section 10 waters" are limited to waters and wetlands that are not connected by surface waters to Section 10 waters; there may be uplands or other non-jurisdictional areas separating those waters. Wetlands contiguous to Section 10 waters may be either tidal or non-tidal.

Many of the proposed new NWPs (e.g., NWPs A, B, D, and E) are applicable only to discharges of dredged or fill material into non-tidal waters of the United States, excluding wetlands that are contiguous to tidal waters. A definition of "contiguous wetland" has been proposed in the definition section of this notice. Proposed NWPs C and F are applicable only to non-Section 10 waters of the United States. For the proposed modification to NWP 12, the construction of substations and access roads is authorized only in non-Section 10 waters, but the construction of utility lines and foundations for overhead utility lines may be authorized in Section 10 waters. The proposed modifications to NWP 27 allow wetland and riparian restoration in non-tidal waters of the United States, while limiting stream enhancement projects to non-Section 10 waters. The proposed modification to NWP 7 may authorize work in navigable waters of the United States (i.e., Section 10 waters). Crushed and broken stone and hard rock/mineral mining activities authorized by proposed NWP E can occur only in non-tidal waters of the United States that are not contiguous to tidal waters. The activities authorized by the proposed modification to NWP 40 are limited to non-tidal waters, including activities in non-tidal wetlands contiguous to tidal waters.

Acreege Limitations and PCN Thresholds

The Corps is seeking comments on the acreage limitations and PCN thresholds for the proposed new NWPs and the proposed modifications to existing NWPs. The Corps will review and

consider acreage limits that are smaller or greater than those proposed. If the Corps believes that an acreage limit substantially higher than proposed may be appropriate, then a new proposal with an opportunity to comment would be published in the **Federal Register**.

For the new NWPs, the acreage limitations range from 1 acre for NWP D to 10 acres for NWP B. NWP F is limited to the minimum necessary to reconfigure the drainage ditch. The upper limits for the proposed modifications to existing NWPs are highly variable. NWP 27 will continue to have no acreage limit, since it authorizes projects that restore or enhance the aquatic environment. The acreage limits for the other proposed modifications range from $\frac{1}{3}$ acre for private roads under NWP 14 to 3 acres for NWP 40. The proposed modification to NWP 7 will not have an acreage limitation, but will restrict the work to the minimum necessary to restore the facility to its original configuration.

The PCN threshold for many of the proposed new NWPs and modifications to existing NWPs will be the loss of greater than $\frac{1}{3}$ acre of waters of the United States. In addition, there are PCN requirements for impacts to open waters and streams for some of these NWPs. NWP A requires a PCN for any impacts to open waters below the ordinary high water mark. NWP B requires a PCN for all activities. NWPs C and D and the proposed modification of NWP 40 require a PCN if greater than 500 linear feet of stream bed is filled or excavated. NWP E and the proposed modification to NWP 7 will require notification for all activities. NWP F will require notification for any ditch reconfiguration that involves sidecasting excavated material into waters of the United States. The proposed modifications to NWP 3 will require notification for the removal of accumulated sediments and debris in the vicinity of existing structures and for restoration of upland areas damaged by storms, floods, or other discrete events that affect greater than $\frac{1}{3}$ acre of waters of the United States. The repair, rehabilitation, or replacement of currently serviceable structures or fills will not require notification under the proposed modification of NWP 3.

Mitigation

A requirement of the NWPs is that project proponents must avoid and minimize impacts to waters of the United States at the project site to the maximum extent practicable. (See General Condition 20.) For those unavoidable impacts to waters of the United States, including wetlands,

compensatory mitigation may be required, either through regional conditioning or on a case-by-case basis. Compensatory mitigation will normally be required by district engineers for those projects which require notification (i.e., impacts to more than 1/3 acre of waters of the United States for most of the proposed NWP). Compensatory mitigation will be required by Corps districts to offset the adverse environmental effects to the aquatic ecosystem of the proposed work to a level that ensures no more than minimal cumulative adverse environmental effects.

There are several ways that a permittee can provide compensatory mitigation for a project that is authorized by NWPs. The permittee can restore, create, enhance, or preserve wetlands or other aquatic habitats to replace the functions and values of the wetlands and other waters of the United States that are lost as a result of the project. In most situations, establishing or maintaining a vegetated buffer, including uplands adjacent to open waters, will be an important part of a mitigation plan. Another method of compensatory mitigation is mitigation banks. A mitigation bank is a site where wetlands or other aquatic resources are restored, created, enhanced, or preserved to provide compensatory mitigation in advance of the authorized impacts. The entity that developed the mitigation bank provides these aquatic resources in return for payment from the permittee. Federal guidance for the establishment, use, and operation of mitigation banks was published in the **Federal Register** on November 28, 1995 (60 FR 58605-58614). A third method of compensatory mitigation is in lieu fee programs, which may be used to offset losses of waters of the United States. In lieu fee programs are typically operated by States, counties, and private and public organizations who protect, restore, and enhance open space, including waters of the United States. Permittees may use in lieu fee programs that protect, enhance, or restore wetlands, riparian corridors, and open water areas, including upland buffers which protect water quality. The permittee pays a fee to the operator of the in lieu fee program in exchange for the protection, enhancement, and restoration of these areas. In lieu fee programs should be watershed based and focused in areas where restoring, enhancing, and preserving the aquatic system and associated uplands will provide the greatest overall protection of that particular watershed. Regardless of the method used to provide

compensatory mitigation, district engineers have the discretionary authority to determine the type and quantity of compensatory mitigation that is appropriate to replace lost aquatic functions and values.

Cumulative Impacts

Cumulative adverse effects on the aquatic environment caused by activities authorized by NWPs, regional general permits, and individual permits must be monitored by the districts on a watershed basis. Assessment of cumulative impacts on a watershed basis is the only technically sound approach and must focus on essential aquatic functions and values. No determination of minimal individual and cumulative adverse effects can be made on a national basis, because the functions and values of aquatic resources vary considerably across the nation and cannot be monitored or assessed by Corps headquarters. Individual districts are better suited to assess cumulative impacts because they have a better understanding of the local conditions and processes used to evaluate whether cumulative impacts to the aquatic environment in a particular watershed will be more than minimal as a result of work authorized by the Corps. In some watersheds, a large acreage of loss of waters offset with appropriate compensatory mitigation could occur and result in no more than minimal cumulative adverse effects on that watershed. Similar wetland losses in other watersheds could exceed the minimal impact threshold, if the wetlands in that watershed were of high value, or if historic wetland losses in that watershed were extensive, making the remaining wetlands especially valuable due to the scarcity of that habitat type. Therefore, each district generally monitors the losses of waters of the United States in each watershed, as well as the gains through restoration, enhancement, creation, and preservation of aquatic resources, to determine whether the effects of these actions result in more than minimal cumulative adverse effects on the aquatic environment. Regional conditions can be used by districts to allow the continued use of these NWPs while making certain that the individual and cumulative adverse environmental effects to the aquatic ecosystem are not more than minimal. The Corps has established a process on a nationwide basis (regional conditioning), a requirement that each district compensate for impacts through mitigation, as well as nationwide PCN limits, all of which will ensure no more than minimal adverse effects will occur

on a cumulative basis. The Corps will continue to work towards the goal of no net loss of functions and values of the Nation's aquatic resources.

Division engineers can revoke any of the proposed NWPs in aquatic environments of particularly high value or in specific geographic areas (e.g., watersheds), if they believe that use of particular NWPs in these areas will result in more than minimal individual and cumulative adverse environmental effects to the aquatic ecosystem. The proposed NWPs may be revoked where districts have implemented programmatic general permits (PGPs) for similar activities, as long as the PGP provides at least the level of protection of the aquatic environment that the Corps does through its NWP program.

Data Collection by Corps Districts

Corps districts use databases to collect information concerning permit applications, issued standard permits, issued general permit authorizations, denied permit applications, and enforcement activities. Most districts utilize the Regulatory Analysis and Management System (RAMS and RAMSII). The Corps has been continuously improving its data collection efforts, especially for the NWP Program. Districts have been collecting the following information for all permit actions, including NWP authorizations:

- The name of the permit applicant.
- The description and location of the work.
- The amount of requested impacts to non-tidal and/or tidal wetlands, in acres.
- The amount of authorized impacts to non-tidal and/or tidal wetlands, in acres.
- The amount of compensatory mitigation provided by the permittee, in acres of non-tidal and/or tidal wetlands restored, enhanced, created, or preserved.
- The amount of non-tidal and/or tidal wetlands impacted as a result of an unauthorized activity, in acres.
- The amount of non-tidal and/or tidal wetlands restored as a result of an enforcement action, in acres.

Since May 1, 1997, districts have been required to collect additional information on the environmental impacts of the NWPs. Wetland impacts are entered in the database as acres of wetlands permitted to be filled, excavated, drained, and flooded. Stream impacts are quantified in linear feet of stream bed that are permitted to be impacted by an activity that involves filling or excavation within a stream. The Corps is also collecting data on the

types of waters impacted (i.e., estuarine, lacustrine, marine, palustrine, or riverine), based on the Cowardin classification system. As resources permit, Corps districts may use the remainder of the Cowardin classification system to better define the types of aquatic habitats being impacted. The United States Geological Survey (U.S.G.S.) hydrological unit code in which the affected waterbody is located is also entered into the database. The U.S.G.S. hydrological unit code system identifies over 2,000 watersheds nationwide. Wetland mitigation is entered in the database as acres of wetlands that are required to be restored, created, enhanced, and preserved. Mitigation for impacts authorized by NWP is also tracked by the method of mitigation (i.e., mitigation provided by permittee, mitigation bank, or some other method, such as an in lieu fee program) and acreage of compensatory mitigation.

For the NWP program, the Corps is monitoring: (1) the number of verified authorizations; (2) the number of requests where discretionary authority was exercised because the activity would have resulted in more than minimal adverse effects; (3) the number of NWP authorization requests that were denied and an individual permit review was required; (4) the number of NWP authorization requests that were withdrawn because no permit was required; (5) the number of NWP authorization requests that were withdrawn based on the applicant's decision; and (6) the number of NWP authorization requests that were withdrawn because the Corps received more than one request for the same project (i.e., an accounting error occurred).

In addition, the Corps is collecting data on the impact of the NWPs on Federally-listed endangered and threatened species and their critical habitat. The Corps is monitoring whether or not a particular activity is proposed in critical habitat for a

Federally-listed endangered or threatened species. The Corps is also collecting data on which endangered or threatened species are involved in verified NWP activities, as well as the ESA determination for that activity (i.e., no effect, not likely to adversely affect, no jeopardy/no adverse modification, or jeopardy/adverse modification).

As part of its effort to develop NWPs to replace NWP 26, the Corps has been collecting more data on the types of activities authorized by NWP 26. For this data collection effort, these types of activities are classified as follows: institutional, agricultural, silvicultural, mining aggregates, mining other, retail individual, retail multiple, residential multiple, industrial, transportation, storm water management, impoundment, treatment facility, or "other". The Corps is also classifying these activities into the following categories: commercial, non-commercial, and governmental. For every NWP action, the location of the impact area within the watershed is recorded as either: (1) above headwaters or in isolated waters, or (2) below headwaters and not in isolated waters. When NWP 26 expires, the Corps will no longer collect the data mentioned in this paragraph.

Data collection requires a balance between the amount of work required to evaluate permit applications and the usefulness of the data to monitor the impacts of the authorized activities on the aquatic environment. The amount and types of collected information should be limited to the data that is needed for cumulative impact assessment while allowing districts the time and personnel resources to effectively evaluate permit applications and conduct enforcement activities. Corps districts will continue to monitor regulated activities on a watershed basis to ensure that the activities authorized by NWPs do not result in more than minimal cumulative adverse effects on the aquatic environment in a particular watershed. In addition, data collection

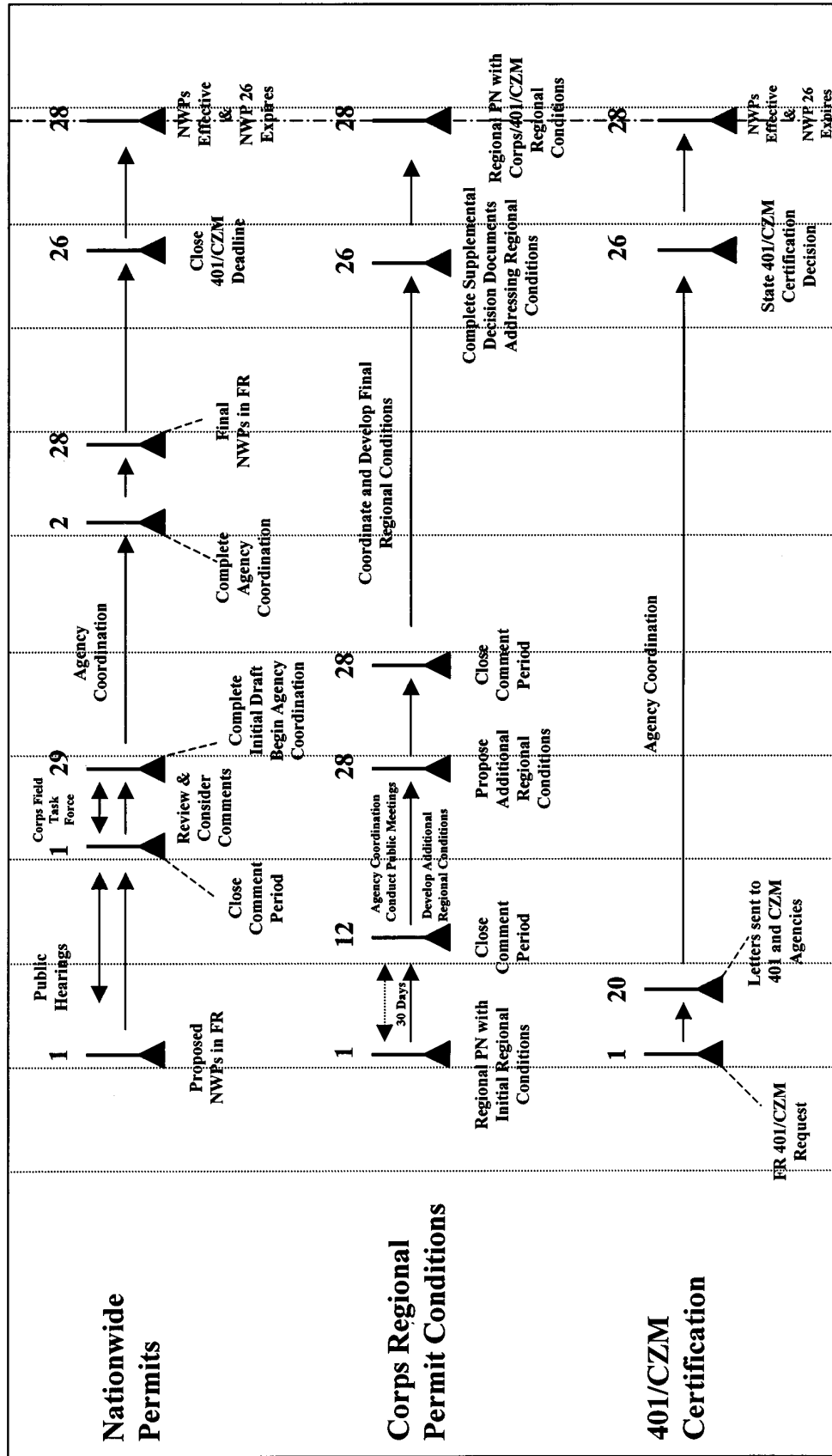
helps the Corps monitor the effects of authorized activities on endangered and threatened species. In the future, the Corps will evaluate our current overall data collection efforts on standard and general permits, including NWPs, to better and more consistently assess the effects of these actions on the aquatic environment.

Process for Issuing the New and Modified NWPs

The process for issuing the proposed new and modified NWPs is illustrated in Figure 1. The regional conditioning and 401/CZM certification processes are also illustrated in Figure 1. The proposal in this **Federal Register** is the beginning of this process. During the 60-day comment period, there will be a public hearing in Washington, DC to solicit comments on the proposed new and modified NWPs. We will initially review the comments received in response to this **Federal Register** notice with a task force staffed by Corps regulatory field personnel. Upon completion of our initial review of the comments, we will complete an initial draft of the final NWPs and begin agency coordination; this process will last approximately 2 months. After agency coordination is finished, we will complete the final version of the NWPs for publication in the **Federal Register** by December 28, 1998. The State 401/CZM agencies will have 60 days to complete their certification decisions. The Corps will then finalize its regional conditions and then certify that the NWPs, with any regional conditions or geographic revocations, will only authorize activities with minimal adverse environmental effects, both individually and cumulatively. The NWPs will become effective 90 days later, as NWP 26 expires. The Corps regional conditioning and 401/CZM certification processes are discussed elsewhere in this notice.

BILLING CODE 3710-92-p

Nationwide Permit 26 Replacement Milestones



Jun Jul Aug Sept Oct Nov Dec Jan Feb Mar Apr

Regional Conditioning of Nationwide Permits

As previously discussed in this notice, the Corps is committed to developing a package of replacement permits with demonstrably less environmental impact than the permit they replace. An important element in achieving this goal is the successful implementation of a significantly improved regionalization process. The coordinated involvement of States, Tribes, the public, and others, at the District level, will assist the Corps in identifying appropriate conditions and in developing permits that ensure effective protection at the local level of wetlands and other water resources. Moreover, effective regional conditioning of the NWP by the Corps Districts will ensure compliance with the statutory requirement that the NWP result in no more than minimal adverse effects on the aquatic environment and will support the Administration's goal of no net loss of aquatic functions and values on a watershed and programmatic basis.

Although a regionalization process has been required during past reissuances of the NWP, we recognize that those efforts were not always the most effective in ensuring the development of appropriate conditions in each Corps District. We are confident, however, that the process proposed in today's notice is fundamentally different from those past approaches and will yield an improved environmental result that makes sense for local watersheds throughout the country. In general terms, the new approach provides the public, as well as other Federal and State/Tribal agencies, with two opportunities to comment on proposed Corps regional conditions before they are finalized, involves a more active and coordinated role for the Federal resource agencies throughout the process, and results in final decision documents that include certifications by each Division Engineer that each NWP, as conditioned, will authorize only minimal adverse environmental effects. The regionalization process is outlined in greater detail below.

There are two types of regional conditions: conditions added as part of the Section 401 water quality certification/Coastal Zone Management Act (401/CZM) process and conditions added by the Corps Divisions after consultation with Corps Districts, other agencies, and the public. The 401/CZM regional conditions for the proposed NWP automatically become regional conditions on those NWP. However, if the division engineer determines that

those conditions do not meet the provisions of 33 CFR 325.4, the 401 certification and/or CZM concurrence will be treated as a denial without prejudice. The 401/CZM regional conditions must be announced by the final Corps public notice concerning the final NWP. Corps regional conditions should generally not, but may, duplicate 401/CZM regional conditions. Corps regional conditions are added to NWP by division engineers after a public notice comment period. Corps regional conditions cannot increase the terms or limits of the NWP, delete or modify NWP conditions, change or be inconsistent with Corps regulations, be unenforceable, require an individual 401 water quality certification or CZM concurrence, or require another agency decision, review, or approval.

When each Corps district issues its initial public notice for the proposed NWP, approximately concurrent with this **Federal Register** notice, the public notice will include: (1) Corps regional conditions for NWP 26, if any, that are applicable to any of the proposed NWP; (2) the existing Corps regional conditions, if any, for the NWP that are proposed to be modified (i.e., NWP 3, 7, 12, 14, 27, and 40); and (3) any additional Corps regional conditions that the district is proposing at that time. This initial public notice will also request comments or suggestions for additional Corps regional conditions for the NWP. The initial public notice may also include, for informational purposes only, any State/tribal 401/CZM regional conditions for NWP 26 and for the NWP that are proposed to be modified. The public does not have the opportunity to comment on the State/tribal 401/CZM regional conditions through the Corps. There is a separate State/tribal process that involves the public regarding State/tribal 401/CZM certifications. Each district will announce the final State/tribal 401/CZM regional conditions in the final NWP public notice. Each district may also propose Corps regional conditions for any existing NWP in this initial public notice.

The initial public notice will request that the general public and other agencies submit comments on the NWP and any regional conditions proposed by the Corps, to suggest additional Corps regional conditions, or to suggest specific watersheds or waterbodies where Corps regional conditions should be implemented, or geographic areas or specific watersheds or waterbodies where certain NWP should be suspended or revoked. After the close of the comment period for the initial public notice, each district will

coordinate with the Federal and State resource agencies to develop additional Corps regional conditions. In addition, each district will hold a public meeting to discuss regional conditioning of the NWP with the public and representatives of Federal, State, tribal, and local agencies. Based on the initial input, the Corps will develop proposed regional conditions and each district will issue a second public notice to solicit comments on those proposed Corps regional conditions. After the close of the comment period for the second public notice, each district will coordinate with the Federal and State resource agencies to develop final Corps regional conditions. Prior to the publication of the final NWP in the **Federal Register**, the District Engineer will meet with the Regional Administrator of EPA and the Regional Directors of FWS and NMFS to discuss the proposed regional conditions and resolve any disputes concerning Corps regional conditions.

Prior to the date the NWP become effective, each Division Engineer will prepare supplemental decision documents addressing the regional conditions for each NWP. Each decision document will include a statement, by the Division Engineer, certifying that the Corps regional conditions imposed on the NWP will ensure that those NWP will authorize only activities with minimal adverse effects. After the Division Engineer establishes the Corps regional conditions, each district will issue final public notices announcing the final 401/CZM regional conditions and Corps regional conditions. Each district may propose additional Corps regional conditions in future public notices.

Corps regional conditions will be tailored to the issues related to the aquatic environment within each district, and will be used to ensure that the effects of the NWP program on the aquatic environment are minimal, both individually and cumulatively. Corps regional conditions can cover a large geographic area (e.g., a State or county), a particular waterbody or watershed, or a specific type of water of the United States (e.g., trout streams). Examples of Corps regional conditions that may be used by districts to restrict the use of the NWP include:

- Restricting the types of waters of the United States where the NWP may be used (e.g., fens, hemi-marshes, prairie potholes, bottomland hardwoods, etc.) or prohibiting the use of some or all of the NWP in those types of waters or in specific watersheds;

- Restricting or prohibiting the use of NWP's in areas covered by a Special Area Management Plan, or an Advanced Identification study with associated regional general permits;

- Adding "Notification" requirements to NWP's to require PCN's for all work in certain watersheds or certain types of waters of the United States, or lowering the PCN threshold;
- Reducing the acreage thresholds in certain types of waters of the United States;

- Revoking certain NWP's on a geographic or watershed basis;
- Restricting activities authorized by NWP's to certain times of the year in certain waters of the United States, to minimize the adverse effects of those activities on areas used by fish or shellfish for spawning, nesting wildlife, or other ecologically cyclical events.

The Corps regional conditions implemented by each district do not supersede the general conditions of the nationwide permit program. The general conditions address the Endangered Species Act, the National Historic Preservation Act of 1966, the Wild and Scenic Rivers Act, Section 401 water quality certification, Coastal Zone Management, navigation, etc. Given the extent of the coordination already mandated by Federal law, the addition of regional conditions at the State, Tribal, watershed, or geographic level will help ensure that important public interest factors are considered when evaluating projects for NWP authorization.

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

Alabama

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

Alaska

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

Arizona

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

Arkansas

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

California

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

Colorado

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

Connecticut

New England District Engineer,
ATTN: CENAE-OD-R, 696 Virginia
Road, Concord, MA 01742-2751

Delaware

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

Florida

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

Georgia

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

Hawaii

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

Idaho

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

Illinois

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

Indiana

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

Iowa

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

Kansas

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

Kentucky

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

Louisiana

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

Maine

New England District Engineer,
ATTN: CENAE-OD-R, 696 Virginia
Road, Concord, MA 01742-2751

Maryland

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

Massachusetts

New England District Engineer,
ATTN: CENAE-OD-R, 696 Virginia
Road, Concord, MA 01742-2751

Michigan

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

Minnesota

St. Paul District Engineer, ATTN:

CEMVP-CO-R, 190 Fifth Street
East, St. Paul, MN 55101-1638

Mississippi

Vicksburg District Engineer, ATTN:
CEMVK-CO-O, 201 N. Frontage
Road, Vicksburg, MS 39180-5191

Missouri

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

Montana

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

Nebraska

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

Nevada

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

New Hampshire

New England District Engineer,
ATTN: CENAE-OD-R, 696 Virginia
Road, Concord, MA 01742-2751

New Jersey

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

New Mexico

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

New York

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

North Carolina

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

North Dakota

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

Ohio

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

Oklahoma

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

Oregon

Portland District Engineer, ATTN:
CENWP-PE-G, P.O. Box 2946,
Portland, OR 97208-2946

Pennsylvania

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

Rhode Island

New England District Engineer,
ATTN: CENAE-OD-R, 696 Virginia
Road, Concord, MA 01742-2751

South Carolina

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

South Dakota

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

Tennessee

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

Texas

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

Utah

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

Vermont

New England District Engineer,
ATTN: CENAE-OD-R, 696 Virginia
Road, Concord, MA 01742-2751

Virginia

Norfolk District Engineer, ATTN:
CENAO-OP-R, 803 Front Street,
Norfolk, VA 23510-1096

Washington

Seattle District Engineer, ATTN:
CENWS-OP-RG, P.O. Box 3755,
Seattle, WA 98124-2255

West Virginia

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

Wisconsin

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

Wyoming

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

District of Columbia

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

Pacific Territories

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

Puerto Rico & Virgin Islands

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

State (or Tribal) Certification of Nationwide Permits

State or tribal water quality certification pursuant to Section 401 of the Clean Water Act, or waiver thereof, is required for activities authorized by NWP's which may result in a discharge into waters of the United States. In addition, any State with a Federally approved Coastal Zone Management (CZM) Plan must agree with the Corps determination that activities authorized

by NWP's which are within, or will affect any land or water uses or natural resources of the State's coastal zone, are consistent with the CZM plan. Section 401 water quality certifications and/or CZM consistency determinations may be conditioned, denied, or authorized for parts of the NWP's.

The Corps believes that, in general, the activities authorized by the NWP's will not violate State or tribal water quality standards and will be consistent with State CZM Plans. The NWP's are conditioned to ensure that adverse environmental effects will be minimal and are the types of activities that would be routinely authorized, if evaluated under the individual permit process. The Corps recognizes that in some States or tribes there will be a need to add regional conditions or individual State or tribal review for some activities to ensure compliance with State or tribal water quality standards or consistency with State CZM Plans. The Corps goal is to develop such conditions so that the States or tribes can issue 401 water quality certifications or CZM consistency agreements. Therefore, each Corps district will initiate discussions with their respective States or tribes, as appropriate, following publication of this proposal to discuss issues of concern and identify regional modification and other approaches to the scope of waters, activities, discharges, and notification, as appropriate, to resolve these issues. Note that there will be some States where an SPGP has been adopted and the NWP's have been wholly or partially revoked. Concurrent with today's proposal, Corps districts may be proposing modification or revocation of the NWP's in States where SPGP's will be used in place of some or all of the NWP program.

Section 401 of the Clean Water Act: This **Federal Register** notice of these NWP's serves as the Corps application to the States, tribes, or EPA, where appropriate, for 401 water quality certification of the activities authorized by these NWP's. The States, tribes, and EPA, where appropriate, are requested to issue, deny, or waive certification pursuant to 33 CFR 330.4(c) for these NWP's.

Proposed NWP's A, B, C, D, E, and F, and the proposed modifications to NWP's 12, 14, 27, and 40 involve activities which would result in discharges and therefore 401 water quality certification is required.

The proposed modifications to NWP's 3 and 7 involve various activities, some of which may result in a discharge and require 401 water quality certification

and others of which do not. State denial of 401 water quality certification for any specific NWP affects only those activities which may result in a discharge. For those activities not involving discharges, the NWP remains in effect.

If a State denies a 401 water quality certification for certain activities within that State, then the Corps will deny NWP authorization for those activities without prejudice. Corps districts will issue provisional NWP verification letters upon receipt of a PCN for such projects. The provisional verification letter will contain all general and regional conditions as well as any project specific conditions the Corps determines are necessary, and will notify the applicant that they must obtain a project specific Section 401 water quality certification, or waiver thereof, prior to starting work in waters of the United States. Anyone wanting to perform such activities where a PCN is not required must first obtain a project specific 401 water quality certification or waiver thereof from the State before proceeding under the NWP. This requirement is provided at 33 CFR 330.4(c).

Section 307 of the Coastal Zone Management Act (CZMA): This **Federal Register** notice serves as the Corps determination that the activities authorized by these NWP's are consistent with States' CZM programs, where applicable. This determination is contingent upon the addition of State CZM conditions and/or regional conditions or the issuance by the State of an individual consistency concurrence, where necessary. The States are requested to agree or disagree with the consistency determination pursuant to 33 CFR 330.4(d) for these NWP's.

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

If a State disagrees with the Corps consistency determination for certain activities, then the Corps will deny authorization for those activities without prejudice. Corps districts will issue provisional NWP verification letters upon receipt of a PCN for such projects. The provisional verification letter will contain all general and regional conditions as well as any project specific conditions the Corps

determines are necessary, and will notify the applicant that they must obtain a project specific CZMA consistency determination prior to starting work in waters of the United States. Anyone wanting to perform such activities where a PCN is not required must present a consistency certification to the appropriate State agency for concurrence. Upon concurrence with such consistency certifications by the State, the activity would be authorized by the NWP. This requirement is provided at 33 CFR 330.4(d).

Discussion of Proposed Nationwide Permits

The following is a discussion of the new NWPs we are proposing to issue. We have identified these NWPs by letters received in response to the December 13, 1996, **Federal Register**, Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits (61 FR 65874) and as a result of a workshop at the Corps 1997 Biennial National Regulatory Program Conference. If issued, they would be placed at a reserved NWP number or given a new number. The proposed modification to NWP 29 is discussed at the end of the preamble.

A. Residential, Commercial, and Institutional Activities

One commenter recommended an NWP to authorize the construction of residential developments and associated activities, including roads, stormwater management facilities, and amenities for recreation, such as golf courses, swimming pools, playing fields, and hiking and biking trails.

Similar comments were received recommending that the Corps develop an NWP for the construction of industrial and office developments, including retail and recreational facilities. Another commenter recommended an NWP for the development and modification of commercial real estate projects, with different thresholds for site plan development and the construction of roads and utilities. A third commenter recommended an NWP for commercial and industrial activities. An NWP for commercial development activities was also recommended by the participants at the 1997 Biennial National Regulatory Program Conference workshop.

Comments were also received recommending an NWP for the construction of Federal, State, Tribal and local government buildings and institutional buildings, including, but not limited to, schools, fire stations, public works buildings, libraries, hospitals and places of worship, and

their attendant features (septic systems, parking lots, loading docks, playgrounds, etc.).

From May 1, 1997, through December 31, 1997, NWP 26 was used to authorize 1,581 residential, commercial or institutional developments, impacting approximately 835 acres of wetlands and 42,190 linear feet of stream bed. Approximately 2,634 acres of compensatory mitigation were provided to offset the adverse environmental effects of these projects.

The Corps is proposing an NWP to authorize discharges of dredged or fill material into non-tidal waters of the United States, excluding wetlands contiguous to tidal waters, for residential, commercial, and institutional development activities, and associated infrastructure, including utilities, roads, driveways, and sidewalks. Infrastructure is integral to residential, commercial, and institutional development activities, and should be included as a part of the single and complete project for NWP authorization, unless the road or utility line is a component of a separate linear project that will provide service to other residential subdivisions, commercial sites, or other areas.

This NWP is intended to authorize the construction of residential developments (particularly subdivisions), commercial developments, and institutional developments with minimal impacts that comply with the terms and conditions of the permit. These types of activities are currently authorized by NWP 26. This NWP is not intended to replace NWP 29, which authorizes the construction of a single family residence to be used only by the person who will use the house as a personal residence. Contractors and commercial developers cannot use NWP 29 to construct a residence which would subsequently be offered for sale upon completion. Furthermore, NWP 29 authorizes discharges into all non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters.

The Corps is also considering and seeking comments on options to establish acreage limits for this NWP. One option would be to establish a simple acreage limit, such as 3 acres, for a single and complete project. Another option would be to establish a sliding scale or indexing of impact acreage limits for this NWP, based on parcel size, percentage of wetlands on the parcel, or other criteria. An example of

such a sliding scale, based on parcel size, is shown in the table below:

| Parcel Size | Maximum acreage loss authorized |
|------------------------------|---------------------------------|
| Less than 5 acres | 1/4 acre. |
| 5-10 acres | 1/2 acre. |
| 10-15 acres | 1 acre. |
| 15-100 acres | 2 acres. |
| Greater than 100 acres | 3 acres. |

Such a scheme helps ensure minimal adverse impacts by authorizing smaller impacts for smaller projects and encouraging planning of developments that reduces impacts to aquatic resources. For example, under a sliding scale, a 25-acre development could result in the loss of only 2 acres of waters of the United States, whereas under a simple acreage limit the permittee could impact up to 3 acres. For NWP A, the Corps is soliciting comments on the use of a sliding scale, as well as acreage for parcel sizes and impacts to waters of the United States that would be used for the sliding scale. The Corps is also seeking comments on the benefits and drawbacks of such a sliding scale. The Corps is also seeking comments on the PCN threshold(s) that would be used in conjunction with the sliding scale of acreage limitation.

The Corps is proposing to require a PCN for losses of greater than 1/3 acre of non-tidal waters of the United States, or for any project that would result in the loss of any open waters, such as perennial or intermittent stream beds or lakes. The PCN will be subject to Corps-only review where the project would result in the loss of 1 acre or less of waters of the United States, and to review by the Corps and coordinating agencies where the loss of waters of the United States would exceed 1 acre. As part of the PCN, applicants must submit a written statement to the District Engineer explaining why discharges in waters of the United States must occur, what measures were taken to avoid and minimize impacts, and how the permittee will provide compensatory mitigation for those impacts. We have conditioned this NWP to require compensatory mitigation for projects resulting in the loss of greater than 1/3 acre of waters of the United States. In general, compensatory mitigation for losses below 1 acre will be provided most effectively through mitigation banks and in lieu fee programs. The compensatory mitigation proposal required for the PCN does not have to include detailed plans and implementation schedules, but must adequately describe the proposal so that

the District Engineer can determine if the proposed compensatory mitigation is appropriate. If the project involves streams or other open water, then buffers, including upland areas adjacent to the open waters, to these areas may be required as a part of the compensatory mitigation proposal. The permittee may be required to submit detailed compensatory mitigation plans at a later date as a special condition of the NWP authorization unless a mitigation bank or in lieu fee program is used to provide the compensatory mitigation. For many of these types of projects, the Corps believes that compensatory mitigation is necessary to offset adverse impacts to waters of the United States.

The PCN requirement will allow district engineers to assert discretionary authority when they have determined that the adverse effects of the proposed work will be more than minimal. The Corps believes that the issuance of this NWP, along with its terms, limitations, and general conditions, as well as any regional or case-specific conditions, will ensure that the authorized work will have no more than minimal adverse effects, both individually and cumulatively, on the aquatic environment on a watershed basis. Projects authorized by this NWP must be designed to avoid and minimize impacts to waters of the United States to the extent practicable on the project site. In addition, the project design must reduce adverse effects to water quality by maintaining off-site upstream and downstream baseflow conditions, providing for stormwater management, and normally maintaining a vegetated buffer zone if the project occurs in the vicinity of open water. Through regional conditions, district engineers may require additional watershed protection techniques, if appropriate.

This NWP cannot be used to authorize recreational facilities that are not an integrated component of a residential, commercial, or institutional development. The development of a master planned community that includes residential, recreation, and commercial activities may be authorized by NWP B. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by this activity.

B. Master Planned Development Activities

One commenter proposed an NWP to authorize discharges of dredged or fill material to construct residential, commercial, and industrial developments that are planned or

designed for the long term protection of aquatic resources and are owned and managed by a single owner. Such developments are designed for residential, industrial, and/or commercial uses, as well as recreational uses. Master planned developments can provide long term protection of valuable aquatic resources by carefully integrating the development into the landscape and protecting the remaining wetlands, open waters, and associated buffers. These developments typically set aside wetlands, riparian corridors, and valuable upland habitats for restoration, enhancement, or preservation as part of the plan for the area.

Increasingly, counties and local communities across the country are encouraging mixed-use development and encouraging land use planning that incorporates consideration of the environment. Such initiatives provide communities with an opportunity to address a variety of concerns including protecting sensitive natural areas, consolidating infrastructure, and maximizing the delivery of urban services. Through local zoning and land use programs, governments are working to achieve these goals by encouraging the development of environmentally responsible, multiple-use communities. The Corps is committed to ensuring that the NWP program is consistent with these goals and objectives and is proposing this NWP to build on the incentives currently provided by State and local governments.

The Corps is proposing an NWP for master planned development activities that are designed, constructed, and managed to conserve and enhance the functions and values of waters of the United States on the project site. The Corps has designed NWP B to authorize only those master planned development activities that are designed, constructed, and managed to integrate multiple uses in a manner that conserves and enhances the functions and values of the water resources on the project site. Specifically, activities authorized by this permit often would incorporate several land use categories, including residential uses (e.g., single family homes, apartments), commercial uses (e.g., stores, hotels, office buildings), industrial uses (e.g., water treatment facilities), transportation uses (e.g., light rail, roads), and open space uses (e.g., parks, trails).

This NWP authorizes discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters, for the construction or expansion of master planned

developments. The Corps is seeking comments on the definition of master planned development to use for this NWP. A PCN will be required for all activities authorized by this NWP. The PCN must include a wetland assessment that utilizes a functional assessment method approved by the District Engineer. Permittees will be required to avoid and minimize impacts to waters of the United States to the maximum extent practicable and must include a written statement detailing compliance with this condition. The PCN must also indicate on the site plans all aquatic areas and adjacent buffer zones that would be protected by conservation easements or other measures. All preserved wetland areas, streams, mitigation areas, and buffer zones adjacent to waters of the United States on the site must be protected by a deed restriction, conservation easement, or other method of conservation and preservation as a condition of the permit. The District Engineer will review the proposed master planned development activities to ensure that these features are designed to ensure resource conservation and protection, and to protect aquatic resources.

The Corps is also considering and seeking comments on options to establish acreage limits for this NWP. One option would be to establish a simple acreage limit, such as 10 acres, for a single and complete project. Another option would be to establish acreage limits for master planned developments that are determined by indexing the upper limit of adverse wetland impact to the size of the parcel, to the amount of wetlands on the parcel, or to a percentage of the jurisdictional waters of the United States on a project site. The following table is an example of such a sliding scale, which indexes the acreage limit to parcel size:

| Parcel size | Maximum acreage loss authorized |
|------------------------------|---------------------------------|
| 100–200 acres | 3 acres. |
| 200–300 acres | 5 acres. |
| 300–500 acres | 7 acres. |
| Greater than 500 acres | 10 acres. |

In this example, master planned developments constructed on parcels less than 100 acres in size could not be authorized by this NWP. Instead, NWP A or another NWP may be used to authorize the development, if appropriate.

Examination of the above table shows that, in general, smaller project sites would be allowed a relatively higher wetland impact limit, as a percentage of

parcel size, than would larger sites, although the ratio does not decrease proportionately as the parcel size increases. (This same relationship already occurs under the existing NWP program, due to the Corps requirements for on-site minimization and avoidance, and the use of regional conditions). The use of a sliding scale can be justified by the limited flexibility that a smaller project site affords an applicant, whereas a larger project site affords an applicant more options in developing the property, and consequently, more opportunities to minimize wetland impacts. Such a method would differ from most NWPs, in that most NWPs have acreage limits that do not vary with the size of the project site. An indexed or varying scale for the maximum threshold would encourage the master planning of larger sites and discourage fragmenting projects to get more acres of impact to waters of the United States.

Other methods of determining acreage limits that we are considering would allow the applicant to adversely impact a certain percentage of the jurisdictional waters of the United States on the project site (e.g., 2% to 10% of the jurisdictional areas), or an amount of jurisdictional waters equal to a percentage of the parcel size. For example, at 1% of the total parcel size, a project on a 200 acre parcel could impact up to 2 acres of waters of the United States, and at 2% of the parcel size, a project on a 200 acre parcel could impact up to 4 acres of waters of the United States, etc.

These are just a few examples of an indexed or varying maximum threshold concept that the Corps is considering. Any such concept, if adopted, would still be subject to on-site avoidance and minimization requirements, as well as regional conditions and/or other restrictions. Any such permits would have to be carefully conditioned, and the respective acreage limits (and implied incentives) studied closely in order for these proposals to lead to a net reduction in the theoretical acreage of impacted waters of the United States. The Corps is seeking comments on the practicability of such concepts, the conditions that should be attached to any such concepts, and the advantages or disadvantages of implementing such concepts.

District engineers will consider the use of discretionary authority when sensitive and/or unique areas or areas with significant social or ecological functions and values may be adversely affected by the work. Although we have proposed a high acreage limit for this NWP, impacts must be avoided and

minimized to the maximum extent practicable, with appropriate compensatory mitigation to offset losses. Moreover, the comprehensive approach to the watershed area to be developed and the fact that all remaining waters of the United States and buffers will be protected will benefit the overall aquatic system. The compensatory mitigation should, in most cases, be on site and be incorporated into the development. District engineers can impose special conditions on a case-by-case basis to ensure the impacts are minimal. Regional conditions can also be used to limit the use of this NWP in high value aquatic ecosystems.

C. Stormwater Management Facilities

The Corps is proposing an NWP to authorize the discharge of dredged or fill material into non-Section 10 waters of the United States, including wetlands, for the construction and maintenance of stormwater management facilities. This permit may be used to authorize the construction of new stormwater management facilities including: the excavation for stormwater ponds/facilities, detention, and retention basins; installation and maintenance of water control structures, outfall structures, and emergency spillways; and the maintenance excavation of existing stormwater management ponds/facilities, detention, and retention basins. This permit may not be used to authorize any activities for the construction of ponds for other purposes.

The proposed acreage limit is 2 acres for the construction of new stormwater management facilities in order to authorize the construction of consolidated regional stormwater management facilities. There is no acreage limit proposed for the maintenance of stormwater management facilities because maintenance of these facilities is necessary to ensure the designed capacity is maintained for water quality improvements and reduction of downstream erosion and flooding. Notification will be required for the loss of greater than $\frac{1}{3}$ acre of waters of the United States, including wetlands, the loss of greater than 500 linear feet of stream bed, or the maintenance of existing stormwater management facilities causing the loss of greater than 1 acre of wetlands. Between May 1, 1997, and December 31, 1997, NWP 26 was used to authorize the construction or maintenance of 358 stormwater management facilities. These projects resulted in the loss of approximately 107 acres of wetlands, and 33,170 linear feet of stream bed, with 205 acres of compensatory

mitigation provided by permittees. In most cases, the construction of stormwater management facilities will be included in project specific permits (e.g., NWPs A, B, C, and D). There may also be cases where the construction of a stormwater management facility will be required, not in association with the construction of a residential, commercial, or institutional development, but for a watershed management plan.

Placement of stormwater management facilities in jurisdictional areas in certain circumstances may provide more environmentally sensitive planning and benefits to the aquatic environment than placing them in the uplands. By incorporating best management practices and watershed protection techniques that provide for long-term protection and enhancement of aquatic resources, and requiring a PCN for certain activities, the Corps believes that impacts to the aquatic environment will be minimal for this NWP. In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the impacts to the aquatic environment are minimal or assert discretionary authority to require an individual permit for the work. Division engineers may place regional conditions on this NWP. Such regional conditions may utilize interagency regional guidance that already exists, to the extent that such guidance complies with Corps regulations and allows the development of enforceable regional conditions.

D. Passive Recreational Facilities

One commenter recommended an NWP to authorize the construction of recreational facilities, such as playgrounds, playing fields, swimming pools and related structures, biking and hiking trails, and golf courses. Another commenter proposed an NWP to authorize discharges associated with the expansion or maintenance of ski areas. NWP 26 has been used to construct recreational facilities in headwaters and isolated wetlands. From May 1, 1997, through December 31, 1997, NWP 26 was used to authorize 57 recreational facilities, but this data does not include information on the specific types of recreational facilities authorized by NWP 26, or the acreage of impacts and compensatory mitigation.

The Corps is proposing an NWP to authorize discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands contiguous with tidal waters, for the construction or expansion of passive recreational facilities. For the purposes of this NWP, passive

recreational facilities are defined as low-impact recreational facilities that are constructed so that they do not substantially change preconstruction grades or deviate from natural landscape contours for the following types of activities: biking, hiking, camping, running, and walking. Passive recreational facilities may also include the construction or expansion of golf courses or ski areas, provided they are designed to be integrated with existing landscape features, do not require substantial amounts of grading or filling, and adverse effects to wetlands and riparian areas are minimized to the extent practicable. District engineers may require vegetated buffers to wetlands and streams and water quality management techniques as measures to ensure the impacts caused by these recreational facilities are minimal.

Passive recreational facilities can be either public or private and will not have a substantial amount of buildings and other impervious surfaces, such as concrete or asphalt. This NWP also authorizes the construction of support facilities such as office buildings, maintenance buildings, storage sheds, and stables, but does not authorize the construction of associated hotels or restaurants. Some grading and filling will be necessary to construct these facilities, such as constructing a gravel running trail or paving a narrow bike path through a park. Timber decks and walkways should be used where possible to minimize adverse impacts to waters of the United States. Campgrounds authorized by this NWP should have few impervious surfaces such as pavement and should consist of small cleared areas for tents and picnic tables connected by dirt or gravel trails or roads, with as little grading and filling as possible.

The maximum acreage loss authorized by this NWP is 1 acre of non-tidal waters of the United States (wetlands contiguous to tidal waters are also excluded). The Corps is proposing to require a PCN for losses of greater than $\frac{1}{3}$ acre of waters of the United States and/or greater than 500 linear feet of stream bed. Recreational facilities authorized by this NWP should be designed to protect valuable aquatic and upland habitats through avoidance and minimization. Compensatory mitigation will normally be required for losses of greater than $\frac{1}{3}$ acre of waters of the United States. A permittee may provide compensatory mitigation through individual restoration, enhancement, or creation of aquatic habitats, or through the preservation of adjacent open or green space, particularly those that include wetland and riparian habitats.

Compensatory mitigation can also be provided through in lieu fee programs, land trusts, and mitigation banks.

This NWP does not authorize the construction or expansion of campgrounds for mobile homes, trailers, or recreational vehicles. This NWP does not authorize the construction of playing fields, basketball or tennis courts, race tracks, stadiums, or arenas. Any recreational facility not authorized by this NWP may be authorized by another NWP, a regional general permit, or individual permit. Playing fields, playgrounds, and other golf courses may be authorized by NWP A if they are an integral part of a residential subdivision. Commercial recreational facilities may be authorized by NWP A. Playgrounds, ball fields, golf courses, parks, and trails may be authorized by NWP B if these facilities are part of a master planned development. The construction of hotels and conference centers that are commonly associated with recreational facilities may be authorized by NWP A.

By restricting this NWP to passive recreational facilities, we believe that the impacts to the aquatic environment will be minimal. In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the impacts to the aquatic environment are minimal or assert discretionary authority to require an individual permit for the work.

E. Mining Activities

During the 1996 NWP reissuance process, the Corps proposed an NWP for "Mining Operations". Based on the comments and information gathered during the process, the Corps decided to encourage the development of regional general permits, rather than to develop national limits to meet the minimal effects requirement. As a part of the initiative to replace NWP 26, the aggregate industry (i.e., sand, gravel, crushed and broken stone) and hard rock metal/mineral mining industry (i.e., extraction of metalliferous ores from subsurface locations) provided information and proposed draft NWPs that they believed would meet the minimal impact requirement.

The Corps has evaluated that input and developed a new proposed NWP for mining activity discharges that would have minimal impact (as conditioned) in certain aquatic ecosystems. We have organized the NWP around specific activities, within specific aquatic ecosystems. We have also provided separate sections for aggregate activities and for hard rock/mineral mining activities. This recognizes that while some of the discharges being regulated by the Corps are similar for both

industries, there are considerable differences in the impacts associated with the subsequent processing of the materials being extracted.

The terms and conditions of this NWP as well as the typical State and local permitting requirements mining operations are subject to, serve to minimize potential resource use conflicts and make it likely that only those activities which have adequately addressed the issue of such potential conflicts would be in a position to consider using this NWP. Both industries are generally speaking highly regulated, often subject to State and local land use planning requirements and individual permits. The NWP does not obviate the need to obtain other authorizations required by law, [33 CFR 330.4(b)]. For example, hard rock/mineral mining operations often require National Pollution Discharge Elimination System (NPDES) permits for discharges associated with ore processing techniques, and those NPDES permits must be obtained.

This NWP is expected to be used primarily for commercial mining activities, although smaller, non-commercial operations may benefit from this NWP. These activities provide both public and private benefits by providing materials for construction, manufacturing, and other industries.

The Corps is proposing to authorize discharges of dredged or fill material associated with specific activities undertaken during the mining of aggregate materials (i.e., sand, gravel, crushed and broken stone) and hard rock/mineral mining at new and existing mining sites. Mining activities authorized by this NWP include: discharges from filling, excavation, and dredging; exploration; processing; construction of berms, haul roads, dikes, and road crossings; construction of settling ponds and settling basins; ditching and trenching; mechanized landclearing; storm water and surface water management; stream diversion or relocation; stockpiling; sediment and erosion controls; grading; and other activities involved in mining and mined land reclamation.

The Corps is proposing two options for the acreage limit for a single and complete mining project in paragraph (j). We are requesting comments on whether the acreage limit for a single and complete project should be 3 acres or 2 acres. The acreage limit for a single and complete project is a combination of the acreage limit for the specific mining activities and the acreage limit for support activities.

This NWP authorizes only those Section 404 discharges associated with

mining activities that have been considered to have minimal impacts, as conditioned. For example, any NWP notification for in-stream mining activities must include a discussion of necessary measures to prevent increases in stream gradient and water velocities to prevent adverse effects (e.g., head cutting, bank erosion) on upstream and downstream channel conditions, as well as measures to minimize adverse effects to downstream turbidity. We are particularly interested in comments concerning conditions that are appropriate for mining activities in the aquatic ecosystems we have identified.

While thresholds and limits have been developed for each type of aquatic ecosystem, during the notification and evaluation process the Corps may find that further conditioning of the nationwide permit for a specific activity, including relocating or further reduction of the impacts of the activity and/or additional compensatory mitigation, is necessary or that the project should be evaluated under the Corps individual permitting procedures. Specifically, if the District Engineer determines that a proposed activity will have more than minimal adverse environmental effects, the District Engineer will require an individual permit. This would result in a project specific alternatives analysis, including off-site alternatives.

This NWP requires that the permittee submit a reclamation plan with the notification. District engineers have the flexibility to assert discretionary authority and not authorize further mining activities under this NWP if there is mined land reclamation required for previously authorized mining activities that has not been completed. Subsequently, upon completion of the required mined land reclamation, the District Engineer may authorize further mining activities under this NWP.

This NWP sets forth criteria that, combined with the discretion of the District Engineer, and the regional conditioning that can take place at the district and State levels, help ensure that only minimal adverse environmental effects will result on a cumulative basis. With required compensatory mitigation for losses of wetlands, environmental gains in addition to adequate environmental protections can be anticipated as an end result of use of this NWP. It is reasonable to assume that the potential time and cost savings associated with use of this NWP will encourage applicants to design their project within the scope of the NWP rather than request an individual permit, which

could potentially have a greater adverse impact. In addition, use of this NWP will enhance regulatory oversight of projects potentially encompassing much greater impacts.

Acreage limitations in this NWP restrict its applicability. Mining projects are of varying sizes, sometimes covering hundreds of acres, which include areas under Corps jurisdiction. Mandatory compensatory wetland mitigation ensures that losses of wetland functions are minimal on a cumulative basis. Furthermore, as a result of the notification requirements and the opportunity for regional conditioning, even small discharges can be ineligible for this NWP if the unique environmental function or ecological setting is determined to require further protection.

Mining companies have considerable experience in land reclamation, including the creation and restoration of wetland and riparian areas. Regulatory confusion surrounding wetlands created intentionally or unintentionally at mining operations serve as further testament to the ability to create wetlands as a part of the mining and reclamation process. We are requesting comments concerning the following position as a part of the NWP notice:

"Waterfilled depressions and pits, ponds, etc., created in any area not a "water of the U.S.", as a result of mining, processing, and reclamation activities, shall not be considered "waters of the U.S." until one of the following occurs:

- (1) All construction, mining, or excavation activities, processing activities and reclamation activities have ceased and the affected site has been fully reclaimed pursuant to an approved plan of reclamation; or
- (2) All construction, mining, or excavation activities, processing activities and reclamation activities have ceased for a period of fifteen (15) consecutive years or the property is no longer zoned for mineral extraction, the same or successive operators are not actively mining on contiguous properties, or reclamation bonding, if required, is no longer in place; and the resulting body of water and adjacent wetlands meet the definition of "waters of the U.S." (33 CFR 328.3 (a))."

This clarification would resolve a long-standing jurisdictional debate that has consumed much time and effort on the part of the regulated community and regulators alike, without contributing significantly to environmental protection. Asserting jurisdiction in such circumstances provides an incentive for operators to go out of their way to make sure that wetlands do not

occur on their properties, thus depriving for the duration of normal activities, whatever benefits would have accrued to the area as a result of the temporary or permanent creation of wetlands. Similarly, such assertions lessen the likelihood of non-mitigation wetland creation for fear of regulatory problems.

F. Reshaping Existing Drainage Ditches

One commenter recommended an NWP to authorize the maintenance of ditches. The maintenance of drainage ditches constructed in waters of the United States does not require a Section 404 permit (i.e., the maintenance is exempt), provided the drainage ditch is returned to its original dimensions and configuration (see 33 CFR 323.4(a)(3)). However, the modification or new construction of drainage ditches in waters of the United States requires a Section 404 permit. NWP 26 has been used in the past to authorize this activity in headwaters and isolated wetlands.

The Corps is proposing an NWP to authorize discharges of dredged or fill material into non-Section 10 waters of the United States for reshaping existing drainage ditches by altering the cross-section of the ditch to benefit the aquatic environment. Since maintenance of drainage ditches to their original dimensions and configurations is exempt from Section 404 permit requirements, the purpose of this NWP is to encourage reshaping of ditches in a manner that provides benefits to the aquatic environment. The original dimensions and configuration of the ditch may not provide water quality benefits that could be achieved with a different configuration. For example, the banks of ditches can be graded at a gentler slope to reduce erosion and decrease sediment transport down the ditch by trapping sediments. Shallower slopes also increase the amount of vegetation along the bank of the ditch, which can decrease erosion, increase nutrient and pollutant uptake by plants, and increase the amount of habitat for wildlife. This NWP is limited to reshaping currently serviceable drainage ditches constructed in waters of the United States, provided the activity does not change the location of the drainage ditch. The centerline of the reshaped drainage ditch must be in essentially the same location as the centerline of the existing ditch. This NWP does not authorize reconstruction of drainage ditches that have become ineffective through abandonment or lack of regular maintenance. This NWP may not be used to relocate drainage ditches or to modify drainage ditches to increase the area drained by the ditch

(e.g., by widening or deepening the ditch beyond its original design dimensions or configuration) or to construct new drainage ditches if the previous drainage ditches have been neglected long enough to require reconstruction. This NWP does not authorize channelization or relocation of streams to improve capacity of the streams to convey water. The construction of new drainage ditches or the reconstruction of drainage ditches may be authorized by an individual permit, another NWP, or a regional general permit.

This NWP does not authorize the maintenance or reshaping of drainage ditches constructed in navigable waters of the United States (wetlands that are contiguous to Section 10 waters are also excluded). A Section 10 permit is required for the maintenance or modification of drainage ditches constructed in navigable waters of the United States.

The Corps is proposing to require notification for reshaping drainage ditches where the material excavated during reconfiguration is sidecast into waters of the United States. If the ditch is being maintained to its original dimensions and configuration and the excavated material is sidecast into waters of the United States, no notification is necessary because this activity is exempt and a Section 404 permit is not required. Compensatory mitigation for the work authorized by this NWP should not be required if the ditch is reshaped to improve water quality. This activity can be considered to be self-mitigating, in that reshaping the ditch will normally result in improvements in water quality and any wetland vegetation that inhabited the ditch prior to the work will recolonize the ditch. In addition, if the project proponent did the work in such a manner that qualified for the exemption, compensatory mitigation would not be required since the activity is exempt. Requiring compensatory mitigation for modifying the cross-sectional configuration of the ditch may encourage maintenance to the original dimensions and configuration and discourage reshaping the ditch to a more environmentally beneficial shape.

Division engineers can regionally condition this NWP to exclude certain waterbodies or require notification when waters or unique areas that provide significant social or ecological functions and values may be adversely affected by the work. Activities authorized by this NWP will have minimal adverse effect on the aquatic environment, since it is limited to existing drainage ditches and activities

that improve water quality. District engineers can assert discretionary authority when very sensitive or unique areas may be adversely affected by these activities. It is unlikely that this NWP will result in a substantial increase in the Corps workload. The PCN requirement allows Corps districts, on a case-by-case basis, to add appropriate special conditions to ensure that the adverse effects are minimal. The District Engineer can also assert discretionary authority to require an individual permit for any activity that may have more than minimal adverse effects.

Discussion of Proposed Modifications to Existing Nationwide Permits

In response to comments received in reply to the December 13, 1996, **Federal Register** notice, the Corps is proposing to modify NWPs 3, 7, 12, 14, 27, and 40. These modifications will increase the number of activities authorized by these NWPs. The following is a discussion of our reasons for modifying these NWPs.

3. Maintenance

The Corps has proposed several modifications to this permit, as outlined in paragraphs (ii) and (iii) of the proposed permit. The Corps experience with NWP 3 to date has been very good; navigable waters have not been obstructed and adverse impacts to the aquatic environment are very minor. Furthermore, in many cases, use of NWP 3 actually enhances the aquatic environment. For example, replacing a damaged seawall often eliminates chronic turbidity caused by erosion. In paragraph (i) of the proposed modification, the Corps is retaining all of the original terms and conditions of this NWP. The Corps is proposing to add two related activities to this NWP: removal of accumulated sediments in the vicinity of existing structures and restoration of upland areas damaged by a storm, flood, or other discrete event.

Paragraph (ii) of the proposed modification will authorize the removal of accumulated sediments from stream beds and other open water areas in the vicinity of existing structures such as bridges and culverted road crossings. This modification also authorizes the placement of rip rap to protect the structure from scour. A new NWP to authorize this work was recommended as a result of a workshop at the 1997 Biennial National Regulatory Program Conference. From May 1, 1997, through December 31, 1997, NWP 26 was used 126 times to authorize the maintenance and clean-out of stream beds. The Corps believes that it is more appropriate to modify NWP 3 than to develop a new NWP for this activity.

The accumulation of sediments in the vicinity of structures is usually due to the structure's effects on sediment transport and flow patterns in the waterbody. These sediment deposits affect the ability of the structure to function effectively and may increase flooding in the area. In addition, these deposits can create barriers to the passage of fish and other aquatic organisms. Periodic removal of these aggraded materials is required to restore stream flow conditions and protect the integrity of the structure for the safety of the public.

Paragraph (ii) of the proposed modification of this NWP will be used more often than NWP 26 to authorize removal of sediments from the vicinity of structures because it is not limited to headwater streams where the median flow on an annual basis is less than 5 cubic feet per second. This activity will be authorized in all waters of the United States. Paragraph (ii) limits the amount of excavated material to the minimum necessary to restore the waterbody to its original dimensions (e.g., depth and width), for a maximum distance of 200 feet upstream and downstream from the structure. The amount of rip rap discharged for scour protection must be the minimum necessary to protect the structure. Excavated sediments must be deposited in an upland area, unless otherwise authorized by the District Engineer, and contained to prevent their reentry into the waterway. We are proposing to require a PCN for all work performed under this paragraph.

We believe that removal of sediments from the vicinity of these structures will have minimal adverse effects on the aquatic environment provided the amount of material removed is the minimum necessary to restore the stream to preconstruction dimensions (e.g., width and depth). Such work may also provide environmental benefits by restoring flow regimes and removing barriers to the movement of aquatic organisms. Flooding in the vicinity of the structure may also be reduced. The placement of rip rap for scour protection is also likely to result in only minimal adverse effects, because only small amounts of rip rap are typically needed to protect these structures. In those areas inhabited by submerged aquatic vegetation or other important aquatic organisms, the PCN requirement of this NWP will allow the District Engineer the opportunity to assert discretionary authority over the activity. In addition, regional or case-by-case special conditions such as time-of-year restrictions can be placed on specific activities or geographic areas.

This NWP will not authorize stream channelization or stream relocation projects. Stream channelization or relocation may be authorized by an individual permit, regional general permit, or other NWP. Removal of sediments from the vicinity of an existing structure in tidal waters may be authorized by an individual permit, regional general permit, or other NWP, such as NWP 19.

The PCN requirement will allow the District Engineer to ensure that the amount of sediment removed is the minimum necessary and consider the use of discretionary authority when important ecological functions are present or sensitive/unique areas may be adversely affected. Districts may impose regional or case-by-case special conditions to decrease the maximum distance to less than 200 linear feet upstream or downstream of the structure. Compensatory mitigation will typically not be required for work authorized by this NWP, since the work usually involves removal of recently aggraded sediments and may provide benefits for aquatic organisms by restoring flow regimes. Although a few streams will have aggraded sediments inhabited by vegetation, removal of these vegetated deposits will have minimal adverse effects on the stream. In circumstances where sediment deposits have developed extensive plant communities, such as in a braided stream, district engineers may require compensatory mitigation or assert discretionary authority to require an individual permit.

Paragraph (iii) of the proposed modification of NWP 3 will authorize discharges of dredged or fill material for the purpose of restoring uplands adjacent to waters of the United States where those uplands have been damaged by discrete events such as floods or storms. The purpose of this modification is to allow the reconstruction of shorelines, river banks, and other lands adjacent to open water areas to the extent and contours that existed prior to the damaging event. For example, the high banks of a river may be subjected to damaging flood flows, with the result that a substantial area of the bank becomes undercut and collapses into the river. The use of this permit would allow the discharge of fill material into the edge of the river in the quantities needed to rebuild the river bank. The installation of any bank stabilization measures needed to protect the restored area could be authorized under a separate permit, such as NWP 13. In order to qualify for this permit, the damage or loss of upland would have to be traceable to a specific event

that has occurred within the 12 months prior to the District Engineer receiving notification of the proposed work. This permit may not be used to reclaim lands that have been lost due to long-term erosion processes, historic damage more than 12 months old, or to restore lands where no substantial evidence of previous land contours can be established. The determination of previous land contours, and the extent of restoration allowed under this permit, is the responsibility of the District Engineer. Proposals to reconfigure and armor the rebuilt bank that the District Engineer has determined to not qualify for this permit may be processed as an individual permit or general permit.

The 12 month notification deadline has been proposed to allow the Corps to establish that the damage has occurred recently, and to verify that the purpose of the permit application is to repair any immediate damage, and not to reclaim lands that may have existed in the past. For example, a river may slowly change course over a period of many years, with a corresponding evolution of the landscape. The meandering of a river is a natural process, and this NWP would not be applicable if a party wished to relocate the channel of the river to reconfigure a piece of property into a more usable form, or to relocate the channel to a historic configuration. Likewise, an old land survey of a property adjacent to a lake may not be presented as evidence of justification for use of this NWP, where the land in question was located in what is now the open waters of the lake, and the land was lost to the lake several years ago. The shorelines of lakes may change over time, and the 12 month limit of this proposed permit is needed to ensure that areas of open water are not reclaimed as dry land in a piecemeal fashion based on historic surveys. The 12 month time period also seems reasonable given that the affected parties would be interested in quickly repairing any damage that has occurred to their property. This permit does not require that the restoration be completed within 12 months; it only requires that the Corps be notified within 12 months of the date of the damage. Any work authorized by this permit would have to commence, or be under contract to commence, within 2 years of the date of the damage.

The need for this NWP is justified by the desire of landowners to quickly repair property damage, or to ensure that they will be able to restore the land when resources become available. A landowner who has suddenly been deprived of a valuable piece of property due to the effects of a flood or storm

may sustain a substantial economic loss if he or she were unable to restore the damaged land quickly. The availability of this NWP would in many cases allow the landowner to repair the damage and minimize economic losses, without having to apply for an individual permit, which would require more time to process. Notification requirements and evidentiary conditions of this permit should ensure that the work is limited to that needed to restore recent damage, and should prevent the reclamation of historic lands.

This proposed modification to NWP 3 would also authorize minor dredging to remove obstructions or sediments deposited by the flood or storm. Dredging under paragraph (iii) of this NWP would be limited to a total of 50 cubic yards, and would be restricted to the extent needed to remove the obstruction. Any dredging requirements in excess of 50 cubic yards may be authorized by another general permit or an individual permit. The dredging provision of this NWP may not be used solely to provide a source of fill material needed for the restoration of uplands, nor may it be used to artificially deepen a waterbody, channelize a stream, or be used in place of a maintenance dredging operation.

It is anticipated that this NWP would only result in minimal impacts to the aquatic environment, since the areas that would be rebuilt were not waters of the United States prior to the damaging event, and the restoration of such lands should not result in a loss of aquatic habitat. Indeed, the actual restoration of the upland itself does not require a permit, because it is exempt under Section 404(f). The determination of the extent of waters of the United States should consider the contours of the affected upland area prior to the damaging event, and should not be based upon the current damaged condition of the property (i.e., the damaged area does not immediately become a water of the United States). As explained above, the applicant must provide evidence of the previous contours of the damaged land in order to qualify for this permit.

No upper acreage limit has been proposed for this activity, and mitigation will typically not be required for the work, since the restoration of uplands should not result in a loss of waters of the United States. While there is no upper limit, it is anticipated that most permittees would seek to restore small areas, such as the frontage of individual lots adjacent to streams or lakes in developed areas. The notification requirement would allow the Corps to alert other Federal and

State agencies, as necessary, such as State flood plain regulatory agencies. In addition, The Corps believes that the potential impacts from the removal of accumulated sediments near existing structures will be minimal. However, if these areas are inhabited by submerged aquatic vegetation or other important aquatic organisms, the PCN requirement of this NWP will allow the District Engineer the opportunity to assert discretionary authority over the activity. In addition, regional or case-by-case special conditions such as time-of-year restrictions can be placed on specific activities or geographic areas.

The Corps would only authorize those upland restoration projects that would be constructed in such a way as to result in no more than minimal impacts to the aquatic environment. Furthermore, this NWP would restrict the upland restoration to the extent that existed prior to the damage; however, the Corps would not require the applicant to make such full upland restoration. For example, should the applicant propose to restore only a part of the damaged upland, or to restore part of the damaged area in a way more beneficial to the aquatic environment, such as a wetland restoration, the Corps will usually agree to the plan. Any proposals to restore only a part of the damaged upland must originate with the applicant, and will not be required by the Corps.

The restoration of wetland areas and riparian zones damaged by storms may not be authorized with this NWP, however, these activities may be authorized by NWP 27. With regard to the use of this proposed permit with other NWPs (i.e., "stacking"), the Corps would not allow the use of this permit in combination with NWP 18 or NWP 19. The Corps is soliciting comments on the requirements and methods needed to demonstrate the prior extent of the uplands to be restored, the practicability of the proposed 50 cubic yard dredging limit, the 12 month time limit for notification to the Corps, the 2 year time limit established for the work to commence.

7. Outfall Structures and Maintenance

A commenter recommended modification of NWP 35 to authorize maintenance dredging activities at utility facilities for three types of areas: barge canals and slips, dam headworks at hydropower plants, and intake and outfall structures and canals. Most of these activities require individual permits because they occur in navigable waters of the United States or below headwater streams. Currently, NWP 35 authorizes maintenance dredging of

marina basins, boat slips, and access channels to marinas and boat slips.

The removal of debris from the headworks of hydroelectric dams does not require a Section 10 permit because it does not constitute work in navigable waters of the United States. A Section 404 permit is not required for this activity as long as there is no associated discharge of dredged or fill material. In these situations, most debris is removed with equipment or specially designed vessels that do not cause discharges of dredged or fill material into waters of the United States. Therefore, we are not proposing an NWP for this activity.

Another commenter requested that the terms and limitations of NWP 31 be expanded to include maintenance of intakes to water supply facilities.

The Corps is proposing to modify NWP 7 to authorize the removal of accumulated sediments from outfalls, intakes, and associated canals. All of the original terms and limitations of NWP 7 are retained in the proposed modification. Outfalls, intakes, and associated canals accumulate sediment and require periodic excavation or maintenance dredging to restore flow capacities to the facility. Most of the dredging is required in the vicinity of intake structures and their canals because circulation patterns result in the deposition of sediments in these areas. These sediments must be removed to ensure that the facility has an adequate supply of water for its operations. Water discharged from outfall structures usually has little or no sediment load; maintenance dredging is not often required in these areas. In situations where an utility company's intake or outfall canal is used by barges to travel to the utility facility, the proposed modification will allow continued access by those barges because the removal of accumulated sediments will return the intake or outfall canal to its designed dimensions, and restore its navigable capacity. Currently, utility companies must obtain individual permits for this work, since the amount of dredged material usually exceeds the limitation of 25 cubic yards specified in NWP 19. This NWP authorizes the removal of accumulated sediment from intake and outfall structures in small impoundments, such as water treatment facilities, irrigation ponds, and farm ponds. This NWP will not authorize the construction of new canals or the removal of sediments from the headworks of large dams, flood control facilities, or large reservoirs. These types of work may be authorized by individual permits, regional general

permits, or other NWPs, such as NWPs 19 or 31.

A PCN will be required so that Corps districts can review these activities on a case-by-case basis to ensure that the adverse effects are minimal. The amount of sediment dredged or excavated must be the minimum necessary to restore the facility to original design capacities and configurations.

The Corps believes that the potential impacts from the removal of accumulated sediments from intake and outfall structures and associated canals will be minimal. If the canals are inhabited by submerged aquatic vegetation or other important aquatic organisms, the PCN requirement of this NWP will allow district engineers the opportunity to assert discretionary authority. In addition, regional or case-by-case special conditions such as time-of-year restrictions can be placed on specific activities or geographic areas.

12. Utility Activities

In response to the December 13, 1996, **Federal Register** notice, the Corps received several comments requesting development of NWPs for activities associated with utility lines, such as the construction of electric and pumping substations, foundations for electric power line towers, and permanent access roads. NWP 26 has been used to authorize these activities in the past. From May 1, 1997, through December 31, 1997, there were 34 utility-related activities authorized by NWP 26. Since the commenters were proposing activities directly related to utility lines, we believe it is more appropriate to modify NWP 12 to authorize these activities, instead of developing separate NWPs for each type of activity.

One commenter proposed an NWP that would authorize the installation and maintenance of overhead electric transmission lines and associated facilities, such as substations and permanent access roads. NWPs 26 and 33 have been used to construct access roads associated with utility lines, but NWP 33 authorizes only temporary access roads. Permanent access roads are necessary for routine and emergency maintenance of overhead electric transmission lines. NWP 26 has also been used to authorize the construction of foundations for transmission towers and poles. Another commenter has used NWP 26 to build electric substations and construct access roads for electric power transmission lines, and recommended either issuance of a new NWP or modification of NWP 12 to authorize these activities. The commenter stated that NWPs 14 and 33 typically cannot be used to authorize

the construction of permanent access roads for utility lines, because of the acreage limitations of NWP 14 and the fact that NWP 33 authorizes temporary, not permanent, access roads.

A commenter recommended including electric utility activities in the NWP program, similar to the utility activities presently authorized by the Florida Department of Environmental Protection and regional water management districts in the State of Florida.

Currently, NWP 12 authorizes only utility line backfill and bedding activities. All of the original terms and limitations of NWP 12 have been retained, with some clarification, in the proposed modification. The proposed modification of NWP 12 will include the following activities commonly associated with utility lines: electric and pumping substations, foundations for electric utility line towers, and permanent access roads. Modifying NWP 12 to expand coverage of the installation and maintenance of utility lines and attendant features is a more effective means of authorizing these activities than developing several new NWPs. It will streamline the authorization process for utility line activities that have minimal adverse effects on the environment.

Paragraph (i) of the proposed modification authorizes the same activities as the NWP 12 published in the December 13, 1996, **Federal Register** notice. In the proposed modification, we are including clarification of the circumstances where a pipeline carrying gaseous or liquid substances over navigable waters of the United States requires a permit from the United States Coast Guard pursuant to Section 9 of the Rivers and Harbors Act. We are also proposing to include language in this paragraph that states that repair of utility lines is authorized by this NWP. The impacts due to repair are often less than those of installation, because in most cases only certain sections of a utility line require repair, and these areas are restored upon completion of the work.

Paragraph (ii) authorizes discharges associated with the construction or expansion of electric or pumping substations, provided the discharge does not cause the loss of more than 1 acre of non-Section 10 waters of the United States (wetlands that are contiguous to Section 10 waters are also excluded). The Corps is proposing to require a PCN if the construction or expansion of the substation will cause the loss of more than $\frac{1}{3}$ acre of waters of the United States.

Paragraph (iii) authorizes discharges for foundations of utility line towers, poles, and anchors. To minimize adverse effects, separate foundations for each tower leg will be required, when practicable, and the foundations must be the minimum size necessary. In most cases, the construction of foundations for overhead utility lines will have minimal adverse effects on the aquatic environment because these utility lines are constructed in a cleared right-of-way (which will remain as a wetland) and the foundations will permanently affect only a small proportion of the cleared wetland area. In the right-of-way, most of the vegetation will be allowed to grow back as either emergent or scrub-shrub wetland.

Paragraph (iv) would authorize discharges for the construction and maintenance of permanent access roads, which would be used to maintain the utility line, especially in emergency situations. Access roads used only for construction can be authorized by NWP 33, but restoration of waters of the United States is required after completion of the work. We expect that most access roads used for maintenance will be the same as the access roads used for construction. Access roads must be the minimum width necessary, be designed to minimize the amount of waters of the United States adversely affected by the roads, and cannot restrict surface and subsurface flows. We are proposing a maximum acreage loss limitation of 1 acre of waters of the United States. Access roads must follow preconstruction contours and elevations to the extent practicable. The Corps is proposing to require notification where more than 500 linear feet of access road is constructed above preconstruction grades in waters of the United States. Corduroy or geotextile/gravel access roads constructed at grade are likely to be the most common access roads constructed. We anticipate that most of these access roads would be 10 to 15 feet wide. We believe that permanent access roads are necessary because they allow efficient emergency maintenance of utility lines. Temporary access roads become overgrown with vegetation, delaying access for emergency repairs. Such delays endanger citizens serviced by the utility line. With proper construction techniques, access roads can be constructed and maintained with minimal adverse effects on the aquatic environment. Surface water flows will not be substantially affected by access roads constructed at-grade. Some components of access roads will have to be constructed above grade, particularly to construct culverted stream crossings.

Such crossings will have minimal adverse effects, provided the culverts are adequately sized.

In the proposed modification of NWP 12, we are including the definition of "loss" of waters of the United States as defined in other NWPs. The installation of subaqueous utility lines in waters of the United States should not be considered as resulting in a loss of waters of the United States if the area impacted by the installation of the utility line is the minimum necessary and preconstruction contours and elevations are restored after construction. The use of timber mats in utility line construction results in temporary impacts to waters of the United States, and typically reduce impacts to wetlands caused by heavy equipment. Therefore, the use of timber mats should not be included as a source of permanent loss when determining impacts to waters of the United States, provided they are removed upon completion of construction. Once the timber mats are removed, wetland conditions typically return within a short time period.

We are also including language in the proposed modification of NWP 12 to clarify that the installation of utility lines in navigable waters of the United States without any associated discharge of dredged or fill material (i.e., Section 10 of the Rivers and Harbors Act is the only applicable law) is authorized by this NWP. All of the original notification provisions of NWP 12 will remain the same, with additional notification provisions for discharges for electric or pumping substations that result in the loss of more than $\frac{1}{3}$ acre of non-tidal waters of the United States and for permanent access roads constructed in waters of the United States above preconstruction grades for a distance of more than 500 feet. We are revising item "c" in the notification section to clarify that the exclusion of overhead utility lines that are constructed for a distance of more than 500 linear feet in waters of the United States from the notification requirement.

This NWP does not authorize the construction of new power plants, water treatment plants, or reservoirs. Discharges in Section 10 waters for the construction of electric or pumping substations or access roads is not authorized. Pipelines used to transport gases and liquids over navigable waters of the United States require a Section 9 permit from the United States Coast Guard and are not authorized by this NWP. Division and district engineers will still be allowed the use of discretionary authority when very

sensitive/unique areas may be adversely affected by these activities.

14. Linear Transportation Crossings

One commenter recommended an NWP to authorize the construction, extension, and expansion of railroad tracks, including railroad beds. NWP 26 has been often used to authorize this type of work. Another commenter recommended an NWP to authorize minor road improvements and maintenance projects and the placement of drainage structures in headwater streams.

The Corps is proposing to modify NWP 14 to authorize discharges of dredged and fill material into non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters, for the construction, expansion, and improvement of public linear transportation crossings for public projects such as roads, railroads and runways. For private linear transportation crossings and for public linear transportation crossings in tidal waters or non-tidal wetlands contiguous to tidal waters, such as a controlled-access road to an industrial site, or the construction of a private road leading to a residence, the original terms and limitations of NWP 14 will be retained.

The Corps is proposing two options for the acreage limit for public linear transportation crossings in paragraph (a). We are requesting comments on whether the acreage limit for public linear transportation crossing should be 1 acre or 2 acres. For public linear transportation crossings, notification will be required for discharges in special aquatic sites, including wetlands, or for all discharges that result in the loss of greater than $\frac{1}{3}$ acre of waters of the United States. For private road crossings, the discharge cannot result in the loss of more than $\frac{1}{3}$ acre of waters of the United States, or extend for a distance of more than 200 feet in waters of the United States. Notification will be required for all discharges in special aquatic sites, including wetlands, for private road crossings. Between May 1, 1997, and December 31, 1997, NWP 26 was used to authorize 953 transportation projects. These transportation projects resulted in the loss of approximately 278 acres of wetlands, and 56,442 linear feet of stream bed, with 1,036 acres of compensatory mitigation provided by permittees.

Features of the proposed work that are integral to the linear transportation project, such as interchanges, stormwater detention basins, rail spurs or water quality enhancement measures, may also be authorized by this permit.

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

For large transportation projects that would have many potential crossings of jurisdictional areas, the Corps districts will determine on a case-by-case basis whether this permit may be used, or whether an individual permit may be required for the work. Corps districts may also exercise discretionary authority over any project that, in the determination of the District Engineer, has the potential to result in more than minimal impact on the aquatic environment. The definition of the term "single and complete project" for linear projects can be found at 33 CFR 330.2(i).

The Corps is soliciting comments on several issues related to this proposed permit, including the acreage limit, and the prohibition of the use of this permit for non-linear features associated with transportation projects.

27. Stream and Wetland Restoration Activities

The Corps is proposing to modify NWP 27 to add the restoration and enhancement of streams to the wetland and riparian enhancement authorized by the existing NWP 27. The modified permit would authorize projects that would enhance, restore or create structural habitat features, hydraulics, and vegetation in altered and/or degraded non-Section 10 streams and non-tidal wetlands. Such activities include, but are not limited to: the removal of accumulated sediments, the installation, removal and maintenance of water control structures, the installation of current deflectors, the enhancement, restoration or creation of riffle and pool stream structure, the placement of in-stream habitat structures, modifications of the stream bed and/or banks to restore or create stream meanders, the backfilling of artificial channels and drainage ditches, the removal of existing drainage practices and structures, the construction of small nesting islands, the construction of open water areas, and activities needed to re-establish vegetation, including plowing or discing for seed bed preparation and mechanized land-clearing to remove undesirable vegetation. This NWP applies to projects that would serve the purpose of restoring and enhancing "natural" stream hydrology, wetland hydrology, vegetation, and function in altered and degraded non-Section 10 streams and associated riparian areas, and non-tidal wetlands.

This NWP cannot be used to authorize activities for the conversion of natural wetlands or streams to another aquatic use, such as the impoundment of a stream for waterfowl habitat, or the conversion of a scrub-shrub wetland into an herbaceous emergent wetland. However, this permit may be used to authorize the construction of projects that would recreate similar habitat types in a different location than the existing wetlands, provided that the project results in functional gains. For example, a berm may be proposed to enhance and enlarge an existing wetland, however, the impoundment of water behind the berm would replace an existing emergent wetland area with open water, and recreate a similar emergent wetland at another location within the larger wetland. This project may be authorized by NWP 27, because it would not result in a conversion of one wetland type to a dissimilar wetland type.

No activities or discharges not directly related to the restoration of ecological values or aquatic functions may be authorized by this permit.

The intent of this permit is to facilitate the restoration of degraded or altered streams and wetlands. The goals of the proposed activities must be based upon the enhancement, restoration or creation of the characteristic ecological conditions that existed, or may have existed, in the stream or wetland prior to disturbance, or to other wise improve the aquatic functions of such areas. The activities may include, but are not limited to, the modification of the hydraulics, vegetation, or physical structure of the altered or degraded stream or wetland. Notification to the District Engineer would be required only for those projects noted in condition (iv) of the permit.

The use of this proposed permit with other NWPs would require notification to the District Engineer in accordance with General Condition 15. Use of this NWP with other NWPs may not be restricted, provided there is a net gain of aquatic habitat and/or aquatic functions. For example, it is likely that some projects considered under this permit would require cofferdams to temporarily dewater the project site, or interim bank stabilization measures during construction of channel improvements. Because neither of these discharges are, in and of themselves, directly related to the restoration of aquatic habitat, they would require separate authorizations, in these cases NWP 33 and NWP 13, respectively. Given the nature of the activities that may be proposed for each project site, the Corps will make a case-by-case determination on the need for other

authorizations during the review of the project.

For activities that require notification, the Corps, with input from other Federal and State agencies, would evaluate each project to determine whether the proposed work would result in a net increase in aquatic functions. Factors such as temporal habitat loss, changes in species composition, and other aquatic functions would be examined in the course of the evaluation. This permit cannot be used to relocate an altered or degraded stream, where the new stream would have characteristics similar to the old stream (i.e., substantial habitat improvement would not result from the work). In another example, this permit would not be applicable to a project that proposed to remove sediment from a stream for the purpose of improving or creating a navigation channel, because the primary purpose of the work would not be the improvement of aquatic functions, although in some cases, some habitat benefits could result from the work. Similarly, this permit may not be used to channelize, deepen or modify a stream in order to facilitate land drainage.

The Corps is soliciting comments on the types of activities that may be authorized under this proposed permit, and whether any additional conditions (e.g., restricting the construction of the projects to certain types of streams) should be placed upon its use. The Corps anticipates that the majority of projects authorized by this permit would involve habitat improvements on small lengths of streams or in small wetland areas; however, there is no restriction on the scope of the projects that can be authorized with this permit. The Corps anticipates that this permit will be used primarily by units of State and local government, private ecological restoration groups and individual landowners.

40. Agricultural Activities

The Corps is proposing to modify NWP 40 to authorize the discharge of dredged or fill material into non-tidal waters of the United States, including non-tidal wetlands, for the purpose of improving production on existing agricultural lands. Between May 1, 1997, and December 31, 1997, NWP 26 was used to authorize 317 agricultural projects. These projects resulted in the loss of approximately 85 acres of wetlands and 20,860 linear feet of stream bed, with 151 acres of compensatory mitigation provided by the permittees. The proposed modification to NWP 40 may be used to authorize, in addition to the construction of foundations and

building pads for farm buildings currently authorized by NWP 40, the installation or placement of drainage tiles; construction of drainage ditches or levees; mechanized land clearing, land leveling, and similar activities.

Paragraph (a) of the proposed modification of NWP 40 authorizes discharges into waters of the United States, provided the permittee has obtained a minimal effect exemption from NRCS and the activity does not cause the loss of greater than 1 acre of non-tidal wetlands and does not cause the loss of greater than 1/3 acre of playas, prairie potholes, and vernal pools. The minimal effect exemption must be obtained in accordance with the provisions of the Food Security Act (16 U.S.C. 3801 *et seq.*) and the National Food Security Act Manual(NFSAM).

Paragraph (b) of the proposed modification authorizes discharges of dredged or fill material into non-tidal wetlands on agricultural lands provided the discharge results in a loss of no greater than 3 acres of non-tidal wetlands and the permittee submits and implements a compensatory mitigation plan that fully offsets the wetlands loss. The Corps is considering options for the type of wetlands that should be applicable to this activity and is seeking comments on whether this proposed modification should be for all non-tidal wetlands, farmed wetlands only, or frequently cropped wetlands only. Farmed wetlands and frequently cropped wetlands are those wetlands which are already being manipulated to some extent for agricultural production. Non-tidal wetlands include farmed wetlands and frequently cropped wetlands in addition to those natural wetland areas on agricultural land that have not been previously manipulated for agricultural production.

The Corps is also considering and seeking comments on options to establish acreage limits for these activities. One option would be to establish a sliding scale or indexing of impact acreage limits for this NWP, based on farm size. Another option is using a simple upper impact acreage limit (e.g., 3 acres). A sliding scale could be based on the size of a farm, percentage of wetlands, percentage of farm, or other approaches. The following table is a sample sliding scale or indexing of impact acreage limits for this NWP, based on farm size:

| Farm Size | Maximum acreage loss authorized for wetlands on agricultural lands |
|------------------------------|--|
| Less than 15 acres | 1/4 acre. |
| 15-25 acres | 1/2 acre. |
| 25-50 acres | 3/4 acre. |
| 50-100 acres | 1 acre. |
| 100-500 acres | 2 acres. |
| Greater than 500 acres | 3 acres. |

NRCS must approve the mitigation plan if the permittee is a USDA program participant or non-participant receiving technical assistance. If the permittee is a USDA non-participant and has not had NRCS approve a mitigation plan, the Corps must approve the mitigation plan. Discharges into natural playas, prairie potholes, or vernal pools are not authorized under the terms of this paragraph.

Paragraph (c) of the proposed modification to NWP 40 authorizes discharges into naturally vegetated playas, prairie potholes, or vernal pools, provided the discharge does not result in the loss of greater than 1 acre of non-tidal wetlands. The Corps is also considering and seeking comments on options to establish acreage limits for these activities. One option would be to establish a sliding scale or indexing of impact acreage limits for this NWP, based on farm size. Another option is using a simple upper impact acreage limit (e.g., 1 acre). A sliding scale could be based on size of farm, percentage of wetlands, percentage of farm, or other approaches. The following table is a sample sliding scale or indexing of impact acreage limits for this NWP, based on farm size:

| Farm size | Maximum acreage loss authorized for playas, prairie potholes, and vernal pools |
|------------------------------|--|
| Less than 25 acres | 1/4 acre. |
| 25-100 acres | 1/2 acre. |
| 100-500 acres | 3/4 acre. |
| Greater than 500 acres | 1 acre. |

The permittee must submit an NRCS- or Corps-approved compensatory mitigation plan to fully offset wetland losses. The compensatory mitigation plan must be approved by NRCS if the permittee is a USDA program participant or non-participant receiving technical assistance. The Corps must approve the mitigation plan if the permittee is not a USDA program

participant and has not had NRCS approve a mitigation plan.

Paragraph (d) of the proposed modification contains the original terms of NWP 40. The acreage limit for this paragraph is 1 acre of non-tidal wetlands in agricultural production prior to December 23, 1985. This NWP does not authorize discharges into playas, prairie potholes, and vernal pools for the construction of building pads or foundations for farm buildings.

In paragraph (e), the Corps is also proposing to modify NWP 40 to authorize the relocation of existing serviceable drainage ditches and previously substantially manipulated intermittent and small perennial streams on agricultural land. However, the relocation of ditches and streams authorized by this NWP does not authorize reconfiguration of those ditches or streams to increase the area drained by the ditch or stream (i.e., by widening or deepening the ditch/stream beyond its original design dimensions or configuration). This NWP does not authorize work in streams other than described above.

The Corps is proposing to require notification for activities that result in: (1) the loss of greater than 1/3 acre of non-tidal waters of the United States, including playas, prairie potholes, or vernal pools, or (2) filling or excavating greater than 500 linear feet of drainage ditches and previously substantially modified intermittent and small perennial streams. The appropriate Federal and State agencies will be notified for the loss of greater than 1 acre of non-tidal wetlands.

The aggregate acreage limit for wetland impacts authorized by this NWP as a result of the activities in paragraphs (a), (b), (c), and (d) cannot exceed 3 acres per farm for the duration of this nationwide permit (i.e., until reissuance or any revocation). NWPs are generally reissued every five years. When NWPs are reissued they may be used again on the same farm to authorize activities for impacts not to exceed the acreage thresholds authorized in the reissuance. In addition, for the purposes of increasing agricultural production, this NWP cannot be used with other NWPs to exceed this 3-acre limit. The use of this NWP prohibits any future use of proposed NWP A, whether by the farm owner/operator or if the property is sold. For the purposes of this NWP a single and complete project is defined as a "farm" (i.e., the land unit under one ownership, which is operated as a farm, as reported to the Internal Revenue Service). We are considering options for and requesting comments on alternative

suggestions for this definition of a single and complete project (such as "farm tract" or "field"). The boundary determination of the single and complete project as defined for this NWP will be as determined as of the effective date of the publication of this **Federal Register** notice.

The notification will allow district engineers to review proposed activities to ensure that no more than minimal adverse effects to aquatic resources will occur. District engineers can require special conditions on a case-by-case basis to ensure that the impacts are minimal. District engineers can exercise discretionary authority and require an individual permit for those activities that may have more than minimal adverse effects on the aquatic environment.

Other Suggested NWPs

In response to the December 13, 1996, **Federal Register** notice, several commenters recommended replacement NWPs for activities which we believe do not warrant the development of a NWP. Some of these activities are in areas that are not considered to be waters of the United States. Other activities are exempt from permit requirements of Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. These comments are addressed below.

Maintenance of Landfill Surfaces: One commenter proposed an NWP authorizing the maintenance of landfill surfaces. The Resource Conservation and Recovery Act (RCRA) requires the use of clay material to cap municipal solid waste landfills, and grading of such areas sufficient to prevent water from ponding on the cap. As refuse in a landfill decomposes and settles, portions of the clay cap can subside, creating ponded areas on the landfill surface. Wetland species may colonize these ponded areas. These depressions increase the chance that water may infiltrate through the clay cap and come into contact with the refuse, which may result in increased pollution of the air and groundwater. To comply with the RCRA, Clean Air Act, and Clean Water Act, these depressions must be filled to return the landfill cap to the designed grade and prevent infiltration of water into the landfill. The regular maintenance of landfill caps prevents leaching of contaminants into the surrounding air, water, and soil.

The Corps believes that these ponded areas on the landfill cap are not waters of the United States, because landfill caps are constructed from uplands and require continuous maintenance. The preamble to 33 CFR Part 328 in the

November 13, 1986, **Federal Register** (51 FR 41217, Section 328.3) states that "water filled depressions created in dry land incidental to construction activity * * *" are not considered waters of the United States " * * * until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States." The landfill is not abandoned because of the routine maintenance required by law to keep the landfill surface at the designed grade. Since routine maintenance of landfill surfaces does not require a Section 404 permit, we will not be developing an NWP for this activity.

Maintenance and Filling of Ditches Adjacent to Roads and Railways: One commenter proposed an NWP to authorize maintenance of roadside ditches constructed in tidal and non-tidal waters of the United States to collect and convey runoff from the road. Another commenter proposed an NWP to authorize discharges of dredged or fill material to construct additional railroad tracks, widen or protect railroad beds, and drain water to prevent saturation of the railroad bed. Saturation of the railroad bed can cause settling of the bed, requiring maintenance or reconstruction to return the railroad bed to the proper grade. Flat-bottom ditches are constructed at the toe of the railroad embankment (often in upland areas) to convey runoff from the railway to natural drainage courses. Roadside and railway ditches commonly develop wetland characteristics as a result of fulfilling their purpose and must be periodically cleaned out. At other times, these drainage ditches may be filled to widen the road or railroad bed. Work in roadside or railroad ditches may or may not require a permit from the Corps, depending on the case-specific circumstances of the ditch.

The maintenance of roadside or railroad drainage ditches constructed in uplands does not require a Section 404 permit since these ditches are not waters of the United States, even though they may support wetland vegetation. The preamble to 33 CFR 328.3, as published in the November 13, 1986, issue of the **Federal Register** (51 FR 41217), states that "non-tidal drainage or irrigation ditches excavated on dry land" are generally not considered to be waters of the United States. Filling these ditches to widen the road or railroad bed does not require a Section 404 permit.

If these roadside or railroad ditches are constructed in waters of the United States, the maintenance of these ditches is exempt from Section 404 permit requirements (see 33 CFR 323.4(a)(3)),

provided the ditch is restored to its original dimensions and configuration. However, the construction of these ditches in waters of the United States requires a Section 404 permit and may be authorized by an individual permit, an NWP or a regional general permit. A Corps permit is required to widen the road or railroad bed in these ditches constructed in waters of the United States, if the activity results in a discharge of dredged or fill material into waters of the United States or the activity extends into navigable waters of the United States. We are proposing to modify NWP 14 to authorize such activities, and other linear transportation activities, in non-tidal waters of the United States (wetlands that are contiguous to tidal areas are also excluded). Widening road or railroad beds in tidal waters usually requires an individual permit, but may be authorized by an NWP, or an applicable regional general permit. The construction or maintenance of roadside and railroad ditches in navigable waters of the United States requires a Section 10 permit. Furthermore, the maintenance of roadside ditches where the proposal includes reconfiguration of these ditches does not qualify for the exemption at 33 CFR 323.4(a)(3). However, we have proposed NWP F in order to address this situation, provided the drainage capacity of the ditch is not increased.

Maintenance of Water Treatment Facilities: One commenter requested an activity-specific NWP for maintenance of water treatment facilities, such as the removal of material from constructed settling lagoons and associated constructed wetlands, maintenance and de-watering of stock ponds for livestock, and maintenance of recharge ponds for water supplies.

Water treatment facilities constructed in uplands do not require a Section 404 permit for maintenance activities. The Corps does not generally consider "[a]rtificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing" to be waters of the United States. (Refer to the preamble to 33 CFR 328.3, as published in the November 13, 1986, issue of the **Federal Register** (51 FR 41217)).

To address some other issues relevant to water quality, we are proposing NWP C for the construction and maintenance of stormwater management facilities, modifying NWP 3 to authorize the removal of sediments that accumulate in the vicinity of structures, and modifying NWP 7 to authorize removal of

accumulated sediments from outfall and intake structures and associated canals. Removal of sediments from detention and settling basins constructed with a Section 404 permit would be authorized by the proposed NWP C as long as the maintenance activity does not change the use of the facility. In addition, some of the activities cited above are covered by existing NWPs, are exempt from Clean Water Act regulation, or do not require a Corps permit. Construction of stock ponds is an exempt activity; thus, the de-watering and maintenance of stock ponds is exempt from 404 Section permit requirements as long as the activity is for water quality benefits and does not enlarge the pond or change the use to other than providing water for livestock. Maintenance of recharge ponds constructed in uplands does not require a Section 404 permit, but the maintenance of these ponds constructed in waters of the United States may be authorized by existing NWPs, such as NWPs 3, 18, or 13, or proposed NWP C. Therefore, these activities have not been specifically included in the proposed NWPs.

Mitigation Banks and the NWP Program. One commenter recommended that the replacement NWPs should include language that identifies mitigation banks as the preferred method of providing compensatory mitigation for impacts authorized by these NWPs. The commenter believes that placing such an emphasis on mitigation banking will provide incentive for the construction of more mitigation banks by increasing the certainty that these banks will be used by permittees to offset losses authorized by these NWPs. This commenter also recommended that the NWP program formally adopt the "Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks" (60 FR 58605-58614). The commenter also recommended the development and implementation of standard policies pertaining to the establishment and use of in lieu fee programs that matches the federal mitigation bank guidance. The commenter believes such guidance is needed to monitor the funds paid by permittees, monitor the number of acres of wetlands restored as a result of payment of those fees, provide compensatory mitigation in advance of authorized impacts, and require binding agreements that will ensure that the compensatory mitigation is successful.

The Corps disagrees that the proposed replacement NWPs should stipulate preference for mitigation banks as a form of compensatory mitigation. In the December 13, 1996, **Federal Register** notice, the Corps did not direct districts

to require permittees to use mitigation banks for offsetting wetland losses due to NWP 26, but suggested that they could be used, as could in lieu fee programs and individual mitigation projects, to provide compensatory mitigation. Consolidated mitigation methods (mitigation banks, in-lieu fees) are often an efficient means of compensating for impacts, and may confer benefits to the aquatic environment as well (see 61 FR 65892). We recognize that consolidated mitigation projects, such as mitigation banks and in lieu fee programs, are more practicable and successful because of the planning and implementation efforts typically expended on these projects by their proponents. In contrast, many individual efforts to create, restore, or enhance wetlands to replace small wetland impacts are often not successful and do not provide many benefits to the aquatic environment, partly because they are not well planned or executed. In addition, numerous small compensatory mitigation efforts can be expensive and time-consuming to monitor.

Mitigation banks and in lieu fee programs are not common throughout the country. Therefore, it would be impractical to require their use as a preferred or sole means of providing compensatory mitigation for impacts authorized by the proposed replacement NWPs. While in lieu fee programs are in place in several districts, efforts continue to ensure in lieu fee programs will provide adequate compensatory mitigation. District engineers have the authority to approve the means by which a particular permittee provides appropriate compensatory mitigation. Permittees should not be required to use a particular mitigation method, just because it is available. Permittees must have the flexibility to propose compensatory mitigation methods that are within their means to accomplish. To the extent appropriate, permittees should consider use of approved mitigation banks and other forms of mitigation including in lieu fees. District engineers will evaluate the permittee's proposed mitigation for its appropriateness and practicability as indicated in the NWP mitigation condition.

Expansion of Nationwide Permit 31. A commenter requested that NWP 31 be expanded to authorize other maintenance activities relating to flood control and maintenance of water supply facilities, including removing sediment from natural stream channels without enlarging the channel, removing vegetation from streams that increases aggradation of the stream bed,

stabilizing banks, removing aggraded sediments, and cleaning sediment from intake pipes that draw water from the stream or groundwater. The commenter stated that some of these activities did not require a Section 404 permit prior to the implementation of the excavation rule and are not authorized by NWP 31 or 33 CFR 330.3.

NWP 31 authorizes discharges of dredged or fill material for the maintenance of existing flood control facilities that were either previously authorized by a Corps permit or 33 CFR 330.3 or constructed by the Corps and transferred to a local sponsor for operation and maintenance. In natural stream channels, most of the activities cited in the previous paragraph can be authorized by NWP 31 provided those channels are part of an authorized flood control facility. One requirement of NWP 31 is that the District Engineer establish a baseline for maintenance. The maintenance baseline can include width at ordinary high water, channel depth, and/or other parameters used to quantify dimensions of a stream channel. For example, the maintenance baseline for a stream channel may be a particular bed elevation. When sediments accumulate in the stream channel, raising the elevation of the bed, NWP 31 may be used to authorize the removal of the aggraded sediments to return the stream bed to the maintenance baseline elevation, even if the sediment supports wetland vegetation. Bank stabilization work for portions of the flood control project may be authorized by NWP 13, regional general permits, or an individual permit. The removal of sediment from water intake pipes cannot be authorized by NWP 31. However, removal of sediments from the vicinity of these structures may be authorized by NWP 18, the proposed modifications to NWP 3, the proposed modification to NWP 7, regional general permits, or individual permits.

Discussion of Nationwide Permit Conditions

General Conditions

The Corps is proposing to consolidate all of the General Conditions and Section 404 Only conditions into one General Condition Section for the NWPs. The reason for this consolidation is that most of the Section 404 Only conditions have applicability to activities in Section 10 waters. Some of the Section 404 Only conditions, such as conditions 4, 5, 6, and 8, are essentially always applicable to work in navigable waters of the United States. For example, 33 CFR 320.4(r) states that

mitigation is an important aspect of the review and balancing process on many Department of the Army permit applications. The Corps policy at 33 CFR 320.4(r) on mitigation applies to all types of decisions, including Section 10 permits. Some of the Section 404 only conditions still generally apply only to Section 404 activities, but in an effort to simplify the general conditions for the NWPs, the Corps is proposing to combine all conditions into one section. This consolidation does not increase the scope of analysis for determining if a particular project qualifies for an NWP; the District Engineer must still use discretion to determine if a particular condition applies to a particular activity. We are proposing to modify the opening language of Section 404 only conditions 1, 2, 3, 4, 5, 7, and 8 to "activity [or activities], including structures and work in navigable waters of the United States and discharges of dredged or fill material," to reflect that broader application. The three modified conditions (general conditions 9 and 13 and Section 404 only condition 6) and the modified Section 404 only conditions would apply to all the existing NWPs as well as the new NWPs that are issued.

The following is a discussion of our reasons for proposing changes to 6 existing NWP conditions and adding one new NWP general condition. If an existing NWP condition is not discussed below, no changes to that condition are proposed, other than those changes cited in the previous paragraph.

9. Water Quality. We are proposing to change the name of this condition from "Water Quality Certification" to "Water Quality" and modify this condition to require, for NWPs 12, 14, 17, 18, 21, 32, 40, A, B, C, D, and E, a water quality management plan, if it is not required as part of the 401 certification. This requirement only applies to those projects for which a water quality management plan would help keep the adverse effects on the aquatic environment minimal, such as prevention of more than minimal degradation of downstream water quality by maintaining a vegetated buffer adjacent to open water bodies such as lakes and streams. The requirement of implementation of a water quality management plan is not intended to apply to projects where the impacts to the aquatic environment are minimal, such as the construction of a small road crossing to provide access to an upland development where the impacts to waters of the United States regulated by the Corps (i.e., NWP 14 in this example) are limited to a small proportion of the project area. The

requirement for a water quality management plan is also not intended to increase the scope of analysis of the Corps review. The water quality management plan must implement methods and technologies to reduce direct and/or indirect degradation of water quality as a result of the permitted work. Practices such as vegetated buffers adjacent to open waters, sediment traps and barriers, sediment detention basins and ponds, infiltration trenches, and nutrient management techniques can be used to reduce degradation of water quality due to adjacent land use.

13. Notification. We are proposing to require notification to the District Engineer for all of the proposed NWPs, based on varying thresholds, generally $\frac{1}{3}$ of an acre of impact. Because the Corps has added so many NWPs with a PCN requirement, the PCN process must be applied in a simple and consistent manner. Therefore, for discharges causing the loss of greater than 1 acre of waters of the United States, the notification will be sent to the appropriate Federal and State agencies in accordance with paragraph (e) of General Condition 13. For other activities requiring notification to the District Engineer, the PCN will be subject to Corps-only review. The PCN will be subject to a 30-day review period, from the date of receipt of a complete PCN by the District Engineer. Corps district personnel will utilize the PCN to assess the environmental impacts of the proposed work and can recommend appropriate actions, such as special conditions or compensatory mitigation, to ensure that impacts are minimal.

16. Subdivisions. The Corps is including a condition in the proposed NWPs similar to the "subdivision clause" of NWP 26, which prohibited the use of NWP 26 for real estate subdivisions created after October 5, 1984, where new discharges of dredged or fill material into waters of the United States in said subdivision would cause the upper acreage limit of NWP 26 to be exceeded. The Corps is proposing to include a similar clause for NWPs A and B. The purpose of this condition is to prevent the division of property as a means of getting around the acreage limits of NWPs A and B. The subdivision clause would state that the cumulative upper limit for a subdivision seeking authorization under NWP A would be 3 acres for a single and complete project, and that the cumulative upper limit for subdivisions seeking to use NWP B would be 10 acres for a single and complete. The term "single and complete" means if, upon

authorization, any given project can be constructed, independent of any reliance on *subsequent* Corps of Engineers authorization for additional regulated activities (i.e., activities following those under current authorization consideration). In other words, a project may be considered single and complete if it has independent utility.

19. Suitable material. The Corps is proposing to modify this general condition by inserting the words “* * * used for construction or * * *” between “material” and “discharged.” This change was made to ensure that materials used for structures or work in navigable waters of the United States are made of suitable materials.

20. Mitigation. We are proposing to delete the words “* * * 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.” from this condition. This condition will be modified to require restoration, creation, enhancement, or preservation of aquatic resources to offset losses of functions and values due to authorized impacts. This condition also stresses the importance of including upland or wetland vegetated buffers adjacent to open water areas as an important component of any mitigation plan.

21. Spawning areas. The Corps is proposing to add a sentence to this condition to prohibit activities that fill or excavate important spawning areas.

22. Management of Water Flows. We are proposing to change the title of this condition from “Obstruction of High Flows” to “Management of Water Flows” and modifying it to require that permittees design their projects to maintain preconstruction downstream flow conditions. The permittee must, to the extent practicable, maintain the flow rates from the site as close as is feasible to preconstruction levels to minimize the potential for adverse effects to aquatic organisms and sediment transport in the stream. The removal of vegetation, and the increase in the percentage of impervious surfaces on a project site can increase runoff flows from the site, which can result in downcutting of stream beds and degradation of aquatic habitat. This condition also requires that projects be designed to reduce upstream impacts such as flooding or draining, unless the primary purpose of the project is to impound water or reestablish drainage.

Definitions

To provide for consistency in the implementation of the proposed NWP,

the Corps is proposing to include definitions for some terms used in these NWPs. The definitions are located in Section E of this notice. The Corps is seeking comments on these definitions.

Nationwide Permit 29 for Single Family Housing

On July 15, 1996, a lawsuit was filed by several organizations against the Corps, challenging the issuance of NWP 29 under Section 404 of the Clean Water Act (CWA). The plaintiffs challenged the issuance of NWP 29 because they believe that: (1) the Corps violated the CWA by issuing an NWP for activities that result in more than minimal adverse environmental effects; (2) the Corps violated the CWA by issuing an NWP for activities that are not similar in nature; (3) the Corps violated the procedural requirements of the Section 404(b)(1) Guidelines of the CWA; (4) the Corps violated the Endangered Species Act (ESA) by failing to consult with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS); (5) the Corps violated the Fish and Wildlife Coordination Act by failing to consult with the FWS and NMFS; (6) the Corps violated the National Environmental Policy Act (NEPA) by failing to prepare an Environmental Impact Statement (EIS); and (7) the issuance of NWP 29 was arbitrary, capricious, and an abuse of discretion. After the Corps reissued NWP 29 on December 13, 1996, a supplemental complaint was filed by the plaintiffs challenging the reissuance of NWP 29.

On April 30, 1998, a court order was issued by the United States District Court, District of Alaska, remanding the Secretary of the Army to consider excluding high value waters from NWP 29, consider the use of lower acreage limits for NWP 29, and to set forth those considerations in an amended environmental assessment (EA). The court determined that the EA issued on December 10, 1996, inadequately addressed the exclusion of high value waters and lower acreage limits for NWP 29. Pending the Secretary of the Army's consideration of these issues, the court enjoined the Corps from accepting any preconstruction notifications for NWP 29 after June 30, 1998, unless the court orders otherwise. The court did not address the other issues raised by the plaintiffs because actions undertaken by the Corps as a result of the remand may have significant impacts on the resolution of the other arguments. It should be noted that the Corps is already undergoing ESA consultation for NWP 29, which should be concluded this summer.

NWP 29 authorizes single family housing activities that have minimal adverse effects, both individually and cumulatively, on the aquatic environment. For this NWP, the Corps has several mechanisms to protect high value waters and wetlands. All activities authorized under NWP 29 require preconstruction notification to the Corps. The preconstruction notification allows district engineers to review each proposed activity to determine if it will result in minimal adverse environmental effects, and if necessary, take measures such as adding special conditions to the NWP authorization to further minimize the adverse effects of the activity. Special conditions may require compensatory mitigation to offset losses of aquatic resource functions and values. If the proposed work will result in more than minimal adverse environmental effects, then the District Engineer will exercise discretionary authority to require an individual permit, with the requisite alternatives analysis and public interest review. District engineers can protect high value waters and endangered species by regionally conditioning NWP 29. Regional conditioning may exclude the use of NWP 29 from certain waters, such as non-tidal wetlands contiguous to tidal waters, lower the acreage limit, or exclude the use of NWP 29 in areas where endangered species or their critical habitat is known to occur. The regional conditioning process is discussed elsewhere in this notice.

Corps districts have been collecting data on the use of NWP 29 since 1995. Districts have been monitoring the use of NWP 29 by tracking the number of NWP 29 verifications, the number of PCNs where discretionary authority was exercised to require individual permits for the proposed activity, the proposed acreage of impacts, the authorized acreage of impacts, and the acreage of compensatory mitigation offered and accepted for NWP 29 authorizations.

During Fiscal Year 1996, NWP 29 was used 333 times to authorize the construction of single family residences and attendant features. Discretionary authority was exercised for 9 PCNs to review the proposed work under the individual permit process. During 1996, applicants proposed to fill 101.8 acres of non-tidal waters of the United States, but were authorized to fill only 62.7 acres. The acreage of compensatory mitigation offered and accepted during this time period was 2.3 acres. The average loss of waters of the United States per NWP 29 authorization was 0.19 acres.

During Fiscal Year 1997, NWP 29 was used 188 times. The Corps asserted

discretionary authority and required individual permit review for two requests for NWP 29 authorization. During this time period, applicants proposed to fill 30.5 acres of non-tidal waters of the United States, but were authorized to fill 28.1 acres of waters of the United States. The acreage of compensatory mitigation offered and accepted during this time period was 11.3 acres. During 1997, the average loss of waters of the United States per NWP 29 authorization was 0.15 acres.

Corps districts are also monitoring cumulative impacts to ensure compliance with the CWA. Corps districts generally monitor regulated activities on a watershed basis to ensure that the activities authorized by NWP 29 and other Corps permits do not result in more than minimal cumulative adverse effects on the aquatic environment in a particular watershed. Division engineers can revoke NWP 29 in high value aquatic environments or in specific geographic areas (e.g., watersheds), if they believe that the use of NWP 29 in these areas will result in more than minimal individual and/or cumulative adverse environmental effects to the aquatic environment.

In accordance with the court order, we have prepared a revised EA for NWP 29. The revised EA includes a Section 404(b)(1) Guidelines compliance review and a Finding of No Significant Impact (FONSI). The revised EA also discusses how high value waters are protected under the NWP and the consideration of lower acreage limits for NWP 29. Copies of the revised EA and FONSI are available at the office of the Chief of Engineers, at each District office, and on the Corps home page at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>. Based on these analyses, the Corps has determined that the issuance of NWP 29 complies with the requirements for issuance under general permit authority.

During the comment period for the proposed reissuance of NWP 29, the Corps considered different acreage limits for this NWP. Several commenters recommended that the acreage limit be reduced to $\frac{1}{10}$ acre. A few other commenters recommended an acreage limit of $\frac{1}{4}$ acre. As discussed previously in this notice, the average acreage impact authorized by NWP 29 was 0.19 acre and 0.15 acre during fiscal years 1996 and 1997, respectively. The average acreage impact requested by applicants was 0.31 acre in 1996 and 0.16 acre in 1997. During their review of PCNs for NWP 29 authorization, district engineers required additional avoidance and minimization to ensure that the authorized impacts were

minimal. Although NWP 29 has an acreage limit of $\frac{1}{2}$ acre, few projects were authorized with that amount of impact. District engineers require avoidance and minimization during the PCN process to ensure minimal adverse environmental impacts due to the work. A higher acreage limit, although it may be rarely used, provides district engineers with the flexibility to authorize projects that have minimal adverse effects under NWP 29, even though they may adversely affect a somewhat larger area of low-value wetlands. As a result, the Corps considered decreasing the acreage limit of this NWP and determined that lower acreage limits are not necessary in terms of environmental effects or the workload that would be required to process requests for higher acreage impacts through the individual permit process.

To provide further assurance that NWP 29 authorizes only single family housing activities that have minimal adverse environmental effects, the Corps is now proposing to modify the acreage limit for NWP 29 to $\frac{1}{4}$ acre. The public is invited to provide comments on the proposed modification to the acreage limit for NWP 29 within 60 days of the date of this notice. The Corps is not requesting comments on the other terms of NWP 29. In the interim, the Corps is suspending NWP 29 for activities that result in the loss of greater than $\frac{1}{4}$ acre of non-tidal waters of the United States.

It is unlikely that the suspension or modification of NWP 29 will result in a substantial burden on the regulated public, since the average NWP 29 authorization in 1996 and 1997 resulted in the loss of 0.19 acre of non-tidal waters of the United States. Most small landowners can design their single family residences to comply with this new acreage limit for NWP 29. If not, then they can request authorization through the individual permit process or by a regional general permit, if available.

Therefore, from the date of this notice until the Corps has determined whether or not to modify NWP 29, NWP 29 can be used to authorize discharges of dredged or fill material to construct single family housing, including attendant features, provided the discharge does not result in the loss of greater than $\frac{1}{4}$ acre of non-tidal waters of the United States, including non-tidal wetlands. All other terms and limitations for NWP 29, as published in the December 13, 1996, issue of the **Federal Register**, remain in effect. Discharges for single family housing activities that result in the loss of greater than $\frac{1}{4}$ acre of non-tidal waters of the United States, including non-tidal

wetlands, will be processed either under the individual permit process or by regional general permits. For information purposes, the text of the proposed modification of NWP 29 is as follows:

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 $\frac{1}{4}$ 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 $\frac{1}{4}$ acre for the entire subdivision;

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

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

g. This NWP may not be used in conjunction with NWP 14, 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 $\frac{1}{4}$ acre. 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)

Authority

Accordingly, we are proposing to issue new NWPs, modify existing NWPs, and add conditions and to add NWP definitions under the authority of Section 404(e) of the Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*).

Dated: June 23, 1998.

Approved:

Russell L. Fuhrman,

Major General, U.S. Army, Director of Civil Works.

Nationwide Permits, Conditions, Further Information, and Definitions

A. Index of Nationwide Permits, Conditions, Further Information, and Definitions

Proposed New Nationwide Permits

- A. Residential, Commercial, and Institutional Activities
- B. Master Planned Development Activities
- C. Stormwater Management Facilities
- D. Passive Recreational Facilities
- E. Mining Activities
- F. Reshaping Existing Drainage Ditches

Nationwide Permits Proposed To Be Modified

- 3. Maintenance
- 7. Outfall Structures and Maintenance
- 12. Utility Activities
- 14. Linear Transportation Crossings
- 27. Stream and Wetland Restoration Activities
- 40. Agricultural Activities

Nationwide Permit Conditions

General Conditions

- 1. Navigation
- 2. Proper Maintenance
- 3. Soil Erosion and Sediment Controls
- 4. Aquatic Life Movements
- 5. Equipment
- 6. Regional and Case-by-Case Conditions
- 7. Wild and Scenic Rivers
- 8. Tribal Rights
- 9. Water Quality*
- 10. Coastal Zone Management
- 11. Endangered Species
- 12. Historic Properties
- 13. Notification*
- 14. Compliance Certification
- 15. Multiple Use of Nationwide Permits
- 16. Subdivisions*

- 17. Water Supply Intakes
- 18. Shellfish Production
- 19. Suitable Material*
- 20. Mitigation*
- 21. Spawning Areas*
- 22. Management of Water Flows*
- 23. Adverse Effects from Impoundments
- 24. Waterfowl Breeding Areas
- 25. Removal of Temporary Fills

(* Indicates conditions proposed to be changed.)

Further Information

Definitions

- 1. Aquatic Bench
- 2. Best Management Practices
- 3. Channelized stream
- 4. Contiguous wetland
- 5. Drainage ditch
- 6. Ephemeral stream
- 7. Farm
- 8. Intermittent stream
- 9. Loss of waters of the United States
- 10. Noncontiguous wetland
- 11. Non-tidal wetland
- 12. Perennial stream
- 13. Riffle and pool complexes
- 14. Stormwater management
- 15. Stormwater management facilities
- 16. Tidal wetland
- 17. Vegetated shallows
- 18. Waterbody

B. Nationwide Permits

A. Residential, Commercial, and Institutional Activities

Discharges into non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters, associated with residential, commercial, and institutional development activities. Residential developments (multiple and single unit development for other than the personal residence of the permittee), commercial developments (such as retail stores, industrial parks, restaurants, business parks, shopping centers, and commercial recreational activities) and institutional developments (such as schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals and places of worship), are authorized, and may include activities such as: grading, rechannelization, expansion of an existing development, building pads, soil erosion and sediment control measures, and infrastructure such as utilities, roads, driveways, sidewalks, and recreation activities associated with the development, including activities such as playgrounds, ball fields, golf courses, nature trails, etc., provided that the activity meets all of the following criteria:

- a. The discharge does not cause the loss of greater than 3 acres of non-tidal waters of the United States, using an index of impact acreage as follows*:

| Parcel size | Maximum acreage loss authorized |
|------------------------------|---------------------------------|
| Less than 5 acres | 1/4 acre. |
| 5-10 acres | 1/2 acre. |
| 10-15 acres | 1 acre. |
| 15-100 acres | 2 acres. |
| Greater than 100 acres | 3 acres. |

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

c. For activities that involve excavation and/or filling of open waters, including perennial or intermittent waterways, below the ordinary high water mark, the permittee notifies the District Engineer in accordance with the "Notification" general condition;

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

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

f. The permittee must avoid and minimize discharges into waters of the United States at the project site to the maximum extent practicable, and the notification must include a written statement to the District Engineer detailing compliance with this condition, i.e., why the discharge must occur in waters of the United States and avoidance or additional minimization cannot be achieved;

g. For discharges requiring notification the permittee must submit a mitigation proposal that will offset the loss to waters of the United States;

h. Whenever any other NWP is used in conjunction with this NWP, the combined total acres of impacts to waters of the United States cannot exceed 3 acres and any combined total acreage exceeding 1/3 acre requires that the permittee notify the District Engineer in accordance with the "Notification" general condition; and

i. Any work authorized with this permit must not cause more than minor changes to the flow characteristics of any stream, or measurably degrade water quality (See General Conditions 9 and 22). (Sections 10 and 404)

***Note:** For the purposes of the proposed NWP, a discussion of acreage limit options is provided in the preamble.

B. Master Planned Development Activities

Discharges into non-tidal waters of the United States, excluding non-tidal

wetlands contiguous to tidal waters, associated with a comprehensively planned development which may include a combination of, but is not limited to, the following: residential housing, office parks, retail stores, restaurants, playgrounds, ball fields, golf courses, ponds, impoundments, community green space, parks, trails, soil erosion and sediment control measures, sewage and/or water treatment facilities, storm water management facilities, and infrastructure such as utilities, roads, driveways, and sidewalks, provided that the activity meets all of the following criteria:

a. The discharge does not cause the loss of greater than 10 acres of non-tidal waters of the United States, using an index of impact acreage as follows*:

| Parcel size | Maximum acreage loss authorized |
|------------------------------|---------------------------------|
| 100–200 acres | 3 acres. |
| 200–300 acres | 5 acres. |
| 300–500 acres | 7 acres. |
| Greater than 500 acres | 10 acres. |

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

c. For discharges in all waters of the United States, including wetlands, the notification must also include a delineation of affected waters and/or wetlands;

d. The notification will include a wetland assessment utilizing a functional assessment approach approved by the District Engineer;

e. The discharge is part of a single and complete project; however the activity may proceed in phases;

f. The permittee must avoid and minimize discharges into waters of the United States at the project site to the maximum extent practicable, and the notification must include a written statement to the District Engineer detailing compliance with this condition (i.e., why the discharge must occur in waters of the United States and why avoidance or additional minimization cannot be achieved);

g. The notification must include a mitigation proposal that will offset the loss to waters of the United States;

h. Deed restrictions, protective covenants, land trusts, or other means of conservation and preservation will be required for all waters of the United States, including wetlands, on the project site, including riparian buffers and/or vegetated buffers adjacent to open water, as well as all existing,

enhanced, restored, or created wetland areas; and

i. Whenever any other NWP is used in conjunction with this NWP, the combined total acres of impacts to waters of the United States cannot exceed 10 acres.

Master Planned Development: The intent of defining Master Planned Development is to distinguish these activities from those that would be authorized under NWP A. Unlike NWP A, this NWP is limited to authorizing those activities that are mixed-use in nature. Master planned developments are designed, constructed, and managed to integrate multiple uses in a manner that conserves and enhances the functions and values of the water resources on the project site. NWP B is intended to be consistent with the increasing nationwide efforts by counties and local communities across the country to encourage mixed-use development and to motivate land use planning alternatives that incorporate consideration of the environment. This NWP is designed to match up with the efforts of local communities to achieve these goals by encouraging the development of environmentally responsible, multiple-use communities and building upon the incentives currently provided by State and local governments. Such master planned developments provide communities with an opportunity to address a variety of concerns, including protecting sensitive natural areas, consolidating infrastructure and maximizing the delivery of urban services. The project may consist of cluster developments surrounded by a substantial amount of open or green space, including vegetated buffers to waters of the United States. All remaining waters of the United States on the project site, including wetlands and riparian areas that are restored, enhanced, or created as compensatory mitigation for impacts authorized by this NWP, as well as vegetated buffers, will be set aside and preserved through deed restrictions, protected covenants, land trusts, or other legal means, to protect these areas and maintain water quality and aquatic resource values. (Sections 10 and 404)

***Note:** For the purposes of the proposed NWP, a discussion of acreage limit options is provided in the preamble.

C. Stormwater Management Facilities

Discharges of dredged or fill material into non-Section 10 waters of the United States, including wetlands, for the construction and maintenance of stormwater management facilities, including activities for the excavation for stormwater ponds/facilities,

detention, and retention basins, installation and maintenance of water control structures, outfall structures and emergency spillways; and the maintenance dredging of existing stormwater management ponds/facilities, detention and retention basins provided that the activity meets all of the following criteria:

a. The discharge or excavation for the construction of new stormwater management facilities does not cause the loss of greater than 2 acres of non-tidal wetlands;

b. For discharges or excavation for the construction of new stormwater management facilities causing the loss of greater than 1/3 acre of non-tidal waters of the United States, including wetlands, or for the maintenance of existing stormwater management facilities causing the loss of greater than 1 acre of non-tidal waters of the United States, or for the loss of greater than 500 linear feet of intermittent stream bed, the permittee notifies the District Engineer in accordance with the "Notification" general condition. In addition the notification must include:

(1) A maintenance plan, which is in accordance with State and local requirements, if any;

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

(3) For discharges involving construction of stormwater management facilities, the notification must include a mitigation proposal that will offset the loss of waters of the United States. In appropriate circumstances, compensatory mitigation can be provided by the use of bioengineering techniques and aquatic benches within the stormwater management facility. Compensatory mitigation will not be allowed in designated facility maintenance areas. Where the size of the facility allows for the construction of sediment forebays, such designs will be used to the maximum extent practicable to enhance water quality and to minimize the maintenance area of the facility. Future maintenance in constructed areas will not require mitigation provided that maintenance is accomplished in designated maintenance areas and not within compensatory mitigation areas.

c. The stormwater management facility must be designed using Best Management Practices and watershed protection techniques (e.g., vegetated buffers, siting considerations to minimize adverse effects to aquatic resources, bioengineering methods incorporated into the facility design to benefit water quality and minimize

adverse effects to aquatic resources from storm flows especially downstream of the facility, as appropriate) that provide for long term aquatic protection and enhancement, to the maximum extent practicable;

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

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

f. This permit does not authorize the discharge of dredged or fill material for the construction of new stormwater management facilities in perennial streams. (Section 404)

D. *Passive Recreational Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters, for the construction or expansion of passive recreational facilities, provided that the activity meets all of the following criteria:

a. The discharge does not cause the loss of greater than 1 acre of non-tidal waters of the United States, including non-tidal wetlands;

b. For discharges causing the loss of greater than 1/3 acre of non-tidal waters of the United States, or the loss of greater than 500 linear feet of stream bed, the permittee notifies the District Engineer in accordance with the "Notification" general condition;

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

d. The discharge is part of a single and complete project.

A *passive recreational facility* is defined as a low-impact recreational facility that is integrated into the natural landscape and consists primarily of open space that does not substantially change preconstruction grades or deviate from natural landscape contours. The primary function of passive recreational facilities does not include the use of motor vehicles, buildings, or impervious surfaces. Examples of passive recreational facilities that may be authorized by this NWP include: hiking trails, bike paths, horse paths, nature centers, and campgrounds (excluding trailer parks). The construction or expansion of golf courses and ski areas may be authorized by this NWP, provided the golf course or ski area does not substantially deviate from natural landscape contours and is designed to minimize adverse effects to waters of the United States and riparian areas through the use of such practices

as integrated pest management, adequate stormwater management facilities, vegetated buffers, reduced fertilizer use, etc. The facility must have an adequate water quality management plan in accordance with General Condition 9, such as a stormwater management facility constructed in uplands to ensure that the recreational facility results in no substantial adverse effects to water quality. This NWP also authorizes support facilities, such as maintenance and storage buildings, office buildings, rental buildings, and stables that are directly related to the recreational activity. It does not authorize other buildings, hotels, restaurants, etc. 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, cannot exceed 1 acre. The construction or expansion of playing fields (e.g., baseball or football fields), basketball and tennis courts, race tracks, stadiums, and arenas is not authorized by this NWP. (Section 404)

E. *Mining Activities*

Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters, for aggregate mining (i.e., sand, gravel, crushed and broken stone) and hard rock metal/mineral mining activities (i.e., extraction of metalliferous ores from subsurface locations), including exploration, excavation, dredging, processing, stream relocation and/or diversion, overburden disposal, stockpiling, mechanized landclearing, mined land reclamation, and support activities, provided the discharge meets all of the following criteria:

a. *Lower perennial riverine systems:* Any discharges for excavation and dredging activities associated with sand and gravel mining in lower perennial riverine systems as defined by the Cowardin classification system for aquatic habitats (areas that are defined as special aquatic sites [40 CFR Subpart E, 230.40 through 230.45] are excluded), must:

1. not cause the loss of greater than 2 acres of waters of the United States;

2. not result in the excavation of fish spawning areas and shellfish beds;

3. include necessary measures to prevent increases in stream gradient and water velocities, to prevent adverse effects (e.g., head cutting, bank erosion) on upstream and downstream channel conditions;

4. not result in adverse effects on the course, capacity, or condition of navigable waters of the United States; and

5. include measures to minimize downstream turbidity;

b. *Intermittent and ephemeral streams:* Any discharges for excavation, dredging, processing, exploration, trenching, stockpiling, and mined land reclamation activities associated with sand and gravel mining activities in intermittent and ephemeral streams (areas that are defined as special aquatic sites [40 CFR Subpart E, 230.40 through 230.45] are excluded), must:

1. not cause the loss of greater than 1 acre of waters of the United States; and

2. include necessary measures to prevent increases in stream gradient and water velocities, to prevent adverse effects (e.g., head cutting, bank erosion) on upstream and downstream channel conditions;

c. *Intermittent and small perennial stream relocations:* Any discharges for stream relocation/diversion activities (i.e., mining may not occur in open waters below the ordinary high water mark; only stream relocation and diversion are authorized) associated with crushed or broken stone mining in intermittent and small perennial streams (areas that are defined as special aquatic sites [40 CFR Subpart E, 230.40 through 230.45] are excluded), must:

1. not cause the loss of greater than 1 acre of waters of the United States;

2. include necessary measures to prevent increases in stream gradient and water velocities and to prevent adverse effects (e.g., head cutting, bank erosion) on upstream and downstream channel conditions; and

3. not result in the excavation of fish spawning areas and shellfish beds;

d. *Isolated wetlands and wetlands above the ordinary high water mark, in non-Section 10 waters:* Any discharges for excavation, exploration, dredging, processing, mechanized landclearing, stockpiling, stream relocation/diversion, on-site overburden disposal, and mined land reclamation associated with aggregate mining activities in isolated wetlands and wetlands above the ordinary high water mark in non-Section 10 streams, must:

1. not cause the loss of greater than 2 acres of waters of the United States; and

2. be compensated for through mitigation approved by the Corps;

e. *Dry washes and arroyos:* Any discharges, including excavation, associated with aggregate mining activities in dry washes and arroyos, must:

1. not cause the loss of greater than 2 acres of waters of the United States;

2. include necessary measures to prevent increases in stream gradient and water velocities and to prevent adverse effects (e.g., head cutting, bank erosion)

on upstream and downstream channel conditions; and

3. include necessary measures to prevent adverse water quality effects on groundwater resources;

f. *Intermittent and small perennial stream relocations*: Any discharges for stream relocation/diversion activities (i.e., mining may not occur in open waters below the ordinary high water mark; only stream relocation and diversion are authorized) associated with hard rock metal/mineral mining activities in intermittent and small perennial streams (areas that are defined as special aquatic sites [40 CFR Subpart E, 230.40 through 230.45] are excluded), must:

1. not cause the loss of greater than 1 acre of waters of the United States;

2. include necessary measures to prevent increases in stream gradient and water velocities and to prevent adverse effects (e.g., head cutting, bank erosion) on upstream and downstream channel conditions; and

3. not result in the excavation of fish spawning areas and shellfish beds;

g. *Isolated wetlands and wetlands above the ordinary high water mark, in non-Section 10 waters*: Any discharges for excavation, exploration, dredging, processing, mechanized landclearing, stockpiling, stream relocation/diversion, on-site overburden disposal, and mined land reclamation associated with hard rock metal/mineral mining activities in isolated wetlands and wetlands above the ordinary high water mark in non-Section 10 streams, must:

1. not cause the loss of greater than 2 acres of waters of the United States; and

2. be compensated for through mitigation approved by the Corps;

h. *Dry washes and arroyos*: Any discharges, including excavation, associated with hard rock metal/mineral mining activities in dry washes and arroyos, must:

1. not cause the loss of greater than 2 acres of waters of the United States;

2. include necessary measures to prevent increases in stream gradient and water velocities and to prevent adverse effects (e.g., head cutting, bank erosion) on upstream and downstream channel conditions; and

3. include necessary measures to prevent adverse water quality effects on groundwater resources;

i. *Support activities*: Any discharges for support activities associated with aggregate mining and/or hard rock metal/mineral mining activities, including the construction of berms, access and haul roads, rail lines, dikes, road crossings, settling ponds and settling basins, ditching, storm water and surface water management, head

cutting prevention, sediment and erosion controls, and mechanized land clearing, must not cause the loss of more than 1 acre of waters of the United States, including wetlands. This acreage limit does not include temporary mining roads that are exempt under Section 404(f). The limit of 1 acre of impact for support activities will be in addition to the acreage allowed for the mining activities;

j. *Single and complete project*: The discharges must be for a single and complete project. Multiple mining activity discharges into several designated parcels of a mining project, may be included together as long as the acreage limit for each aquatic resource type is not exceeded and the combination of more than one aquatic resource type does not exceed 2 acres. The total maximum acreage of waters of the United States adversely affected by the mining activities combined with the support activities will not exceed 3 acres (2 acres)*;

k. *Notification*: The permittee notifies the District Engineer in accordance with the "Notification" general condition. The notification must include a description of all waters of the United States impacted by the project, and, where required, a discussion of measures to minimize or prevent adverse effects (e.g., head cutting, bank erosion, turbidity, water quality) to waters of the United States, a description of measures taken to meet the criteria associated with the discharge being permitted, and a reclamation plan; and

1. Authorized activities associated with hard rock/mineral mining may include beneficiation and mineral processing. This NWP does not authorize hard rock/mineral mining in Section 10 waters or any mining activity in wetlands that are contiguous to tidal waters. (Sections 10 and 404)

***Note**: For the purposes of the proposed NWP, a discussion of acreage threshold options being considered for NWP E is provided in the preamble.

F. *Reshaping Existing Drainage Ditches*

Discharges of dredged or fill material into non-Section 10 waters of the United States to modify the cross-sectional configuration of existing serviceable drainage ditches constructed in non-Section 10 waters of the United States. No compensatory mitigation is required if the work is designed to improve water quality (e.g., by regrading the drainage ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, increase uptake of nutrients and other substances by vegetation, etc.). The reshaping of the ditch cannot

increase drainage beyond the original project boundaries or expand the area drained by the ditch as originally designed (i.e., the capacity of the ditch must be the same as originally designed and it cannot drain additional wetlands or other waters of the United States). The permittee must notify the District Engineer in accordance with the "Notification" general condition, if material excavated during ditch reshaping is sidecast into waters of the United States. This NWP does not apply to reshaping drainage ditches constructed in uplands, since these areas are not waters of the United States, or to the maintenance of existing drainage ditches to their original dimensions and configuration, which does not require a Section 404 permit (see 33 CFR 323.4(a)(3)). This NWP does not authorize the relocation of drainage ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage ditch must be approximately the same as the location of the centerline of the original drainage ditch. This NWP does not authorize the reshaping and maintenance of drainage ditches in navigable waters of the United States, which requires a Section 10 permit. This NWP does not authorize stream channelization or stream relocation projects. (Section 404)

3. Maintenance Activities related to:

(i) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification, and the District Engineer receives notification for all work other than the replacement of a structure. 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 impacts 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 nationwide permit authorizes the repair, rehabilitation, or replacement of those structures destroyed or damaged by storms, floods, fire or other discrete events, provided the repair,

rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the District Engineer, provided the permittee can demonstrate funding, contract, or other similar delays. Maintenance dredging and beach restoration are not authorized by this nationwide permit.

(ii) Discharges of dredged or fill material, including excavation, into any waters of the United States to remove accumulated sediments and debris in the vicinity of existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.) and the placement of new or additional rip rap to protect the structure, provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. The removal of sediment is limited to the minimum necessary to restore the waterway in the immediate vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend further than 200 feet in any direction from the structure. The placement of rip rap must be the minimum necessary to protect the structure, or to ensure the safety of the structure. This NWP does not authorize new stream channelization or stream relocation projects. All excavated materials must be deposited and retained in an upland area unless otherwise specifically approved by the District Engineer under separate authorization. Any bank stabilization measures require a separate authorization from the District Engineer.

(iii) Discharges of dredged or fill material, including excavation, into waters of the United States for the restoration of upland areas damaged by a storm, flood or other discrete event, and minor dredging to remove obstructions in a waterbody adjacent to the upland, where such work requires activities in a regulated water of the United States, provided that the District Engineer receives notification within 12 months of the date of the damage, subject to the following criteria:

a. The extent of the proposed restoration must be justified by a recent topographic survey, or other evidence of the pre-existing conditions. The restoration of the damaged areas cannot exceed the contours, or ordinary high water mark, that existed prior to the damage. The District Engineer retains the right to determine the extent of the pre-existing conditions, and the extent of any restoration work;

b. Minor dredging to remove obstructions from the adjacent waterbody is limited to 50 cubic yards below the plane of the ordinary high water mark, and is limited to the degree needed to restore the pre-existing bottom contours of the waterbody. The dredging may not be done primarily to obtain fill for any restoration activities;

c. For activities affecting greater than $\frac{1}{3}$ acre of waters of the United States, the permittee notifies the District Engineer in accordance with the "Notification" general condition;

d. The discharge of dredged or fill material and all related work needed to restore the upland is part of a single and complete project;

e. This permit authorizes such work, provided the District Engineer has been notified as appropriate in accordance with condition (3) within 12 months of the date of the damage, and the work has commenced, or is under contract to commence, within 2 years of the date of the damage;

f. This permit may not be used in conjunction with NWP 18 or NWP 19;

g. This NWP cannot be used to channelize a stream, and any work authorized must not cause more than minor changes to the hydraulic flow characteristics of the stream, increase flooding, or measurably degrade water quality (See General Conditions 9 and 22); and

h. This permit may not be used to reclaim historic lands lost, over an extended period of time, to normal erosion processes. (Sections 10 and 404)

7. Outfall Structures and Maintenance. Activities related to: (i) Construction of outfall structures and associated intake structures where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted, or are otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System program (Section 402 of the Clean Water Act), and (ii) maintenance excavation, including dredging, to remove accumulated sediments blocking or restricting outfall and intake structures, accumulated sediments from small impoundments associated with outfall and intake structures, and accumulated sediments from canals associated with outfall and intake structures, provided that the activity meets all of the following criteria: a

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

b. The amount of excavated or dredged material must be the minimum necessary to restore the outfalls, intakes, small impoundments, and canals to

original design capacities and design configurations (i.e., depth and width);

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

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

The construction of intake structures is not authorized by this NWP, unless they are directly associated with an outfall structure. For maintenance excavation and dredging to remove accumulated sediments, the notification must include information regarding the original design capacities and configurations of the facility. (Sections 10 and 404)

12. Utility Activities. Discharges of dredged or fill material into waters of the United States and/or structures in, over, or under navigable waters of the United States for the following utility activities:

(i) *Utility lines:* The construction or maintenance of utility lines, including outfall and intake structures and the associated excavation, backfill, or bedding for the utility lines, 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 (see Note 1, below). 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 District Engineer may extend the period of temporary side-casting not to exceed a total of 180 days, where appropriate. In wetlands, the top 6" to 12" of the trench should normally be backfilled with topsoil from the trench. Furthermore, the trench cannot be constructed in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody. This NWP also includes the repair of existing utility lines.

(ii) *Electric or pumping substations:* The construction, maintenance, or expansion of an electric or pumping substation, provided the discharge does

not result in the loss of greater than 1 acre of non-Section 10 waters of the United States.

(iii) *Foundations for overhead utility line towers, poles, and anchors:* The construction or maintenance of foundations for overhead utility lines, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

(iv) *Access roads:* The construction of access roads for the construction and maintenance of utility lines, including overhead power lines, and substations is authorized, provided the discharge does not cause the loss of greater than 1 acre of non-Section 10 waters of the United States, excluding non-tidal waters contiguous with Section 10 waters. Access roads shall be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes the adverse effects on waters of the United States and at preconstruction contours and elevations, or as near as possible (e.g., at grade corduroy roads or geotextile/gravel roads). Access roads constructed above preconstruction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

The term *utility line* does not include activities which drain a water of the United States, such as drainage tile or french drains; however, it does apply to pipes conveying drainage from another area. For the purposes of this NWP, the 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. However, the term "loss" applies only to waters of the United States permanently affected by filling, flooding, excavation, or drainage and not to waters of the United States that are temporarily affected by the work and restored to preconstruction contours and wetland conditions. Temporary construction mats (e.g., timber, steel, geotextile) used during construction and removed upon completion of the work are not included in the calculation of permanent loss of waters of the United States.

Mechanized landclearing necessary for the installation and maintenance of utility lines and the construction and maintenance of electric and pumping substations, foundations for overhead utility lines, and access roads is authorized, provided the cleared area is kept to the minimum necessary and preconstruction contours are maintained as near as possible. The area

of waters of the United States that is filled, excavated, or flooded must be limited to the minimum necessary to construct the utility line, substations, foundations, and access roads. Excess material must be removed to upland areas immediately upon completion of construction. This NWP may authorize utility lines in or affecting navigable waters of the United States, even if there is no associated discharge of dredged or fill material (See 33 CFR Part 322). Construction of access roads or the construction or expansion of electric or pumping substations in navigable waters of the United States is not authorized by this NWP.

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 for the right-of-way;
- (b) A Section 10 permit is required;
- (c) The utility line in waters of the United States, excluding overhead lines, exceeds 500 feet;
- (d) The utility line is placed within a jurisdictional area (i.e., a water of the United States), and it runs parallel to a stream bed that is within that jurisdictional area;
- (e) Discharges associated with the construction of electric or pumping substations that result in the loss of greater than $\frac{1}{3}$ acre of non-tidal waters of the United States; or
- (f) Permanent access roads constructed above grade in waters of the United States for a distance of more than 500 feet.

Note 1: Overhead utility lines constructed over Section 10 waters and utility lines that are routed in or under Section 10 waters without a discharge of dredged or fill material require a Section 10 permit; except for pipes or pipelines used to transport gaseous, liquid, liquefiable, or slurry substances over navigable waters of the United States, which are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to Section 9 of the River and Harbor Act of 1899. However, any discharges of dredged or fill material associated with such pipelines will require a Corps permit under Section 404.

Note 2: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work and the area restored to preconstruction contours, elevations, and wetland conditions. Temporary access roads for construction may be authorized by NWP 33. (Sections 10 and 404)

14. Linear Transportation Crossings. Activities required for the construction,

expansion, modification or improvement of linear transportation crossings (e.g., highways, railways, trails, airport runways, and taxiways) in waters of the United States, including wetlands, provided that the activity meets the following criteria:

a. For public linear transportation crossings, the discharge is limited to non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters, and does not cause the loss of greater than 2 acres (1 acre)* of non-tidal waters of the United States;

b. For private linear transportation crossings in waters of the United States or public linear transportation crossings in tidal waters or in non-tidal wetlands contiguous to tidal waters, the discharge does not cause the loss of greater than $\frac{1}{3}$ acre of waters of the United States, including wetlands, and the length of the fill for the crossing in waters of the United States is limited to 200 linear feet;

c. The permittee notifies the District Engineer in accordance with the "Notification" general condition for discharges into special aquatic sites, including wetlands, or that cause the loss of greater than $\frac{1}{3}$ acre of waters of the United States;

d. For public linear transportation crossings, the notification must include a mitigation proposal that will offset the loss of waters of the United States;

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

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

g. This NWP cannot be used to channelize a stream, and any work authorized must not cause more than minor changes to the hydraulic flow characteristics of the stream, increase flooding, or measurably degrade water quality (See General Conditions 9 and 22); and

h. The crossing is part of a single and complete project for crossing a water of the United States.

Some discharges for crossings may be eligible for an exemption from the need for a Section 404 permit (see 33 CFR 323.4). (Sections 10 and 404)

***Note:** For the purposes of this proposed modification to NWP 14, a discussion of acreage threshold options being considered for NWP 14 is provided in the preamble.

27. Stream and Wetland Restoration Activities. Activities in waters of the United States associated with the restoration and enhancement of former non-tidal wetlands and riparian areas, the enhancement of degraded wetlands

and riparian areas, the creation of wetlands and riparian areas, and the restoration and enhancement of non-Section 10 streams and open water areas; (i) on non-Federal public lands and private lands, in accordance with the terms and conditions of a binding wetland enhancement, restoration or creation agreement between the landowner and the U.S. Fish and Wildlife Service 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 streams or wetlands created, restored or enhanced as mitigation for the mining impacts, nor naturally due to hydrologic or topographic features, nor for a mitigation bank.); or (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, the removal of accumulated sediments, the installation, removal and maintenance of small water control structures, dikes and berms; the installation of current deflectors; the enhancement, restoration, or creation of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or create stream meanders; the backfilling of artificial channels and drainage ditches; the removal of existing drainage structures; the construction of small nesting islands; the construction of open water areas; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation; mechanized land-clearing to remove undesirable vegetation; and other related activities. This NWP cannot be used to authorize activities for the conversion of a stream to another aquatic use, such as the creation of an impoundment for waterfowl habitat. This NWP cannot be used to channelize a stream. This NWP does not authorize the conversion of natural wetlands to another aquatic use, such as creation of waterfowl impoundments where a forested wetland previously existed. However, this NWP may be used to relocate aquatic habitat types on the project site, provided there are net gains in aquatic resource functions and

values. For example, this NWP may authorize the creation of an open water impoundment in an emergent wetland, provided the emergent wetland is replaced by creating that wetland type in the adjacent uplands.

Reversion. For enhancement, restoration 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. Because projects that would be authorized by this permit are designed to enhance the aquatic environment, mitigation will not be required for the work. (Sections 10 and 404)

40. Agricultural Activities. Discharges of dredged or fill material into non-tidal waters of the United States, including non-tidal wetlands, for the purpose of improving agricultural production and construction of building pads for farm buildings. Activities authorized include installation, placement, or construction of drainage tiles, ditches, or levees; mechanized land clearing, land leveling, and similar activities, provided:

a. The Natural Resources Conservation Service (NRCS) has made a written notification based on an NRCS certified wetland determination that the activity qualifies for a minimal effect exemption in accordance with the provisions of the Food Security Act (16

U.S.C. 3801 *et seq.*) and the National Food Security Act Manual (NFSAM) and the discharge does not cause a loss of greater than 1 acre of non-tidal wetlands and no greater than 1/3 acre of playas, prairie potholes, or vernal pools;

b. The discharge does not cause a loss of greater than 3 acres of non-tidal wetlands on a farm, using an index of impact acreage as follows:

| Farm Size | Maximum acreage loss authorized for wetlands on a farm |
|------------------------------|--|
| Less than 15 acres | 1/4 acre. |
| 15-25 acres | 1/2 acre. |
| 25-50 acres | 3/4 acre. |
| 50-100 acres | 1 acre. |
| 100-500 acres | 2 acres. |
| Greater than 500 acres | 3 acres. |

and the permittee submits an NRCS (for USDA program participants and non-participants) or Corps (for USDA non-participants only) approved mitigation plan fully offsetting wetland losses;

c. The discharge does not cause the loss of greater than 1 acre of naturally vegetated playas, prairie potholes, or vernal pools, using an index of impact acreage as follows:

| Farm size | Maximum acreage loss authorized for playas, prairie potholes, and vernal pools |
|------------------------------|--|
| Less than 25 acres | 1/4 acre. |
| 25-100 acres | 1/2 acre. |
| 100-500 acres | 3/4 acre. |
| Greater than 500 acres | 1 acre. |

and the permittee submits an NRCS (for USDA program participants and non-participants) or Corps (for USDA non-participants only) approved mitigation plan fully offsetting wetland losses;

d. For construction of building pads for farm buildings, the discharge does not cause the loss of greater than 1 acre of wetlands (not to include playas, prairie potholes, and vernal pools) that were in agricultural production prior to December 23, 1985; or

e. Any activity in other waters of the United States is limited to the relocation of existing serviceable drainage ditches and previously substantially manipulated intermittent and small perennial streams.

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. Also, authorized activities involving excavation or drainage cannot have the effect of adversely impacting jurisdictional areas through flooding, draining, or restricting the flow and circulation of waters of the United States, including wetlands, beyond the acreage permitted. The acreage limits for the above activities to improve agriculture production are a cumulative limit not to exceed each limit above nor exceed a total of 3 acres per farm for the duration of this nationwide permit (i.e., until reissuance or any revocation). When this NWP is reissued it may be used again on the same farm to authorize activities for impacts not to exceed the acreage thresholds authorized in the reissuance. (The term "farm" refers to a land unit under one ownership operated as a farm as reported to the Internal Revenue Service.) This NWP may not be used in conjunction with any other NWP to exceed the acreage limits listed in (a), (b), (c) and (d) above for the purpose of increasing acreage for agriculture production. Regulated discharges associated with the mitigation are authorized and not calculated into the overall acreage figure. Work in waters of the United States not authorized by the above provisions, may be authorized by other NWPs (e.g., NWP 3—maintenance, NWP 13—bank stabilization, and NWP 27—wetland restoration).

Notification: The permittee must notify the District Engineer in accordance with the "Notification" general condition for the loss of: (1) Greater than $\frac{1}{3}$ acre of non-tidal wetlands, or (2) greater than 500 linear feet of drainage ditches and previously substantially manipulated intermittent and small perennial streams. The appropriate Federal and State agencies will be notified for the loss of greater than 1 acre of non-tidal wetlands, in accordance with paragraph (e) of General Condition 13. The notification must also include any past use of this NWP on the farm. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of the affected area.

This NWP does not affect, or otherwise regulate, discharges associated with agricultural activities when the discharge qualifies for an exemption under Section 404 of the Clean Water Act (CWA) (33 CFR Part 323.4) even though a minimal effect/mitigation determination may be required by the NRCS. (Section 404)

Note: For the purposes of this proposed modification to NWP 40, a discussion of acreage limit options, the types of waters affected in paragraph (b), and the definition

of single and complete project, is provided in the preamble.

C. Nationwide Permit 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. Soil Erosion and Sediment Controls. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date.

4. Aquatic Life Movements. No activity may substantially disrupt the 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. In certain States and tribal lands an individual 401 water quality certification must be obtained or waived (See 33 CFR 330.4(c)). For NWPs 12, 14, 17, 18, 21, 32, 40, A, B, C, D, and E where the State or tribal 401 certification (either generically or individually) does not require/approve a water quality management plan, the permittee must include design criteria and techniques that provide for protection of aquatic resources. The project must include a method for storm water management that minimizes degradation of the downstream aquatic system, including water quality. To the maximum extent practicable, a vegetated buffer zone (including wetlands, uplands, or both) adjacent to the river, stream, or other open waterbody must be established and maintained, if the project occurs in the vicinity of such an open waterbody. The Corps district will determine the proper width of the buffer and in which cases it will be required.

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.nmfs.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 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 12, 14, 18, 21, 29, 34, 38, A, B, C, D, and F, the PCN must also include a delineation of affected special aquatic sites, including wetlands, vegetated shallows, (e.g., submerged aquatic vegetation, seagrass beds), and riffle and pool complexes (see paragraph 13(f));

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

(6) For NWP 12—Utility Activities, where the proposed utility line is constructed or installed in navigable waters of the United States (i.e., Section 10 waters), a copy of the PCN must be sent to the National Oceanic Atmospheric Administration, National Ocean Service, for charting the utility line to protect navigation.

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

(8) 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;

(9) 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.

(10) 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.

(11) For NWPs A and B, the PCN must also include a written statement to the District Engineer detailing why the discharge must occur in waters of the United States and additional avoidance or minimization cannot be achieved.

(12) For NWP B—Master Planned Development Activities, the PCN must also include:

(i) a wetland assessment utilizing a functional assessment approach approved by the District Engineer;

(ii) a mitigation proposal that will offset the loss of waters of the United States; and

(iii) evidence of deed restrictions, protective covenants, land trusts, or other means of conservation and preservation for vegetated buffers (both wetland and/or upland) to open water and any existing wetlands, as well as any wetlands restored, enhanced, or created as part of the project.

(13) For NWP C—Stormwater Management Facilities, the PCN must include, for the construction of stormwater management facilities, a mitigation proposal to offset losses of waters of the United States.

(14) For NWPs E—Mining Activities, the PCN must include a description of all waters of the United States impacted by the project and a reclamation plan.

(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 containing the requisite information 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 on the aquatic environment are minimal, the District Engineer will notify the permittee and include any conditions the District Engineer 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 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.

For NWPs A, B, C, E, and 40, where the loss of waters of United States is greater than 1 acre, and for NWPs 14, 21, 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. For NWP 40, where the activity results in the loss of greater than $\frac{1}{3}$ acre of playas, prairie potholes, or vernal pools, the District Engineer will, upon receipt of notification, provide immediately, a copy of the notification to the appropriate office of the U.S. Fish and Wildlife 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 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.

(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 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 necessary to offset all impacts that are more than minimal 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 non-profit land restoration and stewardship organizations, 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, enhancing, or preserving 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 14, 0.5 acre of wetlands cannot be created to change a 0.75-acre loss of wetlands to a 0.25 acre loss; however, 0.5 created acres can be used to reduce the impacts of a 0.3-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 and any NWP A through F is combined with any other NWP number 12 through 40 and NWP A through F, as part of a single and complete project, the permittee must notify the District Engineer in accordance with paragraphs a, b, and c of 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.

16. *Subdivisions.* Discharges in any real estate subdivision created or subdivided after October 5, 1984, which would cause the aggregate total loss of waters of the United States in said subdivision to exceed 3 acres under NWP A or 10 acres under NWP B, is not authorized by this NWP unless the District Engineer exempts a particular subdivision or parcel by making a

written determination 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. If an exemption is established for a subdivision, subsequent development by individual property owners may proceed using either NWP A or B, as appropriate. For purposes of this condition, 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.

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

18. Shellfish Production. No activity, including structures and work in navigable waters of the United States or discharges of dredged or fill material, may occur in areas of concentrated shellfish production, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4.

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

20. Mitigation. Activities, including structures and work in navigable waters of the United States or 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). Furthermore, the District Engineer will require restoration, creation, enhancement, or preservation of other aquatic resources in order to offset the authorized impacts, at least to the extent that adverse environmental effects to the aquatic environment are minimal. An important element of any mitigation plan for projects in or near streams or other open waters is the requirement of vegetated buffers (wetland, upland, or both) adjacent to the open water areas.

21. Spawning Areas. Activities, including structures and work in navigable waters of the United States or discharges of dredged or fill material, in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that physically destroy (e.g., excavate or fill) an important spawning area are not authorized.

22. Management of Water Flows: To the maximum extent practicable, the project must be designed to maintain pre-construction downstream flow conditions (e.g., location, capacity, and flow rates). Furthermore, the project must not permanently restrict or impede the passage of normal or expected high flows (unless the primary purpose of the fill is to impound waters) and the structure or discharge of dredged or fill material must withstand expected high flows. The project must provide, to the maximum extent practicable, for retaining excess flows from the site and for establishing flow rates from the site similar to pre-construction conditions. To minimize downstream impacts, such as flooding or erosion, and upstream impacts, such as back-up flooding, the project must not, to the maximum extent practicable, increase water flows from the site, relocate water, or redirect flow beyond pre-construction conditions.

23. Adverse Effects from Impoundments. If the activity, including structures and work in navigable waters of the United States or discharge of dredged or fill material, 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.

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

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

D. Further Information

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

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

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

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

5. NWPs do not authorize interference with any existing or proposed Federal project.

E. Definitions

1. *Aquatic bench*: Aquatic benches are those shallow areas around the edge of a permanent pool stormwater management facility that support aquatic vegetation, both submerged and emergent.

2. *Best management practices*: Best Management Practices (BMPs) are policies, practices, procedures, or structures implemented to mitigate the adverse impacts on surface water quality resulting from development. BMPs are categorized as structural or non-structural. A BMP policy may affect the limits on a development.

3. *Channelized stream*: A channelized stream is a stream that has been manipulated to increase the rate of water flow through the stream channel. Manipulation may include deepening, widening, straightening, armoring, and other activities that change the stream cross-section and other aspects of channel geometry in an effort to increase water conveyance. A channelized stream remains a water of the United States despite the alterations. For the purposes of the NWPs, a channelized stream is not considered to be a drainage ditch.

4. *Contiguous wetland*: A contiguous wetland is a wetland that is connected by surface waters to other waters of the United States. For example, in tidal ecosystems, contiguous wetlands may be either tidal or non-tidal. For the purposes of the NWPs, contiguous wetlands in tidal ecosystems extend in the same direction as the ebb and flow of the tide; wetlands that are upstream (i.e., either upstream on the main tidal channel or upstream on any linear aquatic system with a defined channel that enters the contiguous wetland) of tidal waters are not considered to be contiguous. Contiguous wetlands in non-tidal systems are normally contiguous to the nearest open water of the United States and perpendicular to a tangent of the OHWM of that open water. Wetlands contiguous with other waters of the United States are adjacent to those waters, but wetlands adjacent to those waters are not necessarily contiguous, as they may be separated from waters of the United States by berms, levees, roads, etc.

5. *Drainage ditch*: A linear excavation or depression constructed for the purpose of conveying surface runoff or groundwater from one area to another. An "upland drainage ditch" is a

drainage ditch constructed entirely in uplands (i.e., not waters of the United States) and is not a water of the United States, unless it becomes tidal or otherwise extends the ordinary high water line of existing waters of the United States. Drainage ditches constructed in waters of the United States (e.g., by excavating wetlands) remain waters of the United States even though they are heavily manipulated to increase drainage. The term "drainage ditch" does not include channelized streams. A drainage ditch may be constructed in uplands or wetlands.

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

7. Farm: A land unit under one ownership operated as a farm as reported to the Internal Revenue Service.

8. Intermittent stream: An intermittent stream has flowing water during certain times of the year. When the stream bed is located below the water table, groundwater is the primary source of water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

9. Loss of waters of the United States: Waters of the United States that include the filled area and other waters that are adversely affected by flooding, excavation, or drainage as a result of the regulated activity. The acreage of loss of waters of the United States is the threshold measurement of the impact to existing waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and values. The loss of stream bed includes the linear feet of stream that is filled or excavated.

10. Noncontiguous wetland: A noncontiguous wetland is a wetland that is not connected by surface waters to other waters of the United States, or is part of a linear aquatic system with a defined channel to the otherwise contiguous wetland. Noncontiguous wetlands may be adjacent to other waters of the United States, but a direct connection to other waters of the United States is lacking. For example, a depressional wetland located on a floodplain that is separated by a narrow band of uplands from the river is a noncontiguous wetland, but still adjacent to that river due to periodic overbank flooding that is a source of hydrology for that wetland. Noncontiguous wetlands also include those wetlands that are tributary to the contiguous wetland or its open water area, where the tributary has a defined channel for water flow.

11. Non-tidal wetland: A non-tidal wetland is a wetland (i.e., a water of the United States) that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(b). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (i.e., spring high tide line).

12. Perennial stream: A perennial stream has flowing water year-round during a typical year. The stream bed is located below the water table for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

13. Riffle and pool complex: Riffle and pool complexes typically occur in steep gradient sections of perennial streams and consist of alternating stream segments characterized by: 1) the rapid of movement of water over a coarse substrate (e.g., gravel or cobble) with shallow water and 2) the slower movement of water over a finer substrate (e.g., sand or silt) with deeper water.

14. Stormwater management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing

downstream erosion, water quality degradation, and flooding and mitigating the negative impacts of urbanization.

15. Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and BMPs, which retain water for a period of time to control runoff and/or improve the quality (i.e., by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

16. Tidal wetland: A tidal wetland is a wetland (i.e., a water of the United States) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(b) and 33 CFR 328.3(f), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line (i.e., spring high tide line) and are inundated by tidal waters at least two times per month, during spring high tides.

17. Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

18. Waterbody: A waterbody is any area that in a normal year has water flowing or standing above ground to the extent that evidence of an ordinary high water mark is established.

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