DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Final Notice of Issuance and Modification of Nationwide Permits

AGENCY: Army Corps of Engineers, DoD.

ACTION: Final notice.

SUMMARY: The Corps of Engineers (Corps) is issuing 5 new Nationwide Permits (NWPs) and modifying 6 existing NWPs to replace NWP 26 which expires on June 5, 2000. The Corps is also modifying nine NWP general conditions and adding two new NWP general conditions. The new NWP general conditions will increase protection of designated critical resource waters and waters of the United States within 100-year floodplains. In December 1996, the Corps decided to replace NWP 26, which authorizes discharges of dredged or fill material into headwaters and isolated waters of the United States, with activity-specific NWPs. The new and modified NWPs authorize many of the same activities that NWP 26 authorized, but the new and modified NWPs are activity-specific, with terms and conditions to ensure that these activities result in minimal adverse effects on the aquatic environment. The new and modified NWPs will substantially increase protection of the aquatic environment, while efficiently authorizing activities with minimal adverse effects on the aquatic environment. The maximum acreage limits of most of the new and modified NWPs is ½ acre. Most of the new and modified NWPs require notification to the district engineer for activities that result in the loss of greater than ⅒ acre of waters of the United States. This notice also constitutes the Corps application to States, Tribes, and the Environmental Protection Agency (EPA) for Section 401 water quality certification (WQC) and Coastal Zone Management Act (CZMA) consistency determinations. These agencies have 90 days to determine if the new and modified NWPs meet state or Tribal water quality standards and are consistent with state coastal zone management plans.

DATES: The new and modified NWPs and general conditions will become effective on June 5, 2000. The expiration date for NWP 26 is June 5, 2000.

ADDRESSES: HQUSACE, ATTN: CECW–OR, 20 Massachusetts Avenue, NW, Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson or Mr. Sam Collinson at (202) 761–0199 or access the Corps of Engineers Regulatory Home Page at: http://www.usace.army.mil/inet/functions/cw/cecwo/reg/.

SUPPLEMENTARY INFORMATION:

Background

In the December 13, 1996, issue of the **Federal Register** (61 FR 65874) the Corps reissued NWP 26 for a period of two years and announced its intention to replace NWP 26 with activity-specific NWPs. NWP 26 authorizes discharges of dredged or fill material into headwaters and isolated waters, provided the discharge does not result in the loss of greater than 3 acres of waters of the United States or 500 linear feet of stream bed. Headwaters are non-tidal streams, lakes, and impoundments that are part of a surface tributary system to interstate or navigable waters of the United States with an average annual flow of less than 5 cubic feet per second. Isolated waters are non-tidal waters of the United States that are not part of a surface tributary system to interstate or navigable waters and are not adjacent to such surface tributary systems to interstate or navigable waters.

In the July 1, 1998, issue of the **Federal Register** (63 FR 36040) the Corps published its initial proposal to replace NWP 26, including 6 new NWPs, modifying 6 existing NWPs, modifying 6 NWP general conditions, and adding one new NWP general condition. In the October 14, 1998, issue of the **Federal Register** (63 FR 55095), the Corps published a supplementary proposal to limit the use of the proposed new and modified NWPs in 100-year floodplains, impaired waters, and designated critical resource waters. In the October 14, 1998, **Federal Register** notice, the Corps also announced the withdrawal of the proposed NWP for master planned development activities and the extension of the expiration date of NWP 26 to September 15, 1999. The Corps also announced, in the October 14, 1998, **Federal Register** notice, its intent to solicit additional comments on the proposed new and modified NWPs and regional conditions proposed by Corps districts.

As a result of the comments received in response to the July 1, 1998, and October 14, 1998, **Federal Register** notices, the Corps made changes to the proposed NWPs and general conditions. The Corps also modified and reproposed the three new NWP general conditions to limit the use of NWPs in 100-year floodplains, impaired waters, and designated critical resource waters. The draft NWPs and general conditions were published in the July 21, 1999, issue of the **Federal Register** (64 FR 39252) for a 45-day comment period. Concurrent with this **Federal Register** notice, Corps districts proposed the latest drafts of their proposed regional conditions for the new and modified NWPs. In the September 3, 1999, issue of the **Federal Register** (64 FR 48386), the Corps announced that the comment period for the draft NWPs and general conditions was extended an additional 30 days to provide a 75-day comment period. The comment period for the July 21, 1999, **Federal Register** notice ended on October 7, 1999. In the September 3, 1999, **Federal Register** notice, the Corps also announced that the expiration date of NWP 26 was extended to January 5, 2000.

As a result of the number of substantial comments received in response to the July 21, 1999, **Federal Register** notice and the need for additional time to review those comments and develop the final NWPs and general conditions, the Corps issued another **Federal Register** notice on December 15, 1999 (64 FR 69994). This **Federal Register** notice announced a revised expiration date for NWP 26 and the process for accepting NWP 26 PCNs. The expiration date for NWP 26 was extended to April 14, 2000.

Since the schedule published in the December 15, 1999, **Federal Register** notice has changed, we are extending the expiration date of NWP 26 to June 5, 2000. NWP 26 PCNs submitted on or before March 9, 2000, (whether required or not) will be reviewed under the existing terms and conditions of NWPs. If those activities are authorized by NWP 26, their authorizations will be valid until February 11, 2002. If the activity is under construction or under contract prior to February 11, 2002, the permittee will have 12 additional months to complete the authorized activity. NWP 26 PCNs for activities that require notification which are submitted after March 9, 2000, will be reviewed under the new and modified NWPs or other types of DA authorization, such as individual permits. NWP 26 activities that do not require a PCN are authorized by NWP 26 until June 5, 2000. For those NWP 26 activities that do not require notification, the permittee has 12 months to complete the work if construction begins or is under contract before June 5, 2000.

The terms and limits of the new and modified NWPs are intended to authorize activities that have minimal adverse effects on the aquatic environment, individually and cumulatively. Most of the new NWPs authorize activities in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. The

acreage limit for most of the new and modified NWPs is ½ acre. For the new and modified NWPs, the Corps has established pre-construction notification (PCN) thresholds to ensure that any activity that potentially may have more than minimal adverse effects on the aquatic environment is reviewed by a district engineer on a case-by-case basis. Most of the new NWPs require submission of a PCN for discharges of dredged or fill material resulting in the loss of greater than 1/10 acre of waters of the United States. Regional conditions may be added to the NWPs by division engineers to lower notification thresholds.

The new and modified NWPs issued today will become effective on June 5, 2000. This **Federal Register** notice begins the 90-day Clean Water Act Section 401 water quality certification (WQC) and Coastal Zone Management Act (CZMA) consistency determination processes. Because of the changes to the proposed new and modified NWPs, including the general conditions, we have increased the normal 60-day WQC and CZMA consistency determination processes to 90 days. During this 90-day period, Corps divisions and districts will finalize their regional conditions for the new and modified NWPs.

Discussion of Public Comments

I. Overview

In response to the July 21, 1999, **Federal Register** notice, we received over 1,700 comments. We reviewed and fully considered all of these comments. Most of the commenters expressed opposition to the proposed NWPs, but a few commenters indicated support for these NWPs. One commenter stated that NWP 26 should be retained without any changes. A number of commenters support the current NWP program, because data collected by the Corps during Fiscal Year (FY) 1997 indicates that there are net gains in aquatic resources because of the Corps mitigation requirements. These commenters indicated that this net gain demonstrates that the current NWP program results only in minimal adverse effects on the aquatic environment.

After considering the comments received in response to the July 21, 1999, **Federal Register** notice, we have made several important changes to the new and modified NWPs. For most of these NWPs, we have established a ½ acre limit. Notification to the district engineer will be required for most activities that result in the loss of greater than 1/10 acre of waters of the United States. For NWPs 39, 40, 42, and 43, we have imposed a 300 linear foot limit for filling and excavating stream beds. We have also increased the notification review period to 45 days. We have revised nine general conditions and added two new general conditions. The new NWP general conditions limit activities in designated critical resource waters and fills in waters of the United States within 100-year floodplains. All above-grade fill under NWPs 29, 39, 40, 42, 43, and 44 is prohibited within the FEMA-mapped 100-year floodplain below the headwaters of any stream. Within the headwaters, above-grade fill is prohibited within the FEMA-mapped regulatory floodway, and any above-grade fill in the flood fringe must meet FEMA standards.

These new restrictions on use of the NWPs will substantially increase the protection of the Nation's aquatic environment. These revised NWPs continue a trend by the Corps of Engineers of enhancing the protection of the aquatic environment through the NWP program. In 1977 the predecessor to NWP 26 authorized unlimited fill in headwaters and isolated waters without any notification of the Corps. In 1984 the Corps established a maximum project specific impact limit of 10 acres and a notification of the Corps for any impact greater than 1 acre. In 1996, we reduced these project specific limits to 3 acres maximum and 1/3 acre for notification of the Corps. To further ensure that the NWP program properly protects the aquatic environment, the Corps is conducting a Programmatic Environmental Impact Statement, which will be completed in early 2001. To ensure full protection of endangered species, the Corps is formally consulting with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service on the NWP program.

All of these substantial improvements will increase costs to applicants to some degree and will increase the funding needed by the Corps to maintain our current level of service to the public. Based on a report prepared by the Corps Institute for Water Resources (IWR) in response to the Corps FY 2000 Appropriations Act, the changes to the NWP program announced today will increase direct costs for permit applicants by about $20 million per year. Further, based on the IWR report, the Corps would need about $6 million in additional funding to maintain current levels of service to the public. We believe the changes are necessary to ensure the statutory requirement that general permits, including NWPs, will have no more than minimal adverse effects on the aquatic environment.

II. General Comments

In the following discussion, where the comments and responses were the same as for the July 21, 1999, **Federal Register** notice, we referred to the July 21, 1999, **Federal Register** notice instead of repeating those responses.

Many commenters objected to the proposed NWPs for the following reasons: (1) The proposed NWPs are too complex; (2) the proposed NWPs are contrary to the Congressional intent of Section 404(e) of the Clean Water Act; (3) the proposed NWPs are contrary to the Administration's 1993 Wetlands Plan, which states that Federal regulatory programs should be fair, flexible, and effective; (4) the proposed NWPs are contrary to the 1998 Clean Water Action Plan, which states that duplication between Federal, state, and local agencies and Tribal governments should be reduced wherever possible; (5) the conditions of these NWPs will cause many activities with minimal adverse effects on the aquatic environment to be processed as individual permits; and (6) these NWPs will result in unnecessary and costly burdens on the regulated public, increase delays, and increase the Corps workload without providing any benefits.

We have reduced the complexity of these NWPs as much as possible by making the scope of applicable waters for most of the new NWPs the same and establishing similar PCN thresholds. In addition, we have eliminated the indexed acreage limits from NWPs 39 and 40 and established a ½ acre limit for these NWPs. However, some complexity is unavoidable because different activities in waters of the United States do not have the same effects on the aquatic environment and each NWP must have different conditions to address those dissimilar impacts. The new and modified NWPs are conditioned to ensure that only those activities that have minimal adverse effects on the aquatic environment are authorized by these permits.

The new and modified NWPs are not contrary to Section 404(e) of the Clean Water Act, because each NWP authorizes activities that are similar in nature, with terms and conditions to ensure that those NWPs authorize only activities with minimal adverse effects on the aquatic environment. These NWPs still provide an expedited authorization process when compared to the standard permit process, because the district engineer must respond to the applicant within 45 days of the receipt date for a complete preconstruction

notification (PCN). The 45-day PCN review period is shorter than the average evaluation time for individual permits, which was 100 days in FY 1999.

The new and modified NWPs comply with the President's 1993 Wetlands Plan, by allowing the Corps regulatory program to continue to provide effective protection of wetlands and other aquatic resources and avoid unnecessary impacts to private property, the regulated public, and the aquatic environment. The new and modified NWPs, including the new and modified general conditions, will more clearly address individual and cumulative adverse effects on the aquatic environment and ensure that those adverse effects are minimal. The new and modified NWPs address specific applicant group needs and provide more predictability and consistency to the regulated public. During the development of these NWPs, we recognized the concerns of the natural resource agencies and environmental interest groups for potential adverse effects on the aquatic environment resulting from activities authorized by these NWPs and the regulated public's need for certainty and flexibility in the NWP program.

Although certain aspects of the new and modified NWPs duplicate existing Federal, state, and local agency programs, such duplication is not contrary to the 1998 Clean Water Action Plan because it provides additional protection for the aquatic environment. While some state and local governments may address some of the same issues that are addressed by the NWPs and general conditions, there are many areas of the country where those issues are not addressed. Therefore, we believe it is necessary to add certain conditions to the NWPs to address potential adverse effects to the aquatic environment. For example, General Condition 9 requires a water quality management plan for certain NWP activities, unless the state or Tribal Section 401 agency requires an adequate water quality management plan. If the state or Tribe does not adequately address impacts to water quality through its water quality certification process, the district engineer can require additional measures such as stormwater management facilities and vegetated buffers to protect water quality. There are circumstances where the Corps needs to consider more stringent NWP requirements to ensure that the adverse effects to the aquatic environment are minimal, individually and cumulatively.

We agree that the terms and conditions of the new and modified NWPs may cause some activities with minimal adverse effects on the aquatic environment to be subject to the individual permit process. It is important to note that aquatic resource functions and values differ greatly across the country. When developing NWPs that have national applicability, there will be many parts of the country where the terms and limits of the NWPs will not authorize some activities that have minimal adverse effects on the aquatic environment. In these areas, district engineers can issue regional general permits in the future to provide expedited authorization for categories of activities with minimal adverse effects on the aquatic environment.

However, for six months after the publication date of the new and modified NWPs, district engineers will not issue regional general permits or letters of permission (LOPs) that explicitly authorize the same activities as the new and modified NWPs. This six month period will allow Corps districts to assess how effectively the new and modified NWPs authorize activities with minimal adverse effects on the aquatic environment, individually and cumulatively.

As required by the Energy and Water Development Appropriations Act, 2000, we have conducted a study of the workload and compliance costs of the NWPs, including the new general conditions, proposed in the July 21, 1999, **Federal Register** notice. The report for this study was finalized in January 2000. This report is available on the Internet at the Corps headquarters regulatory home page.

The workload and compliance costs study determined that the proposal published in the July 21, 1999, **Federal Register** would increase the number of standard individual permit applications received by the Corps by 4,429 per year. This and other workload increases would result in direct compliance costs incurred by the regulated public by an estimated $46 million annually. The study also examined indirect compliance costs (i.e., opportunity costs) of the July 21, 1999, proposal. The indirect compliance costs include the opportunity costs that result from increases in permit processing times and an estimate of foregone development value caused by the vegetated buffer requirement. The study estimates that the processing times for standard permits would steadily increase each year if the July 21, 1999, proposal were to be implemented and Corps budget resources are not increased. Within five years, the average standard permit processing time and number of backlogged permit applications would increase three to four times the levels measured in FY 1998.

The study also examined an alternative replacement NWP package that included lowering the acreage limit of the new and modified NWPs to ½ acre and withdrawing the three proposed new NWP general conditions. The alternative replacement NWP package would result in 40% fewer standard permit applications and 30% less direct compliance costs than the July 21, 1999, proposal would. After five years, the standard permit processing times and permit application backlog would be approximately ½ of that estimated for the proposal published in the July 21, 1999, **Federal Register**.

Many commenters objected to the Corps statement in the July 21, 1999, **Federal Register** notice that NWPs are optional permits, and that if they do not want to comply with the terms and conditions of the NWPs, then they can request an individual permit. Numerous commenters indicated that the new and modified NWPs are likely to result in decreased protection of the aquatic environment because of the higher numbers of individual permits and a greater workload for the Corps that would result if these NWPs were implemented as proposed. Some commenters also stated that the new and modified NWPs would also result in less protection of the aquatic environment because project proponents would have less incentive to build projects with smaller impacts to aquatic resources due to the strict acreage limits, notification requirements, and conditions. In contrast, one commenter said that developers will modify their projects to comply with the new and modified NWPs. Another commenter said that the costs to the Corps and regulated public that are imposed by the new and modified NWPs will be offset by the additional environmental protection provided by those NWPs.

NWPs provide an expedited Corps permit process for activities that have minimal adverse effects on the aquatic environment, individually and cumulatively. The NWPs are conditioned to ensure that only activities with minimal adverse effects are authorized. If a prospective permittee cannot comply with all of the terms and conditions of the NWPs, then he or she can request another form of Department of the Army (DA) authorization, such as a regional general permit or a standard individual permit.

We believe that the terms and conditions of the new and modified NWPs, including the ½ acre limit and 1/10 acre PCN threshold, are substantially more protective of the aquatic environment. The terms and conditions of these NWPs will ensure that only activities with minimal adverse effects on the aquatic environment are authorized by NWPs. Many project proponents will design their projects to comply with the ½ acre limit so that they can qualify for an NWP and receive authorization more quickly than they could through the standard permit process.

Many commenters stated that the new and modified NWPs would cause more than minimal adverse effects on the aquatic environment, individually and cumulatively. A few commenters said that the proposed NWPs do not comply with the requirement that general permits authorize only activities that are similar in nature. A number of commenters objected to the NWPs, because they provide no opportunity for the public to comment on individual projects.

We have developed terms and conditions for the new and modified NWPs to ensure that they authorize only those activities that result in minimal individual or cumulative adverse effects on the aquatic environment. The new and modified NWPs have PCN thresholds that require prospective permittees to notify district engineers prior to conducting activities that could result in more than minimal adverse effects. Most of the new and modified NWPs require notification to district engineers for discharges resulting in the loss of greater than 1/10 acre of waters of the United States. Division engineers can regionally condition these NWPs to lower notification thresholds, protect high value waters, or add additional restrictions to ensure that authorized activities result only in minimal adverse effects. District engineers will review PCNs on a case-by-case basis to determine if the adverse effects of the proposed work are minimal. If the adverse effects of a particular activity are more than minimal, the district engineer can either add conditions to the NWP authorization to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the proposed work.

Each of the new and modified NWPs authorizes activities that are similar in nature, in full compliance with section 404(e) of the Clean Water Act. This issue was discussed in detail in the July 21, 1999, **Federal Register** notice (64 FR 39263), and we have not changed our position on this matter.

The intent of general permits, including NWPs, is to efficiently authorize activities that have minimal adverse effects on the aquatic environment. These activities are usually non-controversial, and would generate few or no comments from the public if they were subject to the standard permit process. Conducting full public interest reviews for activities with minimal adverse effects on the aquatic environment would substantially increase the Corps workload with little or no added value for the aquatic environment.

A large number of commenters objected to the proposed NWPs, stating that the new and modified NWPs would result in significant wetland losses. Many commenters said that the new and modified NWPs would undermine the Administration's goal of net gain in wetland acreage stated in the Clean Water Action Plan.

The new and modified NWPs will not result in significant losses of wetlands because they are conditioned to require prospective permittees to avoid and minimize impacts to waters of the United States on-site to the maximum extent practicable (see General Condition 19). In addition, the ½ acre limit will substantially reduce wetland losses. Compensatory mitigation is often required for activities that require notification to the district engineer, which offset losses of wetlands and other aquatic habitats so that significant losses of wetlands do not occur as a result of the NWP program.

As discussed in the July 21, 1999, **Federal Register** notice, the NWP program supports the Administration's goal of no net loss and is not contrary to the goals of the Clean Water Action Plan.

Several commenters objected to the proposed NWPs, stating that the NWPs place too much reliance on the assertion of discretionary authority by district engineers. They said that this process does not provide adequate protection of the aquatic environment. Another commenter stated that the proposed NWPs are inappropriately based on the intent of the prospective permittee, instead of potential impacts to aquatic resources. One commenter indicated that there is too much overlap between the new and modified NWPs, which would be confusing to permit applicants.

We disagree with these commenters, because the notification process allows case-by-case review of those activities that have the potential for more than minimal adverse effects on the aquatic environment. If the adverse effects of the proposed activity are more than minimal, then the district engineer can either add special conditions to the NWP authorization to ensure that the activity results in minimal adverse effects or exercise discretionary authority and require an individual permit. This process provides substantial protection for the aquatic environment.

The new and modified NWPs are activity-specific to satisfy the requirements of section 404(e) of the Clean Water Act. These NWPs address impacts to the aquatic environment, because they are limited to certain types of waters and are conditioned to ensure that the adverse effects resulting from the authorized work are minimal, individually and cumulatively. Since these NWPs are activity-specific, they have to reflect specific categories of work that are conducted by individuals of certain occupations.

Although there is some overlap between the activities authorized by the new and modified NWPs, such redundancy is necessary because our intent was to develop NWPs that authorize single and complete projects generally without having to resort to using multiple NWPs. For instance, NWP 39 authorizes most features of residential, commercial, or institutional developments, including road crossings and stormwater management facilities.

Several commenters stated that the NWPs should only authorize activities that are water dependent. One of these commenters said that limiting the NWPs only to water dependent activities would result in a regulatory program that is easier to administer and result in wetland gains. Some commenters indicated that the proposed NWPs do not comply with the Section 404(b)(1) guidelines.

We addressed the issue of water dependency in the preamble of the July 21, 1999, **Federal Register** notice and have not changed our position on this issue. The new and modified NWPs comply fully with the requirements for general permits in the Section 404(b)(1) guidelines (see 40 CFR 230.7).

A few commenters opposed the new and modified NWPs because they said that the Corps has failed to define the term ''minimal effects'' in an understandable or meaningful way. Many commenters stated that the minimal adverse effects criterion for the NWPs is too subjective and that an assessment procedure that considers the size of impacts and quality of waters must be used instead.

The term ''minimal effect'' as it is used in the context of general permits,

including NWPs, cannot be simply defined. The terms and conditions of general permits are established so that those permits authorize most activities that result in minimal adverse effects on the aquatic environment. Preconstruction notifications are an important mechanism to ensure compliance with the minimal adverse effect requirement. Case-specific special conditions and regional general conditions are also important for addressing site-specific and regional concerns for the aquatic environment and ensuring that the NWPs authorize only activities with minimal adverse effects. For activities that require notification to the district engineer, the minimal adverse effects determination requires consideration of site-specific factors, such as the quality of waters that may be impacted by the proposed work, the functions and values of those waters, the geographic setting of the proposed work, and other factors. The minimal adverse effects criterion must be subjective, due to the complexity of the analysis required.

Two commenters suggested issuing the new NWPs with an expiration date of February 11, 2002, so that these NWPs will expire on the same day as the current NWPs. One commenter said that the new NWPs should be reevaluated when the current NWPs are reevaluated to determine if the use of all NWPs will result in more than minimal impacts. Two commenters recommended allowing NWP 26 to expire in January 2000 and not issuing the new NWPs until the next NWP reissuance in 2002. In the interim, individual permits would be required for activities that do not qualify for any of the current NWPs.

The new and modified NWPs issued today will expire on June 5, 2005 (i.e., five years from their effective date). However, when the current NWPs are proposed for reissuance in 2002, the new and modified NWPs are likely to be part of that proposal, so that all of the NWPs will be on the same five year cycle for review. We do not agree with the third comment of the previous paragraph. Allowing NWP 26 to expire prior to the effective date of the new and modified NWPs would be unfair to the regulated public.

Several commenters requested that the expiration date for NWP 26 should be extended to the expiration date of the current NWPs to ensure that NWP 26 is available until the effective date of the new and modified NWPs.

We do not agree that it is necessary to extend the expiration date of NWP 26 to February 11, 2002, because the new and modified NWPs will become effective on June 5, 2000. Keeping NWP 26 in place while the new and modified NWPs are effective would be contrary to the Corps goal of replacing NWP 26 with activity-specific NWPs.

One commenter suggested that the Corps clarify in this **Federal Register** notice that activities authorized by NWP 26 prior to the expiration date will continue to be authorized by NWP 26 for 12 months, provided the permittee has commenced construction or is under contract to commence construction. Another commenter recommended changing the 12-month grandfather provision for the NWPs to 24 months to provide adequate time for the completion of transportation projects.

A permittee who receives an NWP 26 authorization prior to the expiration date will have up to 12 months to complete the authorized activity, provided the permittee commences construction, or is under contract to commence construction, before the date NWP 26 expires (see 33 CFR 330.6(b)). Except as indicated below, 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 NWP authorization in accordance with 33 CFR 330.4(e) and 33 CFR 330.5(c) or (d). We do not agree that it is necessary to increase the time period for the grandfathering provision from 12 months to 24 months. However, anyone who submitted a NWP 26 PCN on or before March 9, 2000, will have until February 11, 2003, to complete the work, provided the permittee receives an NWP 26 verification and has commenced construction or signed a construction contract prior to February 11, 2002.

Jurisdictional Issues

In response to the July 21, 1999, **Federal Register** notice, we received many comments concerning the scope of the Corps regulatory authority. These comments addressed excavation activities in waters of the United States and whether ephemeral streams, drainage ditches, and certain other categories of waterbodies are waters of the United States. Today's action addresses only NWPs, and in no way affects or alters the geographic or activities-based jurisdiction of the CWA nor is it intended to create new policy related to such jurisdiction.

Many commenters said that the Corps is ignoring recent court decisions by including excavation activities as regulated activities in the text of the new and modified NWPs. These commenters cited the recent decision by the United States Court of Appeals for the District of Columbia which upheld the United States District Court for the District of Columbia's decision in the *American Mining Congress* v. *Corps of Engineers* lawsuit. This lawsuit challenged the Corps and EPA's revised definition of ''discharge of dredged material'' that was promulgated on August 25, 1993 (58 FR 45008). The revised definition of ''discharge of dredged material'' was overturned because the District Court held that the rule was outside of the agencies' statutory authority and contrary to the intent of Congress by asserting Clean Water Act jurisdiction over activities where the only discharge associated with the activity is ''incidental fallback.'' These commenters requested that the Corps remove all references to excavation activities from the new and modified NWPs. Two commenters stated that the reference to excavation activities in the new and modified NWPs requires project proponents to submit a notification to the Corps to determine if a Corps permit is required. One commenter said that the final NWPs should contain guidance that explains when excavation is a regulated activity. This commenter also recommended that the Corps clarify how excavation activities are included in the calculation of acreage loss of waters of the United States, to determine if a particular activity exceeds PCN thresholds or NWP acreage limits.

The agencies revised their regulations on May 10, 1999, to respond to the results of the American Mining Congress lawsuit (64 FR 25120). It is important to recognize that not all excavation activities in waters of the United States are conducted so that only incidental fallback occurs. Excavation activities that result in the redeposit of dredged material into waters of the United States other than incidental fallback require a Section 404 permit. For example, excavated material may be temporarily stockpiled in waters of the United States before it is removed. Excavation activities that result only in discharges identified by the Corps as ''incidental fallback'' do not require a Section 404 permit. However, all excavation activities in Section 10 navigable waters require Corps permits under section 10 of the Rivers and Harbors Act of 1899. We have retained the excavation language in the new and modified NWPs and the definition of ''loss of waters of the United States'' because some excavation activities in Section 404 only waters of the United States result in discharges that still

require a Section 404 permit. These activities may be authorized by NWPs. NWPs issued under the Corps Section 10 authority also authorize excavation activities in navigable waters of the United States. No permit is required for excavation activities that do not meet the definition of discharge of dredged or fill material. As with any activity in waters of the United States, a landowner who is uncertain whether their activity needs a permit may contact the Corps.

Two commenters noted that a statement in the July 21, 1999, **Federal Register** notice (64 FR 39276) concerning excavation activities is inaccurate and misleading. This statement said that excavation activities that result in the replacement of an aquatic area with dry land or change the bottom elevation of a waterbody require a Section 404 permit. These commenters said that this statement is actually the definition of ''fill material'' and that excavation cannot, by itself, result in the replacement of an aquatic area with dry land or change the bottom elevation of a waterbody.

We agree that the statement in the **Federal Register** is inaccurate and have included clarification concerning when excavation activities require a Section 404 and/or a Section 10 permit from the Corps (see the above discussion). Excavation activities can change the bottom elevation of a waterbody by removing material and increasing the depth of the waterbody. Increasing the depth of a waterbody without associated discharges of dredged material other than incidental fallback does not require a Section 404 permit, but a Section 10 permit would be required if the activity is in Section 10 waters. However, an excavation activity that involves redeposit of dredged material into waters of the United States other than incidental fallback or involves the discharge of fill material that increases the bottom elevation of a waterbody or creates dry land requires a Section 404 permit (unless the activity qualifies for a Section 404(f) exemption).

A number of commenters stated that the Corps does not have authority to regulate discharges into ephemeral streams because these watercourses, by definition, contain water only briefly and therefore are not waters of the United States. One of these commenters noted that 33 CFR 328.3 includes intermittent streams, but does not include ephemeral streams. A few commenters remarked that the Corps has not explained how an ordinary water mark can be present in a watercourse that has water flow only during a short time after rain events. These commenters assert that under ordinary circumstances, ephemeral watercourses do not have flowing water and cannot develop an ordinary high water mark (OHWM). They said that the Corps needs to define what constitutes an ''ordinary flow'' in an ephemeral watercourse that establishes an OHWM and what indicators are to be used to determine the presence and location of the OHWM. In addition, these commenters stated that the Corps cannot use peak flows and flood stages in lieu of ordinary flows and the Corps cannot use cut banks, shelving, or debris that is influenced only by peak flows or flooding.

An ephemeral stream is a water of the United States, provided it has an OHWM. An ephemeral stream that does not have an OHWM is not a water of the United States. The frequency and duration at which water must be present to develop an OHWM has not been established for the Corps regulatory program. District engineers use their judgement on a case-by-case basis to determine whether an OHWM is present. The criteria used to identify an OHWM are listed in 33 CFR 328.3(e).

Several commenters said that the Corps can only exercise jurisdictional authority over those ephemeral waters that are tributaries to waters of United States. These commenters said that the low frequency of water flows in these watercourses requires the Corps to define criteria and circumstances to determine whether ephemeral watercourses are tributaries to waters of the United States. Some commenters also stated that the Corps has not demonstrated how ephemeral streams have any nexus to interstate commerce or how discharges of dredged or fill material into those watercourses would affect interstate commerce.

We agree that ephemeral streams that are tributary to other waters of the United States are also waters of the United States, as long as they possess an OHWM. The upstream limit of waters of the United States is the point where the OHWM is no longer perceptible (see 51 FR 41217). Ephemeral streams that are part of an interstate surface tributary system are waters of the United States, because they are an integral part of that surface tributary system, which supports interstate commerce.

Three commenters stated that the proposed NWPs illegally assert jurisdiction over drainage ditches. Three commenters objected to a statement in the July 21, 1999, **Federal Register** notice that drainage ditches constructed in waters of the United States remain waters of the United States. These commenters said that if a drainage ditch converts a water of United States to a non-jurisdictional upland, the drainage ditch would not be a water of United States unless the area remains a wetland or other type of water of United States. These commenters also objected to the Corps assertion that non-tidal drainage ditches are waters of the United States if they extend the OHWM of an existing water of the United States. They said that this position is contrary to preamble to November 13, 1986, final rule for the Corps regulatory program (51 FR 41217) and that this change requires justification. One commenter requested that the Corps clarify whether the entire ditch becomes jurisdictional if the OHWM becomes extended within the ditch or whether jurisdiction is extended only to that portion of the ditch that develops an OHWM. Two commenters asked for clarification whether a drainage ditch that runs through a series of uplands and waters of the United States is jurisdictional. One commenter asked how an OHWM that develops within a drainage ditch would be determined to be due to ordinary flows, not peak flows or flooding.

A drainage ditch constructed in a stream, wetland, or other water of the United States remains a water of the United States, provided an OHWM is still present. Since drainage ditches constructed in waters of the United States are constructed either by channelizing a stream or excavating the substrate to improve drainage, it is unlikely that the drainage ditches will become dry land unless the hydrology is removed by some other action. District engineers will determine, on a case-by-case basis, whether a particular area is a water of the United States. If the construction of a drainage ditch has legally converted the entire area to dry land, then the area drained is not a water of the United States, however, in most cases the drainage ditch would remain a water of the United States.

The statement that non-tidal drainage ditches are waters of the United States if they extend the OHWM of an existing water of the United States is consistent with the final rule published in the November 13, 1986, **Federal Register** and applies to ditches constructed in waters or that connect waters. Nothing in the NWP notice was intended to change the November 13, 1986, **Federal Register** notice which states that drainage ditches constructed entirely in upland areas generally are not considered to be waters of the United States.

Drainage ditches constructed in uplands that connect two waters of the United States may be considered waters of the United States if those ditches

constitute a surface water connection between those two waters of the United States. As previously noted, drainage ditches constructed entirely in uplands generally are not considered to be waters of the United States. District engineers will use the criteria at 33 CFR 328.3(e) to determine the presence and extent of an OHWM that may have developed in a drainage ditch.

One commenter stated that the July 21, 1999, **Federal Register** notice incorrectly asserts jurisdiction over farmed wetlands by considering them to be waters of the United States and the Corps does not have authority to require permits for discharges into these areas. Another commenter said that the Corps does not have the authority to regulate activities in isolated wetlands. Two commenters indicated that the Corps contradicts its regulations concerning the construction and maintenance of stormwater management facilities. These commenters assert that the Corps regulations published in the November 13, 1986, **Federal Register** state that detention and first flush basins are generally not considered waters of the United States. One commenter requested clear definitions of the terms ''waters of the United States,'' ''navigable waters,'' and ''navigable waters of the United States.''

Farmed wetlands as defined under the Food Security Act are waters of the United States provided they meet the criteria at 33 CFR 328.3. In addition, those criteria further provide that prior converted croplands are not waters of the United States. Isolated wetlands are waters of the United States, provided they meet the criteria at 33 CFR 328.3. (Within the Fourth Circuit, isolated waters must be shown to have an actual connection to interstate or foreign commerce.) Stormwater management facilities constructed in waters of the United States may, under certain circumstances, be considered waters of the United States. The Corps has the discretion to determine on a case-by-case basis whether or not a particular waterbody is a water of the United States (see 51 FR 41217). The term ''waters of the United States'' is defined at 33 CFR 328.3 and refers to the Corps Section 404 jurisdiction. The term ''navigable waters'' as used in Section 404 of the Clean Water Act has the same meaning as ''waters of the United States.'' The term ''navigable waters of the United States'' is defined at 33 CFR part 329 and refers to the Corps Section 10 jurisdiction. None of these definitions were changed by the proposed NWPs or these final NWPs.

Procedural Comments

Many commenters stated that the Corps was required to hold public hearings on the draft NWPs proposed in the July 21, 1999, **Federal Register** notice. Some of these commenters said that the draft NWPs, especially the three proposed new NWP general conditions, represent a substantial change from the proposed NWPs published in the July 1, 1998, **Federal Register** notice and that these changes warrant an additional public hearing. Numerous commenters stated that the 75-day comment period was inadequate to thoroughly review and comment on the July 21, 1999, **Federal Register** notice. Some of these commenters said that the comment period should be extended because many districts did not post their draft regional conditions on their Internet home pages quickly enough.

We believe that we have fully complied with the public hearing requirements of the Clean Water Act. After the publication of the July 1, 1998, **Federal Register** notice, public hearings on the proposed new and modified NWPs were held across the country, including a public hearing in Washington, DC on August 19, 1998. The proposal published in the July 21, 1999, **Federal Register** was a modification of the original July 1, 1998, proposal to replace NWP 26 with activity-specific NWPs.

The 75-day comment period for the July 21, 1999, **Federal Register** notice provided adequate time for the public to review and comment on the draft NWPs. Within one week of the publication of the July 21, 1999, **Federal Register** notice, 31 out of 38 districts had posted their draft regional conditions on their Internet home pages, which allowed the public sufficient time to consider how the regional conditioning process affected the proposed new and modified NWPs. All Corps districts had posted their draft regional conditions on their Internet home pages by September 3, 1999.

A large number of commenters said that the Corps has completely ignored the economic and workload implications of the new and modified NWPs and general conditions proposed in the July 21, 1999, **Federal Register** notice. These commenters indicated that the economic impacts of this proposal would be substantial. Many commenters stated that the new and modified NWPs should not be issued or implemented until an economic and workload analysis study is completed.

As required by the Energy and Water Development Appropriations Act, 2000, we have prepared, through the Institute for Water Resources (IWR), a study of the workload and compliance costs that would be incurred by the July 21, 1999, proposal. The study report will be available on the Internet at the Corps headquarters regulatory home page. This study demonstrated that the proposal published in the July 21, 1999, **Federal Register** would result in substantial increases in workload and costs to the Corps and the regulated public. The proposed new and modified NWPs, including the three proposed general conditions, would result in a 50% increase in the number of standard permit applications received by the Corps each year. The proposed new and modified NWP package would increase the Corps costs for processing permit applications at the current levels of service by $11.5 million annually, nearly a 15% increase over FY 1998 program funding. In addition, the July 21, 1999, proposal would also increase the direct compliance costs incurred by the regulated public by $46 million annually. In contrast, the modifications to the new and modified NWPs issued today (*i.e.,* the ½ acre limit and the revised floodplain condition) would result in impacts very similar to the IWR estimate for a ½ acre approach to the NWPs. That IWR estimate was 40% fewer standard permit applications than the July 21, 1999, proposal and 30% less in direct compliance costs. It is also important to note that the modified NWPs being issued today will protect the aquatic environment substantially better than the July 21, 1999, proposal would. These final NWPs are also less complex than the proposed NWPs, which will assist the regulated public.

Many commenters stated that the proposed new and modified NWPs, including the proposed general conditions, violate the Administrative Procedures Act (APA). These commenters said that the Corps has failed to provide an adequate administrative record and failed to demonstrate that the proposed acreage limits and other restrictions are necessary to provide protection for the aquatic environment. Some of these commenters stated that the Corps must provide an environmental basis for the acreage limits of the new and modified NWPs. Several commenters said that the proposal to issue new and modified NWPs to replace NWP 26 falls under the jurisdiction of the APA, because these NWPs are an agency statement of general applicability to implement, interpret, or prescribe a law or policy. A number of commenters stated that the proposed NWPs violate the APA because the schedule published in the

July 21, 1999, **Federal Register** notice implies that the decision to issue these NWPs and new general conditions was predetermined and the schedule did not include adequate time for the Corps to carefully consider comments received in response to that notice.

The new and modified NWPs issued today comply with Section 404(e), which requires notice and opportunity for public hearing. The Corps notice and comment process is virtually the same as the APA process. We have prepared an adequate administrative record to justify the issuance of these NWPs. In addition, we have fully considered all comments received in response to the July 21, 1999, **Federal Register** notice to determine the terms and conditions for the new and modified NWPs. This included three extensions of the final NWP issuance in order to fully and fairly consider all comments.

The acreage limit for an NWP is established so that the NWP authorizes most activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively. However, since NWPs are issued for national applicability, the terms and conditions of NWPs, including the acreage limits, must be restrictive enough to ensure that the NWPs authorize only those activities with minimal adverse effects on the aquatic environment, individually and cumulatively, across the country. The NWPs also contain notification requirements that provide district engineers with the opportunity to review certain activities to determine if those activities will result in minimal adverse effects on the aquatic environment. Aquatic resource functions and values vary considerably across the country. Therefore, the minimal adverse effects determination by Corps districts is based site-specific or regional criteria.

The acreage limits of the new and modified NWPs do not preclude any proposed activity from qualifying for a DA permit. If a proposed activity does not meet the terms and conditions of an NWP, then that activity could be authorized by other forms of DA permits. Regional general permits may be available to authorize certain activities that have minimal adverse effects on the aquatic environment based on local environmental conditions. The proposed work may also be authorized by individual permits, including letters of permission, if the activity involves more than minimal adverse effects on the aquatic environment.

We recognize that there are specific activities or classes of activities in areas of the country that will result in minimal adverse effects on the aquatic environment, but exceed the acreage limits of the new and modified NWPs. Corps districts can develop regional general permits in the future to authorize these activities.

Several commenters stated that the Corps is obligated to minimize regulatory burdens on small businesses, as required by Small Business Regulatory Enforcement Fairness Act of 1996. Two commenters said that the Corps is not in compliance with the Regulatory Flexibility Act because an ''initial regulatory flexibility analysis'' was not provided in the **Federal Register** notice. One commenter indicated that the Corps must comply with the Congressional Review Act. Another commenter said that the July 21, 1999, proposal to issue new and modified NWPs does not comply with Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' because the Corps has not identified the takings implications of the proposed NWPs.

The new and modified NWPs comply with the Small Business Regulatory Enforcement Fairness Act of 1996 because they provide an expedited authorization for activities in waters of the United States that have minimal adverse effects on the aquatic environment. We are not required to provide an initial regulatory flexibility analysis because we proposed to issue new and modified NWPs, not change our regulations. The Corps believes it is not required to submit the final new and modified NWPs to Congress pursuant to the Congressional Review Act, but as a matter of comity, we will submit the final NWPs to Congress. The new and modified NWPs will not result in the taking of private property because the NWPs provide an expedited authorization process for certain activities in waters of the United States that have minimal individual and cumulative adverse effects on the aquatic environment but require a Corps permit. If a proposed activity does not comply with the terms and conditions of an NWP, then the project proponent can request another form of DA permit, including regional general permits, letters of permission, or individual permits. Therefore, there are no takings implications for these NWPs.

General Terms and Limits of NWPs

One commenter stated that the acreage limits for the new and modified NWPs are too high. One commenter said that the NWPs should not have an acreage limit greater than 1 acre. Other commenters recommended maximum acreage limits of ⅓ acre and ¼ acre. Several commenters suggested higher acreage limits for NWP activities in ephemeral streams located in the western United States. Two commenters said that the NWPs should have lower acreage limits for activities in certain types of wetlands, such as forested wetlands, playas, prairie potholes, vernal pools, kettles, pocosins, and bogs. Two commenters opposed the use of indexed acreage limits.

We have fully considered comments concerning acreage limits for the new and modified NWPs. To simplify the new and modified NWPs and ensure that these NWPs still authorize only activities with minimal individual and cumulative adverse effects on the aquatic environment, all of the new NWPs, except for NWP 41, will have a ½ acre limit. We have not imposed a ½ acre limit on NWP 41 because it only authorizes activities that benefit the aquatic environment. The acreage limits for specific NWPs are discussed in detail in the preamble discussions for each NWP. Division engineers can regionally condition these NWPs to lower acreage limits if there are specific concerns for the aquatic environment in a particular part of the country. We do not agree that there should be higher acreage limits on the NWPs for discharges of dredged or fill material into ephemeral streams in the western states, due to the national scope of the NWPs. However, Corps districts may issue RGPs with larger acreage thresholds in any local situations where they determine that the activity would result in no more than minimal adverse effects, individually or cumulatively. Division engineers can also regionally condition these NWPs to restrict or prohibit their use in certain types of high value waters of the United States. We have eliminated the indexed acreage limits from NWPs 39 and 40 because the simple ½ acre limit is a more effective way to ensure that these NWPs authorize only activities with minimal adverse effects and the vast majority of activities authorized by NWP 26 are below or slightly above ½ acre.

Many commenters indicated that the PCN thresholds for the new and modified NWPs should be ⅓ acre, instead of ¼ acre. These commenters believe the difference between these two notification thresholds is too small to provide any value and that the lower PCN threshold will increase the Corps workload without providing any benefits. One commenter recommended providing more consistency in PCN thresholds for the NWPs. Several commenters stated that PCNs should be

required for all activities authorized by NWPs and one commenter remarked that PCNs should be required for all discharges into special aquatic sites. One commenter said that lower acreage limits for the NWPs should result in fewer PCN requirements, not a lowering of PCN thresholds.

To further ensure that the new NWPs authorize only activities with minimal adverse effects on the aquatic environment, we have established a 1/10 acre PCN threshold for the new NWPs (except for NWP 41) and retained the original PCN thresholds for impacts to open waters, including streams. The notification threshold for NWP 14 has also been lowered to 1/10 acre. The 1/10 acre PCN threshold will result in a workload increase for Corps districts, but we believe that this increase will be minor, since many permittees request written verification of NWP authorizations, even when notification is not required. We believe that the PCN thresholds in the new and modified NWPs are consistent. There are circumstances, such as NWP 39 activities that impact open waters, where we believe it is necessary to review all proposed activities. However, we do not agree that is necessary to require notification for all NWP activities because most minor activities authorized by NWPs result in minimal adverse effects. Division engineers can impose regional conditions on NWPs to lower PCN thresholds in those geographic areas where there is the potential for more than minimal adverse effects on the aquatic environment. We do not agree that lower acreage limits should result in fewer PCN requirements because the notification process is necessary to address activities that might result in more than minimal adverse effects.

Several commenters suggested adding PCN requirements for discharges into ephemeral streams, not just perennial and intermittent streams, because ephemeral streams are important in arid regions. One commenter recommended reducing the 500 linear foot PCN threshold for perennial and intermittent stream impacts to 200 linear feet. One commenter said that PCNs should be required for all discharges into open waters to allow district engineers to determine appropriate vegetated buffer requirements.

Except for those NWPs that require notification for all activities or all discharges of dredged or fill material into open waters, we believe that notification requirements for stream impacts should be limited to perennial and intermittent streams, since discharges of dredged or fill material into ephemeral streams are likely to result in minimal adverse effects. In geographic areas where discharges of dredged or fill material into ephemeral stream beds may result in more than minimal adverse effects on the aquatic environment, division engineers can regionally condition these NWPs to require notification for these activities. For some of the new NWPs, we have replaced the 500 linear foot PCN threshold for stream bed impacts with a 300 linear foot limit. Division engineers can impose regional conditions to require a PCN threshold to address activities that may result in more than minimal adverse effects. With the exception of NWP 39, we do not agree that it is necessary to require notification for all discharges of dredged or fill material into open waters to determine vegetated buffer requirements. Vegetated buffers are not required for all activities authorized by the NWPs. District engineers will determine on a case-by-case basis when it is appropriate to require vegetated buffers next to open waters.

Cumulative Impact Assessment and Data Collection

Many commenters objected to the Corps position stated in the July 21, 1999, **Federal Register** notice that the Corps can monitor only those cumulative adverse effects on the aquatic environment that result from activities permitted by the Corps regulatory program. Some of these commenters said that this position is contrary to the Clean Water Act and recommended that the Corps utilize the definition of cumulative impacts found in the regulations for the National Environment Policy Act (NEPA). Numerous commenters asserted that cumulative impact analysis should include both regulated and unregulated losses of aquatic habitat within a geographic area. One commenter said that cumulative impact analysis should include all activities that affect water quality. Two commenters objected to the Corps statement in the July 21, 1999, **Federal Register** notice that district engineers must have clear, extensive, and unequivocal evidence that activities regulated pursuant to section 404 of the Clean Water Act or section 10 of the Rivers and Harbors Act are causing more than minimal cumulative adverse effects on the aquatic environment, not unregulated activities, before revoking or suspending the use of NWPs. One commenter stated that cumulative impact assessment should consider temporary and permanent losses of waters of the United States in a different manner. This commenter also remarked that the cumulative impact assessment must also consider both losses of waters of the United States and compensatory mitigation to determine the net cumulative adverse effects on the aquatic environment.

The Corps position in the July 21, 1999, **Federal Register** notice concerning cumulative impact assessment is based on the statutory requirements of Section 404(e) of the Clean Water Act. There are no other references to cumulative adverse effects in Section 404 of the Clean Water Act. The requirement for authorized activities to cause no more than minimal adverse effects on the aquatic environment applies only to general permits (including NWPs), not the entire Corps regulatory program. This position is also supported by the regulations for implementing the Section 404(b)(1) guidelines at 40 CFR 230.7. These regulations state that activities authorized by general permits can result only in minimal adverse effects on water quality and the aquatic environment (see 40 CFR 230.7(a)(3)).

The Corps scope of analysis for the purposes of NEPA is discussed in 33 CFR part 325, appendix B. The Corps can only address the impacts of the specific activity that requires a Department of the Army permit and those portions of the activity over which the district engineer has sufficient control and responsibility to warrant Federal review.

The Corps does provide different consideration to temporary and permanent losses of waters of the United States when assessing the adverse effects of regulated activities on the aquatic environment. As discussed in the NWP definition of ''loss of waters of the United States,'' waters of the United States that are temporarily filled, flooded, excavated, or drained, but restored after construction, are not included in the measurement of loss of waters of the United States. Therefore, temporary losses would not be included in the Corps cumulative impact assessment since the affected areas would be restored as waters of the United States. When assessing cumulative adverse effects on the aquatic environment, the Corps also considers compensatory mitigation for losses authorized by NWPs, because compensatory mitigation is often required to offset losses of waters of the United States and ensure that the activities authorized by NWPs have minimal adverse effects. Corps districts assess cumulative impacts on a watershed basis. Attempting to assess cumulative impacts across the nation is not possible, or appropriate.

Two commenters supported the Corps assertion that cumulative impacts must be assessed on a watershed basis. One of these commenters said that watersheds should be defined by the 8-digit watershed cataloging units designated by the U.S. Geological Survey (USGS). Two commenters requested that the Corps develop a method to quantify potential cumulative and indirect impacts that will result from activities authorized by NWPs in a watershed. Two commenters said that district engineers must demonstrate that the use of NWPs in a watershed or geographic area will not result in more than minimal adverse effects on the aquatic environment.

As discussed in the July 1, 1998, **Federal Register** notice, the Corps utilizes the 8-digit hydrological unit codes developed by USGS to identify watersheds for its data collection process. However, district engineers can utilize subwatersheds within these hydrological units when conducting cumulative impact assessments. The Corps does not have the resources to develop a method to quantify potential cumulative and indirect impacts that may result from activities authorized by NWPs. If the division or district engineer determines that the use of NWPs to authorize activities within a particular watershed or geographic area will result in more than minimal individual or cumulative effects on the aquatic environment, then he or she can modify, suspend, or revoke those NWPs in that area (see 33 CFR 330.4). This is a determination that must be made by districts as they administer the Corps regulatory program in specific geographic areas.

Two commenters said that the Corps should analyze the cumulative impacts of the current NWPs and any NWPs that will be proposed in the future before issuing the new and modified NWPs. These commenters recommended that this analysis consider the efficiency of compensatory mitigation. Two commenters objected to the Corps assertion that it cannot make the individual and cumulative adverse effects determination nationally.

When the Corps issues or modifies an NWP, an environmental assessment, a finding of no significant impact (FONSI), and if necessary, an evaluation of compliance with the Section 404(b)(1) guidelines is prepared for each NWP. These items are contained in one document. This document includes an analysis of the cumulative impacts that are expected to occur during the time the NWP is in effect. This analysis also includes estimates of the amount of compensatory mitigation that will be required to offset losses of waters of the United States authorized by the NWP. We maintain our position that an assessment of cumulative adverse effects that result from the use of the NWPs cannot be made at the national level, and that the only technically sound method to conduct this assessment is on a watershed basis, through the district offices. Concurrent with the issuance of the new and modified NWPs and the final decision documents for each of the new and modified NWPs, division engineers will issue supplementary decision documents that address the impacts of the NWPs in Corps districts.

Several commenters said that Corps record-keeping methods are inadequate and that the Corps should issue quarterly public reports on wetland losses and the status of compensatory mitigation. A number of commenters recommended that the Corps establish a data collection system that tracks various types of compensatory mitigation (i.e., creation, restoration, enhancement, preservation) and monitors compliance with the goal of no net loss. Numerous commenters indicated that the Corps needs to commit to stronger monitoring and enforcement efforts.

We do not have the resources to publish quarterly reports on impacts to waters of the United States and compensatory mitigation at this time. The data collection systems for most Corps districts do not currently differentiate between the amounts of compensatory mitigation provided through restoration, enhancement, creation, or preservation. Instead, most districts track the total amount of compensatory mitigation required for Corps permits. The effectiveness of compensatory mitigation efforts is monitored by district engineers on a case-by-case basis to the extent allowed by workload and personnel resources. Therefore, we cannot collect this type of information for all activities. We are committed to strong enforcement and monitoring efforts, but enforcement and compliance efforts are limited to available district resources. The Corps permit evaluation workload must take precedence over enforcement and monitoring.

Compliance with the National Environmental Policy Act

Several commenters stated that the proposed NWPs require an Environmental Impact Statement (EIS). Two commenters objected to the Corps statement in the July 21, 1999, **Federal Register** notice that the NWP program does not require an EIS because the NWPs can only authorize activities with minimal individual and cumulative adverse effects on the aquatic environment.

We maintain our position that the NWPs do not require an EIS, but we are in the process of preparing a Programmatic Environmental Impact Statement (PEIS) for the NWP program.

A number of commenters indicated that the Corps needs to reevaluate the Finding of No Significant Impact (FONSI) issued on June 23, 1998, since the draft NWPs are substantially different from the NWPs proposed in the July 1, 1998, **Federal Register** notice. These commenters said that the three proposed new general conditions warrant reevaluation of the FONSI.

We do not agree that the FONSI issued on June 23, 1998, requires revision. The FONSI issued on June 23, 1998, was a general statement of findings for the NWP program. That FONSI did not address a specific set of NWPs. The three proposed new general conditions are intended to provide additional protection to the aquatic environment and their implementation would not substantially change the scope of the FONSI issued on June 23, 1998, or its findings.

Two commenters said that the Corps should release or issue the Environmental Assessments (EAs) for the new and modified NWPs before those permits are issued so that the public can comment on those EAs. These commenters stated that the EAs should also include regional analyses in addition to the national analyses. One of these commenters indicated that the EAs should contain analyses of potential impacts on recreation, wildlife habitat, endangered species, cultural resources, land use, and habitat degradation, as well as address cumulative impacts that occur when an NWP is used with other NWPs. Another commenter requested that the EAs assess the expansion of geographic scope of the new NWPs, the amount of cumulative and individual impacts that may be authorized by these NWPs, the types of waters that may be adversely affected by the new and modified NWPs, and the functions of those waters. Other commenters objected to the preliminary EAs, stating that those EAs did not include an ecological rationale for the proposed acreage limits.

We do not agree that it was necessary to issue new preliminary EAs for the draft NWPs proposed in the July 21, 1999, **Federal Register** notice. We received few comments in response to the preliminary EAs that were issued with the July 1, 1998, **Federal Register**

notice. Those individuals that commented on the preliminary EAs requested that the Corps include an alternatives analysis in each EA. We have included an alternatives analysis in each EA for the new and modified NWPs. The EAs for the new and modified NWPs issued today discuss, in general terms, the acreage limits for these NWPs, the types of waters subject to the new and modified NWPs, and the functions of those waters. The EAs also include projected impacts to waters of the United States that will occur through the use of these NWPs. Since aquatic resource functions and values vary considerably across the country, we cannot include detailed ecological analyses to support the acreage limits for these NWPs. However, division engineers will be issuing supplemental EAs that will address issues at the district level.

The final EAs for the new and modified NWPs have been substantially modified from the preliminary EAs issued in conjunction with the July 1, 1998, **Federal Register** notice. The final EAs contain general discussions of potential individual and cumulative impacts to the 20 public interest review factors at 33 CFR 320.4 and the factors in Subparts C through F of the Section 404(b)(1) guidelines (40 CFR Part 230).

In response to the July 21, 1999, **Federal Register** notice, some commenters addressed the Programmatic Environmental Impact Statement (PEIS) of the NWP program that the Corps is preparing. One commenter supported the PEIS, but asserted that an EIS is required. Another commenter stated that the PEIS is unwarranted and unnecessary. Many commenters said that the Corps cannot finalize the NWPs before the PEIS is completed.

These issues concerning the PEIS were addressed in the July 21, 1999, **Federal Register** notice (see 64 FR 39265) and we have not changed our position.

Compliance with the Endangered Species Act

Two commenters stated that the proposed NWPs require Endangered Species Act (ESA) Section 7 consultation. Three commenters asserted that the proposed new and modified NWPs do not comply with ESA. One of these commenters said that the Corps does not adequately address the direct, secondary, and cumulative impacts on endangered and threatened species that will result from activities authorized by the NWPs. This commenter also stated that the Corps cannot rely on prospective permittees to conduct adequate investigations to determine whether endangered or threatened species or designated critical habitat occur on the project site. Three commenters indicated that compliance with ESA cannot be ensured for activities that do not require notification to the district engineer.

We have requested programmatic ESA consultation for the NWP program. We contend that the new and modified NWPs, through the requirements of General Condition 11, comply with ESA. We use the ESA interagency consultation regulations at 50 CFR Part 402 when determining compliance with ESA. Scope of analysis issues for ESA will be resolved through consultation with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). General Condition 11 requires non-Federal permittees to notify the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project. The permittee 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.

Three commenters asserted that the Corps cannot issue the new and modified NWPs prior to completing programmatic ESA consultation. One commenter stated that programmatic ESA consultation does not obviate the need for regional and site-specific consultation. One commenter said that since Standard Local Operating Procedures for Endangered Species (SLOPES) have not yet been completed, the Corps cannot rely on SLOPES to ensure compliance with ESA. One commenter suggested that SLOPES should be developed for all issued NWPs.

We can issue the NWPs prior to the completion of the NWP programmatic ESA consultation, because issuance of the NWPs has not foreclosed opportunities to address endangered species and the NWPs already contain safeguards to ensure compliance with ESA. The programmatic consultation will provide additional assurance that the existing NWPs, as well as the new and modified NWPs issued today, have a formal process to develop any necessary additional procedures at the district level. The programmatic consultation will provide further assurance that the NWP program does not jeopardize the existence of any Federally-listed threatened or endangered species, or destroy or adversely modify the critical habitat of such species. Both the programmatic ESA consultation and the PEIS will address potential cumulative effects on endangered and threatened species and their designated critical habitat regarding the NWP program. We maintain that the SLOPES help ensure compliance with the ESA at the district level. Districts can meet with local offices of the FWS and NMFS at any time to modify or improve their SLOPES. Districts will enter case-specific consultation in any case where the district determines the proposed project may affect a threatened or endangered species.

In addition to NWP General Condition 11, division and district engineers have imposed and can impose additional regional conditions on the NWPs and case-specific special conditions to address endangered or threatened species or their critical habitat. For example, Corps regional conditions can prohibit the use of NWPs in designated critical habitat for endangered or threatened species or require notification for activities in areas known to be inhabited by threatened or endangered species. Some Corps districts have conducted programmatic consultation for specific geographic areas. Also, Corps districts have and will conduct case-specific Section 7 consultation for endangered species. These efforts usually consider the NWP program in that particular area. In summary, General Condition 11, Corps regional conditions, case-specific special conditions, and SLOPES will ensure that the NWP program complies with ESA.

Stream Impacts

Many commenters objected to the proposed NWPs, stating that thousands of feet of stream bed could be channelized or filled under these NWPs. These commenters said that linear foot limits for stream bed impacts should be imposed on the NWPs instead of acreage limits. A large number of commenters recommended adding a 250 linear foot limit for stream bed impacts to the new and modified NWPs. Other commenters suggested linear stream bed impact limits of 200, 100, and 50 linear feet. A few commenters said that the NWPs should not authorize any stream impacts. Another commenter requested clarification regarding the PCN thresholds for linear feet of stream bed impacts, asking if the flooded area is included with the filled area.

After consideration of these comments, we have decided to impose on NWPs 39, 40, 42, and 43, a 300 linear foot limit for filling or excavation activities in stream beds. This 300 linear foot limit applies only to stream beds that normally have flowing water.

Division engineers can regionally condition the NWPs to lower the 300 linear foot limit for stream bed impacts, impose linear foot limits for stream bed impacts on other NWPs, or establish lower PCN thresholds for filling or excavating stream beds.

Several commenters stated that all Corps districts must use the same method to determine where the average annual flow of a stream is 1 cfs. One of these commenters recommended using drainage area as a substitute. Another commenter suggested that the guidance in the preamble to the final rule for the NWP regulations (33 CFR part 330) published in the November 22, 1991, **Federal Register** (56 FR 59112) should be used to establish where the 1 cfs point of a stream is located. That guidance described how to determine the geographic location of the limit of headwaters for perennial, intermittent, and ephemeral streams.

District engineers will utilize the best methods available to identify where the average annual flow of a stream is 1 cfs. Although the guidance published in the November 22, 1991, **Federal Register** was intended to assist district engineers and the regulated public in identifying the geographic location of headwaters (i.e., where the average annual flow is less than 5 cfs), this guidance can also be used to locate the 1 cfs point on a stream. District engineers can utilize the median flow, rather than the average flow, to establish where the 1 cfs point on a stream is located. This approach recognizes that streams with highly irregular flows, such as those occurring in the western portion of the United States, could be dry at the 1 cfs point for most of the year and still average, on an annual basis, a flow of 1 cfs because of high volume, flash flood type flows which greatly distort the average. Furthermore, we recognize that using the median flow for an entire year in streams that have no stream flow for over half the year but with flows greater than 1 cfs for several months would also distort the average. It should also be noted that precision is not required in establishing the 1 cfs point. The definition allows the district engineer to use approximate means to compute it. The drainage area that will contribute an average annual flow of 1 cfs can be estimated by approximating the proportion of average annual precipitation that is expected to find its way into the stream. Knowing the amount of area that will produce this flow in a particular region, the 1 cfs point can be approximated from drainage area maps. For example, in most areas of the eastern United States (i.e., east of the Mississippi River), one square mile of drainage area produces 1 cfs of stream flow annually.

Applicable Waters for the New and Modified Nationwide Permits

A number of commenters objected to the increased scope of waters in which the proposed NWPs published in the July 21, 1999, **Federal Register** could be used. One commenter stated that the NWPs should be used only in headwaters and isolated waters. Two commenters supported the use of the new and modified NWPs in non-tidal waters. Three commenters objected to prohibiting the use of the new and modified NWPs in tidal waters and non-tidal wetlands adjacent to tidal waters. One commenter stated that the Corps has not provided justification for excluding the new and modified NWPs from non-tidal wetlands that are adjacent to tidal waters and recommended that the Corps utilize the term ''contiguous'' instead of ''adjacent.''

We contend that limiting the new NWPs to non-tidal waters, except for non-tidal wetlands adjacent to tidal waters, provides adequate protection of the aquatic environment and helps ensure that these NWPs authorize only activities with minimal adverse effects. Regional conditioning of the new and modified NWPs by division engineers will provide additional protection by restricting or prohibiting the use of the new and modified NWPs in high value waters. General Condition 25 will also protect high value waters. General Condition 26 does not allow permanent, above-grade fills in the 100-year floodplain downstream of the headwaters.

We do not agree that the new and modified NWPs should be used in tidal waters or non-tidal wetlands adjacent to tidal waters. We have identified tidal waters as high value waters on a national basis. Non-tidal wetlands adjacent to tidal waters contribute to the ecological integrity of tidal waters and should not be subject to the new and modified NWPs. District engineers can develop regional general permits for discharges into non-tidal waters adjacent to tidal waters, if such regional general permits are needed for activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively.

One commenter requested that the Corps define the term ''adjacent'' for the purposes of the new and modified NWPs. One commenter stated that the definition of the term ''adjacent'' at 33 CFR 328.3(c) is confusing for use in the NWP program and that the Corps needs to provide a definition that is easily understandable by the regulated public. This commenter also said that the NWPs should be limited to only those non-tidal wetlands that are both adjacent to and inundated by spring tides; wetlands landward of the mean high tide line would be considered as non-tidal wetlands adjacent to tidal waters and wetlands landward of the spring high tide line would not be considered adjacent to tidal waters. Two commenters asked the Corps to provide a clear explanation of the upstream limit of non-tidal wetlands adjacent to tidal waters and whether non-tidal wetlands miles upstream of tidal waters would be considered adjacent to those tidal waters.

For the new and modified NWPs, the definition of the term ''adjacent'' at 33 CFR 328.3(c) will be used. Since aquatic systems vary considerably across the country, we cannot establish more specific criteria at a national level to further define adjacency. District engineers will make appropriate determinations of adjacency, based on regional hydrologic conditions.

Wetlands located between mean high water and the spring high tide line are tidal wetlands because they are inundated by tidal waters (see 33 CFR 328.4(b)(1)). Non-tidal wetlands that are bordering, contiguous, or neighboring to tidal waters are considered adjacent to those tidal waters. The upstream limit of non-tidal wetlands adjacent to tidal waters is determined by the degree of influence of the tidal waterbody on non-tidal wetlands. Those non-tidal wetlands that exert direct hydrologic influence on tidal waters are considered adjacent to those tidal waters. For the purposes of the NWPs, non-tidal streams located upstream of the head of tide are not considered adjacent to tidal waters, although those streams eventually flow into tidal waters and are part of the surface tributary system. Wetlands adjacent to non-tidal streams are within the scope of waters for the new and modified NWPs.

One commenter stated that the new and modified NWPs should not authorize discharges into prairie potholes, playa lakes, or vernal pools. Another commenter said that the NWPs should not be used in rare and irreplaceable wetlands.

We do not agree that the new and modified NWPs should be subject to a national prohibition against discharges of dredged or fill material into prairie potholes, playa lakes, or vernal pools. Rare and irreplaceable wetlands have not been formally defined. General Condition 25 restricts activities in designated critical resource waters. Further, division engineers can

regionally condition these NWPs to restrict or prohibit discharges into high value waters. For those activities that require notification, district engineers can exercise discretionary authority if the proposed work will result in more than minimal adverse effects on the aquatic environment.

Mitigation

A large number of commenters specifically addressed the compensatory mitigation requirements of the proposed new and modified NWPs. One commenter said that the goal of compensatory mitigation is not clearly defined in the proposed NWPs. Several commenters requested that the Corps clarify when compensatory mitigation is required for activities authorized by NWP. These commenters said that there are some inconsistencies concerning compensatory mitigation requirements in the July 21, 1999, **Federal Register** notice. Two of these commenters referred to Corps statements in the July 21, 1999, **Federal Register** notice that: (1) Compensatory mitigation will normally be required for activities that require notification and, (2) in some circumstances, compensatory mitigation may be unnecessary because the adverse effects on the aquatic environment are minimal without mitigation.

For the NWP program, including the new and modified NWPs, the purpose of compensatory mitigation is to ensure that the authorized work results in minimal adverse effects on the aquatic environment. For those activities that require notification to the district engineer, compensatory mitigation may be necessary to ensure that the authorized work results in minimal adverse effects on the aquatic environment. District engineers will determine, on a case-by-case basis, when compensatory mitigation is not practicable. Our use of the word ''normally'' when referring to compensatory mitigation for NWP activities allows district engineers flexibility in determining when compensatory mitigation will be required and lets the regulated public know that compensatory mitigation is likely to be required for impacts that exceed PCN thresholds, except under circumstances where the adverse effects are minimal without compensatory mitigation. Activities that do not require notification are presumed to result in minimal adverse effects and do not require compensatory mitigation to ensure minimal adverse effects. Division engineers can regionally condition an NWP to lower the notification threshold to allow district engineers to determine, on case-by-case basis, if compensatory mitigation is necessary to ensure that the authorized work results in minimal adverse effects on the aquatic environment.

Many commenters opposed the use of compensatory mitigation to ensure that activities authorized by NWPs result in minimal adverse effects on the aquatic environment. Several commenters supported the use of compensatory mitigation to ensure that authorized activities result in minimal adverse effects. One of these commenters said that compensatory mitigation should not be required simply to meet a ''no net loss'' of wetland acreage goal. One commenter indicated that compensatory mitigation should not be required for activities authorized by NWP because NWPs can only authorize activities with minimal adverse effects.

Compensatory mitigation is often necessary to offset losses of waters of the United States and ensure that the authorized activity results in minimal adverse effects on the aquatic environment. The NWP regulations at 33 CFR 330.1(e)(3) allow permittees to provide compensatory mitigation to reduce the adverse effects of the proposed work to the minimal level. In the July 21, 1999, **Federal Register** notice, we stated that for the purposes of the NWP program, compensatory mitigation is required to ensure that the authorized activities result in minimal adverse effects on the aquatic environment, individually or cumulatively, not to achieve ''no net loss'' of wetland acreage. NWP compensatory mitigation requirements are not driven by the ''no net loss'' goal, but will help support that goal. A district engineer can determine, for an activity that requires notification, that compensatory mitigation is not practicable.

Two commenters said that compensatory mitigation should be required only for impacts to waters of the United States. Another commenter stated that the Corps is proposing to require mitigation for activities not subject to its regulatory authority, such as flooding, excavation, and drainage activities. One commenter indicated that the July 21, 1999, **Federal Register** notice requires compensatory mitigation for non-wetland impacts. One commenter remarked that compensatory mitigation for wetland or stream losses should be subject to a public notice process because mitigation is being used to avoid significant impacts.

Compensatory mitigation may be required by district engineers to offset losses of waters of the United States to ensure that the authorized work results in minimal adverse effects on the aquatic environment. Although district engineers may require out-of-kind compensatory mitigation, such as the restoration of upland riparian zones, to compensate for losses of the functions and values of waters of the United States, compensatory mitigation is required only to offset losses of waters of the United States. District engineers can require compensatory mitigation for losses of aquatic resource functions and values caused by flooding, excavation, and drainage caused by activities that are associated with activities that are regulated by the Corps (i.e., discharges of dredged or fill material). However, if the activity does not involve work in navigable waters of the United States or a discharge of dredged or fill material into waters of the United States, compensatory mitigation cannot be required because no Corps permit is necessary to conduct the activity. We do not agree that a public notice process is required for compensatory mitigation projects.

Several commenters stated that the mitigation requirements discussed in the July 21, 1999, **Federal Register** notice do not adequately protect wetlands. Numerous commenters said that the NWPs should be conditioned to require a full alternatives analysis. Many commenters requested that the Corps condition all NWPs to require project proponents to avoid impacts to the maximum extent practicable and implement compensatory mitigation that fully replaces all losses of wetland acreage and functions. One commenter objected to including minimization as a form of mitigation. Two commenters asserted that the NWPs should be subject to the mitigation requirements of the 1990 mitigation Memorandum of Agreement (MOA), including sequencing requirements.

The mitigation requirements of the new and modified NWPs adequately protect wetlands. General Condition 19 requires permittees to avoid and minimize discharges into waters of the United States on-site to the maximum extent practicable. General Condition 19 also states that district engineers can require compensatory mitigation to ensure that the authorized work results in minimal adverse effects on the aquatic environment. The use of minimization as mitigation is well established in Federal regulations (see the Council on Environmental Quality's regulations at 40 CFR 1508.20). The avoidance provisions of the 1990 mitigation MOA apply only to standard individual permits, not activities authorized by NWPs.

One commenter stated that some of the new NWPs (e.g., NWPs 39 and 43)

require compensatory mitigation without requiring submission of a notification to the district engineer. This commenter said that compensatory mitigation should not be required unless the district engineer reviews the PCN and determines that compensatory mitigation is necessary to offset authorized losses of waters of the United States. One commenter objected to requiring compensatory mitigation for activities that require notification, but another commenter supported this requirement. Two commenters objected to allowing district engineers to make the final determination whether compensatory mitigation is required.

Compensatory mitigation is not required for NWP activities that do not require notification to the district engineer. Division engineers can regionally condition NWPs to lower PCN thresholds or require notification for all activities, if such PCN thresholds are necessary to allow district engineers to require compensatory mitigation to ensure that adverse effects to the aquatic environment are minimal. We believe that it is appropriate for district engineers to make the final decisions whether compensatory mitigation is necessary to ensure that activities authorized by NWPs result in minimal adverse effects.

A large number of commenters recommended that the Corps require acre-for-acre wetland restoration as compensatory mitigation for all activities resulting in the loss of greater than ¼ acre of wetlands. Other commenters suggested ½, ⅓, and 1 acre thresholds for requiring compensatory mitigation. Many commenters said that a minimum 1:1 mitigation ratio should be required for all losses of waters of the United States authorized by NWPs. Other commenters recommended higher mitigation ratios. One commenter said that the Corps should provide compensatory mitigation guidelines that addresses site selection and design, options for compensatory mitigation, and a description of success criteria and monitoring requirements.

While final specific compensatory mitigation requirements, such as replacement ratios, are determined by district engineers on a case-by-case basis, we agree that there should be a minimum requirement of an acre-for-acre (1:1) wetland replacement as compensatory mitigation for all activities requiring notification. The Corps can require compensatory mitigation in excess of a 1:1 ratio of impact acreage to compensatory mitigation acreage to adequately replace aquatic resource functions and values that are lost as a result of activities authorized by NWPs. The Corps can also accept out-of-kind compensatory mitigation, if it is best for the aquatic environment. Existing policy and guidance for compensatory mitigation provides a preference for on-site and in-kind replacement of the functions and values of the impacted aquatic resource. If on-site compensatory mitigation is not practicable, off-site compensatory mitigation should be undertaken in the same geographic area if practicable, (*i.e.,* in close proximity and, to the extent possible, the same watershed) or environmentally preferable. The Corps can also accept out-of-kind compensatory mitigation, if it is best for the aquatic environment.

Many commenters stated that the Corps should require in-kind, on-site replacement of wetlands. Several commenters supported the utilization of off-site, out-of-kind compensatory mitigation for losses of waters of the United States authorized by NWPs. These commenters also supported the Corps position that the appropriate compensatory mitigation required for activities authorized by NWPs should be based on what is best for the aquatic environment. One commenter remarked that the selected mitigation method should best replace site-specific functions and values of the impacted aquatic habitat. One commenter supported the use of out-of-kind compensatory mitigation, such as the establishment and maintenance of vegetated buffers next to streams, and stream restoration, and the preservation of wetland/upland complexes.

When reviewing compensatory mitigation proposals, district engineers will consider what is best for the aquatic environment, including requirements for vegetated buffers next to perennial and intermittent streams and other open waters. Wetland restoration, enhancement, creation, and, only in exceptional circumstances, preservation are not the only methods of providing compensatory mitigation for activities authorized by NWPs. Stream restoration and enhancement, including the restoration or preservation of riparian zones, can also provide compensatory mitigation for losses resulting from activities authorized by NWPs. The establishment and maintenance of vegetated buffers next to streams and other open waters as compensatory mitigation for losses of waters of the United States authorized by NWPs are discussed in the next section of this notice.

Many commenters opposed the Corps preference for the use of mitigation banks and in lieu fee programs to provide compensatory mitigation for losses of waters of the United States authorized by NWPs. A number of other commenters supported the Corps preference for consolidated compensatory mitigation methods. One commenter indicated that the preference for consolidated compensatory mitigation methods should not be limited to mitigation banks. One commenter expressed some support for using mitigation banks and other consolidated mitigation methods as alternatives for on-site compensatory mitigation because of the uncertainty for success in some individual compensatory mitigation projects. This commenter also recommended developing guidance for in lieu fee programs and other consolidated mitigation methods before allowing widespread use of these methods. Another commenter recommended that the text of the NWPs and the preamble to the notice announcing the issuance of the NWPs refer to the Federal guidance for compensatory mitigation, especially for the use of mitigation banks and in lieu fee programs. Two commenters indicated that in lieu fee programs should not be considered as compensatory mitigation until guidance has been developed for these programs. One commenter objected to the use of in lieu fee programs to provide compensatory mitigation because the commenter asserts that these programs are not subject to agency and public review and do not ensure compliance with the goal of no net loss.

Consolidated compensatory mitigation methods, including mitigation banks, are often an efficient means of compensating for losses of waters of the United States, particularly for multiple small activities. We recognize that consolidated compensatory mitigation methods are often more practicable and successful because of the planning and implementation efforts typically expended on these activities by their proponents. Individual efforts to create, restore, or enhance wetlands to replace small wetland losses may be unsuccessful because of poor planning and/or construction. Furthermore, consolidated mitigation efforts are often better monitored and maintained and often result in the establishment of larger contiguous wetland areas that benefit the overall local aquatic environment and many of the species that utilize larger aquatic habitats.

One commenter stated that where mitigation banks and in lieu fee programs are in the same watershed, preference should be given to using the mitigation bank since mitigation banks subject to more stringent requirements

and more likely to be successful. Two commenters said that mitigation banks should be located in the same watershed as the site of the NWP activity. One commenter said that in lieu fee programs should not be used as compensatory mitigation for activities that result in the loss of greater than 1/10 acre of waters of the United States.

Where practicable, mitigation banks and other consolidated mitigation methods should be located in the same watershed as the site of the activity authorized by NWP. District engineers have the authority to approve or disapprove the use of specific mitigation approaches as compensatory mitigation for losses of waters of the United States authorized by NWPs. Permittees should have the flexibility to utilize compensatory mitigation methods that are within their means to accomplish and meet the requirements to offset unavoidable losses of waters of the United States. To the extent practicable, permittees should consider use of approved mitigation banks and other forms of consolidated compensatory mitigation. We do not agree that there should be an acreage limit that would preclude the use of any particular type of mitigation to provide compensatory mitigation for losses of waters of the United States authorized by NWPs.

Several commenters stated that the preservation of high value wetlands should be encouraged as a form of compensatory mitigation. A number of commenters objected to the use of preservation as compensatory mitigation, unless one-to-one replacement of aquatic habitats has been achieved. One commenter objected to the use of enhancement unless one-to-one replacement of wetlands has been accomplished.

We concur that the preservation of high value wetlands is one appropriate method of compensatory mitigation for losses of waters of the United States, but only in exceptional circumstances. Preservation of aquatic habitats should be done in conjunction with aquatic habitat restoration, creation, or enhancement to offset losses of waters of the United States. The amount of preservation or enhancement that will be accepted as compensatory mitigation for impacts authorized by NWPs will be determined by district engineers on a case-by-case basis.

To further clarify the issue of mitigation, we have removed some of the mitigation information from General Condition 13 and consolidated the mitigation requirements for the NWPs in General Condition 19.

Vegetated Buffers

In the July 21, 1999, **Federal Register** notice, we proposed to require the establishment and maintenance of vegetated buffers adjacent to waters of the United States as an alternative form of compensatory mitigation to ensure that activities authorized by NWPs result in minimal adverse effects on the aquatic environment. The vegetated buffer requirement was in the draft NWP 39 and the proposed modifications to General Conditions 13 and 19.

As a result of our review of the comments received in response to the July 21, 1999, **Federal Register** notice, we have made several changes to the vegetated buffer requirements for the NWPs. For example, vegetated buffers are required only if there are perennial or intermittent streams or other open waters on the project site. Vegetated buffers will be established and maintained on the uplands or wetlands next to the open waters. For the purposes of the NWPs, vegetated buffers are not required next to ephemeral streams or wetlands. The use of vegetated buffers as mitigation for NWP activities is discussed in General Condition 19. The changes to the vegetated buffer requirements are discussed in more detail below.

Many commenters supported the vegetated buffer requirements for the new and modified NWPs. A number of commenters stated that vegetated buffers should not be a condition of an NWP authorization. These commenters said that vegetated buffers should be considered only when a landowner voluntarily agrees to establish and maintain vegetated buffers adjacent to waters of the United States as an alternative form of compensatory mitigation. Several commenters contend that compensatory mitigation sites should be protected by vegetated buffers. Another commenter stated that the use of upland buffers should be consistent with current Federal guidance, particularly the ''Federal Guidance for the Establishment, Use and Operation of Mitigation Banks'' (60 FR 58605). A commenter stated that the vegetated buffer requirement should not apply to all activities that require a Corps permit, such as piers.

Vegetated buffers will be required only when there are open waters, such as perennial or intermittent streams, on the project site, and the NWP activity involves discharges of dredged or fill material into waters of the United States. However, a required vegetated buffer could be established off-site for impacts on the project site. Project proponents will not be required to establish and maintain vegetated buffers next to ephemeral streams. Vegetated buffers are not normally required for activities that require only Section 10 permits, but district engineers can require vegetated buffers as compensatory mitigation for activities authorized by Section 10 permits, if such compensatory mitigation is appropriate. District engineers will determine, on a case-by-case basis, whether or not vegetated buffers are required. Vegetated buffers are required only when it is practicable for the permittee to establish these areas and the vegetated buffer will be self-maintaining, other than restrictions on cutting or removal of the buffer. If the permittee does not own the land next to the open waters, then vegetated buffers are not required unless the permittee can reasonably obtain the appropriate conservation easements for those buffers.

Compensatory mitigation sites can be protected by vegetated buffers, but we do not agree that this should be a requirement of the NWP program. However, providing a buffer to the restored waters of the United States in a mitigation bank is precisely why a good mitigation bank will have a matrix of waters and uplands for maximum ecological functions and values. The ''Federal Guidance for the Establishment, Use and Operation of Mitigation Banks'' does not contain any useful guidance concerning the establishment and maintenance of vegetated buffers next to open waters. During the revision of the vegetated buffer requirements for the NWPs, we considered the riparian forest buffer Conservation Practice Standard (Code 391A) issued by NRCS in July 1997. We also considered the information in the document entitled ''Riparian Forest Buffers: Function and Design for Protection and Enhancement of Water Resources'' published by the Forest Service.

A large number of commenters opposed the vegetated buffer requirement. Those in opposition to this requirement were divided into two groups. One group objected to vegetated buffers as compensatory mitigation for discharges of dredged or fill material into wetlands because they believe that wetland losses should be compensated only through wetland restoration, creation, or enhancement. The other group of commenters stated that the Corps does not have the regulatory or statutory authority to require vegetated buffers adjacent to waters of the United States.

Those commenters that oppose the use of vegetated buffers as

compensatory mitigation for losses of wetlands indicated that vegetated buffers adjacent to waters of the United States do not replace the lost functions that would be provided by wetland restoration or creation. Many of these commenters said that vegetated buffers next to open waters and streams do not provide flood storage capacity, wildlife habitat, water quality, or groundwater recharge functions. Numerous commenters stated that using vegetated buffers as compensatory mitigation will not help the Administration achieve its goal of a net gain of 100,000 acres of wetlands per year. Other commenters indicated that vegetated buffers as compensatory mitigation is contrary to the ''no net loss'' goal. One commenter said that the use of vegetated buffers is contrary to the 1990 mitigation MOA.

Vegetated buffers next to streams and other open waters on the project site are an important type of compensatory mitigation that provides substantial aquatic habitat, water quality, and flood storage benefits. The establishment and maintenance of vegetated buffers may be a preferable form of compensatory mitigation because it may be infeasible to create or restore wetlands on the project site after the activity is built. Vegetated buffers, even if they are established on uplands next to streams and other open waters, would provide on-site aquatic habitat, water quality, and flood storage functions.

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

Although we are requiring the establishment and maintenance of vegetated buffers in uplands next to open waters as compensatory mitigation for certain activities, we expect to continue our documented programmatic no net loss of wetlands approach to the regulatory program. For most activities authorized by NWPs, vegetated buffers will only be a portion of the required compensatory mitigation. Moreover, where the project involves filling wetlands, vegetated buffers will only be required after a 1:1 ratio based on acreage of wetland mitigation has been required. Only ⅓ of the additional mitigation required for the project may be non-wetland vegetated buffers. The vegetated buffer requirement for the NWPs is not contrary to the 1990 mitigation MOA, because vegetated buffers next to open waters help achieve the goals of the Clean Water Act. It is also important to note that the 1990 mitigation MOA applies only to activities subject to the standard permit process.

One commenter requested clarification as to where vegetated buffers must be located. A few commenters disagree with the Corps position that vegetated buffers adjacent to waters of the United States provide benefits for the aquatic environment. One commenter requested that the Corps explain why vegetated buffers are necessary and specify the goals that will be accomplished by vegetated buffers. This commenter said that the goals of vegetated buffers will affect width requirements. This commenter also believes that not all areas adjacent to open waters provide significant benefits to water quality and that all vegetated buffers do not perform all 10 functions listed on page 39274 of the July 21, 1999, **Federal Register** notice, because the functions of vegetation buffers are dependent on the vegetation present and site and soil characteristics.

For the purposes of the NWPs, vegetated buffers are to be established and maintained on uplands or wetlands next to perennial and intermittent streams and other open waters. The functions and values of vegetated buffers next to open waters, especially forested riparian zones next to streams, are well documented in the scientific literature. The main goal of the vegetated buffer requirement is to restore, enhance, and protect open waters. In general, properly designed and implemented vegetated buffers, especially those inhabited by trees, will perform the functions listed above. Since we are not requiring vegetated buffers next to ephemeral streams, most vegetated buffers should have adequate amounts of water to naturally establish and support trees in the riparian zone. Vegetated buffers will normally be 25 to 50 feet wide on both sides of streams, but the district engineer can require wider vegetated buffers to address documented water quality concerns. A 25 to 50 foot wide vegetated buffer next to a stream provides important aquatic habitat functions and values, as well as substantial water quality benefits.

Many commenters believe that the vegetated buffer requirements for the new and modified NWPs exceed the Corps regulatory authority. Several commenters consider the vegetated buffer requirement as an attempt to expand the scope of the Corps jurisdiction to uplands. Numerous commenters indicated that the Corps is requiring vegetated buffers even if the work does not involve discharges of dredged or fill material into waters of the United States. Many commenters said that any vegetated buffer requirements should be imposed by the states, who have authority under Section 401 of the Clean Water Act to address water quality issues. Several commenters said that vegetated buffers could also be imposed by states through the requirements of the National Pollutant Discharge Elimination System program.

The Corps has the statutory authority to require vegetated buffers next to streams and other open waters because the goal of the Clean Water Act is to restore and maintain the chemical, physical and biological integrity of Nation's waters. This goal is stated in Section 101 of the Clean Water Act and is applicable to all sections of the Clean Water Act, including section 404. Vegetated buffers next to streams and other open waters help maintain the chemical, physical, and biological integrity of these waters. The establishment and maintenance of vegetated buffers next to streams is the

restoration of riparian zones. Discharges of dredged or fill material into waters of the United States, which the Corps regulates under section 404 of the Clean Water Act, result in the loss of aquatic resource functions and values. The establishment and maintenance of vegetated buffers next to streams and other open waters offsets losses of aquatic resource functions and values and reduces degradation of these aquatic resources.

The vegetated buffer requirement is not an attempt to expand the Corps regulatory jurisdiction. We are not asserting jurisdiction over uplands next to streams and other open waters. We cannot require compensatory mitigation for upland impacts, but we can require, as compensatory mitigation, upland vegetated buffers that restore or protect aquatic habitat and water quality. The establishment or maintenance of a vegetated buffer next to waters of the United States can be an important part of the compensatory mitigation required for a Corps permit. The establishment and maintenance of vegetated buffers next to open waters can be considered as compensatory mitigation that offsets losses of waters of the United States and ensures that the adverse effects of the authorized work on the aquatic environment are minimal. Vegetated buffers are not normally required for activities that do not involve discharges of dredged or fill material into waters of the United States. For example, vegetated buffers are not required for structures in navigable waters of the United States, unless the district engineer determines that such compensatory mitigation is necessary to offset impacts to those waters.

Vegetated buffers next to streams and other open waters do more than protect water quality. Eight of the 10 functions listed in the July 21, 1999, **Federal Register** notice relate to aquatic habitat. Only two functions listed in that notice exclusively addressed water quality functions. Likewise, most of the functions of vegetated buffers listed in this **Federal Register** notice are aquatic habitat functions. Commenters objecting to the vegetated buffer requirement focused only on the water quality functions of vegetated buffers, and ignored the aquatic habitat functions.

A number of commenters stated that the vegetated buffer requirement duplicates, and may conflict with, local land use planning. Two commenters said that the vegetated buffer requirement is contrary to 33 CFR 320.4(j)(2), which states that the primary responsibility for zoning lies with state, local and Tribal governments. Many commenters believe that the vegetated buffer requirement constitutes a taking of private property. Two commenters said that the vegetated buffer requirement has the potential to result in a taking of private property because the Corps has failed to demonstrate the causal link between the vegetated buffer requirement and specific water quality concerns caused by discharges of dredged or fill material into waters of the United States authorized by the NWPs. These commenters assert that the Corps must allow alternative methods to address water quality concerns.

The vegetated buffer requirement does not duplicate or conflict with local land use planning. Although some state and local governments have vegetated buffer requirements, there are many regions that do not have such requirements. The district engineer will consider state and local vegetated buffer requirements when determining the vegetated buffer requirements for NWP activities. If the state or local vegetated buffer requirements are adequate, then the district engineer can defer to those requirements. The vegetated buffer requirement is not contrary to 33 CFR 320.4(j)(2) because it does not override state or local zoning decisions. If it is impractical for the permittee to establish and maintain vegetated buffers next to open waters on the project site, then vegetated buffers are not required. If the project proponent does not want to establish and maintain vegetated buffers and the district engineer determines that such buffers are necessary to ensure the proposed work results in minimal adverse effects on the aquatic environment, then the project proponent can request an individual permit or other form of DA permit.

The vegetated buffer requirement does not constitute a taking of private property because it is compensatory mitigation to offset losses of aquatic resource functions and values. If the project proponent does not want to establish and maintain vegetated buffers next to open waters on the project site, then he or she can request another form of DA permit to authorize the activity. The removal of nutrients, sediments, and pollutants from surface and shallow subsurface waters by vegetated buffers next to open waters is well documented in the scientific literature. The establishment and maintenance of vegetated buffers is a type of out-of-kind compensatory mitigation to offset authorized losses of wetlands and other waters of the United States, which also remove these chemical compounds from waters. The vegetated buffer requirement is no different than requiring the alteration of uplands to create wetlands as compensatory mitigation for losses of wetlands. In fact, the establishment and maintenance of vegetated buffers next to streams and other open waters is likely to be more successful and less costly than attempting to create wetlands by grading and altering uplands. When reviewing compensatory mitigation proposals, district engineers can consider alternative forms of compensatory mitigation to address water quality concerns, if vegetated buffers are not practical for the project site.

Several commenters opposed the vegetated buffer requirement, stating that it substantially reduces the amount of developable area on a parcel of land. Two commenters said that the vegetated buffer requirement will be difficult to implement for those projects that have already received subdivision approval. These commenters also assert that this requirement will increase the cost of housing. Several commenters said that the establishment and maintenance of vegetated buffers is practical only in large, open spaces. One commenter stated that the vegetated buffer requirement will increase sprawl development because it requires buildings to be constructed farther apart from each other.

Although the vegetated buffer requirement may reduce the amount of developable land on a particular parcel, we do not agree that such a reduction will be substantial. In most situations, vegetated buffers will be located in 100-year floodplains, in which there are often state or local building restrictions. If it is impractical for the project proponent to establish and maintain vegetated buffers on the property because of prior subdivision approval, then the district engineer can determine that vegetated buffers are not required. We do not agree that the vegetated buffer requirement will increase the cost of housing more than any other type of compensatory mitigation requirement, such as the creation of wetlands. In most circumstances, establishing and maintaining vegetated buffers will be less costly than grading land to create wetlands. The vegetated buffer requirement will not encourage sprawl development.

One commenter believes that the Corps needs to provide a cost-benefit analysis for the vegetated buffer requirement. This commenter also stated that this requirement requires an environmental impact statement because it is a major Federal action.

The vegetated buffer requirement does not need a cost-benefit analysis or an environmental impact statement.

In the July 21, 1999, **Federal Register** notice, we stated that vegetated buffers

will normally be 50 to 125 feet wide, but provided district engineers with the flexibility to impose narrower or wider vegetated buffers. Many commenters stated that the widths of vegetated buffers required for NWP activities should be based on the width necessary to ensure that the adverse effects to the aquatic environment are minimal. These commenters said that permit conditions, including mitigation requirements, must be directly related to impacts of the proposed work and appropriate to scope and degree of those impacts. One of these commenters cited 33 CFR 325.4(a). Another commenter cited 33 CFR 320.4(r) and remarked that the Corps has not demonstrated that vegetated buffers provide compensatory mitigation for identifiable losses of resources. Numerous commenters said that the requirement for 50 to 125 foot wide vegetated buffers would, in some cases, result in compensatory mitigation requirements that would exceed the impacts of the activity. Two commenters disapprove of the vegetated buffer requirement, stating that it is not tailored to the effects of the authorized activity and could result in large vegetated buffers for projects that result in small losses of waters of the United States. Several commenters said that vegetated buffer requirements for particular projects must be in proportion of the impacts of the authorized work.

After considering these comments, we have reduced the recommended width of vegetated buffers to 25 to 50 feet wide on both sides of the stream or 25 to 50 feet from the OHWM or bank of the open waterbody. District engineers can require wider vegetated buffers if there are documented water quality concerns. The width of the vegetated buffer is measured in a direction perpendicular to the OHWM or bank of the open waterbody. The 25 to 50 foot wide vegetated buffer will provide aquatic habitat functions and values, as well as water quality benefits. When determining the appropriate width of vegetated buffers, district engineers will consider the degree of the adverse effects on the aquatic environment caused by the authorized work and require compensatory mitigation to the extent necessary to ensure that the adverse effects are minimal. The required compensatory mitigation, including vegetated buffers, will be in proportion, from an aquatic function and value perspective, to the authorized impacts to waters of the United States. If the authorized work results in minimal adverse effects on the aquatic environment without compensatory mitigation, then vegetated buffers are not required.

Two commenters said that the Corps should not specify a minimum width for vegetated buffers. One of these commenters contends that the benefits of vegetated buffers is likely to be different for dissimilar types of wetlands and waterbodies. One commenter requested clarification concerning the criteria that will be used to determine the width of vegetated buffers for specific project sites and which plant species should be used to establish the vegetated buffer. One commenter asked if a 50 to 125 foot wide vegetated buffer will be required in all cases. Two commenters recommended a minimum vegetated buffer width of 100 feet.

One commenter stated that many factors are cited in the current literature for determining the appropriate width of vegetated buffers. This commenter said that the Corps needs a standard method that district engineers can use to determine appropriate, site-specific vegetated buffer widths. This commenter also indicated that the width of the vegetated buffer should be based on the value of the aquatic resource to be protected and adjacent land uses. In addition, the method should identify situations where vegetated buffers are inappropriate or impractical. Several commenters said that the Corps should use a more flexible approach for vegetated buffer requirements, including the consideration of other methods that provide the same benefits, while utilizing less land. One commenter suggested methods to provide flexibility for vegetated buffer requirements, including buffer averaging to allow certain buffer areas to be narrower as long as the average width meets minimum requirements, conservation easements that can be donated to responsible charitable trusts and owner tax benefits, and density trading which allows developers density credits to offset loss of useable land to buffers.

We believe that recommending a 25 to 50 foot wide vegetated buffer and allowing district engineers the flexibility to determine appropriate vegetated buffer widths on a case-by-case basis is appropriate. A 25 to 50 foot wide vegetated buffer next to open waters will protect or restore aquatic habitat functions and values and provide water quality benefits. District engineers can require wider vegetated buffers if there are documented water quality concerns that can be addressed by a wider vegetated buffer. The district engineer will determine the appropriate width of the vegetated buffer on a case-by-case basis, based on the degree of impacts and the quality of waters. District engineers will also assess, on a case-by-case basis, whether or not vegetated buffers are impractical or inappropriate. District engineers can also consider the use of buffer width averaging. Density trading is more appropriately addressed by local planning and zoning agencies.

One commenter suggested using vegetated buffer width guidelines published by NRCS, which are based on soil type, slope, and topography. Two commenters stated that appropriate vegetated buffer widths should be determined by district engineers after consultation with Federal and state resource agencies. Two commenters requested that the Corps provide guidance for determining the length of the vegetated buffer along the open waterbody (i.e., how far upstream and downstream the vegetated buffer should extend).

We do not agree that it is necessary, for the purposes of the NWPs, to utilize complex vegetated buffer width guidelines based on soil types, slopes, and topography. Vegetated buffers 25 to 50 feet wide provide substantial aquatic habitat functions and water quality benefits. District engineers can require wider vegetated buffers to address documented water quality concerns or narrower vegetated buffers where it is not practicable to require 25 foot wide buffers. District engineers can coordinate with Federal and state resource agencies to determine the appropriate vegetated buffer width for a particular project, but we do not believe that this is necessary in all cases. The length of the vegetated buffer should extend along the open waterbody to the extent the district engineer determines necessary to offset authorized impacts.

Several commenters indicated that the guidance in the July 21, 1999, **Federal Register** notice concerning the width of vegetated buffers contradictory. For instance, General Condition 9 states that vegetated buffers must be established to the maximum extent practicable but there is a statement on page 39339 that says that the vegetated buffer should be as wide as possible. In addition, on page 39274 there is a statement that the width of the vegetated buffer must balance the benefits to environment with the uses of property resulting from authorized work. These commenters believe that the width of the vegetated buffer should be based on the benefits of the buffer and the adverse effects of the regulated activity (i.e., the discharge of dredged or fill material into waters of the United States), not all uses of the project.

We do not agree that the discussion of vegetated buffer requirements in the July 21, 1999, **Federal Register** notice contains contradictions. The appropriate width of a vegetated buffer is dependent on what is practicable for the prospective permittee and the amount of vegetated buffer that is necessary to ensure that the activity results in minimal adverse effects to the aquatic environment.

Several commenters said that vegetated buffers should not be required in all cases, particularly in those situations where the adverse effects on the aquatic environment are minimal. One commenter asked if vegetated buffers are required for activities that do not require notification to the district engineer. Another commenter asked if vegetated buffers are required even if the proposed work does not result in any impacts to streams, open waters, or wetlands on the project site. One commenter stated that vegetated buffers should be required only if there are perennial or intermittent streams on the site. Two commenters asserted that vegetated buffers should not be required next to ephemeral streams. One commenter stated that flexibility for district engineers to determine vegetated buffer widths reduces predictability for the regulated public when planning developments. Two commenters recommended that joint Federal agency guidance be developed for vegetated buffer requirements.

Vegetated buffers are not required if the proposed work results in minimal adverse effects on the aquatic environment without compensatory mitigation. Vegetated buffers are only required where the proposed project requires a Corps permit. The Corps is not establishing any new authority to regulate riparian areas, where no Corps permit is otherwise required. Vegetated buffers are not required for activities that do not require notification, since these activities result in minimal adverse effects on the aquatic environment. Vegetated buffers are required if there are open waters on the project site. We agree that vegetated buffers should not be required next to ephemeral streams. We will consider the development of joint guidance for vegetated buffer requirements.

Two commenters objected to requirements for conservation easements or deed restrictions for vegetated buffers. Another commenter supported the requirement for conservation easements or deed restrictions.

As with other forms of compensatory mitigation, conservation easements or deed restrictions for vegetated buffers are necessary to ensure that the compensatory mitigation site is maintained and protected from future alteration.

Three commenters requested clarification concerning how vegetated buffers are to be maintained and for how long vegetated buffers must be maintained. Two commenters stated that the requirement to maintain vegetated buffers is too burdensome for permittees because it implies that the permittees would have to monitor vegetated buffers and replace any vegetation that dies or is damaged during a flood or other storm event. One commenter indicated that the maintenance of vegetated buffers is problematic in arid regions because water would have to be provided to the plants to ensure their survival, which would be costly and contrary to water conservation policies. Two commenters suggested a limit of one year for the maintenance of vegetated buffers.

Permittees are not required to establish and maintain vegetated buffers that would require active management, such as irrigation. If the vegetated buffer must be planted, it must be self-sustaining, without the need for maintenance. Trees and shrubs damaged by storms and other events do not need to be replaced because the vegetation will grow back at the buffer site.

Two commenters supported the requirement for native species in vegetated buffers. Several commenters objected to requiring native species in vegetated buffers. One commenter said that this requirement is contrary to current best management practices because certain non-invasive, non-native plant species may be preferable in certain circumstances. Two commenters stated that the requirement for native species is unnecessary because there is no connection between water quality and the planting of native species or the removal of noxious weeds. Two commenters indicated that the requirement for native trees and shrubs in vegetated buffers is too strict and permittees should be able to plant native grasses and other herbaceous species instead of trees and shrubs. One commenter requested a list of ''acceptable'' native plant species for vegetated buffers.

Permittees are encouraged to plant vegetated buffers with native species, but this is not an absolute requirement. Vegetated buffers should be planted with native species, but a well-established vegetated buffer that contains some non-native species should not be removed and replaced. We recognize that there are circumstances where non-native species may be more appropriate. The planting of native species is important for the habitat functions of vegetated buffers. We encourage permittees to plant seedlings and saplings of trees in the vegetated buffer, but permittees can plant herbaceous vegetation in the vegetated buffer and allow natural succession processes to allow a woody plant community to develop at a later time. We do not agree that it is necessary to provide a list of ''acceptable'' native species that should be planted in vegetated buffers.

One commenter requested clarification whether vegetated buffers must be grassed or wooded. Another commenter objected to wooded vegetated buffers because they would impede flood flows and increase erosion. One commenter stated that wooded vegetated buffers would cause a loss of hydraulic capacity of the channel.

Vegetated buffers should have woody vegetation because woody plants, especially trees, are important components of an effective vegetated buffer. Woody plants, especially trees, provide shade to the open waters, as well as substantial amounts of detritus that is an important component of aquatic food webs. Woody vegetation in riparian zones often slows the velocity of floodwaters, which can provide water quality benefits by allowing sediment to drop out of suspension and decrease the sediment load in the water column. We do not agree that vegetated buffers increase erosion. The roots of woody vegetation help stabilize the soil, thereby decreasing erosion. Although woody vegetation, especially tree falls that create snags, may reduce the hydraulic capacity of a stream channel, it is important to consider the ecological functions and values of the stream, not just the hydraulic capacity of the stream channel and water conveyance. With the new and modified NWPs, we are placing greater emphasis on protecting open waters, especially streams.

One commenter supported the Corps statement in the July 21, 1999, **Federal Register** notice that mowed lawns are not considered vegetated buffers. Several commenters objected to this statement and believe that mowed lawns should be considered vegetated buffers.

We do not consider mowed lawns next to streams and other open waters as vegetated buffers because mowed lawns do not provide most of the functions and values that a vegetated buffer inhabited by trees or shrubs would provide. For example, mowed lawns cannot shade streams to moderate water temperature changes or produce

woody debris that creates important aquatic habitat. In many areas, mowed lawns are intensively managed through the application of fertilizers, herbicides, and pesticides. Intensively managed mowed lawns next to streams can exacerbate water quality problems that vegetated buffers are intended to address. Since mowed lawns next to streams and other open waters do not provide the functions and values that wooded vegetated buffers provide, it would be inappropriate to consider mowed lawns next to streams and other open waters as compensatory mitigation for activities authorized by NWPs.

One commenter said that the requirement for vegetated buffers is inconsistent with the proposed NWP definitions. For example, the definition for the term ''compensatory mitigation'' does not include vegetated buffers that are established and maintained on uplands next to streams and other open waters. This commenter also contends that vegetated buffers cannot be considered enhancement because the proposed NWP definition for this term is limited to activities in aquatic habitats that increase one or more aquatic functions.

The establishment and maintenance of vegetated buffers next to streams and other open waters as compensatory mitigation is not inconsistent with the definition of the term ''compensatory mitigation'' provided in the ''Definitions'' section of the NWPs. The planting of trees and shrubs next to a stream in a pasture enhances the quality of the stream. Stream restoration activities usually involve planting the upland or wetland riparian zone with trees and shrubs. We have added a definition of the term ''vegetated buffer'' in the ''Definitions'' section of the NWPs.

One commenter requested that the Corps provide guidance concerning the specific amount of vegetated buffer that will be required as compensatory mitigation to offset losses of waters of the United States. Two commenters stated that vegetated buffers should be an additional requirement after the permittee has provided full compensation for wetland losses. A commenter asked if vegetated buffers alone can be used to satisfy compensatory mitigation requirements for the NWPs. This commenter also stated that, in many cases, vegetated buffers already exist on site and that the preservation of these areas is strongly discouraged by Corps mitigation policy because of the ''no net loss'' goal. This commenter believes that the vegetated buffer requirement is contrary to Corps mitigation policy.

We have modified General Condition 19 to provide guidance regarding the proportion of compensatory mitigation that should consist of vegetated buffers. If there are open waters on the project site and the district engineer requires compensatory mitigation for wetland impacts to ensure that the net adverse effects on the aquatic environment are minimal, any vegetated buffer will comprise a portion or all of the remaining compensatory mitigation acreage after the permanently filled wetlands have been replaced at a one-to-one acreage basis. By using vegetated buffers as compensatory mitigation, the quality of open waters will be protected or enhanced by maintaining these vegetated areas if they already exist on the site. If the vegetated buffer is not used as compensatory mitigation, then the permittee could cut down the existing vegetation next to the open waters (which often does not require a DA permit), which would adversely affect the quality of the open waters. Programmatically, the Corps will continue to support the ''no net loss'' goal for wetlands, but the establishment and maintenance of vegetated buffers for NWP activities will provide substantial benefits for open waters, especially streams.

Many commenters stated that the vegetated buffer requirement is problematic for companies and agencies that do not own the property where the vegetated buffer would be located on the project site. For example, the authority of flood control agencies is often limited to the channel, not to the land adjacent to the channel. As another example, utility companies have limited easement rights in utility line rights-of-way and cannot impose deed restrictions or conservation easements in these areas. Numerous commenters said that vegetated buffers should not be required where the project proponent does not own the land next to the open waters on the project site. Several commenters stated that the costs for public agencies to obtain rights-of-way to establish and maintain vegetative buffers will be prohibitive or economically impractical.

District engineers will not normally require vegetated buffers next to streams and other open waters if the permittee does not own the land next to the open waterbody. Such vegetated buffers will only be required where the permittee has or can reasonably obtain the appropriate conservation easements. Likewise, vegetated buffers are not required in utility line easements. However, if the utility company is building a substation on its land and there are open waters on the project site, the district engineer can require vegetated buffers next to those open waters as compensatory mitigation.

Two commenters said that vegetated buffers are impractical in urban areas where most of the surface runoff is directed to storm drain pipes, not streams. A commenter stated that maintaining vegetated buffers adjacent to facilities built by developers but handed over to local governments would increase costs to those local governments. Another commenter said that the vegetated buffer requirement will increase project and maintenance costs for state Department of Transportation projects. Two commenters assert that the vegetated buffer requirement will make maintenance of authorized facilities difficult or prohibitive. One commenter requested clarification whether a vegetated buffer disturbed during a maintenance activity will require additional mitigation or whether the project proponent would be required only to replace the disturbed vegetation.

If it is impractical to establish and maintain vegetated buffers next to streams in urban areas because of the limited amount of available land, then vegetated buffers are not required. In these circumstances, off-site compensatory mitigation may be preferable, including off-site vegetated buffers. If vegetated buffers next to open waters would make the maintenance of facilities in waters of the United States too costly, then other forms of compensatory mitigation should be considered. We do not agree that the vegetated buffer requirement would increase costs for transportation projects, because these activities usually require compensatory mitigation. If it is necessary to disturb the vegetated buffer during maintenance activities, the project proponent is only required to allow the vegetation to grow back. Additional compensatory mitigation will not be required for the disturbance of a vegetated buffer if it is allowed to grow back.

Several commenters said that vegetated buffers should not be required for activities authorized by NWPs 3 or 12. One commenter indicated that vegetated buffers should not be required for linear transportation crossings that are constructed perpendicular to the stream. Another commenter said that vegetated buffers should not be required for flood control maintenance activities.

District engineers can require vegetated buffers for activities that involve discharges of dredged or fill material into waters of the United States if there are open waters on the project site. Activities authorized by NWP 3 typically do not require compensatory

mitigation, including vegetated buffers. There may be circumstances where vegetated buffers will be required for utility line activities, if compensatory mitigation is necessary to ensure that the adverse effects on the aquatic environment are minimal. Activities authorized by NWP 31 usually would not require vegetated buffers, especially if the flood control authority does not own the land next to the flood control facility or compensatory mitigation was required for the construction of the facility or previous maintenance activities.

Regional Conditioning

One commenter supported the Corps increased emphasis on regional conditioning to ensure that the new and modified NWPs authorize only those activities that result in minimal adverse effects on the aquatic environment. Numerous commenters objected to imposing regional conditions on the new and modified NWPs and stated that the Corps should rely on case-specific special conditions instead of regional conditions. Several commenters said that regional conditioning of the NWPs is unnecessary and contrary to the purpose of the NWPs, which is to authorize activities that have minimal adverse effects. Two commenters suggested that the Corps impose more stringent national terms and conditions on the NWPs instead of relying on regional conditions. One commenter indicated that the Corps reliance on regional conditions for the new and modified NWPs demonstrates that these NWPs authorize activities with more than minimal adverse effects. Two commenters said that regional conditions do not provide adequate protection for wetlands.

We do not agree that only case-specific special conditions should be added to NWPs. Regional conditions are more effective at ensuring that NWPs authorize only those activities with minimal adverse effects on the aquatic environment, individually and cumulatively. Regional conditions also benefit the regulated public by providing them with advance notice of additional NWP restrictions and promoting consistency in the implementation of the NWP program. Regional conditions are necessary because aquatic resource functions and values vary considerably across the country. Utilization of regional conditions is not contrary to the NWP program because those conditions help ensure that the NWPs do not authorize activities with more than minimal adverse effects on the aquatic environment.

Imposing more stringent national terms and limitations on the NWPs instead of imposing regional conditions would not be a practical alternative, because it would severely limit the ability of the NWPs to authorize many activities that have minimal adverse effects on the aquatic environment. It is far more efficient to develop NWPs that authorize most activities that have minimal adverse effects on the aquatic environment and allow division and district engineers to limit the use of these NWPs or exercise discretionary authority in specific situations that may result in more than minimal adverse effects on the aquatic environment. For particular regions of the country or specific waterbodies where additional safeguards are necessary to ensure that the NWPs authorize only those activities with minimal adverse effects, regional conditions are the appropriate mechanism. Case-specific discretionary authority or special conditions cannot substitute for regional conditions in many cases, especially for those NWP activities that do not require notification to the District Engineer. For example, regional conditions can lower PCN thresholds for activities in high value waters to allow district engineers to review those activities and determine if the work can be authorized by NWPs. Division and district engineers are much more knowledgeable about local aquatic resource functions and values and can prohibit or limit the use of the NWPs in high value waters. We contend that regional conditioning of the NWPs provides effective protection for high value wetlands and other aquatic habitats.

Several commenters indicated that regional conditions should be more consistent between Corps districts. One of these commenters also stated that regional conditions should be based on environmental factors and climate, not political boundaries. One commenter recommended Corps division boundaries as the smallest unit for consistency in regional conditions. Another commenter suggested state boundaries as the smallest unit for consistency of regional conditions. Several commenters said that regional conditions make it more difficult for companies that work in more than one state to efficiently manage their operations to comply with the NWPs.

To a certain extent, regional conditions are based on environmental factors but it is usually necessary to provide some consistency within political boundaries, such as state boundaries. Consistency within a particular state is beneficial to the regulated public because it results in more effective cooperation between state agencies, such as the state agencies responsible for making Section 401 and CZMA determinations, and the Corps. In those states where more than one Corps district is present, we have recommended that those Corps districts develop, to the extent practicable, consistent regional conditions statewide. However, we recognize that there may be certain regions within a state, such as specific high value waterbodies, that may warrant regional conditions that are not necessary in other areas of that state. Different regional conditions can be imposed in those unique situations. Within Corps division boundaries, there is often wide variability in aquatic resource functions and values. Therefore, consistency in regional conditions at a scale larger than a state is contrary to the purpose of the regional conditioning process, which is to consider local differences in aquatic resource functions and values to ensure that the NWPs do not authorize activities with more than minimal adverse effects on the aquatic environment. Companies that work in more than one Corps district or more than one state will have to comply with the regional conditions established in each district or within each state.

One commenter stated that the Corps assertion that regional conditions cannot be elevated to headquarters is inconsistent with the regional conditioning process established in the July 1, 1998, **Federal Register** notice. Three commenters indicated that division engineers should be able to increase the acreage limit of an NWP or delete or modify conditions of an NWP through regional conditions and recommended that the Corps revise its regulations to provide division engineers with such authority.

The authority to require regional conditions lies solely with division engineers and cannot be elevated to the Headquarters level. The regulations for the NWPs (33 CFR Part 330) clearly state that the modification, suspension, or revocation of any NWP on a regional basis is the decision of the division engineer. The regional conditioning process described in the July 1, 1998, **Federal Register** notice did not include elevation of NWP regional conditions to headquarters. Meetings between Corps district commanders and Regional Administrators of EPA and Regional Directors of the U.S. Fish and Wildlife Service and National Marine Fisheries Service were to occur to discuss proposed regional conditions and resolve any disputes concerning those regional conditions (see 63 FR 36048).

As discussed in the July 21, 1999, **Federal Register** notice, division and district engineers cannot use regional conditioning to make the NWPs less restrictive. Only the Chief of Engineers can modify an NWP to make it less restrictive, if it is in the national public interest to do so. Such a modification must go through a public notice and comment process. However, if a Corps district determines that regional general permits (RGPs) are necessary for activities not authorized by NWPs, then that district can develop and implement regional general permits to authorize those activities, as long as those regional general permits comply with Section 404(e) of the Clean Water Act. However, we have established a six month moratorium on RGPs and LOPs that are germane to the new and modified NWPs to allow districts time to assess the true need for such RGPs and LOPs.

One commenter stated that the regional conditioning process violates the Administrative Procedures Act and that proposed regional conditions must be published in the **Federal Register** for comment. This commenter said that posting draft regional conditions on Internet home pages provides inadequate notice because most citizens do not use the Internet. This commenter also requested that the Corps publish a notice in the **Federal Register** that includes all proposed regional conditions to solicit public comments on those regional conditions. Several commenters objected to the regional conditioning process because all draft regional conditions were not available when the July 21, 1999, **Federal Register** notice was published. Two commenters said that regional conditions should not be drafted or subject to comment until the new and modified NWPs are issued.

Regional conditions for the NWPs do not need to be published in the **Federal Register** for public comment. It is important to remember that regional conditions are issued by division commanders, not Corps headquarters. District public notices for regional conditions provide adequate opportunities for public comment. Since the proposed regional conditions do not affect the process for issuing the new and modified NWPs, we do not agree that it was necessary to have all draft regional conditions posted on district Internet home pages at the same time the July 21, 1999, **Federal Register** notice was published. The 75-day comment period provided adequate opportunities for the public to consider both the July 21, 1999, **Federal Register** notice and all draft regional conditions proposed by Corps districts.

One commenter stated that it is difficult for prospective permittees to determine in which district their activities would occur and recommended that the Corps make maps of district boundaries available. One commenter suggested that high value waters subject to regional conditioning include warm water fisheries and waters with benthic macroinvertebrates.

The Corps has a general map of Corps division and district boundaries that is available on the Internet at http://www.usace.army.mil/inet/locations/bdry-pages/. This interactive map also provides links to Corps district home pages. Due to the scale of this map and since most Corps district boundaries are based on watershed boundaries, prospective permittees should contact the nearest Corps district office to determine which Corps district will review their PCN or permit application. Division engineers can determine that waters of the United States supporting warm water fisheries or benthic macroinvertebrates are high value waters that should be subject to regional conditioning.

Essential Fish Habitat

For the proposed new and modified NWPs published in the July 21, 1999, **Federal Register** notice, we conducted programmatic Essential Fish Habitat (EFH) consultation with the National Marine Fisheries Service (NMFS), pursuant to Section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act. In response to our request for programmatic consultation, NMFS made two programmatic EFH conservation recommendations. The first EFH conservation recommendation was for Corps districts to work with NMFS regional offices to the extent necessary to develop NWP regional conditions that conserve EFH and are consistent with NMFS regional EFH conservation recommendations. The second EFH conservation recommendation indicated that paragraph (e) of General Condition 13, which states that district engineers will provide no responses to resource agency comments on PCNs, should not apply to EFH conservation recommendations provided by NMFS.

We concur with both of these EFH conservation recommendations. We have directed our district offices in geographic regions with EFH to coordinate with NMFS regional offices to develop, to the extent necessary, regional conditions for the new and modified NWPs that conserve EFH and are consistent with NMFS regional EFH conservation recommendations. In addition, we have added a sentence to paragraph (e) of General Condition 13 to require district engineers to respond to NMFS within 30 days of receipt of any EFH conservation recommendations. This requirement is necessary to comply with section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

Workload Implications of the New and Modified Nationwide Permits

A large number of commenters stated that the lower acreage limits and PCN requirements of the new and modified NWPs, as well as the three proposed general conditions, will result in substantial increases in the number of standard permit applications processed by the Corps and processing times for all Section 404 permits. Many commenters objected to the proposed NWPs because the Corps did not explain how it will handle the increase in workload. A number of commenters said that if the proposed changes to the NWP program are implemented, the Corps will need to increase its resources to process the additional standard applications and PCNs in a timely manner. One commenter said that the cumulative impact analysis requirements will increase the Corps workload while another commenter cited regional conditions as another factor that will increase the Corps workload.

One commenter predicted that the Corps will experience an increase of 17,000 individual permit applications per year. Another commenter estimated an increase of 2,000 individual permits per year as a result of the proposed changes. This commenter also predicted that average individual permit processing times will increase from 89 days to 350 days over the next six years and estimates that the permit application carryover will double during that time period.

The workload and compliance costs study conducted by IWR, and mentioned above in the overview, for the proposal published in the July 21, 1999, **Federal Register** showed that the proposed NWP package would result in a 50% increase in the number of standard individual permit applications received by the Corps per year. The study estimated that the Corps would receive 4,429 additional standard permit applications per year and receive 2,878 fewer NWP PCNs per year. As a result of the increased standard permit workload, the average amount of time that it takes for the Corps to process permit applications would increase three to four times within five years. Likewise, the permit application

backlog would increase by the same amount during that five year period.

The changes to the new and modified NWP issued today, including the ½ acre limit and the modification of the general condition for fills in 100-year floodplains, are estimated to result in 40% fewer standard permit applications compared to the proposal published in the July 21, 1999, **Federal Register**. Also, the standard permit processing times and the permit application backlog would increase by one and a half to two times the amount for FY 1998.

We have also reviewed an analysis, based on the July 21, 1999, proposal, that was conducted on behalf of the National Association of Counties. This analysis examined the impacts of the July 21, 1999, proposal on the Corps workload and costs to the Corps and the regulated public.

We have not proposed any changes to our approach for analyzing cumulative adverse effects on the aquatic environment cause by NWPs. Therefore, cumulative adverse effect analysis will not impose additional workload on Corps district offices. Although regional conditions will cause some increases in the Corps workload, those increases are manageable and necessary to ensure that the NWPs do not authorize activities that result in more than minimal adverse effects on the aquatic environment.

One commenter said that the increases in workload caused by the three proposed general conditions are offset by the increased scope of applicable waters for these NWPs, because many of these activities would have required individual permits when NWP 26 was in place. In contrast, another commenter stated that the proposed NWPs will result in more individual permit applications because the new NWPs do not authorize activities in tidal waters.

We do not agree that the larger geographic scope of the new NWPs, when compared to the geographic scope of NWP 26, will offset the increase in workload caused by the new NWP general conditions. For example, General Condition 26 prohibits discharges of dredged or fill material into waters of the United States within 100-year floodplains of stream segments below headwaters. Since NWP 26 did not authorize discharges of dredged or fill material into tidal waters, prohibiting the use of the new NWPs in tidal waters will not cause any increases in the number of individual permit applications processed by the Corps.

Other Issues

In response to the July 21, 1999, **Federal Register** notice, some commenters raised additional issues related to the new and modified NWPs. Several commenters expressed concern that none of the new and modified NWPs authorize oil and gas development facilities. These commenters said that NWP 26 was used to authorize these facilities where no regional general permits (RGPs) are available and recommended that the Corps develop such an NWP. One commenter suggested that the Corps modify NWP 39 to authorize oil and gas wells as industrial facilities.

When we developed the new and modified NWPs that will replace NWP 26, we considered an NWP to authorize oil and gas facilities. However, when we surveyed Corps districts to determine how frequently such an NWP would be used, we found that there was little need for this NWP because most of the districts that frequently authorize oil and gas facilities have issued RGPs to authorize these activities. The development of RGPs for this activity is more appropriate than developing a new NWP. We do not agree with the recommendation to modify NWP 39 to authorize these activities, because NWP 39 authorizes building pads and attendant features, and oil and gas wells are not buildings.

Two commenters recommended that the Corps develop an NWP to authorize the construction of fish passage facilities and other stream enhancement activities, such as relocating a portion of a stream channel to provide proper alignment for fish passage, because these activities were authorized by NWP 26.

We do not agree that there is sufficient need to develop a new NWP to authorize the construction of fish passage facilities. Stream enhancement activities may be authorized by NWP 27, provided the proposed work meets the terms and conditions of this NWP. Discharges into waters of the United States associated with the construction of fish passage facilities may also be authorized by other NWPs, RGPs, or individual permits.

Several commenters requested that the Corps reverse its decision to withdraw NWP B, which was proposed in the July 1, 1998, **Federal Register** notice to authorize master planned development activities. One of these commenters stated that the withdrawal of proposed NWP B is contrary to ''smart growth'' initiatives.

Our decision to withdraw NWP B is discussed in the October 14, 1998, and July 21, 1999, **Federal Register** notices. We have not changed our position on this matter, but we could propose an NWP for master planned development activities at a later time. We do not agree that the withdrawal of NWP B is contrary to smart growth initiatives, because developments that are part of smart growth planning efforts can be authorized by other NWPs, such as NWP 39, RGPs, and individual permits.

One commenter objected to the draft NWPs, stating that they do not authorize certain activities associated with railroad operations, such as the completion of drainage improvements along unstable embankments, bank stabilization to protect tracks from slide events, small fills associated with the installation of signals and switches, and the construction of miscellaneous structures associated with railroad tracks.

Some of these activities can be authorized by existing NWPs, including some of the NWPs modified today. For example, bank stabilization activities to protect railroad tracks from slide events may be authorized by NWP 13. Small fills associated with the installation of signals, switches, and minor drainage improvements may be authorized by NWP 18. NWP 14 may also be used to authorize some activities associated with railroads, since railways are linear transportation projects. These activities can also be authorized by RGPs and individual permits, if they do not qualify for authorization under the NWP program.

Two commenters said that a new NWP should be developed to authorize the construction of flood control improvements, including structures and fills for flood control facilities. Two commenters stated that the new and modified NWPs and regional conditions will make it more difficult to maintain a previously authorized flood-control facility.

We do not agree that a new NWP should be developed for the construction of flood control facilities. Such activities are likely to result in more than minimal adverse effects on the aquatic environment by reducing or eliminating the natural functions and values of open waters, including streams, and floodplains. Flood control activities may be authorized by NWPs, RGPs, or individual permits. The new and modified NWPs will not make it more difficult to maintain flood control facilities. We have withdrawn the proposed general condition for impaired waters. General Condition 26, Fills in 100-year Floodplains, does not apply to NWP 31, which authorizes the

maintenance of existing flood control facilities.

One commenter requested that the Corps develop a new NWP to authorize abandoned mined land cleanup activities, since NWP 27 does not authorize all of these activities. This commenter said that NWP 26 was used to authorize these activities.

During the reissuance process for the existing NWPs that will begin in 2001, we will consider developing an NWP to authorize discharges of dredged or fill material into waters of the United States for abandoned mined land cleanup projects.

One commenter recommended that the Corps revoke the NWPs in all watersheds or sub-basins that have exceeded 8% imperviousness. Another commenter suggested that the Corps condition the NWPs to encourage or require planting of native plant species in areas that are impacted by NWP activities, because such a condition would support Executive Order 13112, entitled ''Invasive Species.'' Two commenters said that the Corps should develop and implement a classification system that assesses the potential for restoring or enhancing degraded wetlands to encourage restoration or enhancement, instead of issuing permits to fill these areas.

We do not agree that the NWPs should be revoked simply because the amount of impervious surface within a particular watershed has exceeded a certain threshold. District engineers will monitor the use of the NWPs to ensure that the NWPs do not authorize activities with more than minimal adverse effects on the aquatic environment, individually or cumulatively. We cannot require all permittees to plant native species at sites impacted by activities authorized by NWPs, but they are encouraged for vegetated buffers. While we encourage restoration and enhancement of degraded wetlands as compensatory mitigation for activities authorized by DA permits, including NWPs, we cannot develop a classification system to identify these areas and prohibit discharges of dredged or fill material into those waters.

Two commenters requested that the final notice announcing the issuance of the new and modified NWPs include a statement that the three new NWP conditions proposed in the July 21, 1999, **Federal Register** notice should not become conditions on all Corps permits, including individual permits. Two commenters said that any regional general permits or Section 404 letters of permission issued by Corps districts must include the three proposed new NWP general conditions.

We agree that the proposed general conditions limiting the use of NWPs in designated critical resource waters, impaired waters, and waters of the United States within 100-year floodplains should not be incorporated into all Corps permits. RGPs issued by Corps districts can authorize only activities that result in minimal adverse effects on the aquatic environment. Since RGPs are local solutions for implementing the Corps regulatory program, these general permits will thoroughly address local concerns for the aquatic environment. Therefore, it is not necessary for all RGPs issued by district engineers to contain conditions limiting their use in designated critical resource waters, impaired waters, and waters of the United States within 100-year floodplains. Standard permits are subject to the public interest review process, which considers impacts to public interest factors, including critical resource waters, impaired waters, and waters of the United States within 100-year floodplains.

One commenter recommended that the **Federal Register** notice announcing the final new and modified NWPs contain a compilation of all regulatory information concerning the NWPs to make the preamble discussions available to the regulated public. Another commenter indicated that the Corps cannot issue provisional NWP authorizations in states that have denied water quality certification for those NWPs.

All **Federal Register** notices concerning the new and modified NWPs are currently available to the public. Due to the length of these notices and the many changes that have occurred since these NWPs were initially proposed on July 1, 1998, it would be impractical to compile the preambles for all of these notices into one document. In the July 21, 1999, **Federal Register** notice (64 FR 39261), we addressed comments concerning the issuance of provisional NWP verifications and we have not changed our position on this matter.

One commenter said that the new NWPs and general conditions should not become effective until six to nine months after the new NWPs are issued, so that activities that have already been planned can proceed under the NWPs issued in 1996. One commenter objected to using NWPs to authorize the expansion of existing projects, stating that this discourages avoidance and minimization of losses of waters of the United States. One commenter stated that the new and modified NWPs should address impacts to prior converted cropland. Several commenters said that NWP 29 should be revoked.

The new and modified NWPs, including the new and modified general conditions, will become effective on June 5, 2000. Until the effective date of the new and modified NWPs and general conditions, the current NWPs (as published in the December 13, 1996, **Federal Register**) are applicable. Permittees that begin work, or are under contract to begin work, prior to the effective date of the new and modified NWPs, have one year to complete the work under the term and conditions of the NWPs issued in 1996. However, in a notice published in the December 15, 1999, issue of the **Federal Register** (64 FR 69994), we established a procedure for processing NWP 26 PCNs. We do not agree that a longer implementation schedule is necessary. In addition, an extended implementation schedule would be contrary to our intent to replace NWP 26 with activity-specific NWPs that authorize activities with minimal adverse effects on the aquatic environment.

The use of NWPs to authorize the expansion of existing projects does not discourage avoidance and minimization of activities in waters of the United States. These activities are required to comply with all NWP terms and conditions, including General Condition 19, and must result only in minimal adverse effects on the aquatic environment. The new and modified NWPs do not need to address impacts to prior converted cropland, since these areas are not waters of the United States. If prior converted cropland is abandoned and reverts back to jurisdictional wetlands, then those areas are subject to the permit requirements of Section 404 of the Clean Water Act. We do not agree that NWP 29 should be revoked, since it authorizes single family housing activities with minimal adverse effects on the aquatic environment.

III. Comments and Responses on Specific Nationwide Permits

3. Maintenance: In the July 21, 1999, **Federal Register** notice, we proposed to modify this NWP to authorize the removal of accumulated sediment in the vicinity of existing structures and authorize activities in waters of the United States associated with the restoration of uplands damaged by storms, floods, or other events. These additional activities are in paragraphs (ii) and (iii), respectively, of this NWP.

One commenter said that the proposed modifications are not

maintenance activities and should not be authorized by this NWP. Some commenters requested clarification whether this NWP only applies to activities not statutorily exempt under section 404(f)(1)(B) of the Clean Water Act. One commenter objected to this NWP, stating that it is used to change existing projects to different use categories. Another commenter asked what is meant by the phrase ''minor deviations in the structure's configuration or filled area.''

We believe that the activities authorized by paragraphs (ii) and (iii) of this NWP are maintenance activities. The note at the end of this NWP states that NWP 3 authorizes the repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Section 404(f) exemptions for maintenance. The first sentence of paragraph (i) explicitly states that NWP 3 does not authorize changes in use for the authorized structure or fill. The phrase ''minor deviations in the structure's configuration or filled area'' allows the project proponent to make minor changes to a previously authorized structure or fill during the repair or maintenance activity so that the structure or fill complies with current construction standards or other regulations.

Several commenters supported the removal of the notification requirement from paragraph (i) of this NWP. One commenter said that replacement activities should allow reconfiguration of structures such as marina piers. One commenter believes that paragraph (i) contains contradictory language because it authorizes the repair, replacement, or rehabilitation of previously authorized, currently serviceable structures or fills and the replacement of structures destroyed by storms. Another commenter said that some maintenance activities take longer than two years and recommended that the NWP be modified to accommodate those longer repair periods. One commenter recommended that the NWP authorize the use of cofferdams during maintenance activities.

The reconfiguration of marinas is authorized by NWP 28. The reconfiguration of other types of structures may be authorized by other NWPs, regional general permits, or individual permits. Authorizing the repair of currently serviceable structures or fills and the replacement of structures or fills damaged by storms, floods, or other discrete events is not contradictory because both of these activities are maintenance activities that typically have minimal adverse effects on the aquatic environment. These provisions are also consistent with the Section 404(f) exemptions for maintenance. We do not agree that it is necessary to increase the two-year limit for maintenance activities because this amount of time is adequate for most maintenance activities. In addition, NWP 3 contains a provision that allows district engineers to waive this time limit. The use of cofferdams during maintenance activities may be authorized by NWP 33.

Some commenters recommended removing the proposed limitations in paragraph (ii) of NWP 3. Several commenters suggested adding acreage limits to paragraph (ii) and others suggested that the 200 linear foot limit should be reduced to 50 feet. One commenter stated that this provision is unnecessary and that NWP 3 should not be modified to authorize this activity. Another commenter said that paragraph (ii) should not authorize the installation of rip rap.

We believe that the 200 linear foot limit for the removal of accumulated sediments in the vicinity of existing structures is appropriate and will ensure that this NWP authorizes only activities with minimal adverse effects on the aquatic environment. The removal of accumulated sediments allows structures to continue to function properly and ensure the safety of the users of the structure. The installation of rip rap is often necessary to protect these structures after the accumulated sediment is removed and should be authorized by this NWP as part of the single and complete project.

One commenter supported paragraph (iii) of the proposed modification of NWP 3, which authorizes activities in waters of the United States associated with the restoration of uplands damaged by storms and other discrete events. One commenter said that paragraph (iii) is unnecessary because these activities should be considered exempt and bank stabilization can be authorized by NWP 13. One commenter stated that the activities authorized by paragraph (iii) will have more than minimal adverse effects on the aquatic environment. Two commenters objected to the proposed modification, stating that it would prevent natural stream processes from occurring and allow stream channelization. A commenter said that this NWP should not authorize bank stabilization activities in floodplains. Another commenter stated that separate authorization should not be required if excavated material is used to replace material that is lost as a result of erosion. One commenter recommended modifying the text of paragraph (iii) to state that the NWP does not authorize the replacement of uplands lost through gradual erosion processes.

The intent of paragraph (iii) of NWP 3 is to authorize activities in waters of the United States associated with the replacement of uplands that are damaged as a result of storms and other catastrophic events. The restoration of uplands damaged as a result of storms and other catastrophic events is exempt from Section 404 permit requirements, as long as the upland area is replaced to its original extent. For example, a hurricane may cause substantial erosion and destroy a section of a road constructed in uplands or on a permitted fill. The restoration of those uplands or the permitted fill and the replacement of the destroyed road are exempt from Section 404 permit requirements, provided the area is repaired to its original extent. However, the restoration work may involve activities in waters of the United States, which are authorized by paragraph (iii), provided those activities comply with the terms and conditions of NWP 3. We maintain our position that this is a maintenance activity that should be authorized by NWP 3. Paragraph (iii) does not authorize new stream channelization or stream relocation activities. We believe that bank stabilization is a necessary component of this activity and should be authorized by paragraph (iii) as part of the single and complete project. We concur with the last comment in the previous paragraph and have made the appropriate modification of the text of paragraph (iii).

One commenter indicated that the district engineer should have discretion over which flood damage repair activities require notification and another commenter said that notification should not be required for any of these activities. One commenter suggested that the 50 cubic yard limit for removal of obstructions should be replaced with 500 linear foot and ⅓ acre limits.

We contend that notification should be required for all of the activities authorized by paragraph (iii) to ensure that these activities result in minimal adverse effects on the aquatic environment. We do not agree that the 50 cubic yard limit for the removal of obstructions should be replaced with 500 linear foot or ⅓ acre limits.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. 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 these activities. This NWP is subject to General Condition 25, which requires notification for activities in designated critical resource waters. NWP 3 is reissued with the modifications discussed above.

7. *Outfall Structures and Maintenance:* In the July 21, 1999, **Federal Register** notice, we proposed to modify NWP 7 to authorize maintenance excavation, including dredging, to remove accumulated sediments from intake or outfall structures and canals associated with these structures.

Several commenters stated that the maintenance activities authorized by the proposed modification of this NWP are exempt from permit requirements. Numerous commenters indicated that the removal of accumulated sediments should be authorized by NWP 3 and that the modification of this NWP is unnecessary. Several commenters requested clarification regarding what types of maintenance activities are authorized by this NWP. Another commenter said that the Corps should withdraw the proposed modification. This commenter also recommended prohibiting removal of material in special aquatic sites and small impoundments. One commenter said that the construction of outfall structures that does not involve discharges of dredged or fill material into waters of the United States should not require a Corps permit.

Maintenance dredging to remove accumulated sediments from intake and outfall structures in Section 10 waters is not exempt from Corps permit requirements. Although the removal of accumulated sediments in the vicinity of existing structures is authorized by paragraph (ii) of NWP 3, there are maintenance dredging or excavation activities associated with intake and outfall structures that do not meet the terms and conditions of NWP 3 and could be authorized by NWP 7. The text of this NWP clearly states which maintenance activities are authorized by NWP 7. District engineers will review PCNs for maintenance activities in special aquatic sites and small impoundments to ensure that the adverse effects on the aquatic environment are minimal. Outfall structures constructed in Section 10 waters require a Corps permit, even if there are no associated discharges of dredged or fill material into waters of the United States.

One commenter said that acreage and linear limits should be imposed on this NWP. Several commenters contend that this NWP should not authorize activities in tidal waters or special aquatic sites. One commenter stated that this NWP should not authorize maintenance activities associated with aquaculture facilities or power plants. A commenter remarked that maintenance excavation and dredging activities could result in more than minimal adverse effects on the aquatic environment and that notification should be required for all activities authorized by this NWP. Another commenter objected to the requirement for notification for all activities authorized by this NWP.

We do not agree that it is necessary to impose acreage or linear foot limits on the activities authorized by this NWP or restrict the applicable waters because all activities authorized by this NWP require notification to the district engineer. The removal of accumulated sediments from outfall and intake structures associated with aquaculture facilities and power plants is necessary to ensure the efficient operation of these installations. The district engineer will review these PCNs to ensure that the NWP authorizes only those activities with minimal adverse effects on the aquatic environment.

One commenter said that delineations of special aquatic sites should be limited to the impact area or within 200 feet of the proposed activity. Two commenters stated that it is unnecessary to require delineations of special aquatic sites since this NWP authorizes maintenance activities. One commenter remarked that there should be a provision in the NWP that allows maintenance of existing structures when the original design capacities and configurations are not available. Another commenter said that paragraph (d) of the proposed modification should be removed because this requirement is already addressed by General Condition 3.

The text of this NWP states that the requirement for delineations of special aquatic sites is limited to the vicinity of the proposed work. The delineation of special aquatic sites, especially vegetated shallows, is necessary to ensure that the NWP authorizes only activities with minimal adverse effects on the aquatic environment. If the original design capacities and configurations of the facility are not available, district engineers will use their judgement to determine if the proposed work is authorized by this NWP. The requirements of paragraph (d) of this NWP and General Condition 3 are not the same. Therefore, we believe that paragraph (d) is necessary to ensure that NWP 7 authorizes only activities with minimal adverse effects on the aquatic environment.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. 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 these activities. This NWP is subject to General Condition 25, which restricts its use in designated critical resource waters. NWP 7 is reissued with the modifications discussed above.

12. Utility Line Activities: In the July 21, 1999, **Federal Register** notice, we proposed to modify NWP 12 to authorize utility line substations; foundations for overhead utility line towers, poles, and anchors; and permanent access roads for the construction and maintenance of utility lines.

Many commenters supported the proposed modifications, but a few commenters opposed the proposed modifications. Several commenters believe that this NWP will authorize activities with more than minimal adverse effects on the aquatic environment. One commenter said that NWP 12 should have a maximum limit of 2 acres for a single and complete utility line activity and another commenter suggested a ⅓ acre limit. One commenter supported the ¼ acre PCN threshold and also recommended requiring notification for activities that result in the loss of greater than 100 linear feet of stream bed, with agency coordination for activities that result in the loss of greater than 250 linear feet of stream bed. Another commenter said that the PCN threshold should be ⅓ acre. One commenter requested clarification concerning the emergency authorization of utility line activities.

The terms and conditions of this NWP, including PCN requirements, will ensure that NWP 12 will authorize only activities with minimal individual and cumulative adverse effects on the aquatic environment. We do not agree that an overall acreage limit is appropriate for this NWP, since many of the impacts to waters of the United States caused by the construction and maintenance of utility lines will be temporary. Acreage limits and PCN thresholds for specific activities authorized by this NWP are discussed below. This NWP can be used to authorize the emergency installation,

replacement, or repair of utility lines in waters of the United States. Emergency procedures for the Corps regulatory program are discussed in 33 CFR 325.2(e)(4).

One commenter said that this NWP is too restrictive for the installation of underground gas transmission lines. Two commenters stated that this NWP should authorize wireless communication towers. Another commenter suggested that well drilling fluid flowlines should be authorized by this NWP. One commenter said that pipeline maintenance activities should be exempt from permit requirements. A commenter stated that PCNs should be required for all underground utility lines to ensure that the installation of those utility lines does not drain wetlands. Another commenter said that sidecast material from utility line installation should be removed within 30 days. One commenter indicated that utility lines constructed in waters of the United States parallel to streambeds should be limited to 500 feet in length to ensure that those activities result in minimal adverse effects on the aquatic environment.

This NWP authorizes the construction, maintenance, and repair of utility lines, including underground gas transmission lines, that have minimal adverse effects on the aquatic environment. We do not agree that the terms for underground transmission lines are too restrictive. This NWP does not authorize wireless communication towers because these facilities are not utility lines. Well drilling fluid flowlines are not authorized by this NWP, because they are not utility lines. The construction or installation of wireless communication towers or well drilling fluid flowlines in waters of the United States can be authorized by individual permits, regional general permits, or other NWPs. Pipeline maintenance activities can be authorized by this NWP or NWP 3, although some pipeline maintenance activities may be eligible for the Section 404(f) exemption. This NWP contains specific terms to ensure that the installation of utility lines does not drain wetlands. This NWP does not authorize the installation of utility lines that result in french drains. We believe that the 180 day limit is appropriate for temporary sidecasting of excavated material, but division engineers can regionally condition this NWP to reduce this time period, if such a reduction is necessary to ensure that the NWP authorizes only activities with minimal adverse effects. Paragraph (d) of the ''Notification'' section of this NWP will allow district engineers to review proposed utility lines to be installed in waters of the United States parallel to stream beds and ensure that these activities result in minimal adverse effects on the aquatic environment.

One commenter requested clarification whether a Corps permit is required if the United States Coast Guard does not require a permit under Section 9 of Rivers and Harbors Act. Another commenter said that pipelines are transportation structures.

A Section 10 permit is not required for utility lines constructed over navigable waters of the United States to transport gaseous, liquid, liquifiable, or slurry substances, because these structures are considered bridges which are regulated under Section 9, not Section 10, of the Rivers and Harbors Act. Pipelines constructed over navigable waters may be considered bridges under Section 9 of the Rivers and Harbors Act.

Two commenters supported the inclusion of utility line substations in the proposed modification of this NWP. One commenter said that the acreage limit of utility line substations should be ¼ acre. Several commenters recommended adding ''storage facilities'' to paragraph (ii) to authorize these activities with utility line substations. Two commenters requested a definition of the term ''substation.'' One commenter said that this NWP should not authorize the construction of substations in floodplains. Another commenter stated that electric and pumping substations should be sited in uplands.

We have changed the acreage limit for the construction or expansion of utility line substations to ½ acre, to ensure that this NWP authorizes only activities with minimal adverse effects on the aquatic environment. Notification is required for discharges of dredged or fill material resulting in the loss of greater than ⅒ acre of non-tidal waters of the United States for the construction or expansion of utility line substations.

We do not agree that storage facilities should be included with utility line substations. These facilities may be authorized by NWPs, regional general permits, or individual permits. The term ''utility line substations'' includes power line substations, lift stations, pumping stations, meter stations, compressor stations, valve stations, small pipeline platforms, and other facilities integral to the operation of a utility line. There are situations where utility line substations must be located in waters of the United States within 100-year floodplains or other waters of the United States. Utility line substations constructed in waters of the United States within 100-year floodplains must comply with General Condition 26.

One commenter recommended limiting foundations for overhead utility line towers, poles, and anchors to 1 acre or 250 linear foot of stream bed. This commenter also said that losses of waters of the United States resulting from the installation of overhead utility line towers, anchors, and poles should be included with the impacts caused by utility line substations when determining if an activity meets the acreage limits of this NWP.

We do not believe it is necessary to impose an acreage limit on foundations for overhead utility line towers, poles, and anchors, but division engineers can regionally condition this NWP to impose such limits if it is necessary to ensure that the NWP authorizes only activities with minimal adverse effects on the aquatic environment. We do not agree that foundations for overhead utility line towers, poles, and anchors should be included with the acreage limit for utility line substations. For those utility line activities that require notification, district engineers will review PCNs to ensure that these activities result in minimal adverse effects on the aquatic environment.

One commenter objected to the proposed modification to authorize the construction of permanent access roads in waters of the United States. Another commenter asked whether permanent or temporary access roads are authorized by paragraph (iv) of this NWP. One commenter said that the 1 acre limit is too high and recommended a ⅒ acre limit for permanent access roads. Another commenter recommended a 250 linear foot limit on stream bed impacts for the construction of access roads. One commenter asked if the 500 linear foot PCN threshold for permanent access roads constructed above-grade in waters of the United States applies to an entire project or a single crossing.

Permanent access roads are necessary for the operation and maintenance of utility lines and should be authorized by this NWP as part of a single and complete utility line project. Paragraph (iv) of the NWP authorizes only permanent access roads; temporary access roads can be authorized by NWP 33. We have changed the acreage limit for above-grade permanent access roads to ½ acre, to ensure that this NWP authorizes activities with minimal adverse effects on the aquatic environment. We do not agree that it is necessary to impose a 250 linear foot limit on stream bed impacts for access roads, since most of the access roads will be constructed perpendicular to

streams. The 500 linear foot PCN threshold for access roads applies to each single and complete crossing (see 33 CFR 330.2(i)).

One commenter supported the provision requiring access roads to be constructed with pervious surfaces. Two commenters objected to this requirement. One of these commenters noted that it may not be possible to utilize pervious surfaces, because those materials may not be practicable, stable, or safe in certain situations.

We have deleted the last sentence of paragraph (iv) to allow this NWP to authorize permanent access roads constructed with impervious material. However, to ensure that permanent access roads constructed with impervious material result in minimal adverse effects on the aquatic environment, we have added paragraph (g) to the ''Notification'' section to require notification when access roads for utility lines are constructed with impervious materials.

One commenter requested clarification whether this NWP authorizes mechanized landclearing necessary to maintain a previously established utility line right-of-way. One commenter said that this NWP should not authorize mechanized landclearing of forested wetlands, unless the acreage and functions of those wetlands are replaced. Several commenters objected to the requirement for mitigation to offset permanent adverse effects to waters of the United States, such as the conversion of forested wetlands to emergent wetlands in permanently maintained utility line right-of-ways. One commenter objected to the language in the NWP that excludes temporary adverse effects due to filling, flooding, excavation, or drainage from the calculation of permanent losses of waters of the United States. One commenter said that mitigation plans should be required with all PCNs. Two commenters supported the Corps position that it does not regulate groundwater flow. Another commenter said that this NWP should be conditioned to prohibit impacts to groundwater.

This NWP authorizes mechanized landclearing that is necessary to maintain an existing utility line right-of-way, provided the cleared area is kept to the minimum necessary and preconstruction contours are maintained as close as possible. District engineers will require mitigation for the permanent conversion of wetland types to ensure that utility line activities will result in minimal adverse effects on the aquatic environment. Impacts to waters of the United States due to temporary filling, flooding, excavation, or drainage should not be considered as permanent losses, because this NWP requires the restoration of temporarily affected waters of the United States. We do not agree that it is necessary to require the submission of mitigation plans with all PCNs, because compensatory mitigation is not required for all utility line activities. We maintain our position that we do not regulate groundwater flows, but district engineers may consider adverse effects to groundwater when reviewing PCNs.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. 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 these activities. This NWP is subject to General Condition 25, which restricts its use in designated critical resource waters. For utility line activities resulting in discharges of dredged or fill material into waters of the United States within 100-year floodplains, General Condition 26 requires the permittee to notify the district engineer and demonstrate that the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements. NWP 12 is reissued with the modifications discussed above.

14. Linear Transportation Crossings: In the July 21, 1999, **Federal Register** notice, we proposed to modify NWP 14 to authorize the construction, expansion, modification, or improvement of linear transportation crossings, with a higher acreage limit for public linear transportation crossings constructed in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters.

Two commenters said that the proposed modification of NWP 14 will authorize activities with more than minimal adverse effects on aquatic environment. Two commenters said that this NWP should have the same terms and conditions as NWPs 41 and 43 because these NWPs authorize similar activities.

The terms and conditions of this NWP will ensure that only activities with minimal adverse effects on the aquatic environment will be authorized. Most activities authorized by this NWP require notification to the district engineer, which will allow case-by-case review of proposed NWP 14 activities. NWPs 14, 41, and 43 authorize distinctly different activities and should not contain the same terms. However, these NWPs can be combined to authorize a single and complete project, provided the activity complies with General Condition 15.

One commenter supported limiting the modification of this NWP to the authorization of linear transportation crossings. Another commenter said that this NWP should not authorize new linear transportation crossings. A commenter stated that the maintenance of road crossings should be exempt from permit requirements and that NWP 14 should be needed only for the construction of new crossings. One commenter indicated that this NWP should be limited to the construction of span bridges and should not authorize culverted crossings. A commenter said that the NWP should authorize integral features associated with the linear transportation crossing. One commenter objected to the proposed modification, stating that it should not authorize the expansion of airport runways. Two commenters said that the term ''public-use airport'' should be used when describing airport runways that are to be used by the general public and considered as public transportation crossings.

We have not changed the categories of authorized activities from the proposed modification of NWP 14 published in the July 21, 1999, **Federal Register** notice. Some road crossing maintenance activities may qualify for the Section 404(f) exemption and not require a DA permit. Maintenance activities that require changes in the configuration or design of the linear transportation crossing are authorized by this NWP, provided the work meets the terms and conditions of the NWP and results in minimal adverse effects on the aquatic environment. We do not agree that this NWP should be limited to span bridges. Culverts and fords can be used to construct linear transportation crossings that have minimal adverse effects on the aquatic environment. Features that are an integral part of the linear transportation crossing, such as interchanges, rail spurs, stormwater detention basins, and water quality enhancement measures are authorized by this NWP. However, this NWP can be combined with other NWPs to authorize a single and complete project provided the activity complies with the requirements of General Condition 15. We maintain our position that this NWP should authorize the expansion of airport runways. We do not agree that it is necessary to incorporate the term ''public-use airport'' in the text of the NWP. District engineers will determine on a case-by-case basis whether the

construction of a linear transportation crossing for an airport is a public or private activity.

Several commenters objected to the differentiation between public and private linear transportation crossings for the acreage limits of the proposed modification of this NWP. Two commenters agreed that public linear transportation crossings should have higher acreage limits under this NWP. One commenter requested clearer definitions of the terms ''public'' and ''private'' as used in the context of this NWP. This commenter asked if the determination whether a particular activity is public or private depends upon the users of the linear transportation crossing or the project proponent. For example, if a private developer is required to build a road that will be used by the general public as a condition of subdivision approval, would that road be considered a public or private road for the purposes of this NWP?

We maintain our position that public linear transportation crossings should have a higher acreage limit because they fulfill a larger proportion of public interest factors and the government agencies that typically sponsor and build these projects have the resources necessary to ensure that these projects have minimal adverse effects on the aquatic environment. Public transportation projects often require detailed planning processes to document compliance with the National Environmental Policy Act, Section 404 of the Clean Water Act, and other applicable laws. As a result, we have decided that it is appropriate to impose a higher acreage limit for public linear transportation projects in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters.

Public linear transportation crossings are available for use by the general public. Private linear transportation crossings are restricted to use by an individual or a specific group of individuals. The users of the crossing determine whether the crossing is public or private, not the builder of the transportation crossing. Public roads that are constructed as a condition of subdivision approval and will be used by the general public are considered public linear transportation crossings for the purposes of this NWP.

Many commenters recommended a 2 acre limit for public linear transportation crossings. One commenter suggested a 3 acre limit. Two commenters said that the 1 acre limit for public linear transportation crossings is too low. Several commenters stated that this NWP should have a ⅓ acre limit. One commenter said that the length of fill should not exceed 200 feet and another commenter remarked that the 200 foot restriction for fills should be removed from the NWP. Two commenters recommended replacing the 200 foot limit with a 500 foot limit. One commenter suggested a 500 linear foot limit for stream bed impacts.

We have determined that the maximum acreage limit for this NWP should be ½ acre, to ensure that this NWP only authorizes activities with minimal adverse effects on the aquatic environment. For public linear transportation crossings constructed in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, the acreage limit will be ½ acre. For public linear transportation crossings in tidal waters or non-tidal wetlands adjacent to tidal waters, the acreage limit will be ⅓ acre. For private linear transportation crossings, the acreage limit will be ⅓ acre. The 200 foot limit for the length of fill in waters of the United States will be retained for public linear transportation crossings constructed in tidal waters or non-tidal wetlands adjacent to tidal waters and for private linear transportation crossings.

One commenter said that PCNs should be required for all activities authorized by this NWP. Several commenters recommended a PCN threshold of ⅓ acre. Two commenters suggested that PCNs should be required for discharges of dredged or fill material resulting in the loss of greater than 500 linear feet of stream bed. Three commenters said that notification should not be required for all discharges into special aquatic sites. One commenter requested clarification concerning when a PCN is required for discharges into waters of the United States that are not special aquatic sites.

We have modified this NWP to require notification for discharges of dredged or fill material resulting in the loss of greater than 1/10 acre of waters of the United States. We are retaining the notification requirement for all discharges of dredged or fill material into special aquatic sites. If the proposed work does not involve discharges of dredged or fill material into special aquatic sites, the prospective permittee is required to notify the district engineer if the proposed work will result in the loss of greater than 1/10 acre of waters of the United States.

One commenter asked if the acreage limits for this NWP apply only to permanent losses of waters of the United States. Three commenters requested clarification whether the requirement for a mitigation proposal in paragraph (c) applies to the mitigation process (i.e., avoidance, minimization, and compensation) or only to compensatory mitigation. One commenter said that there should be an acreage threshold for the requirements of paragraph (c). One commenter said that mitigation should be required for all impacts to waters of the United States and another commenter stated that mitigation should be required for discharges resulting in the loss of greater than 1 acre of waters of the United States.

In accordance with the definition of the term ''loss of waters of the United States'' in the ''Definitions'' section of the NWPs, the acreage limit applies only to permanent losses of waters of the United States. We have inserted the word ''compensatory'' before the phrase word ''mitigation proposal'' in paragraph (c) to clarify that the prospective permittee must submit a compensatory mitigation proposal with the PCN. The requirement for a compensatory mitigation proposal applies only to those activities that require notification. District engineers can determine, on a case-by-case basis, that compensatory mitigation is not necessary to offset losses of waters of the United States because the work, without compensatory mitigation, will result in minimal adverse effects on the aquatic environment. We have also inserted the phrase ''of waters of the United States'' after the term ''temporary losses'' in paragraph (c) to clarify that the required statement must address temporary losses of waters of the United States.

One commenter suggested that notification should be required if NWP 14 was previously used to authorize a road crossing on the same waterbody. Another commenter objected to considering each crossing of a separate waterbody as a distinct single and complete project. One commenter said that the second sentence of paragraph (h) should be deleted because it contradicts the definition of the term ''single and complete project.''

Since notification is required for all discharges of dredged or fill material into special aquatic sites and discharges resulting in the loss of greater than 1/10 acre of waters of the United States, most activities authorized by this NWP will require notification to the district engineer. If NWP 14 is used more than once by different project proponents to cross a single waterbody, the district engineer will assess the adverse effects on the aquatic environment and determine if those adverse effects are minimal. The second sentence of

paragraph (h) does not contradict the Corps definition of the term ''single and complete project'' at 33 CFR 330.2(i).

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. 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 these activities. This NWP is subject to General Condition 25, which restricts its use in designated critical resource waters. For linear transportation crossings resulting in discharges of dredged or fill material into waters of the United States within 100-year floodplains, General Condition 26 requires the permittee to notify the district engineer and demonstrate that the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements. NWP 14 is reissued with the modifications discussed above.

27. Stream and Wetland Restoration Activities: In the July 21, 1999, **Federal Register** notice, we proposed to modify NWP 27 to authorize the restoration of tidal waters and the restoration and enhancement of non-tidal streams and non-tidal open waters.

One commenter supported the expansion of this NWP to tidal waters. This commenter requested clarification regarding which restoration activities can occur in Section 10 waters and tidal waters. One commenter said that the title of this NWP should be changed to include creation activities. This commenter asked for clarification concerning the types of wetland creation activities that are authorized by this NWP. This commenter said that a Corps permit should be required only if the wetland creation activity includes connecting the wetland creation site to waters of the United States. One commenter said that restoration activities should be limited to restoring areas to their historic state and another commenter stated that NWP 27 should authorize activities that are part of a watershed improvement plan. One commenter said that this NWP should have enforceable conditions and permittees should be required to obtain restoration agreements that are approved by the Corps and the resource agencies. One commenter recommended a 2 acre limit for this NWP. Another commenter recommended that the Corps add a note to this NWP that is similar to the note at the end of NWP 39, which describes open waters of the United States.

This NWP authorizes the restoration of former tidal waters, the enhancement of degraded tidal wetlands, and the creation of tidal wetlands. We do not agree that it is necessary to include the word ''creation'' in the title of this NWP, since it is clearly indicated in the first paragraph of this NWP that wetland creation activities are authorized. This NWP provides authorization for all wetland creation activities, provided those activities comply with the terms and conditions of this NWP. Wetland creation activities that do not involve discharges of dredged or fill material into waters of the United States do not require a Section 404 permit. We do not agree that this NWP should be limited to restoring wetlands to their historic state, because restoration projects result in net improvements to the aquatic environment, even though they may not restore former waters to their historic state. This NWP can authorize the restoration, enhancement, and creation of aquatic habitats that are part of a watershed improvement plan.

We do not agree that it is necessary to execute restoration agreements for all activities authorized by this NWP. Such a provision would likely to discourage landowners from conducting these activities. Since this NWP authorizes activities that benefit the aquatic environment, an acreage limit would be counterproductive. The activities authorized by this NWP either require notification to the district engineer or involve oversight by other Federal agencies, which will ensure that only activities that benefit the aquatic environment are authorized by this NWP. A definition of the term ''open water'' is included in the ''Definitions'' section of the NWPs. Therefore, it is not necessary to include a note in this NWP.

One commenter said that this NWP should authorize the restoration and enhancement of tidal wetlands and streams. Another commenter stated that NWP 27 should authorize restoration, enhancement, and creation activities in drainage ditches, because it is difficult to distinguish between drainage ditches and streams in the mid-West. Several commenters believe that significant stream destruction can be authorized by this NWP and suggested imposing a limit of 250 linear feet on stream impacts.

This NWP authorizes the restoration and enhancement of tidal wetlands, but it does not authorize the restoration of tidal streams, particularly the open water areas of tidal streams. However, the restoration and enhancement of riparian zones next to tidal streams is authorized by this NWP. The restoration of tidal streams is not authorized by NWP 27 because changes in tidal aquatic habitats may result in more than minimal adverse effects on the aquatic environment. The restoration of tidal streams can be authorized by individual permits or regional general permits. This NWP authorizes the restoration and enhancement of non-tidal streams that were channelized to create drainage ditches, including the restoration and enhancement of riparian zones next to those streams. Since the activities authorized by NWP 27 benefit the aquatic environment and most activities require notification or oversight by other agencies, we do not agree that it is necessary to impose a linear limit on stream impacts.

One commenter said that this NWP should authorize only those activities that are conducted or sponsored by Federal or state agencies. Two commenters support the use of this NWP to authorize the restoration of aquatic habitats on public or private land. One commenter stated that the recommendation in paragraph (c) to plant native species on the project site should be modified to require the permittee to use local sources of plant materials.

Limiting this NWP to activities conducted or sponsored by Federal or state agencies would preclude the use of an NWP for many aquatic habitat restoration, enhancement, and creation activities conducted by private individuals that benefit the aquatic environment. We do not agree that permittees should be required to use local sources of plant materials.

One commenter objected to the provision that allows the relocation of aquatic habitats on the project site, stating that this provision is contrary to the avoidance and minimization requirements of the NWPs. Another commenter said that the relocation of aquatic habitats should be authorized only when it is ecologically preferable than avoidance and minimization. This commenter also requested that the NWP contain a provision that requires the relocated waters to be equal or greater in acreage than the waters of the United States filled as a result of the authorized activity. One commenter indicated that the relocation of aquatic habitats on the project site should not be authorized by this NWP.

Allowing the relocation of non-tidal waters on the project site is not contrary to General Condition 19 because NWP 27 requires authorized activities to result in net gains in aquatic resource functions and values. We are retaining

the provision that allows the relocation of non-tidal waters on the project site.

One commenter opposed the use of rip rap for activities authorized by this NWP and another commenter supported the use of rip rap. One commenter said that the removal of accumulated sediments requires a Corps permit only when the work is conducted in navigable waters (i.e., Section 10 waters). Another commenter asked if the removal of accumulated sediments is authorized only once or if this activity can occur for the duration of the project to maintain the restored areas. One commenter stated that this NWP should also authorize the management of the restored, created, or enhanced waters.

Rip rap provides habitat for many species of aquatic organisms and its use should be authorized by this NWP, provided the authorized work results in net gains in aquatic resource functions and values. The Corps regulatory authority regarding excavation activities in waters of the United States is addressed in a previous section of this **Federal Register** notice. The removal of accumulated sediments is authorized by this NWP as often as necessary to maintain the restored areas, although the permittee should endeavor to locate the sediment source and try to stabilize that area to reduce inputs of sediment in the restored waters. This NWP authorizes activities necessary to maintain the restored, enhanced, or created aquatic habitats.

One commenter asked for a definition of the term ''small'' water control structure. This commenter recommended defining a small water control structure as a structure that impounds water to a maximum depth of 2.5 feet or less. This commenter also requested clarification concerning the extent of mechanized landclearing activities that are authorized by this NWP to remove undesirable vegetation. This commenter said that mechanized landclearing should be limited to establishing or maintaining native herbaceous wetland plant species and selected plant species that provide food for wildlife. This commenter recommended limiting mechanized landclearing to vegetation that has a diameter at breast height of 4 inches or less.

We do not believe that it is necessary to specify the dimensions of small water control structures that are authorized by this NWP. For those activities that require notification, the district engineer will determine whether the water control structure is authorized by this NWP. This NWP authorizes mechanized landclearing to remove undesirable vegetation and we recommend replacing the removed vegetation with native plant species. We do not agree that mechanized landclearing activities authorized by this NWP should be limited to vegetated that has a diameter at breast height of 4 inches or less, because the proposed work may require the removal of larger undesirable trees.

One commenter supported the provision that the conversion of natural wetlands to another aquatic use is not authorized by NWP 27. Two commenters stated that the construction of water impoundments should not be authorized by this NWP. One commenter opposed the prohibition against the impoundment of streams or the conversion of forested wetlands to construct waterfowl impoundments, because this commenter believes that these activities benefit the aquatic environment. This commenter supports the term of NWP 27 that prohibits the channelization of streams.

We maintain our position that this NWP should not authorize the impoundment of streams or the conversion of forested wetlands to construct waterfowl impoundments. These activities often result in more than minimal adverse effects to the aquatic environment by destroying or degrading habitat that is utilized by many other species of wildlife. However, open water impoundments can be created from uplands on the project site or by converting a non-tidal emergent or scrub-shrub wetland, provided that wetland type is recreated elsewhere on the project site and there are net gains in aquatic resource functions and values on the project site.

One commenter stated that all reversion activities on agricultural lands should be authorized by NWP 40 and all reversion activities on reclaimed surface coal mined lands should be authorized by NWP 21. Another commenter requested clarification of the provision that authorizes the reversion of wetlands restored, created, or enhanced on prior converted cropland. This commenter also suggested that a five year time limit for reversions should apply to agreements with the U.S. FWS or NRCS that do not have time limits. One commenter stated that the paragraph of NWP 27 that address reversion activities implies that the Corps is asserting jurisdiction over wetlands that were created on prior converted cropland, even though a Corps permit was not required to restore wetlands on that cropland. This commenter said that the Corps cannot consider all created wetlands to be jurisdictional wetlands.

It is more appropriate to authorize reversion activities by NWP 27, since this NWP was likely to be used to authorize the initial wetland restoration, enhancement, or creation activity. This NWP authorizes the reversion of wetlands that were restored, enhanced, or created on prior converted cropland that has not been abandoned, because prior converted croplands are not waters of the United States and a Section 404 permit is not required for discharges of dredged or fill material into prior converted cropland. We do not agree that it is necessary to impose a five year limit for reversions on U.S. FWS or NRCS agreements that do not have time limits. A Section 404 permit is not required to revert wetlands that are not considered waters of the United States.

One commenter supported the note in the proposed modification of NWP 27, which states that compensatory mitigation is not required for activities authorized by this NWP, provided there are net increases in aquatic resource functions and values in the project area. Two commenters said that this NWP should be used to authorize all compensatory mitigation projects. One commenter supports the use of NWP 27 to authorize the establishment of mitigation banks. Many commenters objected to the use of NWP 27 to authorize discharges of dredged or fill material into waters of the United States to construct mitigation banks. Several commenters oppose this provision, stating that mitigation banks should be subject to public comment because they affect local development patterns and land prices. The Corps received comments that it appeared that NWP 27 could be used to authorized mitigation banks that may not have been approved by an Interagency Mitigation Banking Review Team. That was not our intent. NWP 27 can only be used to authorize impacts at a mitigation bank that has been approved under the National Interagency Federal Mitigation Banking Guidance.

We maintain our position that NWP 27 may be used to authorize compensatory mitigation projects, including mitigation banks, that involve activities in waters of the United States, provided the work results in a net increase in aquatic resource functions and values in the project area. The use of NWP 27 to authorize mitigation banks does not override the Federal guidance for the establishment, use, and operation of mitigation banks that was issued in 1995. We do not agree that it is necessary to require individual permits for all mitigation banks, because they benefit the aquatic environment.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that

the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. 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 these activities. This NWP is subject to General Condition 25, which requires notification for activities in designated critical resource waters. NWP 27 is reissued with the modifications discussed above.

39. Residential, Commercial, and Institutional Developments: In the July 21, 1999, **Federal Register** notice, we proposed to issue an NWP to authorize discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction of building pads, building foundations, and attendant features for residential, commercial, and institutional developments.

Many commenters opposed the issuance of the proposed NWP. Two commenters said that this NWP should authorize discharges of dredged or fill material into non-tidal wetlands that are adjacent to tidal waters.

We believe that the scope of waters for this NWP is appropriate to ensure that NWP 39 authorizes only those residential, commercial, and institutional development activities that have minimal adverse effects on the aquatic environment.

One commenter said that this NWP should authorize only single and complete projects that consist of buildings and attached or integral attendant features. This commenter indicated that this NWP should not authorize the expansion of existing developments. Several commenters stated that golf courses should not be authorized by this NWP because they are not necessary for residential developments. Another commenter said that this NWP should authorize discharges of dredged or fill material into waters of the United States for the construction of ski areas, since they are not more environmentally harmful than golf courses.

We maintain our position that this NWP should authorize building pads and attendant features for residential, commercial, and institutional development activities. Attendant features should not be limited to structures or fills that are attached to buildings. This NWP can be used to authorize the expansion of existing developments, provided the adverse effects on the aquatic environment are minimal, individually and cumulatively. Many residential subdivisions are constructed with golf courses as important attendant features. These types of residential communities are marketed as golf course communities. We do not agree that ski areas are attendant features of residential communities in the same manner as golf courses. Ski resorts are usually constructed first, with residences constructed at a later time.

A large number of commenters supported the indexed acreage limit for NWP 39 that was proposed in the July 21, 1999, **Federal Register** notice. Many commenters opposed the proposed indexed acreage limit. Two commenters objected to the indexed acreage limit, stating that minimal impact determinations are based on the size and quality of the aquatic resources, not the size of the parcel owned by the applicant. A commenter remarked that the indexed acreage limit will encourage developers to build larger projects to qualify for higher acreage limits. Three commenters said that an indexed acreage limit based on project size will not ensure minimal adverse effects on the aquatic environment. Numerous commenters stated that the maximum 3 acre limit is too high. Several commenters said that the maximum indexed acreage limit should be 1 acre. Another commenter suggested a maximum indexed acreage limit of 10 acres. Several commenters recommended that the Corps impose a simple 5 acre limit for this NWP. A number of commenters suggested a simple 10 acre limit for discharges of dredged or fill material into ephemeral streams.

To ensure that this NWP authorizes only activities with minimal adverse effects on the aquatic environment, we have decided to impose a simple ½ acre limit on NWP 39. We have not adopted the indexed acreage limit, which will make NWP 39 easier to implement for both the Corps and the regulated public.

Various commenters suggested 100, 200, 250, and 500 linear foot limitations for stream impacts. One commenter said that NWP 39 should have a limit for perennial and intermittent stream bed impacts.

We have added a 300 linear foot limit for stream bed impacts (i.e., filling and excavating perennial and intermittent stream bed) to this NWP at paragraph (b). Division engineers can regionally condition this NWP to decrease the 300 linear foot limit for filling and excavating stream bed.

Several commenters suggested a PCN threshold of ⅓ acre. Another commenter said that PCNs should be required for all NWP 39 activities. One commenter stated that notification should be required for discharges resulting in the loss of greater than 500 linear feet of stream bed. One commenter said that a PCN should be required for discharges of dredged or fill material that result in the permanent loss of open waters, not all discharges into open waters. A commenter requested clarification of the PCN thresholds of NWP 39. One commenter said that notification should not be required for discharges into intermittent streams. One commenter recommended removing the phrase ''including wetlands'' at the end of paragraph (c) of the proposed NWP.

To ensure that district engineers will have the opportunity to review all activities that could result in more than minimal adverse effects on the aquatic environment, we have reduced the PCN threshold to 1/10 acre. We are retaining the requirement for notification for all discharges into open waters. The latter notification requirement applies to both temporary and permanent losses of open waters. Notification is not required for all activities authorized by NWP 39. Discharges of dredged or fill material that result in the loss of 1/10 acre or less of non-tidal wetlands do not require the submission of a PCN to the district engineer, although a post-construction notification is required (see paragraph (i)). We have removed the phrase ''including wetlands'' at the end of paragraph (d) (paragraph (c) of the proposed NWP).

One commenter said that paragraph (d) of the proposed NWP 39 (now designated as paragraph (e)) should not imply that this NWP can be used more than once for the same activity.

Paragraph (e) requires the discharge of dredged or fill material into waters of the United States for the residential, commercial, or institutional development activity to be for a single and complete project. NWP 39 can be used more than once for a single and complete project, provided the combined losses of waters of the United States from all of the phases of that single and complete project do not exceed the ½ acre or the 300 linear foot limits for NWP 39.

One commenter expressed support for the statement of avoidance and minimization that is required by paragraph (e) of the proposed NWP 39 (now designated as paragraph (f)). Two commenters stated that the requirement for a written avoidance and minimization statement is similar to an alternatives analysis and would be cost-prohibitive for many mid-sized activities. Another commenter opposed this requirement because the NWP

regulations already require avoidance and minimization.

We are retaining the requirement for the submission of a written statement explaining how avoidance and minimization of losses of waters of the United States was achieved on the project site. This statement should consist of a brief explanation that discusses how the activity was planned to avoid and minimize losses of waters of the United States on-site to the maximum extent practicable. An exhaustive analysis is not required. The required statement will document compliance with General Condition 19 and will help expedite reviews of PCNs by district engineers.

One commenter supported the mitigation requirements for NWP 39. Two commenters stated that compensatory mitigation should be required for all activities authorized by this NWP. Another commenter said that compensatory mitigation should be required for activities that require notification. Two commenters stated that the provision of paragraph (e) of the proposed NWP 39 (now designated as paragraph (f)) that provides the prospective permittee with the opportunity to submit justification explaining why compensatory mitigation is unnecessary should be deleted because it is inconsistent with the compensatory mitigation requirements of the other NWPs. One commenter recommended including a reference to the mitigation provisions in General Conditions 13 and 19 in paragraph (e) of the proposed NWP 39. Another commenter said that all prospective permittees should be required to submit detailed mitigation plans with the PCN.

As discussed elsewhere in this **Federal Register** notice, compensatory mitigation will normally be required for those activities that require notification to the district engineer, to ensure that the authorized work results in minimal adverse effects on the aquatic environment. If the proposed work will result in minimal adverse effects on the aquatic environment without compensatory mitigation, then the district engineer can issue an NWP verification without special conditions that require compensatory mitigation. Allowing the prospective permittee to submit a statement with the PCN to assert that compensatory mitigation is unnecessary to ensure minimal adverse effects is not contrary to the compensatory mitigation requirements of the NWPs. District engineers can determine that compensatory mitigation is necessary to ensure that the adverse effects on the aquatic environment are minimal, even though the prospective permittee may believe that compensatory mitigation should not be required. We have added text to paragraph (f) that refers to General Condition 19, which contains the mitigation requirements for the NWPs. As discussed in the section addressing the NWP general conditions, we have moved the compensatory mitigation information from paragraph (g) of General Condition 13 to General Condition 19. We maintain our position that the prospective permittee can submit either conceptual or detailed compensatory mitigation plans with the PCN. Detailed compensatory mitigation plans can be required as special conditions of the NWP authorization.

One commenter requested clarification of the phrase ''minimal degradation of water quality,'' which appears in paragraph (g) of the proposed NWP 39, because it could be subject to broad interpretation.

The requirements of paragraph (g) (now designated as paragraph (h)) are intended to reinforce the fact that the NWPs can authorize only activities with minimal adverse effects on the aquatic environment, by focusing on two important aspects of the aquatic environment that can be altered by NWP activities, namely water quality and stream flows.

Two commenters object to the requirements of paragraph (h) of the proposed NWP 39 (now designated as paragraph (i)) because it infers that mitigation is required for activities that do not require notification. Another commenter identified an inconsistency in this paragraph, because it contains a reference to stream impacts and this commenter noted that NWP 39 requires notification for all discharges of dredged or fill material into streams.

Compensatory mitigation is not required for those NWP activities that do not require notification to the district engineer. However, compensatory mitigation to offset losses of waters of the United States may be required by state or local permits, which should be reported to the Corps through the post-construction notification required by paragraph (i). We have removed the references to stream bed impacts from paragraph (i), since the NWP requires notification for all discharges into open waters.

One commenter opposed the provisions of paragraph (i) of the proposed NWP 39 (now designated as paragraph (j)), which requires the permittee to establish and maintain, to the maximum extent practicable, vegetated buffers next to open or streams within the project area. Another commenter said that Federal and state lands should be required to have a management plan instead of deed restrictions for vegetated buffers.

The requirements for vegetated buffers next to open waters are discussed in detail in a previous section of this **Federal Register** notice. There is flexibility in the requirements of paragraph (j). If there are open waters or streams within the project area and it is impractical for the project proponent to establish and maintain vegetated buffers next to those waters, then those vegetated buffers are not required. However, other types of compensatory mitigation may be required to ensure that the work results in minimal adverse effects on the aquatic environment. District engineers will determine, on a case-by-case basis, when it is practicable to establish and maintain vegetated buffers and the appropriate width of those vegetated buffers.

Several commenters opposed paragraph (j) of the proposed NWP 39 (now designated as paragraph (k)), which prohibits stream channelization or stream relocation downstream of the point on the stream where the average annual flow is 1 cubic foot per second (cfs). One commenter supported this provision. Some of these commenters indicated that this provision will be difficult to implement in areas with many ephemeral streams. Other commenters stated that this requirement is difficult to implement because it will be expensive and time consuming to determine where the 1 cfs point occurs. One commenter suggested that stream channelization or relocation activities should be limited to ephemeral streams instead of prohibiting these activities downstream of the 1 cfs point. Another commenter recommended replacing the 1 cfs criterion with either a prohibition against channelizing perennial streams or utilizing drainage area instead of average annual flow. This commenter suggested applying the prohibition to streams with a drainage area greater than 250 acres.

We discussed the identification of the 1 cfs point on streams in a previous section of this **Federal Register** notice. Drainage area, based on regional criteria, can be used to approximate the location of the 1 cfs point on a stream. We believe that the prohibition in paragraph (k) is necessary to ensure that NWP 39 authorizes only activities with minimal adverse effects on the aquatic environment. This provision is consistent with the increased emphasis we are placing on the protection of open and flowing waters.

Several commenters objected to allowing project proponents to construct

their activities in phases. Numerous commenters said that NWP 39 should not be used with NWP 14 because it will authorize activities that exceed the acreage limit of NWP 39.

District engineers will review PCNs for phased construction projects to determine if those activities comply with the terms and conditions of the NWPs. District engineers will also review the PCNs for these activities to ensure that they result in minimal adverse effects on the aquatic environment. General Condition 15 states that when more than one NWP is used to authorize a single and complete project, that single and complete project is subject to the highest specified acreage limit of those NWPs. Therefore, when NWP 14 is combined with NWP 39 to authorize a single and complete project, the total project acreage limit will be ½ acre.

One commenter asked how a project proponent would know if NWP 40, as it was issued in 1996, was used to construct a farm building that was more than 500 feet from a waterbody, if that land was sold to build a residential, commercial, or institutional development on the land. One commenter objected to the restrictions relating the use of NWP 39 and NWP 40 on the same parcel, but another commenter supported these restrictions.

The limitations for the use of NWPs 39 and 40 on the same parcel apply only to those activities authorized by the NWPs issued today, because the previous version of NWP 40 authorized discharges of dredged or fill material into farmed wetlands for the construction of farm buildings. We are retaining the provisions limiting the use of NWPs 39 and 40 on the same parcel.

Several commenters objected to the subdivision provision in NWP 39, stating that it will allow the authorization of activities with more than minimal adverse effects on the aquatic environment. One commenter requested clarification whether the subdivision provision applies to all of the terms of NWP 39 or whether it only addresses the acreage limits for each parcel within the subdivision. This commenter also indicated that if the district engineer grants an exemption pursuant to the subdivision provision, then the landowner can use NWP 26 to authorize the development activity. Another commenter said that only NWP 29 should be used to authorize activities on individual lots within an exempted subdivision.

The notification requirements of the subdivision provision will ensure that NWP 39 will authorize only activities with minimal adverse effects on the aquatic environment. District engineers can assert discretionary authority if the proposed work will result in more than minimal adverse effects on the aquatic environment. The subdivision provision addresses only the acreage limits for the subdivision, or the individual parcels within that subdivision if an exemption has been granted by the district engineer. The subdivision provision does not keep NWP 26 in effect for those activities that have been granted an exemption by the district engineer. If an exemption has been granted, the activities on individual parcels must comply with the terms and conditions of NWP 39. We do not agree that activities on individual lots should be eligible only for NWP 29 if an exemption has been granted, because other types of buildings may be constructed on these lots, with minimal adverse effects on the aquatic environment.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. 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 these activities. This NWP is subject to General Condition 25, which restricts its use in designated critical resource waters. For NWP 39 activities resulting in discharges of dredged or fill material into waters of the United States within 100-year floodplains, General Condition 26 requires the permittee to notify the district engineer and demonstrate that the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements. Furthermore, General Condition 26 prohibits any above-grade fill under NWP 39 within regulatory floodways above the headwaters. NWP 39 is issued with the modifications discussed above.

40. Agricultural Activities: In the July 21, 1999, **Federal Register** notice, we proposed to modify NWP 40 to authorize discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to improve agricultural production.

A large number of commenters expressed opposition to the proposed modification of this NWP. Many commenters said that the use of this NWP will result in substantial losses of wetlands and some commenters stated that the activities authorized by this NWP will result in more than minimal adverse effects on the aquatic environment. Numerous commenters said that the proposed modification of NWP 40 violates the Clean Water Act because it authorizes discharges of dredged or fill material that result in the loss of agricultural wetlands. Some commenters stated that the proposed modification is unnecessary because on-going farming activities are exempt from Section 404 permit requirements. One commenter said that the proposed modification is contrary to other Federal programs, such as the Wetlands Reserve Program and the Conservation Reserve Program. One commenter indicated that the text of this NWP should reference the wetland conservation provisions of the ''Food Security Act of 1985, as amended.''

NRCS will review those activities authorized by paragraph (a) and district engineers will review most activities authorized by paragraphs (b), (c), and (d) to ensure that the activities authorized by this NWP do not result in more than minimal adverse effects on the aquatic environment. The use of this NWP will not result in substantial losses of wetlands. Compensatory mitigation will be required for most activities authorized by this NWP to offset losses of waters of the United States and ensure that the authorized work results in minimal adverse effects on the aquatic environment.

The modification of NWP 40 does not violate the Clean Water Act, because the Clean Water Act does not prohibit discharges of dredged or fill material into waters of the United States to increase agricultural production. The Clean Water Act merely requires a permit for such activities. The conversion of wetlands to increase agricultural production is not exempt from Section 404 permit requirements. The proposed modification of NWP 40 is not contrary to the Wetlands Reserve Program or the Conservation Reserve Program. We have modified the text of the NWP to refer to the ''Food Security Act of 1985, as amended.''

One commenter said that the proposed modification of NWP 40 should authorize activities in non-tidal wetlands adjacent to tidal waters to increase the utility of this NWP in coastal areas. Several commenters stated that this NWP should be restricted to frequently cropped wetlands. Many commenters stated that this NWP should not authorize activities in playas, prairie potholes, and vernal pools. Three commenters indicated that this NWP should not authorize activities within 100 feet of playas, prairie potholes, and vernal pools. Another commenter said that this NWP will authorize the destruction of streams.

We do not agree that this NWP should authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters. In addition, this NWP should not be restricted to frequently cropped wetlands. Division engineers can regionally condition paragraph (b) or (c) of this NWP to prohibit or limit its use in playas, prairie potholes, and vernal pools. This NWP does not authorize the destruction of streams. The only stream impacts authorized by this NWP are discharges of dredged or fill material into waters of the United States to relocate drainage ditches constructed in non-tidal streams.

One commenter stated that a separate NWP should be developed for the installation of drainage ditches or drainage tile. Another commenter asked if this NWP authorizes silvicultural or ranching activities.

This NWP can be used to authorize discharges of dredged or fill material into non-tidal wetlands to construct drainage ditches or install drainage tile, provided the work meets the terms and conditions of this NWP and does not result in the loss of greater than ½ acre of non-tidal waters of the United States. This NWP authorizes silvicultural and ranching activities, because they are considered agricultural activities.

One commenter opposed the proposed indexed acreage limit for this NWP and several commenters supported the use of an indexed acreage limit. One commenter said that the activities authorized by paragraphs (c) and (d) should be included in the indexed acreage limit for this NWP. Two commenters supported the maximum 2 acre limit. Many commenters said that this NWP should have a ¼ acre limit. Other commenters suggested ⅒, ⅓, and 1 acre limits. One commenter supported the 1 acre limit for discharges of dredged or fill material into playas, prairie potholes, and vernal pools. Other commenters said that the acreage limit for discharges into these types of waters should be lower, and one commenter recommended a ⅓ acre limit. Several commenters stated that this NWP should have a linear foot limit for stream impacts. Some commenters suggested a 250 linear foot limit and another commenter recommended a 500 linear foot limit.

Based upon our review of the comments received in response to the July 21, 1999, **Federal Register** notice, we have established a ½ acre limit for discharges of dredged or fill material into non-tidal wetlands (including playas, prairie potholes, and vernal pools) to increase agricultural production. This acreage limit will ensure that the activities authorized by this NWP result in minimal adverse effects on the aquatic environment. We have withdrawn the indexed acreage limit for discharges of dredged or fill material into playas, prairie potholes, and vernal pools to increase agricultural production. We have added a 300 linear foot limit for the relocation of existing drainage ditches constructed in non-tidal streams.

One commenter supported the use of farm tracts to identify single and complete projects under NWP 40. This commenter also said that using farm tracts to define single and complete projects for this NWP is problematic, especially when a farmer leases land to other farms. This commenter stated that landowners would need to request tract numbers and boundary determinations for certain areas, such as range land, where tract numbers or boundary determinations have not yet been designated. Several commenters indicated that the acreage limit for this NWP should be based on farms, not farm tracts. Some of these commenters said that basing the acreage limit on farm tracts will allow more than one use of this NWP for a single agricultural operation. One commenter remarked that the use farm tracts in this NWP does not satisfy the definition of independent utility because the majority of farm tracts are not economically self-supporting.

We maintain our position that single and complete projects for this NWP should be based on farm tracts, not farms. Utilizing farm tracts will make this NWP easier to implement for the regulated public, NRCS personnel, and Corps personnel. In addition, the use of farm tracts will avoid the difficulties associated with the leasing of farm tracts. Data from the Farm Service Agency shows that there is an average of 1.5 farm tracts per farm nationwide. Therefore, the use of farm tracts to determine single and complete projects will not result in substantial losses of wetlands. Since NRCS supports the use of farm tracts for this NWP and the national average is 1.5 farm tracts per farm, we cannot agree with the comment that the majority of farm tracts are not economically self-supporting.

Many commenters objected to the terms of paragraph (a) of the proposed modification of NWP 40, stating that the Corps, not NRCS, should review these activities and determine if they can be authorized by NWP 40. One commenter opposed paragraph (a), stating that it does not provide the district engineer with the opportunity to exercise discretionary authority. Two commenters said that the Clean Water Act does not allow the Corps to delegate portions of the Section 404 permit program to NRCS. One of these commenters also stated that there should be a Memorandum of Agreement between the Corps and NRCS to track the use of this NWP. Two commenters said that NRCS does not have the authority under the Clean Water Act to evaluate the indirect or cumulative impacts of activities authorized by this NWP. One commenter remarked that the provisions of paragraph (a) will increase the workload of District Conservationists at local NRCS offices. Many commenters objected to paragraph (a) because division engineers cannot impose regional conditions on this provision of NWP 40.

These terms and conditions of NWP 40, in conjunction with the requirements of NRCS, will ensure that the activities authorized by paragraph (a) will result in minimal adverse effects on the aquatic environment, without oversight by the Corps. The provisions of paragraph (a) do not delegate the Section 404 program to NRCS. The reporting requirements of subparagraph (a)(5) will allow district engineers to monitor the use of this NWP and assess cumulative adverse effects. The comments we received from NRCS do not indicate that the workload increase imposed on District Conservationists will be unmanageable. To assist in the effective implementation of paragraph (a), division engineers cannot impose regional conditions on this term of NWP 40.

One commenter supported the requirement for USDA program participants to be in compliance with the minimal effects criteria of NRCS. One commenter said that subparagraph (a)(1) of NWP 40 should include the terms ''categorical minimal effects exemption, minimal effect exemptions, and mitigation exemptions,'' which are more accurate than the proposed language. This commenter recommended that the phrase ''if required'' should be included in subparagraph (a)(5) of the proposed modification of NWP 40 because not all activities will require compensatory mitigation. One commenter said that mitigation requirements should be coordinated between NRCS and the Corps to ensure that the mitigation requirements of the Food Security Act and the Clean Water Act are satisfied.

We have modified the text of subparagraph (a)(1) to make it consistent with the terminology utilized in NRCS regulations. We also concur with the third comment in the previous paragraph, and have revised subparagraph (a)(4) accordingly. For

activities authorized by paragraph (a), the Corps will accept the compensatory mitigation requirements of NRCS.

One commenter suggested that NRCS should determine if proposed activities authorized by paragraph (a) will result in unacceptable impact to 100-year floodplains because NRCS must consider impacts to flood storage and flood flowage when determining whether an activity qualifies for a USDA exemption. This commenter also said that if proposed General Condition 27 is not modified to allow NRCS to determine the impacts to 100-year floodplains, then the text of NWP 40 should be revised to include the prohibitions imposed by this general condition.

Since we have modified the proposed General Condition 27 (now designated as General Condition 26) for fills within 100-year floodplains, we have added paragraph (e) to NWP 40. This paragraph states that the permittee must comply with General Condition 26 if the NWP 40 activity is in a 100-year floodplain identified by FEMA's Flood Insurance Rate Maps or FEMA-approved local floodplain maps. We believe that it is adequate to refer the permittee to General Condition 26, instead of incorporating the provisions of this general condition into the text of NWP 40. The Corps, as available, will identify the limits of headwaters for the purposes of General Condition 26.

One commenter said that the PCN threshold for this NWP should be ⅓ acre and another commenter stated that the PCN threshold should be ⅒ acre. A commenter said that the prospective permittee should not be required to disclose past use of NWP 40 with a NWP 40 PCN for additional discharges of dredged or fill material into waters of the United States on the property. Another commenter said that a mitigation plan should be submitted with all NWP 40 PCNs. One commenter said that the phrase ''if required'' should be included in paragraph (b)(5) because not all activities authorized by NWP 40 will require compensatory mitigation. Another commenter objected to paragraph (b) because it contains no provisions for the Corps to verify wetland determinations.

We have adopted a ⅒ acre PCN threshold for activities authorized by paragraph (b) of this NWP. There is no provision in NWP 40 that requires the permittee to notify the Corps of the past use of NWP 40. Subparagraph (b)(4) of NWP 40 requires the submission of a mitigation plan with the PCN. We do not agree with the fourth comment in the previous paragraph, because we are only requiring the submission of a compensatory mitigation proposal with the PCN. District engineers can determine, on a case-by-case basis, that compensatory mitigation is not necessary to ensure that the authorized activity results in minimal adverse effects on the aquatic environment. Verification of wetland determinations and wetland delineations on agricultural land that will remain in agricultural use is the responsibility of NRCS, not the Corps.

One commenter stated that there should be a separate NWP to authorize discharges of dredged or fill material into waters of the United States for the construction of farm buildings. Several commenters objected to this provision, stating that building pads for farm buildings can be constructed outside of waters of the United States. A commenter remarked that the terms for the construction of farm buildings should be the same as the terms for NWP 29. One commenter said that the use of farm buildings constructed near wetlands and streams will contaminate these waters.

We do not agree that a separate NWP for the construction of farm buildings is necessary. We have reduced the acreage limit from 1 acre to ½ acre to ensure that this NWP authorizes discharges of dredged or fill material for the construction of farm buildings that have minimal adverse effects on the aquatic environment. We disagree with the comment that all farm buildings can be constructed outside of wetlands. Farm buildings serve different purposes and are typically larger than single family residences. Therefore, farm buildings should not be subject to the same terms and conditions as NWP 29. The pollution of streams and other waters from agricultural operations are addressed by other Federal, state, and local programs.

Several commenters stated that this NWP should not authorize the relocation of streams or ditches. One commenter said that there should be a limit on the length of ditch that can be relocated, to ensure that the NWP authorizes only activities with minimal adverse effects. Another commenter indicated that the impacts due to ditch relocations should be included in the 2 acre limit for this NWP.

The relocation of drainage ditches is often necessary to increase agricultural production on the farm tract. We have imposed a 300 linear foot limit for the relocation of existing drainage ditches constructed in non-tidal streams. We do not agree that the relocation of drainage ditches constructed in non-tidal waters of the United States should be included in the ½ acre limit of paragraph (a) or (b) because these relocation activities typically do not result in a net loss of aquatic resource functions and values.

One commenter objected to the proposed NWP, stating that it treats USDA program participants and non-participants differently. Another commenter said that the terms and conditions of NWP 40 should not be established to provide equity between developers and agricultural producers, but instead should be based on activities that are similar in nature that have minimal adverse effects on the aquatic environment. One commenter stated that NWP 40 should be subject to the same terms and conditions as NWP 39.

The terms of paragraphs (a) and (b) do not treat USDA program participants and non-participants differently. These two groups are subject to the same acreage limits and mitigation requirements. The only differences between paragraphs (a) and (b) are the agencies reviewing the proposed work and the reporting requirement for USDA program participants. The terms of NWPs 39 and 40 are established to ensure that these NWPs authorize activities with minimal adverse effects on the aquatic environment. Both NWPs 39 and 40 are subject to the ½ acre limit, but different terms and conditions are necessary because these NWPs authorize different types of activities.

Two commenters expressed concern that NWP 40 will be used by land developers to prepare sites for future development by filling wetlands and keep the land in agricultural production for a few years, and then request authorization under NWP 39 for additional discharges of dredged or fill material into waters of the United States to construct a development. One commenter supported the provision proposed in the July 1, 1998, **Federal Register** notice that allowed the use of this NWP each time it was reissued. Another commenter opposed this NWP, indicating that it can be used repeatedly on a single farm over time. One commenter said that discharges of dredged or fill material into waters of the United States for the construction of compensatory mitigation sites should be calculated in the acreage loss of waters of the United States.

NWP 40 contains provisions that prevent land developers from filling wetlands on agricultural land to increase the amount of non-wetland area on the site for future developments. If NWP 40 was used to authorize discharges of dredged or fill material into non-tidal waters on the farm tract to increase agricultural production and the current landowner wants to use NWP 39 to authorize the construction of

a residential, commercial, or institutional development, the combined acreage loss of waters of the United States authorized by NWPs 39 and 40 cannot exceed ½ acre. NWP 40 cannot be used repeatedly on a single farm tract to exceed the ½ acre limit for a single and complete project. Discharges of dredged or fill material into waters of the United States to construct compensatory mitigation sites should not be calculated in the acreage loss of waters of the United States.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. 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 these activities. This NWP is subject to General Condition 25, which restricts its use in designated critical resource waters. For NWP 40 activities resulting in discharges of dredged or fill material into waters of the United States within 100-year floodplains, General Condition 26 requires the permittee to notify the district engineer and demonstrate that the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements. Furthermore, General Condition 26 prohibits any above-grade fill under NWP 40 within regulatory floodways above the headwaters. NWP 40 is reissued with the modifications discussed above.

41. Reshaping Existing Drainage Ditches: In the July 21, 1999, **Federal Register** notice, we proposed to issue an NWP to authorize discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-section of drainage ditches constructed in these waters.

Two commenters opposed the issuance of this NWP if certain channelized streams are considered to be drainage ditches. One commenter said that these activities should be reviewed through the individual permit process. Another commenter stated that this NWP will be abused by landowners who want to reshape the banks of their drainage ditches under the guise of improving water quality.

The maintenance of drainage ditches that were constructed by channelizing streams may be eligible for the Section 404(f) exemption. The purpose of NWP 41 is to provide a general permit that authorizes the reshaping of existing serviceable drainage ditches constructed in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, in a manner that benefits the aquatic environment. This NWP does not authorize reshaping of drainage ditches that increases the area drained by the ditch. We do not agree that this NWP will be abused by landowners, because of the stringent terms of the NWP. Division engineers can revoke this NWP in areas where the reshaping of drainage ditches constructed in non-tidal waters of the United States results in more than minimal adverse effects on the aquatic environment, individually or cumulatively.

Several commenters said that NWP 41 is unnecessary, because these activities are authorized by NWP 3 or are exempt from Section 404 permit requirements. A commenter stated that the discussion of the Section 404(f) exemption for ditch maintenance in the July 21, 1999, **Federal Register** notice is inaccurate because it did not include the recapture provision of Section 404(f)(2). Another commenter indicated that if the intent of NWP 41 is to improve water quality, then these activities should be authorized by NWP 27.

NWP 3 does not authorize the reshaping of drainage ditches constructed in waters of the United States. Maintenance activities explicitly identified in Section 404(f) are exempt from permit requirements, subject to the recapture provisions of Section 404(f)(2). NWP 27 authorizes the restoration, enhancement, and creation of aquatic habitats, not the reshaping of drainage ditches.

One commenter said that this NWP should apply to all man-made ditches, whether or not they are currently serviceable, as long as the cropland draining to the ditch has not been abandoned. A commenter requested criteria that will be used to determine whether a particular ditch is currently serviceable. Another commenter recommended expanding the scope of this NWP to authorize ditch relocation. One commenter said that sidecasting into waters of the United States should not be authorized by this NWP. Another commenter suggested that this NWP should not authorize activities that involve the installation of concrete lining or other hard structures.

This NWP applies only to the reshaping of existing serviceable drainage ditches constructed in waters of the United States. It does not authorize the reconstruction of drainage ditches. We have replaced the word ''existing'' with the word ''currently'' in the first sentence of this NWP. For the purposes of NWP 41, the definition of the term ''currently serviceable'' is the same as the definition provided in NWP 3. This NWP does not authorize ditch relocation, because relocating a drainage ditch is likely to result in draining of areas that were not previously drained. We have modified NPW 41 to allow for the temporary sidecasting of material into waters of the United States. Material may be temporarily sidecast (up to three months) into waters of the United States, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The District Engineer may extend the period of temporary sidecasting not to exceed a total of 180 days, where appropriate. This NWP does not authorize discharges of dredged or fill material into waters of the United States to line drainage ditches with concrete or other hard structures.

Several commenters said that the scope of waters for this NWP should be expanded to include tidally influenced drainage ditches. One commenter stated that the text of this NWP is misleading because the Corps has no legal authority to regulate the reshaping of drainage ditches landward of the ordinary high water mark if there is no wetland hydrology. Another commenter recommended adding a provision to NWP 41 which states that the maintenance of existing drainage ditches to their original dimensions and configuration is exempt from Section 404 permit requirements.

We do not agree that this NWP should be expanded to authorize discharges of dredged or fill material into tidal waters of the United States or non-tidal wetlands adjacent to tidal waters. The text of NWP 41 clearly states that it authorizes discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. If the ditch reshaping activity does not involve discharges of dredged or fill material into waters of the United States, including wetlands, then the project proponent does not need a Section 404 permit. The text of this NWP includes a reference to the Corps regulations that address the Section 404(f) exemptions.

One commenter believes that the water quality benefits of the activities authorized by this NWP are doubtful and that the use of this NWP will increase the drainage of wetlands. Another commenter stated that the activities authorized by this NWP will prevent the development of woody vegetated buffers, which contradicts the goal of no net loss of wetlands and discourage stream restoration. Three commenters said that reshaping a drainage ditch will increase its

hydraulic capacity. One of these commenters indicated that the project proponent should be required to demonstrate that the proposed work will not increase the area drained by the ditch. Two commenters indicated that compensatory mitigation should be required for the activities authorized by this NWP because drainage ditches drain wetlands.

Drainage ditches can be reshaped to improve water quality, without increasing the area drained by those ditches. This NWP does not authorize ditch reshaping activities that expand the area drained by the ditch. The removal of woody vegetation next to the stream is often necessary to maintain or reshape the drainage ditch. We do not agree that it is necessary to require project proponents to provide documentation that demonstrates that the activity will not increase the area drained by the ditch because the work is limited to restoring the ditch to its original capacity. Compensatory mitigation should not be required for activities authorized by this NWP, because it does not authorize the drainage of additional wetlands.

Three commenters recommended a 500 linear foot limit on this NWP and one commenter suggested a 250 linear foot limit. One commenter said that there should not be a limit on this NWP if the activity does not involve sidecasting into waters of the United States. One commenter stated that the PCN threshold should be reduced to 250 linear feet. Two commenters indicated that a delineation of special aquatic sites should not be required for those activities that require notification.

We do not agree that a linear foot limit should be placed on this NWP, because it authorizes activities that typically benefit the aquatic environment. We are retaining NWP 41 on the list of NWPs that require the submission of a delineation of special aquatic sites with the PCN.

One commenter said that NWP 41 should be conditioned to require permittees to obtain certification for best management practices from NRCS. Another commenter stated that this NWP should include a condition prohibiting the construction of berms and levees that would impede overbank flow. One commenter said that this NWP should authorize the reconfiguration of improperly designed drainage ditches, with the submission of a notification that documents the need for reconfiguration, to minimize adverse effects due to headcutting and increases in sediment loads.

We do not agree that it is necessary to require permittees to obtain certification for best management practices from NRCS. General Condition 21 states that NWP activities cannot permanently restrict or impede the passage of normal or expected high flows. Temporarily sidecast material should be placed so that it does not impede overbank flows. No berms, levees, or other similar structures are authorized by NWP 41. The reconfiguration of improperly designed drainage ditches can be authorized by individual permits, regional general permits, or other NWPs.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. 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 these activities. NWP 41 is issued with the modifications discussed above.

42. Recreational Facilities: In the July 21, 1999, **Federal Register** notice, we proposed to issue an NWP to authorize discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of recreational facilities that are integrated into the existing landscape.

One commenter said that this NWP will authorize activities with more than minimal adverse effects on the aquatic environment and induce development of neighboring areas. One commenter stated that the word ''passive'' should be retained in the title of the NWP. One commenter noted that the word ''of'' should be replaced with the word ''or'' after the word ''construction'' in the first sentence. Two commenters said that this NWP should authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

The terms and conditions of this NWP, as well as the ability of division and district engineers to place regional and case-specific conditions on this NWP, will ensure that this NWP authorizes only activities with minimal adverse effects on the aquatic environment. We will not restore the word ''passive'' to the title of this NWP because it is an ambiguous term that does not provide any value to the NWP. We have replaced the word ''of'' with the word ''or'' in the first sentence of the NWP. The scope of applicable waters for this NWP is limited to ''non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters'' to ensure that this NWP authorizes only activities with minimal adverse effects on the aquatic environment.

Many commenters objected to including the construction and expansion of golf courses and the expansion of ski areas in the list of activities authorized by this NWP. One commenter stated that the improvement of ski areas should be authorized by this NWP, in addition to the expansion of these facilities. One commenter said that other types of recreational facilities should be authorized by this NWP if they do not result in substantial amounts of grading and filling and the adverse effects on the aquatic environment are minimal. This commenter indicated that ball fields should be authorized by this NWP. Another commenter said that impervious surfaces should be authorized in areas where they are required for stabilization or meeting access requirements for disabled persons. One commenter stated that the term ''substantial'' needs to be defined so that it is consistently implemented by district engineers.

As discussed in the July 21, 1999, **Federal Register** notice, NWP 42 authorizes the construction and expansion of golf courses and the expansion of ski areas that are integrated into the natural landscape. These types of recreational facilities can be constructed without substantial amounts of grading and filling. NWP 42 does not authorize the construction of new ski areas, but this NWP may authorize discharges of dredged or fill material into waters of the United States to improve existing ski areas, provided the activity meets the terms and conditions of this NWP.

This NWP does not authorize the construction or expansion of playing fields because these activities typically require substantial grading and filling to create level playing surfaces, as well as the installation of drainage systems. The construction or expansion of basketball courts, tennis courts, racetracks, stadiums, and areas involve the construction of substantial amounts of impervious surfaces and therefore are not authorized by this NWP. Recreational facilities not authorized by this NWP may be authorized by other NWPs, regional general permits, or individual permits.

This NWP does not authorize discharges of dredged or fill material into waters of the United States to stabilize areas within the recreational facility. NWP 13 may authorize bank stabilization activities associated with the recreational facility. Small amounts of impervious surface may be constructed in recreational facilities

authorized by this NWP to satisfy access requirements for disabled persons. District engineers will determine on a case-by-case basis whether the construction or expansion of a proposed recreational facility will result in substantial changes in preconstruction grades.

Two commenters supported the proposed 1 acre limit. Several commenters stated that the proposed acreage limit is too large. One commenter said that the acreage limit should be ½ acre and two commenters suggested a ⅓ acre limit. A commenter recommended a 100 linear foot limit for stream bed impacts and two commenters suggested a 250 linear foot limit for stream bed impacts.

To ensure that this NWP authorizes activities with minimal adverse effects on the aquatic environment, we have reduced the acreage limit to ½ acre and added a 300 linear foot limit for filling or excavating perennial or intermittent stream beds.

Two commenters said that this NWP should have the same PCN thresholds as NWP 39. Two commenters recommended a PCN threshold of ⅓ acre. One commenter supported the 500 linear foot PCN threshold for perennial and intermittent stream bed impacts. Three commenters stated that the PCN threshold for stream bed impacts should be reduced to 250 linear feet.

We have reduced the PCN threshold to 1/10 acre. Since we have added a 300 linear foot limit for stream bed impacts, we have deleted the 500 linear foot PCN threshold for perennial and intermittent stream bed impacts.

One commenter said that the phrases ''has low impact on the aquatic environment'' and ''consists primarily of open space that'' should be deleted from NWP 42 because they are confusing and will cause inconsistent implementation of this NWP. Several commenters indicated that a compensatory mitigation proposal to offset losses of waters of the United States should be required for all activities that require notification.

We have deleted these phrases from the text of NWP 42. We do not agree that it is necessary to require a compensatory mitigation proposal with the PCN, because of the types of recreational facilities authorized by this NWP.

Several commenters said that this NWP should not authorize discharges of dredged or fill material into wetlands for the construction of stables and sanitary facilities. One commenter stated that support facilities should be authorized by NWP 39. Another commenter remarked that support facilities should be constructed in uplands. One commenter said that restaurants and hotels should be authorized by this NWP because these facilities support the recreational facility. One commenter requested a definition of the term ''small support facilities.'' A commenter stated that the phrase ''reduced fertilizer use'' should be replaced with the term ''appropriate fertilizer use'' in the last paragraph of this NWP.

We maintain our position that this NWP should authorize small support facilities necessary for the operation of the recreational facility. Permittees are required to comply with General Condition 19, which states that the project proponent must avoid and minimize activities in waters of the United States on-site to the maximum extent practicable. We maintain our position that restaurants and hotels should not be authorized by this NWP. Restaurants and hotels can be authorized by other NWPs, such as NWP 39, regional general permits, or individual permits. District engineers will determine, for those activities that require notification, what constitutes a ''small'' support facility that is authorized by this NWP. We believe that the term ''reduced fertilizer use'' is more appropriate because the intent is to encourage permittees to utilize less fertilizer, which will reduce fertilizer loads on neighboring waterbodies.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. 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 these activities. This NWP is subject to General Condition 25, which restricts its use in designated critical resource waters. For NWP 42 activities resulting in discharges of dredged or fill material into waters of the United States within 100-year floodplains, General Condition 26 requires the permittee to notify the district engineer and demonstrate that the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements. NWP 42 is issued with the modifications discussed above.

43. Stormwater Management Facilities: In the July 21, 1999, **Federal Register** notice, we proposed to issue an NWP to authorize discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction and maintenance of stormwater management (SWM) facilities.

Several commenters supported the issuance of this NWP and one commenter agreed that the construction of SWM facilities in wetlands is often necessary and that these SWM facilities are often more effective than SWM facilities constructed in uplands. Several commenters objected to the issuance of an NWP that authorizes the construction of SWM facilities in wetlands and other commenters opposed the issuance of a separate NWP for SWM facilities. One commenter said that this NWP should authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

We maintain the position discussed in the July 21, 1999, **Federal Register** notice that the construction of SWM facilities in waters of the United States is often necessary and may provide more protection to the aquatic environment. SWM facilities located in waters of the United States are often more effective than SWM facilities constructed in uplands, because storm runoff flows to streams and wetlands, making these areas more effective at trapping sediments and pollutants than upland areas. The local aquatic environment benefits from more efficient SWM facilities. Low value wetlands and low value ephemeral and intermittent streams may be the best places to locate SWM facilities, to reduce adverse effects to higher value waters by attenuating storm flows and preventing pollutants from further degrading those areas. Division engineers can regionally condition this NWP to prohibit its use in high value waters. For those activities that require notification, district engineers can add case-specific conditions to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority and require an individual permit for activities with more than minimal adverse effects. We do not agree that the scope of applicable waters for this NWP should be expanded to non-tidal wetlands adjacent to tidal waters, because this restriction is necessary to ensure that NWP 43 authorizes activities with minimal adverse effects on the aquatic environment.

Two commenters asked whether NWP 43 authorizes the construction of dams and detention basins to build new SWM facilities. Several commenters said that this NWP does not clearly identify the extent of the Corps regulatory jurisdiction concerning stormwater retention and detention facilities. One of these commenters stated that SWM

facilities constructed in uplands that contain wetland vegetation should not be considered jurisdictional wetlands. One commenter said that 40 CFR 131.10 prohibits states from designating waste transport or waste assimilation uses for any water of the United States. This commenter indicated that NWP 43 is contrary to this regulation because it authorizes the construction of SWM facilities in waters of the United States.

This NWP authorizes the construction of dams and detention basins for SWM facilities. However, this NWP does not authorize discharges of dredged or fill material into perennial streams for the construction of new SWM facilities. SWM facilities that were constructed in uplands and have not been abandoned are generally not considered waters of the United States, but district engineers reserve the right to determine on a case-by-case basis whether these areas are waters of the United States (see 51 FR 41217). The provisions of 40 CFR 131.10 do not prohibit discharges of dredged or fill material into waters of the United States for the construction or maintenance of SWM facilities. Stormwater is not categorized as waste.

One commenter supported the proposed 2 acre limit and several commenters recommended increasing the acreage limit to 3 acres for SWM facilities constructed by local governments or local flood control agencies. One commenter said that the 2 acre limit is too low but another commenter indicated that this acreage limit is too high. One commenter suggested a 1 acre limit for NWP 43 and another commenter recommended a ¼ acre limit. One commenter said that this NWP should have a 100 linear foot limit for stream bed impacts.

We have reduce the acreage limit for this NWP to ½ acre, to ensure that NWP 43 authorizes activities with minimal adverse effects on the aquatic environment. In addition, we have added a 300 linear foot limit for filling or excavating perennial or intermittent stream beds.

One commenter supported paragraph (b) of the proposed NWP (now designated as paragraph (c)), which states that NWP 43 does not authorize discharges of dredged or fill material into perennial streams for the construction of new SWM facilities. One commenter said that this NWP should not authorize discharges of dredged or fill material into any stream with perennial stream segments, because some arid regions of the country have perennial streams that occasionally become dry along certain reaches. Two commenters stated that this NWP should not authorize any discharges of dredged or fill material into streams to construct SWM facilities. One of these commenters expressed concern that the NWP would authorize activities with more than minimal cumulative adverse effects in urban areas and said that the conversion of streams to SWM ponds results in the creation of pollution sinks for urban storm runoff. One commenter said that this NWP should contain a condition that requires the maintenance of stream base flows.

We have retained this paragraph in NWP 43. In arid regions of the country, division engineers can regionally condition this NWP to prohibit or restrict its use in streams with intermittent or ephemeral stream segments, if those streams are high value waters. We do not agree that the prohibition in paragraph (c) should be extended to intermittent or ephemeral streams because we believe that, under the terms and conditions of this NWP, the construction of SWM facilities in these waters will result in minimal adverse effects on the aquatic environment. District engineers will monitor the use of this NWP to ensure that it does not authorize activities with more than minimal adverse effects on the aquatic environment, individually and cumulatively. Compliance with General Condition 21 will ensure that surface water flows will be maintained to the maximum extent practicable.

Two commenters objected to the proposed NWP because it does not contain limits for ephemeral stream impacts. These commenters suggested that this NWP should contain language stating that notification to the district engineer is not required for the construction or maintenance of SWM facilities constructed in ephemeral streams. These commenters also recommended that the text of this NWP explicitly state that SWM facilities that were originally constructed in ephemeral streams that have become perennial or intermittent streams are exempt from any permit requirements.

The ½ acre limit for this NWP adequately limits impacts to ephemeral streams. Division engineers can regionally condition this NWP to impose limits on discharges of dredged or fill material resulting in the loss of ephemeral stream bed, if there are specific concerns for the aquatic environment in those regions. Any discharges of dredged or fill material into waters of the United States associated with SWM facilities constructed in ephemeral streams that are considered waters of the United States requires a Corps permit.

Two commenters said that the ¼ acre PCN threshold is too small and two other commenters suggested a ⅓ acre PCN threshold. One commenter stated that the PCN threshold should be lower.

We have lowered the PCN threshold for this NWP to ⅒ acre, to ensure that district engineers have the opportunity to review all activities that have the potential to result in more than minimal adverse effects on the aquatic environment. We have removed the PCN threshold for activities causing the loss of greater than 500 linear feet of intermittent stream bed, since we have added a 300 linear foot limit for stream bed impacts.

One commenter asked if the PCN threshold applies to wetlands that were created as a result of the impoundment of stormwater. This commenter expressed concern that permittees would be required to mitigate for impacts to wetlands created by the construction of an SWM facility. This commenter said that these wetlands are often removed during routine maintenance activities and that requiring compensatory mitigation for the losses of these created wetlands would adversely affect the ability of permittees to effectively restore SWM facilities to their original design capacities.

Notification to the district engineer is required for discharges of dredged or fill material that result in the loss of greater than ⅒ acre of waters of the United States. District engineers will determine the appropriate amount of compensatory mitigation necessary to offset losses of waters of the United States to ensure that the adverse effects on the aquatic environment are minimal. Subparagraph (d)(3) clearly states that compensatory mitigation is not required for maintenance activities in designated maintenance areas of existing SWM facilities.

One commenter recommended the removal of subparagraph (c)(1) of the proposed NWP (now designated as subparagraph (d)(1)) because the maintenance of SWM facilities occurs on an unpredictable, episodic basis which is not conducive to a maintenance plan. Another commenter said that a compensatory mitigation proposal should not be required for all activities that require notification because the construction of some SWM facilities may result in the establishment of diverse, mature wetlands in areas that are not disturbed for extended amounts of time. This commenter suggested that the district engineer should have the ability to determine whether or not compensatory mitigation should be required for maintenance activities authorized by this NWP.

Subparagraph (d)(1) does not require maintenance on a timed schedule. The maintenance plan can include a statement that maintenance activities will be conducted as needed, to ensure that the SWM facility continues to function effectively. The maintenance plan should also identify the designated maintenance areas of the SWM facility. Subparagraph (d)(3) requires only the submission of a compensatory mitigation proposal with the PCN. Based on the review of a PCN, a district engineer can determine that compensatory mitigation is unnecessary because the adverse effects on the aquatic environment are minimal without compensatory mitigation or that they will be mitigated as wetlands are established in the SWM facility.

Two commenters said that the reference to ''watershed protection techniques'' should be deleted from paragraph (e) of the proposed NWP (now designated as paragraph (f)) or the term should be defined for the purposes of NWP 43. One commenter stated that the maintenance of existing SWM facilities should be exempted from the requirements of this paragraph. One commenter said that it is inappropriate for the Corps to characterize bioengineering methods as best management practices. This commenter indicated that bioengineering methods should be considered as mitigation and that the permittee should be given compensatory mitigation credits for utilizing bioengineering methods. One commenter indicated that there is a contradiction in the July 21, 1999, **Federal Register** notice because this notice states the district engineer can allow the establishment of mitigation credits in SWM facilities constructed with bioengineering techniques, but mitigation credits cannot be established in regularly maintained areas in SWM facilities. This commenter said that that mitigation credits should be limited to non-maintenance areas and that mitigation credits should not be allowed for the establishment of aquatic benches.

We have retained the phrase ''watershed protection techniques'' in paragraph (f) because these techniques are an important mechanism to ensure that NWP 43 authorizes activities with minimal adverse effects on the aquatic environment. We will not define this term because appropriate watershed protection techniques may vary in different areas of the country. For example, in many arid regions of the country it may be impractical to establish and maintain vegetated buffers next to streams. In general, the requirements of paragraph (f) apply to the construction of new SWM facilities, but best management practices should be used when conducting maintenance activities. Bioengineering techniques can be used to mitigate adverse effects on surface water quality. These techniques should be considered as best management practices in accordance with the definition in the ''Definitions'' section of the NWPs. District engineers can grant compensatory mitigation credits for bioengineering methods if those methods result in net gains in aquatic resource functions and values and are not located in areas within SWM facilities that require regular maintenance. Aquatic benches can provide compensatory mitigation, if those areas are not in designated maintenance areas of SWM facilities.

One commenter said the NWP 43 will authorize the construction of more than one stormwater management facility in a single watershed. This commenter stated that paragraph (e) of the proposed NWP (now designated as paragraph (f)) should contain a provision that requires the consideration of other SWM facilities located in the same watershed.

NWP 43 can be used to authorize more than one SWM facility in a particular watershed, provided each of those SWM facilities constitutes a separate single and complete project with independent utility. District engineers will monitor the use of this NWP to ensure that it does not authorize activities with more than minimal adverse effects on the aquatic environment, individually or cumulatively.

Several commenters said that maintenance of SWM facilities should be considered exempt from Corps permit requirements. One commenter stated that the requirements of paragraph (f) of the proposed NWP (now designated as paragraph (g)) are unnecessary because this activity can be authorized by NWP 3.

The maintenance of SWM facilities constructed in Section 404 waters is not exempt from Corps permit requirements. However, most maintenance does not require a Corps permit because the activity only involves incidental fallback of dredged material. NWP 43 authorizes the maintenance of existing SWM facilities that involves discharges of dredged or fill material into waters of the United States. NWP 43 does not authorize maintenance activities in Section 10 waters.

One commenter expressed concern about the provision in paragraph (g) of the proposed NWP (now designated as paragraph (h)). This commenter said that a developer could fill up to 3 acres of waters of the United States under NWP 39 and the local government could build an SWM facility for the development under NWP 43, which would exceed the total acreage for a single and complete project.

We believe that most SWM facilities constructed for a particular development will be built by the developer, not the local government. The developer may turn over the SWM facility to the local government for maintenance, but the construction of the SWM facility will be reviewed with the construction of the development. If NWP 39s and 43 are combined to authorize a single and complete project, the activity is subject to General Condition 15. There may be instances where a local government will construct a regional SWM facility that serves more than one development. These regional SWM facilities are considered to have independent utility from the serviced developments and may be authorized by NWP 43.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. 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 these activities. This NWP is subject to General Condition 25, which restricts its use in designated critical resource waters. For NWP 43 activities resulting in discharges of dredged or fill material into waters of the United States within 100-year floodplains, General Condition 26 requires the permittee to notify the district engineer and demonstrate that the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements. NWP 43 is issued with the modifications discussed above.

44. Mining Activities: In the July 21, 1999, **Federal Register** notice, we proposed to issue an NWP to authorize discharges of dredged or fill material into certain types of non-tidal waters of the United States for aggregate and hard rock/mineral mining activities.

A large number of commenters opposed the issuance of NWP 44. Numerous commenters said that NWP 44 is so restrictive that it will be of little use to the mining industry. These commenters also indicated that mining companies will have little incentive to design their projects to meet the terms and conditions of NWP 44 and that these companies will apply for individual permits. Many commenters

stated that the activities authorized by NWP 44 will result in more than minimal cumulative adverse effects on the aquatic environment, individually and cumulatively. Several commenters said that the Corps should issue separate NWPs for aggregate and hard rock/mineral mining activities. One of these commenters stated that aggregate and hard rock/mineral mining activities are distinct forms of mining and that issuing one NWP to authorize both of these activities violates the similar in nature requirement of Section 404(e) of the Clean Water Act.

The terms and conditions of this NWP will ensure that it authorizes only aggregate and hard rock/mineral mining activities with minimal adverse effects on the aquatic environment. Where there are specific concerns for the aquatic environment, division engineers can regionally condition this NWP to prohibit or limit its use in high value waters. Since notification to the district engineer is required for all activities authorized by this NWP, each proposed mining activity will be reviewed by district engineers to ensure that the work results in minimal adverse effects. We maintain our position that it is unnecessary to issue separate NWPs for aggregate and hard rock/mineral mining activities. These activities are sufficiently similar in nature to warrant the issuance of a single NWP.

One commenter asked what is meant by the term ''hard rock/mineral mining'' as used in the context of NWP 44. This commenter indicated that the district engineer will determine what constitutes mining for the purposes of this NWP on a case-by-case basis. This commenter also requested clarification whether NWP 44 authorizes all discharges of dredged or fill material into waters of the United States for hard rock/mineral mining activities or whether the Corps intends to limit this NWP to a certain subset of mining and related activities. One commenter asked for a definition of the term ''support activities'' as used in the context of this NWP. Another commenter said that this NWP should be expanded to authorize the mining of clay and dirt.

For purposes of this NWP, hard rock/mineral mining is the extraction of metalliferous ores from subsurface locations. NWP 44 authorizes discharges of dredged or fill material into certain categories of waters of the United States, as identified in the first paragraph of this NWP, for aggregate mining activities and hard rock/mineral mining activities. District engineers will determine, on a case-by-case basis, whether a particular mining activity is within the scope of this NWP. NWP 44 also authorizes fill for support facilities necessary for the mining operation. Support facilities authorized by this NWP include berms, access and haul roads, rail lines, dikes, road crossings, settling ponds and settling basins, ditches, stormwater and surface water management facilities, head cut prevention activities, sediment and erosion controls, and mechanized landclearing. In the July 21, 1999, **Federal Register** notice, we discussed the applicability of this NWP to clay mining activities and the extraction of soil to be used as fill material. NWP 44 does not authorize clay mining or the extraction of fill dirt from waters of the United States. These activities can be authorized by other NWPs, regional general permits, or individual permits.

Several commenters objected to the scope of applicable waters for this NWP, stating that it is too limited for most mining activities A number of commenters stated that hard rock/mineral mining activities should be authorized in ephemeral streams. One commenter said that NWP 44 should authorize mining activities in headwaters, including intermittent and perennial streams. Several commenters stated that there is no need to limit the use of this NWP to the upper portion of headwaters and eliminate the ability for miners to relocate or divert most headwater stream segments. Many commenters indicated that this NWP should not authorize any activities in streams. One commenter asked why NWP 44 does not authorize mining activities between lower perennial streams and the upper segments of headwater streams. One commenter said that the 1 cubic foot per second threshold should be replaced with ephemeral streams as a limit for stream bed impacts for aggregate mining activities. Several commenters said that the Cowardin definition of the term ''lower perennial stream'' should be included in the ''Definitions'' section of the NWPs.

The scope of applicable waters for NWP 44 is intended to ensure that this NWP authorizes only those mining activities that have minimal adverse effects on the aquatic environment, individually and cumulatively. We do not agree that hard rock/mineral mining activities should be authorized in streams because these activities are more likely to result in more than minimal adverse effects on the aquatic environment, due to the processing methods used for this type of mining. NWP 44 authorizes aggregate mining activities in perennial and intermittent streams, provided those streams have an average annual flow of 1 cubic foot per second (cfs) or less. NWP 44 also authorizes aggregate mining activities in lower perennial streams. Limiting aggregate mining activities to these small streams will ensure that the NWP authorizes activities with minimal adverse effects on the aquatic environment. Streams segments located between lower perennial streams and the upper reaches of headwater streams often provide valuable aquatic habitat, such as fish spawning areas. We do not agree that the 1 cfs threshold should be replaced with ephemeral streams for aggregate mining activities in headwaters. In the last paragraph of this NWP, we have incorporated a modified version of the Cowardin definition of the term ''lower perennial riverine subsystem'' to clarify where aggregate mining activities in lower perennial streams are authorized. We have also replaced the word ''and'' with the term ''and/or'' between parts (ii) and (iii) of the introductory paragraph to clarify that a particular mining activity authorized by NWP 44 can occur in any or all of the specified waters.

Several commenters stated that the proposed 2 acre limit for NWP 44 is too low. Numerous commenters suggested that this NWP should have a higher, indexed acreage limit. Three commenters recommended a 3 acre limit and another commenter said that impacts to lower perennial streams, isolated wetlands, and ephemeral streams should be limited to 1 acre. One commenter stated that this NWP should have a higher acreage limit because other Federal and state programs that address hard rock/mineral mining activities require measures to minimize impacts to waters of the United States. One commenter suggested that the Corps impose a linear limit on perennial and intermittent stream bed impacts. Another commenter recommended a 500 linear foot limit for stream bed impacts.

To ensure that this NWP authorizes activities with minimal adverse effects on the aquatic environment, we have reduced the acreage limit of NWP 44 to ½ acre. We do not agree that this NWP should have an indexed acreage limit. Since this NWP has applicability nationwide, it would be impractical to utilize state requirements for mining activities, because their requirements are likely to vary considerably between geographic areas. This NWP is limited to small stream segments; therefore it is unnecessary to impose a linear limit on stream bed impacts. However, division engineers can regionally condition this NWP to further limit stream impacts. In addition, notification is required for all activities authorized by this NWP,

which will allow district engineers to review proposed stream impacts on a case-by-case basis to ensure that those activities result in minimal adverse effects on the aquatic environment.

Two commenters objected to requiring PCNs for all activities authorized by this NWP. One commenter suggested a ⅓ acre PCN threshold. Several commenters stated that the Corps does not have the authority to review reclamation plans and the requirement to submit reclamation plans with the PCN should be removed.

We believe that it is necessary to require notification for all activities authorized by this NWP, to ensure that the NWP authorizes activities with minimal individual and cumulative adverse effects on the aquatic environment. As discussed in the July 21, 1999, **Federal Register** notice, the requirement for submission of a reclamation plan with the PCN is not intended to supersede other Federal or State requirements. The district engineer will not require reclamation *per se,* but will review the reclamation plan to determine if compensatory mitigation is required to offset losses of waters of the United States and ensure that the individual or cumulative adverse effects of the mining activity on the aquatic environment are minimal. If there are no Federal or State requirements for a reclamation plan for a particular mining activity, the applicant should state that fact in the PCN. The District Engineer may require compensatory mitigation for that activity to ensure that the adverse effects on the aquatic environment are minimal. If the reclamation plan required by Federal or state law adequately addresses compensation for losses of waters of the United States, then the District Engineer will not require additional compensatory mitigation, unless there are additional concerns for the aquatic environment.

Several commenters asked whether paragraph (i) of the proposed NWP (now designated as paragraph (h)) applies only to hard rock/mineral mining activities because of the processes involved in mineral extraction. Some of these commenters indicated that the text of this paragraph implies that the 200 foot setback applies to both aggregate and hard rock/mineral mining activities. A number of commenters said that the Corps does not have the authority to prohibit beneficiation and mineral processing within 200 feet of the ordinary high water mark (OHWM) of open waters. One commenter asked if the 200 foot setback is necessary because NWP 44 does not authorize discharges of dredged or fill material into open waters of the United States for hard rock/mineral mining activities.

The requirements of paragraph (h) of the proposed NWP 44, apply only to hard rock/mineral mining activities. We have inserted the phrase ''for hard rock/mineral mining activities'' into the text of paragraph (h) to clarify that the 200 foot setback applies only to beneficiation and mineral processing associated with hard rock/mineral mining activities. In the mining industry, the term ''beneficiation'' applies solely to mineral ore processing. We have the authority to condition NWP 44 to prohibit beneficiation and mineral processing within 200 feet of the OHWM of open waters because this requirement is necessary to ensure that the NWP authorizes activities with minimal adverse effects on the aquatic environment. Project proponents conducting hard rock/mineral mining activities in waters of the United States who want to conduct beneficiation and mineral processing within 200 feet of the OHWM of open waters can request another form of DA permit for those activities. The 200 foot setback required for beneficiation and mineral processing activities is necessary to protect water quality.

We have also modified paragraph (i) (paragraph (j) of the proposed NWP) to clarify that the district engineer can require modifications to the water quality management plan for the mining activity to ensure that adverse effects to water quality are minimal. In addition, we have modified paragraph (k) (formerly paragraph (l)) to clarify what constitutes a single and complete mining activity. In paragraph (l) (formerly paragraph (m)), we have changed the first item to require the notification to include a description of waters of the United States adversely affected by the proposed work.

Several commenters objected to the provision in the last paragraph of NWP 44 that prohibits hard rock/mineral mining within 100 feet of the OHWM of headwater streams. Another commenter said that this NWP should contain depth limits for pits because large pits could be constructed under this NWP. One commenter suggested adding a provision to NWP 44 that requires the permittee to fully reclaim or restore the mined site before commencing mining activities on another site in the same stream segment.

The prohibition against hard rock/mineral mining activities in waters of the United States within 100 feet of the OHWM of headwater streams is necessary to ensure that these mining activities result in minimal adverse effects on headwater streams. It is unnecessary to add a depth limit for mining pits because the ½ acre limit and the terms and conditions of NWP 44 provide adequate protection of the aquatic environment. We do not agree that it is necessary to require permittees to fully reclaim or restore the mined site before conducting mining activities on other sites because the NWP regulations concerning single and complete projects already adequately address multiple mining activities.

Several commenters requested further explanation of the proposed ''clarification of jurisdiction'' for mining operations that was provided in the preamble of the July 21, 1999, **Federal Register** notice. These commenters asked for definitions of the terms ''cessation of operations'' and ''abandonment.'' Two commenters said that the ''clarification of jurisdiction'' must clearly state that wetlands, ponds, and other waterbodies will not be considered ''waters of the United States'' until bond release. One commenter objected to changing the 15 year term proposed in the preamble to the July 1, 1998, **Federal Register** notice to a 5 year term because mining is a cyclical industry and shutdowns of greater than 5 years are not uncommon.

One commenter stated that the ''clarification of jurisdiction'' statement is inconsistent with the effluent limitation guidelines at 40 CFR part 440. This commenter said that pit lakes should be regulated as waters of the United States, even though the mining site has not been reclaimed. This commenter expressed concern that pit lakes would not be considered waters of the United States even if the mining operation ceased years ago. In addition, this commenter indicated that the construction of pit lakes would does not comply with former paragraph (f) (now designated as paragraph (e)) of the proposed NWP and General Condition 21.

As a result of our review of the comments addressing the proposed ''clarification of jurisdiction'' we have decided to withdraw the proposed guidance. District engineers will determine, on a case-by-case basis, whether a specific mined area has been abandoned. In most cases, a mining site where no construction, mining, excavation, processing, and/or reclamation activities have occurred during the last 10 years would be considered abandoned, at the district engineer's discretion. Wetlands and waterbodies within an abandoned mined area would be considered ''waters of the United States'' if those

areas meet the criteria at 33 CFR part 328.

In response to a PCN, district engineers can require special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. 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 these activities. This NWP is subject to General Condition 25, which restricts its use in designated critical resource waters. For NWP 44 activities resulting in discharges of dredged or fill material into waters of the United States within 100-year floodplains, General Condition 26 requires the permittee to notify the district engineer and demonstrate that the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements. NWP 44 is issued with the modifications discussed above.

IV. Comments and Responses on Nationwide Permit General Conditions

In the July 21, 1999, **Federal Register** notice, the Corps announced its decision to combine the NWP General Conditions with the Section 404 Only conditions. Two commenters supported this change. In the July 21, 1999, **Federal Register** notice, the Corps proposed to modify nine NWP general conditions and add three new NWP conditions. In response to that **Federal Register** notice, we received many comments on specific NWP general conditions.

The general conditions in this **Federal Register** notice will apply to all of the NWPs, including the NWPs published in the December 13, 1996, **Federal Register** notice, unless a particular general condition applies only to specific NWPs listed in that general condition. The general conditions published today will become effective on June 5, 2000.

4. Aquatic Life Movements: In the July 21, 1999, **Federal Register** notice, we proposed to modify this general condition by adding a requirement for culverts to be installed to maintain low flow conditions.

One commenter stated that there are situations, such as stream channels with bedrock substrate, where culverts cannot be installed below grade to maintain low flows. This commenter requested that the Corps remove the requirement to install culverts to maintain low flows. Another commenter asked the Corps to remove the word ''substantially'' from this general condition because it imposes a threshold that is too high for activities that result in minimal adverse effects on the aquatic environment.

We do not agree that it is necessary to add an exclusion for stream beds that consist solely of bedrock. Road crossings in these streams can be constructed through other means, such as bridges or fords, that allow low flows to pass through the crossing. It is important to maintain low flow conditions to minimize disruptions to movements of aquatic organisms.

We have retained the word ''substantially'' in the text of this general condition because the removal of this word would change the requirement from ''minimal adverse effect'' to ''no adverse effect.'' We recognize that most work in waters of the United States will result in some disruption in the movement of aquatic organisms through those waters. District engineers will determine, for those activities that require notification, if the disruption of aquatic life movements is more than minimal and either add conditions to the NWP to ensure that the adverse effects are minimal or exercise discretionary authority and require an individual permit. This general condition is adopted as proposed.

7. Wild and Scenic Rivers: In the July 21, 1999, **Federal Register** notice, we did not propose any changes to this general condition. One commenter objected to the inclusion of ''study rivers'' in the text of this general condition.

We will retain ''study rivers'' in this general condition because study rivers are afforded the same protections as designated Wild and Scenic Rivers, while they are in study status. This general condition is retained without change.

9. Water Quality: The draft modification of General Condition 9 that was published in the July 21, 1999, **Federal Register** notice required permittees to develop and implement water quality management plans for activities authorized by NWPs 12, 14, 17, 18, 32, 39, 40, 42, 43, and 44, if such a plan is not required by the state or Tribal Section 401 water quality certification. The draft modification of this general condition also required the establishment and maintenance of vegetated buffers next to open waters, such as streams.

To clarify the requirements of General Condition 9, we have divided this general condition into two paragraphs. Paragraph (a) discusses the requirement for individual water quality certifications. Paragraph (b) addresses the requirement for water quality management plans, including vegetated buffers.

Many commenters objected to the requirement for a water quality management plan, stating that the Corps lacks the statutory authority to require such a plan. A large number of commenters said that this requirement is duplicative of existing programs, such as state or Tribal water quality certification (WQC) and National Pollutant Discharge Elimination System programs. Several commenters stated that the Corps does not have the authority to determine whether a particular state or Tribal program adequately addresses water quality. Two commenters remarked that the Corps cannot override a state's WQC decision. Several commenters said that the proposed modification of General Condition 9 is not consistent with 33 CFR 320.4(d), which states that: ''[c]ertification of compliance with applicable effluent limitations and water quality standards required under provisions of section 401 of the Clean Water Act will be considered conclusive with respect to water quality considerations unless the Regional Administrator, Environmental Protection Agency (EPA), advises of other water quality aspects to be taken into consideration.'' A number of commenters said that the Corps does not have the expertise to assess the effectiveness of water quality management plans or stormwater management plans for particular activities. One commenter asked for a definition of the term ''water quality management plan.''

Two commenters objected to the proposed modification of General Condition 9 because it requires stormwater management plans, even if those plans are not required by state or local governments. One commenter supported the statement in the July 21, 1999, **Federal Register** notice that a water quality management plan is not required if water quality issues are adequately addressed by state or local governments. One commenter objected to a statement in the July 21, 1999, **Federal Register** notice that a water quality management plan is not required for activities that have minimal adverse effects on local water quality. This commenter said that this statement is illogical because the NWPs can authorize only activities that have minimal adverse effects on the aquatic environment. Several commenters agreed that a water quality management plan should not be required for activities that have minimal adverse effects and requested that the Corps add

appropriate language to General Condition 9 because the draft general condition published in the July 21, 1999, **Federal Register** notice does not provide that flexibility. Several commenters stated that the requirement for water quality management plans will substantially increase costs for local governments and the regulated public. One commenter suggested that the Corps should rely on standard best management practices to protect water quality, instead of requiring case-specific water quality management plans.

A goal of the Clean Water Act, as stated in section 101 of the Act, is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. We maintain our position that the requirement for a water quality management plan for certain NWPs is necessary to ensure that activities authorized by those NWPs do not result in more than minimal adverse effects to water quality. We can require water quality management plans through our statutory authority under section 404 of the Clean Water Act, because the goal stated in section 101 applies to all sections of the Clean Water Act.

A water quality management plan is a mechanism to ensure that the activity authorized by NWP causes only minimal adverse effects on water quality. It can include stormwater management techniques and vegetated buffers next to open waters to protect water quality. The terms of General Condition 9 are not intended to replace existing state or Tribal section 401 requirements. In regions with strong water quality programs, district engineers will defer to state, Tribal, and local requirements and will not require water quality management plans as special conditions of NWP authorizations. If the 401 agency or other state or local agency does not require adequate measures to protect downstream water quality, we have the authority to require measures, including the construction of stormwater management facilities or the establishment of vegetated buffers next to open waters, that will minimize adverse effects to water quality.

If a district engineer determines that a water quality management plan is unnecessary because the authorized work will result in minimal adverse effects on water quality, then a water quality management plan is not required. For example, the district engineer may determine that a water quality management plan is not required for an activity in a watershed that is not substantially developed. In addition, a water quality management plan is not necessary for activities that are serviced by a regional stormwater management system. We have modified the first sentence of paragraph (b) by replacing the phrase ''provide for protection of aquatic resources'' with the phrase ''will ensure that the authorized work does not result in more than minimal degradation of water quality'' to clarify why a water quality management plan may be required by the district engineer.

We have also modified the second sentence of paragraph (b) by replacing the word ''project'' with the phrase ''water quality management plan.'' This clarifies that stormwater management is a component of the water quality management plan. If the district engineer determines that a water quality management plan is not required because a specific activity will have minimal adverse effects on water quality, then stormwater management methods are not necessary if they are not required by state or local governments.

We recognize that the development and implementation of a water quality management plan may increase costs to the regulated public. It is important to note that the purpose of the water quality management plan is to ensure that the authorized work results in minimal adverse effects on the aquatic environment, especially water quality. In most cases, the requirements of the Section 401 water quality certification and state or local stormwater management requirements will adequately address these issues. These state and local requirements already incur costs on project proponents and we do not agree that the requirements of General Condition 9 will impose substantial additional costs. Since site conditions are extremely variable between geographic regions of the country, we do not agree that generic best management practices are a better approach to address water quality concerns.

Several commenters objected to the requirements of General Condition 9, because the Corps does not define what constitutes a ''strong'' state water quality program. These commenters said that this requirement would confuse the regulated public because they cannot know when a water quality management plan will be required by the Corps for a particular NWP activity. Two commenters recommended that the Corps add language to General Condition 9 stating that water quality management plans will not be required in states with strong water quality programs. A commenter objected to the proposed modification of General Condition 9 because a district engineer may require modifications that conflict with the requirements of a state-issued WQC. Another commenter said that the Corps should coordinate water quality management requirements with state or local authorities, which would reduce redundancy and assist in enforcement.

We cannot define, at a national level, what constitutes a strong state water quality program. Corps districts can make a programmatic determination that a particular state, Tribe, or local government has a strong water quality program and therefore the Corps would not require project-specific water quality management plans in those jurisdictions. Where these programmatic determinations have not been made, district engineers will determine, on a case-by-case basis, when water quality management plans are necessary. A water quality management plan for a particular activity may be required as a special condition to the NWP authorization, whereby the permittee would submit the specifics of the water quality management plan to the district engineer prior to starting the work. We do not agree that it is necessary to explicitly state in the text of General Condition 9 that water quality management plans will not be required in states with strong water quality programs because this issue is adequately addressed in the preamble.

It is unlikely that a district engineer will request modifications to a particular activity that conflicts with WQC requirements, although the district engineer may require additional measures that are more stringent than the WQC conditions. We encourage district engineers to coordinate water quality management requirements with state and local authorities, to effectively implement the provisions of General Condition 9.

One commenter suggested that the Corps add language to this general condition that explains that the standard to be achieved is ''minimal'' degradation, not ''no'' degradation of water quality. This commenter cited the requirement of minimal degradation that was discussed in the preamble in the July 21, 1999, **Federal Register** notice. Two commenters objected to the proposed modification of General Condition 9 because the Corps has not defined what constitutes acceptable ''minimal degradation to water quality'' or ''minimal adverse effects to water quality.''

General Condition 9 does not contain a ''no degradation'' standard. General Condition 9 requires methods to minimize degradation of downstream aquatic habitats. We cannot provide

national definitions of the terms ''minimal degradation'' or ''minimal adverse effects'' to water quality because aquatic systems vary considerably across the country. District engineers will utilize their knowledge of local aquatic resources to make these determinations.

Several commenters requested that the Corps add language to this general condition that states that the requirements of General Condition 9 apply only to activities that result in discharges of dredged or fill material into waters of the United States, not to activities in uplands. These commenters cited the example in the preamble to the July 21, 1999, **Federal Register** notice, which indicated that the water quality management plan does not apply to the entire upland site if only a small amount of waters of the United States are filled to provide access to an upland development site. Two commenters stated that the Corps needs to provide a definition of the term ''project'' as it is used in the context of this general condition, because the general condition requires the establishment and maintenance of vegetated buffers if the activity occurs in the vicinity of open waters. These commenters asserted that the Corps cannot require stormwater management facilities or vegetated buffers to offset adverse effects caused by activities outside of waters of the United States.

The requirements for water quality management plans, including vegetated buffers next to open waters, apply only to those NWP activities that involve discharges of dredged or fill material into waters of the United States. Water quality management plans are required only for those NWPs listed in paragraph (b). We have also modified this general condition to state that vegetated buffers next to open waters are an important component of the water quality management plan. We have included a reference to General Condition 19, which contains the vegetated buffer requirements for the NWPs, in General Condition 9.

The requirement for a water quality management plan does not apply to activities in uplands, if the discharge of dredged or fill material into waters of the United States constitutes only a small portion of the entire activity. In this situation, if a water quality management plan is necessary to ensure that the activity in waters of the United States causes only minimal degradation of water quality, the water quality management plan would address only the specific activity that results in discharges or dredged or fill material into waters of the United States. However, if a large proportion of the project area is comprised of waters of the United States, then the water quality management plan should consider those upland areas within the project area to ensure that the overall activity will result in minimal adverse effects to water quality. Since the applicable area for the water quality management plan depends on the proportion of the project area that is composed of waters of the United States, we cannot provide a definition of the term ''project'' for the purposes of this general condition.

A commenter requested that the Corps specify the information that should be included in a water quality management plan. One commenter stated that the general condition should include a qualitative assessment procedure. Several commenters stated that water quality management requirements must be directly related to an identifiable water quality concern that is caused by the authorized discharge of dredged or fill material into waters of the United States. A commenter recommended adding a statement to this general condition explaining that water quality mitigation will be required when necessary to address site-specific water quality concerns and that the required mitigation will be accomplished through the most cost-effective method to address those concerns. Several commenters suggested that the Corps add a definition of the term ''practicable'' as it is used in the context of this general condition.

We cannot specify the components of a water quality management plan because these requirements will vary across the country. In general, stormwater management techniques and vegetated buffers next to open waters can be components of a water quality management plan. The language of General Condition 9 is intended to allow flexibility and minimize the amount of information necessary to determine compliance with its requirements. We cannot include a qualitative assessment procedure in the text of the general condition because of the variability in aquatic resources across the country. District engineers have their own criteria for assessing impacts to water quality, based on local conditions. District engineers will use their judgement to qualitatively determine if a particular activity complies with this general condition and will not require extensive analyses or reviews. Detailed studies are not required. We contend that these assessments should be left to the judgement of district engineers and will not establish a national assessment procedure. Water quality management requirements will be directly related to the activity authorized by NWP, to ensure that the authorized activity results in minimal adverse effects on local water quality.

Water quality management techniques must be practicable and capable of being accomplished by the permittee. For the purposes of General Condition 9, the definition of the term ''practicable'' is the same as the definition in the first sentence of paragraph (a) of General Condition 19. Measures required by district engineers to ensure that activities authorized by NWPs do not result in more than minimal adverse effects to water quality must be practicable, while allowing the proposed work to accomplish the overall project purpose. For example, the establishment and maintenance of vegetated buffers next to open waters on the project site will help protect water quality, but the width of those vegetated buffers must not reduce the amount of developable land on the project site to the extent that the proposed work is no longer technologically or economically viable.

One commenter recommended expanding the water quality management plan requirement to NWPs 3, 7, 8, 21, 23, 29, and 33. One commenter indicated that water quality management plans should not be required for NWP 44 activities because such plans are already required for hard rock/mineral mining operations. One commenter suggested waiving the water quality management plan requirement for discharges of dredged or fill material into ephemeral streams. One commenter stated that the requirement for stormwater management should apply only to activities that impact more than 4 acres of land.

We do not agree that water quality management plans should be required for activities authorized by NWPs 3, 7, 8, 21, 23, 29, and 33. We addressed the applicability of this general condition to NWP 21 in the preamble of the July 21, 1999, **Federal Register** notice and have not changed our position on this issue. The other NWPs listed in the first sentence of the previous paragraph authorize activities that typically have minor impacts on water quality. Even though other laws or regulations require water quality management plans for hard rock/mineral mining activities, we are not aware of a similar requirement for aggregate mining activities. Therefore, we do not agree that NWP 44 should be removed from the list of applicable NWPs. District engineers can determine, on a case-by-case basis, that water quality management plans are not required for activities involving

discharges of dredged or fill material into ephemeral streams. We do not agree that there should be a minimum project size to determine when stormwater management facilities are necessary.

Numerous commenters addressed the vegetated buffer requirement in the proposed modification of this general condition. Two commenters requested clarification whether the establishment and maintenance of vegetated buffers are required for all NWPs or only the NWPs listed in the second sentence of the proposed modification of General Condition 9. Two commenters said that vegetated buffers should not be required under all circumstances and that district engineers should use their discretion on a case-by-case basis. Several commenters recommended the removal of the vegetated buffer requirement from this general condition. Two commenters stated that vegetated buffers should be required only to address site-specific water quality concerns when the establishment and maintenance of vegetated buffers is practicable.

For the purposes of General Condition 9, vegetated buffers should be an important component of a water quality management plan. The vegetated buffer requirements for the NWPs are discussed in paragraph (b) of General Condition 19. If there are not any open waters on the project site, then vegetated buffers are not required. In addition, vegetated buffers are not required for Section 404 activities that result only in minimal adverse effects to water quality. District engineers will determine, on a case-by-case basis, when vegetated buffers are necessary to ensure that the authorized work results only in minimal adverse effects. The use of vegetated buffers in the NWP program is discussed in more detail in a previous section of this **Federal Register** notice.

Several commenters requested that the Corps clarify what is meant by the phrase ''in the vicinity'' of an open waterbody as it relates to the vegetated buffer requirement. Two commenters recommended that the Corps replace ''vicinity'' with ''contiguous'' to more clearly establish a direct relationship between the vegetated buffer requirement and the impacts caused by the authorized work. Two commenters said that the phrase ''to the maximum extent practicable'' needs to be defined for the purposes of the vegetated buffer requirement.

The term ''in the vicinity'' as used in the context of this general condition, means the parcel where the activity is located. If there are not any open waters on the project site, then vegetated buffers are not required. We have replaced the word ''adjacent'' with the word ''next'' to clarify that the vegetated buffer is to be established and maintained on land next to the open waterbody. We do not agree that the word ''vicinity'' should be replaced with ''contiguous'' because the requirement for vegetated buffers applies only to open waters on the project site. We have removed the phrase ''to the maximum extent practicable'' as it was used in the context of the vegetated buffer requirement in the proposed general condition. This general condition is adopted with the modifications discussed above.

11. Endangered Species: In the July 21, 1999, **Federal Register** notice, we proposed to modify this general condition by adding a requirement for the prospective permittee to submit, with the notification, the name(s) of the endangered or threatened species that may be affected by the proposed work or utilize designated critical habitat that may be affected by the proposed work.

One commenter objected to the requirement for prospective permittees to notify the Corps if there may be threatened or endangered species in the vicinity of the proposed activity. Another commenter objected to the requirement for applicants to notify the Corps for any activity that will occur in designated critical habitat. A commenter stated that the requirement to notify the district engineer if listed species or critical habitat may be affected by the proposed activity should apply to both Federal and non-Federal applicants. Two commenters opposed the notification requirement, stating that project proponents cannot know if their projects are located in designated critical habitat. Several commenters stated that the Corps is responsible as the lead Federal agency for compliance with section 7 of the Endangered Species Act (ESA) and that the Corps cannot delegate to the prospective permittee the determination whether a listed species or their critical habitat would be affected by the proposed work.

The notification requirements for General Condition 11 are necessary to ensure that activities authorized by NWPs comply with the requirements of ESA. Federal permittees are required to conduct Section 7 ESA consultation directly with either the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS), depending on which species may be affected by the proposed work. Prospective permittees should contact the FWS or NMFS to determine if their activities may affect Federally-listed endangered or threatened species or destroy or adversely modify designated critical habitat. We recognize that we are responsible for determining whether an activity is likely to jeopardize the continued existence of a threatened or endangered species or whether an activity will adversely modify or destroy designated critical habitat, but we cannot require permittees to submit notifications for all NWP activities so that we can determine compliance with ESA. Division engineers can regionally condition the NWPs to require notification for NWP activities in known locations of Federally-listed endangered or threatened species and their designated critical habitat.

One commenter suggested that a specific distance should be used to define the phrase ''in the vicinity'' as it is used in this general condition. Another commenter said that the Corps needs to define what constitutes ''affecting critical habitat'' as it applies to the NWPs. One commenter stated that the word ''destroy'' should be defined or deleted from this general condition. A commenter stated that any activity that may affect a Federally-listed endangered or threatened species or its critical habitat must be reviewed by the FWS. Another commenter said that individual permits should be required for activities that may affect endangered or threatened species or their critical habitat.

We do not agree that a specific distance should be established to define the term ''vicinity'' because the area that constitutes the ''vicinity'' varies from species to species. Activities in waters of the United States within critical habitat have the potential to destroy or adversely modify that critical habitat and should be reviewed by the Corps to ensure compliance with ESA. The phrase ''destruction or adverse modification'' is defined at 50 CFR 402.02 and this definition applies to the phrase ''destroy or adversely modify'' that is found in General Condition 11. We will consult with FWS and NMFS for those activities that may affect or jeopardize Federally-listed endangered or threatened species or may destroy or adversely modify the designated critical habitat of those species. We do not agree that all activities that may affect endangered or threatened species or their critical habitat should be reviewed under the individual permit process because these activities can often be authorized by NWPs in compliance with ESA.

As a consequence of the NWP/General Permit Programmatic ESA Section 7 consultation, district engineers will develop Standard Local Operating Procedures for Endangered Species and

may develop other procedures to ensure that the NWPs and general permits will comply with the ESA. In addition, as part of this process, the Corps may need to adopt regional conditions for endangered species. To ensure that these conditions and procedures are properly coordinated, the decision authority for adding regional conditions for endangered species has been delegated to the district engineer in General Condition 11. This general condition is adopted with the modifications discussed above.

12. Historic Properties: In the July 21, 1999, **Federal Register** notice, we did not propose any changes to this general condition. One commenter objected to requiring compliance with the National Historic Preservation Act (NHPA) for activities authorized by NWPs. Another commenter opposed the notification requirement of General Condition 12 and asked how a permittee would know if his or her activity will affect historic properties. One commenter stated that the requirement to notify the district engineer if eligible cultural resources may be affected by a proposed activity should apply to both Federal and non-Federal applicants. A commenter said that individual permits should be required for all activities that may affect eligible cultural resources. One commenter indicated that the Corps should not require extensive documentation from an applicant demonstrating compliance with the NHPA.

All activities that require a Federal license (including NWPs) must comply with the NHPA. A prospective permittee can contact the local State Historic Preservation Officer to determine if the proposed work will affect known historic properties. Both Federal and non-Federal permittees are required to notify district engineers when authorized activities may affect listed or eligible historic properties. We do not agree that all activities that may affect cultural resources should be reviewed under the individual permit process because these activities can often be authorized by NWPs in compliance with the NHPA. The Corps requires the minimum documentation necessary to ensure compliance with the NHPA. This general condition is retained without change.

13. Notification: In the July 21, 1999, **Federal Register** notice, we proposed to change the 30 day PCN review period to 45 days, and include a requirement for district engineers to determine whether a PCN is complete within 30 days of the date of receipt.

Two commenters supported the proposed changes to the PCN review period. Many commenters objected to the proposed changes, stating that allowing 30 days for a completeness review and 45 days to determine whether the proposed work qualifies for NWP authorization makes the NWP process similar to the standard permit process, in terms of processing times. Two commenters remarked that the 30-day completeness review period should be included in the 45-day PCN review period. Two commenters said that the PCN should be considered complete if the Corps does not request additional information prior to the end of the 30 day completeness review period, so that the Corps cannot defer processing the PCN indefinitely. One commenter suggested that the Corps notify prospective permittees, through telephone calls or postcards, if their PCNs are complete. This commenter said that such a process would relieve some burdens associated with the proposed revisions to the notification process. Another commenter recommended modifying General Condition 13 to impose a time limit for the Corps to notify prospective permittees that all of the requested information has been received.

The 30 day completeness review period and the 45 day PCN review period are not independent of each other (i.e., they do not add up to a 75 day review period for NWP activities). If a prospective permittee submits a complete PCN to the Corps district office, the 45 day PCN review period begins on the date of receipt and the district engineer must decide whether to issue an NWP verification or exercise discretionary authority within 45 days. If the 30 day completeness review period has passed since the date of receipt of a PCN and the district engineer has not requested additional information to make the PCN complete, the applicant can assume the PCN is complete.

Other commenters recommended different time limits for PCN completeness reviews. One commenter said that the completeness review should be done on the date of receipt of the PCN and the applicant should be notified immediately that additional information is necessary to begin the PCN process. Other recommended time periods for completeness review included 7, 10, and 15 days. One commenter objected to the 30 day completeness review period, stating that it was longer than the completeness review period for standard permits (i.e., 15 days).

It is impractical for district engineers to conduct completeness reviews on the date of receipt. We believe the 30 day completeness review period is necessary because district engineers can make only one request for the information needed for a complete PCN.

Two commenters requested clarification whether the 45 day PCN review period starts on the day the Corps determines the PCN to be complete or the date the complete PCN is received in the district office. One commenter asked if the verification of wetland delineations would be done within the 30 day completeness review period. Two commenters supported allowing only one request for additional information. One commenter asserted that allowing only one request for additional information would cause Corps personnel to request large amounts of information, whether or not that information is necessary for the review of the PCN.

The 45 day PCN review period begins on the date of receipt of a complete PCN. If a complete PCN is submitted, the 45 day PCN review period starts on the date of receipt. If the PCN is incomplete and the prospective permittee submits the necessary information to make the PCN complete, the 45 day PCN review period starts on the date the additional information is received by the district engineer. The verification of delineations of special aquatic sites will be conducted during the 30 day completeness review period. A complete PCN is comprised of the information listed in paragraph (b) of General Condition 13. If the prospective permittee provides all of the relevant information listed in paragraph (b), then the PCN is complete (provided any delineations of special aquatic sites are accurate) and the 45 day PCN review period begins. District engineers cannot request information not listed in paragraph (b). If the district engineer believes that the proposed work may result in more than minimal adverse effects on the aquatic environment, based on the information required for the PCN, then he or she should exercise discretionary authority and require an individual permit to conduct a more thorough review of that activity.

Many commenters suggested that the Corps retain the 30 day PCN review period. One commenter said that 15 days would be adequate for the Corps to determine whether a complete PCN would qualify for NWP authorization and another commenter suggested a 40 day review period. Many commenters stated that the larger workload caused by the proposed new and modified NWPs is not sufficient justification for increasing the PCN review period to 45 days and requested that the Corps maintain the 30 day period.

We contend that the 45 day period is necessary to determine if a PCN is complete (within 30 days), conduct agency coordination if necessary, and review the PCN to determine if the proposed work is authorized by NWP. NWP 26 had a PCN review period of 45 days and we believe it is necessary to retain this time period for the new NWPs.

Several commenters stated that paragraph (b) of General Condition 13 should clearly state what is required for a complete PCN, so that applicants will know what they need to submit to the district engineer. These commenters also said that clearly stating what is required for a complete PCN would promote consistency. One commenter requested that the Corps clarify whether the phrase ''additional information'' refers only to the items necessary to make the PCN complete or to any other information that the district engineer believes is necessary for the review of the PCN. One commenter recommended adding a requirement for prospective permittees to supply all information identified in the NWP, special conditions, and regional conditions, as well as any information required by the district engineer. Two commenters objected to the amount of information required for PCNs.

Paragraph (b) of General Condition 13 lists all of the information necessary for a complete PCN. Corps districts can provide checklists to assist prospective permittees, especially if they have regional conditions that specify additional information that must be submitted with PCNs. The phrase ''additional information'' as used in the context of General Condition 13 refers only to the information that is necessary to make the PCN complete. We have limited the amount of information that must be submitted with a PCN to the minimum necessary to determine whether the proposed work will result in minimal adverse effects on the aquatic environment, individually and cumulatively.

Two commenters said that the statement in General Condition 13 indicating that the permittee can commence work if the district engineer does not respond to the PCN within 45 days is meaningless because of the suspension procedures at 33 CFR 330.5(d)(2), which allow the Corps to stop NWP activities in progress. These commenters said that the permittee cannot safely proceed with the activity until he or she receives authorization from the Corps.

Some prospective permittees may want assurance that the proposed work is authorized by NWP and will not start work until a written verification is received from the Corps. The procedures at 33 CFR 330.5(d)(2) provide a process where a permittee who begins work after the 45 day PCN period expires can make their case that they have expended resources and it would be inequitable for the Corps to modify their project.

One commenter suggested that the PCN review period should be waived in states using monthly coordination meetings to review and process permit applications. One commenter suggested adding a fourth item in paragraph (a), which would state that the prospective permittee shall not begin the activity ''If the District Engineer has notified the prospective permittee in writing that the notification is still incomplete.''

Paragraph (a) of General Condition 13 does not prohibit district engineers from responding to PCNs in a more timely manner provided all other requirements are completed. Paragraph (a) clearly states that district engineers will notify prospective permittees if their PCNs are still incomplete, and since the 45 day clock does not start until the PCN is complete, the prospective permittee may not start work.

One commenter stated that all PCNs should include delineations of special aquatic sites. Another commenter recommended adding NWPs 3 and 31 to paragraph (b)(4). One commenter said that delineations of riffle and pool complexes should not be required for PCNs because such a requirement imposes burdens on applicants, especially on large projects such as highways. A commenter suggested that the phrase ''submerged aquatic vegetation'' used in paragraph (b)(4) should refer only to vascular plants.

We do not agree that delineations of special aquatic sites should be submitted with all NWP PCNs. Since NWPs 3 and 31 authorize maintenance activities, it is not necessary to submit delineations of special aquatic sites with PCNs for these activities. Maps indicating stream segments containing riffle and pool complexes and their location can be used as delineations of these special aquatic sites. It is not necessary to map each riffle and pool complex within a stream. The phrase ''submerged aquatic vegetation'' refers only to vascular plants, not algae.

One commenter suggested that the Corps revise paragraph (b) of General Condition 13 to require documentation of baseline conditions for NWP 3 activities. This commenter also recommended that PCNs for NWP 3, 7, and 31 activities should include locations of disposal sites for dredged or excavated material. One commenter said that detailed mitigation and monitoring plans should be submitted with PCNs for activities authorized by NWPs 12, 14, 39, 40, 41, 42, 43, and 44. One commenter indicated that a statement discussing on-site avoidance and minimization should be required for all NWP activities that require PCNs. Another commenter asserted that a statement of avoidance and minimization should be required for NWPs 12, 14, 40, 41, and 42. One commenter said that the information required to be submitted with a PCN is inadequate to ensure compliance with ESA.

The text of paragraph (iii) of NWP 3 states that the permittee ''should'' provide evidence to justify the extent of the proposed restoration, but such evidence is not required. We do not agree that it is necessary to include location maps of disposal sites for dredging or excavation activities authorized by NWPs 3, 7, and 31, because the material removed from waters of the United States will not be deposited in waters of the United States, unless the district engineer issues a separate authorization to discharge that material into waters of the United States. Under that separate authorization process, the district engineer will assess the impacts to the disposal site. We maintain our position that compensatory mitigation plans, including monitoring plans, submitted with a PCN can be either conceptual or detailed. District engineers can require more detailed compensatory mitigation plans through special conditions of the NWP authorization where appropriate. We also do not agree that avoidance and minimization statements should be required for other NWPs. We maintain our position on this matter as it was discussed in the July 21, 1999, **Federal Register** notice. The information that must be submitted with a PCN is adequate for the Corps to make its initial determination concerning compliance with ESA.

Two commenters noted that the Corps did not add a provision to paragraph (b) of General Condition 13 that requires prospective permittees to submit a list of names of Federally-listed endangered or threatened species and the names or locations of historic properties that may be affected by the proposed work. The Corps stated in the July 21, 1999, **Federal Register** notice (64 FR 39340) that it would add these provisions to General Condition 13.

We have added these requirements to paragraph (b) of General Condition 13 as subparagraphs (17) and (18), respectively. In addition, we have modified subparagraph (b)(9) to comply

with the recent modification of NWP 29, which reduced the acreage limit to ¼ acre (see 64 FR 47175). We have also added subparagraph (b)(19), which describes the documentation that must be submitted with the PCNs for certain NWP activities within 100-year floodplains.

In paragraph (d) of the proposed modification of General Condition 13, one commenter objected to the use of the term ''net'' in the context of determining whether the adverse effects to the aquatic environment are minimal, after considering compensatory mitigation that offsets impacts authorized by NWPs. This commenter says that the wording of the second sentence of paragraph (d) is contrary to the Corps policy of determining that impacts authorized by NWPs are minimal without considering mitigation. One commenter asked if the term ''mitigation'' in paragraph (d) refers to compensatory mitigation. Another commenter requested a definition of the term ''adverse'' as it is used in the context of paragraph (d). One commenter requested that the Corps clarify whether the word ''work'' in paragraph (d) refers only to mitigation work or the permitted activity.

The language of paragraph (d) complies with Corps regulations for the NWP program, specifically 33 CFR 330.1(e)(3), which provides for the use of compensatory mitigation to offset losses of waters of the United States authorized by NWPs and ensure that the adverse effects on the aquatic environment are minimal. The word ''mitigation'' in the second sentence of paragraph (d) refers to the mitigation process. We do not agree that it is necessary to provide a definition of the term ''adverse'' since the commonly used definition is applicable. The word ''work'' refers to the proposed activity, but the compensatory mitigation is also considered when determining whether the adverse effects on the aquatic environment are minimal.

Two commenters supported the 1 acre threshold for agency coordination. One commenter suggested a ⅓ acre threshold. A number of commenters said that agency coordination should be required for all NWP activities that require PCNs. One commenter recommended agency coordination for activities that result in the loss of greater than 250 linear feet of stream bed. One commenter said that PCNs should be coordinated with the U.S. FWS for any NWP activity that could affect Federally-listed endangered or threatened species or their habitats. Another commenter indicated that agency coordination of PCNs should be conducted for any NWP activities in streams or aquatic resources of natural importance.

We are reducing the 1 acre threshold for agency coordination to ½ acre because most of the new NWPs have maximum limits of ½ acre. There will be coordination of some PCNs because there are NWPs based on other government programs, such as NWPs 17 and 38, that can authorize activities that result in the loss of greater than ½ acre of waters of the United States. If those NWPs require submission of a PCN to the district engineer and the proposed work will result in the loss of greater than ½ acre of waters of the United States, then the Corps will conduct agency coordination. Activities that may affect Federally-listed endangered or threatened species or their critical habitat will be coordinated with the U.S. FWS or NMFS, as appropriate. District engineers can conduct agency coordination in other circumstances at their discretion.

One commenter asked for clarification whether a PCN is transmitted to agencies upon receipt of the PCN or whether the PCN must be determined to be complete before it is sent to the agencies. Two commenters said that, for activities requiring agency coordination, the applicant should mail copies of the PCN to the review agencies to expedite the PCN process. One commenter recommended adding the Federal Emergency Management Agency (FEMA) to the list of agencies for coordination. Another commenter said that the Corps should provide written responses to agency comments received in response to PCNs. One commenter recommended inserting the word ''aquatic'' between the words ''adverse environmental'' in paragraph (e).

We do not start agency coordination until we determine that the PCN is complete. It would not be advantageous for a prospective permittee to submit a PCN directly to review agencies because the PCN may not be complete. District engineers can, at their discretion, include FEMA with the other review agencies. We do not agree that district engineers should provide written responses to agency comments, except where Essential Fish Habitat (EFH) conservation recommendations are received from NMFS in response to a PCN. There is a statutory requirement in the Magnuson-Stevens Fishery Conservation and Management Act for Federal action agencies to provide written responses to EFH conservation recommendations. We have modified paragraph (e) to address this requirement. We agree that we should include the word ''aquatic'' in the first sentence of paragraph (e).

Two commenters opposed the proposed changes to the agency coordination period. Three commenters said that 15 days is enough time for agency coordination. Other commenters suggested 5, 10, or 30 days for agency coordination. One commenter recommended 45 days for agency coordination, with the ability for agencies to receive an extension of time. One commenter requested clarification whether the 25 day agency review period is added to the 45 day PCN review period or whether the agency coordination process occurs during the 45 day PCN review period. One commenter said that the 25 day agency coordination period conflicts with ESA regulations, which provide 30 days to respond to a request for a list of species that may occur in the project area.

We will maintain the 10 day period for agencies to request an additional 15 days to provide substantive, site-specific comments on PCNs. Twenty-five days is sufficient for agencies to comment on PCNs. The agency coordination process occurs during the 45 day PCN review period. During the agency coordination period, the Corps is not requesting a list of Federally-listed endangered or threatened species that may be in the project area. Therefore, the agency coordination period does not violate ESA regulations.

Several commenters objected to the text in paragraph (f) that requires wetland delineations to be performed in accordance with the current method required by the Corps. These commenters assert that this language allows Corps personnel to use methods and criteria that are not in the 1987 *Corps of Engineers Wetlands Delineation Manual* and expand the Corps jurisdiction. These commenters said that the text of this paragraph should be revised to specifically reference the 1987 *Corps of Engineers Wetlands Delineation Manual.* Another commenter recommended that paragraph (f) include a statement that the permittee is responsible for the accuracy of the delineation of special aquatic sites.

We do not agree with these commenters. The only currently acceptable method that the Corps uses for delineating wetlands is the 1987 *Corps of Engineers Wetlands Delineation Manual* and associated guidance. We will not change the text of paragraph (f) because the required delineation manual may change in the future.

Several commenters recommended combining paragraph (g) of General

Condition 13 with General Condition 19 so that the mitigation requirements of the NWPs would be in one general condition. One commenter suggested that deed restrictions and protective covenants should be required as part of a compensatory mitigation proposal submitted with a PCN. One commenter recommended that the Corps reinstate the following language into subparagraph (ii) of paragraph (g): ''* * *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.''

We have moved paragraph (g) of General Condition 13 to General Condition 19. Prospective permittees can submit either conceptual or detailed compensatory mitigation proposals with their PCNs, but they are not required to submit deed restrictions or protective covenants at that time. As special conditions to a NWP verification, the district engineer may require deed restrictions or protective covenants for compensatory mitigation projects. We do not agree that it is necessary to put the referenced text back into the general condition because General Condition 19 allows district engineers the flexibility to consider all appropriate forms of compensatory mitigation, including mitigation banks and other consolidated approaches to compensatory mitigation.

One commenter objected to the statement in paragraph (g) of the proposed modification of General Condition 13 that identifies mitigation banks, in lieu fee programs, and other types of consolidated mitigation as preferred methods. This commenter said that if compensatory mitigation is necessary, the method should be at the discretion of the applicant and consider economic and environmental factors. This commenter also stated that the Corps should only determine if the compensatory mitigation method chosen by the applicant is appropriate.

Our preference for consolidated compensatory mitigation methods such as mitigation banks does not prohibit the use of other methods to provide compensatory mitigation, if the district engineer determines that the other methods are appropriate and adequately offset losses of aquatic resource functions and values. General Condition 19 clearly states that mitigation must be practicable, and the district engineer will consider costs and environmental factors when determining if the prospective permittee's compensatory mitigation proposal is acceptable.

Two commenters stated that the Corps should post PCNs on the Internet. Another commenter concurred with the Corps position against posting PCNs on the Internet, stating that such a process would result in delays to the regulated public and provide no additional value to the review of PCNs.

As discussed in the July 21, 1999, **Federal Register** notice, we maintain our position that posting of PCNs on Internet home pages would provide no added value to our review of these PCNs.

This general condition is adopted with the modifications discussed above.

15. Use of Multiple Nationwide Permits: In the July 21, 1999, **Federal Register** notice, we proposed to modify this general condition to ensure that the use of more than one NWP to authorize a single and complete project will result in minimal adverse effects on the aquatic environment.

One commenter supported the proposed modification of General Condition 15. Many commenters objected to the proposed modification of this general condition, stating that it would prohibit the authorization of activities with minimal adverse effects. One commenter said that the proposed modification is contrary to 33 CFR 330.6(c) and must be addressed through rulemaking. A number of commenters indicated that the use of more than one NWP to authorize a single and complete project should be unrestricted because of the low acreage limits of the proposed new and modified NWPs. Several commenters objected to permittees using more than one NWP to authorize a single and complete project. One commenter said that the proposed modification of this general condition will cause more piecemealing of activities and discourage watershed-based planning and compensatory mitigation.

The modification of General Condition 15 is necessary to ensure that the use of more than one NWP to authorize a single and complete project does not result in more than minimal adverse effects on the aquatic environment, individually and cumulatively. The proposed modification is not contrary to 33 CFR 330.6(c) because that provision in the NWP regulations simply states that two or more different NWPs can be combined to authorize a single and complete project. With the modification of General Condition 15, we are not prohibiting the use of more than one NWP to authorize a single and complete project. Instead, we are simply imposing an acreage limit based on the maximum specified acreage limit of those NWPs used to authorize a single and complete project. We do not agree that the modification of General Condition 15 will encourage piecemealing of activities, since the definition of the term ''single and complete project'' is clearly defined at 33 CFR 330.2(i) and this definition has not changed. The modification of this general condition is adopted as proposed.

16. Water supply intakes: In the July 21, 1999, **Federal Register** notice, we did not propose any changes to this general condition. One commenter objected to this general condition, stating that it is too vague, excessive, and difficult to manage. This commenter recommend that the Corps require submission of a PCN when a proposed activity is within 1 mile upstream of a public water supply intake.

District engineers will determine whether an activity is subject to this general condition. Imposing a notification requirement based on a distance from an intake structure is not appropriate for a national condition, but division engineers can regionally condition the NWPs to establish specific distances from public water supply intakes. This general condition is adopted without change.

17. Shellfish Beds: In the July 21, 1999, **Federal Register** notice, we proposed to change the title of this general condition from ''Shellfish Production'' to ''Shellfish Beds.'' We also proposed to change the phrase ''concentrated shellfish production'' to ''concentrated shellfish populations'' because the word ''production'' implies that the general condition applies only to areas actively managed for shellfish production.

Two commenters recommended that the Corps change this general condition from a prohibition against activities in areas of concentrated shellfish populations to a notification requirement when any proposed NWP activity may cover concentrated shellfish populations. One commenter objected to changing the title of this general condition from ''Shellfish Production'' to ''Shellfish Beds.'' This commenter also indicated that the restrictions imposed by this general condition are too broad.

With the exception of NWP 4, we do not agree that the NWPs should authorize activities in concentrated shellfish beds. Changing the terms of this general condition from ''shellfish production'' to ''shellfish beds'' is necessary to ensure that activities authorized by NWPs result in minimal

adverse effects on the aquatic environment, especially in areas of concentrated shellfish populations that may be harvested for human consumption. The modification of this general condition is adopted as proposed.

18. Suitable Material: In the July 21, 1999, **Federal Register** notice, we did not propose any changes to this general condition, but one commenter requested further definitions of suitable material and debris that can be used.

We do not agree that it is necessary to further define what constitutes ''suitable material'' for the purposes of this general condition. It is impractical to provide a comprehensive list of unsuitable materials. If there are questions concerning the suitability of a particular material, the permittee should contact the appropriate Corps district office and ask if that material is considered suitable for the purposes of General Condition 18. This general condition is adopted without change.

19. Mitigation: In the July 21, 1999, **Federal Register** notice, we proposed several changes to this general condition. Several commenters recommended combining the mitigation information in paragraph (g) of General Condition 13 with this general condition. One commenter stated that this general condition is contrary to the 1990 mitigation MOA. Numerous commenters said that General Condition 19 should specify that mitigation is required, to the maximum extent practicable, in the same watershed as the impact site.

We have combined the provisions of paragraph (g) of General Condition 13 with the provisions of General Condition 19, so that the mitigation requirements for the NWPs are in General Condition 19. The 1990 mitigation MOA applies only to standard individual permits, not general permits such as the NWPs. Although we encourage permittees to locate compensatory mitigation in the same watershed as the site of the authorized work, there are occasions where it may be necessary or more beneficial to the aquatic environment to implement compensatory mitigation outside of the watershed. For example, restoring wetlands in a degraded watershed to compensate for losses of wetlands in a watershed with less impacts may be better for the overall aquatic environment.

One commenter suggested that General Condition 19 should contain a provision that allows district engineers to determine that compensatory mitigation is unnecessary if the adverse effects on the aquatic environment are minimal without compensatory mitigation. Several commenters objected to the phrase in the second sentence of the proposed modification of General Condition 19 which states that compensatory mitigation is required ''__* * * at least to the extent that adverse environmental effects to the aquatic environment are minimal.'' These commenters contend that this language allows the Corps to require mitigation in excess of the amount necessary to offset the authorized impacts.

In accordance with the NWP regulations, district engineers can determine that compensatory mitigation is not necessary to ensure that the authorized work results in minimal adverse effects on the aquatic environment. District engineers will require only the amount of compensatory mitigation that is needed to ensure that the net adverse effects on the aquatic environment are minimal, individually and cumulatively.

One commenter supported the inclusion of enhancement and preservation in the definition of compensatory mitigation. Another commenter said that the definition of mitigation should be expanded from restoration, creation, enhancement, preservation, and vegetated buffers to include avoiding, minimizing, rectifying, reducing, or compensating for losses of aquatic resources to make it consistent with paragraph (g) of General Condition 13, which recognizes this broader definition.

Since we have moved the provisions of paragraph (g) of General Condition 13 to General Condition 19, this general condition recognizes these types of mitigation. Rectifying impacts to the aquatic environment is similar to the enhancement and restoration of aquatic resources. Reducing impacts to the aquatic environment is similar to minimization.

A number of commenters objected to the removal of the phrase ''unless the District Engineer approves a compensation plan that the District Engineer determines is more beneficial to the environment than on-site minimization and avoidance measures'' which was in December 13, 1996, version of ''Section 404 Only'' Condition 4, from which General Condition 19 was derived. These commenters stated that the removal of this language conflicts with some recent statements by the Corps, including preferences for mitigation banks and in lieu fee programs. One commenter indicated that permittees should have options for providing compensatory mitigation, including the ability to utilize off-site compensatory mitigation (e.g., mitigation banks and in lieu fee programs) and out-of-kind compensatory mitigation (e.g., vegetated buffers next to open waters).

The modification of General Condition 19 does not conflict with our preference for using consolidated compensatory mitigation methods to offset losses of waters of the United States authorized by NWPs. General Condition 19 simply states that the district engineer will require, when necessary, the restoration, creation, enhancement, or preservation of aquatic resources to ensure that the adverse effects on the aquatic environment are minimal, individually and cumulatively. That compensatory mitigation can be provided by individual compensatory mitigation projects or consolidated mitigation methods, such as mitigation banks. District engineers have flexibility to determine the appropriate options for compensatory mitigation on a case-by-case basis. For activities authorized by NWPs, the selected compensatory mitigation method should be based on what is best for the aquatic environment and what is practicable for the permittee.

One commenter recommended modifying the vegetated buffer requirements in General Condition 19 to allow district engineers to waive these requirements if it is impractical for the permittee to establish and maintain vegetated buffers. Another commenter suggested that General Condition 19 should be modified to place more emphasis on on-site avoidance and minimization so that large scale mitigation such as vegetated buffers would be required only in exceptional circumstances. Two commenters said that the text of General Condition 19 should be rewritten to acknowledge that NWPs authorize activities that have minimal adverse effects on the aquatic environment and that most mitigation for NWP activities would consist of avoidance and small restoration projects, not the large scale mitigation that would result from establishing 50 to 125 foot wide vegetated buffers. One commenter stated that General Condition 19 does not contain specific requirements for maintaining and protecting vegetated buffers and asked how the maintenance of vegetated buffers will be guaranteed. One commenter objected to requiring vegetated buffers to be comprised of native species, because it would necessitate the removal of undesirable species in existing riparian buffers.

We have added the phrase ''to the maximum extent practicable'' to the

second sentence in paragraph (c) to clarify that vegetated buffers next to open waters can be required as compensatory mitigation only if such a requirement is practicable for the project proponent. District engineers will determine on a case-by-case basis whether vegetated buffers are necessary and the appropriate width of those vegetated buffers. Recommended widths of vegetated buffers are discussed in a previous section of this **Federal Register** notice. We have also added a provision to General Condition 19 that limits the proportion of compensatory mitigation that can be provided by vegetated buffers next to open waters. If compensatory mitigation for wetland impacts is necessary to ensure that an NWP activity results in minimal adverse effects on the aquatic environment and there are open waters on the project site, any vegetated buffer will comprise no more than 33% of the remaining compensatory mitigation acreage after the permanently filled wetlands have been replaced on a one-to-one acreage basis. Of course, many vegetated buffers will be wetlands and can be included as compensatory mitigation for wetland impacts.

Vegetated buffers are an alternate method of compensatory mitigation and should be protected in the same manner as wetland compensatory mitigation sites (i.e., through deed restrictions, conservation easements, or other appropriate legal means). The language of General Condition 19 does not require the removal of non-native plant species from the area where the vegetated buffer will be established and maintained. If the permittee is planting the vegetated buffer, he or she should use native plant species. Vegetated buffer zones that are already established with mature trees or shrubs can be maintained without removing those plants to replace them with native species. This general condition is adopted with the modifications discussed above.

20. Spawning Areas: In the July 21, 1999, **Federal Register** notice, we proposed to modify this general condition by adding the word ''important'' before the phrase ''spawning areas.'' The proposed modification would limit this general condition to spawning areas used by species harvested commercially for human consumption.

One commenter objected using the word ''important'' in this general condition, stating that it ignores the fact that commercially harvested fish species often rely on non-commercial species for survival . Two commenters said that this general condition should apply to all spawning areas. One commenter recommended expanding the scope of General Condition 20 to spawning areas of importance to recreational fisheries. One commenter suggested that the phrase ''important spawning areas'' should be replaced with ''spawning areas that support Federally-listed or special status fish.'' A commenter said that spawning areas that are important for state-listed endangered or threatened species or ecologically important fish species can be addressed through General Condition 25, Designated Critical Resource Waters. One commenter requested that the Corps provide a definition of the term ''substantial'' as it is used in the context of this general condition because many species of fish can tolerate high turbidity levels for short periods of time.

We maintain our position that the terms of this general condition should be limited to spawning areas used by species that are harvested commercially for human consumption. Division engineers can impose regional general conditions to restrict or prohibit activities in spawning areas used by other species. We cannot provide a definition of the word ''substantial'' as it is used in the context of this general condition because it is more appropriate to make this determination on a case-by-case basis, depending on the characteristics of the project site and the species that may be affected. This general condition is adopted as proposed.

21. Management of Water Flows: In the July 21, 1999, **Federal Register** notice, we proposed to modify this general condition to require permittees to maintain, to the maximum extent practicable, preconstruction surface water flow patterns.

Three commenters supported the proposed modification of General Condition 21. Several commenters objected to the proposed modification. One commenter suggested that the text of the proposed modification should be withdrawn and replaced with the original language of ''Section 404 Only'' Condition 6. A number of commenters stated that the Corps does not have the statutory authority to impose the requirements of this general condition. Two commenters indicated that the proposed modification of General Condition 21 is contrary to 33 CFR 320.4(m). One commenter said that best management practices should be required instead of this general condition. Numerous commenters stated that the requirements of General Condition 21 duplicate existing state or local programs. One commenter expressed concern that this general condition will impose requirements that are contrary to local standards or watershed plans. One commenter said that the requirements of this general condition will make the NWP program useless because all dredge and fill activities affect water flow.

We have statutory authority, through section 404 of the Clean Water Act, to impose General Condition 21 because this general condition is necessary to ensure that activities authorized by NWPs result in minimal adverse effects on the aquatic environment. Flooding and erosion that results from changes in surface water flows can have more than minimal adverse effects on the aquatic environment. The requirements of this general condition are not contrary to 33 CFR 320.4(m) because that section of the Corps regulations, which addresses the allocation of water supplies, is unrelated to the intent of General Condition 21.

District engineers can refer to best management practices to assist permittees in complying with this general condition, but we do not agree that best management practices are more efficient methods of achieving the objectives of General Condition 21. Although the requirements of this general condition may duplicate existing state or local programs, it is important to note that not all state and local governments address the management of water flows. Therefore, we believe that it is necessary to impose, on a nationwide basis, the requirements of General Condition 21 on activities authorized by NWPs. If the state or local government adequately addresses the management of surface water flows, the district engineer will defer to those agencies. However, if the state or local government does not adequately address the management of water flows, district engineers will determine if the proposed work complies with General Condition 21 and may impose special conditions on the NWP to ensure that the authorized work results in minimal adverse effects on surface water flows. If the activity is part of a larger system designed to manage water flows, then activity-specific management of water flows is not required. It is unlikely that this general condition will result in requirements that are contrary to watershed plans, because the intent of General Condition 21 is to ensure that activities authorized by NWPs result only in minimal adverse effects on the aquatic environment.

Although most discharges of dredged or fill material into waters of the United States authorized by NWPs alter surface water flow patterns, these changes are

usually minimal or could be mitigated to the minimal adverse effect level and would comply with General Condition 21. If more than minimal changes to surface water flows will occur as a result of the proposed work, the activity should be reviewed through the individual permit process or the activity should be modified with mitigation to comply with General Condition 21.

Two commenters objected to the proposed modification, stating it is too subjective. These commenters said that a lack of specific criteria will cause inconsistent and arbitrary implementation. These commenters requested specific criteria that will allow consistent determination of compliance. One commenter stated that the general condition should specify a storm event magnitude that will be used to determine compliance, because requiring no change in water flows for a 2-year storm event is different that requiring no change in water flows for a 100-year storm event. A commenter requested clarification whether the general condition addresses stream flow, overland flow, and/or stormwater flow. One commenter objected to the proposed modification of this general condition because it requires only qualitative analysis. Two commenters opposed the proposed modification of General Condition 21 because the Corps has not explained how compliance will be determined, specifically how pre-construction and post-construction water flows will be determined. One commenter recommended that the Corps adopt the guidelines at 23 CFR Part 650 (i.e., the Federal Highway Administration's regulations concerning bridges, structures, and hydraulics) to address floodplain encroachments and provide consistency for permit applicants.

We do not agree that specific criteria should be provided nationally, because of the large variability in hydrologic regimes and site conditions across the country. District engineers are better suited to establish local qualitative criteria to determine compliance with this general condition. As discussed in the July 21, 1999, **Federal Register** notice, this general condition applies to general surface water flow patterns over the course of a year, not to any particular storm event. The types of water flows subject to this general condition include both stream flows and overland flow. For example, this general condition prohibits the use of NWPs to authorize activities that will redirect substantial amounts of surface water to adjoining property owners and more than minimally increase the magnitude of flooding on their property.

To determine compliance with this general condition, district engineers will rely on their judgement and knowledge of local water flow patterns. District engineers will not require detailed hydrologic analyses or engineering studies.

Two commenters stated that requiring permittees to maintain, to the maximum extent practicable, surface water flows from the site is an impossible standard to meet, since such a requirement allows no change from pre-construction water flow conditions. Two commenters said that the phrase ''to the maximum extent practicable'' is an arbitrary threshold and will result in disputes between the Corps and project proponents with no mechanism for resolution.

The phrase ''to the maximum extent practicable'' provides flexibility for permittees to comply with the requirements of General Condition 21. This general condition does not establish a ''no effect'' requirement for compliance. It does not prohibit changes to surface water flows. General Condition 21 merely requires that the activity cause only minimal changes to surface water flows and maintain those flows so that they are similar, not necessarily identical, to preconstruction flow conditions. If changes to surface water flows will be more than minimal, the district engineer will either mitigate those impacts, or if that is not practicable, assert discretionary authority and require an individual permit.

Several commenters said that the analysis required to determine compliance with General Condition 21 is costly and burdensome on project proponents and is inappropriate for NWP activities. One commenter recommended that the text of this general condition include a statement requiring district engineers to defer to state and local agencies that have adequate requirements to manage water flows. A commenter suggested that General Condition 21 should be modified to provide greater flexibility for flood control and stormwater management activities, because this would allow permittees to demonstrate that changes in water flows comply with state or local flood control standards or benefit local hydrology or flow regimes. Another commenter recommended that activities authorized by NWPs should also be designed to allow the movement of aquatic organisms or require mitigation to maintain those movements.

Since district engineers will not require detailed hydrologic or engineering analyses, and must utilize qualitative analyses to determine whether or not a particular activity complies with this general condition, there will not be additional economic burdens on prospective permittees. Although district engineers should defer to state and local agencies if those agencies already impose adequate requirements for maintaining surface water flows, we do not agree that it is necessary to make this statement in the text of General Condition 21. We believe that the text of General Condition 21 provides adequate flexibility for flood control and stormwater management activities because it requires maintenance of surface water flows to the maximum extent practicable. In addition, this general condition does not prohibit the construction of facilities that impound water, such as retention or detention ponds, if the primary purpose of the project is to impound water. General Condition 4, Aquatic Life Movements, already addresses the issues raised by the last comment in the previous paragraph.

In the text of General Condition 21, we have changed the word ''project'' to ''activity'' to be consistent with the other general conditions, which refer to activities. This general condition is adopted with the modification discussed above.

23. Waterfowl Breeding Areas: In the July 21, 1999, **Federal Register** notice, we did not propose any changes to this general condition. One commenter recommended expanding this general condition to include all wetland-dependent migratory bird species.

We do not agree with this comment, because the intent of this general condition is to ensure that the NWPs do not authorize activities that result in more than minimal adverse effects to waterfowl, not all migratory bird species that may utilize wetlands. This general condition is retained without change.

24. Removal of Temporary Fills: In the July 21, 1999, **Federal Register** notice, we did not propose any changes to this general condition. One commenter requested clarification as to what constitutes a ''temporary'' fill by establishing time limits. Another commenter said that certain temporary fills, such as gravel, may be used by project proponents and left in stream beds to enhance habitat for spawning fish species. This commenter suggested that the Corps modify this general condition to allow temporary fills to remain in waters of the United States if those fills are for a permit requirement of any other regulatory agency.

District engineers will determine, on a case-by-case basis, what constitutes a temporary fill. Fills that are left in

waters of the United States as a condition of permit issued by another agency must also be authorized by Section 404 of the Clean Water Act (and Section 10 of the Rivers and Harbors Act if the fill is in navigable waters). These fills may be authorized by NWPs, regional general permits, or individual permits. This general condition is retained without change.

General Comments on Proposed General Conditions 25, 26, and 27: In the July 21, 1999, **Federal Register** notice, we proposed three new NWP general conditions that would limit the use of NWPs in designated critical resource waters, impaired waters, and waters of the United States within 100-year floodplains.

A number of commenters supported the three proposed NWP general conditions. Many commenters objected to the proposed general conditions, stating that there is no need for these restrictions. Several commenters opposed these three general conditions, because they duplicate other programs. Several commenters stated that the proposed general conditions will not provide any environmental benefits. Several commenters said that concerns for critical resource waters, impaired waters, and 100-year floodplains can be adequately addressed through the PCN process and the ability of district engineers to exercise discretionary authority on those activities that will result in more than minimal adverse effects on the aquatic environment. Other commenters stated that regional conditions would adequately address these issues.

After reviewing the comments addressing the three proposed NWP general conditions, we have decided to adopt proposed General Condition 25, Designated Critical Resource Waters, and proposed General Condition 27, Fills Within the 100-year Floodplain. We have decided to withdraw proposed General Condition 26, Impaired Waters. Proposed General Condition 27 has been substantially modified, as discussed below. This general condition has been designated as General Condition 26, Fills Within 100-year Floodplains. The new general conditions, in conjunction with the 1/2 acre limit for most of the new NWPs, will provide substantial environmental benefits. We do not agree that regional conditions are a better mechanism to address these issues, since the new general conditions address issues of national concern.

Several commenters said that the proposed new NWP general conditions will substantially reduce the regulated public's ability to efficiently obtain authorization for activities that have minimal adverse effects on the aquatic environment. Two of these commenters remarked that it will be more difficult to obtain authorization for maintenance activities. Several commenters stated that the proposed general conditions replace the ''minimal adverse effect'' criterion of the NWPs with a ''no effect'' criterion. Numerous commenters asserted that the assumption that activities in designated critical resource waters, impaired waters, and 100-year floodplains will result in more than minimal adverse effects on the aquatic environment is incorrect. These commenters said that many activities authorized by NWPs in these areas may actually improve water quality or provide essential public health and safety functions.

The two new NWP general conditions will not make it more difficult to obtain authorization for maintenance activities. Many maintenance activities are eligible for the Section 404(f) exemptions. NWP 3 activities in designated critical resource waters require notification to the district engineer but may be authorized. General Condition 26 does not restrict NWP 3 or NWP 31 activities in 100-year floodplains. The intent of the new general conditions is to ensure that the NWPs comply with the statutory requirements of Section 404(e) of the Clean Water Act. Although these conditions will limit the use of NWPs in certain waters, activities in these waters may be authorized by other forms of DA permits, such as regional general permits or standard permits.

One commenter stated that the proposed general conditions are contrary to the Corps goal of focusing its limited resources on those activities with the potential for greater environmental impacts. Two commenters said that without additional resources to implement and enforce the three proposed general conditions, there will be a decrease in environmental protection. One of these commenters said that these general conditions are too confusing and difficult to enforce. Two commenters objected to these general conditions because they substantially reduce the geographic area in which the NWPs can be used. One commenter stated that the proposed general conditions improperly change the focus of the NWPs from the type of activity to the location of the activity. Another commenter said that the proposed general conditions are confusing because of specific inconsistencies, such as the imposition of an acreage limit in proposed General Condition 26 without similar acreage limits in proposed General Conditions 25 and 27 or the different applicability of these general conditions for specific NWPs. For example, NWP 39 cannot be used in the 100-year floodplain but it can be used to authorize discharges of fill material into impaired waters and adjacent wetlands.

We agree that the proposed general conditions may have resulted in a decrease in environmental protection. However, the changes we have made will ensure that the conditions will substantially increase protection of the aquatic environment. General Condition 25 restricts the use of NWPs in high value waters, which is analogous to the increased emphasis on regional conditioning we placed on the proposed new and modified NWPs. General Condition 26 will minimize adverse effects to the flood-holding capacity of 100-year floodplains, as well as enhance protection of free-flowing streams in the regulated floodway. Although the two new NWP general conditions reduce the geographic scope of the NWPs, these conditions are necessary to ensure that the NWPs do not authorize activities with more than minimal adverse effects on the aquatic environment. The location of a waterbody or wetland has a substantial influence on the functions and values it provides. For example, a wetland within a 100-year floodplain may provide fish spawning habitat that is not provided by an isolated wetland. The differences in the requirements between the two general conditions are necessary because each of these conditions addresses different issues. Therefore, each of the new NWP general conditions requires different restrictions or limitations to ensure that the NWPs authorize activities with minimal adverse effects on the aquatic environment.

25. Designated Critical Resource Waters: In the July 21, 1999, **Federal Register** notice, we proposed a new general condition that would limit the use of certain NWPs in designated critical resource waters.

Many commenters expressed their support for the proposed general condition. A number of commenters opposed this general condition. One commenter said that General Condition 25 will severely restrict the NWP program and make it unusable. Some commenters stated that NWPs should not authorize activities in designated critical resource waters.

Numerous commenters said the proposed general condition is based on an invalid assumption that all discharges of dredged or fill material into designated critical resource waters will always jeopardize any essential functions that make these waters high value. These commenters stated that

this assumption is invalid because the NWPs authorize activities with minimal adverse effects on the aquatic environment. One commenter said that this general condition imposes a ''no effect'' standard instead of a ''minimal effect'' standard. Many commenters suggested that protection of designated critical resource waters is more effectively provided through regional conditions imposed by division engineers and the PCN process. The PCN process allows district engineers to add special conditions to NWP authorizations or exercise discretionary authority to require individual permits for activities that result in more than minimal adverse effects on the aquatic environment.

General Condition 25 does not prohibit the use of all NWPs in designated critical resource waters or adjacent wetlands. Only those NWP activities that are likely to result in more than minimal adverse effects on designated critical resource waters are restricted by General Condition 25. Although regional conditions and the PCN process may have fully protected designated critical resource waters, we believe that for the waters listed nationwide restrictions are appropriate. We believe that a national condition is necessary for certain categories of waters.

One commenter said that NOAA-designated marine sanctuaries should be subject to the same restrictions that General Condition 7 imposes on activities in Wild and Scenic Rivers. This commenter stated that the use of NWPs should be allowed if those activities are approved by the agency managing those sanctuaries. This commenter also said that National Estuarine Research Reserves do not require extra protection through General Condition 25 because they are already protected by coastal states and NOAA.

We do not agree that NOAA-designated marine sanctuaries should be subject to the same restrictions as Wild and Scenic Rivers. We believe that the listed NWPs would likely result in more than minimal adverse effects to these important waters. We believe that restricting the use of certain NWPs in National Estuarine Research Reserves is necessary.

Many commenters stated that existing General Condition 7 provides adequate protection for Wild and Scenic Rivers, and recommended the removal of Wild and Scenic Rivers from the list of designated critical resource waters in General Condition 25. Several commenters opposed the inclusion of critical habitat for Federally-listed endangered or threatened species as designated critical resource waters, stating that General Condition 11 already provides sufficient protection for these areas. Numerous commenters objected to the provision in General Condition 25 that requires concurrence from the U.S. FWS or NMFS that the proposed work complies with General Condition 11. One of these commenters said that this provision is contrary to the Endangered Species Act (ESA), which requires consultation only for those activities that adversely affect Federally-listed endangered or threatened species or their critical habitat. Two commenters indicated that this provision inappropriately shifts the responsibility for determining effects on endangered or threatened species from the Corps to the U.S. FWS or NMFS. One commenter said that this provision is not strong enough.

General Condition 25 merely states that activities involving discharges of dredged or fill material into Wild and Scenic Rivers must comply with General Condition 7. This general condition does not impose any additional restrictions on NWP activities in Wild and Scenic Rivers. We believe that the provisions concerning designated critical habitat for Federally-listed endangered or threatened species in General Condition 25 are necessary to ensure compliance with ESA. Moreover, we believe that designated critical habitat deserves the highest level of protection, thus for the NWPs listed, we will seek the concurrence of the FWS to ensure protection.

One commenter recommended the removal of state natural heritage sites from the list of designated critical resource waters. Another commenter said that General Condition 25 will prohibit the use of many NWPs in certain counties, since some state natural heritage sites encompass entire counties. One commenter requested clarification as to what constitutes a ''state natural heritage site.''

We are maintaining state natural heritage sites in the list of designated critical resource waters because these areas typically contain high value waters. A state natural heritage site has been designated, through a state legislative or regulatory process, as an area that warrants additional protection due to its natural resource characteristics. Therefore, we believe that authorizing projects under NWPs would likely result in more than minimal adverse effects on the aquatic environment.

One commenter objected to including outstanding national resource waters in the list of designated critical resource waters. This commenter said that this general condition should be limited to waters that are defined by Federal standards, not state standards, because there is a need for consistency across state boundaries. Two commenters said that outstanding national resource waters already receive special protection from states through an existing program. These commenters cited EPA's regulations at 40 CFR 131.12(a)(3). Three commenters supported the requirement for the legislature or governor to designate waters with particular environmental or ecological significance. Three commenters said that other state or local officials should be able to designate waters with environmental or ecological significance that should be subject to this general condition.

We believe that outstanding national resource waters should be subject to the provisions of General Condition 25, because these waters are typically high value waters. We maintain our position that outstanding national resource waters must be officially designated by the state as having particular environmental or ecological significance. To be subject to General Condition 25, those outstanding national resource waters must be identified and approved by the district engineer after public notice and opportunity for comment. We do not agree that state or local officials should be able to designate additional waters that will be subject to General Condition 25, without the district engineer providing an opportunity for public notice and comment.

Three commenters supported allowing district engineers to include additional waters after public notice and opportunity for comment. Several commenters opposed this mechanism, because it would provide no additional protection since these waters are already protected by state and local governments. Two commenters indicated that waters identified by Federal and state agencies as designated critical resource waters should be subject to a public review process. Two commenters stated that the use of the word ''include'' in the first sentence of General Condition 25 implies that there are other waters that are considered to be designated critical resource waters and subject to this general condition. A commenter requested clarification as to what constitutes an official designation as having particular environmental or ecological significance. This commenter said that public notice at the district level should be adequate to make this designation.

We have modified General Condition 25 to explicitly state that district

engineers can designate additional critical resource waters after notice and opportunity for public comment. This process is similar to the NWP regional conditioning process whereby district engineers would identify high value waters that should be subject to NWP restrictions. Waters having particular environmental or ecological significance should be designated by the governor or legislature, and the district engineer can designate these waters as critical resource waters for the purposes of General Condition 25, after public notice and opportunity for comment. In contrast to the regional conditioning process, the district engineer would approve any additional critical resource waters for the purposes of General Condition 25.

One commenter asked why wetlands adjacent to designated critical resource waters are included in General Condition 25. Several commenters recommended that the Corps replace the word ''adjacent'' with ''contiguous'' to clarify the geographic scope of this general condition and make it easier to implement. One commenter stated that adjacent wetlands are not clearly defined for the purposes of this general condition. Another commenter remarked that waters adjacent to designated critical habitat are not subject to the same ESA requirements as designated critical habitat and should not be treated as such.

Wetlands adjacent to designated critical resource waters are included in General Condition 25 because these wetlands can have substantial influences on the quality of these waters. We believe that this is true for all critical resource waters, including designated critical habitat for endangered species. For the purposes of this general condition, the definition term ''adjacent'' is the same as the definition at 33 CFR 328.3(c).

Several commenters requested that the Corps define what constitutes an ''effect'' to a designated critical resource water. Two commenters indicated that it is difficult for the public to know which waters are subject to General Condition 25 because that information is not readily available and the list of applicable waters can change frequently. Several commenters suggested that the Corps produce maps of designated critical resource waters and subject those maps to a public comment process.

For the purpose of General Condition 25, the term ''directly affecting'' refers to activities involving discharges of dredged or fill material into waters of the United States. Prospective permittees should contact the appropriate Corps district to determine if any designated critical resource waters occur in the vicinity of the proposed work. Corps districts can produce maps of designated critical resource waters to aid in the implementation of this general condition, but such maps are not required.

Several commenters said that states can restrict the use of NWPs in certain waterbodies through the Section 401 water quality certification process and that state-designated waters should not be subject to General Condition 25. Another commenter stated that the Corps should not restrict discharges into designated critical resource waters if other Federal or state agencies have not imposed restrictions on those waters.

We believe that the provisions in General Condition 25 are necessary to ensure that the NWPs only authorize activities with minimal adverse effects on the aquatic environment, individually or cumulatively. Other Federal and state agencies may not have the regulatory authority to restrict or prohibit discharges of dredged or fill material into designated critical resource waters. Therefore, it is appropriate for the Corps to impose such restrictions, since such discharges are regulated by the Corps under Section 404 of the Clean Water Act.

One commenter recommended adding NWP 13 to the list of NWPs that are prohibited in this general condition. Another commenter suggested that NWP 8 should be added to the list of NWPs that cannot be used in designated critical resource waters. Many commenters objected to the inclusion of maintenance activities (*e.g.*, NWPs 3 and 31) in General Condition 25 because these activities have minimal adverse effects on the aquatic environment and delaying the authorization of these activities is unsafe and contrary to the public interest. Some commenters suggested removing NWPs 7 and 43 from the list of prohibited activities. Many commenters said that NWPs 12 and 14 should not be restricted in these waters. Some of these commenters stated that submission of a PCN to the district engineer is adequate to ensure that the work results in minimal adverse effects on the aquatic environment. Two commenters said that NWP 25 should not be subject to this general condition. A commenter stated that NWP 35 should be included in the list of NWPs that require notification. This commenter also indicated that it is unnecessary to require a PCN for activities authorized by NWPs 22, 27, 30, and 37.

We do not agree that NWPs 13 or 8 should be added to the list of NWPs in paragraph (a) of General Condition 25. NWP 3 activities can occur in designated critical resource waters, provided those activities result in minimal adverse effects on the aquatic environment. The maintenance of flood control facilities constructed in designated critical resource waters could result in more than minimal adverse effects on the aquatic environment, and should be reviewed through other DA permit processes. We continue to believe that NWPs 7, 12, 14, 35, and 43 should be subject to the restrictions in paragraph (a). We do not agree that the PCN process is a more effective mechanism to review activities in designated critical resource waters. We believe that the activities authorized by NWPs 22, 25, 27, 30, and 37, should be reviewed on a case-by-case basis if they are located in designated critical resource waters or adjacent wetlands.

Many commenters suggested additional waters that should be included in the list of designated critical resource waters. Numerous commenters recommended groundwater recharge areas and sources of drinking water as designated critical resource waters. Other suggested waters include: primary nursery areas and shellfish waters; streams that support cold water fisheries; areas used by migratory birds; waters of the United States in wilderness areas, national parks, and wildlife refuges; areas identified by state natural heritage programs as supporting high concentrations of rare species; vernal pools; stream segments and waterbodies proposed for listing under section 303(d) of the Clean Water Act; waters supporting salmonid fisheries; and wetlands that are rare and difficult to replace, such as peatlands, potholes, vernal marshes, playas, kettles, high altitude wetlands, and mature forested wetlands.

Concerns regarding these waters are more effectively addressed through other processes, such as regional conditioning of the NWPs or case-specific review of PCNs. Division engineers can regionally condition the NWPs to prohibit or limit their use in such high value waters. District engineers will exercise discretionary authority and require individual permits if activities proposed in designated critical resource waters will result in more than minimal adverse effects on the aquatic environment. Proposed General Condition 25 is adopted with the modifications discussed above.

26. Impaired Waters: In the July 21, 1999, **Federal Register** notice, we proposed a new general condition that

would limit the use of NWPs in waterbodies that are identified as impaired through the Clean Water Act Section 303(d) process. The sources of impairment considered for the proposed general condition were: nutrients, organic enrichment resulting in low dissolved oxygen concentration in the water column, sedimentation and siltation, habitat alteration, suspended solids, flow alteration, turbidity, or the loss of wetlands. The proposed limitation would also apply to wetlands adjacent to the impaired waterbody.

Many commenters supported the proposed General Condition 26 and many commenters opposed this proposed general condition. Numerous commenters said that the NWPs should not authorize activities in impaired waterbodies. A large number of commenters supported the identification of impaired waters through the Clean Water Act Section 303(d) process. One commenter supported the exclusion of NWP 3 from the 1 acre limit imposed by General Condition 26. Two commenters stated that the limitations in this general condition should apply to all wetlands in the watershed or sub-basin, not only to those wetlands that are adjacent to the impaired waters.

Those commenters that expressed opposition to the proposed general condition stated that the limitations in General Condition 26 are unnecessary and would provide no benefits for the environment. Many commenters objected to the proposed general condition because they believe that activities in waters of the United States may have no effect on the actual cause of impairment. Numerous commenters objected to the presumption in proposed General Condition 26 that NWP activities would result in further impairment of waterbodies. Some commenters indicated that certain NWP activities improve water quality. For example, these commenters said that NWPs can authorize activities that stabilize eroding stream banks, improve fish passage, improve the quality of highway runoff, or decrease peak flows. Several commenters believe that the Corps lacks the legal authority to impose this general condition. One commenter said that General Condition 26 is unnecessary because the quality of waters is improving. Several commenters stated that the limitations of General Condition 26 place more value on impaired waters than unimpaired waters. Two commenters indicated that the requirements of this general condition make permittees responsible for mitigating impacts to water quality that they did not cause.

Many commenters recommended using the PCN process and discretionary authority to address impacts to impaired waters, instead of utilizing a prohibition. A number of commenters said that the NWPs should be used to authorize discharges of dredged or fill material into impaired waters and adjacent wetlands if the adverse effects on the aquatic environment are minimal. Two commenters stated that the criterion of ''no further impairment'' imposes a ''no adverse effect'' standard on the NWPs, not a ''minimal adverse effect'' standard. Several commenters said that the limitations imposed by proposed General Condition 26 offset the utility of regional conditions. A number of commenters objected to the 1 acre limit imposed by the proposed general condition. Two commenters said that the 1 acre limit is arbitrary and violates the Administrative Procedures Act because the Corps provided no justification that this limit is necessary. One commenter stated that the acreage limit should be in the text of the NWPs, not the general condition.

A large number of commenters objected to this proposed general condition because it is duplicative of existing programs, such as the Section 401 water quality certification or National Pollutant Discharge Elimination System programs. Two commenters stated that the issuance of a water quality certification by the state or Tribe should be adequate to ensure that the use of the NWP is consistent with water quality standards. Several commenters asserted that states are best suited to determine which actions are necessary to address causes of impairment, allocate pollutant loads, and protect water quality, and that the Corps should defer these matters to the states. Two commenters said that the proposed general condition is redundant with General Condition 9.

Several commenters objected to the use of Clean Water Act Section 303(d) lists to identify impaired waters. A commenter objected to the provisions of proposed General Condition 26 because EPA is currently proposing to revise its regulations for the Total Maximum Daily Load (TMDL) program, upon which the limitations of the proposed general condition are based. This commenter also opposed the proposed general condition because state Section 303(d) lists are constantly changing and not all state lists are available at the same time. One commenter requested clarification whether the TMDL program is the same as the Section 303(d) program for identifying impaired waters. Another commenter asked how the Corps will be able to enforce this general condition when water quality standards may vary from year to year and the Section 303(d) status of individual stream segments may change. Two commenters objected to the proposed general condition because of the subjective criteria used to identified impaired waters on 303(d) lists.

Several commenters objected to making the prospective permittee responsible for demonstrating that the proposed work will not result in further impairment of the waterbody. Many commenters opposed this general condition because it does not explain how the prospective permittee can rebut the presumption and what information is needed to make the rebuttal. Several commenters indicated that, in many cases, it will be impossible to rebut the presumption in General Condition 26 and in other cases much time and money would be required to rebut the presumption. One commenter suggested that the prospective permittee should be required to provide documentation to the district engineer instead of demonstrating that the activity will not result in further impairment of the waterbody.

Several commenters asserted that permittees should be allowed to use compensatory mitigation to ensure that the authorized work will not result in further impairment of the waterbody. Two commenters said that the prohibition against using compensatory mitigation to ensure no further impairment of the waterbody is contrary to General Condition 19 and the last sentence of paragraph (b) of the proposed General Condition. One commenter requested clarification whether the term ''excluding mitigation'' refers to compensatory mitigation. This commenter also asked if avoidance and minimization could be used as documentation that the activity will not cause further impairment of the waterbody.

Three commenters asked if tributaries of impaired waters are also considered impaired and subject to proposed General Condition 26. Several commenters requested clarification whether wetlands adjacent to an impaired waterbody are considered part of that waterbody and subject to the 1 acre limit. One commenter questioned whether the proposed general condition is applied on a watershed or stream reach basis.

Several commenters objected to the inclusion of adjacent wetlands in proposed General Condition 26 because the definition of adjacency is too vague and those wetlands may not have direct hydrologic connections to the waterbody. Three commenters requested

a definition of the term ''adjacent'' as it applies to this general condition. Two commenters said that the general condition should be limited to the impaired waterbody and wetlands with demonstrable hydrologic connections to the impaired waterbody. One commenter recommended that the Corps replace the term ''adjacent'' with ''contiguous'' in this general condition. This commenter also said that, for the purposes of this general condition, adjacent wetlands should not include wetlands downstream of the impaired waterbody. Another commenter said that identifying adjacent wetlands is problematic since impaired waters are identified by segments. This commenter requested guidance on how to identify wetlands that are adjacent to impaired stream segments.

Two commenters said that this general condition should be included in General Condition 25 because impaired waters warrant the same protection as designated critical resource waters. Another commenter said that proposed General Condition 26 should not apply to waters where TMDL water quality management plans have been implemented. Two commenters said that this general condition should not apply to activities that do not result in discharges of the listed pollutant.

One commenter requested clarification whether proposed General Condition 26 applies only to waterbodies that are impaired as a result of the causes listed in the text of the proposed general condition or if other sources of impairment are applicable. Two commenters said that the proposed general condition should apply only to waterbodies that are impaired as a result of the loss of wetlands. Many commenters recommended additional criteria to identify waters that should be subject to this general condition. Suggested criteria include: (1) watersheds that have lost more than 50% of their original wetlands; (2) loss of riparian vegetation that results in greater fluctuations in water temperature; (3) waters identified as impaired through EPA's Index of Watershed Indicators; (4) all waters identified as impaired through the Section 303(d) process; (5) pollutants listed in section 502(6) of the Clean Water Act; (6) waters impaired by hydrological and habitat modification; and (7) waters impaired by pesticides and pathogens.

A number of commenters suggested specific NWPs that should not be subject to proposed General Condition 26. Many commenters said that NWP 3 activities should not be subject to the proposed general condition, because it would result in delays for maintenance activities that have minimal adverse effects on the aquatic environment and are not likely to result in further impairment of these waterbodies. One commenter stated that NWP activities that enhance or restore waters, are necessary for public health and safety, or authorize maintenance activities, should not be subject to the proposed general condition. Various commenters recommended that NWPs 12, 13, 14, 31, and 33 should not be subject to proposed General Condition 26. One commenter said that the proposed general condition should not apply to NWPs 3, 13, 27, 41, 42, and 43 because the activities authorized by these NWPs usually improve water quality. Most NWPs were recommended for exclusion from the proposed general condition.

After considering the comments received in response to the July 21, 1999, **Federal Register** notice, we determined that General Condition 26 should be withdrawn. We believe that the 1/2 acre limit and the 1/10 acre PCN limit on the new and modified NWPs will ensure that the adverse effects are no more than minimal. We also agree with the commenters who stated that the limitation would yield limited, if any, value added for the aquatic environment. We agree that in many cases mitigated NWPs will actually improve the status of the aquatic environment. Finally, we believe that impacts to impaired waters are more appropriately addressed through the Section 401 water quality certification process.

27. Fills Within 100-year Floodplains: We proposed, in the July 21, 1999, **Federal Register** notice, to add a new general condition to the NWPs that would limit the use of certain NWPs in waters of the United States within all 100-year floodplains.

We received many comments supporting or opposing proposed General Condition 27. A large number of commenters said that this general condition should include drainage activities in 100-year floodplains. Several commenters recommended expanding the scope of the proposed general condition to include excavation activities in 100-year floodplains. Many commenters stated that the proposed general condition should be expanded to prohibit all fills in 100-year floodplains. Some commenters expressed concern that the proposed general condition does not address increases in flooding caused by stream channelization activities. One commenter supported proposed General Condition 27 because it will provide protection of essential fish habitat and anadromous fish species.

Many commenters opposed proposed General Condition 27, stating that it would provide few benefits and that it will increase delays and costs for the regulated public. A number of commenters contend that the requirements of the proposed general condition are outside of the scope of the Corps regulatory authority. Many commenters stated that the requirements of proposed General Condition 27 imply that the Corps is expanding its regulatory authority to the entire 100-year floodplain. Several commenters objected to the provisions of this general condition because it duplicates the requirements of other government agencies, especially state and local flood protection regulations and ordinances, as well as the National Flood Insurance Program (NFIP) of the Federal Emergency Management Agency (FEMA). One commenter said that General Condition 27 is contrary to the Administration's initiatives that encourage reuse of brownfields, because most brownfields are located within 100-year floodplains in urban areas.

As a result of our review of the comments received in response to the July 21, 1999, **Federal Register** notice, we have modified proposed General Condition 27 and designated it as General Condition 26, Fills Within 100-year Floodplains. The revised general condition prohibits the use of NWPs 29, 39, 40, 42, 43, and 44 to authorize discharges of dredged or fill material into waters of the United States that result in permanent, above-grade fills within the FEMA-mapped 100-year floodplain of streams below the headwaters. NWPs 12 and 14 can be used to authorize discharges of dredged or fill material resulting in permanent, above-grade fills within the 100-year floodplain of streams below headwaters, provided the permittee notifies the district engineer in accordance with General Condition 13 and the activity complies with FEMA or FEMA-approved local floodplain construction requirements.

In flood fringes of FEMA-mapped 100-year floodplains located within headwater streams, NWPs 12, 14, 29, 39, 40, 42, 43, and 44 can be used to authorize permanent, above grade fills in waters of the United States, provided the prospective permittee notifies the district engineer in accordance with General Condition 13 and provides documentation demonstrating that the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements. In FEMA-designated floodways of 100-year

floodplains located within headwater streams, NWPs 29, 39, 40, 42, 43, and 44 cannot be used to authorize permanent, above-grade fills in waters of the United States. However, NWPs 12 and 14 can be used to authorize permanent, above-grade fills in waters of the United States within floodways of FEMA-designated 100-year floodplains located within headwater streams, provided the prospective permittee notifies the district engineer in accordance with General Condition 13 and provides documentation demonstrating that the activity complies with FEMA or FEMA-approved local floodplain construction requirements. We believe that these changes, combined with the 1/2 acre maximum acreage limit and 1/10 acre PCN threshold, will ensure protection of the functions and values of floodplains. Definitions of the terms ''flood fringe'' and ''floodway'' are found at 44 CFR 9.4.

We do not agree that this general condition should be extended to drainage and excavation activities within 100-year floodplains, since these activities do not have substantial adverse effects on the flood-holding capacity of 100-year floodplains. Stream channelization activities authorized by NWPs are subject to General Condition 21, which prohibits substantial changes to surface water flow patterns, including downstream flooding. Stream channelization projects are constructed to improve conveyance of water, which may decrease local flooding.

It is important to note that the requirements of this general condition are not a surrogate for the requisite and separate determination by the Corps of minimal adverse effects on the aquatic environment that is required for all NWPs. District engineers will exercise discretionary authority if proposed discharges of dredged or fill material into waters of the United States within 100-year floodplains will result in more than minimal adverse effects (after consideration of mitigation measures) on the aquatic environment.

We do not believe that the modified version of this general condition will unreasonably increase costs for the regulated public. NWP 26 authorized only discharges of dredged or fill material in headwaters and isolated waters and the modified condition allows the use of NWPs in the flood fringe of the headwaters. The Corps study of the economic and workload implications of the proposed NWPs indicates that the revised approach will cost the regulated public roughly one-half the amount the proposal in the July 21, 1999, **Federal Register** would cost. Moreover, we believe that the modifications we have made will actually enhance protection of the aquatic environment. To participate in the NFIP, the permittee must comply with FEMA or FEMA-approved local floodplain construction requirements, which will not impose additional costs. The requirements of this general condition are not an attempt to, and do not, expand the Corps regulatory jurisdiction to areas outside of waters of the United States.

Two commenters stated that the current NWP program complies with Executive Order (E.O.) 11988, Floodplain Management. One of these commenters said that requiring individual permits for the activities prohibited by the proposed general condition is not considered a practicable alternative in the context of E.O. 11988, because it is impractical to require individual permits for all activities in 100-year floodplains.

We concur that the NWP program fully complies with E.O. 11988, including the ''Floodplain Management Guidelines for Implementing E.O. 11988'' issued by the U.S. Water Resources Council and ''Further Advice on Executive Order 11988 Floodplain Management'' issued by the Interagency Task Force on Floodplain Management. ''Further Advice on Executive Order 11988 Floodplain Management'' states that class review of repetitive actions proposed in 100-year floodplains can be conducted in full compliance with E.O. 11988. The NWPs clearly fall within the category of class review of repetitive actions.

Several commenters indicated that requiring individual permits for activities in 100-year floodplains will not provide any benefits because individual permits will be issued with little or no change from the proposed work. These commenters said that it is likely that the Corps will rely on the NFIP standards when assessing impacts on 100-year floodplains. Two commenters said that the requirements of proposed General Condition 27 will remove incentives for project proponents to design their activities to have minimal adverse effects to qualify for NWP authorization. These commenters believe that project proponents will design larger activities with greater environmental impacts when required to request individual permits. One commenter said that the NWPs should authorize fills that result in the loss of less than 2 acres of waters of the United States in 100-year floodplains.

Several commenters stated that the requirements of proposed General Condition 27 should not be more restrictive than FEMA regulations. Numerous commenters indicated that the proposed general condition is contrary to FEMA regulations, which allow fills in the flood fringe of 100-year floodplains. One commenter said that the proposed general condition should be modified to allow the NWPs to authorize activities that comply with NFIP construction standards. One commenter said that proposed General Condition 27 should not apply in areas with FEMA-certified floodplain management programs in place, where the activity has been approved by the local floodplain management agency.

We agree with these comments and have modified this general condition so that the NWPs can be used to authorize activities within flood fringes of 100-year floodplains within headwater streams, provided those activities comply with FEMA or FEMA-approved local floodplain construction requirements and result in minimal adverse effects on the aquatic environment. We do not agree that there should be a 2 acre limit for discharges of dredged or fill material into waters of the United States within 100-year floodplains. The 1/2 acre limit for most of the new NWPs will allow the NWP program to continue to provide a streamlined authorization process for activities with minimal adverse effects on the aquatic environment.

A large number of commenters stated that proposed General Condition 27 will impose additional requirements on local floodplain authorities that will increase their workload. For example, the proposed general condition required local floodplain authorities to determine the extent of 100-year floodplains, determine whether a proposed activity is outside of the 100-year floodplain, and provide documentation that the proposed work will not decrease the flood-holding capacity of the 100-year floodplain.

We agree with these concerns, but believe that the revised general condition will not impose such additional workload requirements on local floodplain authorities.

Many commenters contend that the prohibitions in proposed General Condition 27 are not necessary because the NWPs authorize only activities with minimal adverse effects on the aquatic environment, including floodplains. Several commenters noted that the terms of proposed General Condition 27 impose a ''no effect'' standard on the NWPs instead of a ''minimal adverse effect'' standard.

We agree with these comments. The revised general condition does not

prohibit the use of NWPs 29, 39, 40, 42, 43, and 44 to authorize discharges of dredged or fill material into waters of the United States within flood fringes of 100-year floodplains within headwater streams, provided the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements and results in minimal adverse effects on the aquatic environment. NWPs 12 and 14 can be used to authorize activities in all non-tidal 100-year floodplains, provided those activities comply with FEMA or FEMA-approved local floodplain construction requirements and result in minimal adverse effects on the aquatic environment.

Numerous commenters objected to this general condition because it requires PCNs for all activities. Two commenters requested clarification whether notification to the district engineer is required if the FEMA map or local floodplain map shows that the project site is outside of the 100-year floodplain. Three commenters asked if the PCN requirement in paragraph (a) of the proposed general condition is for all NWPs or only NWPs 21, 29, 39, 40, 42, 43, and 44.

The revised general condition does not require notification for all activities authorized by NWPs 12, 14, 29, 39, 40, 42, 43, and 44. Notification is required only if the proposed activity involves discharges of dredged or fill material into waters of the United States within 100-year floodplains that are mapped through Flood Insurance Rate Maps (FIRMs) published by FEMA or FEMA-approved local floodplain maps.

Numerous commenters said that compensatory mitigation can be used to offset losses of floodplain functions and values, including flood storage, and that the prohibitions in proposed General Condition 27 are unnecessary. Several commenters remarked that floodplain issues are more appropriately addressed through regional conditions. Other commenters suggested that PCNs and discretionary authority should be used instead of prohibitions. Two commenters recommended that the Corps include local floodplain agencies in the agency coordination process to address floodplain concerns.

Compensatory mitigation can be used to ensure that the proposed work complies with FEMA or FEMA-approved local floodplain construction requirements. Since flood hazards are a national concern, we do not agree that this issue should be addressed solely by regional conditions. Certain NWP activities within 100-year floodplains will be reviewed through the PCN process to ensure that those activities comply with FEMA or FEMA-approved local floodplain construction requirements and result in minimal adverse effects on the aquatic environment. In addition, we believe that the waters of the United States within the mapped floodway have inherently higher wetland functions and values, which should be afforded additional protections.

Several commenters said that proposed General Condition 27 is unnecessary because the proposed modification of General Condition 21 adequately addresses changes to surface water flows, including flooding. Three commenters requested clarification whether runoff from buildings constructed in uplands within 100-year floodplains requires a Section 404 permit. Three commenters asked whether permanent, above-grade fills in uplands within 100-year floodplains are subject to proposed General Condition 27.

We do not agree that General Condition 21 adequately addresses all potential adverse effects to 100-year floodplains. Stormwater runoff from buildings constructed in uplands within 100-year floodplains does not require a Section 404 permit. During reviews of PCNs, district engineers will consider the adverse effects of the proposed activity on the ecological as well as flooding functions and values of 100-year floodplains. Depending on the Corps scope of analysis for the proposed work, district engineers will generally limit their reviews to activities in waters of the United States within 100-year floodplains.

Many commenters addressed problems associated with identifying and mapping 100-year floodplains. One commenter supported the requirement for using up-to-date FEMA maps. Several commenters advocated expanding proposed General Condition 27 to 100-year floodplains not mapped by FEMA on its FIRMs. A large number of commenters indicated that FEMA maps are not accurate and should not be relied upon to identify the extent of 100-year floodplains. Two commenters said that the Corps should map the floodplains. One commenter noted that many FEMA maps do not reflect changes in land use that have occurred since the last FIRM was issued, which makes these maps unreliable.

To effectively implement the requirements of this general condition, and to be consistent with other Federal programs, 100-year floodplains will be identified through the latest FIRMs published by FEMA or FEMA-approved local floodplain maps. If there are no FIRMs or FEMA-approved local floodplain maps available for the area where the proposed work is located, then the requirements of this general condition do not apply. In such cases, the Corps will still consider the impacts of proposed projects through the PCN review process.

Many commenters stated that in areas where there are no FEMA maps or those maps are out of date, local floodplain authorities may be unwilling to certify the extent of the 100-year floodplain without extensive analyses. These commenters said that landowners may have to go through a lengthy and expensive map revision process before the local floodplain authority will provide the documentation required by proposed General Condition 27. Two commenters remarked that the requirement to have a licensed professional engineer certify whether or not the activity is in the 100-year floodplain is too restrictive. These commenters said that this requirement should be modified to allow qualified hydrologists to identify 100-year floodplains in areas not mapped by FIRMs. Several commenters suggested that proposed General Condition 27 should contain a statement requiring the consideration of man-made flood control structures when mapping 100-year floodplains.

The revised general condition does not require local floodplain authorities to certify the extent of 100-year floodplains. In addition, the prospective permittee is not required to have a licensed professional engineer certify whether or not the proposed work is within a 100-year floodplain.

One commenter objected to using FEMA maps, stating that the scale of these maps makes it difficult to determine if a particular parcel is within a 100-year floodplain. Another commenter objected to using FIRMs because they may contain large areas that are within the 100-year floodplain but are not mapped because of inadequate funding. These unmapped areas would place burdens on local governments or the landowners, who would be required to survey the property and map the 100-year floodplain. One commenter objected to proposed General Condition 27, because it would require project proponents to obtain individual permits if they cannot demonstrate that the proposed work is located outside of 100-year floodplains because there are no FEMA or local floodplain maps available for the project sites.

We believe that FIRMs or FEMA-approved local floodplain maps are adequate for the purposes of this general condition. Utilizing existing FIRMs and

FEMA-approved local floodplain maps eliminates the additional burdens on local governments or landowners that existed in the proposed condition. If there are no FIRMs or FEMA-approved local floodplain maps available for the project area, this general condition does not apply.

Several commenters stated that paragraph (b) of proposed General Condition 27 is an illegal delegation of the Corps regulatory authority because it allows FEMA or local floodplain authorities to prohibit the use of NWPs 12 and 14 in 100-year floodplains. Two commenters disapprove of the requirement for prospective permittees to provide, with the notification, a statement from FEMA or the local flood control agency that the proposed work will not increase flooding. One commenter objected to the provisions of paragraph (b) because FEMA regulations require engineering analyses only for work in regulatory floodways. Two commenters recommended modifying paragraph (b) to allow professional engineers to provide documentation to district engineers without submitting it to FEMA or local floodplain authorities for approval.

We have revised this general condition to require the permittee to comply with the appropriate FEMA or FEMA-approved local floodplain construction requirements. These requirements address impacts to base flood elevations and 100-year floodplains to minimize flood damages. The revised general condition does not require engineering analyses on a case-by-case basis.

Two commenters said that the requirements of the proposed general condition will require local floodplain authorities to develop new regulations to address the documentation necessary to comply with paragraph (b), since these are new requirements that are not currently used by local floodplain agencies. These commenters indicated that it would be more appropriate for FEMA to change its regulations to address these documentation requirements. Many commenters stated that FEMA and local floodplain authorities are not equipped to handle the reviews necessary for the rebuttable presumption in paragraph (b) of proposed General Condition 27 because it contains different standards than they currently use. Several commenters disapprove of this general condition because it provides no mechanism to resolve disputes that may occur between FEMA and local floodplain agencies.

We have revised this general condition to require the permittee to comply with FEMA or FEMA-approved local floodplain construction requirements. If those construction requirements change, the permittee would have to comply with the new construction requirements.

Several commenters indicated that the criteria in paragraph (b) of proposed General Condition 27 (i.e., no more than minimal alteration of the hydrology, flow regime, or volume of waters associated with the floodplain) are not well-defined in current FEMA regulations or the guidance for implementing local floodplain regulations. These commenters said that most states do not use these criteria when assessing impacts to 100-year floodplains. Two commenters suggested that the Corps consult with state floodplain regulatory agencies and Federal transportation agencies to develop language that makes this condition practical to implement. Another commenter recommended that other factors, such as the width of the drainage course, slope, roughness coefficients, and location of above-grade fills within the 100-year floodplain should be considered.

We have removed these criteria from this general condition. Instead, we will rely on FEMA or FEMA-approved local floodplain construction requirements to ensure that the authorized work does not result in more than minimal adverse effects to the flood-holding capacity of 100-year floodplains.

One commenter identified inconsistencies between the second and fourth sentences of paragraph (b). The second sentence states that the '' * * * project and associated mitigation, will not decrease flood-holding capacity and no more than minimally alter the hydrology, flow regime, or volume of waters associated with the floodplain.'' The fourth sentence states that the project ''* * * will not result in increased flooding or more than minimally alter floodplain hydrology or flow regimes.'' Since the documentation requirements of these sentences differ, the commenter was unsure as to what constitutes the criteria that will be used to determine compliance with the proposed general condition.

The revised general condition does not contain these inconsistencies.

Two commenters stated that the proposed general condition should apply to NWP activities in smaller tributaries, in addition to the main river. One commenter said that tributaries to streams should be considered as separate watersheds and eligible for the exception in paragraph (c) of proposed General Condition 27. This commenter requested criteria that will be used to determine whether a tributary is separate from the floodplain of the main channel. Another commenter contends that paragraph (c) of the proposed general condition is too confusing and requested clarification explaining how district engineers and prospective permittees would determine if a particular site is located in the portion of the watershed that drains less than one square mile.

This general condition applies to activities authorized by NWPs 12, 14, 29, 39, 40, 42, 43, and 44, where 100-year floodplains are delineated on either FIRMs or FEMA-approved floodplain maps. If no 100-year floodplain map has been produced for a particular tributary, then the provisions of this general condition do not apply. The revised general condition does not contain a provision similar to paragraph (c) of the proposed General Condition 27.

Several commenters suggested that the rebuttable presumption in paragraph (b) should be utilized for NWPs 21, 29, 39, 40, 42, 43, and 44, instead of prohibiting these activities in 100-year floodplains. One commenter recommended expanding proposed General Condition 27 to NWPs 7, 8, 16, and 17. Several commenters said that proposed General Condition 27 should not apply to the construction, replacement, and maintenance of water supply facilities, fish production facilities, flood control facilities, and hydraulic control and drainage facilities. Three commenters indicated that the proposed general condition should not apply to NWP 27 activities.

We have revised the proposed general condition to require, for NWP 29, 39, 40, 42, 43, and 44 activities in flood fringes of the 100-year floodplains within headwater streams, that the permittee notify the district engineer in accordance with General Condition 13 and provide documentation demonstrating that the proposed work complies with FEMA or FEMA-approved local floodplain construction regulations. We have withdrawn NWP 21 from the general condition. We do not agree that this general condition should apply to NWPs 7, 8, and 16 because the activities authorized by these NWPs have little or no adverse effects on the flood-holding capacity of 100-year floodplains. Hydropower projects authorized by NWP 17 would be required to comply with the appropriate floodplain construction requirements. This general condition does not apply to water supply facilities, fish production facilities, flood control facilities, and hydraulic control and drainage facilities, unless those activities are authorized by the NWPs listed in the general condition.

NWP 27 is not subject to this general condition.

Many commenters said that proposed General Condition 27 should not apply to NWP 12 activities. One commenter suggested a ⅓ acre limit for utility line activities in 100-year floodplains. Another commenter stated that the installation of above-ground utility line valves within 100-year floodplains should not be subject to the hydraulic modeling requirements of paragraph (b) because these activities have minor adverse effects on flood-holding capacity. Several commenters said that the requirements of paragraph (b) should not apply to utility lines that are installed underground. Three commenters said that permanent above-grade fills within 100-year floodplains for utility line activities should not be authorized by NWP 12.

We do not agree that NWP 12 activities should be excluded from this general condition. Utility line activities can adversely affect the flood-holding capacity of the 100-year floodplain. NWP 12 activities are required to comply with the appropriate FEMA or FEMA-approved local floodplain construction requirements.

Numerous commenters stated that proposed General Condition 27 should not apply to NWP 14 activities. One commenter said that the proposed general condition should apply only to transportation crossings that are constructed parallel to streams. A commenter suggested a ⅓ acre limit for NWP 14 activities in 100-year floodplains. One commenter said that restricting NWP 14 activities in 100-year floodplains could adversely affect public safety.

NWP 14 activities can adversely affect the flood-holding capacity of 100-year floodplains, as well as surface water flow patterns during flood events. The revised general condition does not prohibit NWP 14 activities in 100-year floodplains. NWP 14 activities must comply with the appropriate FEMA or FEMA-approved local floodplain construction requirements.

Many commenters said that proposed General Condition 27 should not apply to activities authorized by NWP 21 because all coal mining is regulated by the Office of Surface Mining (OSM) and delegated state agencies. Some of these commenters indicated that state mining programs have extensive performance standards for hydrological balance, which address similar issues as proposed General Condition 27. Numerous commenters stated that OSM-approved state programs have requirements to restore mined areas to approximately the original contours and that prohibiting the use of NWP 21 in 100-year floodplains will place burdens on the mining industry without providing any additional benefits.

We concur with these commenters and have removed NWP 21 from the revised general condition.

One commenter stated that, for activities authorized by paragraph (a) of NWP 40, NRCS would have to determine if the proposed work will result in unacceptable impacts on FEMA-mapped 100-year floodplains. This commenter said that NRCS, as part of its review, addresses impacts on flood storage and flood flows and that prospective permittees should be allowed to use NWP 40 if the work will not result in impacts to 100-year flood events. This commenter also recommended incorporating the requirements of proposed General Condition 27 into the text of NWP 40 so that the regulated public will be aware of these requirements.

For activities authorized by paragraph (a) of NWP 40, NRCS will determine if the proposed work complies with this general condition. We have added paragraph (e) to NWP 40, which refers permittees to General Condition 26.

Many commenters objected to applying the prohibition in paragraph (a) of proposed General Condition 27 to NWP 43 activities. A number of these commenters said that this prohibition is inappropriate since stormwater management facilities must be located in or near 100-year floodplains and their purpose is floodplain management and flood control. Several commenters said that prohibiting NWP 43 activities in 100-year floodplains will put citizens at greater risks and make their property more susceptible to flood damage. One commenter stated that proposed General Condition 27 should not apply to the maintenance of existing flood control projects.

We do not agree that NWP 43 should be excluded from this general condition. NWP 43 activities must comply with FEMA or FEMA-approved local floodplain construction requirements, if the activity is located in flood fringes of 100-year floodplains of headwater streams. Furthermore, many in-stream stormwater management facilities are located above the 1 cfs point on streams. General Condition 26 does not apply above the 1 cfs point, thus these projects will not be affected. The revised general condition does not apply to NWP 31 activities.

Many commenters stated that proposed General Condition 27 should not apply to NWP 44 activities because it would not provide any added benefits. Some of these commenters said that aggregate mining activities often increase flood storage capacity and therefore should not be prohibited by this general condition. Several commenters suggested that NWP 44 activities should be subject to the rebuttable presumption in paragraph (b) of the proposed general condition. One commenter said that the proposed general condition should not apply to aggregate mining activities because sand and gravel deposits are typically located within floodplains and off-site alternatives are usually impractical. This commenter also stated that mined land reclamation will restore surface water flow patterns. A commenter noted that dikes, berms, foundations, and impoundments associated with mining activities can be located so that they will not restrict the flow of floodwaters.

We do not agree that NWP 44 should be excluded from this general condition, because permanent, above-grade fills associated with mining activities can adversely affect the flood-holding capacity of 100-year floodplains. Mining activities that do not result in permanent above-grade fills are not subject to the requirements of this general condition.

The Corps of Engineers is very concerned with the loss of life and property resulting from unwise development in the floodplain. The Corps has recently advocated the strengthening of floodplain policy and the use of non-structural measures to reduce flood damages. We believe that the changes to the NWP program published today will play an important role in reducing damages associated with development in the floodplain. We will monitor carefully the effectiveness of the new floodplain condition to ensure that it has the intended impact on reducing floodplain development. Specifically, three years from the effective date of the new NWPs, we will prepare a report on the use of NWPs in the flood fringe area in the headwaters. This report will include an analysis of the extent, if any, to which NWPs are being used in the floodplain of areas with repeated flood damages.

Proposed General Condition 27 is adopted as General Condition 26, with the modifications discussed above.

V. Comments and Responses on Nationwide Permit Definitions

We received many comments concerning the proposed definitions for the NWPs. Comments regarding specific definitions are discussed below. In this section, we also address requests for definitions of additional terms used in the NWP program. One commenter said that certain terms defined in the

''Definitions'' section do not appear in the text of NWPs and that they should be removed. This commenter cited the definitions of ''aquatic bench'' and ''ephemeral streams.'' Another commenter objected to the differential treatment of perennial, intermittent, and ephemeral streams, stating that each stream type has important functions and values and that the proposed NWPs imply that ephemeral streams are less valuable.

We have deleted the definition of the term ''aquatic bench,'' since it is not used in the new NWPs. We believe that it is necessary to retain the definition of the term ''ephemeral stream'' because it is important to recognize the differences between perennial, intermittent, and ephemeral streams when determining whether a particular project will have more than minimal adverse effects on the aquatic environment. For example, NWP 43 does not authorize the construction of new stormwater management facilities in perennial streams. Division engineers can also regionally condition these NWPs to address regional concerns for different stream types.

Best Management Practices. One commenter recommended adding ''and wetlands'' after the phrase ''surface water quality.''

We do not agree that this change is necessary, because wetlands are surface waters. This definition is adopted as proposed.

Compensatory Mitigation. One commenter stated that the requirement in the new NWPs for vegetated buffers adjacent to open waters is inconsistent with the proposed definition of compensatory mitigation, because that definition does not recognize vegetated buffers as a form of compensatory mitigation. Another commenter recommended revising the definition to recognize the use of upland areas to provide out-of-kind compensatory mitigation. One commenter said that the definition of this term should include references to mitigation banks and in lieu fee programs. One commenter said that the word ''unavoidable'' in the definition is confusing and should be removed.

The establishment and maintenance of vegetated buffers next to open waters, including streams, is not inconsistent with the proposed definition of this term. An integral component of stream restoration projects is the reestablishment of the riparian zone, which may involve planting trees and shrubs next to the stream to restore aquatic habitat. It is not necessary to include mitigation banks and in lieu fee programs in the definition of this term because these are specific forms of compensatory mitigation. The word ''unavoidable'' is an integral part of this definition because the NWPs require on-site avoidance and minimization of losses of waters of the United States, to the maximum extent practicable (see General Condition 19). This definition is adopted as proposed.

Creation: We did not receive any comments concerning the proposed definition. This definition is adopted as proposed.

Drainage Ditch. Several commenters noted that the term ''ordinary high water line,'' which is used in the proposed definition of this term, is not defined in Corps regulations. These commenters asked if we intended to refer to the ''ordinary high water mark.'' Several commenters stated that channelized streams should not be included in this definition. One commenter recommended that this definition differentiate between channelized streams and drainage ditches by stating that channelized streams convey water from high water tables. Another commenter objected to a statement in the preamble discussion related to this definition (64 FR 39351) that the maintenance of drainage ditches which are constructed by channelizing streams is exempt from Section 404 permit requirements as long as the maintenance activity does not exceed the original ditch design and configuration. Two commenters requested that the Corps add structural drainage ditches and channels to the definition of this term.

One commenter said that a clear definition of the term ''upland drainage ditch'' is needed. Another commenter objected to the second sentence of the proposed definition, stating that drainage ditches are jurisdictional only when they are constructed in waters of the United States. This commenter indicated that the entire drainage ditch should become jurisdictional if any part of that drainage ditch is constructed in waters of the United States.

We have withdrawn the proposed definition of this term from the ''Definitions'' section of the NWPs, because of the complexity of the jurisdictional issues related to drainage ditches.

Enhancement: We did not receive any comments concerning the proposed definition. This definition is adopted as proposed.

Ephemeral Stream. Several commenters recommended modifying the proposed definition of this term to state that ephemeral streams are not waters of the United States as defined at 33 CFR 328.3(a)(3). These commenters also noted that in the July 1, 1998, **Federal Register** notice (63 FR 36042), the Corps defined the term stream bed as including only perennial and intermittent streams.

We do not agree that it is necessary to explicitly state in the definition of this term that ephemeral streams are not waters of the United States because such a statement would be inaccurate. An ephemeral stream that meets the criteria at 33 CFR part 328 is a water of the United States. We acknowledge that we made an error on page 36042 of the July 1, 1998, **Federal Register** notice. Our intent was to clarify that the PCN thresholds for stream bed impacts for the proposed NWPs apply only to perennial and intermittent stream beds, not ephemeral stream beds. The term ''stream bed,'' as used for the NWPs, applies to perennial, intermittent, and ephemeral stream beds. This definition is adopted as proposed.

Farm tract: We did not receive any comments concerning the proposed definition. This definition is adopted as proposed.

Independent utility: We did not receive any comments concerning the proposed definition. This definition is adopted as proposed.

Intermittent stream: We did not receive any comments concerning the proposed definition. This definition is adopted as proposed.

Loss of Waters of the United States. During our review of the comments received in response to the July 21, 1999, **Federal Register** notice, we found an error in the proposed definition of the term ''loss of waters of the United States.'' In the fourth sentence of the draft definition, we stated that the loss of stream bed includes the linear feet of perennial or intermittent stream bed that is filled or excavated. This statement is inaccurate because ephemeral stream bed that is filled or excavated can also be considered a loss of waters of the United States. However, the 300 linear foot limit for stream beds filled or excavated does not apply to ephemeral streams. We have modified this sentence to define the loss of stream bed as the linear feet of stream bed that is filled or excavated.

One commenter requested clarification whether the definition of this term refers only to permanent losses. This commenter also said that the proposed definition implies that all permanent losses of waters of the United States, no matter how small, are considered. Several commenters stated that only permanent losses of waters of the United States should be regulated by the Corps. Another commenter suggested that temporary losses should

be included in the measurement of loss of waters of the United States.

All permanent losses of waters of the United States are considered when calculating the amount of loss of waters of the United States to determine whether a particular activity complies with the acreage or linear limits of an NWP. All discharges of dredged or fill material into waters of the United States resulting in permanent or temporary losses of waters of the United States are regulated by the Corps, unless they are specifically exempt under Section 404(f) of the Clean Water Act. We do not agree that temporary losses of waters of the United States should be included in the threshold measurement to determine whether a activity may qualify for an NWP, since these areas revert back to waters of the United States once they are restored.

One commenter asked if the term ''loss of waters of the United States'' includes the removal of silt that has accumulated in a channel. Another commenter said that the proposed definition is so broad that it would include any effect, not just losses. This commenter said that it is not clear whether maintenance dredging of flood control channels to restore design grades is considered a loss of waters of the United States. One commenter objected to the third sentence of the proposed definition, stating that this sentence is inconsistent with Corps practice of considering compensatory mitigation when determining whether the adverse effects on the aquatic environment are minimal. A commenter suggested that the Corps consider the entire single and complete project to determine the amount of loss of waters of the United States and whether the adverse effects are minimal.

The term ''loss of waters of the United States'' does not include maintenance dredging activities that remove accumulated sediments, provided the dredged material is deposited in upland disposal sites. An exception occurs where the channel has accumulated so much sediment that wetlands have developed in the channel and the removal of those wetlands are necessary to reconstruct the channel. In that situation, we would consider the activity to result in a loss of waters of the United States. However, in most situations mitigation is not required for the cyclical removal of vegetation during maintenance activities.

The third sentence of this definition is not inconsistent with our policy of using compensatory mitigation to determine whether the net adverse effects of a particular activity on the aquatic environment are minimal. This part of the definition merely states that compensatory mitigation cannot be used to offset a loss of waters of the United States to meet the acreage limit of an NWP. For example, a project proponent cannot create ½ acre of wetlands to change a ¾ acre loss of wetlands to a ¼ acre loss of wetlands (see paragraph (b) of General Condition 19). However, the district engineer will consider compensatory mitigation when determining whether the net adverse effects on the aquatic environment are minimal.

One commenter said that this definition should also include long-term, but temporary, impacts to aquatic resource functions and values. Another commenter stated that discharges of dredged or fill material into waters of the United States to construct compensatory mitigation projects should be included in the measurement of loss of waters of the United States because these projects do not always succeed.

District engineers will determine, on a case-by-case basis whether an activity results in permanent or temporary losses of waters of the United States. We do not agree that impacts due to the construction of compensatory mitigation projects should be included in the measurement of loss of waters of the United States because these activities offset losses of waters of the United States. This definition is adopted with the modification discussed above.

Non-tidal wetland. One commenter said that the third sentence of the proposed definition is not accurate because it changes the definition of high tide line. This commenter believes that the maximum height of the tide is not the spring high tide.

The spring high tide line is the normal high tide line that occurs during the tidal cycle. Water levels higher than spring high tides result from storm surges, which are not part of the normal tidal cycle. This definition is retained as proposed.

Open Water. Two commenters stated that the proposed definition of this term is confusing and asked whether all waters of the United States that have ordinary high water marks are open waters. These commenters also inquired whether this term applies to other areas, such as ephemeral washes, arroyos, and vernal pools, that are not inundated for sufficient amounts of time to develop OHWMs and may not be waters of the United States. Two commenters said that the definition of this term should specifically exclude ephemeral washes. One commenter requested that the Corps clarify whether or not all waters of the United States have an OHWM.

To clarify this definition, we have modified the second sentence to state that open waters either have little or no emergent aquatic vegetation. Vegetated shallows are considered to be open waters. Waters of the United States with substantial amounts of emergent aquatic vegetation are wetlands, which may or may not have an OHWM. An ephemeral wash, arroyo, or vernal pool that does not have an OHWM is not a water of the United States, unless that area has wetlands that meet the criteria in 33 CFR part 328. We have added a sentence to the definition which states that ephemeral waters are not considered open waters, for the purposes of the NWPs. The definition of this term is adopted with the modifications discussed above.

Perennial stream. One commenter recommended that the Corps modify the proposed definition to state that the water table ''discharges'' into the stream for most of the year.

We do not agree with this comment, because using the word ''discharge'' in this definition is likely to create confusion since certain NWPs authorize discharges of dredged or fill material into waters of the United States for specific activities. The definition is adopted as proposed.

Permanent above-grade fill. Several commenters requested a more explicit definition of the word ''permanent'' as used in the context of this term. One commenter asked for clarification of what is considered ''above-grade'' for the purposes of this definition. One commenter said that any discharge of dredged or fill material into waters of the United States should be considered an above-grade fill.

District engineers will determine, on a case-by-case basis, what constitutes a permanent, above-grade fill for the purposes of this definition and General Condition 26. Not all discharges of dredged or fill material into waters of the United States result in permanent, above-grade fills. For example, during the installation of an underground utility line, a wetland could be excavated and backfilled with no permanent change in grade. We believe the definition is adequately clear.

One commenter expressed concern that the use of the word ''substantial'' in the definition of this term would prohibit stockpiling in 100-year floodplains during sand and gravel mining operations. Another commenter requested that the last sentence of this definition specifically state which NWPs are excluded from this definition, and whether NWP 12 is one of the excluded NWPs.

Temporary stockpiles of materials during mining operations would not be considered permanent above-grade fills for the purposes of this definition and General Condition 26. The exclusion in the last sentence of this definition applies to all structural discharges authorized by NWPs, except for structural discharges that are authorized by the NWPs listed in General Condition 26 (i.e., NWPs 12, 14, 29, 39, 40, 42, 43, and 44). This definition is adopted as proposed.

Playa. Many commenters objected to the proposed definition of this term, stating that this type of aquatic habitat is found throughout the country. Various commenters suggested additional geographic areas that should be included, such as Oklahoma, Colorado, Kansas, Oregon, Washington, and Idaho. Another commenter objected to the inclusion of the word ''small'' in the proposed definition because some playas can be large in size. This commenter also objected to including the phrase ''emergent hydrophytic vegetation'' in the definition because many playas do not support vegetation.

Since we have removed the indexed acreage limit for discharges of dredged or fill material into playas, prairie potholes, and vernal pools from NWP 40, therefore we have removed the proposed definition of a playa.

Prairie pothole. Many commenters objected to the proposed definition of this term, stating that this type of aquatic habitat is found throughout the country.

Since we have removed the indexed acreage limit for discharges of dredged or fill material into playas, prairie potholes, and vernal pools from NWP 40, we have removed the proposed definition of prairie pothole.

Preservation: We did not receive any comments concerning the proposed definition. This definition is adopted as proposed.

Project Area. One commenter objected to the inclusion of open space in the definition of this term, because the commenter believes that it penalizes the permittee for avoiding impacts to waters of the United States. Another commenter said that the exclusion of public roads from the definition of ''project area'' is unnecessary because the public roads would not have been built unless the subdivision was constructed.

Since we have replaced the indexed acreage limit of NWP 39 with a simple ½ acre limit, we have deleted the proposed definition of project area from this section.

Restoration. One commenter recommended deleting the phrase ''or exist in a substantially degraded state'' from the definition of this term, because it overlaps with the definition of the term ''enhancement.''

The definition of this term was taken from the ''Federal Guidance for the Establishment, Use and Operation of Mitigation Banks'' that was published in the November 28, 1995, **Federal Register** (60 FR 58605). Therefore, we cannot make the recommended change because this guidance is still in effect. The definition is adopted as proposed.

Riffle and Pool Complex. One commenter suggested that this term apply only to perennial streams and not to intermittent or ephemeral streams. This commenter also recommended inserting the word ''moderately'' before the word ''steep'' in the second sentence of this definition because stream beds with steep gradients seldom have riffle and pool complexes.

The definition of this term was taken from 40 CFR 230.45. Therefore, we will not modify the definition of this term for the purposes of the NWPs. District engineers will use their judgement to identify riffle and pool complexes at project sites and to distinguish between riffle and pool complexes (which are found in areas with moderate grades) and step-pool complexes (which are found in areas with steep grades, where the stream bed material consists mostly of boulders and large rocks). The definition is adopted as proposed.

Single and Complete Project. One commenter said that the criteria for linear single and complete projects should be the same as for other activities.

We do not agree with this comment. The definition of single and complete linear projects is consistent with the current NWP regulations at 33 CFR 330.2(i). This definition is adopted as proposed.

Stormwater management. Several commenters objected to the proposed definition, stating that it does not specifically include facilities that reduce downstream flooding. These commenters said that the definition should include flood control facilities so that they can be authorized by NWP 43.

The proposed definition does consider flooding and the definition of its related term, ''stormwater management facilities,'' addresses flooding issues by discussing runoff in the definition. NWP 43 can be used to authorize certain types of flood control facilities, if they are constructed to control runoff and reduce flooding impacts. This definition is adopted as proposed.

Stormwater management facilities. Two commenters said that this definition should distinguish between facilities that are designed to protect water quality and facilities that are designed for flood control purposes.

We disagree with these commenters because stormwater management facilities usually perform both functions by slowing runoff during storms and trapping sediments and chemical compounds. This definition is adopted as proposed.

Stream bed: We did not receive any comments concerning the proposed definition. This definition is adopted as proposed.

Stream channelization. One commenter requested that the Corps modify the definition of this term to more specifically identify what constitutes stream channelization. Another commenter said that the definition should contain a statement that excavation activities are not regulated by the Corps. Two commenters stated that this definition should include definitions for the terms ''structures'' and ''fills'' so that the regulated public will know when the maintenance of these structures and fills is eligible for NWP 3 or the maintenance exemption in section 404(f) of the Clean Water Act.

The proposed definition already provides sufficient examples of activities that may result in stream channelization. District engineers will determine on a case-by-case basis whether a particular activity involves stream channelization. We discuss the regulation of excavation activities in waters of the United States in a previous section of this **Federal Register** notice and do not believe it is necessary to address that issue in this definition. We do not agree that it is necessary to provide definitions of the terms ''structure'' and ''fill'' in the definition of this term. This definition is adopted as proposed.

Tidal Wetland. One commenter stated that the term ''spring high tide'' should be replaced with the phrase ''mean high tide'' to make the definition consistent with the provisions of section 10 of the Rivers and Harbors Act.

Although the shoreward limit of jurisdiction for section 10 of the Rivers and Harbors Act is mean (average) high water (see 33 CFR 329.12(a)(2)), spring high tides are waters of the United States under Section 404 of the Clean Water Act (see 33 CFR 328.3(d) and (f)). Tidal wetlands are wetlands that are inundated with tidal waters, including spring high tides. Therefore, this definition is adopted as proposed.

Vegetated Shallows. One commenter suggested inserting the phrase

''submerged or floating'' before the word ''vegetation'' in the proposed definition.

The proposed definition was taken from the definition of vegetated shallows published at 40 CFR 230.43 and we do not agree that the recommended change is necessary. This definition is adopted as proposed.

Vernal pool. Many commenters objected to the proposed definition of this term, stating that this type of aquatic habitat is found throughout the country. One commenter stated that not all regions with vernal pools exhibit the ''Mediterranean'' climates cited in the proposed definition.

Since we have removed the indexed acreage limit for discharges of dredged or fill material into playas, prairie potholes, and vernal pools from NWP 40, we have removed the proposed definition of vernal pools from this section.

Waterbody. One commenter suggested that the word ''contiguous'' in the second sentence of the proposed definition should be replaced with the word ''adjacent.''

We disagree with this recommendation, because wetlands that are adjacent to a waterbody are not necessarily part of the waterbody, unless there is a direct, surface water connection (i.e., contiguous) between the wetland and the waterbody. This definition is adopted as proposed.

Additional Definitions. Several commenters recommended that the Corps include definitions of other terms in this section of the NWPs. These comments are addressed below.

One commenter said that the phrase ''minimal effects on the aquatic environment'' needs to be precisely defined so that users of NWPs will know the extent of adverse effects authorized by the NWPs. Two commenters suggested adding definitions of the terms ''isolated waters'' and ''headwaters.'' One of these commenters requested a definition of the term ''excavation.'' One commenter said that a definition of the term ''upland'' as it is used in the context of NWPs 39, 43, and 44 is needed. Two commenters asked for a definition of the phrase ''utility line substations'' as used in NWP 12. Another commenter requested a definition of the term ''practicable'' as it is used in General Condition 21. This commenter recommended adopting the definition in the Section 404(b)(1) guidelines.

We cannot provide a national definition of the term ''minimal effects on the aquatic environment'' because the determination of minimal adverse effects for the NWPs and other general permits must be made on a case-by-case basis, by considering site characteristics, the functions and values of waters of the United States, the quality of those waters, regional differences in aquatic resource functions and values, and other factors. Definitions of the terms ''isolated waters'' and ''headwaters'' are found at 33 CFR 330.2(e) and 33 CFR 330.2(d), respectively. We do not agree that it is necessary to provide a definition of the terms ''excavation,'' ''uplands,'' or ''utility line substations.'' The Corps regulatory program uses the definition of the term ''practicable'' found at 40 CFR 230.3(q).

One commenter requested a definition of the term ''non-tidal wetlands adjacent to tidal waters'' because the word ''adjacent'' can be broadly defined. This commenter recommended limiting the phrase ''non-tidal wetlands adjacent to tidal water'' to wetlands that are found between the mean tide line and the spring high tide line; wetlands landward of the spring high tide line would not be considered adjacent to tidal waters.

As discussed in a previous paragraph in this section, wetlands located between the mean high tide line and the spring high tide line are tidal wetlands, because they are inundated with tidal waters. Non-tidal wetlands that are landward of the spring high tide line and bordering, contiguous, or neighboring to tidal waters are adjacent to tidal waters. District engineers will determine, on a case-by-case basis, whether a particular non-tidal wetland is adjacent to tidal waters.

One commenter recommended including a more detailed definition of the term ''lower perennial stream'' that is developed from the Cowardin definition and discusses the stream gradient, water velocity, stream substrate, faunal composition, and floodplain development of the lower perennial stream.

Since the term ''lower perennial stream'' is used only in the context of NWP 44, we have provided a modified version of the Cowardin definition in the text of this NWP. This modified definition describes the stream gradient, stream flow, water velocity, and the stream substrate. We do not agree that it is necessary to address the type of organisms that inhabit lower perennial streams, since the physical description of these stream segments is adequate for the purposes of NWP 44.

One commenter suggested that the Corps include a definition of the term ''vegetated buffer'' in this section. We concur with this comment and have added a definition of this term to the ''Definitions'' section of the NWPs.

For the implementation of General Condition 26, we have also added definitions of the terms ''flood fringe'' and ''floodway'' to this section. These definitions were taken from 44 CFR 9.4, FEMA's regulations for floodplain management and protection of wetlands.

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

Maine

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

Maryland

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

Massachusetts

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

Michigan

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

Minnesota

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

Mississippi

Vicksburg District Engineer, ATTN: CEMVK–OD–F, 4155 Clay Street, Vicksburg, MS 39183–3435

Missouri

Kansas City District Engineer, ATTN: CENWK–OD–R, 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–R, 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: CESPA–OD–R, 4101 Jefferson Plaza NE, Room 302, Albuquerque, NM 87109–3435

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–RG, 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–PE–R, 1645 South 101st East Avenue, Tulsa, OK 74128–4609

Oregon

Portland District Engineer, ATTN: CENWP–OP–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–CO–F, P.O. Box 1070, Nashville, TN 37202–1070

Texas

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

Utah

Sacramento District Engineer, ATTN: CESPK–CO–R, 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–CO–R, 803 Front Street, Norfolk, VA 23510–1096

Washington

Seattle District Engineer, ATTN: CENWS–OD–RD, 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–CO–O, Building 230, Fort Shafter, Honolulu, HI 96858–5440

Puerto Rico and Virgin Islands

Jacksonville District Engineer, ATTN: CESAJ–RD, P.O. Box 4970, Jacksonville, FL 32202–4412

Date: February 28, 2000.

Hans A. Van Winkle,

Deputy Commander for Civil Works.

Accordingly, these Nationwide Permits are issued as follows:

Nationwide Permits, Conditions, Further Information, and Definitions

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40. Agricultural Activities
41. Reshaping Existing Drainage Ditches
42. Recreational Facilities

43. Stormwater Management Facilities
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2. Proper Maintenance
3. Soil Erosion and Sediment Controls
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B. Nationwide Permits and Conditions

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 the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, or current construction codes or safety standards which are necessary to make repair, rehabilitation, or replacement, are permitted, provided the adverse environmental effects resulting from such repair, rehabilitation, or replacement are minimal. Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction. This nationwide permit authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire, or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the District Engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(ii) Discharges of dredged or fill material, including excavation, into all waters of the United States to remove accumulated sediments and debris in the vicinity of, and within, existing structures (*e.g.*, bridges, culverted road crossings, water intake structures, etc.) and the placement of new or additional rip rap to protect the structure, provided the permittee notifies the District Engineer in accordance with General Condition 13. The removal of sediment is limited to the minimum necessary to restore the waterway in the immediate vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend further than 200 feet in any direction from the structure. The placement of rip rap must be the minimum necessary to protect the structure or to ensure the safety of the structure. All excavated materials must be deposited and retained in an upland area unless otherwise specifically approved by the District Engineer under separate authorization. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the District Engineer.

(iii) Discharges of dredged or fill material, including excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by a storm, flood, or other discrete event, including the construction, placement, or installation of upland protection structures and minor dredging to remove obstructions in waters of the United States. (Uplands lost as a result of a storm, flood, or other discrete event can be replaced without a Section 404 permit provided the uplands are restored to their original pre-event location. This NWP is for the activities in waters of the United States associated with the replacement of the uplands.) The permittee must notify the District Engineer, in accordance with General Condition 13, within 12 months of the date of the damage and the work must commence, or be under contract to commence, within two years of the date of the damage. The permittee should provide evidence, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. The restoration of the damaged areas cannot exceed the contours, or ordinary high water mark, that existed 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 authorized by this permit. Minor dredging to remove obstructions from the adjacent waterbody is limited to 50 cubic yards below the plane of the ordinary high water mark, and is limited to the amount necessary to restore the pre-existing bottom contours of the waterbody. The dredging may not be done primarily to obtain fill for any restoration activities. The discharge of dredged or fill material and all related work needed to restore the upland must be part of a single and complete project. This permit cannot be used in conjunction with NWP 18 or NWP 19 to restore damaged upland areas. This permit does not authorize the replacement of lands lost through gradual erosion processes.

Maintenance dredging for the primary purpose of navigation and beach restoration are not authorized by this permit. This permit does not authorize new stream channelization or stream relocation projects. Any work authorized by this permit must not cause more than minimal degradation of water quality, more than minimal changes to the flow characteristics of the stream, or increase flooding (See General Conditions 9 and 21). (Sections 10 and 404)

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

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 is 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 the activity meets all of the following criteria:

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

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

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

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

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

12. *Utility Line Activities.* Activities required for the construction, maintenance, and repair of utility lines and associated facilities in waters of the United States as follows:

(i) *Utility lines:* The construction, maintenance, or repair of utility lines, including outfall and intake structures and the associated excavation, backfill, or bedding for the utility lines, in all waters of the United States, 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 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). For example, utility line trenches can be backfilled with clay blocks to ensure that the trench does not drain the waters of the United States through which the utility line is installed. Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

(ii) *Utility line substations:* The construction, maintenance, or expansion of a substation facility associated with a power line or utility line in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, provided the activity does not result in the loss of greater than ½ acre of non-tidal waters of the United States.

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

(iv) *Access roads:* The construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than ½ acre of non-tidal waters of the United States. 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 as near as possible to preconstruction contours and elevations (*e.g.*, at grade corduroy roads or geotextile/gravel roads). Access roads constructed above preconstruction contours and elevations in waters of the 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 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. Activities authorized by paragraphs (i) through (iv) may not exceed a total of ½ acre loss of waters of the United States. Waters of the United States temporarily affected by filling, flooding, excavation, or drainage, where the project area is restored to preconstruction contours and elevations, are not included in the calculation of permanent loss of waters of the United States. This includes temporary construction mats (*e.g.*, timber, steel, geotextile) used during construction and removed upon completion of the work. Where certain functions and values of waters of the United States are permanently adversely affected, such as the conversion of a forested wetland to a herbaceous wetland in the permanently maintained utility line right-of-way, mitigation will be required to reduce the adverse effects of the project to the minimal level.

Mechanized landclearing necessary for the construction, maintenance, or repair of utility lines and the construction, maintenance, and expansion of utility line substations, foundations for overhead utility lines, and access roads is authorized, provided the cleared area is kept to the minimum necessary and preconstruction contours are maintained as near as possible. The area of waters of the 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).

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

(a) Mechanized land clearing in a forested wetland for the utility line right-of-way;

(b) A Section 10 permit is required;

(c) The utility line in waters of the 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 utility line substations that result in the loss of greater than 1/10 acre of waters of the United States;

(f) Permanent access roads constructed above grade in waters of the United States for a distance of more than 500 feet; or

(g) Permanent access roads constructed in waters of the United States with impervious materials. (Sections 10 and 404)

Note 1: Overhead utility lines constructed over Section 10 waters and utility lines that are routed in or under Section 10 waters without a discharge of dredged or fill material require a Section 10 permit; except for pipes or pipelines used to transport gaseous, liquid, 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 Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material associated with such pipelines will require a Corps permit under Section 404.

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

Note 3: Where the proposed utility line is constructed or installed in navigable waters of the United States (*i.e.,* Section 10 waters), copies of the PCN and NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration, National Ocean Service, for charting the utility line to protect navigation.

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

a. This NWP is subject to the following acreage and linear limits:

(1) For *public linear transportation projects* in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than 1/2 acre of waters of the United States;

(2) For *public linear transportation projects* in tidal waters or non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than 1/3 acre of waters of the United States and the length of fill for the crossing in waters of the United States does not exceed 200 linear feet, or;

(3) For *private linear transportation projects* in all waters of the United States, provided the discharge does not cause the loss of greater than 1/3 acre of waters of the United States and the length of fill for the crossing in waters of the United States does not exceed 200 linear feet;

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

(1) The discharge causes the loss of greater than 1/10 acre of waters of the United States; or

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

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

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

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

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

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

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

Note: Some discharges for the construction of farm roads, forest roads, or temporary roads for moving mining equipment may be eligible for an exemption from the need for a Section 404 permit (see 33 CFR 323.4).

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

(a) The activity is conducted on:

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

(2) Any Federal land; or

(3) 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

(4) Any private or public land;

(b) *Notification:* For activities on any private or public land that are not described by paragraphs (a)(1), (a)(2), or (a)(3) above, the permittee must notify the District Engineer in accordance with General Condition 13; and

(c) Only native plant species should be planted at the site, if permittee is vegetating the project site.

Activities authorized by this NWP include, but are not limited to: the removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms; the installation of current deflectors; the enhancement, restoration, or creation of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or create stream meanders; the backfilling of artificial channels and drainage ditches; the removal of existing drainage structures; the construction of small nesting islands; the construction of open water areas; activities needed to reestablish vegetation, including

plowing or discing for seed bed preparation; mechanized landclearing to remove undesirable vegetation; and other related activities.

This NWP does not authorize the conversion of a stream to another aquatic use, such as the creation of an impoundment for waterfowl habitat. This NWP does not authorize stream channelization. This NWP does not authorize the conversion of natural wetlands to another aquatic use, such as creation of waterfowl impoundments where a forested wetland previously existed. However, this NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands, on the project site provided there are net gains in aquatic resource functions and values. For example, this NWP may authorize the creation of an open water impoundment in a non-tidal emergent wetland, provided the non-tidal emergent wetland is replaced by creating that wetland type on the project site. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

Reversion. For enhancement, restoration, and creation projects conducted under paragraphs (a)(2) and (a)(4), this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion. For restoration, enhancement, and creation projects conducted under paragraphs (a)(1) and (a)(3), 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. This NWP also authorizes the reversion of wetlands that were restored, enhanced, or created on prior-converted cropland that has not been abandoned, in accordance with a binding agreement between the landowner and NRCS or FWS (even though the restoration, enhancement, or creation activity did not require a Section 404 permit). The five-year reversion limit does not apply to agreements without time limits reached under paragraph (a)(1). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate State agency executing the agreement or permit. Prior to any reversion activity, the permittee or the appropriate Federal or State agency must notify the District Engineer and include the documentation of the prior condition. Once an area has reverted back to its prior physical condition, it will be subject to whatever the Corps regulatory requirements will be at that future date. (Sections 10 and 404)

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

39. Residential, Commercial, and Institutional Developments. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of residential, commercial, and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, stormwater management facilities, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development). The construction of new ski areas or oil and gas wells is not authorized by this NWP. Residential developments include multiple and single unit developments. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The activities listed above are authorized, provided the activities meet all of the following criteria:

a. The discharge does not cause the loss of greater than ½ acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters;

b. The discharge does not cause the loss of greater than 300 linear feet of stream bed;

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

(1) The discharge causes the loss of greater than ⅒ acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters; or

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

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

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

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

g. When this NWP is used in conjunction with any other NWP, any combined total permanent loss of waters of the United States exceeding ⅒ acre requires that the permittee notify the District Engineer in accordance with General Condition 13;

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

i. For discharges causing the loss of ⅒ acre or less of waters of the United States, the permittee must submit a report, within 30 days of completion of the work, to the District Engineer that contains the following information: (1) The name, address, and telephone number of the permittee; (2) The location of the work; (3) A description of the work; (4) The type and acreage of

the loss of waters of the United States (*e.g.*, 1/12 acre of emergent wetlands); and (5) The type and acreage of any compensatory mitigation used to offset the loss of waters of the United States (e.g., 1/12 acre of emergent wetlands created on-site);

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

k. Stream channelization or stream relocation downstream of the point on the stream where the annual average flow is 1 cubic foot per second is not authorized by this NWP.

Only residential, commercial, and institutional activities with structures on the foundation(s) or building pad(s), as well as the attendant features, are authorized by this NWP. The compensatory mitigation proposal required in paragraph (f) of this NWP may be either conceptual or detailed. The wetland or upland vegetated buffer required in paragraph (j) of this NWP will normally be 25 to 50 feet wide on each side of the stream, but the District Engineer may require wider vegetated buffers to address documented water quality concerns. The required wetland or upland vegetated buffer is part of the overall compensatory mitigation requirement for this NWP. If the project site was previously used for agricultural purposes and the farm owner/operator used NWP 40 to authorize activities in waters of the United States to increase production or construct farm buildings, NWP 39 cannot be used by the developer to authorize additional activities in waters of the United States on the project site in excess of the acreage limit for NWP 39 (*i.e.*, the combined acreage loss authorized under NWPs 39 and 40 cannot exceed 1/2 acre).

Subdivisions: For any real estate subdivision created or subdivided after October 5, 1984, a notification pursuant to paragraph (c) of this NWP is required for any discharge which would cause the aggregate total loss of waters of the United States for the entire subdivision to exceed 1/10 acre. Any discharge in any real estate subdivision which would cause the aggregate total loss of waters of the United States in the subdivision to exceed 1/2 acre 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 and the property owner had, after October 5, 1984, but prior to July 21, 1999, committed substantial resources in reliance on NWP 26 with regard to a subdivision, in circumstances where it would be inequitable to frustrate the property owner's investment-backed expectations. Once the exemption is established for a subdivision, subsequent lot development by individual property owners may proceed using NWP 39. For the purposes of NWP 39, 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. (Sections 10 and 404)

Note: Areas where there is no wetland vegetation are determined by the presence or absence of an ordinary high water mark or bed and bank. Areas that are waters of the United States based on this criteria would require a PCN even though water is infrequently present in the stream channel (except for ephemeral waters).

40. *Agricultural Activities.* Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the purpose of improving agricultural production and the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized landclearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities, provided the permittee complies with the following terms and conditions:

a. For discharges into non-tidal wetlands to improve agricultural production, the following criteria must be met if the permittee is a USDA program participant:

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

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

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

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

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

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

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

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

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

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

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

d. Any activity in other waters of the United States is limited to the relocation of existing serviceable drainage ditches constructed in non-tidal streams. This NWP does not authorize the relocation of greater than 300 linear feet of existing serviceable drainage ditches constructed in non-tidal streams; and

e. Activities located in 100-year floodplains identified by FEMA's Flood Insurance Rate Maps or FEMA-approved local floodplain maps must comply with General Condition 26.

The term ''farm tract'' refers to a parcel of land identified by the Farm Service Agency. The Corps will identify

other waters of the United States on the farm tract. NRCS will determine if a proposed agricultural activity meets the terms and conditions of paragraph (a) of this NWP, except as provided below. For those activities that require notification, the District Engineer will determine if a proposed agricultural activity is authorized by paragraphs (b), (c), and/or (d) of this NWP. USDA program participants requesting authorization for discharges of dredged or fill material into waters of the United States authorized by paragraphs (c) or (d) of this NWP, in addition to paragraph (a), must notify the District Engineer in accordance with General Condition 13 and the District Engineer will determine if the entire single and complete project is authorized by this NWP. Discharges of dredged or fill material into waters of the United States associated with completing required compensatory mitigation are authorized by this NWP. However, total impacts, including other authorized impacts under this NWP, may not exceed the ½ acre limit of this NWP. This NWP does not affect, or otherwise regulate, discharges associated with agricultural activities when the discharge qualifies for an exemption under Section 404(f) of the Clean Water Act, even though a categorical minimal effects exemption, minimal effect exemption, or mitigation exemption from NRCS pursuant to the Food Security Act of 1985, as amended, may be required. Activities authorized by paragraphs (a) through (d) may not exceed a total of ½ acre on a single farm tract. Activities authorized by paragraphs (c) and (d) are not included in the ½ acre limit for the farm tract. If the site was used for agricultural purposes and the farm owner/operator used either paragraphs (a), (b), or (c) of this NWP to authorize activities in waters of the United States to increase agricultural production or construct farm buildings, and the current landowner wants to use NWP 39 to authorize residential, commercial, or industrial development activities in waters of the United States on the site, the combined acreage loss authorized by NWPs 39 and 40 cannot exceed ½ acre. (Section 404)

41. *Reshaping Existing Drainage Ditches.* Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of currently serviceable drainage ditches constructed in these waters. The reshaping of the ditch cannot increase drainage capacity beyond the original design capacity 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). Compensatory mitigation is not required because the work is designed to improve water quality (*e.g.*, by regrading the drainage ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, increase uptake of nutrients and other substances by vegetation, etc.). The permittee must notify the District Engineer in accordance with General Condition 13, if greater than 500 linear feet of drainage ditch will be reshaped. Material resulting from excavation may not be permanently sidecast into waters but may be temporarily sidecast (up to three months) into waters of the United States, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The District Engineer may extend the period of temporary sidecasting not to exceed a total of 180 days, where appropriate. This NWP does not apply to reshaping drainage ditches constructed in uplands, since these areas are not waters of the United States, and thus no permit from the Corps is required, or to the maintenance of existing drainage ditches to their original dimensions and configuration, which does not require a Section 404 permit (see 33 CFR 323.4(a)(3)). This NWP does not authorize the relocation of drainage ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage ditch must be approximately the same as the location of the centerline of the original drainage ditch. This NWP does not authorize stream channelization or stream relocation projects. (Section 404)

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

a. The discharge does not cause the loss of greater than ½ acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters;

b. The discharge does not cause the loss of greater than 300 linear feet of stream bed;

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

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

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

f. Compensatory mitigation will normally be required to offset the losses of waters of the United States. The notification must also include a compensatory mitigation proposal which provides for 1:1 replacement to offset authorized losses of waters of the United States.

For the purposes of this NWP, the term ''recreational facility'' is defined as a recreational activity that is integrated into the natural landscape and does not substantially change preconstruction grades or deviate from natural landscape contours. For the purpose of this permit, the primary function of recreational facilities does not include the use of motor vehicles, buildings, or impervious surfaces. Examples of recreational facilities that may be authorized by this NWP include: hiking trails, bike paths, horse paths, nature centers, and campgrounds (excluding trailer parks). The construction or expansion of golf courses and the expansion of 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, to ensure that the recreational facility results in no substantial adverse effects to water quality. This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables, that are directly related to the recreational activity. This NWP does not authorize other buildings, such as hotels, restaurants, etc. The construction or expansion of playing fields (*e.g.*, baseball, soccer, or football fields), basketball and tennis courts, racetracks, stadiums, arenas, and the construction of new ski areas are not authorized by this NWP. (Section 404)

43. *Stormwater Management Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction and maintenance of stormwater management facilities, including activities for the excavation of

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

a. The discharge for the construction of new stormwater management facilities does not cause the loss of greater than ½ acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters;

b. The discharge does not cause the loss of greater than 300 linear feet of stream bed;

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

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

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

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

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

e. 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 additional minimization cannot be achieved);

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

g. 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

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

44. *Mining Activities.* Discharges of dredged or fill material into: (i) Isolated waters, streams where the annual average flow is 1 cubic foot per second or less, and non-tidal wetlands adjacent to headwater streams, for aggregate mining (*i.e.*, sand, gravel, and crushed and broken stone) and associated support activities; (ii) lower perennial streams, excluding wetlands adjacent to lower perennial streams, for aggregate mining activities (support activities in lower perennial streams or adjacent wetlands are not authorized by this NWP); and/or (iii) isolated waters and non-tidal wetlands adjacent to headwater streams, for hard rock/mineral mining activities (*i.e.*, extraction of metalliferous ores from subsurface locations) and associated support activities, provided the discharge meets the following criteria:

a. The mined area within waters of the United States, plus the acreage loss of waters of the United States resulting from support activities, cannot exceed ½ acre;

b. 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 detailing compliance with this condition (*i.e.*, why the discharge must occur in waters of the United States and why additional minimization cannot be achieved);

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

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

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

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

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

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

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

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

k. *Single and complete project:* The discharge must be for a single and complete project, including support activities. Discharges of dredged or fill material into waters of the United States for multiple mining activities on several designated parcels of a single and complete mining operation can be authorized by this NWP provided the ½ acre limit is not exceeded; and

l. *Notification:* The permittee must notify the District Engineer in accordance with General Condition 13. The notification must include: (1) A description of waters of the United

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

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

C. Nationwide Permit General Conditions

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

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

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

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

4. Aquatic Life Movements. No activity may substantially disrupt the 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. Culverts placed in streams must be installed to maintain low flow conditions.

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

6. Regional and Case-By-Case Conditions. The activity must comply with any regional conditions 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 and Coastal Zone Management Act consistency determination.

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

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

9. Water Quality. (a) In certain States and tribal lands an individual 401 water quality certification must be obtained or waived (See 33 CFR 330.4(c)).

(b) For NWPs 12, 14, 17, 18, 32, 39, 40, 42, 43, and 44, where the State or tribal 401 certification (either generically or individually) does not require or approve a water quality management plan, the permittee must include design criteria and techniques that will ensure that the authorized work does not result in more than minimal degradation of water quality. An important component of a water quality management plan includes stormwater management that minimizes degradation of the downstream aquatic system, including water quality. Refer to General Condition 21 for stormwater management requirements. Another important component of a water quality management plan is the establishment and maintenance of vegetated buffers next to open waters, including streams. Refer to General Condition 19 for vegetated buffer requirements for the NWPs.

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 will destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the District Engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or is located in the designated critical habitat and shall not begin work on the activity until notified by the District Engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. For activities that may affect Federally-listed endangered or threatened species or designated critical habitat, the notification must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. As a result of formal or informal consultation with the FWS or NMFS, the District Engineer may add species-specific regional endangered species conditions to the NWPs.

(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://www.nfms.gov/prot__res/esahome.html, respectively.

12. Historic Properties. No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the 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)). For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the notification must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

13. Notification. (a) Timing: Where required by the terms of the NWP, the prospective permittee must notify the District Engineer with a preconstruction notification (PCN) as early as possible. The District Engineer must determine if the PCN is complete within 30 days of the date of receipt and can request the additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the District Engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the District Engineer. The prospective permittee shall not begin the activity:

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

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

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

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

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

(2) Location of the proposed project;

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

(4) For NWPs 7, 12, 14, 18, 21, 34, 38, 39, 40, 41, 42, and 43, the PCN must also include a delineation of affected special aquatic sites, including wetlands, vegetated shallows (*e.g.,* submerged aquatic vegetation, seagrass beds), and riffle and pool complexes (see paragraph 13(f));

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

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

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

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

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

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

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

(iii) A description of the entire parcel, including its size, and a delineation of wetlands. For the purpose of this NWP, parcels of land measuring ¼ 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 ¼ 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;

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

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

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

(iii) Location of the dredged material disposal site.

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

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

(13) For NWP 39, Residential, Commercial, and Institutional Developments, and NWP 42, Recreational Facilities, the PCN must include a compensatory mitigation proposal that offsets unavoidable losses of waters of the United States or justification explaining why compensatory mitigation should not be required.

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

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

(16) For NWP 44, Mining Activities, the PCN must include a description of all waters of the United States adversely affected by the project, a description of measures taken to minimize adverse effects to waters of the United States, a description of measures taken to comply with the criteria of the NWP, and a reclamation plan (for aggregate mining activities in isolated waters and non-

tidal wetlands adjacent to headwaters and any hard rock/mineral mining activities).

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

(18) For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

(19) For NWPs 12, 14, 29, 39, 40, 42, 43, and 44, where the proposed work involves discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills within 100-year floodplains (as identified on FEMA's Flood Insurance Rate Maps or FEMA-approved local floodplain maps), the notification must include documentation demonstrating that the proposed work complies with the appropriate FEMA or FEMA-approved local floodplain construction requirements.

(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)–(19) of General Condition 13. A letter containing the requisite information may also be used.

(d) District Engineer's Decision: In reviewing the PCN for the proposed activity, the District Engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. The prospective permittee may, optionally, submit a proposed mitigation plan with the PCN to expedite the process and the District Engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed work are minimal. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, the District Engineer will notify the permittee and include any conditions the District Engineer deems necessary.

Any compensatory mitigation proposal must be approved by the District Engineer prior to commencing work. If the prospective permittee is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the District Engineer will expeditiously review the proposed compensatory mitigation plan. The District Engineer must review the plan within 45 days of receiving a complete PCN and determine whether the conceptual or specific proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant 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 submission of a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions. Where the District Engineer determines that mitigation is required in order to ensure no more than minimal adverse effects on the aquatic environment, the activity will be authorized within the 45-day PCN period, including the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level. When conceptual mitigation is included, or a mitigation plan is required under item (2) above, no work in waters of the United States will occur until the District Engineer has approved a specific mitigation plan.

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

For activities requiring notification to the District Engineer that result in the loss of greater than ½ acre of waters of the United States, the District Engineer will, upon receipt of a notification, provide immediately (*e.g.*, via facsimile transmission, overnight mail, or other expeditious manner), a copy to the appropriate offices of the Fish and Wildlife Service, State natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO), and, if appropriate, the National Marine Fisheries Service. With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the District Engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 15 calendar days before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency, except as provided below. The District Engineer will indicate in the administrative record associated with each notification that the resource agencies' concerns were considered. As required by Section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act, the District Engineer will provide a response to National Marine Fisheries Service within 30 days of receipt of any Essential Fish Habitat conservation recommendations. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification.

(f) Wetlands Delineations: Wetland delineations must be prepared in accordance with the current method required by the Corps. For NWP 29 see paragraph (b)(9)(iii) for parcels less than ¼ acre in size. The permittee may ask the Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 45-day period will not start until the wetland delineation has been completed and submitted to the Corps, where appropriate.

14. Compliance Certification. Every permittee who has received 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. The certification will include: (a) A statement that the authorized work was done in

accordance with the Corps authorization, including any general or specific conditions; (b) A statement that any required mitigation was completed in accordance with the permit conditions; and (c) The signature of the permittee certifying the completion of the work and mitigation.

15. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed ⅓ acre.

16. 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.

17. Shellfish Beds. 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 populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4.

18. Suitable Material. No activity, including structures and work in navigable waters of the 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).

19. Mitigation. The project must be designed and constructed to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable at the project site (i.e., on site). Mitigation will be required when necessary to ensure that the adverse effects to the aquatic environment are minimal. The District Engineer will consider the factors discussed below when determining the acceptability of appropriate and practicable mitigation necessary to offset adverse effects on the aquatic environment that are more than minimal.

(a) Compensatory mitigation at a minimum 1:1 ratio will be required for all wetland impacts requiring a PCN. Consistent with National policy, the District Engineer will establish a preference for restoration of wetlands to meet the minimum compensatory mitigation ratio, with preservation used only in exceptional circumstances.

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

(c) The District Engineer will require restoration, creation, enhancement, or preservation of other aquatic resources in order to offset the authorized impacts to the extent necessary to ensure that the adverse effects on the aquatic environment are minimal. An important element of any compensatory mitigation plan for projects in or near streams or other open waters is the establishment and maintenance, to the maximum extent practicable, of vegetated buffers next to open waters on the project site. The vegetated buffer should consist of native species. The District Engineer will determine the appropriate width of the vegetated buffer and in which cases it will be required. Normally, the vegetated buffer will be 25 to 50 feet wide on each side of the stream, but the District Engineer may require wider vegetated buffers to address documented water quality concerns. If there are open waters on the project site and the District Engineer requires compensatory mitigation for wetland impacts to ensure that the net adverse effects on the aquatic environment are minimal, any vegetated buffer will comprise no more than ⅓ of the remaining compensatory mitigation acreage after the permanently filled wetlands have been replaced on a one-to-one acreage basis. In addition, compensatory mitigation must address adverse effects on wetland functions and values and cannot be 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 39, ¼ acre of wetlands cannot be created to change a ½ acre loss of wetlands to a ¼ acre loss; however, ½ acre of created wetlands can be used to reduce the impacts of a ⅓ acre loss of wetlands). If the prospective permittee is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed.

(d) To the extent appropriate, permittees should consider mitigation banking and other appropriate forms of compensatory mitigation. If the District Engineer determines that compensatory mitigation is necessary to offset losses of waters of the United States and ensure that the net adverse effects of the authorized work on the aquatic environment are minimal, consolidated mitigation approaches, such as mitigation banks, will be the preferred method of providing compensatory mitigation, unless the District Engineer determines that activity-specific compensatory mitigation is more appropriate, based on which is best for the aquatic environment. These types of mitigation are preferred because they involve larger blocks of protected aquatic environment, are more likely to meet the mitigation goals, and are more easily checked for compliance. If a mitigation bank or other consolidated mitigation approach is not available in the watershed, the District Engineer will consider other appropriate forms of compensatory mitigation to offset the losses of waters of the United States to ensure that the net adverse effects of the authorized work on the aquatic environment are minimal.

20. 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 result in the physical destruction (*e.g.*, excavate, fill, or smother downstream by substantial turbidity) of an important spawning area are not authorized.

21. Management of Water Flows. To the maximum extent practicable, the activity must be designed to maintain preconstruction downstream flow conditions (*e.g.*, location, capacity, and flow rates). Furthermore, the activity must not permanently restrict or impede the passage of normal or expected high flows (unless the primary purpose of the fill is to impound waters) and the structure or discharge of dredged or fill material must withstand expected high flows. The activity must, to the maximum extent practicable, provide for retaining excess flows from the site, provide for maintaining surface flow rates from the site similar to preconstruction conditions, and must not increase water flows from the project site, relocate water, or redirect water flow beyond preconstruction conditions. In addition, the activity

must, to the maximum extent practicable, reduce adverse effects such as flooding or erosion downstream and upstream of the project site, unless the activity is part of a larger system designed to manage water flows.

22. 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.

23. 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.

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

25. Designated Critical Resource Waters. Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally listed threatened and endangered species, coral reefs, State natural heritage sites, and outstanding national resource waters or other waters officially designated by a State as having particular environmental or ecological significance and identified by the District Engineer after notice and opportunity for public comment. The District Engineer may also designate additional critical resource waters after notice and opportunity for comment.

(a) Except as noted below, discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters. Discharges of dredged or fill materials into waters of the United States may be authorized by the above NWPs in National Wild and Scenic Rivers if the activity complies with General Condition 7. Further, such discharges may be authorized in designated critical habitat for Federally listed threatened or endangered species if the activity complies with General Condition 11 and the U.S. Fish and Wildlife Service or the National Marine Fisheries Service has concurred in a determination of compliance with this condition.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with General Condition 13, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The District Engineer may authorize activities under these NWPs only after he determines that the impacts to the critical resource waters will be no more than minimal.

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

(a) *Discharges Below Headwaters.* Discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills within the 100-year floodplain at or below the point on a stream where the average annual flow is five cubic feet per second (*i.e.*, below headwaters) are not authorized by NWPs 29, 39, 40, 42, 43, and 44. For NWPs 12 and 14, the prospective permittee must notify the District Engineer in accordance with General Condition 13 and the notification must include documentation that any permanent, above-grade fills in waters of the United States within the 100-year floodplain below headwaters comply with FEMA or FEMA-approved local floodplain construction requirements.

(b) *Discharges in Headwaters* (*i.e.*, above the point on a stream where the average annual flow is five cubic feet per second).

(1) *Flood Fringe.* Discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills within the flood fringe of the 100-year floodplain of headwaters are not authorized by NWPs 12, 14, 29, 39, 40, 42, 43, and 44, unless the prospective permittee notifies the District Engineer in accordance with General Condition 13. The notification must include documentation that such discharges comply with FEMA or FEMA-approved local floodplain construction requirements.

(2) *Floodway.* Discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills within the floodway of the 100-year floodplain of headwaters are not authorized by NWPs 29, 39, 40, 42, 43, and 44. For NWPs 12 and 14, the permittee must notify the District Engineer in accordance with General Condition 13 and the notification must include documentation that any permanent, above grade fills proposed in the floodway comply with FEMA or FEMA-approved local floodplain construction requirements.

D. Further Information

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

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

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

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

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

E. Definitions

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

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

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

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

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

Farm tract: A unit of contiguous land under one ownership which is operated as a farm or part of a farm.

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

Floodway: The area regulated by Federal, state, or local requirements to provide for the discharge of the base flood so the cumulative increase in water surface elevation is no more than

a designated amount (not to exceed one foot as set by the National Flood Insurance Program) within the 100-year floodplain.

Independent utility: A test to determine what constitutes a single and complete project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases are not built can be considered as separate single and complete projects with independent utility.

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

Loss of waters of the United States: Waters of the United States that include the filled area and other waters that are permanently adversely affected by flooding, excavation, or drainage as a result of the regulated activity. Permanent adverse effects include permanent above-grade, at-grade, or below-grade fills that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the 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 bed that is filled or excavated. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to preconstruction contours and elevations after construction, are not included in the measurement of loss of waters of the United States.

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.,* the spring high tide line).

Open water: An area that, during a year with normal patterns of precipitation, has standing or flowing water for sufficient duration to establish an ordinary high water mark. Aquatic vegetation within the area of standing or flowing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. The term ''open water'' includes rivers, streams, lakes, and ponds. For the purposes of the NWPs, this term does not include ephemeral waters.

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

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

Preservation: The protection of ecologically important wetlands or other aquatic resources in perpetuity through the implementation of appropriate legal and physical mechanisms. Preservation may include protection of upland areas adjacent to wetlands as necessary to ensure protection and/or enhancement of the overall aquatic ecosystem.

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

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Steep gradient sections of streams are sometimes characterized by riffle and pool complexes. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a course substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. Pools are characterized by a slower stream velocity, a streaming flow, a smooth surface, and a finer substrate.

Single and complete project: The term ''single and complete project'' is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers (see definition of independent utility). For linear projects, the ''single and complete project'' (*i.e.,* a single and complete crossing) will apply to each crossing of a separate water of the United States (*i.e.,* a single waterbody) at that location. An exception is for linear projects crossing a single waterbody several times at separate and distant locations: each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly-shaped wetland or lake, etc., are not separate waterbodies.

Stormwater management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

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

Stream bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

Stream channelization: The manipulation of a stream channel to increase the rate of water flow through the stream channel. Manipulation may include deepening, widening, straightening, armoring, or other activities that change the stream cross-section or other aspects of stream channel geometry to increase the rate of water flow through the stream channel. A channelized stream remains a water of the United States, despite the modifications to increase the rate of water flow.

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 two times per lunar month, during spring high tides.

Vegetated buffer: A vegetated upland or wetland area next to rivers, streams, lakes, or other open waters which separates the open water from developed areas, including agricultural land. Vegetated buffers provide a variety of aquatic habitat functions and values (*e.g.,* aquatic habitat for fish and other aquatic organisms, moderation of water temperature changes, and detritus for aquatic food webs) and help improve or maintain local water quality. A vegetated buffer can be established by maintaining an existing vegetated area or planting native trees, shrubs, and herbaceous plants on land next to open waters. Mowed lawns are not considered vegetated buffers because they provide little or no aquatic habitat functions and values. The establishment and maintenance of vegetated buffers is a method of compensatory mitigation that can be used in conjunction with the restoration, creation, enhancement, or preservation of aquatic habitats to ensure that activities authorized by NWPs result in minimal adverse effects to the aquatic environment. (See General Condition 19.)

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

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

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