

**DEPARTMENT OF DEFENSE****Department of the Army, Corps of Engineers**

ZRIN 0710-ZA05

**Proposal To Reissue and Modify Nationwide Permits**

AGENCY: Army Corps of Engineers, DoD.

ACTION: Notice.

**SUMMARY:** The U.S. Army Corps of Engineers (Corps) is soliciting comments for the reissuance of the existing nationwide permits (NWP), general conditions, and definitions, with some modifications. The Corps is also proposing to issue two new NWPs and two new general conditions. The Corps is requesting comment on all aspects of these proposed nationwide permits. More specifically, the Corps is requesting comments on options for NWP 21, which authorizes discharges of dredged or fill material into waters of the United States associated with surface coal mining activities, such as reissuing NWP 21 with modifications or not reissuing NWP 21. The Corps is also seeking comments on whether to reissue NWP 48 with modifications to authorize new commercial shellfish aquaculture activities or to issue a separate NWP to authorize only new commercial shellfish aquaculture activities. The reissuance process starts with today's publication of the proposed NWPs in the **Federal Register** for a 60-day comment period. The purpose of this **Federal Register** notice is to solicit comments on the proposed new and modified NWPs, as well as the NWP general conditions and definitions. Shortly after the publication of this **Federal Register** notice, each Corps district will publish a public notice to solicit comments on their proposed regional conditions for the new and modified NWPs. The comment period for these district public notices will be 45 days.

**DATES:** Submit comments on or before April 18, 2011.

**ADDRESSES:** You may submit comments, identified by docket number COE-2010-0035 and/or ZRIN 0710-ZA05, by any of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

*E-mail:* [NWP2012@usace.army.mil](mailto:NWP2012@usace.army.mil). Include the docket number, COE-2010-0035, and/or the ZRIN number, 0710-ZA05, in the subject line of the message.

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

*Hand Delivery/Courier:* Due to security requirements, we cannot receive comments by hand delivery or courier.

*Instructions:* Direct your comments to docket number COE-2010-0035 and/or ZRIN 0710-ZA05. All comments received will be included in the public docket without change and may be made available on-line at <http://www.regulations.gov>, including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through [regulations.gov](http://www.regulations.gov) or e-mail. The [regulations.gov](http://www.regulations.gov) Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail directly to the Corps without going through [regulations.gov](http://www.regulations.gov), your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, we recommend that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* For access to the docket to read background documents or comments received, go to [regulations.gov](http://www.regulations.gov). All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

**FOR FURTHER INFORMATION CONTACT:** Mr. Dave Casey at 907-283-3519 or 202-761-5903 or Mr. David Olson at 202-761-4922 or access the U.S. Army Corps of Engineers Regulatory Home Page at [http://www.usace.army.mil/CECW/Pages/cecwo\\_reg.aspx](http://www.usace.army.mil/CECW/Pages/cecwo_reg.aspx).

**SUPPLEMENTARY INFORMATION:**

**Background**

The current nationwide permits (NWP), which were published in the March 12, 2007, issue of the **Federal Register** (72 FR 11092) expire on March 18, 2012. With this **Federal Register** notice, we are beginning the process for reissuing the NWPs so that the reissued NWPs will be in effect as the current NWPs expire.

Section 404(e) of the Clean Water Act provides the statutory authority for the Secretary of the Army, after notice and opportunity for public hearing, to issue general permits on a nationwide basis for any category of activities involving discharges of dredged or fill material into waters of the United States. Activities authorized by NWPs must be similar in nature, cause only minimal adverse environmental effects when performed separately, and cause only minimal cumulative adverse effect on the aquatic environment. Nationwide permits can also be issued to authorize activities pursuant to Section 10 of the Rivers and Harbors Act of 1899. The NWP program is designed to provide timely authorizations for the regulated public while protecting the Nation's aquatic resources.

Today's proposal to reissue 48 of the 49 existing NWPs with some modifications and to issue two new NWPs reflects the Corps commitment to its environmental protection mission and to aquatic resource protection. For the reasons provided below, we are proposing to let one NWP expire and not reissue it: NWP 47—Pipeline Safety Program Designated Time Sensitive Inspections and Repairs. We are proposing to revise the text of some of the NWPs, general conditions, and definitions so that they are clearer and can be more easily understood by the regulated public, government personnel, and interested parties, while retaining terms and conditions that protect the aquatic environment. Making the text of the NWPs clearer and easier to understand will also facilitate compliance with these permits, which will benefit the aquatic environment. The NWP program allows the Corps to authorize activities with minimal adverse environmental impacts in a timely manner and protect the aquatic environment. The NWP program also allows the Corps to focus its limited resources on more extensive evaluation of projects that have the potential for causing environmentally damaging adverse effects.

Through the NWPs, impacts to the aquatic environment may also receive additional protection through regional conditions, case-specific special

conditions, and case-specific discretionary authority to require individual permits. Nationwide permits and other general permits help protect the aquatic environment because permit applicants often reduce project impacts to meet the restrictive requirements of general permits and receive authorization more quickly than they would through the individual permit process.

Thirty of the NWP's proposed for reissuance require pre-construction notification (PCN) for certain activities. Twenty of those NWP's require PCNs for all activities. Each of the two proposed new NWP's require PCNs. Pre-construction notification requirements give the Corps the opportunity to evaluate certain proposed NWP activities on a case-by-case basis to ensure that they will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. This case-by-case review often results in adding case-specific conditions to the NWP authorization to ensure that impacts to the aquatic environment are minimal. Review of a PCN may also result in the Corps asserting discretionary authority to require an individual permit if the district engineer determines, based on the information provided in the PCN, that adverse impacts will be more than minimal, either individually or cumulatively, or there are sufficient concerns for any of the Corps public interest review factors.

Regional conditions may be imposed by division engineers to take into account regional differences in aquatic resource functions and services across the country and to restrict or prohibit the use of NWP's to protect those resources. Through regional conditions, a division engineer can modify an NWP to require submission of PCNs for certain activities. Regional conditions may also restrict or prohibit the use of an NWP in certain waters or geographic areas, if the use of that NWP in those waters or areas might result in more than minimal individual or cumulative adverse effects to the aquatic environment.

District engineers may impose special conditions on NWP authorizations to ensure that the NWP authorizes only activities that result in minimal individual and cumulative effects on the aquatic environment and other public interest review factors. In addition, special conditions will often include compensatory mitigation requirements to reduce the project impacts to the minimal level. Compensatory mitigation may include the restoration, establishment, enhancement, and/or

preservation of aquatic habitats, as well as the establishment and maintenance of riparian areas next to streams and other open waters. Compensatory mitigation can be provided through permittee-responsible mitigation, mitigation banks, or in-lieu fee programs.

#### Process for Reissuing the NWP's

The NWP's reissued on March 12, 2007, went into effect on March 19, 2007, and expire on March 18, 2012. The reissuance process starts with today's publication of the proposed NWP's in the **Federal Register** for a 60-day comment period. Requests for a public hearing must be submitted in writing to the address in the **ADDRESSES** section of this notice. These requests must state the reason(s) for holding a public hearing. If we determine that a public hearing or hearings would assist in making a decision on the issuance of the proposed new NWP's, reissuance of existing NWP's, or the NWP general conditions or definitions, a 30-day advance notice will be published in the **Federal Register** to advise interested parties of the date(s) and location(s) for the public hearing(s). Any announcement of public hearings would also be posted as a supporting material in the docket at <http://www.regulations.gov> as well as the Corps regulatory home page at [http://www.usace.army.mil/CECW/Pages/cecwo\\_reg.aspx](http://www.usace.army.mil/CECW/Pages/cecwo_reg.aspx).

Shortly after the publication of this **Federal Register** notice, Corps district offices will issue public notices to solicit comments on proposed regional conditions. In their district public notices, district engineers may also propose to suspend or revoke some or all of these NWP's if they have issued, or are proposing to issue, regional general permits, programmatic general permits, or section 404 letters of permission for use in lieu of NWP's. The comment period for these district public notices will be 45 days.

After the comment period has ended, we will review the comments received in response to this **Federal Register** notice. Then we will draft the final NWP's, and those final draft NWP's will be subjected to another review by interested Federal agencies. The final issued NWP's will be published in the **Federal Register** by December 2011. The final NWP's will go into effect 90 days after their publication. In the past, the schedule normally allowed state governments, tribal governments, and EPA a 60-day period for Clean Water Act Section 401 water quality certifications (WQCs) as well as Coastal Zone Management Act (CZMA) consistency determinations by states.

The change to 90 days is made in order to meet the requirements of the Department of Commerce that require Federal agencies to provide at least 90 days for state governments to make their CZMA consistency determinations (see 15 CFR 930.36(b)). Within this 90-day period, division engineers will also develop regional conditions and supplemental decision documents. Supplemental decision documents address the environmental considerations related to the use of NWP's in a Corps district. The supplemental decision documents will certify that the NWP's, with any regional conditions or geographic suspensions or revocations, will only authorize activities within that Corps district that result in minimal individual and cumulative adverse effects on the aquatic environment. The regional conditioning and WQC/CZMA processes are discussed below.

#### Compliance With Section 404(e) of the Clean Water Act

The proposed NWP's are issued in accordance with Section 404(e) of the Clean Water Act. These NWP's authorize categories of activities that are similar in nature. The "similar in nature" requirement does not mean that activities authorized by an NWP must be identical to each other. We believe that the "categories of activities that are similar in nature" requirement of section 404(e) is to be interpreted broadly, for practical implementation of this general permit program. Nationwide permits, as well as other general permits, are intended to reduce administrative burdens on the Corps and the regulated public, by efficiently authorizing activities that have minimal adverse environmental effects.

As for the minimal adverse effects provision of section 404(e), the various terms and conditions of these NWP's, including the provisions in the NWP regulations at 33 CFR 330.1(d) and 33 CFR 330.4(e) that allow district engineers to exercise discretionary authority, ensure compliance with this requirement. A decision document will be prepared for each NWP to address the requirements of the National Environmental Policy Act and generally discuss the anticipated impacts the NWP will have on the Corps public interest review factors. For those NWP's that may authorize discharges of dredged or fill material into waters of the United States, a 404(b)(1) Guidelines analysis will be provided in the decision document. The 404(b)(1) Guidelines analysis will be conducted in accordance with 40 CFR 230.7. The draft decision documents for the

proposed NWP are available on the internet at: <http://www.regulations.gov> (docket ID number COE-2010-0035). We are soliciting comments on these draft decision documents, and any comments received will be considered when preparing the final decision documents for the NWPs.

### National Environmental Policy Act Compliance

We have prepared a draft decision document for each proposed NWP. Each decision document contains an environmental assessment (EA). If the proposed NWP authorizes discharges of dredged or fill material into waters of the United States, the decision document will also include a 404(b)(1) Guidelines analysis conducted in accordance with 40 CFR 230.7. These decision documents will consider the environmental effects of each NWP from a national perspective. Division engineers will issue supplemental decision documents to evaluate regional effects on the aquatic environment and other public interest review factors. Those supplemental decision documents will discuss regional conditions imposed by division engineers to protect the aquatic environment and ensure that any adverse effects resulting from NWP activities will be no more than minimal.

The assessment of cumulative effects occurs at two levels: national and regional (district). However, modifications at the district level are made by the appropriate division engineer. There are eight Corps division offices in the United States, with 38 district offices. A division office may oversee as many as seven districts (Lakes and Rivers Division) or as few as two district offices (Pacific Ocean Division).

At the national level, the decision documents issued by Corps Headquarters include cumulative effects assessments required by NEPA and, if the NWP authorizes discharges of dredged or fill material into waters of the United States, the 404(b)(1) Guidelines. The 404(b)(1) Guidelines at 40 CFR 230.7(b) require an evaluation of the potential individual and cumulative impacts of the category of activities authorized under the NWP.

The supplemental decision documents issued by division engineers include cumulative effects assessments at the regional (district) level, for each district within the division. For those NWPs that authorize section 404 activities, the supplemental decision documents will also discuss local concerns relating to the Section 404(b)(1) Guidelines, if the national

decision documents do not adequately address those issues. If the NWP is not suspended or revoked in a district, the supplemental decision document includes a certification that the use of the NWP in that district, with any applicable regional conditions (i.e., applicable in a specific district), will result in minimal cumulative adverse environmental effects. The supplemental decision documents are prepared by Corps districts, but must be approved and formally issued by the appropriate division engineer, since the NWP regulations at 33 CFR 330.5(c) state that the division engineer has the authority to modify, suspend, or revoke NWP authorizations for any specific geographic area within his division. Regional conditions are considered NWP modifications. Therefore, when the process is completed, each district will have approved supplemental decision documents for each NWP, and those supplemental decision documents will assess cumulative effects within that district.

District engineers may also recommend that the division engineer exercise discretionary authority to modify, suspend, or revoke case-specific NWP authorizations within a district to ensure that only minimal cumulative adverse effects on the aquatic environment result from activities authorized by that NWP. Evaluations by a district engineer may result in the division engineer modifying, suspending, or revoking NWP authorizations in a particular geographic region or watershed at a later time, if the use of an NWP in a particular area will result in more than minimal cumulative or individual adverse effects on the aquatic environment. Special conditions added to NWP authorizations on a case-by-case basis by district engineers, such as compensatory mitigation requirements, help ensure that the NWPs authorize only activities that result in minimal individual and cumulative adverse effects on the aquatic environment.

### Acreage Limits and Pre-Construction Notification Thresholds

We are proposing to retain most of the current acreage limits for the NWPs and propose to modify some of the NWPs acreage limits. We are also proposing to modify the language concerning the use of waivers in NWPs 13, 29, 36, 39, 40, 42, and 43 by clarifying that a waiver may be granted only after the district engineer makes a written determination concluding that the discharge will result in minimal adverse effects. The modified waiver language will also be applied to NWPs 21, 44, and 50, as well

as proposed new NWPs A and B. We are proposing to replace the 25 cubic yard limit for temporary pads in NWP 6 with a 1/10-acre limit for temporary pads. For NWP 50 we are proposing a 1/2-acre limit on non-tidal waters of the United States including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. In NWPs 40 and 44 we are proposing to increase protection of streams by adding a 300 linear foot limit for losses of stream bed, which can be waived for intermittent and ephemeral stream beds if the district engineer makes a written determination concluding that the discharge will result in minimal adverse effects.

Proposed NWP A, Land-Based Renewable Energy Generation Facilities, and proposed NWP B, Water-Based Renewable Energy Generation Pilot Projects, have a 1/2-acre limit for losses of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. Both of these proposed NWPs require PCNs.

In NWP 48, we are proposing to add another PCN threshold for proposed expansions of the project area for the production of shellfish.

### Compliance With the Endangered Species Act

In its April 6, 2005, decision in *National Wildlife Federation et al. v. Les Brownlee* (No. 03-1392), the U.S. District Court for the District of Columbia determined that the Corps is obligated to consult with the U.S. Fish and Wildlife Service (FWS) on the effects of the NWPs. In response to that decision, on March 13, 2007, the Corps initiated Endangered Species Act Section 7(a)(2) programmatic consultation with FWS and the National Marine Fisheries Service (NMFS) for the current NWPs. NMFS provided a draft biological opinion and the Corps provided comments on that draft biological opinion, as well as additional information regarding the NWPs to NMFS as well as FWS. The Corps also granted an extension of time to the NMFS to provide the next draft of the biological opinion, and to the FWS to provide its draft biological opinion. Since the 2007 programmatic consultation was not completed, the

Corps has reinitiated programmatic Section 7 consultation for the NWP program. Corps districts will consult, as necessary, with the FWS and the NMFS for the species that occur in their districts and may develop regional conditions to protect listed species and designated critical habitat.

#### Essential Fish Habitat

The NWP Program's compliance with the essential fish habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act will be achieved through EFH consultations between Corps districts and NMFS regional offices. Corps districts will request EFH consultations with the NMFS regional office in cases where activities authorized by NWP may adversely affect EFH. The purpose of these regional consultations is to determine if implementation of the proposed NWPs and regional conditions within a particular region may have an adverse effect on EFH. These consultations will be conducted according to the EFH consultation regulations at 50 CFR 600.920.

#### Regional Conditioning of Nationwide Permits

Under Section 404(e), NWPs can only be issued for those activities that result in minimal individual and cumulative adverse effects on the aquatic environment. An important mechanism for ensuring compliance with this requirement is an effective regional conditioning process. Coordination with Federal and state agencies and Indian Tribes, and the solicitation of public comments, assist division and district engineers in identifying and developing appropriate regional conditions for the NWPs. Effective regional conditions protect local aquatic ecosystems and helps ensure that the NWPs authorize only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment, and are in the public interest.

There are two types of regional conditions: (1) Corps regional conditions and (2) water quality certification/Coastal Zone Management Act consistency determination regional conditions.

Corps regional conditions may be added to NWPs by division engineers after a public notice and comment process and coordination with other Federal, state, and local agencies.

Examples of Corps regional conditions include:

- Restricting the types of waters of the United States where the NWPs may

be used (*e.g.*, fens, bogs, bottomland hardwoods, etc.) or prohibiting the use of some or all of the NWPs in those types of waters or in specific watersheds.

- Restricting or prohibiting the use of NWPs in an area covered by a Special Area Management Plan, or an Advanced Identification study with associated regional general permits.

- Adding pre-construction notification (PCN) requirements to NWPs to require notification for all work in certain watersheds or certain types of waters of the United States, or lowering the PCN threshold.

- Reducing NWP acreage limits in certain types of waters of the United States, or specific waterbodies.

- Revoking certain NWPs on a geographic or watershed basis.

- Restricting activities authorized by NWPs to certain times of the year in a particular waterbody, to minimize the adverse effects of those activities on fish or shellfish spawning, wildlife nesting, or other ecologically cyclical events.

- Conditions necessary to ensure compliance with the Endangered Species Act and essential fish habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act.

Corps regional conditions approved by division engineers cannot remove or reduce any of the terms and conditions of the NWPs, including general conditions and PCN requirements. In other words, Corps regional conditions can only be more restrictive than the original NWP terms and conditions.

Regional conditions may also be added to the NWPs as a result of water quality certifications (WQCs) issued by states, Indian Tribes, or the U.S. EPA, as well as state Coastal Zone Management Act (CZMA) consistency determinations.

At approximately the same time as the publication of this **Federal Register** notice, each Corps district will issue an initial public notice. Those initial public notices will include Corps regional conditions proposed by our district offices, and will also request comments or suggestions for additional Corps regional conditions. The initial public notice may also include, for informational purposes only, any proposed state or tribal WQC regional conditions or state CZMA regional conditions. However, public comment on the state or tribal WQC regional conditions or state CZMA regional conditions is handled through a separate state or tribal administrative procedures process. The public should not address such comments to the Corps.

In response to the district's initial public notice, interested parties may suggest additional Corps regional conditions, or suggest suspension or revocation of NWPs in certain geographic areas, such as specific watersheds or waterbodies. Such comments should include data to support the need for any suggested modifications, suspensions, or revocations of NWPs.

After the NWPs are issued or reissued, the division engineer will issue supplemental decision documents for each NWP. These supplemental decision documents will address the NWP regional conditions. Each supplemental decision document will also include a statement by the division engineer, which will certify that the NWP, with approved regional conditions, will authorize only activities with minimal individual and cumulative adverse effects on the aquatic environment.

After the division engineer approves the Corps regional conditions, each Corps district will issue a final public notice for the NWPs. The final public notice will announce both the final Corps regional conditions and any final WQC/CZMA regional conditions. The final public notices will also announce the final status of water quality certifications and CZMA consistency determinations for the NWPs. Corps districts may adopt additional regional conditions in future public notices (following public notice and comment procedures), if they identify a need for such conditions.

Information on regional conditions and revocation can be obtained from the appropriate district engineer, as indicated below. Furthermore, this and additional information can be obtained on the internet at [http://www.usace.army.mil/CECW/Pages/cecwo\\_reg.aspx](http://www.usace.army.mil/CECW/Pages/cecwo_reg.aspx). If you select a state on this Web site you will be directed to the Web site of the appropriate Corps district office.

In cases where a Corps district has issued a regional general permit that authorizes similar activities as one or more NWPs, the district will clarify the use of the regional general permit versus the NWP(s) during the regional conditioning process. For example, the division engineer may revoke the applicable NWP(s) so that only the regional general permit may be used to authorize those activities.

#### Water Quality Certification/Coastal Zone Management Act Consistency Determination for Nationwide Permits

State or Tribal water quality certification, or waiver thereof, is

required by Section 401 of the Clean Water Act, for activities authorized by NWP's which result in a discharge into waters of the United States. In addition, any state with a federally-approved CZMA plan must agree with the Corps determination that activities authorized by NWP's which are within, or will affect any land or water uses or natural resources of the state's coastal zone, are consistent with the CZMA plan to the maximum extent practicable. Water quality certifications and/or CZMA consistency determinations may be issued without conditions, issued with conditions, or denied for specific NWP's.

We believe that, in general, the activities authorized by the NWP's will not violate State or Tribal water quality standards and will be consistent with state CZMA plans. The NWP's are conditioned to ensure that adverse environmental effects will be minimal and address the types of activities that would be routinely authorized if evaluated under the individual permit process. We recognize that in some states or Tribal lands there will be a need to add regional conditions, or individual state or Tribal review for some activities, to ensure compliance with water quality standards and/or consistency with the state's CZMA plans. As a practical matter, we intend to work with states and Tribes to ensure that NWP's include the necessary conditions so that they can issue water quality certifications or CZMA consistency concurrences. Therefore, each Corps district will initiate discussions with their respective state(s) and Tribe(s), as appropriate, to discuss issues of concern and identify regional modification and other approaches to address the scope of waters, activities, discharges, and PCNs, as appropriate, to resolve these issues. Note that in some states the Corps has issued state programmatic general permits (SPGP's), and within those states some or all of the NWP's may be suspended or revoked by division engineers. Concurrent with today's proposal, district engineers may be proposing modification or revocation of the NWP's in states where SPGP's will be used in place of some or all of the NWP's.

#### **Section 401 of the Clean Water Act**

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

If a state denies a water quality certification for an NWP within that state, then the affected activities are not authorized by NWP within that state, until a project proponent obtains an individual water quality certification, or the water quality certification is waived. However, when applicants request approval of such activities, and the Corps determines that those activities meet the terms and conditions of the NWP, the Corps will issue provisional NWP verification letters. The provisional verification letter will contain general and regional conditions as well as any project specific conditions the Corps determines are necessary for NWP authorization. The Corps will notify the applicant that they must obtain a project specific water quality certification, or waiver thereof, before they are authorized to start work in waters of the United States. That is, NWP authorization will be contingent upon obtaining the necessary water quality certification or waiver thereof from the State, Tribe, or EPA where appropriate. Anyone wanting to perform such activities where pre-construction notification to the Corps is not required has an affirmative responsibility to first obtain a project-specific water quality certification or waiver thereof from the Tribe, State, or EPA before proceeding under the NWP. This requirement is provided at 33 CFR 330.4(c).

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

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

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

If a state disagrees with the Corps consistency determination for an NWP, then the affected activities are not authorized by NWP within that state,

until a project proponent obtains an individual consistency determination, or sufficient time (six months) passes after requesting a consistency determination for the applicant to make a presumption of consistency, as provided for in 33 CFR 330.4(d)(6). However, when applicants request approval of such activities, and the Corps determines that those activities meet the terms and conditions of the NWP, the Corps will issue provisional NWP verification letters. The provisional verification letter will contain general and regional conditions as well as any project specific conditions the Corps determines are necessary for NWP authorization. The Corps will notify the applicant that they must obtain a project specific CZMA consistency determination before they are authorized to start work in waters of the United States. That is, NWP authorization will be contingent upon obtaining the necessary CZMA consistency concurrence from the State. Anyone wanting to perform such activities where pre-construction notification to the Corps is not required has an affirmative responsibility to present a consistency certification to the appropriate State agency for concurrence. Upon concurrence with such consistency certifications by the state, the activity would be authorized by the NWP. This requirement is provided at 33 CFR 330.4(d).

#### **Nationwide Permit Verifications**

Certain NWP's require the permittee to submit a PCN, and thus request confirmation from the district engineer that an activity complies with the terms and conditions of an NWP, prior to commencing the proposed work. The requirement to submit a PCN is identified in the NWP text. Pre-construction notification requirements may be added to NWP's by division engineers through regional conditions. In cases where pre-construction notification is not required, a project proponent may submit a PCN voluntarily, if he or she wants assurance that the activity is authorized by an NWP. A NWP verification is a response to a PCN that confirms that a particular activity is authorized by an NWP.

In response to an NWP verification request or PCN, the district engineer reviews the information submitted by the prospective permittee. If the district engineer determines that the activity complies with the terms and conditions of the NWP, he or she will notify the permittee. Special conditions, such as compensatory mitigation requirements, may be added to the NWP authorization to ensure that the activity results in

minimal individual and cumulative adverse effects on the aquatic environment and other public interest factors. The special conditions are incorporated into the NWP verification, along with the NWP text and the NWP general conditions.

If the district engineer reviews the NWP verification request and determines that the proposed activity does not comply with the terms and conditions of an NWP, he or she will notify the project proponent and provide instructions for applying for authorization under a regional general permit or an individual permit. District engineers will respond to NWP verification requests, submitted voluntarily or when required, within 45 days of receiving a complete PCN. Except for NWPs 21, 49, and 50, and for proposed NWP activities that require Endangered Species Act Section 7 consultation and/or National Historic Preservation Act Section 106 consultation, if the project sponsor has not received a reply from the Corps within 45 days, he or she may assume that the project is authorized, consistent with the information in the PCN. For NWPs 21 (Surface Coal Mining Activities), 49 (Coal Remining Activities), and 50 (Underground Coal Mining Activities), and for proposed NWP activities that require Endangered Species Act Section 7 consultation and/or National Historic Preservation Act Section 106 consultation, the project sponsor may not begin work before receiving a written NWP verification.

#### Contact Information for Corps District Engineers

##### Alabama

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

##### Alaska

Alaska District Engineer, ATTN: CEPOA-RD, P.O. Box 6898, Elmendorf AFB, AK 99506-6898.

##### Arizona

Los Angeles District Engineer, ATTN: CESPL-RG-R, P.O. Box 532711, Los Angeles, CA 90053-2325.

##### Arkansas

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

##### California

Sacramento District Engineer, ATTN: CESPK-RD, 1325 J Street, Sacramento, CA 95814-2922.

##### Colorado

Albuquerque District Engineer, ATTN: CESPA-OD-R, 4101 Jefferson Plaza NE, Albuquerque, NM 87109-3435.

##### Connecticut

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

##### Delaware

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

##### Florida

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

##### Georgia

Savannah District Engineer, ATTN: CESAS-RD, 100 West Oglethorpe Avenue, Savannah, GA 31401-3640.

##### Hawaii

Honolulu District Engineer, ATTN: CEPOH-EC-R, Building 230, Fort Shafter, Honolulu, HI 96858-5440.

##### Idaho

Walla Walla District Engineer, ATTN: CENWW-RD, 201 North Third Avenue, Walla Walla, WA 99362-1876.

##### Illinois

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

##### Indiana

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

##### Iowa

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

##### Kansas

Kansas City District Engineer, ATTN: CENWK-OD-R, 635 Federal Building, 601 E. 12th Street, Kansas City, MO 64106-2896.

##### Kentucky

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

##### Louisiana

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

##### Maine

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

##### Michigan

Detroit District Engineer, ATTN: CELRE-RG, 477 Michigan Avenue, Detroit, MI 48226-2550.

##### Minnesota

St. Paul District Engineer, ATTN: CEMVP-OP-R, 180 Fifth Street East, Suite 700, St. Paul, MN 55101-1678.

##### Mississippi

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

##### Missouri

Kansas City District Engineer, ATTN: CENWK-OD-R, 635 Federal Building, 601 E. 12th Street, Kansas City, MO 64106-2896.

##### Montana

Omaha District Engineer, ATTN: CENWO-OD-R, 1616 Capitol Avenue, Omaha, NE 68102-4901.

##### Nebraska

Omaha District Engineer, ATTN: CENWO-OD-R, 1616 Capitol Avenue, Omaha, NE 68102-4901.

##### Nevada

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

##### New Hampshire

New England District Engineer, ATTN: CENAE-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, Albuquerque, NM 87109-3435.

*New York*

New York District Engineer, ATTN: CENAN-OP-R, 26 Federal Plaza, New York, NY 10278-0090.

*North Carolina*

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

*North Dakota*

Omaha District Engineer, ATTN: CENWO-OD-R, 1616 Capitol Avenue, Omaha, NE 68102-4901.

*Ohio*

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

*Oklahoma*

Tulsa District Engineer, ATTN: CESWT-RO, 1645 S. 101st East Ave, Tulsa, OK 74128-4609.

*Oregon*

Portland District Engineer, ATTN: CENWP-OD-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-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-OD-R, 1616 Capitol Avenue, Omaha, NE 68102-4901.

*Tennessee*

Nashville District Engineer, ATTN: CELRN-OP-F, 3701 Bell Road, Nashville, TN 37214.

*Texas*

Galveston District Engineer, ATTN: CESWG-PE-R, P.O. Box 1229, Galveston, TX 77553-1229.

*Utah*

Sacramento District Engineer, ATTN: CESP-K-RD, 1325 J Street, CA 95814-2922.

*Vermont*

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

*Virginia*

Norfolk District Engineer, ATTN: CENAO-REG, 803 Front Street, Norfolk, VA 23510-1096.

*Washington*

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

*West Virginia*

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

*Wisconsin*

St. Paul District Engineer, ATTN: CEMVP-OP-R, 180 Fifth Street East, Suite 700, St. Paul, MN 55101-1678.

*Wyoming*

Omaha District Engineer, ATTN: CENWO-OD-R, 1616 Capitol Avenue, Omaha, NE 68102-4901.

*District of Columbia*

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

*Pacific Territories (American Samoa, Guam, & Commonwealth of the Northern Mariana Islands)*

Honolulu District Engineer, ATTN: CEPOH-EC-R, 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 32232-0019.

**Request for Comment**

We are proposing to reissue 48 nationwide permits, as well as the general conditions and definitions. We are also proposing to issue two new NWP's, two new general conditions, and one new definition. Substantive changes to the nationwide permits, general conditions, and definitions are discussed below, but we are soliciting comments on all the nationwide permits, general conditions, and definitions. Minor grammatical changes, the removal of redundant language, and other small changes are not discussed in the preamble below. Therefore, commenters should carefully read each proposed NWP, general condition, and definition in this notice.

**NWP Not Proposed for Reauthorization**

NWP 47. *Pipeline Safety Program Designated Time Sensitive Inspections and Repairs*. This NWP was first issued in 2007 in reliance on the Pipeline and Hazardous Materials Safety Administration's (PHMSA)

implementation of a Web-based system called the Pipeline Repair and Environmental Guidance System (PREGS). The terms of NWP 47 required permittees to report their use of this NWP through PREGS. PHMSA ceased their development of PREGS, which the Corps planned to use in order to monitor projects authorized by NWP 47. In the place of NWP 47, projects subject to PHMSA's Pipeline Safety Program may be eligible for authorization under NWP 3, Maintenance, or NWP 12, Utility Line Activities, provided those projects meet the terms and conditions of the appropriate NWP(s).

**Discussion of Proposed Modifications to Existing Nationwide Permits**

If an existing NWP is not listed in this section of the preamble, we are proposing to reissue the NWP without changing it.

NWP 3. *Maintenance*. We are proposing to clarify that stream channel excavation immediately adjacent to the structure or fill being maintained that involves discharges of dredged or fill material into waters of the United States and/or work in navigable waters of the United States is authorized under paragraph (a) and does not require a PCN. Examples of stream channel excavation activities that may be authorized under paragraph (a) include those necessary to facilitate minor deviations in a structure's configuration or filled area. This can occur when structures or fills are replaced with larger culverts or bridges that improve fish passage. Specifically, we are proposing to add "Any stream channel modification, is limited to the minimum necessary for the repair, rehabilitation, or replacement of the structure or fill; such modifications must be immediately adjacent to the project" to paragraph (a).

To simplify and clarify the text, we propose to replace the word "and" with "and/or" in the first sentence of paragraph (b) to indicate that the activity does not need to include the placement of new or additional riprap in order to qualify for the NWP. In paragraph (d) we propose to explicitly state beach restoration is not authorized by the NWP by removing beach restoration from the first sentence and adding a stand-alone sentence. In the Notification provision we propose to remove from the first part of the second sentence the phrase "[w]here maintenance dredging is proposed" because paragraph (b) of the NWP is the only component of the NWP that requires a PCN. This deletion will simplify redundant and confusing text.

NWP 5. *Scientific Measurement Devices*. We are proposing to add a sentence to explicitly require the removal of the device and any associated structures or fills at the conclusion of the study. Specifically, we are proposing to add the following sentence: "Upon completion of the study the measuring device and any other structures or fills associated with that device (e.g., anchors, buoys, lines, etc.) must be removed and to the maximum extent practicable the site must be restored to pre-construction elevations after the removal of associated structures." We are proposing to add "meteorological stations" as an example of the types of scientific measuring devices authorized by this NWP since such devices are currently being used to collect meteorological data for planning offshore wind energy generation facilities. We are also proposing to add "current gages" and "biological observation devices" to the list of examples, because such instruments may be used to collect data for sites that are being considered for hydrokinetic energy generation facilities.

NWP 6. *Survey Activities*. We are proposing to modify how exploratory trenches are backfilled by stating the work "must not drain a water of the United States." This would make the NWP consistent with other NWPs that involve backfilling. We also propose to adjust the requirements for the temporary pads necessary to provide proper levels for equipment used for core sampling. Specifically, we propose to remove 25 cubic yard limit and replace it with a 1/10-acre limit. The acreage limit for temporary pads applies to a single and complete project, as defined at 33 CFR 330.2(i).

NWP 8. *Oil and Gas Structures on the Outer Continental Shelf*. We are proposing to update the name of former Mineral Management Service to the Bureau of Ocean Energy Management, Regulation, and Enforcement.

NWP 12. *Utility Line Activities*. We are proposing one minor change regarding how the calculation of loss of waters of the United States for a single and complete project with multiple components is made by replacing the phrase " \* \* \* the total discharge from a \* \* \*" with " \* \* \* the activity, in combination with all other activities included in one \* \* \*" to the access road component of the NWP. This adjustment would match the language from the utility line substation component of the NWP.

NWP 13. *Bank Stabilization*. To encourage bank stabilization activities that use bioengineering techniques and

other methods that may have less adverse environmental effects, we are proposing to modify paragraph (c) by removing the waiver provision and authorizing bank stabilization activities that utilize bioengineered techniques to exceed an average of one cubic yard per running foot placed along the bank below the plane of the ordinary high water mark or the high tide line. This change would not authorize bank stabilization activities that involve hardening the bank with material such as sheet pile, riprap, concrete, etc. if the discharge exceeds one cubic yard per running foot. A separate form of Department of the Army authorization, such as an individual permit or regional general permit, would be required for such activities. Bioengineered techniques can slow erosion rates and can have beneficial effects on habitat for macroinvertebrates and fish and may include the use of living material or other material such as tree revetments or root wads.

Because some bank stabilization activities require temporary structures or fills, or a site to be temporarily dewatered, we propose to add language authorizing these associated activities. This proposed language is consistent with that used to authorize the same activity in NWPs 3, 12, and 14.

NWP 15. *U.S. Coast Guard Approved Bridges*. We are proposing to modify this NWP by removing the reference to the U.S. Coast Guard authorizing the discharge of dredged or fill material into waters of the United States as a part of their bridge permit, since their bridge permits do not authorize such activities. We are also proposing to reference the U.S. Coast Guard's bridge permitting authority under Section 9 of the Rivers and Harbors Act of 1899 and other applicable laws. The other applicable laws include: The International Bridge Act of 1972 (at 33 U.S.C. 535-535(i)), the General Bridge Act of 1946 (at 33 U.S.C. 525, 528, 530, and 533), the Bridge Act of 1906 (at 33 U.S.C. 491, 494, and 495); and the Rivers and Harbors Appropriation Act of 1899 (at 33 U.S.C. 401, 403, 406, and 502). Because a bridge permit issued by the U.S. Coast Guard does not cover discharges of dredged or fill material into navigable waters of the United States, and such discharges are likely to be considered work that modifies those waters, we propose to add section 10 authority to this NWP to provide authorization under the Rivers and Harbors Act of 1899.

NWP 20. *Response Operations for Oil and Hazardous Substances*. We are proposing to change the name of this NWP from "Oil Spill Cleanup" to

"Response Operations for Oil and Hazardous Substances" to better describe the activities and types of materials authorized by the NWP.

The proposed modification would also authorize a wider set of activities, specifically containment and mitigation, associated with a response operation's effort to manage a release of oil or hazardous substances.

We are also proposing to modify the NWP to authorize work under a wider range of approved response plans or work approved by a Federal on-scene coordinator as designated by 40 CFR part 300.

Additionally, we propose to modify this NWP to authorize training exercises for the cleanup of oil and hazardous substance by this NWP. These drills can take place on land and water and sometimes involve the use of temporary structures and fills used to contain spill materials.

NWP 21. *Surface Coal Mining Activities*. To help make a fully informed decision about whether or not to reissue NWP 21, we are soliciting comment on three options for this NWP. Option 1 would be to not reissue NWP 21. Option 2 would be to reissue NWP 21 with modifications, including a 1/2-acre limit for losses of non-tidal waters of the United States, a 300 linear foot limit for the loss of stream bed (with a waiver for the loss of intermittent and ephemeral stream beds if the district engineer makes a written determination that the discharge will result in minimal adverse effects), and a provision prohibiting the use of NWP 21 to authorize discharges of dredged or fill material into waters of the United States associated with the construction of valley fills for surface coal mining activities. Option 3 would be to reissue NWP 21 with the same modifications as described for Option 2, except there would be no provision prohibiting the use of NWP 21 to authorize discharges of dredged or fill material into waters of the United States associated with the construction of valley fills. Options 2 and 3 would not authorize discharges of dredged or fill material into tidal waters or non-tidal wetlands adjacent to tidal waters.

The preferred option is Option 2, since the construction of valley fills for surface coal mining activities substantially alters the watersheds associated with headwater streams and has a greater potential to cause more than minimal adverse effects on the aquatic environment. Those changes to the watershed cause direct and indirect effects to downstream waters.

Option 1, to not reissue NWP 21, would be consistent with a

determination that any discharge of dredge or fill material associated with surface coal mining activities, in any region of the country, might result in more than minimal adverse effects on the aquatic environment and thus warrant the more rigorous review associated with an individual permit. In contrast, the proposed modifications presented in Options 2 and 3 would authorize minor activities associated with surface coal mining activities such as the discharges of dredged or fill material to construct sediment ponds or minor road crossings. All the Options would require larger surface coal mining activities involving discharges of dredged or fill material into waters of the United States to be authorized by individual permits. In previously issued versions of NWP 21, there was no limit on losses of waters of the United States. Instead of acreage or linear foot limits the Corps relied on the following to ensure minimal adverse effects: (a) The implementation of environmental protections through SMCRA (e.g., preventing material damage to the hydrologic balance in the surrounding areas and minimizing adverse impacts to fish and wildlife habitat); and, (b) the requirement that the prospective permittee could not commence work in waters of the United States until he or she received written verification from the Corps district that the activity was authorized by NWP 21. Under Options 2 and 3, the Corps would continue to rely on these sources of assurance, along with the proposed new acreage and linear foot limits, to ensure minimal adverse effects. The Corps believes that this combination of safeguards is sufficient, particularly if discharges associated with valley fills are not authorized, and has thus identified Option 2 as its preferred option.

We are also soliciting public comment on additional options that should be considered for the reissuance of NWP 21. In addition to the three options described above, we are proposing to change the title of this NWP by replacing the word "Operations" with "Activities" because the Corps only authorizes discharges of dredged or fill material into waters of the United States, not the operation of the surface coal mine. The operation of a surface coal mine is regulated under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). In addition, Clean Water Act Section 402 National Pollutant Discharge Elimination System permits may authorize discharges of pollutants other than dredge or fill material to waters of the United States, including

those from outfall pipes of sediment ponds.

On June 11, 2009, the Department of the Army, the Department of the Interior (DOI), and the U.S. Environmental Protection Agency (EPA) signed a Memorandum of Understanding (MOU) that addresses actions to strengthen the environmental review of Appalachian surface coal mining. The MOU includes an Interagency Action Plan (IAP) that was developed to reduce the adverse environmental effects of surface coal mining activities in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia, while assuring that future mining remains consistent with the Clean Water Act and SMCRA. One of the short-term action items the Army agreed to do under the IAP was to issue a **Federal Register** notice proposing to modify NWP 21 to preclude its use to authorize discharges of fill material into streams for surface coal mining activities in the Appalachian region of these six states and to seek public comment on this proposal. On July 15, 2009, the Corps published a **Federal Register** notice (74 FR 34311) to solicit public comment on this proposal. As an interim measure to provide environmental protection while the Corps evaluated the comments received on the proposal to modify NWP 21, on June 18, 2010, the Corps suspended NWP 21 in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia (see 75 FR 34711).

Since the current NWP 21 will expire on March 18, 2012, it would be more prudent to address the modification of NWP 21 in today's proposal, instead of making a separate decision on the July 15, 2009, proposal to modify NWP 21 in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia. We also believe that substantial changes to NWP 21 are necessary to ensure, at a national level, that it authorizes only those discharges of dredged or fill material into waters of the United States associated with surface coal mining activities that have minimal individual and cumulative adverse effects on the aquatic environment and other public interest review factors. Nationwide permit 21 has been used to authorize surface coal mining activities in at least 20 other states, such as states in the west and southeast, and we believe it is necessary to impose an acreage limit on NWP 21 to ensure that the surface coal mining activities in those other states result in minimal adverse effects.

Division engineers have the authority to regionally condition this NWP to impose an acreage or linear foot limit or

other special conditions, if there are concerns for the aquatic environment in a particular district, watershed, or other geographic region. The proposed modification of NWP 21 will provide an NWP for minor activities associated with surface coal mining activities. Pre-construction notification is still required before any activities commence in waters of the United States and the applicant must receive authorization in writing from the Corps before beginning the activity.

*NWP 27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities.* We are proposing to add "the removal of small dams" to the list of examples of activities that can be authorized by this NWP. In the reversion provision we are proposing to remove the phrase "that has not been abandoned" that modifies the term "prior converted cropland" because areas of prior converted cropland being used for wetland or stream enhancement or restoration that are eligible for this provision are subject to a binding agreement with the Natural Resources Conservation Service and have not been abandoned, so the qualifier is unnecessary.

We are proposing to modify "Notification" provisions (1) and (2) by having stream restoration, rehabilitation, and enhancement activities conducted in accordance with binding agreements with the appropriate agencies or as voluntary actions documented by NRCS or a USDA Technical Service Provider be subject to the reporting provision instead. Additionally, we propose to modify notification provision (1) by adding the United States Forest Service to the list of Federal agencies that can develop stream or wetland enhancement, restoration, or establishment agreements. The "Notification" provision requires the permittee or appropriate Federal or state agency to notify the district engineer in accordance with general condition 30 (formerly general condition 27).

*NWP 29. Residential Developments.* We are proposing to modify the waiver provision for activities resulting in the loss of greater than 300 linear feet of intermittent and ephemeral stream bed to clarify that the district engineer will only issue the waiver after making a project-specific written determination that the activity will result in minimal adverse effects.

*NWP 31. Maintenance of Existing Flood Control Facilities.* We are proposing to add language that states, in those cases where a Corps permit is required, the NWP authorizes the removal of vegetation from levees

associated with a flood control project. The removal of vegetation from a flood control levee may require a permit under Section 10 of the Rivers and Harbors Act of 1899 if it is considered to be work in navigable waters of the United States. Vegetation removal may also require Clean Water Act Section 404 authorization if it involves discharges of dredged or fill material into waters of the United States.

NWP 39. *Commercial and Institutional Developments.* We are proposing to modify the waiver provision for activities resulting in the loss of greater than 300 linear feet of intermittent and ephemeral stream bed to clarify that the district engineer will only issue the waiver after making a project-specific written determination that the activity will result in minimal adverse effects.

NWP 40. *Agricultural Activities.* We are proposing to modify the text of this NWP to impose a limit on stream bed impacts that mirrors the limits in other NWPs, such as NWPs 29 and 39. Currently, the 300 linear foot limit for this NWP only applies to the relocation of ditches constructed in streams. The modification would apply to all stream impacts authorized by the NWP. Specifically, we propose to replace the last sentence of the fourth paragraph with: "The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects."

NWP 42. *Recreational Facilities.* We are proposing to modify the waiver provision for activities resulting in the loss of greater than 300 linear feet of intermittent and ephemeral stream bed to clarify that the district engineer will only issue the waiver after making a project-specific written determination that the activity will result in minimal adverse effects.

NWP 43. *Stormwater Management Facilities.* We are proposing to add "low impact development stormwater features" to the examples of types of stormwater management facilities that are authorized by this NWP. Low impact development for stormwater management comprises a set of site design approaches and small-scale features that promote the use of natural systems for infiltration, evapotranspiration, and reuse of rainwater. The types of low impact development stormwater practices that would be eligible for this NWP could

include bioretention features, swales and vegetated landscaping. We are also proposing to modify the waiver provision for activities resulting in the loss of greater than 300 linear feet of intermittent and ephemeral stream bed to clarify that the district engineer will only issue the waiver after making a project-specific written determination that the activity will result in minimal adverse effects.

NWP 44. *Mining Activities.* To be consistent with other NWPs and ensure that the NWP authorizes only those activities with minimal adverse effects, we are proposing to add a 300 linear foot limit for the loss of stream bed, which for intermittent and ephemeral stream beds can be waived by the district engineer if he or she makes a written determination concluding that the discharge will result in minimal adverse effects.

NWP 45. *Repair of Uplands Damaged by Discrete Events.* We are proposing to modify this NWP by adding a sentence to clarify that it does not authorize beach restoration. Beach nourishment or restoration activities may be authorized by individual permits or regional general permits.

NWP 48. *Existing Commercial Shellfish Aquaculture Activities.* The modifications proposed for this NWP include authorizing the expansion of existing commercial shellfish aquaculture operations. We are proposing to remove the reporting requirement because we do not believe it is necessary to track all activities authorized by this NWP. Many existing commercial shellfish aquaculture activities have been in continuous operation for many years, and are subject to a multitude of Federal, state, and local regulations. We believe that our focus should be on reviewing those proposed commercial shellfish aquaculture activities that have the potential to result in more than minimal adverse effects on the aquatic environment. Such activities are those commercial shellfish aquaculture operations that exceed 100 acres in size, involve dredge harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation, or involve changes in operation, such as expansions, reconfigurations, relocations, changes in species cultivated, or changes in culture methods. Since many commercial shellfish aquaculture activities, especially those on the west coast, may affect listed or threatened species under the Endangered Species Act, the notification requirement in general condition 19, Endangered Species, will

also result in these activities being reported to the Corps.

We are also proposing to modify the notification thresholds by adding a pre-construction notification requirement for all activities that propose to expand the commercial production of shellfish beyond the existing project area.

We are proposing to change the notification provision to require the prospective permittee to submit the information that was required for reporting under the current version of NWP 48. That information will be used with the information submitted in accordance with paragraph (b) of general condition 30, Pre-Construction Notification, to determine if the proposed activity will result in minimal individual and cumulative adverse effects on the aquatic environment and other public interest review factors.

We are seeking comments on modifying NWP 48 to authorize new commercial shellfish aquaculture activities or alternatively, issuing a new NWP to authorize those activities that require DA authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. We are also soliciting comments and suggestions regarding appropriate limits for new commercial shellfish aquaculture activities, as well as other terms and conditions that would be appropriate for authorizing new shellfish aquaculture activities with a nationwide permit to ensure minimal individual and cumulative adverse effects.

NWP 49. *Coal Remining Activities.* We are proposing to modify this NWP to clarify how the 40% of newly mined area is determined. As an example, if there are 600 acres of land previously unreclaimed as a result of previous mining activities and the Corps agrees with the SMCRA agency's determination that there are 200 acres needed to adequately reclaim the 600 acres, then there are a total of 800 acres included in the previously mined area and area needed to be reclaimed. Given this, the amount of newly mined area eligible for the NWP is 320 acres (40% of 800 acres). While the Corps acknowledges the SMCRA agency's expertise, the Corps will review the SMCRA agency's determination regarding the amount of previously unmined area necessary for the reclamation of the previously mined area and independently determine this area. This is necessary in order for the Corps to make informed decisions regarding whether the proposal satisfies the minimal adverse effects requirement of the NWP. We have also modified the notification provision by requiring the

prospective permittee to submit documentation with the PCN “describing how the overall mining plan will result in a net increase in aquatic resource functions.”

NWP 50. *Underground Coal Mining Activities*. To provide acreage and linear foot limits consistent with other NWPs and provide greater assurance that the NWP will only authorize activities with minimal adverse environmental effects, we are proposing to modify this NWP to impose a 1/2-acre limit on losses of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects.

### Discussion of Proposed New Nationwide Permits

*A. Land Based Renewable Energy Generation Facilities*. We are proposing to issue a new NWP to authorize the 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, expansion, or modification of land-based renewable energy production facilities. Examples include infrastructure to generate solar (concentrating solar power and photovoltaic), biomass, wind or geothermal energy and their collection systems. Attendant features may include, but are not limited to roads, parking lots, utility lines, and storm water management facilities.

We are proposing a 1/2-acre limit for this NWP, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives this 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. We believe the 1/2-acre limit, as well as the 300 linear foot limit for stream impacts, will authorize only those activities that have minimal adverse effects on the aquatic environment, individually and cumulatively. Division engineers can regionally condition this NWP to lower the acreage or linear foot limit or otherwise limit its use. We are proposing to require pre-construction notification for all activities. We are seeking comments on this proposed NWP, including its terms and conditions, such as the proposed 1/2-acre and 300 linear foot limits.

*B. Water-Based Renewable Energy Generation Pilot Projects*. We are

proposing to issue a new NWP to authorize structures and work in navigable waters of the United States and the discharges of dredged or fill material into waters of the United States, for the construction, expansion, and modification of hydrokinetic or wind energy generation pilot projects and their attendant features. This NWP also authorizes structures and infrastructure to collect energy as well as utility lines to transfer the energy to land-based distribution facilities.

We are proposing a 1/2-acre limit for this NWP, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives this 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. We believe the 1/2-acre limit, as well as the 300 linear foot limit for stream impacts, will authorize only those activities that have minimal adverse effects on the aquatic environment, individually and cumulatively. Division engineers can regionally condition this NWP to lower the acreage or linear foot limit or add additional restrictions on its use.

The proposed NWP would also prohibit activities in danger zones and restricted areas established by the Corps, as well as anchorage areas and shipping safety fairways or traffic separation schemes designated by the U.S. Coast Guard. This NWP would not authorize structures in open water dredged material disposal areas designated by the Corps or EPA. In addition, the NWP would not authorize activities in coral reefs.

We are proposing to require pre-construction notification for all activities. This proposed NWP would authorize activities that require section 10 and/or 404 authorization.

We are proposing to add a note to this NWP (Note 1) to make it clear that if the proposed activity involves modification of an existing Corps project, a separate authorization from the Chief of Engineers is required under 33 U.S.C. 408 to alter that Corps project.

The proposed NWP also includes Note 2, which instructs district engineers to provide a copy of the NWP verification to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS) for charting structures and utility lines in navigable waters of the United States to protect navigation.

We are seeking comments on this proposed new NWP, including its terms and conditions, such as the proposed 1/2-acre and 300 linear foot limits.

### Discussion of Proposed Modifications to Nationwide Permit General Conditions

In the 2007 NWPs we reordered the general conditions (GCs) to make them easier to read and to group together the GCs that are associated with environmental concerns and public interest review factors, followed by general conditions relating to administrative requirements. In this proposal, we are moving former general condition 28, Single and Complete Project, and renumbering it as general condition 16. The following GCs would be renumbered, but we are not proposing to make any changes to the text of those GCs: Proper Maintenance; Tribal Rights; Water Quality; Coastal Zone Management; Regional and Case-by-Case Conditions; Use of Multiple Nationwide Permits; and Transfer of Nationwide Permit Verifications.

*GC 2. Aquatic Life Movements*. To provide added protection to the aquatic environment we are proposing to modify this GC by adding a statement requiring bottomless culverts to be used when practicable. We are proposing to provide an example of a circumstance where it would not be practicable to use a bottomless culvert, such as sites where sub-grade instability would make it unsafe to use a bottomless culvert. The proposed modification of this general condition would also require the bottom of the culvert to be below the grade of the stream bed unless the stream bed consists of bedrock or boulders.

*GC 14. Discovery of Previously Unknown Remains and Artifacts*. We are proposing to add a new general condition to address circumstances when previously unknown historic, cultural or archeological remains or artifacts are discovered during construction of the authorized activity. The Corps uses a similar general condition (number 3) on all standard permits as prescribed by 33 CFR part 325, Appendix A. This GC would also require a permittee, to the maximum extent practicable, to stop activities that would adversely affect those remains and artifacts until the required coordination has been completed.

*GC 17. Wild and Scenic Rivers*. We are proposing to modify this general condition to clarify that project proponents should obtain information from the specific Federal land management agency responsible for the designated Wild and Scenic River or study river.

*GC 19. Endangered Species*. We are proposing to modify paragraph (a) of this general condition to clarify that direct and indirect effects are to be taken into account when assessing

whether an activity may jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, or destroy or adversely modify the critical habitat of such species.

We are also proposing to modify paragraph (e) to include definitions of “take” and “harm”. We are proposing to add a new paragraph (f) to provide prospective permittees with guidance on where they can obtain information on the locations of listed species and their critical habitat. That guidance was previously provided in paragraph (e).

**GC 20. *Historic Properties.*** (Formerly general condition 18.) We are proposing to modify paragraph (c) by stating district engineers will comply with the current procedures for addressing the requirements of Section 106 of the National Historic Preservation Act. The Regulatory Program’s procedures for the protection of historic properties are provided in Appendix C of 33 CFR part 325. On April 25, 2005, we issued revised interim guidance for implementing Appendix C in light of the Advisory Council on Historic Preservation’s revised regulations at 36 CFR part 800. We believe this general condition should have a more general reference to the Corps Regulatory Program’s current procedures for section 106 compliance, since we are using Appendix C, the revised interim guidance, and other guidance for section 106 compliance.

**GC 21. *Designated Critical Resource Waters.*** (Formerly general condition 19.) We are proposing to modify this general condition to clarify the types of areas subject to the GC by altering how NOAA’s marine sanctuaries are described, which categories of critical resource waters are always subject to this general condition, and which categories of critical resource waters can be designated by a district engineer after a public notice and comment process. This general condition will also specify that state-designated outstanding national resource waters are intended for inclusion in the general condition. We also propose making state natural heritage sites subject to the district engineer’s designation process in order to provide the public an opportunity to comment on a proposed designation of new critical resource waters and any effects the designation of those waters will have on local NWP program implementation. States may request the district engineer to consider designating state natural heritage sites as critical resource waters subject to this general condition. For those NWPs listed in paragraph (b), district engineers determine on a case-by-case basis

whether special permit conditions are needed to protect critical resource waters, or whether discretionary authority to require an individual permit should be exercised.

We are proposing to add proposed new NWPs A and B to the list of NWPs in paragraph (a) that cannot be used to authorize activities in designated critical resource waters.

**GC 22. *Mitigation.*** (Formerly general condition 20.) We are proposing to modify paragraph (g) so it better reflects our compensatory mitigation regulations at 33 CFR part 332. Specifically, we would replace the word “arrangements” with “programs” in describing in-lieu fee programs. We are also proposing to replace the phrase “activity-specific” with “permittee-responsible” when referring to compensatory mitigation implemented by the permittee. Another proposed change is the addition of a provision stating that for activities resulting in the loss of marine or estuarine resources, permittee-responsible compensatory mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. This will encourage the use of in-kind mitigation to compensate for the losses of marine or estuarine resources. Lastly, we propose to revise the last sentence of paragraph (g) to state that the party responsible for providing the required permittee-responsible mitigation, including any required long-term management, shall be identified in the special conditions of the NWP verification.

**GC 23. *Safety of Impoundment Structures.*** We are proposing to add this general condition to clarify that district engineers can request that a non-Federal applicant demonstrate the proposed impoundment structure is designed for safety in accordance with 33 CFR 320.4(k).

**GC 29. *Compliance Certification.*** (Formerly general condition 26.) We are proposing to make minor changes to clarify that the Corps provides the permittee with the necessary document to complete and return to the Corps as the signed certification.

**GC 30. *Pre-Construction Notification.*** (Formerly general condition 27.) We are proposing to rearrange paragraph (d)(2) to make it clearer that all NWP activities resulting in the loss of greater than ½-acre of waters of the United States require agency coordination. We are also proposing to require agency coordination for an NWP 21, 29, 39, 40, 42, 43, 50, A, or B PCN when the proposed activity will result in the loss

of greater than 1,000 linear feet of intermittent and ephemeral stream bed. This is a subset of cases where a waiver by the district engineer is required for a loss of greater than 300 linear feet of intermittent and ephemeral stream bed. The Corps believes that the addition of this coordination requirement for a subset of waivers, along with the added requirement of written minimal adverse effects determinations for all waivers and further specification of factors that need to be taken into account in minimal effects determinations (see below), appropriately balances the need to ensure that any waiver does not result in more than minimal adverse effects, individually and cumulatively, with the regulated public’s expectation that the Corps will issue NWP verifications in a timely manner. The Corps requests comment on this approach for strengthening the waiver provisions of the affected NWPs.

In paragraph (e), we are proposing to clarify that the district engineer must make a written determination of minimal adverse effects before waiving the 300 linear foot limit on impacts to intermittent or ephemeral streams or an otherwise applicable limit, as provided for in NWPs 13, 21, 29, 36, 39, 40, 42, 43, 44, 50, A or B. More generally, we are also proposing to clarify that the district engineer is to consider direct and indirect effects caused by the NWP activity when determining if an NWP activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. Specifically, we are proposing to add this language after the first sentence of paragraph (e)(1): “If an applicant requests a waiver of the 300 linear foot limit on impacts to intermittent or ephemeral streams or an otherwise applicable limit, as provided for in NWPs 13, 21, 29, 36, 39, 40, 42, 43, 44, 50, A or B, the district engineer will only grant the waiver upon a written determination that the discharge will result in minimal adverse effects. When making minimal effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity.”

We are also proposing to add language to paragraph (e)(1) that describes factors to consider when making minimal effects determinations for the purposes of the NWPs. Functional assessments may be used to make minimal effects determinations, if appropriate methods are available and practicable to use for a particular NWP activity. District engineers may also add special conditions to NWP authorizations to address site-specific environmental concerns and impose requirements to

ensure that authorized activities result in minimal adverse effects.

#### Discussion of Proposed Modifications to Existing Nationwide Permit Definitions

We are proposing changes to some of the NWP definitions. If a definition is not discussed below, we are not proposing any substantive changes to that definition.

*Compensatory Mitigation.* We are proposing to modify this definition to be consistent with the definition of this term found in 33 CFR 332.2.

*Re-establishment.* We are proposing to modify this definition by adding “and functions” to the end of the last sentence in order to be consistent with the definition of this term found in 33 CFR 332.2.

*Single and Complete Project.* We are proposing to modify this definition by splitting it into two definitions pertaining to linear (Single and Complete Linear Projects) and non-linear (Single and Complete Non-Linear Projects) projects in order to clarify how the “independent utility” test applies to non-linear projects.

#### Discussion of New Proposed Nationwide Permit Definitions

We are proposing to add three new definitions to assist those using the nationwide permits. As discussed above, we are proposing separate definitions of the terms “single and complete linear project” and “single and complete non-linear project.” We are also proposing to add a definition of the term “high tide line.” The definition of “high tide line” is adapted from the definition at 33 CFR 328.3(d).

#### Administrative Requirements

##### Plain Language

In compliance with the principles in the President’s Memorandum of June 1, 1998, (63 FR 31855) regarding plain language, this preamble is written using plain language. The use of “we” in this notice refers to the Corps. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

##### Paperwork Reduction Act

The proposed NWPs will increase the number of permittees who are required to submit a PCN. The content of the PCN is not changed from the current NWPs, except for NWP 48, where information from the current reporting requirement is being moved into the PCN, but the paperwork burden will increase because of the increased number of PCNs submitted. For the two new proposed NWPs A and B, the paperwork burden would be an

estimated 3,300 hours per year for 300 PCNs. This is based on an average burden to complete and submit a PCN of 11 hours. However, activities that would be authorized by the two proposed new NWPs are currently authorized by alternative forms of Department of the Army (DA) permits (*i.e.*, standard permits, letters of permission, or regional general permits), with many needing a standard permit application which requires an average burden of 11 hours to complete and submit. Since the paperwork burden is similar for standard permit applications and PCNs, we anticipate no additional paperwork burden if the two proposed NWPs are issued. Similarly, we anticipate no additional burden from the increased information required in a PCN for NWP 48 because the same information is currently being requested through the reporting requirement, which we are proposing to eliminate. Prospective permittees who are required to submit a PCN for a particular NWP, or who are requesting verification that a particular activity qualifies for NWP authorization, may use the current standard Department of the Army permit application form.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. For the Corps Regulatory Program under Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, the current OMB approval number for information collection requirements is maintained by the Corps of Engineers (OMB approval number 0710–0003, which expires on August 31, 2012).

##### Executive Order 12866

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

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, we have determined that the proposed rule is a “significant regulatory action” and the draft rule was submitted to OMB for review.

##### Executive Order 13132

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

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

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

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

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

Nationwide permits automatically expire and become null and void if they are not modified or reissued within five years of their effective date (*see* 33 CFR 330.6(b)). Furthermore, Section 404(e) of the Clean Water Act states that general permits, including NWP, can be issued for no more than five years. If the current NWP is not reissued, they will expire on March 18, 2012, and small entities and other project proponents would be required to obtain alternative forms of DA permits (i.e., standard permits, letters of permission, or regional general permits) for activities involving discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States. Regional general permits that authorize similar activities as the NWP may be available in some geographic areas, but small entities conducting regulated activities outside those geographic areas would have to obtain individual permits for activities that require DA permits.

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

Another requirement of Section 404(e) of the Clean Water Act is that general

permits, including nationwide permits, authorize only those activities that result in minimal adverse environmental effects, individually and cumulatively. The terms and conditions of the NWP, such as acreage or linear foot limits, are imposed to ensure that the NWP authorize only those activities that result in minimal adverse effects on the aquatic environment and other public interest review factors.

After considering the economic impacts of the proposed nationwide permits on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. Small entities may obtain required DA authorizations through the NWP, in cases where there are applicable NWP authorizing those activities and the proposed work will result in minimal adverse effects on the aquatic environment and other public interest review factors. The terms and conditions of the revised NWP will not impose substantially higher costs on small entities than those of the existing NWP. If an NWP is not available to authorize a particular activity, then another form of DA authorization, such as an individual permit or regional general permit, must be secured. However, as noted above, we expect a slight to moderate increase in the number of activities than can be authorized through NWP, because we are adding two new NWP, and we are removing some limitations in existing NWP and replacing them with PCN requirements that will allow the district engineer to judge whether any adverse effects of the proposed project are more than minimal, and authorize the project under an NWP if they are not.

We are interested in the potential impacts of the proposed NWP on small entities and welcome comments on issues related to such impacts.

#### *Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under Section 202 of the UMRA, the agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating a rule for which a written statement is needed, Section 205 of the UMRA generally requires the agencies to identify and consider a

reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows an agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted. Before an agency establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed, under Section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

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

#### *Executive Order 13045*

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

we must evaluate the environmental health or safety effects of the proposed rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

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

#### *Executive Order 13175*

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

The proposal to issue NWP's does not have tribal implications. It is generally consistent with current agency practice and will not have substantial direct effects on tribal governments, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Therefore, Executive Order 13175 does not apply to this proposal. However, in the spirit of Executive Order 13175, we specifically request comment from Tribal officials on the proposed rule. Each Corps district will be conducting government-to-government consultation with Tribes, to identify regional conditions or other local NWP modifications that may be necessary to protect aquatic resources of interest to Tribes, as part of the Corps responsibility to protect trust resources.

#### *Environmental Documentation*

A draft decision document, which includes a draft environmental assessment and Finding of No Significant Impact (FONSI) has been prepared for each proposed NWP. These draft decision documents are available at: <http://www.regulations.gov> (docket ID number COE-2010-0035). They are also available by contacting

Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street, NW., Washington, DC 20314-1000.

#### *Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. We will submit a report containing the final NWP's and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The proposed NWP's are not a "major rule" as defined by 5 U.S.C. 804(2).

#### *Executive Order 12898*

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

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

#### *Executive Order 13211*

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

#### **Authority**

We are proposing to issue new NWP's, modify existing NWP's, and reissue

NWP's without change under the authority of Section 404(e) of the Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*).

Dated: February 9, 2011.

**MG William T. Grisoli,**  
*Deputy Commanding General for Civil and Emergency Operations.*

#### **Nationwide Permits, Conditions, Further Information, and Definitions**

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

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5. Scientific Measurement Devices
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#### Further Information

#### Definitions

- Best management practices (BMPs)
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- Discharge
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- Independent utility
- Intermittent stream
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- Riffle and pool complex
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- Single and complete non-linear project

- Stormwater management
- Stormwater management facilities
- Stream bed
- Stream channelization
- Structure
- Tidal wetland
- Vegetated shallows
- Waterbody

#### B. Nationwide Permits

1. *Aids to Navigation.* The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard (see 33 CFR, chapter I, subchapter C, part 66). (Section 10)

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

3. *Maintenance.* (a) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized. Any stream channel modification is limited to the minimum necessary for the repair, rehabilitation, or replacement of the structure or fill; such modifications must be immediately adjacent to the project. This NWP also authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the district engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(b) This NWP also authorizes the removal of accumulated sediments and debris in the vicinity of and within existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.) and/or the placement of

new or additional riprap to protect the structure. 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. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an upland area unless otherwise specifically approved by the district engineer under separate authorization. The placement of riprap must be the minimum necessary to protect the structure or to ensure the safety of the structure. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the district engineer.

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

(d) This NWP does not authorize maintenance dredging for the primary purpose of navigation. This NWP does not authorize beach restoration. This NWP does not authorize new stream channelization or stream relocation projects.

**Notification:** For activities authorized by paragraph (b) of this NWP, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 30). The pre-construction notification must include information regarding the original design capacities and configurations of the outfalls, intakes, small impoundments, and canals. (Sections 10 and 404)

**Note:** This NWP authorizes the repair, rehabilitation, or replacement of any

previously authorized structure or fill that does not qualify for the Clean Water Act Section 404(f) exemption for maintenance.

4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.* Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, and clam and oyster digging, and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This NWP does not authorize artificial reefs or impoundments and semi-impoundments of waters of the United States for the culture or holding of motile species such as lobster, or the use of covered oyster trays or clam racks. (Sections 10 and 404)

5. *Scientific Measurement Devices.* Devices, whose purpose is to measure and record scientific data, such as staff gages, tide and current gages, meteorological stations, water recording and biological observation devices, water quality testing and improvement devices, and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards. Upon completion of the study, the measuring device and any other structures or fills associated with that device (e.g., anchors, buoys, lines, etc.) must be removed and, to the maximum extent practicable, the site must be restored to pre-construction elevations. (Sections 10 and 404)

6. *Survey Activities.* Survey activities, such as core sampling, seismic exploratory operations, plugging of seismic shot holes and other exploratory-type bore holes, exploratory trenching, soil surveys, sampling, and historic resources surveys. For the purposes of this NWP, the term "exploratory trenching" means mechanical land clearing of the upper soil profile to expose bedrock or substrate, for the purpose of mapping or sampling the exposed material. The area in which the exploratory trench is dug must be restored to its pre-construction elevation upon completion of the work and must not drain a water of the United States. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. This NWP authorizes the construction of temporary pads, provided the discharge does not exceed  $\frac{1}{10}$ -acre in waters of the U.S. discharges and structures associated with the recovery of historic resources are not authorized by this NWP. Drilling and the discharge of excavated material from test wells for oil and gas exploration are

not authorized by this NWP; the plugging of such wells is authorized. Fill placed for roads and other similar activities is not authorized by this NWP. The NWP does not authorize any permanent structures. The discharge of drilling mud and cuttings may require a permit under Section 402 of the Clean Water Act. (Sections 10 and 404)

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 30.) (Sections 10 and 404)

8. *Oil and Gas Structures on the Outer Continental Shelf.* Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of the Interior, Bureau of Ocean Energy Management, Regulation, and Enforcement. Such structures shall not be placed within the limits of any designated shipping safety fairway or traffic separation scheme, except temporary anchors that comply with the fairway regulations in 33 CFR 322.5(l). The district engineer will review such proposals to ensure compliance with the provisions of the fairway regulations in 33 CFR 322.5(l). Any Corps review under this NWP will be limited to the effects on navigation and national security in accordance with 33 CFR 322.5(f). Such structures will not be placed in established danger zones or restricted areas as designated in 33 CFR part 334, nor will such structures be permitted in EPA or Corps designated dredged material disposal areas.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 30.) (Section 10)

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

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

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

12. *Utility Line Activities.* Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than  $\frac{1}{2}$ -acre of waters of the United States.

**Utility lines:** This NWP authorizes 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 pre-construction contours. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication. The term "utility line" does not include activities that drain a water of the United States, such as drainage tile or french drains, but it does apply to pipes conveying drainage from another area.

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

**Utility line substations:** This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with a power line or

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

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

**Access roads:** This NWP authorizes the construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (e.g., at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize utility lines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (See 33 CFR Part 322).

Overhead utility lines constructed over section 10 waters and utility lines that are routed in or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

This NWP also authorizes temporary structures, fills, and work necessary to conduct the utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or

dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if any of the following criteria are met: (1) The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials. (See general condition 30.) (Sections 10 and 404)

**Note 1:** Where the proposed utility line is constructed or installed in navigable waters of the United States (i.e., section 10 waters), copies of the pre-construction notification and NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the utility line to protect navigation.

**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, in accordance with the requirements for temporary fills.

**Note 3:** Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to Section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit (see NWP 15).

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

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

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

(c) The activity will not exceed an average of one cubic yard per running foot placed along the bank below the plane of the ordinary high water mark or the high tide line, unless the permittee utilizes bioengineering techniques to accomplish the bank stabilization;

(d) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in minimal adverse effects;

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

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

(g) The activity is not a stream channelization activity.

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the bank stabilization activity: (1) Involves discharges into special aquatic sites; or (2) is in excess of 500 feet in length. (See general condition 30.) (Sections 10 and 404)

**14. Linear Transportation Projects.** Activities required for the construction, expansion, modification, or improvement of linear transportation projects (e.g., roads, highways, railways,

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

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

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The loss of waters of the United States exceeds 1/10-acre; or (2) there is a discharge in a special aquatic site, including wetlands. (See general condition 30.) (Sections 10 and 404)

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

15. *U.S. Coast Guard Approved Bridges.* Discharges of dredged or fill material incidental to the construction of a bridge across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills, provided the construction of the bridge structure has been authorized by the U.S. Coast Guard under Section 9 of the Rivers and Harbors Act of 1899 and other applicable laws. Causeways and

approach fills are not included in this NWP and will require a separate section 404 permit. (Sections 10 and 404)

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

17. *Hydropower Projects.* Discharges of dredged or fill material associated with hydropower projects having: (a) Less than 5,000 kW of total generating capacity at existing reservoirs, where the project, including the fill, is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; or (b) a licensing exemption granted by the FERC pursuant to Section 408 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and Section 30 of the Federal Power Act, as amended.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 30.) (Section 404)

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

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

(b) The discharge will not cause the loss of more than 1/10-acre of waters of the United States; and

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge or the volume of area excavated exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line, or (2) the discharge is in a special aquatic site, including wetlands. (See general condition 30.) (Sections 10 and 404)

19. *Minor Dredging.* Dredging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States (i.e., section 10 waters). This NWP does not authorize the dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist but may not be present in a given year), anadromous fish spawning areas, or wetlands, or the connection of canals or other artificial waterways to navigable waters of the United States (see 33 CFR 322.5(g)). (Sections 10 and 404)

20. *Response Operations for Oil and Hazardous Substances.* Activities conducted in response to a discharge or release of oil and hazardous substances that are subject to the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR part 300) including containment, cleanup, and mitigation efforts, provided that the activities are done under either: (1) The Spill Control and Countermeasure Plan required by 40 CFR 112.3; (2) the direction or oversight of the Federal on-scene coordinator designated by 40 CFR part 300; or (3) any approved existing state, regional or local contingency plan provided that the Regional Response Team (if one exists in the area) concurs with the proposed response efforts. This NWP also authorizes activities required for the cleanup of oil releases in waters of the United States from electrical equipment that are governed by EPA's polychlorinated biphenyl spill response regulations at 40 CFR part 761. This NWP also authorizes the use of temporary structures and fills in waters of the U.S. for spill response training exercises. (Sections 10 and 404)

21. *Surface Coal Mining Activities.*

We are seeking comment on the following three options:

*Option 1—Do not reissue NWP 21.*

*Option 2 (Preferred Option)—21.*

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

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including

the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This NWP does not authorize discharges into tidal waters or non-tidal wetlands adjacent to tidal waters.

This NWP does not authorize discharges of dredged or fill material into waters of the United States associated with the construction of valley fills.

**Notification:** The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 30.) (Sections 10 and 404)

*Option 3—21. Surface Coal Mining Activities.* Discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations provided the activities are already authorized, or are currently being processed by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 or as part of an integrated permit processing procedure by the Department of Interior (DOI), Office of Surface Mining Reclamation and Enforcement (OSMRE).

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 30.) (Sections 10 and 404)

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The vessel is listed or eligible for listing in the National Register of Historic Places;

or (2) the activity is conducted in a special aquatic site, including coral reefs and wetlands. (See general condition 30.) If condition 1 above is triggered, the permittee cannot commence the activity until informed by the district engineer that compliance with the "Historic Properties" general condition is completed. (Sections 10 and 404)

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

**Note 2:** Compliance with general condition 19, Endangered Species, and general condition 20, Historic Properties, is required for all NWPs. The concern with historic properties is emphasized in the notification requirements for this NWP because of the likelihood that submerged vessels may be historic properties.

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

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

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

The Office of the Chief of Engineers may require additional conditions, including pre-construction notification, for authorization of an agency's categorical exclusions under this NWP.

**Notification:** Certain categorical exclusions approved for authorization under this NWP require the permittee to submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 30). The activities that require pre-construction notification are listed in the appropriate Regulatory Guidance Letters. (Sections 10 and 404)

**Note:** The agency or department may submit an application for an activity believed to be categorically excluded to the Office of the Chief of Engineers (Attn: CECW-CO). Prior to approval for authorization under this

NWP of any agency's activity, the Office of the Chief of Engineers will solicit public comment. As of the date of issuance of this NWP, agencies with approved categorical exclusions are the: Bureau of Reclamation, Federal Highway Administration, and U.S. Coast Guard. Activities approved for authorization under this NWP as of the date of this notice are found in Corps Regulatory Guidance Letter 05-07, which is available at: <http://www.usace.army.mil/CECW/Pages/rglsindx.aspx>. Any future approved categorical exclusions will be announced in Regulatory Guidance Letters and posted on this same Web site.

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

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

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

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

26. [Reserved]

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

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to:

The removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms; the installation of current deflectors; the enhancement, restoration, or establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or establish 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; the construction of oyster habitat over unvegetated bottom in tidal waters; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; the removal of small dams; and other related activities. Only native plant species should be planted at the site.

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

Except for the relocation of non-tidal waters on the project site, this NWP does not authorize the conversion of a stream or natural wetlands to another aquatic habitat type (e.g., stream to wetland or vice versa) or uplands. This NWP does not authorize stream channelization. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

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

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

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

enhancement, restoration, or establishment agreement, or a project description, including project plans and location map; (2) the NRCS or USDA Technical Service Provider documentation for the voluntary stream enhancement or restoration action or wetland restoration, enhancement, or establishment action; or (3) the SMCRA permit issued by OSMRE or the applicable state agency. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP.

**Notification.** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 30), except for the following activities:

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

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

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

However, the permittee must submit a copy of the appropriate documentation. (Sections 10 and 404)

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

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

**29. Residential Developments.** Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant

features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development).

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

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 30.) (Sections 10 and 404)

**30. Moist Soil Management for Wildlife.** Discharges of dredged or fill material into non-tidal waters of the United States and maintenance activities that are associated with moist soil management for wildlife for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage habitat and feeding areas for wildlife. Such activities include, but are not limited to, plowing or discing to impede succession, preparing seed beds, or establishing fire breaks. Sufficient riparian areas must be maintained adjacent to all open water bodies, including streams to preclude water quality degradation due to erosion and sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, or similar features associated with the management areas. The activity must not result in a net loss of aquatic resource functions and services. This NWP does not authorize the conversion of wetlands to uplands, impoundments, or other open water bodies. (Section 404)

**Note:** The repair, maintenance, or replacement of existing water control structures or the repair or maintenance of dikes may be authorized by NWP 3. Some

such activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4).

**31. Maintenance of Existing Flood Control Facilities.** Discharges of dredged or fill material resulting from activities associated with the maintenance of existing flood control facilities, including debris basins, retention/detention basins, levees, and channels that: (i) Were previously authorized by the Corps by individual permit, general permit, or 33 CFR 330.3, or did not require a permit at the time they were constructed, or (ii) were constructed by the Corps and transferred to a non-Federal sponsor for operation and maintenance. Activities authorized by this NWP are limited to those resulting from maintenance activities that are conducted within the "maintenance baseline," as described in the definition below. Discharges of dredged or fill materials associated with maintenance activities in flood control facilities in any watercourse that have previously been determined to be within the maintenance baseline are authorized under this NWP. To the extent that a Corps permit is required, this NWP authorizes the removal of vegetation from levees associated with the flood control project. This NWP does not authorize the removal of sediment and associated vegetation from natural water courses except when these activities have been included in the maintenance baseline. All dredged material must be placed in an upland site or an authorized disposal site in waters of the United States, and proper siltation controls must be used.

**Maintenance Baseline:** The maintenance baseline is a description of the physical characteristics (e.g., depth, width, length, location, configuration, or design flood capacity, etc.) of a flood control project within which maintenance activities are normally authorized by NWP 31, subject to any case-specific conditions required by the district engineer. The district engineer will approve the maintenance baseline based on the approved or constructed capacity of the flood control facility, whichever is smaller, including any areas where there are no constructed channels but which are part of the facility. The prospective permittee will provide documentation of the physical characteristics of the flood control facility (which will normally consist of as-built or approved drawings) and documentation of the approved and constructed design capacities of the flood control facility. If no evidence of the constructed capacity exists, the approved capacity will be used. The

documentation will also include best management practices to ensure that the impacts to the aquatic environment are minimal, especially in maintenance areas where there are no constructed channels. (The Corps may request maintenance records in areas where there has not been recent maintenance.) Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5. Except in emergencies as described below, this NWP cannot be used until the district engineer approves the maintenance baseline and determines the need for mitigation and any regional or activity-specific conditions. Once determined, the maintenance baseline will remain valid for any subsequent reissuance of this NWP. This NWP does not authorize maintenance of a flood control facility that has been abandoned. A flood control facility will be considered abandoned if it has operated at a significantly reduced capacity without needed maintenance being accomplished in a timely manner.

**Mitigation:** The district engineer will determine any required mitigation one-time only for impacts associated with maintenance work at the same time that the maintenance baseline is approved. Such one-time mitigation will be required when necessary to ensure that adverse environmental impacts are no more than minimal, both individually and cumulatively. Such mitigation will only be required once for any specific reach of a flood control project. However, if one-time mitigation is required for impacts associated with maintenance activities, the district engineer will not delay needed maintenance, provided the district engineer and the permittee establish a schedule for identification, approval, development, construction and completion of any such required mitigation. Once the one-time mitigation described above has been completed, or a determination made that mitigation is not required, no further mitigation will be required for maintenance activities within the maintenance baseline. In determining appropriate mitigation, the district engineer will give special consideration to natural water courses that have been included in the maintenance baseline and require compensatory mitigation and/or best management practices as appropriate.

**Emergency Situations:** In emergency situations, this NWP may be used to authorize maintenance activities in flood control facilities for which no maintenance baseline has been approved. Emergency situations are

those which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if action is not taken before a maintenance baseline can be approved. In such situations, the determination of mitigation requirements, if any, may be deferred until the emergency has been resolved. Once the emergency has ended, a maintenance baseline must be established expeditiously, and mitigation, including mitigation for maintenance conducted during the emergency, must be required as appropriate.

**Notification:** The permittee must submit a pre-construction notification to the district engineer before any maintenance work is conducted (see general condition 30). The pre-construction notification may be for activity-specific maintenance or for maintenance of the entire flood control facility by submitting a five-year (or less) maintenance plan. The pre-construction notification must include a description of the maintenance baseline and the dredged material disposal site. (Sections 10 and 404)

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

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

(a) The unauthorized activity affected no more than 5 acres of non-tidal waters or 1 acre of tidal waters;

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

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

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

(iii) The terms of a final court decision, consent decree, settlement

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

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

33. *Temporary Construction, Access, and Dewatering.* Temporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard. This NWP also authorizes temporary structures, work, and discharges, including cofferdams, necessary for construction activities not otherwise subject to the Corps or U.S. Coast Guard permit requirements. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. The use of dredged material may be allowed if the district engineer determines that it will not cause more than minimal adverse effects on aquatic resources. Following completion of construction, temporary fill must be entirely removed to upland areas, dredged material must be returned to its original location, and the affected areas must be restored to pre-construction elevations. The affected areas must also be revegetated, as appropriate. This permit does not authorize the use of cofferdams to dewater wetlands or other aquatic areas to change their use. Structures left in place after construction is completed require a separate section 10 permit if

located in navigable waters of the United States. (See 33 CFR part 322.)

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 30). The pre-construction notification must include a restoration plan showing how all temporary fills and structures will be removed and the area restored to pre-project conditions. (Sections 10 and 404)

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer once during the period that this NWP is valid, and the NWP will then authorize discharges of dredge or fill material at an existing operation for the permit term, provided the 10-acre limit is not exceeded. (See general condition 30.) (Section 404)

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

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

(a) The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or in the form of pre-cast concrete planks or slabs, unless the district engineer waives the 50 cubic yard limit by making a written determination concluding that the discharge will result in minimal adverse effects;

(b) The boat ramp does not exceed 20 feet in width, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in minimal adverse effects;

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

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

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

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge into waters of the United States exceeds 50 cubic yards, or (2) the boat ramp exceeds 20 feet in width. (See general condition 30.) (Sections 10 and 404)

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

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

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

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

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

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

In general, the prospective permittee should wait until the district engineer issues an NWP verification or 45 calendar days have passed before proceeding with the watershed protection and rehabilitation activity. However, in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the emergency watershed protection and rehabilitation

activity may proceed immediately and the district engineer will consider the information in the pre-construction notification and any comments received as a result of agency coordination to decide whether the NWP 37

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

**Notification:** Except in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 30). (Sections 10 and 404)

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 30.) (Sections 10 and 404)

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

39. *Commercial and Institutional Developments.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of commercial and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures.

Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, storm water management facilities, and recreation facilities such as playgrounds and playing fields. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of

worship. The construction of new golf courses, new ski areas, or oil and gas wells is not authorized by this NWP.

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 30.) (Sections 10 and 404)

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

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

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

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 30.) (Section 404)

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

404(f)(1)(C) exemption because of the recapture provision at Section 404(f)(2).

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

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity, if more than 500 linear feet of drainage ditch will be reshaped. (See general condition 30.) (Section 404)

42. *Recreational Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of recreational facilities. Examples of recreational facilities that may be authorized by this NWP include playing fields (e.g., football fields, baseball fields), basketball courts, tennis courts, hiking trails, bike paths, golf courses, ski areas, horse paths, nature centers, and campgrounds (excluding recreational vehicle parks). This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables that are directly related to the recreational activity, but it does not authorize the construction of hotels, restaurants, racetracks, stadiums, arenas, or similar facilities.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal

waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 30.) (Section 404)

43. *Stormwater Management Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction and maintenance of stormwater management facilities, including the excavation of stormwater ponds/facilities, detention basins, and retention basins; the installation and maintenance of water control structures, outfall structures and emergency spillways; low impact development stormwater features; and the maintenance dredging of existing stormwater management ponds/facilities and detention and retention basins.

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

**Notification:** For the construction of new stormwater management facilities, or the expansion of existing stormwater management facilities, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 30.) Maintenance activities do not require pre-construction notification if they are limited to restoring the original design capacities of the stormwater management facility. (Section 404)

44. *Mining Activities.* Discharges of dredged or fill material into non-tidal waters of the United States for mining activities, except for coal mining activities. The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, including the loss of no more than 300

linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 30.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification. (Sections 10 and 404)

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

This NWP does not authorize beach restoration.

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer (see general condition 30) within 12-months of the date of the damage. The pre-construction notification should include documentation, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. (Sections 10 and 404)

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

material into waters of the United States associated with the restoration of uplands.

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

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 30.) (Section 404)

47. [Reserved]

48. *Existing Commercial Shellfish Aquaculture Activities.* Discharges of dredged or fill material in waters of the United States or structures or work in navigable waters of the United States necessary for the continued operation and/or expansion of existing commercial shellfish aquaculture operations, including the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures. This NWP also authorizes discharges of dredged or fill material necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked. This NWP does not authorize:

(a) The cultivation of species not previously cultivated in the waterbody or of an aquatic nuisance species as defined in the Non-Indigenous Aquatic Nuisance Prevention and Control Act of 1990; or,

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

This NWP does not authorize new commercial shellfish aquaculture operations, except for expansions of existing operations.

**Notification:** The permittee must submit a pre-construction notification to

the district engineer if: (1) The project area is greater than 100 acres; or (2) there is any reconfiguration of the aquaculture activity, such as relocating existing operations into portions of the project area not previously used for aquaculture activities; or (3) there is a change in culture methods (e.g., from bottom culture to off-bottom culture); or (4) dredge harvesting, tilling, or harrowing is conducted in areas inhabited by submerged aquatic vegetation; or, (5) there is an expansion to the project area. (See general condition 30.)

In addition to the information required by paragraph (b) of general condition 30, the pre-construction notification must also include the following information: (a) The size of the project area, plus any proposed expansion (in acres); (b) the corner latitude and longitude coordinates of the project area and the expansion area; (c) a brief description of the culture and harvest method(s), including plans for rotating production within a project area; (d) the name(s) of the cultivated species; (e) whether canopy predator nets are being used; and, (f) a description of the composition of the substrate material and vegetation. (Sections 10 and 404)

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

**Note 2:** The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 defines "aquatic nuisance species" as "a nonindigenous species that threatens the diversity or abundance of native species or the ecological stability of infested waters, or commercial, agricultural, aquacultural, or recreational activities dependent on such waters."

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

As part of the project, the permittee may conduct new coal mining activities in conjunction with the remining activities when he or she clearly

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

**Notification:** The permittee must submit a pre-construction notification and a document describing how the overall mining plan will result in a net increase in aquatic resource functions to the district engineer and receive written authorization prior to commencing the activity. (See general condition 30.) (Sections 10 and 404)

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

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 30.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification. (Sections 10 and 404)

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

*A. Land-Based Renewable Energy Generation 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, expansion, or modification of land-based renewable energy production facilities. Such facilities include infrastructure to collect solar (concentrating solar power and photovoltaic), wind, biomass, or geothermal energy, as well as utility lines to transfer the energy to land-based distribution facilities. Attendant features may include, but are not limited to roads, parking lots, utility lines, and storm water management facilities.

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 30.) (Sections 10 and 404)

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

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

For each single and complete project, no more than 10 generation units (e.g., wind turbines) are authorized.

This NWP does not authorize activities in coral reefs.

Structures in an anchorage area established by the U.S. Coast Guard

must comply with the requirements in 33 CFR part 322.5(1)(2).

Structures may not be placed in established danger zones or restricted areas as designated in 33 CFR part 334, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard (see 33 CFR part 322.5(1)(1)), or EPA or Corps designated open water dredged material disposal areas.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 30.) (Sections 10 and 404)

**Note 1:** An activity that is located on an existing locally or federally maintained U.S. Army Corps of Engineers project requires separate approval from the Chief of Engineers under 33 U.S.C. 408.

**Note 2:** Copies of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the project and associated utility line(s) to protect navigation.

### *C. Nationwide Permit General Conditions*

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

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

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

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the

Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. *Aquatic Life Movements.* No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. Culverts placed in streams must be installed to maintain low flow conditions. Bottomless culverts must be used where practicable. For an activity where it is not practicable to use a bottomless culvert, such as circumstances where sub-grade instability would make it unsafe to use a bottomless culvert, the bottom of the culvert must be below the grade of the stream bed unless the stream bed consists of bedrock or boulders.

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

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

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

6. *Suitable Material.* No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).

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

8. *Adverse Effects From Impoundments.* If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting

its flow must be minimized to the maximum extent practicable.

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

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

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

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

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

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

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

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

17. *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 responsible for the designated Wild and Scenic River or study river (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service).

18. *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.

19. *Endangered Species.* (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements.

(c) 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 if the project is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might

affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. The district engineer will determine whether the proposed activity "may affect" or will have "no effect" to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the project, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have "no effect" on listed species or critical habitat, or until Section 7 consultation has been completed.

(d) 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.

(e) Authorization of an activity by a NWP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the U.S. FWS or the NMFS, The Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word "harm" in the definition of "take" means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

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

20. *Historic Properties.* (a) In cases where the district engineer determines that the activity may affect properties listed, or eligible for listing, in the

National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of Section 106 of the National Historic Preservation Act. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements.

(c) Non-Federal permittees must submit a pre-construction notification to the district engineer if the authorized activity may have the potential to cause effects to any historic properties listed, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties may be affected by the proposed work or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of or potential for the presence of historic resources can be sought from the State Historic Preservation Officer or Tribal Historic Preservation Officer, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of Section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted and these efforts, the district engineer shall determine whether the proposed activity has the potential to cause an effect on the historic properties. Where the non-Federal applicant has identified historic properties on which the activity may have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects or that consultation under Section 106 of the NHPA has been completed.

(d) The district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA

Section 106 consultation is required. Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). If NHPA section 106 consultation is required and will occur, the district engineer will notify the non-Federal applicant that he or she cannot begin work until Section 106 consultation is completed.

(e) Prospective permittees should be aware that section 110k of the NHPA (16 U.S.C. 470h-2(k)) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of Section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

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

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

(b) For NHPs 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 30, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NHPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

22. *Mitigation.* The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that adverse effects on the aquatic environment are minimal:

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

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed  $\frac{1}{10}$ -acre and require pre-construction notification, unless the district engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-specific waiver of this requirement. For wetland losses of  $\frac{1}{10}$ -acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in minimal adverse effects on the aquatic environment. Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, wetland restoration should be the first compensatory mitigation option considered.

(d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation, such as stream restoration, to ensure that the activity results in minimal adverse effects on the aquatic environment.

(e) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NHPs. For example, if an NWP has an acreage limit of  $\frac{1}{2}$ -acre, it cannot be used to authorize any project resulting in the loss of greater than  $\frac{1}{2}$ -acre of waters of the United States, even if

compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that a project already meeting the established acreage limits also satisfies the minimal impact requirement associated with the NWP.

(f) Compensatory mitigation plans for projects in or near streams or other open waters will normally include a requirement for the establishment, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, riparian areas may be the only compensatory mitigation required. Riparian areas should consist of native species. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(g) Permittees may propose the use of mitigation banks, in-lieu fee programs, or separate permittee-responsible mitigation. For activities resulting in the loss of marine or estuarine resources, permittee-responsible compensatory mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee-responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project.

(h) Where certain functions and services of waters of the United States are permanently adversely affected, such as the conversion of a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse effects of the project to the minimal level.

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

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

25. *Coastal Zone Management.* In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). The district engineer or a State may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

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

27. *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  $\frac{1}{3}$ -acre.

28. *Transfer of Nationwide Permit Verifications.* If the permittee sells the property associated with a nationwide

permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature: "When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below."

\_\_\_\_\_  
(Transferee)

\_\_\_\_\_  
(Date)

29. *Compliance Certification.* Each permittee who receives an NWP verification letter from the Corps must provide a signed certification documenting completion of the authorized activity and any required compensatory mitigation. The Corps will provide the permittee the certification document with the NWP verification letter. The certification document will include:

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

(b) A statement that any required compensatory mitigation was completed in accordance with the permit conditions; and

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

30. *Pre-Construction Notification.*  
(a) *Timing.* Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, as a general rule, will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The

prospective permittee shall not begin the activity until either:

(1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or

(2) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 19 that listed species or critical habitat might be affected or in the vicinity of the project, or to notify the Corps pursuant to general condition 20 that the activity may have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is "no effect" on listed species or "no potential to cause effects" on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (*see* 33 CFR 330.4(f)) and/or Section 106 of the National Historic Preservation (*see* 33 CFR 330.4(g)) has been completed. Also, work cannot begin under NWPs 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee cannot begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

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

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

(2) Location of the proposed project;

(3) A 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. The description should be sufficiently detailed to allow the district engineer to determine that the adverse effects of the project will be minimal and to

determine the need for compensatory mitigation. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the project and when provided results in a quicker decision.);

(4) The PCN must include a delineation of special aquatic sites and other waters of the United States on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters of the United States, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many waters of the United States. Furthermore, the 45-day period will not start until the delineation has been submitted to or completed by the Corps, as appropriate;

(5) If the proposed activity will result in the loss of greater than  $\frac{1}{10}$ -acre of wetlands and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(6) If any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, for non-Federal applicants the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work. Federal applicants must provide documentation demonstrating compliance with the Endangered Species Act; and

(7) For an activity that may affect a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, for non-Federal applicants 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. Federal applicants must provide documentation demonstrating compliance with Section 106 of the National Historic Preservation Act.

(c) *Form of Pre-Construction Notification:* The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it is a PCN and must include all of the information required in paragraphs (b)(1) through (7) of this general

condition. A letter containing the required information may also be used.

(d) *Agency Coordination:* (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

(2) For all NWP activities that result in the loss of greater than  $\frac{1}{2}$ -acre of waters of the United States, NWP 21, 29, 39, 40, 42, 43, 44, 50, A, and B activities that will result in the loss of greater than 1,000 linear feet of intermittent and ephemeral stream bed, and all NWP 48 activities requiring pre-construction notification, the district engineer will immediately provide (*e.g.*, via facsimile transmission, overnight mail, or other expeditious manner) a copy of the PCN to the appropriate Federal or state offices (U.S. FWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Office (THPO), and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the district engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction 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 pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(3) In cases where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by Section 305(b)(4)(B) of the

Magnuson-Stevens Fishery Conservation and Management Act.

(4) Applicants are encouraged to provide the Corps multiple copies of pre-construction notifications to expedite agency coordination.

(e) *District Engineer's Decision:* (1) In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If an applicant requests a waiver of the 300 linear foot limit on impacts to intermittent or ephemeral streams or of an otherwise applicable limit, as provided for in NWPs 13, 21, 29, 36, 39, 40, 42, 43, 44, 50, A or B, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in minimal adverse effects. When making minimal effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (e.g., watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse effects determination. The district engineer may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns.

(2) If the proposed activity requires a PCN and will result in a loss of greater than  $\frac{1}{10}$ -acre of wetlands, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for projects with smaller impacts. 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. The compensatory mitigation

proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, after considering mitigation, the district engineer will notify the permittee and include any conditions the district engineer deems necessary. The district engineer must approve any compensatory mitigation proposal before the permittee commences work. If the prospective permittee 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 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the district engineer to be minimal, the district engineer will provide a timely written response to the applicant. The response will state that the project can proceed under the terms and conditions of the NWP.

(3) If the district engineer determines that the adverse effects of the proposed work are more than minimal, then the district engineer will notify the applicant either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (2) that the project is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse effects occur to the aquatic environment, the activity will be authorized within the 45-day PCN period. The authorization will include the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level. When mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan.

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

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

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

*Discharge:* The term "discharge" means any discharge of dredged or fill material and any activity that causes or results in such a discharge.

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

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

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

**High Tide Line:** The line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

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

**Independent utility:** A test to determine what constitutes a single and complete non-linear project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

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

**Loss of waters of the United States:** Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation

of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. The loss of stream bed includes the linear feet of stream bed that is filled or excavated. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities eligible for exemptions under Section 404(f) of the Clean Water Act are not considered when calculating the loss of waters of the United States.

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

**Open water:** For purposes of the NWPs, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of standing or flowing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of "open waters" include rivers, streams, lakes, and ponds.

**Ordinary High Water Mark:** An ordinary high water mark is a line on the shore established by the fluctuations of water and indicated by physical characteristics, or by other appropriate means that consider the characteristics of the surrounding areas (see 33 CFR 328.3(e)).

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

**Practicable:** Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

**Pre-construction notification:** A request submitted by the project proponent to the Corps for confirmation

that a particular activity is authorized by nationwide permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

**Preservation:** The removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

**Re-establishment:** The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

**Rehabilitation:** The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

**Restoration:** The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

**Riffle and pool complex:** Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a coarse substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

*Riparian areas:* Riparian areas are lands adjacent to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects waterbodies with their adjacent uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 20.)

*Shellfish seeding:* The placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (i.e., spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.

*Single and complete linear project:* For linear projects, the term “single and complete project” is defined as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers and includes all crossings of a single water of the United States (i.e., a single waterbody) at a specific location. For linear projects crossing a single 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, and crossings of such features cannot be considered separately.

*Single and complete non-linear project:* For non-linear projects, the term “single and complete project” is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A

single and complete non-linear project must have independent utility (see definition of “independent utility”).

*Stormwater management:* Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

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

*Stream bed:* The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

*Stream channelization:* The manipulation of a stream’s course, condition, capacity, or location that causes more than minimal interruption of normal stream processes. A channelized stream remains a water of the United States.

*Structure:* An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

*Tidal wetland:* A tidal wetland is a wetland (i.e., 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, which is defined at 33 CFR 328.3(d).

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

*Waterbody:* For purposes of the NWP, a waterbody is a jurisdictional water of the United States that, during a year with normal patterns of precipitation, has water flowing or standing above ground to the extent that an ordinary high water mark (OHWM) or other indicators of jurisdiction can be determined, as well as any wetland area (see 33 CFR 328.3(b)). If a jurisdictional wetland is adjacent—meaning bordering, contiguous, or neighboring—to a jurisdictional waterbody displaying an OHWM or other indicators of jurisdiction, that waterbody and its adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of “waterbodies” include streams, rivers, lakes, ponds, and wetlands.

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