

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

RIN 0710-AA71

**Reissuance of Nationwide Permits****AGENCY:** Army Corps of Engineers, DoD.**ACTION:** Final notice.

**SUMMARY:** The U.S. Army Corps of Engineers (Corps) is reissuing 48 of the 49 existing nationwide permits (NWPs), general conditions, and definitions, with some modifications. The Corps is also issuing two new NWPs, three new general conditions, and three new definitions. The effective date for the new and reissued NWPs will be March 19, 2012. These NWPs will expire on March 18, 2017. The NWPs will protect the aquatic environment and the public interest while effectively authorizing activities that have minimal individual and cumulative adverse effects on the aquatic environment.

**DATES:** The NWPs and general conditions will become effective on March 19, 2012.

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

**FOR FURTHER INFORMATION CONTACT:** Mr. David Olson at 202-761-4922 or by email at [david.b.olson@usace.army.mil](mailto:david.b.olson@usace.army.mil) or access the U.S. Army Corps of Engineers Regulatory Home Page at [http://www.usace.army.mil/CECW/Pages/cecw\\_reg.aspx](http://www.usace.army.mil/CECW/Pages/cecw_reg.aspx).

**SUPPLEMENTARY INFORMATION:****Executive Summary**

The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWPs) to authorize certain activities that require Department of the Army permits under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. The purpose of this regulatory action is to reissue 48 existing NWPs and issue two new NWPs. In addition, three new general conditions and three new definitions will be issued. The NWPs may be issued for a period of no more than five years. Therefore, the Corps must reissue the NWPs every five years to continue to authorize these activities. These 50 NWPs will go into effect on March 19, 2012.

The NWPs authorize activities that have minimal individual and cumulative adverse effects on the aquatic environment. The NWPs authorize a variety of activities, such as aids to navigation, utility lines, bank

stabilization activities, road crossings, stream and wetland restoration activities, residential developments, mining activities, commercial shellfish aquaculture activities, and agricultural activities. Some NWP activities may proceed without notifying the Corps, as long as those activities satisfy the terms and conditions of the NWPs. Other NWP activities cannot proceed until the project proponent has submitted a pre-construction notification to the Corps, and for most NWPs the Corps has 45 days to notify the project proponent whether the activity is authorized by NWP.

**Background**

In the February 16, 2011, issue of the **Federal Register** (76 FR 9174), the U.S. Army Corps of Engineers (Corps) published its proposal to reissue 48 existing nationwide permits (NWPs), issue two new NWPs, and not reissue one NWP. The Corps also proposed to reissue its general conditions and add two new general conditions.

After evaluating the comments received in response to the February 16, 2011, proposal, we have made a number of changes to the NWPs, general conditions, and definitions to further clarify the permits, general conditions, and definitions, facilitate their administration, and strengthen environmental protection. Examples of improved environmental protection include: imposing limits on surface coal mining activities authorized by NWP 21; modifying NWP 27 to authorize additional aquatic resource restoration and enhancement activities such as the rehabilitation and enhancement of tidal streams, wetlands, and open waters; and providing flexibility in designing crossings of streams and other waterbodies so that movements of aquatic species can be maintained after taking into account the characteristics of the stream or waterbody and the surrounding landscape (see general condition 2, aquatic life movements). These changes are discussed in the preamble.

The Corps is reissuing 48 existing NWPs, issuing two new NWPs, reissuing 28 existing general conditions, and issuing three new general conditions. The Corps is also reissuing all of the NWP definitions, and adding three new definitions. The Corps is also splitting one existing definition into two definitions as they relate to single and complete projects. The effective date for these NWPs, general conditions, and definitions is March 19, 2012. These NWPs, general conditions, and definitions expire on March 18, 2017.

**Grandfather Provision for Expiring NWPs**

In accordance with 33 CFR part 330.6(b), activities authorized by the current NWPs issued on March 12, 2007, that have commenced or are under contract to commence by March 18, 2012, will have until March 18, 2013, to complete the activity under the terms and conditions of the current NWPs. Nationwide permit 21 activities that were authorized by the 2007 NWP 21 may be reauthorized without applying the new limits imposed on NWP 21, provided the permittee submits a written request for reauthorization to the district engineer by February 1, 2013, and the district engineer determines that the on-going surface coal mining activity will result in minimal adverse effects on the aquatic environment and notifies the permittee in writing that the activity is authorized under the 2012 NWP 21.

**Clean Water Act Section 401 Water Quality Certifications (WQC) and Coastal Zone Management Act (CZMA) Consistency Determinations**

The NWPs issued today will become effective on March 19, 2012. This **Federal Register** notice begins the 60-day Clean Water Act Section 401 water quality certification (WQC) and the 90-day Coastal Zone Management Act (CZMA) consistency determination processes.

After the 60-day period, the latest version of any written position taken by a state, Indian tribe, or EPA on its WQC for any of the NWPs will be accepted as the state's, Indian tribe's, or EPA's final position on those NWPs. If the state, Indian tribe, or EPA takes no action by April 23, 2012, WQC will be considered waived for those NWPs.

After the 90-day period, the latest version of any written position taken by a state on its CZMA consistency determination for any of the NWPs will be accepted as the state's final position on those NWPs. If the state takes no action by May 21, 2012, CZMA concurrence will be presumed for those NWPs.

While the states, Indian Tribes, and EPA complete their WQC processes and the states complete their CZMA consistency determination processes, the use of an NWP to authorize a discharge into waters of the United States is contingent upon obtaining individual water quality certification or a case-specific WQC waiver. Likewise, the use of an NWP to authorize an activity within a state's coastal zone, or outside a state's coastal zone that will affect land or water uses or natural

resources of that state's coastal zone, is contingent upon obtaining an individual CZMA consistency determination, or a case-specific presumption of CZMA concurrence. We are taking this approach to reduce the hardships on the regulated public that would be caused by a substantial gap in NWP coverage if we were to wait until the WQC 60-day period and the CZMA 90-day period ended before these NWPs would become effective.

## Discussion of Public Comments

### I. Overview

In response to the February 16, 2011, **Federal Register** notice, we received more than 26,600 comment letters, of which approximately 26,300 were form letters pertaining to NWP 21. The non-form letters we received contained a few thousand comments on various components of the NWPs and NWP Program implementation. We reviewed and fully considered all comments received in response to the proposed rule.

### General Comments

Many commenters expressed support for the proposed permits. Some commenters stated that the changes are a step forward in improving consistency in the NWP program. Many commenters endorsed the fundamentals of the NWP program, stating that the permits could have a beneficial impact to conducting infrastructure and mining projects important to the country. Some stated that permitting delays and an increase in individual permits would result without the NWP program, creating a backlog for the Corps and resource agencies, while placing a burden on regulated industries. Another commenter urged the Corps to increase flexibility to allow for project modifications when needed due to unanticipated challenges encountered during construction. Some commenters stated that further streamlining is needed for increased efficiency and reducing administrative burden while maintaining a high level of environmental protection. One commenter said the Corps should maximize rather than limit use of the NWP program in light of the current economic situation, Federal budget cuts, and presidential efforts to streamline regulations. Another commenter was pleased to see the Corps hold the line against further restrictions on the NWP program. Many commenters emphasized that a timely, efficient, and consistent permitting system is critical to the nation's economy.

The NWP Program provides flexibility to readily authorize project modifications if the NWP activity cannot be constructed in accordance with the approved plans, as long as any modifications would still meet the terms and conditions of applicable NWP(s) and qualify for NWP authorization. In cases where the district engineer has issued an NWP verification letter, the permittee should contact the district as soon as he or she finds that the activity cannot be constructed in accordance with the approved plans. The district engineer will then determine if authorization by NWP is still appropriate. If it is not, then the permittee will be instructed on the most appropriate mechanism for permitting the modified activity.

We believe the final permits issued today maintain a proper balance between efficiently authorizing activities with minimal individual and cumulative adverse environmental effects and protecting the aquatic environment. The NWPs provide a streamlined authorization process that is consistent with the principles of Executive Order 13563, Improving Regulation and Regulatory Review.

In contrast, many other commenters expressed general opposition to the proposal, and said that the proposed rule weakens protection for waters and should be withdrawn. Some commenters said that the proposal threatens to undermine the important and statutorily mandated function of the NWPs and the Clean Water Act, and is contrary to Congressional intent. One commenter expressed opposition to the issuance of the NWPs, stating that they will result in an increase in the number of activities that can be permitted and a reduction in the opportunity for public review and comment. Many of these commenters objected to the goals of "streamlining" or "improving regulatory efficiency," and they said that the focus of the NWPs should be on compliance with the Clean Water Act. Another commenter was concerned that the proposed NWPs do not support the "no overall net loss" goal for wetlands, and that the Corps analysis predicts that the NWPs will result in a decrease of waters of the United States, including wetlands.

As discussed below, those NWPs that authorize discharges of dredged or fill material into waters of the United States comply with the Clean Water Act and the environmental criteria provided in its implementing regulations, the 404(b)(1) Guidelines at 40 CFR part 230. The NWPs authorize minor activities that result in minimal adverse effects on the aquatic environment that would

likely generate little, if any, public comment if they were evaluated through the standard permit process with a full public notice. Through the adoption of Section 404(e) of the Clean Water Act in 1977, Congress approved the use of general permits as an important tool to keep the Corps Regulatory Program manageable from a resources and manpower perspective, while protecting the aquatic environment. The Corps first adopted the concept of general permits in its final rule published on July 25, 1975 (see 40 FR 31321). The NWP program also continues to support the national goal of "no overall net loss" for wetlands, and wetlands compensatory mitigation will be required when appropriate and practicable to offset losses of wetland area and functions. The "no overall net loss" goal applies only to wetlands, and for other waters of the United States the goal is to avoid and minimize losses of those waters and to provide compensatory mitigation to offset those losses if it is appropriate and practicable to do so. Stream mitigation is becoming more commonplace as the science and practical applications become further developed.

Some commenters stated that the NWPs should require consideration of less damaging alternatives or demonstrate that NWP activities result in minimal adverse environmental effects. One commenter said that there is not sufficient emphasis on avoidance of impacts to waters of the United States. Another commenter objected to using NWPs to expand existing projects, stating that it discourages avoidance and minimization.

Those NWPs that authorize discharges of dredged or fill material into waters of the United States comply with the provisions of the 404(b)(1) Guidelines that address the issuance of general permits (see 40 CFR 230.7). A decision document is prepared for each NWP to provide information to show that the NWP will authorize only those activities that result in minimal adverse effects on the aquatic environment and other public interest review factors.

Supplemental decision documents are prepared at a regional level to support the decision on whether to add regional conditions to an NWP or suspend or revoke the use of that NWP in a specific waterbody, category of waters, or geographic area to ensure that only activities that result in minimal adverse effects on the aquatic environment and other public interest review factors are authorized by the NWP. In response to a pre-construction notification or a request to verify that an activity is authorized by NWP, a district engineer

may add activity-specific conditions to the NWP authorization or suspend or revoke the NWP authorization if he or she determines that the proposed activity would result in more than minimal adverse effects.

Paragraph (a) of general condition 23, mitigation, requires permittees to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable on the project site. The use of NWPs to authorize the expansion of existing projects does not discourage avoidance and minimization because this general condition applies equally to all NWP authorizations, including those that authorize expansion of existing projects. The consideration of practicable alternatives in accordance with 40 CFR 230.10(a) does not apply directly to discharges of dredged or fill material into waters of the United States authorized by general permits (see 40 CFR 230.7(b)(1)).

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

Several commenters said that the proposed NWPs are contrary to the Clean Water Act and violate Section 404(e) of that Act. Many commenters asserted that the NWPs result in more than minimal adverse effects on the aquatic environment, individually and cumulatively. These commenters stated that the NWPs do not protect vitally important functions of wetlands and streams, and that the proposal does not satisfy the Corps legal obligation to limit general permits to activities that cause minimal adverse impacts, individually and cumulatively. They also said the Corps lacks the data to show that the effects of the authorized activities are in fact minimal. Some commenters expressed concern regarding the potential overuse of these permits without the inclusion of acreage, linear feet, watershed or regional limitations. Another commenter said that the NWPs fail to describe similarly covered activities in precise terms.

The Corps disagrees with these comments. The NWPs comply with the Clean Water Act and the environmental criteria provided in its implementing regulations, the 404(b)(1) Guidelines at 40 CFR part 230. Section 404(e) of the Clean Water Act states that the Chief of Engineers may issue, after publishing a notice and providing an opportunity a public hearing, general permits on a nationwide basis for any category of activities involving discharges of dredged or fill material into waters of the United States, if it is determined that the activities in each category are similar in nature and result in minimal individual and cumulative adverse

environmental effects. The issuance of the NWPs is consistent with these requirements and therefore complies with the intent of the Clean Water Act. As discussed above, national decision documents and supplemental decision documents are prepared to demonstrate that an NWP will authorize only those activities that have minimal individual and cumulative adverse effects on the aquatic environment and other public interest review factors. The decision documents use available data and other information to support their conclusions.

Where appropriate and necessary, certain NWPs have acreage, linear foot, or cubic yard limits, or combinations of those limits, to ensure that authorized activities result in minimal individual and cumulative adverse effects on the aquatic environment. Specifically, NWPs have acreage limitations, NWPs have linear foot limitations, and NWPs have cubic yard limitations. Many other NWPs have qualitative limitations in the form of specific activities or situations that are not authorized, or for which a PCN is required to allow the Corps to ensure on a case-by-case basis that the adverse effects on the aquatic environment of the project are truly minimal. A few NWPs have no explicit limits, but this is limited to those that authorize activities that provide benefits to the aquatic environment (e.g., NWP 27, which authorizes aquatic habitat restoration, establishment, and enhancement activities, and NWP 41, which authorizes activities for reshaping drainage ditches to improve water quality), or those for which the nature of the authorized activity inherently ensures that effects will be minimal (e.g., NWP 10, which authorizes non-commercial, single boat, mooring buoys). Division engineers may impose regional conditions on the NWPs to add acreage, linear foot, or cubic yard limits, or reduce those limits when the NWPs have specified limits in their terms and conditions, to ensure those NWPs authorize only those activities that result in minimal adverse effects on the aquatic environment.

The NWPs comply with the requirement in Section 404(e) of the Clean Water Act to authorize categories of activities that are similar in nature. Each NWP authorizes a specific category of activities, which may be broadly defined for some NWPs to keep the NWP program manageable. The Act does not require that activities authorized by an NWP be identical, only that they be similar in nature. The permits meet this requirement and are consistent with the Corps' longstanding practice regarding the appropriate level

of detail with which to specify what constitutes activities that are similar in nature.

#### Compliance With the Section 404(b)(1) Guidelines

Several commenters said that the NWPs do not comply with the 404(b)(1) Guidelines. One commenter said that the Corps has no factual basis to conclude that significant degradation of waters of the United States has not occurred, which is required to be in compliance with the Guidelines. This commenter recommended withdrawing the NWPs or replacing them with state program general permits. One commenter stated that the NWPs do not comply with the 404(b)(1) Guidelines because they authorize discharges into special aquatic sites.

When we issue the NWPs, we fully comply with the requirements of the 404(b)(1) Guidelines at 40 CFR 230.7, which govern the issuance of general permits under Section 404 of the Clean Water Act. For each NWP that authorizes discharges of dredged or fill material into waters of the United States, the decision document contains a 404(b)(1) Guidelines analysis. Section 230.7(b) of the 404(b)(1) Guidelines requires a "written evaluation of the potential individual and cumulative impacts of the categories of activities to be regulated under the general permit." Since the required evaluation must be completed before the NWP is issued, the analysis is predictive in nature. The estimates of potential individual and cumulative impacts, as well as the projected compensatory mitigation that will be required, are based on the best available data from the Corps district offices, including the past use of NWPs. In our decision documents, we also used readily available national data on the status of wetlands and other aquatic habitats in the United States, and the foreseeable impacts of the NWPs on those waters.

The process for issuing state programmatic general permits is similar to the process for issuing NWPs, including the use of information to support decisions. The 404(b)(1) Guidelines analysis for state programmatic general permits is also predictive. Given those similarities, compliance with the 404(b)(1) Guidelines is not different for state programmatic general permits versus NWPs.

Despite the fact that many NWPs authorize discharges of dredged or fill material into special aquatic sites, they are still in compliance with the 404(b)(1) Guidelines. Section 230.7 of the 404(b)(1) Guidelines does not

prohibit the use of NWPs to authorize discharges of dredged or fill material into special aquatic sites. Many NWPs contain additional provisions to protect special aquatic sites. For example, several NWPs specifically require pre-construction notification for proposed discharges of dredged or fill material into special aquatic sites (e.g., NWP 13 for bank stabilization activities, NWP 14 for linear transportation projects, NWP 18 for minor discharges). As another example, NWP 19 for minor dredging activities, does not authorize dredging in coral reefs or dredging activities that cause siltation that degrades coral reefs. General condition 22, designated critical resource waters, applies the prohibitions in paragraph (a) and the notification requirement in paragraph (b) to wetlands (a special aquatic site) adjacent to critical resource waters.

#### Compliance With the National Environmental Policy Act

Three commenters stated that the NWPs do not satisfy the requirements of the National Environmental Policy Act (NEPA), as they do not adequately consider indirect and cumulative effects on global warming. One commenter said that degradation in air quality from burning coal from mining projects must be addressed in an environmental impact statement, and that the Corps has to address the implications of climate change on aquatic ecosystems. Another commenter stated that the scientific consensus on the impacts of climate change has to be considered in the renewal of the NWPs. One commenter said the NWPs should take into account ongoing federal efforts to address the effects of climate change through federal programs. These federal programs address mitigation of climate change (e.g., through reduction of greenhouse gas emissions) and adaptation to climate change (e.g., by adjustments made to reduce vulnerability resulting from changing climate).

Although the Council on Environmental Quality has made available draft guidance on the consideration of the effects of climate change and greenhouse gas emissions, and sought public comment on that draft guidance, they have not issued any final guidance specifically on how to consider, in NEPA documents, the indirect and cumulative effects Federal agency actions have on climate change. In the Council on Environmental Quality's October 2011 Progress Report of the Interagency Climate Change Adaptation Task Force entitled "Federal Actions for a Climate Resilient Nation" adaptation is defined as "adjustment in

natural or human systems to a new or changing environment that exploits beneficial opportunities or moderates negative effects."

A major cause of climate change is emissions of greenhouse gases. Activities authorized by NWPs have little direct, indirect, or cumulative effects on climate change and the emission of greenhouse gases. There may be brief emissions of greenhouse gases during the construction of activities authorized by NWP, specifically discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States. Any greenhouse gas emissions that occur other than as a result of the discharge of dredged or fill materials are outside of the Corps NEPA scope of analysis because the Corps does not have the legal authority to control those emissions. The degradation of air quality caused by burning coal is not the result of a discharge of dredged or fill material and therefore is outside the Corps legal authority. The issuance of a Corps permit is designed to ensure that any discharges of dredged or fill material into waters of the United States associated with such mining comply with the Clean Water Act. A Corps permit does not authorize coal mining per se, and therefore the effects of coal mining that do not result from a discharge of dredge or fill material to waters of the United States generally are beyond the Corps NEPA scope of analysis.

The effects of climate change on aquatic ecosystems are a much broader issue than the effects on the aquatic environment caused by activities authorized by NWPs. The effects of climate change on hydrology and extreme events are difficult to project. The effects will vary by location and the sensitivity of resources to changes in hydrology and extreme events. The timeframe used to project hydrologic changes will also affect the evaluation. For activities with minimal adverse effects on the aquatic environment that are eligible for authorization by the NWPs, the Corps believes that any necessary adaptation to climate change is appropriately addressed through land use planning and zoning, which is the primary responsibility of state, tribal, and local governments. Activities authorized by NWPs may be part of state, tribal, or local adaptation efforts to mitigate the effects of climate change.

On October 1, 2011, the Corps issued updated guidance on sea level change considerations for Civil Works Program (Engineer Circular 1165-2-211). The current Engineer Circular applies to

Corps Civil Works activities, but not to the Regulatory Program. As stated on page 25 of its "Climate Change Adaptation Plan and Report 2011" (available at: <http://www.corpsclimate.us/adaptationpolicy.cfm>), the Corps expects to make larger changes in the next update of the Engineer Circular, "and the regulatory program will be added following appropriate consultation."

#### Compliance With the Endangered Species Act

One commenter acknowledged the Corps 2007 efforts to pursue programmatic consultation for the NWP program with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to ensure compliance with the Endangered Species Act (ESA), stating that failure to complete consultation violates the ESA, as well as Section 404(e) of the Clean Water Act. Two commenters stated that the Corps has a requirement to complete these consultations prior to the issuance of the NWPs.

We have reinitiated programmatic Section 7 Endangered Species Act consultation for the NWPs. If this consultation is not completed prior to the effective date of these NWPs, district engineers will consult, as necessary on a case-by-case basis with the U.S. Fish and Wildlife Service and National Marine Fisheries Service in accordance with general condition 18, endangered species. Division engineers may also impose regional conditions on any of the NWPs to facilitate compliance with the requirements of the Endangered Species Act.

#### Compliance With Section 304(d) of the National Marine Sanctuaries Act

One commenter stated that the proposed NWPs must comply with Section 304(d) of the National Marine Sanctuaries Act (NMSA). Section 304(d)(1)(A) of the NMSA states that "Federal agency actions internal or external to a national marine sanctuary, including private activities authorized by licenses, leases, or permits, that are likely to destroy, cause the loss of, or injure any sanctuary resource are subject to consultation with the Secretary." The regulations for implementing section 304(d) are found at 15 CFR 922.187, and those regulations state that the Federal agency consultation should be conducted with the Director of the marine sanctuary. The consultation may be conducted with Endangered Species Act section 7 consultation.

District engineers that have NOAA-designated marine sanctuaries within their geographic area of responsibility should consult with the Director of the marine sanctuary to determine which NWP activities require activity-specific consultation under Section 304(d) of the NMSA. Regional conditions should be adopted where necessary to ensure compliance with the requirements of section 304(d).

### New Nationwide Permits

We received several suggestions for the establishment of new NWPs for various activities. Two commenters suggested developing an NWP to authorize activities associated with linear gas facility infrastructure based on the Federal Energy Regulatory Commission's (FERC) blanket certification program that would allow the industry to undertake routine activities without the need to obtain a case-specific authorization from FERC for each project. One commenter recommended issuing an NWP to authorize activities associated with controlling nuisance and exotic plant species and another NWP to authorize activities for innovative mitigation proposals. One commenter said that an NWP should be developed to authorize the beneficial reuse of dredged material, for up to 10,000 cubic yards of material. Another commenter recommended adding an NWP to authorize discharges of dredged or fill material to raise dam elevations to increase pool elevations of public water supply reservoirs to increase potable water supplies and wetlands.

We believe that existing NWPs such as NWPs 12, 3, and 39 are sufficient to provide general permit authorization for gas utility lines and associated infrastructure. Discharges of dredged or fill material into waters of the United States or work in navigable waters of the United States associated with the removal of nuisance or exotic plant species may be authorized by NWP 27, aquatic habitat restoration, establishment, and enhancement activities. Innovative mitigation proposals may also be authorized by NWP 27, as long as those activities result in net increases in aquatic resource functions and services and satisfy the other terms and conditions of that NWP. We believe that the beneficial reuse of dredged material, especially at such large quantities, is more appropriately evaluated through the individual permit process, to more thoroughly consider effects on existing aquatic resource functions already being provided in the waters where the reused dredged material might be placed.

### Waivers of Certain NWP Limits

We proposed 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 and sets forth the basis for that determination. We also proposed to apply the modified waiver language to NWPs 21, 44, and 50, as well as to the two proposed new NWPs. Some commenters supported the proposed modifications.

Many commenters said the proposed changes would allow district engineers too much discretion, and there should be no waivers of NWP limits. One commenter stated there was not a need for waivers because many of the NWPs already require pre-construction notification and the changes make the NWPs more difficult to obtain. The commenter said the waivers create an additional paperwork burden and provide no environmental benefits. Many commenters objected to the proposed waivers, stating that they imply that ephemeral and intermittent streams are considered lower in their function and value to the aquatic environment and are provided less protection than perennial streams. These commenters discussed the importance of ephemeral and intermittent streams to overall watershed integrity and to water quality and stated there is no scientific evidence to support the position that the use of waivers will result in only minimal impacts. One commenter said that before a waiver is issued, there should be analysis of cumulative effects to the watershed. Several commenters stated that the use of waivers in states with arid and semi-arid ecosystems does not properly take into account the importance of headwater streams in these ecosystems and could result in more than minimal individual and cumulative effects.

The basic requirement for general permits, including NWPs, is that they may only authorize activities that result in minimal individual and cumulative adverse effects on the aquatic environment. Section 404(e) of the Clean Water Act and the regulations relevant to the issuance of the NWPs (e.g., 33 CFR part 330 and 40 CFR 230.7) do not mandate a single approach to satisfying that basic requirement. The terms and conditions of the NWPs, including acreage, linear foot, and cubic yard limits and allowing the use of certain NWPs in specific types of waters, are intended to limit NWPs

activities so that they do not result in more than minimal adverse effects on the aquatic environment. Division engineers have the authority to impose regional conditions on NWPs to restrict or prohibit their use in certain waters or other geographic areas. Another important tool is pre-construction notification, which provides for district engineers to review proposed NWP activities to ensure that they will result in minimal adverse effects. In response to a pre-construction notification, a district engineer may add activity-specific conditions to the NWP authorization to further minimize adverse effects to the aquatic environment. For those NWPs that allow district engineers review pre-construction notifications and issue written waivers of certain limits, such as the 300 linear foot limit for the loss of intermittent and ephemeral stream bed, the NWP activity must still satisfy the statutory and regulatory requirements for general permits. The waiver process does not make the NWP process more difficult. Instead, it provides an important tool for districts to efficiently authorize activities with minimal adverse effects on the aquatic environment after making a written determination that the activity satisfies the NWP requirements.

We recognize the importance of intermittent and ephemeral streams and the waiver process for certain NWPs requires district engineers to make activity-specific evaluations of the intermittent or ephemeral streams proposed to be filled or excavated before deciding whether to waive the 300 linear foot limit. To issue a waiver, the district engineer must make, and document, a minimal adverse effects determination, which as discussed above, is consistent with the statutory and regulatory requirements for general permits. As part of the analysis, the district engineer must consider the individual and cumulative adverse effects on the aquatic environment on a watershed basis, or for another appropriate geographic area, such as an ecoregion. For those activities in arid and semi-arid regions, district engineers will use local criteria as well as their knowledge of arid and semi-arid ecosystems to make decisions on pre-construction notifications for proposed activities that might be eligible for waivers. The basis for any waiver, including appropriate consideration of individual and cumulative effects, will be documented in the district engineer's written determination.

Several commenters noted concern with the 45-day pre-construction notification review period to provide a

decision whether to grant or deny the waiver. One commenter noted the applicant can proceed without authorization if the Corps fails to respond to a waiver request within the 45 day time limit. Several commenters expressed concern with the additional time and the expense that could be incurred by the applicant who must wait for the waiver decision and written determination.

We believe that the 45-day pre-construction notification review period is sufficient for district engineers to make their written determinations on whether to issue waivers of the applicable limits for certain NWPs. The text of the NWPs that allow waivers of certain limits clearly states that the waivers must be made by the district engineer in writing. In addition, paragraph (a)(2) of general condition 31, pre-construction notification, says that if a proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin that activity until the district engineer issues the waiver. The 45-day pre-construction notification review period still applies to pre-construction notifications that involve requests to waive specific limits of an NWP, but the project proponent may not proceed with the NWP activity if a written waiver is needed and the district engineer did not provide a written waiver by the time the 45-day review period ends. The Corps will make every effort to act on waiver requests within the 45-day review period. If a prospective permittee is concerned that a written waiver will not be issued within the 45-day pre-construction notification review period, then he or she has the option of modifying the proposed activity so that it does not exceed any specified limit of the applicable NWP and does not require a written waiver.

Many commenters said that specific criteria should be applied to the waiver process to ensure proposed activities result in minimal individual or cumulative adverse effects on the aquatic environment. One commenter stated that the waivers provide little incentive to minimize impacts. Another commenter said that water quality certification cannot be issued for NWPs that have limits that can be waived by district engineers because the state cannot certify that those activities meet state water quality standards. One commenter said that when waivers are issued by district engineers, the district engineer must include a fact-specific basis to support his or her finding.

The criteria that are to be applied to requested waivers of specified limits for certain NWPs are the same general

criteria that are to be used to make any minimal adverse effects determination for the NWPs. Criteria that are to be used to make minimal adverse effects determinations are provided in paragraph (1) of Section D, District Engineer's Decision. The waivers still provide incentives to minimize impacts because the NWP authorization threshold (i.e., activities must result in minimal individual and cumulative adverse effects on the aquatic environment) is lower than the authorization threshold for individual permits (e.g., the proposed activity is not contrary to the public interest and, if it involves discharges of dredged or fill material into waters of the United States, it complies with the 404(b)(1) Guidelines). In other words, a waiver cannot be granted if the activity does not meet the minimal effects threshold, and applicant cannot proceed without the Corps' written determination. Applicants who submit waiver requests run the risk that the waiver will be denied, and valuable time will be lost in obtaining Department of the Army authorization. Thus, it is in the applicant's interest to modify the proposed activity if possible to avoid exceeding a threshold that requires a waiver, and especially to avoid submitting waiver requests for projects that will in fact have more than minimal adverse effects. States can issue water quality certifications for NWPs based on the specified acreage, linear foot, or cubic yard limits, and require individual water quality certifications for losses of waters of the United States that exceed the specified limits and must be waived in writing by district engineers. The written waiver determinations prepared by the district engineer have to be activity-specific, and explain the factual basis of the waiver.

Several commenters said that the additional information required for a request for a waiver and the requirement to use of a functional assessment method that is available and practicable would impose a significant documentation obligation on Corps staff.

The NWPs do not impose additional information requirements for requests for waivers of specific limits of NWPs. In addition, there is no requirement to use functional assessments to make decisions on waiver requests. The sentence in paragraph (1) of Section D, District Engineer's Decision, on the use of functional assessments to make minimal effects determinations, states that those methods "may" be used if they are available and practicable to use. However, the Corps does agree that

there must be a factual basis for the waiver (which may entail the use of a functional assessment methodology, among other possible approaches) and documenting this does impose an additional obligation on the Corps. Applicants should provide the district engineer as much factual information as possible to support the waiver request and facilitate the district engineer's determination.

Several commenters supported the proposed changes requiring agency coordination and a written decision. Several commenters said that all appropriate state and Federal resource agencies should be provided an opportunity to comment on requests for waivers. One commenter stated there is no need for additional agency coordination unless specific resource issues are identified, such as compliance with the Endangered Species Act or the National Historic Preservation Act.

We have modified the proposed provision requiring agency coordination for pre-construction notifications involving losses of greater than 1,000 linear feet of intermittent and ephemeral stream bed, to require agency coordination for all pre-construction notifications requesting a waiver of the 300 linear foot limit for filling or excavating intermittent or ephemeral streams (see paragraph (d)(2) of general condition 31, pre-construction notification). Under this agency coordination process, district engineers will solicit comments from the agencies to assist in making the written minimal adverse effects determination necessary for a waiver of the 300 linear foot limit to take effect. Compliance with the Endangered Species Act and the National Historic Preservation Act is addressed by general conditions 18 and 20, respectively.

One commenter said that the loss of stream bed should be defined and the 300 linear foot limit should be reduced to 150 linear feet of loss of stream bed for those NWPs. Another commenter suggested reducing the linear foot limit for loss of stream bed to 50 linear feet. One commenter stated that the 300 linear foot limit should not apply to ephemeral streams. One commenter said that waivers should be allowed for losses of perennial streams if the adverse effects are determined to be minimal and the perennial stream is limited in its aquatic function.

The loss of stream bed is defined in "loss of waters of the United States" as the linear feet of stream bed that is filled or excavated. We believe the 300 linear foot limit is appropriate to ensure that losses of stream beds result in minimal

adverse effects on the aquatic environment. Division engineers may add regional conditions to an NWP to reduce the linear foot limit to an amount less than 300 linear feet. The 300 linear foot limit should not be waived for losses of perennial streams because they function differently than intermittent and ephemeral streams, and we believe it will generally not be the case that losses of more than 300 linear feet of a perennial stream would constitute a minimal adverse effect. We believe it would not be a good use of Corps or applicant resources to allow waiver requests for perennial streams on the remote chance that the adverse effects of such an activity would be found to be minimal. The functions provided by perennial streams, intermittent streams, and ephemeral streams differ, in terms of ecological processes and duration. Perennial streams provide aquatic habitat functions year-round, while intermittent streams provide aquatic habitat during the months when water is flowing in the stream channel, and when hyporheic flow occurs during drier months. Ephemeral streams provide aquatic habitat functions only for brief periods, because they have flowing water only during, and briefly after, precipitation events. Other important stream functions, such as sediment transport, nutrient cycling, and energy transport also depend on the presence of flowing water and, for some of those functions, the presence of aquatic organisms inhabiting those waters. The other stream functions are present year-round for perennial streams, and for much of the year for intermittent streams. In ephemeral streams, sediment transport, nutrient cycling, and energy transport functions occur during brief periods or are absent. The functional differences exhibited by perennial, intermittent, and ephemeral streams provide a scientific basis for not allowing a waiver for perennial streams. District engineers will make written case-specific determinations on whether to waive the 300-linear foot limit for losses of intermittent and ephemeral stream bed, based in part on the considerations listed in paragraph (1) of Section D, "District Engineer's Decision."

#### Clean Water Act Jurisdiction

Many commenters cited the U.S. Supreme Court decisions issued in 2001 and 2006, for *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers and Rapanos*. United States (Rapanos), as well as other court decisions, and said that the proposed NWPs exceed the Corps jurisdictional authority under Section

404 of the Clean Water Act and reflect the Corps and EPA's flawed broad interpretation of what constitutes a water of the United States, specifically for ephemeral streams. Most commenters said the proposed NWPs would result in an expansion of Clean Water Act authority and jurisdiction that would have a negative impact on the nation's economy by creating excessive burdens on developers, farmers, and Corps staff. Another commenter said the Corps should not assert jurisdiction over isolated mining pits.

The NWPs do not assert jurisdiction over waters and wetlands. Rather, the NWPs are a form of Department of the Army authorization to comply with the permit requirements of Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. Nationwide permits issued under the authority of Section 404 of the Clean Water Act authorize discharges of dredged or fill material into waters of the United States. Nationwide permits issued under the authority of Section 10 of the Rivers and Harbors Act of 1899 authorize structures or work in navigable waters of the United States. Determining the geographic jurisdiction under the Clean Water Act (i.e., identifying waters and wetlands that are waters of the United States) is a separate process than the NWP authorization process. Likewise, identifying navigable waters of the United States for the purposes of geographic jurisdiction under Section 10 of the Rivers and Harbors Act of 1899 is a different process than the NWP authorization process. These NWPs do not expand either geographic jurisdiction or activities-based jurisdiction under the Clean Water Act. Activity-based jurisdiction under the Clean Water Act is determined by applying the appropriate regulations from 33 CFR part 323. These NWPs continue to provide a streamlined process for obtaining authorization for activities that require Department of the Army permits under either Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. Determining whether isolated mining pits are subject to Clean Water Act jurisdiction is a case-specific inquiry to be made by applying the appropriate regulations and guidance. A project proponent or landowner may contact the Corps district office that has the responsibility for that region of the country and request a jurisdictional determination for an isolated mining pit or any other area that might be considered a water or wetland. The

Corps district will respond to that request and inform the project proponent or landowner of the status of that water with respect to Clean Water Act jurisdiction.

#### Comments on Administrative Requirements

##### Executive Order 13211

One commenter stated that these proposed regulations will cause coal mines to cease operations and believe the proposal is subject to Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

Although we have made substantial changes to NWP 21, some surface coal mining activities will still be authorized by this NWP. The changes to NWP 21 will not cause coal mines to cease operations, because there are other forms of Department of the Army authorization available if the coal mining activity involves discharges of dredged or fill material into waters of the United States. Project proponents may apply for individual permits to obtain Department of the Army authorization for such activities. Any activity that could have previously been authorized under earlier versions of NWP 21 would still be eligible for authorization under an individual permit. Thus, while there may be additional paperwork burden for mine operators, the Corps does not believe that the changes in these permits will have a significant impact on the supply, distribution, or use of energy (e.g., coal).

##### Executive Order 13563

Several commenters stated that the proposed NWPs are not consistent with EO 13563 for "Improving Regulation and Regulatory Review" because the modifications to the NWPs would impose numerous onerous conditions and limitations on applicants.

The NWPs continue to provide a streamlined process for authorizing activities that require Department of the Army permits under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. The average processing times for standard permit applications in Fiscal Year 2010 was 221 days, while the average processing time for NWP pre-construction notifications and voluntary requests for NWP verifications was 32 days. The terms and conditions of the NWPs are necessary to ensure that the NWPs comply with applicable statutes and regulations, including the requirement that only activities with minimal adverse effects, both

individually and cumulatively, be authorized by NWPs.

#### Water Quality Certification Issues

One commenter said that the Corps should provide an opportunity for state and Tribal water quality certification agencies to participate early in the NWP reissuance process, to reduce potential conflicts during the water quality certification process. Another commenter asked for clarification regarding enforcement of the NWPs, in cases where a provisional NWP verification is issued, but the permittee proceeds with work without receiving the individual water quality certification. This commenter asked whether the Corps or the state would initiate an enforcement action. One commenter objected to use of provisional NWP verifications in cases where water quality certification has not yet been issued for a particular NWP activity.

The current NWP reissuance process provides sufficient opportunity to reduce potential conflicts during the water quality certification process. States and Tribes begin their water quality certification processes when the proposal to reissue the existing NWPs and issue new NWPs is published in the **Federal Register** for public comment. Water quality certification agencies are encouraged to submit comments on the NWP proposal. But it is important to remember that each state and Tribe is likely to have different water quality standards, and the national terms and conditions for the NWPs cannot address those regional variations.

After the comments received in response to the proposal are reviewed, the final NWPs are developed. Once the final NWPs are published in the **Federal Register**, States and Tribes have another opportunity to decide whether to issue or deny water quality certification for the NWPs. States and Tribes will have 90 days to make their water quality certification decisions.

If water quality certification was denied for an NWP, then the permittee must obtain an individual water quality certification or a waiver, even if the Corps issued a provisional NWP verification. The provisional NWP verification merely informs the prospective permittee that the Corps has determined that the proposed activity qualifies for NWP authorization, as long as the permittee receives an individual water quality certification or waiver. The prospective permittee should provide a copy of the individual water quality certification to the Corps district. The Corps has full authority to pursue an enforcement action for not

obtaining an individual water quality certification or waiver, which is a violation of the terms of the permit. Case-specific decisions on appropriate enforcement actions are at the Corps discretion. The provision for NWP verification is an important tool to be responsive to users of the NWPs, and to inform them of their need to work with the water quality certification agency to comply with the requirements of Section 401 of the Clean Water Act. The provisional verification serves to inform the applicant that all other requirements for NWP verification have been satisfied and allows the applicant to focus on obtaining the required state certifications.

#### Discussion of Comments

##### Nationwide Permits

**NWP 1. Aids to Navigation.** There were no changes proposed for this NWP, and no comments were received. This NWP is reissued without change.

**NWP 2. Structures in Artificial Canals.** There were no changes proposed for this NWP. One commenter recommended not reissuing this NWP because a state will deny water quality certification.

The potential for a state to deny water quality certification for an NWP is not a sufficient basis for not reissuing an NWP. The water quality certification process is independent of the decision on whether to issue or reissue an NWP. This NWP is reissued without change.

**NWP 3. Maintenance.** We proposed to modify this NWP to clarify that stream channel excavation immediately adjacent to the structure or fill being maintained is authorized under paragraph (a) and does not require a PCN. We also proposed to replace the word "and" with "and/or" in paragraph (b) to indicate that the activity does not need to include the placement of new or additional riprap to qualify for this NWP.

Several commenters supported the change to paragraph (a) to allow excavation in a stream channel immediately adjacent to a structure or fill as part of the maintenance activity, without requiring pre-construction notification. Some commenters specifically supported the ability to do minor excavation within stream channels to install a larger culvert or bridge that would improve fish passage without a pre-construction notification. Two commenters asked which types of stream channel modifications could be authorized under paragraph (a). Another commenter said that the proposed modification does not adequately clarify that a pre-construction notification is

not required for stream channel modification as discussed in the proposed rule. This commenter recommended that paragraph (a) state that stream channel modification immediately adjacent to the structure or fill being maintained is authorized without pre-construction notification. One commenter suggested that paragraph (a) include the removal of material from within existing structures. One commenter indicated that the scope of activities considered as stream channel modifications should be clarified, because certain stream channel modifications such as sediment or debris removal and reestablishment of the original bridge-stream alignment are needed to maintain a safe crossing with sufficient hydraulic capacity. Another commenter indicated that while stream channel modification is restricted to the minimum necessary, there should be a 300 linear foot impact limit. One commenter did not support the proposed modification, stating that pre-construction notification should be required for stream channel excavation near a structure because excavation has the potential to uncover unknown archeological resources.

We have changed the text of paragraphs (a) and (b) to clarify which stream modifications fall under paragraph (a) and which fall under paragraph (b). The removal of material from waters within, or immediately adjacent to, the structure or fill are authorized under paragraph (a) and do not require pre-construction notification. The removal of material from waters that are not immediately adjacent to the structure or fill, but within the limits in paragraph (b), may be authorized under paragraph (b). This NWP authorizes only activities that repair or return an activity to previously existing conditions. We do not believe it is necessary to place additional limits on this NWP because the current limits are sufficient to ensure minimal effects. Paragraph (a) only authorizes minor stream channel modifications necessary to repair, replace, or rehabilitate the structure or fill, which may include minor deviations to account for changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards. Such minor deviations could be done to improve conditions to facilitate aquatic species movements. General conditions 20 and 21 address the protection of historic properties and actions to be taken if previously unknown remains or artifacts are discovered during the maintenance activity.

Several commenters recommended adding the word “or stabilization” after “repair, rehabilitation, replacement” in paragraph (a) to clarify that stabilization activities are included in paragraph (a). Two commenters requested that practicability be considered with the “minimum necessary.” One commenter requested that the NWP include the requirements of other regulatory agencies as a reason for allowing minor deviations in a structure’s configuration or filled area.

We do not believe it would be appropriate to include stabilization activities under paragraph (a) since some stabilization activities may result in more than a minor deviation in the structure’s configuration or filled area. District engineers already consider what is practicable when reviewing proposed NWP 3 activities, and we do not believe it is necessary to provide additional clarification. We agree that the requirements of other regulatory agencies is an appropriate basis for making minor changes in a structure or filled area during maintenance, especially if those regulatory requirements help protect aquatic resources.

Several commenters stated that the placement of new or additional riprap to protect small structures be included in paragraph (a). A commenter requested clarification that the placement of pipe liners and concrete repairs to flow lines of pipes are examples of maintenance activities authorized by this NWP. One commenter expressed concern that authorizing the expansion of existing projects into waters of the United States discourages avoidance and minimization of adverse impacts and violates the 404(b)(1) Guidelines. Another commenter indicated that work that is immediately adjacent to the project is not maintenance and that the work should be limited to the extent of the original project.

The placement of riprap to protect a structure or fill is more appropriately authorized by paragraph (b) of this NWP, after the district engineer reviews the pre-construction notification. If the installation of pipe liners or concrete repairs to flow lines are necessary and result only in a minor deviation to the structure’s configuration or filled area, it may be authorized under paragraph (a). Paragraph (a) only authorizes minor deviations to the structure or filled area that are necessary to conduct the repair, rehabilitation, or replacement activity, and complies with the general condition requiring on-site avoidance and minimization.

One commenter said that the permit should require that the Corps be

notified, within 12 months of the date of the damage, for activities involving the repair, rehabilitation, or replacement of structures or fills destroyed or damaged by storms, floods, fire or other discrete events.

The repair, rehabilitation, or replacement of structures or fills destroyed or damaged by these types of events does not require pre-construction notification. This is because restoring a structure or fill to its pre-event configuration will not result in more than minimal adverse effects relative to the pre-event status quo. If a project proponent wants a waiver of the two-year limit, the district engineer can issue a waiver if warranted, without reviewing a pre-construction notification.

Some commenters expressed opposition over the proposed change from “and” to “and/or” under paragraph (b). They recommended retaining the current language because they indicated that making the change to “and/or” would cause confusion as to which provision of this NWP would be used to authorize riprap placement. The commenters also said that this change would result in the regulation of excavation activities that do not result in more than incidental fallback. Another commenter was concerned that the change to “and/or” suggested that the addition of riprap triggered pre-construction notification.

The use of the term “and/or” means that paragraph (b) authorizes the removal of accumulated sediments or debris, the placement of new or additional riprap to protect the structure, or both activities. This NWP authorizes the removal of accumulated sediment and debris if that activity involves a regulated discharge of dredged or fill material. This NWP also authorizes the removal of accumulated sediments and debris in the vicinity of existing structures from section 10 waters. If a project proponent seeks authorization to place new or additional riprap near the structure, then pre-construction notification is required in accordance with paragraph (b) of this NWP.

One commenter said that the use of riprap should be discouraged and only authorized if other options are not possible. Another commenter suggested placing a limit on the amount of riprap that can be placed under paragraph (b). One commenter stated that the placement of new or additional riprap is not maintenance and should not be authorized by NWP 3. One commenter recommended requiring mitigation techniques, such as weep holes, when

steel sheet piling is used for the maintenance activity.

Riprap may be necessary to protect the integrity of these structures. We have modified the next to last sentence of paragraph (b) to clarify that new or additional riprap may be placed to protect the structure or ensure the safety of the structure. In response to a pre-construction notification (which is required for all placement of new or additional riprap under paragraph (b) of this NWP), best management practices or other mitigation measures may be required by the district engineer to minimize adverse effect to the aquatic environment.

One commenter said that this NWP should not authorize maintenance dredging and that NWP 19 should be used instead. This commenter also recommended adding a cubic yard limit for the amount of dredging that is authorized. Another commenter recommended that the removal of sediment should be limited to 100 feet instead of 200 feet. One commenter suggested increasing the linear foot limit to 500 feet. One commenter also suggested that the applicant be required to provide information to ensure that sediments proposed to be removed are not contaminated.

Paragraph (b) may be used to authorize the removal of accumulated sediment and debris from section 10 waters, and the 200 linear foot limit is appropriate to ensure minimal adverse effects. District and division engineers can condition this NWP to reduce the limit to less than 200 linear feet. Maintenance dredging for the purposes of navigation may be authorized by NWP 19 and may not be authorized by this NWP. The only excavation authorized by this NWP is excavation necessary for the maintenance, repair, rehabilitation, or replacement of the structure, and then only within the limits established in the permit. It is not necessary to require contaminant testing for the sediments to be removed as a general condition of the permit, because for many cases there is reason to believe that no contaminants are present in the material. If there is reason to believe that contaminants are present, the district engineer may require contaminant testing and/or best management practices to control the release of contaminants on a case-specific basis.

One commenter objected to the proposed removal of the words “[w]here maintenance dredging is proposed” from the “Notification” paragraph. Another commenter said that pre-construction notification should only be

required when maintenance dredging is contemplated.

Pre-construction notification is required for all activities covered under paragraph (b). When a permittee submits the pre-construction notification for activities covered under paragraph (b), they also must submit information regarding the original design capacities and configurations of the outfalls, intakes, small impoundments, and canals. The deleted phrase is meant to clarify the "Notification" provision.

A commenter asked if the term "upland" means "above the ordinary high water mark." That commenter also requested clarification as to what constitutes "temporary" in terms of how long temporary fills can be kept in place. Another commenter asked for a definition of "minor deviations" and two commenters recommended that "immediately adjacent" be defined.

There may be wetlands landward of the ordinary high water mark of a river or other water of the United States, so it would not be appropriate to define "uplands" as suggested in the previous paragraph. Since some waters and wetlands are not subject to Clean Water Act jurisdiction, we have changed the text of paragraph (b) to require all dredged or excavated materials to be deposited and retained in an area that has no waters of the United States, unless otherwise specifically approved by the district engineer under separate authorization. Waters of the United States will be identified in accordance with applicable laws, regulations, and guidance, as discussed above, and is not affected by the issuance of these NWPs. What constitutes a temporary fill is at the discretion of the district engineer. Determining what is a minor deviation and immediately adjacent is also at the discretion of the district engineer. The Corps believes this is appropriate because it is difficult to identify bright line definitions for these terms that are applicable in all circumstances. If an applicant is unsure whether a specific activity qualifies, he or she should consult the appropriate Corps district office.

Several commenters said that pre-construction notification should not be required for activities authorized by paragraph (b), to reduce delays. Other commenters requested removal of the pre-construction notification requirements for sediment and debris removal, because the work is often conducted immediately after storm events when a timely response is critical to public safety. Another commenter also requested that no pre-construction notification be required for activities

under paragraph (b), if the waters are ephemeral or intermittent streams. Other commenters said that pre-construction notification should be required for all activities authorized by this NWP.

We believe that the pre-construction notification requirements for this NWP are appropriate. Pre-construction notification is required for those activities that may have the potential to cause more than minimal adverse effects on the aquatic environment. Activities authorized by paragraph (b) usually involve larger impacts than those authorized by paragraph (a) and therefore warrant pre-construction notification to ensure that those activities will result in minimal adverse effects on the aquatic environment.

One commenter suggested that this NWP should require the use of best management practices to avoid sediment loading of waters. One commenter suggested that paragraph (c) should be conditioned to protect downstream water quality and prohibit sediment discharges. Two commenters said that general condition 2 should not apply to NWP 3 activities.

General condition 12 requires the use of sediment and erosion controls to minimize sediment inputs during construction. General condition 2 does apply to this NWP, to ensure that aquatic life movements can continue after the maintenance activity is conducted.

One commenter said that Tribes should be notified to avoid impacts to tribal treaty natural resources and cultural resources. Two commenters said that this NWP should be conditioned to allow fish migration to continue. One of these commenters also stated that these activities should not restrict water flows or constrict channels. One commenter said that this NWP should be conditioned to address slope stability to prevent overburden material from going into the water. Another commenter recommended that all stream crossings span the bankfull width and, in cases where the structures have a bottom, the structure bottom shall match stream slope.

District engineers have conducted government-to-government consultation with Tribes to determine which NWP activities should be subject to project-specific consultation to protect Tribal treaty natural resources and cultural resources. General Condition 18 specifies that no activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights. General condition 2 requires that NWP activities be

constructed to maintain aquatic life movements, and general condition 9 requires that water flows be maintained to the maximum extent practicable. The appropriate size for stream crossings will be determined on a case-by-case basis, to comply with the applicable general conditions.

A commenter recommended an addition to the "Note", which references the section 404(f) exemption for maintenance. This commenter suggested that the note include clarification as to who can use the exemption for maintenance of irrigation and drainage ditches.

The section 404(f) exemption for maintenance of irrigation ditches and drainage ditches can be used by anyone that qualifies for the exemption. If a particular activity does not qualify for the exemption because of the recapture provision in section 404(f)(2) or for any other reason, NWP 3 may be used to authorize the maintenance activity, if it meets the terms and conditions of the NWP.

This NWP is reissued with the modifications discussed above.

**NWP 4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.** There were no changes proposed for this NWP. One commenter suggested adding fish aggregating devices to the list of devices and activities authorized by this NWP. Fish aggregating devices are man-made objects used to attract ocean-going pelagic fish. Before these devices, commercial fishing used purse seining to target surface-visible aggregations of birds and dolphins, which were used as a signal of the presence of tuna schools below. However, the by-catch of dolphins became a significant issue. The demand for dolphin-safe tuna was a driving force for fish aggregating devices. Therefore, we concur with the comment and have added that device to this NWP. This NWP is reissued with the modification discussed above.

**NWP 5. Scientific Measurement Devices.** We proposed to modify this NWP to require the removal of the device and any associated structures or fills at the conclusion of the study. We also proposed to add meteorological stations to the list of examples of the types of devices authorized by this NWP, as well as current gages and biological observation devices.

One commenter suggested that each of the listed devices be defined and have footprint and height limitations. Another commenter said that meteorological stations should not be authorized by this NWP. One commenter supported adding meteorological stations, current gages,

and biological observation devices as examples of the types of devices authorized by this NWP. Another commenter stated the Corps should define a maximum period required for a meteorological tower study.

We do not believe it is necessary to provide definitions for each of these devices and add limits. These devices are usually small in size and since most of them are structures they do not typically result in a loss of waters of the United States. This NWP already has a 25 cubic yard limit for weirs and flumes. Division engineers can regionally condition this NWP to establish additional limits, including maximum time frames for studies. In response to an NWP verification request, district engineers may also place limits on these devices and their use.

One commenter suggests the Corps clarify the requirements for the removal of a scientific measurement device, and suggested that the NWP not require excavation to remove the entire structure. This commenter also said that cutting off the structure near the substrate of the waterbody and leaving the buried foundation may result in less environmental damage during removal. Another commenter said that where meteorological towers are used for long-term data collection and preliminary testing for wind turbines, those meteorological towers would be removed during the wind energy facility decommissioning process. One commenter stated that the device should be removed "upon completion of the use of the device to measure and record scientific data."

We have modified the provision in the NWP to require the removal of the device when it will no longer be used to measure and record scientific data. Meteorological towers used in wind energy generation facility preliminary testing and operations could be left in place until the facility is decommissioned. We have also changed the text to state that structures or fills must be removed to the maximum extent practicable, which would allow the foundation to remain if removing the foundation would cause more adverse effects to the waters or wetlands than leaving the foundation in place. We also added the word "foundation" to the examples of structures or fills that may be associated with a scientific measurement device.

This NWP is reissued with the modifications discussed above.

**NWP 6. Survey Activities.** We proposed to modify this NWP to specify how exploratory trenches are backfilled by stating the work "must not drain a

water of the United States" and to replace the 25 cubic yard limit for temporary pads with a  $\frac{1}{10}$ -acre limit.

Several commenters supported changing the limit from 25 cubic yards to  $\frac{1}{10}$ -acre. Two commenters expressed concern that removing the 25 cubic yard limit would result in more than minimal cumulative effects to aquatic resources. One commenter recommended adding wetland delineation sampling activities to the list of examples of activities authorized by this NWP. Several others recommended adding conditions to require removal of the temporary fills and re-establishment of pre-construction contours and reseeding of affected areas after completion of work. One commenter requested a definition of "temporary pad." One commenter recommended that exploratory trenching should not be authorized below the ordinary high water mark of any waters of the United States.

We are changing the limit of this NWP from 25 cubic yards to  $\frac{1}{10}$ -acre. We have added "sample plots or transects for wetland delineations" as an example of an activity authorized by this NWP. General condition 13, removal of temporary fills, requires temporary fills to be removed in their entirety and the area revegetated, as appropriate. We do not believe it is necessary to define "temporary pad" for purposes of this NWP, since it is simply a temporary fill that must be removed upon completion of the survey activity. We do not agree that exploratory trenching should be prohibited below the ordinary high water mark since these activities result in temporary impacts to the aquatic environment.

This NWP is reissued with the modification discussed above.

**NWP 7. Outfall Structures and Associated Intake Structures.** We did not propose any changes to NWP. One commenter objected to the reissuance of this NWP, stating that these activities adversely affect aquatic vegetation or areas designated as critical habitat for fish foraging and spawning, through increases in turbidity, discharges of nutrients and contaminants, alteration of near-shore areas, and scouring vegetation within the plume. Another commenter recommended that outfall structures not be placed in wetlands or constructed in such a manner that would create shoreline pockets capable of trapping debris. One commenter recommended conditioning this NWP to ensure that the outfall structure not extend into the receiving water and impair navigation. One commenter suggested that for activities proposed to occur on state-owned submerged lands,

a separate authorization would be required from that state.

In waters that have been designated as Essential Fish Habitat in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, consultation with the National Marine Fisheries Service will be conducted for proposed activities that may adversely affect Essential Fish Habitat. That consultation will often result in conservation recommendations that will protect habitat for fish foraging and spawning. General condition 22, designated critical resource waters, will also reduce adverse effects to fish foraging and spawning areas caused by NWP activities in those critical resource waters. Division engineers may regionally condition this NWP to restrict or prohibit its use in specific waters, including those that provide important habitat. In response to a pre-construction notification, district engineers may also exercise discretionary authority if the proposed activity would result in more than minimal adverse effects on the aquatic environment, including vegetated shallows and fish spawning and feeding areas. These structures may be designed so that they do not trap debris. General condition 14, proper maintenance, requires authorized structures and fills to be properly maintained, which may include periodic removal of debris from outfall structures and associated intake structures, to ensure that these structures continue to function properly, do not trap debris, and do not cause more than minimal adverse effects to nearshore aquatic environments. Compliance with general condition 1, navigation, will prevent adverse impacts to navigation. Permittees are responsible for obtaining any other Federal, state or local permits that may be required.

The NWP is reissued without change.

**NWP 8. Oil and Gas Structures on the Outer Continental Shelf.** We proposed to modify this NWP to update the name of the former Minerals Management Service to the Bureau of Ocean Energy Management Regulation, and Enforcement (BOEMRE).

One commenter expressed support for the proposed modification. One commenter recommended that no oil and gas structures or activities be authorized through the nationwide permit process.

After the proposal to reissue this NWP was published, the Bureau of Ocean Energy Management (BOEM) became the agency responsible for issuing leases for oil and gas structures on the outer continental shelf. We have modified the text of NWP 8 to reflect this change. This NWP only authorizes structures

erected within areas of the outer continental shelf leased by the Bureau of Ocean Energy Management. The general environmental concerns are addressed in the required NEPA documentation prepared by BOEM prior to issuing a lease. The Corps role is limited to reviewing impacts on navigation and national security, as stated in 33 CFR part 322.5(f).

This NWP is reissued as proposed.

**NWP 9. Structures in Fleeting and Anchorage Areas.** There were no changes proposed for this NWP, and no comments were received. This NWP is reissued without change.

**NWP 10. Mooring Buoys.** There were no changes proposed for this NWP. One commenter stated a notice to Tribes needs to be provided to avoid adverse effects to Tribal treaty fishing access. One commenter recommends prohibiting the use of this NWP in “downgraded shellfish harvest areas.” Another commenter said that the permit should be conditioned to require permittee’s to provide information on the location of the mooring buoy, including a site plan drawn to scale that shows the distance of the buoy from the shore, mark the Corps permit number on the buoy, and a statement that the buoy satisfies U.S. Coast Guard requirements. One commenter suggested adding a limit on the number of buoys installed per acre, based on the number and size of the moored vessels.

Division engineers can regionally condition this NWP to prohibit its use in areas where mooring buoys may impact access to Tribal treaty fishing areas. General condition 18 states that NWP activities cannot impair reserved tribal rights. Division engineers can impose regional conditions to restrict or prohibit its use in shellfish harvesting areas. We do not agree that pre-construction notification for the activities authorized by this NWP is necessary, to require prospective permittees to submit detailed information on the location of the proposed mooring buoy, a detailed site plan, and a statement that it complies with U.S. Coast Guard requirements. All applicable Coast Guard regulations must be complied with independent of the conditions in this NWP. We believe that it is not necessary to limit this NWP, at the national level, to install a particular number of mooring buoys per acre. Division engineers may also regionally condition this NWP to impose such restrictions.

This NWP is reissued without change.

**NWP 11. Temporary Recreational Structures.** There were no changes proposed for this NWP. One commenter recommended requiring that structures

authorized under this NWP be removed immediately after use ceases, instead of the 30 days specified in the NWP.

The Corps believes that the current requirements for the removal of temporary structures are sufficient. Where necessary, shorter time periods for removal can be imposed through regional conditioning or through special conditions provided in activity-specific NWP verifications.

The NWP is reissued without change.

**NWP 12. Utility Line Activities.** We proposed to modify this NWP to clarify how to calculate the loss of waters of the United States for a single and complete project that involves an access road. This proposed change was intended as a clarification of long-standing practice, not a substantive revision.

Several commenters supported the proposed change to this NWP. Another commenter stated the proposed clarification would severely restrict the use of NWP 12, because it changes the definition of single and complete project. One commenter requested further clarification of the intent and applicability of the term “single and complete” and suggested we replace it with “single and complete linear projects” wherever the former phrase is found in NWP 12 since the NWP applies to linear projects and their associated facilities and activities. Two commenters requested confirmation that the calculation of impacts for purposes of satisfying the NWP 12 threshold is done separately for each crossing. Another commenter objected to the definition of “single and complete project” at 33 CFR 330.2(i) and the NWP definitions section and stated mitigation should be required for utility lines that result in the loss of greater than ½-acre.

This modification of the NWP does not change the definition of single and complete project and does not affect its implementation, except to clarify that only losses of waters of the United States associated with a single and complete project would be considered when determining whether the acreage limit or pre-construction notification threshold is exceeded. However, it is correct that the Corps long-standing practice (which we are not changing) has been to generally calculate impacts for purposes of satisfying the ½-acre threshold separately for each separate and distant crossing, and we have clarified this in the definitions section by adding separate definitions that explain how single and complete projects are determined for linear and non-linear projects. We do not agree that in the text of this NWP the term “single and complete project” should be replaced with “single and complete

linear project.” Although the vast majority of utility lines are linear projects where the crossings are at separate and distant locations, and thus considered separate single and complete projects, there may be circumstances where the separate crossings of a waterbody are too close together to be considered separate single and complete projects, and one NWP authorization would be evaluated for those closely-spaced crossings. Therefore, we have retained the more generic term “single and complete project” in the text of this NWP. Other supporting components of a utility line, such as substations, may not be considered linear projects in some circumstances. District engineers may exercise discretionary authority and require compensatory mitigation for utility line activities that require pre-construction notification and result in the loss of aquatic resources.

One commenter stated the Corps should clarify that the only relevant activity for purposes of NWP 12 is a discharge of dredged or fill material into waters of the United States. One commenter said that no discharges should be authorized in waters below the ordinary high water mark or in areas that provide fish habitat functions. This commenter also said that utility lines should be buried at least six feet below the authorized federal channel depth. One commenter stated that mechanized land clearing of forested wetlands for installation of utility lines should not be authorized by NWP 12.

The activities authorized by this NWP are not limited to discharges of dredged or fill material. This NWP also authorizes structures or work in navigable waters of the United States that require authorization under Section 10 of the Rivers and Harbors Act of 1899. We do not agree that discharges should be prohibited in open waters, below the ordinary high water mark. Such activities often result in minimal adverse effects on the aquatic environment and qualify for general permit authorization. Division engineers can restrict or prohibit use of this NWP in certain waters, through the approval of regional conditions. The appropriate depth a utility line should be buried below a federal channel should be determined on a case-by-case basis. Mechanized landclearing of a forested wetland in a utility line right-of-way may only result in a conversion of wetland type, and not result in permanent loss of waters of the United States. District engineers may require compensatory mitigation to offset permanent losses of wetland functions when such mechanized landclearing occurs in forested wetlands.

One commenter stated that authorizing the loss of 1/2-acre of waters of the United States for each crossing results in more than minimal adverse environmental effects. Another commenter said that the 1/2-acre limit should apply to the entire utility line project, because the cumulative effects of the utility line must be considered. One commenter stated that this NWP should also limit stream impacts to 300 linear feet. Several commenters asked whether the conversion of a forested wetland to a scrub-shrub wetland counts toward the 1/2-acre limit.

The 1/2-acre limit applies to each crossing that is considered to be a separate single and complete project, because they are sited at distant locations from other crossings that constitute the linear project. Each separate and distant crossing should be evaluated to determine if it meets the terms and conditions of the NWP, and cumulative effects of the overall utility line should be evaluated to determine if the adverse cumulative effects on the aquatic environment are more than minimal and therefore do not qualify for NWP authorization. Separate utility line crossings are usually on different water bodies, and may also be in widely separated watersheds. Such factors should be considered when assessing cumulative impacts. The "Definitions" section provides further clarification on single and complete projects. The conversion of a forested wetland to a scrub shrub wetland does not constitute a permanent loss of waters of the United States, and thus does not count towards the acreage limit, even though it may result in the permanent loss of certain functions, which may require compensatory mitigation.

One commenter said that some utility lines and associated renewable energy projects may have unintended negative impacts on the Department of Defense mission. For example, high voltage transmission lines could potentially interfere with long-range radar surveillance, homeland defense, testing, and training missions. This commenter requested that pre-construction notifications for NWP 12 activities involving the construction of overhead utility lines in waters of the United States be coordinated with the Department of Defense, by sending a copy of the pre-construction notification to the Department of Defense Siting Clearinghouse. Department of Defense Siting Clearinghouse staff will review the pre-construction notification and contact the project proponent if they identify potential negative impacts to Department of Defense operations, testing, and training missions.

We have added Note 4 to this NWP, which states that a copy of the pre-construction notification will be provided to the Department of Defense Siting Clearinghouse if the proposed activity involves an overhead utility line constructed in waters of the United States. This coordination process will not interfere or delay the district engineer's decision on the pre-construction notification, which must be made within the timeframes specified in the NWP general conditions. The coordination process will consist of districts sending the Department of Defense Siting Clearinghouse copies of pre-construction notifications and NWP verifications, and Clearinghouse staff will work with project proponents to address effects to military operations.

One commenter stated that the definition of a utility line in the NWP is too expansive and should not include liquefied or slurry substances. This commenter asked if utility lines could also be used to transport waste products. One commenter stated that terms and conditions of the NWP should require projects to use existing trenches or cables whenever possible, and require that sidecast material be put back in place within 24 hours. One commenter requested that temporary fill be defined and that compensatory mitigation should be required for temporary fills left in place for two years. One commenter said that enforcing the time periods for temporary side casting is too difficult. One commenter requested more detail regarding the circumstances under which a district engineer would extend the period of temporary side casting up to a total of 180 days. One commenter stated the side casting in areas with known or probable sediment contamination should be prohibited. One commenter stated the placement of excavated materials into any waterway should be prohibited.

Water or sewer lines are generally recognized to be utility lines, and are used to transport liquid or slurry substances. They may also be used to transport waste products, such as sewage or industrial byproducts. We do not agree that existing trenches or cable should be a requirement of this NWP, since many new utility lines constructed in waters of the United States result in minimal adverse effects on the aquatic environment. However, project sponsors should consider the use of existing trenches and cables where practicable as one way of avoiding or minimizing adverse impacts to the aquatic environment, which is required by general condition 23,

mitigation. It is not practicable to require side cast material to be put back into the original trench or pit within 24 hours, and we have retained the current language concerning temporary side casting. It is the district engineer's discretion on whether to extend the period of temporary side casting. That discretion would be based on the site-specific environmental conditions, the activity, practicability considerations, and other factors. District engineers can restrict or prohibit side casting in areas where sediment contamination may be a concern. Excavated materials are generally not placed in flowing waters, and should be retained in areas outside of flowing waters with proper sediment and erosion controls.

One commenter objected to authorizing the expansion of utility line substations, stating that those activities should require individual permits and a finding of compliance with the Clean Water Act Section 404(b)(1) Guidelines and public interest review.

The expansion of utility line substations does not generally warrant a full public interest review and activity-specific Section 404(b)(1) Guidelines analysis since it is an expansion of an existing facility. In response to a pre-construction notification, the district engineer will review the proposed expansion of a substation and exercise discretionary authority if it would result in more than minimal individual and cumulative adverse effects on the aquatic environment.

Two commenters stated the construction of temporary access roads will require a submerged lands authorization and would require a submerged land lease for long-term use.

The use of NWP 12 does not obviate the need for the project proponent to obtain any other federal, state, or local permits that may be required, including permits from states that hold title to submerged lands.

One commenter said that this NWP should have fewer pre-construction notification thresholds to expedite pipeline safety repairs and infrastructure projects. One commenter supported retaining the 1/10-acre threshold pre-construction notification.

We believe all of the current pre-construction notification thresholds are necessary because of the variety of utility line activities authorized by NWP 12 (i.e., utility line construction, maintenance, repair, and removal, the construction, maintenance, or expansion of utility line substations, the construction or maintenance of foundations for overhead transmission lines, and the construction of access roads) and to allow district engineers

the opportunity to review those activities to determine whether they will result in minimal adverse effects on the aquatic environment. Pipeline maintenance may be authorized by NWP 3 or NWP 12, and use of NWP 3 would not usually trigger a pre-construction notification requirement. Many pipeline maintenance activities may also be authorized by NWP 12, without pre-construction notification. The  $\frac{1}{10}$ -acre pre-construction notification threshold remains in this NWP.

One commenter recommended that this NWP require the use of specific equipment such as low ground pressure equipment and wide tires to minimize adverse effects to wetlands. Another commenter said that this NWP should be conditioned to require the use of best management practices to reduce sediment loads into waters. One commenter stated that this NWP does not require sufficient avoidance and minimization of waters of the United States. One commenter suggested requiring the installation of barriers next to utility line trenches to prevent amphibians and reptiles from falling into the trench and to reduce sediment transport into waters of the United States during precipitation events. One commenter said that pipes installed over rivers and streams should have shut-off valves to minimize the potential for discharges to occur if the pipe is breached.

The use of equipment that minimizes adverse effects to waters of the United States is addressed by general condition 11, equipment, which requires permittees to take measures to minimize soil disturbance, such as placing heavy equipment on mats when working in wetlands, mudflats, or other waters. Division or district engineers may condition this NWP, either through the regional conditioning process or through activity-specific conditions added to an NWP 12 authorization, to require the use of best management practices. General condition 23, mitigation, requires permittees to design and construct their activities to avoid and minimize adverse effects to waters of the United States. A requirement to install barriers next to utility line trenches, or the use of shut-off valves in pipes constructed over waters, is more appropriately addressed through the regional conditioning process or through activity-specific conditions added to an NWP 12 authorization during the review of a pre-construction notification or NWP verification request.

One commenter stated that this NWP could streamline the authorization of offshore wind energy generation

facilities, but two of the terms and conditions may be problematic. The first is the prohibition against side casting when sediments would be dispersed by currents or other forces. The second is the  $\frac{1}{2}$ -acre limit, which may prohibit use of this NWP to authorize the installation of cables that transfer the energy generated by wind turbines.

The transmission cable that runs from an offshore wind energy generation facility to a land-based facility or distribution system may be constructed so that the trench for the cable is backfilled immediately after the cable is laid into the trench. That immediate backfilling would minimize dispersion by currents or other forces in those waters. The placing of a power transmission cable on the sea bed is considered a structure under our regulations for implementing Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(b)), and not a loss of waters of the United States subject to the  $\frac{1}{2}$ -acre limit in NWP 12.

One commenter recommended requiring coordination with Tribes to avoid impacts to Tribal treaty natural resources and cultural resources. Another commenter said that coordination with State Historic Preservation Officers should be required to protect historic properties.

Division engineers can regionally condition this NWP to require coordination with Tribes, to ensure that this NWP does not adversely affect Tribal treaty natural resources and cultural resources. General condition 20, historic properties, addresses compliance with the National Historic Preservation Act, which requires consultation for activities that have the potential to cause effects to historic properties, including tribal resources that meet the definition of "historic property." General condition 17, tribal rights, requires that no NWP activity or its operation may impair reserved treaty rights, such as reserved water rights and treaty fishing and hunting rights.

One commenter requested clarification that individual permits are not automatically required for NWP 12 activities when a Corps district participates as a cooperating agency for an environmental impact statement.

Even though an environmental impact statement may be prepared for a particular utility line, the National Environmental Policy Act process does not prohibit the Corps from using NWP 12 to authorize the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, as long as the activity complies with all applicable terms and conditions and results in

minimal individual and cumulative adverse effects on the aquatic environment. NEPA requires consideration of all environmental impacts, not only those to aquatic resources, so there may well be situations where aquatic impacts are minimal even though environmental impacts more generally are not. These other environmental impacts would be addressed by the lead agency preparing the environmental impact statement. The district engineer will exercise discretionary authority to require an individual permit for any utility line activity that he or she determines does not meet the terms and conditions of NWP 12.

One commenter suggested modifying Note 1 to limit submission of NWP 12 pre-construction notifications and verifications to the National Oceanic and Atmospheric Administration's National Ocean Service (NOS), since NOS only produces charts for waters in the coastal United States, Great Lakes, and United States territories.

We have modified Note 1 to require district engineers to send copies of NWP 12 pre-construction notifications and verifications to NOS in those regions of the country.

This NWP is reissued with the modifications discussed above.

**NWP 13. Bank Stabilization.** We proposed modifying this NWP by removing the waiver provision in paragraph (c) that allowed district engineers to authorize bank stabilization fills that exceeded one cubic yard per running foot below the ordinary high water mark or high tide line to encourage the use of bioengineered techniques for bank stabilization. To conform with the proposed change to in paragraph (c), we proposed to remove the third pre-construction notification threshold for bank stabilization fills that exceeded one cubic yard per running foot, since these fills would no longer be allowed. We also proposed changing this NWP to authorize temporary structures and fills necessary for the construction of bank stabilization activities.

Many commenters recommended that this NWP not be reissued, and stated that all bank stabilization should be evaluated under individual permit procedures. One commenter asserted that bank stabilization activities should be authorized with NWP 3 in man-made ditches and canals and NWP 13 in natural waterways. Two commenters said this NWP should not authorize new bank stabilization activities. Some commenters recommended modifying this NWP so that it would not authorize new vertical bulkheads and seawalls.

One commenter stated that this NWP does not result in minimal individual and cumulative adverse effects on the aquatic environment because these activities accelerate coastal erosion and retreat. Additional commenters said that these activities result in more than minimal individual and cumulative effects. Some of these commenters said that this NWP has more than minimal adverse effects on low-order ephemeral and intermittent streams. One commenter said that this NWP should not be applicable to both riverine and lacustrine systems and recommended that separate NWPs be developed that would address the different erosional processes in those systems. Several commenters stated that this NWP should not be reissued because of adverse effects to coastal environments, as well as sea turtles and other endangered species and their habitats. Another commenter recommended that bank stabilization only be permitted by this NWP if it is part of a habitat improvement project or has other net improvements in aquatic function.

The terms and conditions for this NWP are appropriate for limiting bank stabilization activities so that they have minimal individual and cumulative effects on the aquatic environment, while allowing landowners and other entities to protect their property and safety. NWP 3 only authorizes minor amounts of rip rap associated with maintenance activities. It is more appropriate to authorize bank stabilization activities in man-made waterways through NWP 13. In many coastal waters and rivers it is necessary to utilize hard bank protection structures, because wave energy and currents are too strong for bioengineering or other techniques to successfully prevent or reduce erosion. We do not agree that there should be separate NWPs developed to authorize bank stabilization activities in riverine and lacustrine waters. Bank stabilization that may affect endangered or threatened species require pre-construction notification and compliance with general condition 18, endangered species. We also do not agree that this NWP should be limited to habitat improvement projects, because it is often necessary to install bank stabilization structures and fills to protect property and safety.

Two commenters said that NWP 13 should not be reissued because it authorizes activities that may prevent retreat that would be necessary to adapt to sea level rise caused by climate change. These commenters also said that sea level rise needs to be considered in the decision on whether

to reissue this NWP. These commenters also stated that the structures and fills authorized by NWP 13 exacerbate erosion in areas where sea level rise will occur.

Coastal and riparian areas are dynamic landscapes. They are constantly changing as a result of erosional and depositional processes. Landowners seek Department of the Army authorization for bank stabilization activities to protect their property and provide safety. The purpose of NWP 13 activities is to protect land on which residences, commercial buildings, infrastructure, and other features are located. The Corps regulations recognize that a riparian landowner has a right to protect his or her property from erosion (see 33 CFR 320.4(g)(3)). When a district engineer evaluates a permit application for bank stabilization activities, including pre-construction notifications for NWP 13 activities, he or she considers the current environmental conditions at the site of the proposed activity, as well as the reasonably foreseeable direct, indirect, and cumulative effects that might be caused by the proposed activity. At the present time, there is a considerable amount of uncertainty surrounding climate change, and any associated sea level rise that may occur as a result of climate change. To the extent there is reliable information about projected sea level rise during the reasonably foreseeable future in the vicinity of a proposed activity, the district engineer will take that information into account when determining whether a proposed NWP 13 activity will have minimal individual and cumulative adverse effects on the aquatic environment. We do not agree that the structures and fills authorized by NWP 13 will accelerate erosion in areas affected by changing sea level rise caused by climate change. The bank stabilization structures and fills authorized by this NWP must be properly designed, so that they have minimal individual and cumulative adverse effects on coastal and riparian erosion and deposition processes. As sea level rise occurs, bank stabilization activities may no longer be effective, and it may be necessary for landowners to relocate.

Two commenters suggested limiting all projects to a maximum length of 500 linear feet, except for allowing bioengineering projects to exceed that length on a case-specific basis if the district engineer waives that limit. One commenter recommended not allowing vertical bulkheads longer than 500 feet. One commenter recommended limiting replacement of vertical bulkheads and

seawalls to a maximum length of 200 feet. Another commenter recommended a 300 linear foot maximum project length for shoreline protection on coastal areas or lakes. One commenter suggested a 300 linear foot maximum length for bioengineering projects and a 150 foot maximum length for all other bank stabilization projects. Two commenters requested clarification regarding project length in paragraph (b) as it relates to activities that stabilize both banks (left and right) of a stream. Many commenters supported the district engineer waiver for the 500 linear foot limit for any projects.

The limits in this NWP are sufficient to ensure that the NWP authorizes only those activities that have minimal adverse effects on the aquatic environment, although division engineers may regionally condition the NWP to reduce those limits to account for local environmental conditions and the ecological functions and services provided by waters of the United States in those areas. For streams, the linear foot limit in paragraph (b) applies to a single and complete project for the bank stabilization activity measured along the length of the stream segment, which may involve discharging dredged or fill material along either one or both stream banks. We have retained the ability for district engineers to waive the 500 linear foot limit.

One commenter requested a definition for bank stabilization. Many commenters asked for a definition of bioengineering. One commenter said that bioengineering techniques should include living plant material and soil as the primary structural components to reinforce soil and to stabilize slopes. One commenter recommended requiring native vegetation in bioengineering projects where vegetation is the primary or secondary component of a project.

We do not believe that a definition of bioengineering is necessary because there is a wide variety of bioengineering techniques and project proponents and district engineers generally understand what it means in a local context. It is not possible at the national level to envision every possible variation of technique and materials that would reasonably fit within the meaning of this term, but generally bioengineering involves the use of a combination of vegetation and hard materials instead of only hard materials such as rip-rap for bank stabilization. Also, as explained below, the final NWP does not make a distinction between bioengineering and other bank stabilization techniques. We agree that bioengineering, for the purposes of bank stabilization, includes providing protection from erosion and

providing habitat for aquatic species. We also agree that bioengineered techniques can slow erosion rates and can have beneficial effects on habitat for macroinvertebrates and fish which is why we proposed to modify this NWP to encourage greater use of this technique.

Several commenters recommended the NWP encourage the use of natural materials over riprap. One commenter said that only native plant species should be used for bioengineered bank stabilization. Another commenter recommended using natural stream design methods for erosion prevention. Several commenters objected to the placement of plant material in waters of the United States, and also objected to the planting of willows and similar species in and along waterways because these types of woody plants clog waterways and cause maintenance problems at bridge and culvert crossings.

Division engineers can regionally condition this NWP to encourage bioengineering or the use of natural materials for bank stabilization in waters subject to lower energy waves and currents. The use of plant materials as a component of a bank stabilization activity can have beneficial environmental effects, such as providing shading and habitat for near-shore organisms, or for riparian ecosystems. Proper maintenance should be done to remove plants that colonize waterways, especially at culverts or bridges. We have added a provision to this NWP stating that if bioengineering or vegetative bank stabilization is used, invasive plant species should not be used, because Executive Order 13112, Invasive Species, states that agencies should not "authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere." The Executive Order states there are economic, ecological, and human health impacts that are caused by invasive species, and we believe that invasive species should not be used for bioengineering bank stabilization activities authorized by this NWP because of the adverse environmental effects those species can cause.

Many commenters supported the proposed modification of paragraph (c) to only allow bioengineering projects to exceed one cubic yard per running foot, and to not allow waivers from the district engineer for other types of projects. Many other commenters objected to limiting that flexibility to bioengineering techniques, stating that bank protection structures are necessary

in high energy coastal and riverine environments, and said that the waiver in the 2007 NWP 13 should be reinstated. Some commenters suggested removing paragraph (c) entirely. Several of these commenters thought the proposal would encourage bioengineering methods for achieving the necessary bank stabilization. Many commenters stated that the waiver to the cubic yard limit should be removed from paragraph (c) to ensure that the NWP authorizes only those activities with minimal adverse effects on the aquatic environment. Many commenters asserted that bioengineering methods for bank stabilization are unproven and not as effective at preventing erosion as hard structures. A few commenters suggested that the preference for bioengineering would be a hardship on local governments. Another commenter suggested that bioengineering techniques are rarely successful in arid areas and in ephemeral waterways. Another commenter added that the hydraulic forces in large rivers and tidal areas require the use of large stone, the size of which exceeds the one cubic yard per running foot average size, and are not conducive to bioengineering. Several commenters said that bioengineering is not always appropriate for protecting infrastructure such as roads and bridges, and requested that the one cubic yard per foot waiver be left in place to protect these structures. One commenter suggested modifying the NWP to require alternatives analyses for each proposed project using an established hierarchy, beginning with bioengineering as the most preferable bank stabilization method and ending with the hard bank stabilization structures. One commenter observed that bank stabilization using bioengineering or any other method will still result in adverse effects, and suggested all bank stabilization activities should be located landward of the ordinary high water mark.

In response to the many commenters that objected to removing the provision allowing district engineers to waive, after reviewing a pre-construction notification, the one cubic yard per running foot limit, we have reinstated that provision in this NWP. We have also reinstated the third pre-construction notification threshold that was in the 2007 version of NWP, which requires pre-construction notification for discharges exceeding one cubic yard per running foot along the bank below the plan of the ordinary high water mark or the high tide line. We acknowledge that bioengineering may not be appropriate in all waters, because it may

not result in effective bank stabilization. We have thus determined that it is not appropriate to establish a hierarchy of preferred bank stabilization options because such decisions are best left to district engineers that review project-specific pre-construction notifications, and can take into account the characteristics of the waterbody and the surrounding area, and determine which bank stabilization method would be most effective and environmentally preferable. We agree, however, that bioengineering techniques may be environmentally preferable in many situations and that project proponents should consider such techniques where practicable in order to comply with the general requirement to avoid and minimize adverse effects to the aquatic environment. It is not practicable to require all bank stabilization activities to be located landward of the ordinary high water mark.

One commenter asked if the volume of fill buried deeply below bioengineering or turf reinforcement mats could be exempted from the volume of fill that counts towards the one cubic yard per running foot limit in paragraph (b). Another commenter said that buried stone does not meet the regulatory definition of fill material, and said the volume of stone buried below the ordinary high water mark should not count towards the one cubic yard per running foot limit. One commenter suggested replacing the words "below the plane of" with "within the" when describing the ordinary high water mark in paragraph (c).

The definition of "fill" found in 33 CFR part 323.2 clearly states that rock is fill material, and burying rock in a waterway constitutes a discharge of fill material. The volume of the buried stone, along with all other fill material, must be determined and that volume placed below the plane of the ordinary high water mark or high tide line is considered when reviewing the proposed project. We have retained the language in NWP because the phrase "below the plane of" more accurately describes the Corps jurisdiction in waters of the United States. To the extent that the location and type of fill placed below the plane of the ordinary high water mark affects the potential for adverse effects to the aquatic environment, the district engineer would consider such factors in deciding whether to grant a waiver request.

Several commenters said that paragraph (d) should prohibit fills in special aquatic sites, including wetlands. One commenter opposes removing the waiver provision in

paragraph (d) for work in special aquatic sites.

We believe that the pre-construction notification process affords the district engineer an appropriate opportunity to review proposed activities in special aquatic sites. Many streams and shorelines include, or are bordered by, special aquatic sites, and precluding use of this permit in these areas severely limits its usefulness for projects that have no more than minimal adverse effects on the aquatic environment. Additionally, it may be beneficial in some watersheds to stabilize eroding banks, even though small amounts of special aquatic sites may be impacted by a bank stabilization activity. Paragraph (d) requires a written determination concluding that the activity will result in minimal adverse effects. If a written waiver is not issued by the district engineer, then this NWP does not authorize such activities and the project proponent will have to obtain another form of DA authorization.

Several commenters expressed support for inclusion of temporary fills required to accomplish work authorized under this NWP. One commenter said that temporary fills should remain in place if their removal would do more damage than allowing them to remain in place. One commenter requested a list of mandatory best management practices developed for temporary fills authorized by this NWP.

If the district engineer determines that temporary fills should remain in place those fills may be authorized by another NWP, a regional general permit, or individual permit. We do not agree that specifically requiring best management practices is appropriate, although division engineers may regionally condition this NWP to add appropriate best management practices. District engineers may also add conditions to the NWP to require specific best management practices for a particular activity.

Several commenters stated that pre-construction notification should be required for all activities authorized by this NWP. One commenter requested that no pre-construction notification be required for any bank stabilization exceeding one cubic yard per running foot in ephemeral and intermittent waters. One commenter suggested removing all pre-construction notification requirements from work done under this NWP in man-made waterways. One agency recommended lowering a pre-construction notification threshold to 100 feet for hard bank stabilization projects such as riprap, and 300 feet for bioengineering projects. One commenter claimed it would be

burdensome and costly to submit a pre-construction notification for every bank stabilization project.

We do not agree that it is necessary to require pre-construction notification for all activities authorized by this NWP. A large number of small bank stabilization activities are conducted each year that result in minimal adverse effects on the aquatic environment. We believe that the existing pre-construction notification thresholds are sufficient for satisfying the minimal adverse effects requirement for general permits, and division engineers can regionally condition this NWP to impose lower pre-construction notification thresholds, including requiring pre-construction notification for all activities.

Two commenters said that bank stabilization activities must avoid impacting tribal rights, tribal natural resources, and tribal cultural resources. Many commenters said that while bank stabilization projects may reduce erosion at a site, they may transfer or accelerate erosion in other areas of a waterbody.

General condition 17, tribal rights, prohibits the impairment of all reserved tribal rights. We acknowledge that bank stabilization activities may cause indirect effects in other areas of the waterbody and those indirect effects should be evaluated during the review of a pre-construction notification, if it is required. Activities that do not require a pre-construction notification have minimal adverse effects on the aquatic environment.

Some commenters asked that compensatory mitigation be required for all activities authorized by this NWP. A few commenters remarked that compensatory mitigation should be required for adverse effects on high quality riparian areas. Another commenter said that mitigation should be required when sheet piling is used to stabilize banks.

We do not believe compensatory mitigation should be required for all bank stabilization activities. District engineers will determine when compensatory mitigation is necessary to ensure that an activity results in minimal individual and cumulative adverse effects on the aquatic environment.

This NWP is reissued with the modifications discussed above.

*NWP 14. Linear Transportation Projects.* There were no changes proposed for this NWP. One commenter suggested that this NWP should authorize only the maintenance of existing linear transportation projects because the construction of new linear

transportation projects results in more than minimal adverse environmental effects. One commenter said that this NWP should not authorize parking lots. One commenter stated that activities in tidal waters should not be authorized by this NWP because any proposed linear transportation project impacting tidal wetlands require an individual permit to more thoroughly assess impacts on those aquatic habitats.

This NWP should not be limited to authorizing the maintenance of existing linear transportation projects. The terms and conditions of this NWP, including its acreage limits and pre-construction notification thresholds, provide an effective means for authorizing linear transportation projects with minimal individual and cumulative adverse effects on the aquatic environment. Parking lots may be an integral part of a single and complete linear transportation project and may be authorized under this NWP. Small linear transportation projects constructed or maintained in tidal waters may be authorized by this NWP, if they comply with appropriate thresholds and result in minimal adverse effects on the aquatic environment. Division engineers can regionally condition this NWP to restrict or prohibit the use of this NWP to authorize structures or fills in tidal waters where necessary.

Most commenters suggested adding a linear foot limit to this NWP to ensure that it only authorizes activities with minimal adverse effects on the aquatic environment, stating that the current NWP authorizes large amounts of small streams to be permanently lost or significantly altered. One commenter recommended a 100 linear foot limit for the loss of perennial, intermittent, and ephemeral streams. One commenter said that the  $\frac{1}{2}$ -acre limit is too large when compared to other NWPs that limit impacts to  $\frac{1}{10}$ -acre. One commenter suggested limiting private roads to 200 feet in length, with a maximum width of 16 feet. One commenter recommended that public road projects with multiple crossings should have a maximum cumulative limit of two acres for all crossings associated with that project.

We believe the  $\frac{1}{2}$ -acre and  $\frac{1}{3}$ -acre limits are appropriate for ensuring that the NWP authorizes only those linear transportation projects that result in minimal individual and cumulative adverse effects on the aquatic environment. Division engineers can regionally condition this NWP to decrease these acreage limits or impose linear foot limits to provide additional protection for wetlands and other waters

in a particular district or region. We do not agree that public and private crossings should have different acreage limits. The environmental effects are not dependent on the status of the entity who proposes to construct the project. A 200 linear foot limit was removed from NWP 14 in 2007 to simplify this NWP. The Corps is not aware of situations where this change resulted in projects being authorized that had more than minimal adverse effects.

One commenter asserted that using this NWP prevents the public from commenting on large transportation projects. Another commenter said that this NWP should not authorize expansion of existing projects, because it discourages avoidance and minimization and is contrary to the 404(b)(1) Guidelines. One commenter stated that use of this NWP for the expansion, modification, or improvement of previously authorized projects could result in cumulative impacts that exceed the acreage limits and said the impacts of previously authorized projects should count towards the acreage limit.

Linear transportation projects that involve small losses of waters of the United States and result in minimal adverse effects on the aquatic environment would not generally generate substantive public comments in response to a public notice and should not require public notices. It is appropriate to authorize expansions, modifications, or improvements to existing projects, as long as those activities comply with the terms and conditions of the NWP, including the applicable acreage limit. An expansion, modification, or improvement of an existing project has few practicable alternatives available because it is a change to a previously constructed project. Alternatives that would involve relocating an existing project are likely to result in more adverse effects to the aquatic environment. An expansion, modification, or improvement of a previously authorized single and complete linear transportation project should include the previously authorized losses of waters of the United States when determining whether the acreage limit would be exceeded by the expanded, modified, or improved project, if the expansion, modification, or improvement is not a separate single and complete project. Factors that may affect this determination include the length of time between the original project and the expansion, modification or improvement; the degree of independent utility of the original project and the expansion, modification

or improvement; and the degree to which the expansion, modification or improvement may have been already envisioned, or planning might already have begun, at the time the original project was authorized. Under no circumstance will district engineers allow "piecemealing" of projects (for this or any other NWP) in order to meet thresholds.

One commenter requested that the term "minimum necessary" used in the first paragraph of this NWP be defined. One commenter asked if temporary fill may be put in place for up to two years without requiring any mitigation, and another commenter requested a definition for "temporary." One commenter suggested that culverts or other appropriate measures should be required to maintain existing drainage patterns, all stream crossings should span the bankfull width of a stream, and in cases where bottomless culverts or bridge structures are not used, the bottom of the structure should match stream slope. Another commenter suggested that the NWP should require the use of best management practices to avoid sediment loading of waters and that best management practices should be used in upland areas and within waters to protect downstream water quality.

The decision as to whether a stream channel modification is the "minimum necessary" and whether a fill is "temporary" is to be determined on a case-by-case basis, after considering the specifics of the proposed activity and the types of aquatic resources proposed to be impacted by the linear transportation project. General condition 2, aquatic life movements, and general condition 9, management of water flows, require that linear transportation projects be designed to sustain corridors for aquatic life movements and maintain, to the maximum extent practicable, the pre-construction course, condition, capacity, and location of streams and other open waters. General condition 12, soil erosion and sediment controls, requires permittees to take appropriate measures to reduce or prevent movements of sediment into waters during construction. Water quality management measures may also be required by district engineers on a case-by-case basis after evaluating a pre-construction notification.

One commenter said that pre-construction notification should be required for stream impacts that exceed 100 linear feet. Another commenter stated that any stream channel modifications should require pre-construction notification. One

commenter suggested requiring low ground pressure equipment, wide tires, rubberized racks, lightweight equipment, and the use of varied paths to avoid repeatedly crossing wetlands at the same location, to protect wetlands. One commenter suggested sending pre-construction notifications to tribes to avoid impacts to tribal treaty natural and cultural resources. One commenter recommended that the Corps consult with the Federal Highway Administration to streamline projects and align with their efforts.

The present pre-construction notification thresholds provide sufficient protection for streams, and division engineers can regionally condition this NWP to require pre-construction notification for proposed losses of stream beds that would exceed a specified amount. Streams with riffle and pool complexes are considered to be special aquatic sites under the 404(b)(1) Guidelines and would require pre-construction notification. General condition 11, equipment, establishes requirements for equipment working in wetlands or mudflats and we believe this general condition provides sufficient protection for those types of construction impacts. Division engineers can regionally condition this NWP to require pre-construction notification for activities that may affect tribal treaty resources, and consult with those tribes before making a decision on whether the activity is authorized by this NWP. This NWP, as well as other NWPs such as NWP 23, provides a means for streamlining the authorization of linear transportation projects and working cooperatively with the Federal Highway Administration and state departments of transportation.

The NWP is reissued without change.

**NWP 15. U.S. Coast Guard Approved Bridges.** We proposed to modify this NWP by removing reference to the U.S. Coast Guard authorizing the discharge of dredged or fill material into waters of the United States as part of their bridge permit. We also proposed 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. We proposed to add section 10 to the regulatory authorities so that discharges authorized under Section 404 of the Clean Water Act would be also authorized under the Rivers and Harbors Act.

One commenter agreed with adding section 10 authority to this NWP, which they believed would help clarify a sometimes confusing permitting scenario. Another commenter objected to adding section 10 authority, stating that the section 9 permits issued by the

U.S. Coast Guard for bridge and causeway construction satisfy all requirements of the Rivers and Harbors Act of 1899 and adding section 10 authorization is not necessary. One commenter requested clarification regarding the applicability of section 10 to the U.S. Coast Guard approved bridges over both navigable-in-fact and historically navigable waters of the United States. One commenter requested definitions of the terms "causeway" and "approach fills."

We agree that the U.S. Coast Guard's section 9 permit satisfies the permit requirements of the Rivers and Harbors Act and have removed the reference to section 10 from the NWP. Discharges of dredged or fill material associated with the construction of bridges across navigable waters of the United States require separate authorization under Section 404 of the Clean Water Act, since navigable waters of the United States are also considered waters of the United States under the Clean Water Act, and discharges of dredged or fill material into waters of the United States require section 404 permits, unless they are eligible for an exemption from permit requirements. Historically navigable waters of the United States may still be subject to jurisdiction under Rivers and Harbors Act of 1899, depending on the case-specific circumstances. We do not believe it is necessary to define what causeways and approach fills are, since they would be identified in the specific plans approved by the U.S. Coast Guard as part of their section 9 permit.

This NWP is reissued with the modification discussed above.

**NWP 16. Return Water From Upland Contained Disposal Areas.** We did not propose any changes to this NWP. This NWP provides section 404 authorization for the discharge of return water from a dredged material placement facility located in uplands, because that discharge of return water into waters of the United States has been administratively defined as a "discharge of dredged material" (see 33 CFR 323.2(d)(1)(ii)). One commenter said the NWP should address both the technical requirements and water quality of the return water due to the potential for the return water to degrade water quality for natural heritage resources. One commenter said that pre-construction notification should be required for activities authorized by this NWP to ensure that suspended contaminated sediments do not reenter waterways and impact state submerged lands.

The water quality certification issued for a specific dredging project should address any water quality concerns for

natural heritage resources. We do not agree that pre-construction notification should be required for this NWP because any required sediment testing would identify contaminants. The sediment testing and potential impacts to water quality are more appropriately considered through the water quality certification process. We have modified this NWP to clarify that disposal of dredged material in an area that has no waters of the United States does not require a section 404 permit, because disposal of dredged material may occur in non-jurisdictional wetlands and waters, not just uplands.

The NWP is reissued with the modification discussed above.

**NWP 17. Hydropower Projects.** No changes were proposed for this NWP. Several commenters said that this category of activities is inappropriate for authorization under an NWP because of the scope and scale of these projects. One commenter stated that these activities result in more than minimal adverse effects on the aquatic environment, especially downstream effects such as the loss of riffle and pool complexes and degradation of water quality through increased sediment loads.

This NWP authorizes small hydropower projects that have minimal adverse effects on the aquatic environment. All activities authorized by this NWP require pre-construction notification, so that district engineers can review each proposed hydropower project and make a case-specific determination whether the minimal effects requirement has been met. Discretionary authority will be exercised, and another form of Department of the Army authorization would be required, if the district engineer determines that a particular hydropower project would result in more than minimal individual and cumulative adverse effects to the aquatic environment or any other public interest review factor. District engineers may also require compensatory mitigation to offset losses of aquatic resource functions.

This NWP is issued without change.

**NWP 18. Minor Discharges.** We did not propose modifications to this NWP. Several commenters expressed support for the reissuance of this NWP. A few commenters said that this NWP does not comply with the "similar in nature" requirement for general permits. Other commenters asserted that the cumulative impacts resulting from the use of this NWP would be more than minimal. Another commenter said that this NWP should not authorize discharges into waters that provide

forage fish habitat or that contain aquatic vegetation. One commenter stated that the NWP should not be used to authorize discharges in rare aquatic environments such as vernal pools.

We believe that the small discharges of dredged or fill material authorized by this NWP comply with the similar in nature requirement for general permits. District engineers will review pre-construction notifications and may assert discretionary authority to add activity-specific conditions to the NWP authorization to ensure that the activity results in minimal adverse environmental effects. Division engineers may regionally condition this NWP to restrict or prohibit its use in specific waters or categories of waters, including fish foraging areas, vegetated shallows, or vernal pools.

One commenter stated that the limit for this NWP should only be expressed in terms of area filled (i.e., up to  $\frac{1}{10}$ -acre) and not include the volumetric limit (i.e., 25 cubic yards). Another commenter said that all discharged material should consist of clean, uncontaminated sand, crushed rock, or stone. One commenter recommended adding language requiring that the discharge will not result in significant changes to stream geomorphology or hydrology, and that the discharge will not impede navigation.

The 25 cubic yard limit for regulated excavation activities and the  $\frac{1}{10}$ -acre limit for losses of waters of the United States caused by discharges of dredged or fill material are both necessary to ensure that this NWP authorizes only those activities that have minimal individual and cumulative adverse effects on the aquatic environment. General condition 6, suitable material, prohibits the use of unsuitable fill material. The fill material must not have toxic pollutants that are present in toxic amounts. Compliance with general condition 9, management of water flows, will ensure that the activity does not cause more than minimal adverse effects to stream geomorphology or hydrology. General condition 1, navigation, states that NWP activities cannot cause a more than minimal adverse effect to navigation.

This NWP is reissued without change.

**NWP 19. Minor Dredging.** There were no changes proposed for this NWP. One commenter recommended that the NWP include a cumulative volume limit for multiple single and complete dredging projects. One commenter recommended modifying the NWP to require that dredge material be limited to a maximum of 25 cubic yards from a 1,000 square foot area, not disturb sediments in an area known or

suspected to contain toxic pollutants, and the disposal of dredged material at an upland location. Another commenter said that pre-construction notification should be required for all activities to ensure that sediments are not contaminated and do not cause impacts to state owned land. One commenter stated that the activities authorized by this NWP are not similar in nature and do not result in cumulative minimal adverse environmental effects.

This NWP may be used only once for each single and complete project (see general condition 15, single and complete project). Therefore, each single and complete dredging project is subject to the 25 cubic yard limit. District engineers will also review pre-construction notifications and other requests for NWP verifications, and will exercise discretionary authority if they determine that the use of this NWP in a particular region is resulting in more than minimal cumulative adverse effects on the aquatic environment. We believe that the 25 cubic yard limit is sufficient to satisfy the minimal adverse environmental effects requirement for general permits, and that an areal limit, such as the 1,000 square feet recommended above, is not necessary. Division engineers may impose regional conditions on this NWP to restrict or prohibit its use in waters known to have contaminated sediments or in waters where there is sufficient reason to believe that there are contaminated sediments, that would cause more than minimal adverse effects to water quality if they were disturbed by these minor dredging activities. A separate Department of the Army authorization must be obtained if the project proponent plans to deposit the dredged material into waters of the United States, including jurisdictional wetlands. Absent such authorization, the dredged material must be deposited in an upland area or an approved dredged material disposal facility.

This NWP is reauthorized without change.

**NWP 20. Response Operations for Oil and Hazardous Substances.** We proposed to change the name of this NWP, and modify its terms and conditions to authorize a wider set of activities, such as containment and mitigation actions, to more effectively authorize efforts to manage releases of oil or hazardous substances. We also proposed to authorize training exercises for the cleanup of oil and hazardous substances, including those that involve temporary structures or fills.

Five commenters expressed support for the proposed changes to this NWP. One commenter objected to the

proposed modifications, stating that the NWP could authorize large dredge and fill operations that would result in net adverse effects on the aquatic environment that would be more than minimal. One commenter stated that the NWP should be limited to interim response activities and that a separate permit should be required for final restoration response. Another commenter said that there should be a requirement to remove temporary structures and fill. This commenter also recommended that the NWP include criteria for temporary structures or fills, such as a requirement to restore wetlands to the maximum extent practicable, to ensure there are no lasting impacts from these activities. A commenter said that this NWP should require coordination with the appropriate state wetland or water resources program.

This NWP authorizes activities in waters of the United States to remediate spills of oil and hazardous substances, which normally results in environmental benefits. We do not agree that the NWP should be limited to interim responses. It should also authorize the final response activity that results in the removal of the oil or hazardous substances, as well as the authorization to remove any temporary structures or fills, to the extent that a Department of the Army permit is required to remove such temporary structures or fills. General condition 13, removal of temporary fills, requires temporary fills to be removed in their entirety, and the affected areas revegetated, if necessary. We do not agree that this NWP should require coordination with state wetland or water resource agencies, since those agencies are likely to have an independent authority to regulate such response activities, as well as their own procedures for reviewing and approving those activities. As a practical matter, such remediation efforts almost always involve coordination among multiple agencies.

This NWP is reissued as proposed.

**NWP 21. Surface Coal Mining Activities.** We proposed three options concerning this NWP. The first option was not to reissue NWP 21 and to let it expire on March 18, 2012. The other two options consisted of reissuing the NWP with modifications. Option 2 was to reissue NWP 21 with a 1/2-acre limit, including a 300 linear foot limit for the loss of stream bed. Under Option 2, NWP 21 would not authorize discharges of dredged or fill material into waters of the United States to construct valley fills. Option 3 was similar to Option 2, but under Option 3 NWP 21 could

authorize discharges of dredged or fill material into waters of the United States to construct valley fills. In the February 16, 2011, proposal, Option 2 was identified as the Corps preferred option. Both Options 2 and 3 require a pre-construction notification for activities authorized by NWP 21, and permittees would have to receive written authorization from the district engineer prior to commencing the activity.

A large majority of commenters supported Option 1 and opposed the reissuance of NWP 21, including any modification of that NWP. Over 26,000 of those comments were form letters. Several commenters recommended adopting Option 2. Two commenters supported Option 3. Many commenters stated that NWP 21 should be reissued without change from the NWP issued in 2007.

While some commenters expressed support for Option 1, they also said that if NWP 21 is to be reissued, Option 2 should be selected and modified to remove the provision allowing district engineers to waive the 300 linear foot limit for the loss of intermittent or ephemeral stream bed. Another commenter stated that if NWP 21 is reissued, it should not authorize any losses of intermittent or perennial streams.

We believe that district engineers should have the ability to waive the 300 linear foot limit for the loss of ephemeral or intermittent stream bed if they make a case-specific determination that the proposed activity will result in minimal individual and cumulative adverse effects on the aquatic environment. For proposed activities under paragraph (b) of NWP 21 that would result in the loss of greater than 300 linear feet of intermittent or ephemeral stream bed, district engineers will coordinate the pre-construction notifications with the resource agencies, to solicit their comments (see paragraph (d) of general condition 31). Those comments will be used by the district engineer in making his or her minimal adverse effects determination. The loss of intermittent or perennial streams caused by NWP 21 activities may still result in minimal individual and cumulative adverse effects on the aquatic environment, and in such cases authorization by NWP is appropriate. Note that the 300 linear foot limit may not be waived for perennial streams. Activities authorized under paragraph (a) of NWP 21 do not require agency coordination because paragraph (a) does not authorize any expansion of surface coal mining activities in waters of the United States and the district engineer previously determined, and must again

confirm in writing, that those activities will result in minimal individual and cumulative adverse effects and qualify for NWP authorization. Many of the surface coal mining activities authorized under the 2007 NWP 21 already had agency coordination because they resulted in the loss of greater than  $\frac{1}{2}$  acre of waters of the United States.

Many commenters stated their preference for Option 2 because it would not allow valley fills for surface coal mining activities, which they believe substantially alter watersheds and associated headwater streams, and generally are alleged to cause more than minimal adverse effects on the aquatic environment. One commenter suggested adding a provision that would prohibit the use of NWP 21 for activities associated with mountain-top removal mining.

We have selected Option 2 for the reissuance of NWP 21, and have made some additional modifications to reduce hardships on permittees who previously obtained authorization under the NWP 21 issued on March 12, 2007, and invested substantial resources in reliance on that NWP authorization. These modifications are discussed in greater detail below. In addition, we have added a definition of “valley fill” to the NWP to clarify the activities to which the valley fill prohibition applies. For the purposes of this NWP, a “hollow fill” is considered a valley fill. This NWP authorizes discharges of dredged or fill material into waters of the United States when those discharges are associated with surface coal mining activities. The Corps review is focused on the individual and cumulative adverse effects to the aquatic environment, and determining appropriate mitigation that may be needed to ensure that the adverse effects on the aquatic environment are minimal, individually and cumulatively. It does not extend to the mining operation as a whole. The Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, and its implementing regulations address the environmental impacts of proposed surface coal mining operations as a whole, including adverse effects to uplands and changes in land use. SMCRA is administered by the Office of Surface Mining Reclamation and Enforcement and states with approved regulatory programs under SMCRA.

Two commenters supported Option 3, and they said the production of energy from all sources, including surface-mined coal, is vitally important to the short-term economic recovery of the United States and the long-term energy

independence and economic prosperity of our country. Another commenter said there is no need to limit NWP 21 to  $\frac{1}{2}$ -acre and 300 linear feet and prohibit valley fills, because district engineers review every pre-construction notification and can require an individual permit if necessary.

We have adopted Option 2 because it provides greater assurance that NWP 21 will authorize only those discharges of dredged or fill material into waters of the United States that have minimal individual and cumulative adverse effects on the aquatic environment. Surface coal mining activities that involve discharges of dredged or fill material that require section 404 permits but do not qualify for NWP 21 may be authorized by other forms of Department of the Army authorization, such as individual permits or regional general permits. We have added the  $\frac{1}{2}$ -acre limit, and the 300 linear foot limit for the loss of stream bed, to make this NWP consistent with many of the other NWPs (e.g., NWPs 29, 39, 40, 42, 43, 44, and 51). We have also added a prohibition against using this NWP to authorize discharges of dredged or fill material into waters of the United States to construct valley fills. Such limits are necessary to constrain the adverse effects to the aquatic environment, to ensure compliance with the statutory requirement that general permits, including NWPs, may only authorize those activities that have minimal individual and cumulative adverse effects on the aquatic environment. We do not believe it is efficient to rely on the pre-construction notification process alone to ensure minimal adverse environmental effects. Many other NWPs use a combination of acreage and/or linear foot limits and pre-construction notification requirements to ensure compliance with Section 404(e) of the Clean Water Act, as well as 33 CFR 322.2(f) and 33 CFR 323.2(h).

Previous versions of NWP 21 did not have any acreage or linear foot limits, and relied solely on the pre-construction notification review process and permit conditions to reduce adverse effects on the aquatic environment to satisfy the minimal adverse environmental effects requirement for general permits. We believe that approach is no longer appropriate because of the inconsistency with other NWPs, the possibility that larger losses of waters of the United States might be authorized, and the difficulty of documenting minimal adverse effect determinations for losses of aquatic resource area and functions that exceed those allowed in other NWPs. We note that part of the basis for the earlier

approach was the environmental review that occurs in connection with obtaining a SMCRA permit, and that the SMCRA regulations related to stream protection have changed since the previous NWP 21 was issued.<sup>1</sup> The new acreage and linear foot limits will ensure that this NWP contributes no more than minimal individual and cumulative adverse effects to the aquatic environment, by limiting the amount of waters of the United States that can be filled by each NWP 21 activity.

Many commenters said the Corps should fulfill its June 2009 determination to prohibit the use of NWP 21 to authorize surface coal mining activities in six states in Appalachia because these activities result in more than minimal adverse effects to the aquatic environment, individually and cumulatively. Some commenters said the proposed reissuance of NWP 21 is contrary to the Corps June 18, 2010, decision to suspend NWP in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia, which stated that continued use of this NWP may result in more than minimal adverse effects to aquatic resources. Many commenters stated that surface coal mining activities in Appalachia have resulted in the loss of a couple of thousand miles of streams, substantially degraded water quality, and are harmful to the health and drinking water of Appalachian citizens. They also said the Corps should follow science and stop issuing permits, including individual permits, for surface coal mining activities in these six Appalachian states because those activities cause significant degradation of waters of the United States, and this region cannot afford to lose more of its vital natural resources.

In accordance with the June 11, 2009, memorandum of agreement implementing the interagency action plan on Appalachian Surface Coal Mining, which was signed by the Department of the Army, the Department of Interior, and the U.S. Environmental Protection Agency, the Corps issued a proposal in the **Federal Register** on July 15, 2009, to modify NWP 21 so that it would not authorize discharges of dredged or fill material into waters of the United States in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and

<sup>1</sup> The Office of Surface Mining has announced its intention to further revise these requirements however such revisions will not be in place at the time the NWPs are reissued. The Corps may reconsider these limits in future promulgations of the NWPs based on its experience and any changes in the broader regulatory context.

West Virginia (see 74 FR 34311). In the June 18, 2010, issue of the **Federal Register** (75 FR 34711), the Corps announced the suspension of NWP 21 in the Appalachian region of six states (i.e., Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia) and said that it would consider modifying NWP 21.

As a result of our review of the comments received in response to the February 16, 2011, proposal we have determined that it would be appropriate to adopt Option 2 and substantially modify NWP 21 by imposing acreage and linear foot limits, as well as prohibiting its use to authorize discharges of dredged or fill material into waters of the United States to construct valley fills associated with surface coal mining activities, to ensure that the NWP authorizes only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment. The ½-acre and 300 linear foot limits will substantially reduce the amount of stream bed and other waters lost as a result of activities authorized by this NWP, and limit this NWP to minor fills associated with surface coal mining activities, such as the construction of sediment ponds. Issues relating to the use of individual permits to authorize discharges of dredged or fill material into waters of the United States associated with surface coal mining activities are outside the scope of the NWP reissuance process and are not addressed in this rule.

The proposed reissuance of NWP 21, as well as the selection of Option 2 to reissue the NWP with ½-acre and 300 linear foot limits and a prohibition against authorizing discharges of dredged or fill material into waters of the United States to construct valley fills, is not contrary to the suspension of NWP 21 in the Appalachian region of these six states. The NWP reissued today has been substantially modified from the 2007 version of NWP 21, with paragraph (a) authorizing Corps district engineers to re-authorize activities that were previously verified under the 2007 NWP 21 authorization where that would be appropriate, and paragraph (b) imposing the acreage and linear foot limits stated above, as well as the condition prohibiting its use for the construction of valley fills in waters of the United States, on new NWP 21 activities. The substantial changes in the terms and conditions of the reissued NWP 21 will ensure that the activities authorized by this NWP result in minimal individual and cumulative adverse effects on the aquatic environment. District engineers will

review pre-construction notifications for activities authorized under paragraph (b) of this NWP and may require compensatory mitigation to offset losses of waters of the United States and ensure the adverse effects on the aquatic environment are minimal, individually and cumulatively. Compensatory mitigation required for activities verified under the 2007 NWP 21 will continue to be required, and may be augmented if the district engineer determines that they do not adequately compensate for losses of aquatic resource function and ensure minimal individual and cumulative adverse effects. Suspension of an NWP is an interim measure to be taken if there are substantive concerns that an NWP activity is potentially causing more than minimal adverse environmental effects, while the Corps collects additional information and considers modifications to that NWP to satisfy statutory or regulatory requirements for general permits, such as compliance with Section 404(e) of the Clean Water Act. We fully considered the comments received in response to the July 15, 2009, proposal to suspend NWP 21 and used those comments to develop the three options presented in the February 16, 2011, proposal to reissue NWP 21. We have now determined that adopting Option 2 addresses the concern that led to our previous suspension of NWP 21 in the six Appalachian states, but in a more effective and equitable way. It is not the geographic location of activities, but rather the nature of these activities and their associated discharges that may lead to more than minimal adverse effects. By prohibiting the use of NWP 21 for discharges associated with valley fills and activities exceeding appropriate thresholds, which are consistent with the thresholds used for many other NWPs, we can ensure that activities that may result in more than minimal individual and cumulative adverse effects obtain individual permits, and those activities that will not result in more than minimal adverse effects can be authorized by an NWP, regardless of the region of the country in which they occur.

Only those surface coal mining activities involving discharges into waters of the United States that received written authorization under the 2007 NWP 21 may be eligible for authorization under paragraph (a) of this NWP. Activities that were subject to the June 18, 2010, suspension of NWP 21 in the Appalachian region of the six states may be eligible for NWP 21 authorization under paragraph (b) if they do not result in the loss of greater

than ½-acre of waters of the United States, do not result in the loss of greater than 300 linear feet of stream bed (unless that 300 linear foot limit for intermittent and ephemeral streams is waived by the district engineer after agency coordination and making a written determination that the activity will result in minimal individual and cumulative adverse effects on the aquatic environment), and do not involve discharges of dredged or fill material into waters of the United States to construct valley fills.

One commenter objected to the proposed reissuance of NWP 21, stating that it authorizes impacts for activities that are not similar in nature, such as mining operations, impoundments, processing plants, and road crossings. The commenter said that the Corps decision documents do not recognize that impoundments can cause massive spills or contaminate well water.

We do not agree that this NWP authorizes activities that are not similar in nature. This NWP authorizes surface coal mining activities, a broad category that includes a variety of features that may be constructed by discharging dredged or fill material into waters of the United States, the activities regulated by the Corps under Section 404 of the Clean Water Act. Discharges of dredged or fill material into waters of the United States may be used to construct sediment ponds, road crossings, etc. that are necessary to conduct surface coal mining activities, or they may occur while coal is being mined (e.g., mine-throughs). Impoundments constructed in waters of the United States should be properly maintained (see general condition 14, proper maintenance). District engineers may also require non-Federal permittees to demonstrate that those impoundment structures comply with applicable dam safety criteria (see general condition 24, safety of impoundment structures).

One commenter said that if NWP 21 was reissued and could be used to authorize valley fills, the Corps would violate the requirement in the 404(b)(1) Guidelines that no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of waters of the United States. This commenter also stated that the proposed 300 linear foot limit for the loss of stream bed would not prevent significant degradation of streams, and objected to the proposed waiver of that limit for intermittent and ephemeral streams, if the district engineer determined that such a loss would result in minimal adverse effects on the aquatic environment.

The NWP 21 reissued today does not authorize discharges of dredged or fill material into waters of the United States to construct valley fills, unless under paragraph (a) the activity was previously verified under the 2007 NWP 21 and the district engineer has determined that those activities still qualify for NWP 21 authorization under the 2012 NWP general conditions, applicable regional conditions, and any activity-specific conditions such as compensatory mitigation requirements. For those previously authorized surface coal mining activities, the district engineer determined that the adverse effects on the aquatic environment are minimal, individually and cumulatively. To re-verify the NWP authorization under the 2012 NWP 21, the district engineer must determine that the activity continues to result in minimal individual and cumulative adverse effects on the aquatic environment. Surface coal mining activities that involve discharges of dredged or fill material into waters of the United States for the construction of valley fills that were not previously verified under the 2007 NWP 21 are subject to paragraph (b) of the 2012 NWP 21 and cannot be authorized by NWP 21. Discharges of dredged or fill material into waters of the United States authorized by NWP 21 require water quality certification. If water quality certification is not obtained or waived, that activity is not authorized by NWP 21. The water quality certifications issued by states are to be considered by district engineers to be conclusive regarding water quality issues, unless the Regional Administrator of the U.S. Environmental Protection Agency advises the district engineer of other water quality concerns that need to be taken into consideration. The construction of impoundments authorized by NWP 21 is generally a minor cause of changes to water quality. Most of the changes to water quality are due to the overall surface coal mining activity and the change in land use (including uplands) that occurs as a result of those mining activities. The discharges of dredged or fill material into waters of the United States authorized by NWP 21 constitute a small proportion of the overall fill placed in a watershed to dispose of the rock, soil, and other materials that are produced by the surface coal mining activity. As water percolates through the larger overall fill that has been placed in uplands and streams, the water chemistry changes. The effluent discharged from impoundments constructed to trap sediments and other

materials to reduce their transport to downstream waters is regulated under Section 402 of the Clean Water Act, and requires a National Pollutant Discharge Elimination System (NPDES) permit. The NPDES permit is issued by states that have approved programs or the U.S. EPA.

One commenter said the Corps has ignored cumulative impacts from discharges of dredged or fill material previously authorized by NWP 21 in proposing Option 2 as a preferred alternative. The commenter also stated that the draft decision documents fail to provide any evidence that would support a minimal effects determination and that the Corps only considers cumulative effects during the five year period the NWP is in effect and this ignores the fact that valley fills bury streams permanently, whether authorized by past nationwide or individual permits, or in the future. The commenter also said that Option 2 ignores the cumulative amount of stream loss or acreage in a watershed from multiple permits.

We have taken into account cumulative impacts from discharges of dredged or fill material previously authorized by NWP 21, and cumulative effects of discharges of dredged or fill material previously authorized by individual permits, when developing the proposal to reissue NWP 21, including Option 2. For NWP 21 activities that were not previously authorized by the 2007 NWP 21, paragraph (b) of NWP 21 imposes a 1/2-acre limit on NWP 21, as well as a 300 linear foot limit for losses of stream bed, and does not authorize discharges of dredged or fill material into waters of the United States to construct valley fills. These changes will reduce the number of surface coal mining activities authorized by NWP 21, when compared to previous versions of NWP 21, which had no acreage or linear foot limits, and could be used to authorize discharges of dredged or fill material into waters of the United States to construct valley fills. We determined that these limits will ensure that the adverse effects of discharges authorized by NWP 21 are minimal, both individually and cumulatively. Under the National Environmental Policy Act, an assessment of cumulative effects has to consider the past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such actions (see 40 CFR 1508.7). In addition, the 404(b)(1) Guidelines require a different approach to cumulative effects analysis for the issuance of a general permit, such as NWP 21. The 404(b)(1)

Guidelines require the Corps or other permitting authority to predict cumulative effects by evaluating the number of individual discharges of dredged or fill material into waters of the United States expected to be authorized by that general permit until it expires (see 40 CFR 230.7(b)(3)).

The decision document for this NWP includes evaluations of cumulative effects under both approaches, and concludes that the reissuance of this NWP, including the imposition of the 1/2-acre limit, 300 linear foot limit, and prohibition against authorizing valley fills on activities that were not previously authorized under the 2007 NWP 21, as well as the pre-construction notification requirements and other procedural safeguards, will authorize only those activities with minimal individual and cumulative adverse effects on the aquatic environment. Activities authorized under the 2007 NWP 21 were already determined by district engineers to result in minimal individual and cumulative adverse effects on the aquatic environment. The other procedural safeguards include the authority for division engineers to modify, suspend, or revoke NWP 21 authorizations on a regional basis, and the authority for district engineers to modify NWP 21 authorizations by adding conditions, such as compensatory mitigation requirements, to ensure minimal individual and cumulative adverse effects on the aquatic environment. District engineers may also assert discretionary authority to require individual permits in cases where the adverse effects will be more than minimal.

Under the National Environmental Policy Act approach to assessing cumulative effects, the decision document discusses, in general terms, the various activities (Federal, non-Federal, and private actions) that may adversely affect the quantity and quality of aquatic resources in a watershed or other geographic region used for cumulative effects analysis, regardless of whether those activities occurred in the past or are expected to occur in the present or reasonably foreseeable future. Under the 404(b)(1) Guidelines approach for assessing cumulative effects of the issuance of a general permit such as NWP 21, the decision document evaluates the number of discharges of dredged or fill material into waters of the United States expected to occur during the five-year period the NWP would be in effect, as well as the estimated loss of waters of the United States and compensatory mitigation. District and division engineers are to supplement these

analyses when they prepare supplemental decision documents for this NWP, and these supplemental decision documents are to include cumulative effects analyses at a regional level, which can be highly informative regarding impacts at a local watershed level. The appropriate geographic scope of those cumulative effects analyses are at the discretion of the division or district engineers.

The Corps considers and addresses cumulative environmental effects of NWP 21 (and other NWPs) in two distinct ways. First, when Corps Headquarters evaluates and proposes to issue or re-issue a NWP (such as NWP 21), we evaluate cumulative effects at the national level, using available national information on aquatic resource status and trends and the general effects human activities have on aquatic resources. The cumulative effects analyses presented in the Headquarters decision documents reflect these national-scale evaluations and conclusions supporting the promulgation of the NWP from Corps Headquarters.

Second, division and district engineers monitor the use of the NWPs on a regional level, and will modify, suspend, or revoke applicable NWPs when necessary if the use of those NWPs is likely to result in more than minimal individual and cumulative adverse effects on the aquatic environment within a particular watershed, ecoregion, state, county, or other appropriate geographic area. To address regional and site-specific environmental considerations, we rely on the Corps district offices that receive pre-construction notifications required by the terms and conditions of the NWP to evaluate the relevant regional and site-specific environmental considerations. The Corps district may add conditions to the NWP authorization, including compensatory mitigation requirements, to ensure that the individual and cumulative adverse effects on the aquatic environment caused by the NWP activity are minimal, and therefore qualify for NWP authorization. If conditions cannot be added to the NWP authorization to ensure that minimal individual and cumulative adverse effects on the aquatic environment occur, the district engineer will exercise discretionary authority and notify the applicant that an individual permit is required.

One commenter said there is insufficient support for the Corps position that the required compensatory mitigation will attenuate cumulative impacts on the Nation's aquatic resources by providing aquatic resource

functions and services, so the net effects will be minimal. Another commenter stated that the Corps relies heavily on mitigation, such as stream creation, restoration, and enhancement, but there is no evidence that stream creation works. The commenter also indicated that the 404(b)(1) Guidelines provide that no permit may rely on mitigation techniques unless they have been demonstrated to be effective in circumstances similar to those under consideration, and that the 2008 compensatory mitigation rule requires that the district engineer assess the likelihood for ecological success. The commenter said the Corps cannot issue an NWP without assessing mitigation effectiveness and success in the specific context in which the mitigation technique would be used. The commenter concluded that the Corps mitigation analysis fails to contain any discussion of stream functions that would be lost from potential NWP activities and whether compensatory mitigation can replace those functions.

Compensatory mitigation can be an effective means of offsetting losses of aquatic resource functions caused by activities authorized by Department of the Army permits, including NWP 21 activities, if it is thoughtfully planned, implemented, and monitored. Compensatory mitigation projects must be carefully sited, planned, and designed to be ecologically successful in providing stream or wetland functions. Site selection is a critical step in developing and implementing an ecologically successful compensatory mitigation project. With the promulgation of 33 CFR part 332 on April 10, 2008 (73 FR 19594), the Corps Regulatory Program adopted requirements and standards to improve compensatory mitigation practices for offsetting losses of aquatic resource functions. Under the 2008 rule, a watershed approach should be used for establishing compensatory mitigation requirements that will successfully provide aquatic resource functions to offset losses of those functions caused by permitted activities.

The 2008 rule identifies streams as "difficult-to-replace" resources and states that if further avoidance and minimization of stream impacts is not practicable, the required compensatory mitigation should be provided through stream rehabilitation, enhancement, or preservation since those techniques have a greater certainty of success (see 33 CFR 332.3(e)(3)). The preamble to the 2008 rule includes a detailed discussion of the scientific status of stream restoration and concludes that there has been success with stream rehabilitation,

enhancement, and preservation activities (see 73 FR 19596–19598). In accordance with the 2008 rule, the Corps is not relying on stream creation as a mechanism to provide compensatory mitigation for NWP 21 activities. In cases where compensatory mitigation is required for NWP 21 activities, those compensatory mitigation requirements will be specified as activity-specific conditions of NWP 21 authorizations. The required components of a compensatory mitigation plan are specified at 33 CFR 332.4(c)(2)–(14), and the district engineer will evaluate each compensatory mitigation proposal to assess its potential for ecological success, and consider the relevant factors provided in 33 CFR 332.3. The compensatory mitigation plan must be approved by the district engineer and monitoring will be required to assess whether the compensatory mitigation project is meeting its objectives and is successfully meeting its ecological performance standards. The district engineer will review monitoring reports, and if the compensatory mitigation project is not meeting its ecological performance standards, he or she will require the responsible party to identify and implement adaptive management measures to make changes to provide a successful mitigation project. If adaptive management is not likely to result in an ecologically successful compensatory mitigation project that will be sufficient for offsetting lost aquatic resource functions that result from the permitted activity, alternative compensatory mitigation may be required. Financial assurances may also be required to help ensure the success of the required compensatory mitigation.

The 404(b)(1) Guidelines, which address habitat development and restoration as a means of minimizing adverse effects to plant and animal populations (40 CFR 230.75(d)), recommend the use of techniques that have been demonstrated to be effective. That provision is consistent with the section on difficult-to-replace resources (33 CFR 332.3(e)(3)/40 CFR 230.93(e)(3)), which states that rehabilitation, enhancement, and preservation should be used to provide the required compensatory mitigation to offset permitted impacts to such resources because there is greater certainty that such stream rehabilitation, enhancement, and preservation will be ecologically successful and offset those permitted impacts. The decision document for this NWP contains a general discussion of the functions provided by streams, as well as general

citations supporting our position that stream rehabilitation and enhancement can provide stream functions to offset functions lost as a result of permitted activities. It is not necessary for the decision document to provide a comprehensive analysis of the state of stream restoration success. The approach discussed above, and in 33 CFR part 332, is consistent with the Council on Environmental Quality's January 14, 2011, guidance on the "Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact." That guidance advocates the use of adaptive management to take corrective actions if the required mitigation fails to achieve projected environmental outcomes, which is also required by the Corps compensatory mitigation regulations in 33 CFR part 332.

One commenter said that the Corps has failed to analyze whether surface coal mining activities authorized by NWP 21 will cause significant degradation to "special aquatic sites," such as riffle and pool complexes. This commenter asserted that valley fills and mining through streams frequently buries riffle and pool complexes, and these special aquatic sites are protected by stringent restrictions on discharges of fill material into such sites. The commenter also stated that practicable alternatives that do not involve burying riffles and pools are presumed to be available unless clearly demonstrated otherwise and such alternatives are presumed to have less adverse impacts on the aquatic ecosystem. This commenter said the Corps should deny a permit if it lacks sufficient information to determine whether the proposed discharge complies with the Guidelines.

The activities authorized by this NWP comply with the 404(b)(1) Guidelines, even though it authorizes discharges of dredged or fill material into waters of the United States that may be classified as special aquatic sites such as riffle and pool complexes. Each activity authorized by an NWP does not require a project-specific 404(b)(1) Guidelines analysis—that analysis is done before the NWP or any other type of general permit is issued (see 40 CFR 230.7). The 404(b)(1) Guidelines do not prohibit the use of general permits to authorize discharges of dredged or fill material into special aquatic sites. A determination of significant degradation does not focus simply on the loss of a special aquatic site caused by the discharge of dredged or fill material. It requires a broader analysis. The process for determining whether significant degradation occurs consists of applying

the provisions of the 404(b)(1) Guidelines holistically, and assessing the effects of the proposed discharge of pollutants on human health and welfare; aquatic life and wildlife; aquatic ecosystem diversity, productivity, and stability; and recreational, aesthetic, and economic values. For activities authorized by general permits, the evaluation of alternatives in accordance with 40 CFR 230.10(a) does not directly apply (see 40 CFR 230.7(b)(1)). Paragraph (a) of general condition 23, mitigation, requires project proponents to design and construct NWP activities to avoid and minimize adverse effects to the aquatic environment to the maximum extent practicable on the project site.

Several commenters stated that surface coal mines are already heavily regulated under SMCRA, which includes a variety of requirements to protect waters of the United States, so additional requirements are not needed to ensure that adverse effects to the aquatic environment are minimal. Two of these commenters stated NWP 21 should be reissued without change because of SMCRA requirements. One commenter said the authority to authorize stream and wetland impacts caused by mining activities should rest solely with the SMCRA regulatory authority.

There is often more than one Federal law that regulates surface coal mining activities, especially in cases where those activities involve discharges of dredged or fill material into waters of the United States. While most aspects of surface coal mining are regulated under SMCRA, surface coal mining and reclamation activities involving discharges of dredged or fill material into waters of the United States also require permits issued under Section 404 of the Clean Water Act. The statutory and regulatory standards established under SMCRA are different than those established under Section 404 of the Clean Water Act, including section 404(e) which authorizes the Corps to issue general permits. One of the objectives of SMCRA is to ensure that surface coal mining activities are conducted in an environmentally responsible manner and that the land disturbed by mining is adequately reclaimed. One of the objectives of the Clean Water Act is to "restore and maintain the physical, chemical, and biological integrity of the Nation's waters." Under the regulations implementing SMCRA, surface coal mining and reclamation activities must be conducted in a manner that will "minimize the disturbance of the hydrologic balance within the permit

and adjacent areas" and that will "prevent material damage to the hydrologic balance outside the permit area." As part of the SMCRA permitting process, potential changes to the quality and quantity of surface and groundwater are evaluated to ensure that material damage to the hydrologic balance outside the permit area will not occur. Other factors considered under SMCRA include: pre- and post-mining land uses, backfilling and grading activities, disposal of excess spoil, and the protection or replacement of water supplies.

Under Section 404 of the Clean Water Act, the 404(b)(1) Guidelines provide the substantive criteria for evaluating the environmental effects of proposed discharges of dredged or fill material into waters of the United States. The 404(b)(1) Guidelines are not focused on considering effects to water quality and quantity. The 404(b)(1) Guidelines also require examination of the effects that discharges of dredged or fill material will have on physical, chemical, and biological attributes of waters of the United States. The 404(b)(1) Guidelines at 40 CFR part 230 require the Corps to evaluate the effects of discharges of dredged or fill material, including general permits that authorize such discharges, on the applicable criteria listed in subparts C through F. Examples of criteria in those subparts are: Substrate; suspended particulates/turbidity; water; current patterns and water circulation; normal water fluctuations; threatened and endangered species; fish, crustaceans, mollusks, and other aquatic organisms in the food web; other wildlife; wetlands; riffle and pool complexes; municipal and private water supplies; recreational and commercial fisheries; water-related recreation; and aesthetics. The threshold for issuance of general permits such as NWP 21 is a determination that the authorized activities would result in no more than minimal individual or cumulative adverse environmental effects.

There is no corresponding threshold under SMCRA and its implementing regulations, which do not require that permit applications be evaluated in terms of the 404(b)(1) Guidelines. Instead, section 507(b)(11) of SMCRA requires that the permit applicant prepare a determination of the probable hydrologic consequences of the proposed operation with respect to the hydrologic regime and the quantity and quality of water in surface and ground water systems. Section 510(b)(3) of SMCRA requires that the regulatory authority use this determination and other available information to prepare an assessment of the probable

cumulative impact of all anticipated mining in the area on the hydrologic balance. The SMCRA regulatory authority may not issue a permit unless it first finds that the operation has been designed to prevent material damage to the hydrologic balance outside the permit area. While there is some overlap, the thresholds for permit issuance under SMCRA are not the same as the thresholds under Section 404 of the Clean Water Act. Given the different permit issuance thresholds of SMCRA and Section 404 of the Clean Water Act, NWP 21 authorizations cannot only rely on the environmental reviews conducted under SMCRA to satisfy the minimal effects requirement.

Section 404 of the Clean Water Act applies to all discharges of dredged or fill material into waters of the United States, unless those activities qualify for an exemption under Section 404(f) of the Clean Water Act. Section 404(f) does not specifically exempt surface coal mining activities. For those activities that do not qualify for an exemption from the permit requirements of the CWA, the Corps must evaluate applications for Department of the Army permits, including general permits, and either apply the 404(b)(1) Guidelines (if an individual permit is required) or determine whether the proposed activity qualifies for NWP authorization. This NWP provides an efficient means of authorizing discharges of dredged or fill material into waters of the United States that result in minimal individual and cumulative adverse effects on the aquatic environment. Corps districts work with SMCRA regulatory authorities to reduce duplication, but each agency must still ensure that proposed activities comply with their respective statutes and implementing regulations.

Two commenters stated the primary effect of adopting any of the three options proposed for NWP 21 in the February 16, 2011, **Federal Register** notice would be to require proposed surface coal mining activities involving discharges of dredged or fill material into waters of the United States to be evaluated under the individual permit process. This would cause an unnecessary additional delay and expense to mine operators and require the Corps to get additional personnel and funding to process additional individual permit applications in a timely manner. One commenter suggested that NWP 21 should be reissued as it was in 2007, and that regional conditions should be used in Appalachia to ensure those activities result in minimal adverse effects on the aquatic environment. This commenter

said this approach would allow western coal producers to continue their operations without negative consequences.

We acknowledge that reissuing NWP 21 with a 1/2-acre limit, a 300 linear foot limit for the loss of stream bed, and not authorizing discharges of dredged or fill material into waters of the United States to construct valley fills, will result in more surface coal mining activities requiring Clean Water Act Section 404 individual permits. To provide an equitable and less burdensome transition to the new limits to NWP 21, under paragraph (a) NWP 21 continues to authorize surface coal mining activities that were previously authorized under the 2007 NWP 21 without those new limits. Under paragraph (b), the 1/2-acre and 300 linear foot limits, as well as the prohibition against authorizing discharges of dredged or fill material into waters of the United States to construct valley fills, apply to surface coal mining activities that were not authorized by the 2007 NWP 21. Expansions of activities that were previously verified under the 2007 NWP 21 do not qualify for paragraph (a) of NWP 21.

Continuing to authorize surface coal mining activities that were verified under the 2007 NWP 21 will reduce burdens on the regulated public while protecting the aquatic environment in accordance with the requirements of Section 404(e) of the Clean Water Act. These project proponents who received verifications under the 2007 NWP 21 expended substantial resources to obtain their authorizations. If they cannot comply with the new limits imposed on NWP 21 it would impose a significant hardship to require those operators to cease surface coal mining activities in waters of the United States while they apply for individual permits and wait for a decision. We estimate that there are approximately 70 surface coal mining activities across the country that were authorized by the 2007 NWP 21 that may qualify for authorization under paragraph (a) of NWP 21 when it goes into effect on March 19, 2012. To obtain authorization under paragraph (a) of the 2012 NWP 21, these project proponents do not need to submit a pre-construction notification since they already did so under the 2007 NWP 21 and that notification will be on file at the district office. Instead, those project proponents only need submit a letter to the district engineer requesting verification under the 2012 NWP 21. That letter should be sent to the district engineer by February 1, 2013, although that deadline may be extended in writing by the district engineer. This

date allows the district engineer approximately 45 days for review of the letter before the expiration of the one-year period that is allowed for completion of activities authorized under the 2007 NWP 21. Any changes to the previously authorized surface coal mining activity must also be described in that letter, so that the district engineer can determine whether the activity still results in minimal individual and cumulative adverse effects on the aquatic environment and is eligible for authorization under paragraph (a) of NWP 21. The district engineer will review such requests and notify the permittee whether the activity is authorized by the 2012 NWP 21. There will be no agency coordination of these previously authorized NWP 21 activities. Any currently applicable regional conditions and any activity-specific conditions, such as compensatory mitigation requirements, would apply to the NWP authorization. The district engineer may also revise such conditions and requirements if the existing ones are determined not to be adequate to ensure minimal adverse effects. If the permittee does not receive a written verification from the district engineer prior to the expiration of the one-year period provided in 33 CFR 330.6(b), the permittee must cease all activities until such verification is received because that one-year period cannot be extended. The surface coal mine activity must be authorized under the 2012 NWP 21 or another form of Department of the Army authorization to discharge dredged or fill material into waters of the United States after the one-year period ends on March 18, 2013. The district engineer may also extend the February 1, 2013, deadline by notifying the permittee in writing, if he or she needs less than 45 days to make a decision on the 2012 NWP 21 authorization. The Corps encourages operators who received a 2007 NWP 21 verification and plan to operate past March 18, 2013, to submit their letter as soon as possible to allow for uninterrupted NWP 21 permit coverage. Expansions of previously verified NWP 21 activities that result in greater losses of waters of the United States are not authorized under paragraph (a) will require a different form of Department of the Army authorization if they do not qualify for authorization under paragraph (b) of NWP 21. If the surface coal mining activity involving discharges of dredged or fill material into waters of the United States authorized under paragraph (a) cannot be completed by the time the 2012 NWP 21 expires, then the project proponent

will have to obtain an individual permit or regional general permit, if the activity does not qualify for an applicable NWP issued in 2017. The Corps recommends that any projects that will extend beyond March 18, 2017, that do not meet the new limits in NWP 21 apply for an individual permit and allow sufficient time for the Corps to process their application to allow uninterrupted coverage when the new NWP 21 expires in 2017.

The limits added to paragraph (b) of NWP 21 will ensure that this NWP authorizes only those activities that have minimal adverse effects on the aquatic environment, individually and cumulatively. These limits will also result in more new projects needing to obtain individual permits. The Corps has the resources necessary to process those individual permit applications in a timely manner. It is important for coal mine operators to consider the advantages of obtaining individual permits for surface coal mining activities. In accordance with Section 404(e) of the Clean Water Act, general permits, including NWPs, can be issued for a period of no more than five years. Individual permits can be issued for longer periods of time—the expiration date for an individual permit is at the discretion of the district engineer, who will take into account the characteristics of the proposed activity and the amount of time expected to be needed to complete the regulated activities. Therefore, it would often be advantageous for a surface coal mine operator to obtain an individual permit that would authorize discharges of dredged or fill material into waters of the United States for the expected operational timeframe for that particular coal mine. Under NWP 21, no authorization could be issued for a time period of more than five years. If the NWP 21 activity is not completed by the expiration date of the NWP authorization then the project proponent would have to notify the district engineer and obtain another NWP verification.

Nationwide permit NWP 21 pre-construction notifications require substantial resources to evaluate proposed activities and determine whether they result in minimal individual and cumulative adverse effects on the aquatic environment, and whether compensatory mitigation is needed to comply with the minimal adverse environmental effects requirement for general permits. Under the 2007 NWP 21, the project proponent could not proceed until he or she obtained an NWP 21 verification. The substantial amount of review required

for both NWP 21 pre-construction notifications and individual permit applications both involve considerable amounts of resources from the Corps, so we do not expect a significant increase in workload or processing times to occur through the implementation of Option 2 and the modifications we made to that option for the final NWP. In response to the NWP 21 proposal, one commenter said the Corps was attempting to decide on behalf of the United States government how much coal mining should take place, or what scale of mining operations is appropriate. The commenter suggested that the Corps only concern should be the scale of the regulated activity and not the scale of the mining operation. The commenter stated that the Corps evaluation of surface coal mining activities should be focused on impacts to aquatic resources. One commenter said the proposed changes to NWP 21 would have a significant effect on energy supply, since the ability to obtain permits in a timely manner is essential to the production of coal, which provides over 30 percent of America's electric power.

The three options provided in the February 16, 2011, **Federal Register** notice were intended to solicit comment to assist the Corps in identifying an option for the reissuance of NWP 21 that would comply with the statutory and regulatory requirements for general permits. Those options were developed to determine which terms and conditions (if any) should be established to ensure that NWP 21 authorizes only those activities that result in minimal adverse effects on the aquatic environment. The proposal does not affect how much coal mining may take place, nor does it have a significant effect on energy supply, because those surface coal mining activities that do not qualify for NWP 21 authorization may be authorized by individual permits or general permits, if such general permits are available. The Corps review is focused on adverse effects to aquatic resources, as well as other public interest review factors. The limits on the use of NWP 21 are expressed in terms of impacts to the aquatic environment, not the scale of the mining operation. Other aspects of surface coal mining activities are regulated by OSMRE or delegated states under SMCRA.

One commenter said that NWP 21 should not apply to ephemeral waters because they are not jurisdictional waters of the United States. Several commenters stated that NWP 21 encourages operators to design their projects within the scope of the NWP

rather than seek an individual permit, thereby reducing impacts. These commenters said that there may be a net gain of wetland acreages because of reclamation practices at surface coal mines.

Ephemeral streams are waters of the United States if they meet the definition of "waters of the United States" at 33 CFR part 328 and applicable guidance on Clean Water Act jurisdiction, such as the guidance issued in 2008 entitled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*." The NWP 21 issued in 2007 did not have any acreage or linear foot limits, which are the primary tools used to encourage avoidance and minimization to qualify for NWP authorization. Except for those previously verified 2007 NWP 21 activities authorized under paragraph (a), the NWP 21 reissued today has a  $\frac{1}{2}$ -acre limit and a 300-linear foot limit for losses of stream bed, which will be more effective in encouraging project proponents to avoid and minimize losses of waters of the United States to qualify for NWP 21 authorization. We acknowledge that there may be net gains in wetland acreage at some surface coal mining reclamation sites, but we have imposed limits on NWP 21 because of concerns about losses of stream bed and the potential for surface coal mining activities to have more than minimal adverse effects on the aquatic environment, individually and cumulatively.

One commenter disagreed with the Corps assertion that valley fills substantially alter watersheds and result in adverse impacts on the aquatic environment. This commenter also said that Options 2 and 3 do not allow the Corps the flexibility to increase the amount of stream bed loss above the 300 linear foot limit. The commenter also objected to the proposed interagency coordination for activities resulting in a loss of greater than 1,000 linear feet of intermittent and ephemeral stream beds, and said the Corps has not suggested any reasons for this restrictive provision.

Surface coal mining activities involving the construction of valley fills result in substantial changes to the watersheds of the headwater streams that are primarily impacted by these activities. Those watersheds are changed by the large amounts of land clearing and earthmoving that occur during the mining activity. The construction of the valley fill itself causes changes to the geomorphology of the watershed, which affects water quality and watershed hydrologic

functions, such as water collection, transport, and storage. It is well documented in the scientific literature that changes in land use affect the quantity and quality of streams, wetlands, and other aquatic resources. Examples of such scientific studies are cited in the decision document for this NWP. The 300 linear foot limit for losses of stream bed is generally necessary to ensure that NWP 21 authorizes only those activities that result in minimal adverse effects on the aquatic environment. However, that 300 linear foot limit may be waived by the district engineer if the proposed activity involves filling or excavating intermittent or ephemeral stream beds and the district engineer determines, in writing, that that activity will result in minimal individual and cumulative adverse effects on the aquatic environment. Agency coordination for proposed losses of greater than 300 linear feet of intermittent or ephemeral stream bed is intended to provide information that will assist the district engineer in making his or her minimal adverse effects determination.

One commenter said all Corps divisions and districts should add regional modification alternatives to address differences in aquatic resources functions. This commenter also stated that the proposal provides that the cumulative impact analysis for an NWP 21 is not limited to assessing impacts of the use of the NWP 21 on a national basis and is not limited to activities authorized by NWPs or other Department of Army permits. The commenter acknowledged that the Corps considers activities not regulated by the Corps, including private actions and those resulting in changes in the use of uplands next to or near wetlands, streams, or other aquatic resources during the cumulative effects analysis.

It is at the division engineer's discretion whether to add regional conditions to an NWP to ensure that the NWP authorizes only those activities that have minimal individual and cumulative adverse effects on the aquatic environment. In addition, district engineers may modify NWP authorizations by adding activity-specific conditions to minimize adverse environmental effects. The decision documents comply with the two relevant approaches for conducting cumulative effects analyses: (1) The approach provided in the Council on Environmental Quality's definition of "cumulative impact" provided in their National Environmental Policy Act regulations at 40 CFR 1508.7, and (2) the approach indicated in the 404(b)(1) Guidelines at 40 CFR 230.7(b).

One commenter said the proposed changes to NWP 21 will actually increase impacts because mining operators will need to increase the size of their mining sites to make the individual permit process cost effective. The commenter said operators will no longer be able to afford to mine the smaller reserve areas, so larger mine areas would need to be permitted.

The changes to NWP 21 are appropriate to help ensure that this NWP complies with the statutory requirements for general permits, in that it may only authorize activities that have minimal individual and cumulative adverse environmental effects. Surface coal mining activities involving discharges of dredged or fill material into waters of the United States that do not qualify for NWP authorization will be evaluated as individual permits if applicable regional general permits are not available. Activities authorized by individual permits must comply with the 404(b)(1) Guidelines and undergo an alternatives analysis. A public interest review will also be conducted during the individual permit review process. Mining companies will have to make their own decisions on whether it is economically viable to mine smaller reserve areas, and apply for Department of the Army authorization if proposed activities involve discharges of dredged or fill material into waters of the United States.

One commenter said that if Option 2 is adopted, it should include a definition of valley fill. A commenter stated that the utility of NWP 21 would be substantially reduced because losses of waters of the United States caused by the construction of attendant features such as ponds and roads would be counted towards the 1/2-acre and 300 linear foot limits. Another commenter indicated that the 1/2-acre limit would only authorize small sediment ponds. This commenter stated that small sediment ponds would not be able to effectively service a typical mine site. One commenter requested clarification on whether the amount of stream that is impounded for sediment ponds will be counted as a loss of waters of the United States and whether these ponds will have to be removed upon completion of the mining.

We have added a definition of the term "valley fill" to the text of this NWP. While fewer surface coal mining activities involving discharges of dredged or fill material into waters of the United States would be authorized by NWP 21 when compared to previous issued versions of this NWP, the new terms and conditions of this NWP,

including the 1/2-acre and 300 linear foot limits, are necessary to ensure that this NWP authorizes only those activities that have minimal individual and cumulative adverse effects on the aquatic environment. If the construction of larger sediment ponds does not qualify for NWP 21 authorization, activities may be authorized by individual permits or applicable regional general permits. In the definition of "loss of waters of the United States" the loss of stream bed is determined by the amount of linear feet of stream bed that is filled or excavated. As to whether sediment ponds would have to be removed upon completion of the mining operation, that would be a case-specific determination made by the district engineer after taking into account requirements of the SMCRA authority.

One commenter asked how many surface coal mining activities may be authorized each year with NWP 21 if Option 2 is selected. One commenter said the proposed changes to NWP 21 would be costly to small businesses and disagreed with the Corps statement that the revised NWPs will not impose substantially higher costs on small entities than those of existing permits. Another commenter indicated that the proposed changes to NWP 21 would result in more environmental impact statements being required because of the amount of wetlands in their area.

In section 6.2.2 of the decision document for this NWP, we provide estimates of the number of times we predict NWP 21 will be used each year. Under paragraph (b), we estimate that NWP 21 will be used approximately 11 times per year, although more activities may qualify for NWP 21 authorization if project proponents do additional avoidance and minimization to reduce losses of waters of the United States to satisfy the acreage and linear foot limits. As discussed above, we estimate that, across the country, approximately 70 NWP 21 activities verified under the 2007 NWP 21 might be re-verified under paragraph (a) of the 2012 NWP 21. The estimate provided in the decision document was based on an analysis of past use of NWP 21, and it is a rough estimate because NWP 21 did not have an acreage or linear foot limit and we cannot predict how many activities can be modified to comply with the new limits. Therefore, it is difficult to accurately predict how often project proponents will qualify for authorization under the NWP 21 issued today. Since fewer surface coal mining activities are likely to qualify for NWP 21 authorization, and more will require individual permits, we acknowledge

that there will be greater compliance costs for small businesses. In the preamble to the proposal, where we discuss compliance with the Regulatory Flexibility Act, we state that the proposed NWPs would not result in a significant impact on a substantial number of small entities. That statement was made in the context of considering all of the 48 NWPs proposed to be reissued and the two proposed new NWPs. Some NWPs, such as NWP 48, will require fewer pre-construction notifications and other requirements on small entities while other NWPs, such as NWP 21, will have more stringent requirements to satisfy the minimal adverse environmental effects standard and will authorize fewer activities. We do not agree that these changes to NWP 21 will result in significantly more environmental impact statements. The threshold for NWP authorization, as well as for other general permits, is minimal adverse environmental effects. The threshold for preparing an environmental impact statement is that the activity constitutes a major Federal action significantly affecting the quality of the human environment. Since the threshold that triggers the requirement to prepare an environmental impact statement is greater than the minimal adverse environmental effects threshold for NWP activities, activities that were previously authorized by NWP should generally not require an environmental impact statement if they are instead evaluated through the individual permit process. Environmental assessments should suffice to provide National Environmental Policy Act compliance for most, if not all, of those activities. If the adverse effects on the aquatic environment for a proposed NWP activity are determined by the district engineer to be more than minimal individually and cumulatively, then discretionary authority should be exercised and the proposed activity evaluated through the individual permit process.

Many commenters said that it would be more appropriate to establish different NWP terms and conditions for different areas of the United States, because of vast differences in geological, topographical, climatologically and ecological regimes in areas where coal resources are located across the country. One of these commenters recommended focusing on the use of regional conditions to address regional differences in coal mining techniques and issues, instead of modifying NWP 21.

An NWP is developed to authorize specific categories of activities across the country that have minimal

individual and cumulative adverse effects on the aquatic environment and is issued by Corps Headquarters. There must be a national decision document for each NWP, and to issue that NWP, there must be a finding that the NWP will authorize only those activities that have minimal individual and cumulative adverse effects on the aquatic environment. Division and districts prepare supplemental decision documents to explain whether regional conditions are needed to satisfy the minimal adverse effects requirement. Regional conditions are added to an NWP at a division engineer's discretion and Corps Headquarters cannot mandate the adoption of regional conditions. The national decision documents acknowledge that regional conditions approved by division engineers and activity-specific conditions added to NWP authorizations are procedures to be relied upon to satisfy the minimal adverse environmental effects requirement. In those areas of the country where surface coal mining activities result in minimal individual and cumulative adverse effects on the aquatic environment but exceed the limits of NWP 21, division and district engineers may issue regional general permits that have different terms and conditions than NWP 21, including larger acreage or linear foot limits. Those regional general permits are a more appropriate mechanism for considering local geologic, topographic, climatologic, and ecological characteristics.

Some commenters stated that Executive Order 13563, "Improving Regulation and Regulatory Review" asks federal agencies to tailor regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities. These commenters said that adding additional redundant review by Federal agencies violates this Executive Order and threatens energy supplies. One of these commenters said the proposal to reissue NWP 21 with modifications is contrary to the objectives of Executive Order 13563 because it fails to use the best, most innovative and least burdensome tools for achieving regulatory ends and that the proposed limits in NWP 21 are redundant, inconsistent, or overlapping with other regulations.

As explicitly recognized in Executive Order 13563 itself, an Executive Order does not supersede Federal laws, such as the requirements in the Clean Water Act, the Rivers and Harbors Act of 1899, the Endangered Species Act, and the National Historic Preservation Act. Section 404(e) of the Clean Water Act states that general permits (including

NWPs) authorize categories of activities that are similar in nature and result only in minimal individual and cumulative adverse environmental effects. The Corps complied with Section 2 of Executive Order 13563 by seeking public comment on the proposal to reissue NWP 21 with modifications, for a 60-day comment period. The Corps has determined that the changes to NWP 21 are necessary to comply with the requirements of Section 404(e) of the Clean Water Act. We have modified Option 2 by authorizing activities verified under the 2007 NWP 21 (see paragraph (a) of NWP 21), to provide an equitable transition to the new limits in NWP 21 and reduce burdens on the regulated public. The authority for the district engineer to waive the linear foot limit for losses of intermittent and ephemeral streams if the impacts are not more than minimal is also intended to minimize regulatory burden. As discussed earlier in this section, the terms and conditions of NWP 21 are not duplicative with the requirements of other Federal agencies. While surface coal mining activities are more broadly regulated under the Surface Mining Control and Reclamation Act by the Office of Surface Mining Reclamation and Enforcement or approved states, the Corps regulates discharges of dredged or fill material into waters of the United States, and focuses its evaluation on the effects those discharges have on the aquatic environment or its other public interest review factors (see 33 CFR 330.1(d) and (e)(2)). Those activities that do not qualify for NWP authorization may be authorized by other forms of Department of the Army authorization, such as individual permits or regional general permits. The standards the Corps uses to ensure compliance with the Clean Water Act differ from the standards used by the Office of Surface Mining Reclamation and Enforcement or approved states to ensure compliance with the Surface Mining Control and Reclamation Act, and those standards are not redundant.

A commenter disagreed with the Corps statement that the proposed NWPs are not a significant energy action as defined by Executive Order 13211 because of the proposed changes to NWP 21. The commenter said the Corps must prepare a Statement of Energy Effects as required by the Executive Order, including a description of the adverse impacts expected to the production of coal, the nation's primary electrical generation fuel supply. One commenter said that the time frames for evaluating NWP 21 pre-construction notifications should be similar to those

of other NWPS, and NWP 21 should not require the project proponent to wait until he or she receives a written NWP verification even if the 45-day review period has passed.

The changes to NWP 21 are appropriate and help to ensure that the NWP authorizes only those discharges of dredged or fill materials into waters of the United States that have minimal adverse effects on the aquatic environment, individually and cumulatively. Surface coal mining activities that involve discharges of dredged or fill material into waters of the United States that do not qualify for NWP authorization may be authorized by individual permits or, if available, applicable regional general permits, which would still support the production of coal to supply the nation's energy needs. Given the adverse environmental effects associated with surface coal mining activities involving discharges of dredged or fill material into waters of the United States, which are discussed in the decision document for this NWP, we believe it is necessary to retain the existing requirement that the project proponent may not proceed with the NWP 21 activity until after he or she has obtained a written NWP 21 verification. Project proponents are already accustomed to complying with this requirement and plan accordingly.

One commenter suggested establishing a grandfathering period for surface coal mining activities authorized by the NWP 21 issued in 2007, to allow permittees to complete their currently approved mitigation plans without an added burden of updating permits. Another commenter asked how project proponents are expected to transition from the current 2007 NWP 21 to one of the selected options for reissuing NWP 21, if NWP 21 is reissued under either Option 2 or 3.

As discussed above, we have revised NWP 21 to continue the NWP authorization for surface coal mining activities that were verified under the 2007 NWP 21, to provide project proponents until March 18, 2017, to complete those activities under NWP 21. The acreage limits, linear foot limits, and prohibition against discharges of dredged or fill material into waters of the United States to construct valley fills apply to those surface coal mining activities that were not previously authorized by the 2007 NWP 21. We believe this approach for transitioning to the new NWP 21 limits provides both protection to the aquatic environment and is equitable to those members of the regulated public who made substantial

investments in reliance on a previously verified NWP 21 authorization.

One commenter said that a pre-construction notification should be required for all NWP 21 activities, so plans and permit conditions could be reviewed to ensure that contaminated water being generated during these activities is not later reaching open water and impacting state-owned lands. One commenter expressed concern that historic resources impacts are not considered under SMCRA in cases where the program has been delegated to states.

To be authorized by this NWP, the project proponent must submit a pre-construction notification, so that the district engineer can evaluate the proposed activity and ensure that it qualifies for NWP authorization. Activities authorized by this NWP must comply with general condition 20, historic properties. If the proposed activity has the potential to cause effects to historic properties, consultation under Section 106 of the National Historic Preservation Act will be conducted before the district engineer determines whether the activity is authorized by NWP.

This NWP is reissued with the modifications discussed above.

**NWP 22. Removal of Vessels.** There were no changes proposed for this NWP, and no comments were received. This NWP is reissued without change.

**NWP 23. Approved Categorical Exclusions.** There were no changes proposed for this NWP. One commenter requested that this NWP be limited to federal applicants only. One commenter requested that the NWP be modified to allow any agency with categorical exclusions to use this NWP, not just those that have been approved by the Office of the Chief of Engineers. One commenter recommended adding references to requirements to comply with other applicable federal laws, such as Section 106 of the National Historic Preservation Act. One commenter stated that this NWP does not take into consideration the actions that may impact Tribal treaty cultural or natural resources and requested that notification be provided to affected tribes regardless if considered a categorical exclusion.

This NWP applies only to those activities "undertaken, assisted, authorized, regulated, funded or financed, in whole or in part, by another Federal agency or department." In certain instances, another agency, such as a state department of transportation, may legally assume the responsibility for categorical exclusion determinations for a Federal entity. To ensure

compliance with the requirements for general permits, it is necessary for the Office of the Chief of Engineers to review and approve agency categorical exclusions for use with this NWP. In cases where the Federal agency is responsible for compliance with the National Historic Preservation Act, the Endangered Species Act, or other Federal laws, the Corps can accept their compliance, as long as it adequately covers the activity authorized by the NWP. The same principle applies for Tribal treaty natural or cultural resources: If the agency issuing the categorical exclusion that qualifies for NWP 23 authorization has sufficiently addressed the Tribal treaty resources, then the Corps district can accept that as a basis for compliance with general condition 17, tribal rights.

One commenter stated that this NWP authorizes activities that are not similar in nature, and its use does not result in minimal adverse effects on the aquatic environment. One commenter said that the approved categorical exclusions need to be reassessed to ensure that they still meet the minimal adverse environmental effects requirement for general permit activities. One commenter said that pre-construction notification should be required for all NWP 23 activities to ensure adequate interagency coordination. Another commenter said that reporting to the Corps should be required for any activity that affects wetlands, encroaches on a regulatory floodway, affects the water level of a 100-year flood event, or affects waters designated as critical resource waters.

This NWP, along with the Regulatory Guidance Letter listing the approved categorical exclusions, authorizes activities that are similar in nature. The Corps believes that their eligibility for NEPA compliance using a categorical exclusion is an appropriate basis of "similarity" for their authorization under this NWP. Based on the NEPA requirements for use of categorical exclusions, the Corps has determined that these activities will result in minimal individual and cumulative adverse effects on the aquatic environment, and division engineers have the authority to regionally condition this NWP to restrict or prohibit its use if they determine that these activities are resulting in more than minimal adverse environmental effects. We do not agree that the approved categorical exclusions need to be re-evaluated because of the length of time that has passed since they were originally approved. Agencies have an on-going responsibility to review their categorical exclusions and ensure that

the activities they authorize still qualify for this type of NEPA compliance. Division engineers may also regionally condition this NWP to require agency coordination for specific categorical exclusions that have been approved for use with this NWP. We do not agree that reporting or pre-construction notification should be required for all activities that may affect wetlands. Activities that encroach upon regulatory floodways or affect 100-year flood elevations are more appropriately addressed through applicable Federal Emergency Management Agency-approved state or local floodplain management requirements (see general condition 10). General condition 22, designated critical resource waters, requires pre-construction notification for any NWP 23 activity that is proposed in designated critical resource waters and wetlands adjacent to those waters.

The proposed NWP is reissued with no changes.

**NWP 24. Indian Tribe or State Administered Section 404 Programs.**

There were no changes proposed for this NWP, and no comments were received. This NWP is reissued without change.

**NWP 25. Structural Discharges.** We did not propose any changes to this NWP. One commenter stated that concrete should be cured for a full seven days before coming in contact with water. One commenter stated structures constructed by such discharges on state-owned lands may require a "use authorization" from the state.

Specific requirements for the curing of concrete are more appropriately addressed as regional conditions or activity-specific conditions added to an NWP 25 authorization. Project proponents are responsible for obtaining any other federal, state, or local permits that may be required for a particular activity.

The NWP is reissued without change.

**NWP 27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities.** We proposed to modify this NWP by adding "the removal of small dams" to the list of examples of activities authorized by this NWP. We also proposed to remove the phrase "that has not been abandoned" that modifies the term "prior converted cropland." We proposed to change "Notification" provisions (1) and (2) so that certain stream restoration, rehabilitation, and enhancement activities would be subject to the reporting provision instead of requiring pre-construction notification. Lastly, we proposed to modify "Notification" provision (1) by adding the U.S. Forest Service to the list of Federal agencies that can develop stream or wetland

enhancement, restoration, or establishment agreements.

Many commenters supported the addition of removal of small dams to the list of examples of activities authorized by this NWP. One commenter said that if this NWP is modified to authorize the removal of small dams, the NWP should also authorize discharges of dredged or fill material to re-establish appropriate stream channel configurations, with a 1/2-acre limit for the stream channel reconfiguration. Some of these commenters requested clarification as to what constitutes a "small dam." One commenter agreed with the addition of removing small dams but expressed concern regarding potential impacts to water quality when a small dam is removed. One commenter recommended requiring sediment testing before authorizing the removal of small dams.

After further consideration, we have determined that since the NWP 27 issued in 2007 authorized the installation, removal, and maintenance of small water control structures (which clearly includes small dams), it is not necessary to modify this NWP by adding the removal of small dams to the list of examples of activities authorized by NWP 27, so we have not made this proposed change. We agree that the NWP should also authorize the restoration of the stream channel that were affected by the construction of a small water control structure, if that water control structure is to be removed. We do not agree that such activities should be limited to 1/2-acre, since this NWP authorizes only aquatic resource restoration, establishment, and enhancement activities that result in net increases in aquatic resource functions and services. Aquatic resource habitat restoration and enhancement activities involving the removal of small water control structures should be designed and implemented to prevent or minimize the movement of pollutants, including chemical compounds adsorbed to sediments that have accumulated in the impoundment, from the impounded area once the small water control structure is removed. Sediment testing may be required on a case-by-case basis if there are substantive concerns about potential contaminants.

Several commenters suggested that NWP 27 activities be subject to strict technical guidelines and enforceable success criteria commensurate with the scope of the activity being undertaken. A number of commenters expressed concern that some of the activities authorized by NWP 27 may result in a loss of waters rather than a net gain.

One commenter said that aquatic resource restoration, establishment, and enhancement activities should have management plans that include goals and objectives, baseline conditions, effective monitoring requirements, and adaptive management plans. This commenter stated that without this level of documentation, the effectiveness of any restoration, establishment, or enhancement activity cannot be effectively evaluated for success. One commenter recommended adding a requirement for performance bonds to ensure that these activities are monitored and are achieving their goals and objectives.

For those NWP 27 activities that require pre-construction notification, the prospective permittee is required to submit a complete pre-construction notification, with the information listed in paragraph (b) of general condition 31. Activities conducted in accordance with agreements with other Federal or state agencies should be adequately documented to determine whether there will be net increases in aquatic resource functions and services. When Corps districts review the reports required for activities conducted under agency agreements, they will assess whether those activities will satisfy the terms and conditions of this NWP. If a particular activity does not, then the district will notify the project proponent within 30 days of when the report was submitted to the district engineer. This NWP requires authorized activities to result in net increases in aquatic resource functions and services, which will generally add acreage to the nation's aquatic habitat base. Although there may be some NWP 27 activities that result in a decrease in aquatic resource area to increase the functional capacity of those aquatic habitats, such changes are acceptable because it is the ecosystem functions, and the benefits people derive from those functions, that are important to society. To provide better information to assess whether there will be a net increase in aquatic resource functions and services, we have added a provision to the reporting requirement that requires the prospective permittee to provide information on the baseline ecological conditions at the project site, such as a delineation of wetlands, streams, and/or other aquatic habitats. Unless the activities authorized by this NWP are to be used as compensatory mitigation for Department of the Army permits (e.g., mitigation banks or in-lieu fee projects), the project proponent is not required to submit mitigation plans that comply with 33 CFR 332.4. The aquatic resource

restoration, establishment, or enhancement activity should be sufficiently documented to help district engineers decide whether the terms and conditions of this NWP are satisfied. Performance bonds or other types of financial assurances may be required on a case-by-case basis, if such assurances are necessary to provide funding to be used for remediation or adaptive management.

One commenter requested that this NWP authorize the rehabilitation or enhancement of tidal streams, stating that such activities would result in net increases in the functions and services provided by existing tidal aquatic resources and would not be contrary to the provision that prohibits the relocation of tidal waters or the conversion of tidal waters to other aquatic uses. One commenter pointed out that NWP 27 covers a wide range of habitat restoration and enhancement activities and there should be greater flexibility to allow resource managers to plan for sea level rise. This commenter recommended adding the beneficial use of dredged material as a thin layer application to provide sediment to sediment starved marshes, which may provide substrate to maintain those marshes as local sea levels rise. One commenter suggested modifying this NWP by clarifying that it authorizes activities that involve removing or modifying existing drainage ditches and structures, to establish or re-establish wetland or stream hydrology. Another commenter suggested adding the re-establishment of submerged aquatic vegetation or emergent tidal wetlands in areas where those plant communities previously existed. One commenter supported the inclusion of mechanized land clearing to remove non-native invasive species in this NWP.

We agree that the rehabilitation or enhancement of tidal streams should be authorized by this NWP and have modified the first paragraph to include this category of activities. The enhancement of tidal wetlands may be accomplished by minor additions of sediment to facilitate changes in tidal marsh elevation that may successfully track sea level rise. We agree with providing more clarity concerning the types of ditch manipulations that can be used for restoring wetland hydrology and have removed the phrase "and drainage ditches" after "the backfilling of artificial channels" and replaced it with "such as drainage tiles, and the filling, blocking, or reshaping of drainage ditches to restore wetland hydrology" after "the removal of existing drainage structures." We also agree that the re-establishment of

submerged aquatic vegetation or emergent tidal wetlands should be authorized by this NWP, as long as those shallow water habitat and wetland types previously existed in the project area. Such re-establishment activities would not constitute a conversion of tidal waters to other aquatic uses; instead it would be a form of rehabilitation of those habitat types. We have retained the provision authorizing mechanized land clearing to remove non-native, invasive plant species.

One commenter requested that the terms "type" and "natural wetland" be defined in the paragraph that describes the activities that are not authorized by this NWP. Another commenter supported the provision that prohibits the conversion of natural wetlands to another aquatic use and recommended that this prohibition also be applied to the conversion of one type of aquatic habitat to another. One commenter said that the NWP should clearly state that wetlands with documented hydrologic alterations are not "natural" wetlands and that hydrologic restoration of these wetlands is not to be considered a conversion of a natural wetland to another "type" but instead it should be considered as wetland rehabilitation. One commenter stated that a provision should be added to this NWP to clarify that compensatory mitigation is not required for activities authorized by this NWP since they must result in net increases in aquatic resource functions and services.

As indicated by the parenthetical in the first sentence of the referenced paragraph, the term "type" as used for the purposes of this NWP refers to the general category of aquatic resource, such as wetland or stream. We do not believe it would be appropriate to define the term "natural wetland" except to contrast it with constructed wetlands, such as those that are often used to treat wastewater. District engineer have the discretion to determine what constitutes a "natural wetland" for the purposes of this NWP. We have added a sentence to this paragraph to clarify that changes in wetland plant communities that are caused by restoring wetland hydrology are to be considered wetland rehabilitation activities that are authorized by this NWP. Such wetland rehabilitation activities are not to be considered conversions to another aquatic habitat type. We concur that compensatory mitigation should not be required for NWP 27 activities and have added a sentence to the text of the NWP to clearly state this stipulation.

One commenter said that the NWP should prohibit the relocation of

naturally occurring non-tidal aquatic resources. One commenter suggested changing the conversion provision to state that no wetlands may be converted to open water impoundments rather than limiting the prohibition to tidal wetlands. Another commenter stated that while they understand the need for language to clarify that conversion from "streams to wetlands" is not desirable, there are some areas that have been drained or ditched to create water flow away from agricultural land, where there was previously a wetland. This commenter asked whether reestablishing wetlands on the site could be authorized by this NWP. The commenter said that the NWP is too restrictive and has the potential to prohibit activities that may result in aquatic resources that are more appropriately integrated into the landscape.

The relocation of non-tidal waters and wetlands on a project site, including relocation activities that convert open water impoundments to non-tidal wetlands and vice versa, can result in net increases in aquatic resource functions and services when viewed in a watershed context. Therefore, we do not agree that it is appropriate to exclude such activity from coverage under this NWP if it meets all other conditions, including a net increase in resource functions and services. Ditches that were constructed in wetlands to drain those wetlands are not considered streams for the purposes of this provision of the NWP. As discussed earlier, this NWP authorizes the filling, blocking, or reshaping of drainage ditches to restore wetland hydrology.

One commenter asked if the removal of bulkheads, derelict structures, and pilings, can be authorized by this NWP while another suggested that the NWP allow for the temporary use of spat (e.g., larval oysters) collecting devices for the purpose of shellfish restoration.

The removal of structures in navigable waters of the United States is authorized by this NWP if it is a part of an aquatic habitat restoration or enhancement activity. The temporary use of spat devices for oyster habitat restoration is more appropriately authorized by NWP 4.

One commenter said that the provisions concerning shellfish seeding are not clear and asked if the intent of the NWP is to authorize shellfish seeding activities to enhance threatened shellfish populations. This commenter also said that shellfish enhancement activities should be limited to native species. One commenter recommended authorizing shellfish restoration activities without requiring pre-

construction notification when such activities are conducted or approved by a government agency with resource management oversight. One commenter requested we not include shellfish restoration activities in this NWP, because these activities alter existing substrate and benthic habitat and should be reviewed under the individual permit evaluation process. This commenter also recommended imposing a one-acre limit for the placement of scattered shell.

This NWP authorizes shellfish seeding activities, which may help increase shellfish populations in specific waters. Division engineers may regionally condition this NWP to limit shellfish seeding activities to native species. Further, in response to a pre-construction notification or report, a district engineer may exercise discretionary authority and condition a specific NWP authorization to limit it to the seeding of native shellfish species. We do not agree that there should be no pre-construction notification requirement if there is oversight by another government entity with the responsibility for managing shellfish resources. Since these activities occur in navigable waters, the Corps needs to review them on a case-by-case basis to ensure that they result in minimal individual and cumulative adverse effects on the aquatic environment and navigation and provide net increases in aquatic resource functions and services. Shellfish restoration activities should be authorized by this NWP because shellfish provide important ecosystem services in aquatic ecosystems, including the improvement of water quality. In most cases, the changes to benthic habitat are minor when compared to the ecosystem services provided by the shellfish. We also do not agree that there should be a one-acre limit for the placement of shell to construct oyster habitat because larger oyster habitat construction activities can still result in a net increase in aquatic resource functions and services.

One commenter said that stream restoration projects should be limited to 500 linear feet. One commenter stated that the construction of small nesting islands and the alteration of rare or imperiled wetlands should be not be authorized by this NWP. This commenter also suggested acreage limits for categories of activities authorized by this NWP, such as limiting excavation of wetlands to provide shallow water habitat for wildlife to ½-acre in altered wetlands; excavating no more than 1½-acre of wetlands that have been regularly farmed within the past five years or wetlands documented to be

dominated by invasive species; a 3-acre limit for excavation activities; and limiting the placement of fill for the construction of dikes, berms, or water control structures to two acres. This commenter also recommended limiting impoundments to a maximum height of six feet, with a maximum impounded area of no more than five acres during a design flood. This commenter also said that enhancement of hydrology should not be authorized unless a state agency concurs that the wetland has been farmed within the last five years or is dominated by invasive species.

Since this NWP authorizes only those aquatic habitat restoration, establishment, and enhancement activities that result in net increases in aquatic resource functions and services, we do not agree that the recommended limits should be added to this NWP. Division engineers can regionally condition this NWP to restrict or prohibit its use over specific geographic areas or categories of waters. In response to a pre-construction notification, district engineers can add conditions to the NWP authorization to ensure that the NWP authorizes only those activities that result in minimal adverse effects on the aquatic environment.

Two commenters supported the addition of the United States Forest Service as a federal agency that can develop agreements for the restoration, enhancement, or establishment of streams and wetlands. One commenter recommended removing the reversion provision of NWP 27. Another commenter said that the reversion provision should be eliminated or significantly modified because it is inconsistent with other NWPs. Two commenters stated that the reversion of wetlands should not be authorized if the wetlands were being used for compensatory mitigation. One commenter asked how many acres of wetlands could be reverted under this NWP. One commenter asked whether a “USDA Technical Service Provider” includes county soil and water conservation districts.

The reversion provision is necessary for those aquatic resource restoration, enhancement, or establishment activities that are done in accordance with binding agreements, voluntary actions, or permits, where those agreements, actions, or permits allow the project proponent to revert the affected lands to its prior condition. If the reversion provision is removed, it would create a disincentive to do certain aquatic restoration, enhancement, or establishment activities that could provide some aquatic resource functions and services

for a substantial period of time and benefit the watershed. Nationwide permit 27 differs from the other NWPs because of the types of activities it authorizes. As stated in the Note at the end of NWP 27, reversion of an area used as a compensatory mitigation project is not authorized by this NWP. We do not track the acreage of wetland or stream restoration and enhancement activities, or of wetland establishment activities, that were authorized by NWP 27 and might be eligible for reversion. There is no limit on the amount of wetlands that can be reverted under a single authorization, provided all conditions of the NWP are met. County soil and water conservation districts can register with the U.S. Department of Agriculture to be a technical service provider.

One commenter said that pre-construction notifications should include photographs, a description of pre-project site conditions, and a discussion of general aquatic resource functions and services anticipated to be provided by the activity. Another commenter stated that pre-construction notification should be required for all activities.

Paragraph (b) of general condition 31, pre-construction notification, requires prospective permittees to submit documentation that describes the proposed activity, including the anticipated loss of waters of the United States and, if appropriate, sketches that help clarify the project. The pre-construction notification also must include a delineation of wetlands, other special aquatic sites, and other aquatic habitats. We do not agree that pre-construction notification should be required for all activities. The reporting requirements for those activities that do not require pre-construction notification provide sufficient opportunity for district engineers to notify a project proponent if the proposed work does not comply with the terms and conditions of the NWP. We have modified the “Reporting” provision of this NWP to require the permittee to submit information on the baseline ecological conditions at the project site, such as a delineation of wetlands, streams, and/or other aquatic habitats. We have also changed the “Notification” provision of this NWP by replacing the phrase “the activity” with “any activity” to clarify that any activity that does not require reporting requires a pre-construction notification. The last sentence of this NWP has been changed to clarify that appropriate documentation concerning the agreement, voluntary action, or Surface Mining Control and Reclamation Act

permit is to be provided to the district engineer to fulfill the reporting requirement.

One commenter said the NWP should require the use of best management practices to avoid sediment loading of waters especially when mechanized land clearing or work is conducted in waters of the United States. The commenter stated that best management practices, such as floating barriers, should also be used in upland areas to protect downstream water quality. One commenter stated that Tribes should be notified to ensure that NWP 27 activities avoid impacts to tribal treaty natural resources and cultural resources.

General condition 12, soil erosion and sediment controls, requires permittees to implement appropriate soil and erosion and sediment controls during the work. In response to a pre-construction notification, district engineers can add conditions to the NWP authorization to require more specific sediment and erosion controls. Division engineers can impose regional condition on this NWP to require notification of the appropriate Tribe or Tribes if a proposed activity might affect tribal treaty natural resources and cultural resources. General condition 17, Tribal rights, requires that no NWP activity or its operation impair reserved treaty rights, including treaty fishing and hunting rights. Cultural resources are protected through the requirements of general condition 20, historic properties, and general condition 21, discovery of previously unknown remains and artifacts.

This NWP is reissued with the modifications discussed above.

**NWP 28. Modifications of Existing Marinas.** There were no changes proposed for this NWP. Two commenters recommended adding a condition to ensure the modification does not encroach upon additional waters. One commenter suggested adding a condition to require a minimum maneuvering distance for an outside slip to the boundary of the marina's riparian interest area. One commenter stated that modifications for marinas on state-owned aquatic lands should require pre-construction notification.

This NWP clearly states that it does not authorize expansions of existing marinas. Since the NWP does not authorize expansions of existing marinas, it is not necessary to add a condition to provide a minimum maneuvering distance. Concerns about modifications to marinas constructed on state-owned submerged lands are more appropriately addressed through a state authorization process.

This NWP is reissued without change.

**NWP 29. Residential Developments.** We proposed to modify this NWP by changing 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.

One commenter said that this NWP should not be reissued. One commenter suggested revoking this NWP because of the large scale of these projects and associated impacts to waters and said that individual permits should be required for these activities. Two commenters stated that the use of this NWP permit to authorize  $\frac{1}{2}$ -acre losses of waters of the United States would result in more than minimal adverse effects on an individual and cumulative basis. Two commenters said that this NWP should not authorize residential subdivisions, and should be limited to single family homes. Four commenters recommended decreasing the acreage limit for losses of waters of the United States to  $\frac{1}{4}$ -acre. Two commenters suggested increasing the acreage limit to 1 acre. One commenter requested clarification on whether the acreage limits are applied cumulatively when there is any subsequent expansion of a residential development.

We do not agree that this NWP should not be reissued or limited to single family homes. The construction of residential developments, including multiple unit residential developments, may have minimal individual and cumulative adverse effects on the aquatic environment, and is appropriate for NWP authorization if it meets the conditions of this NWP. Provided the limits are met, the effects to waters of the United States are similar whether single family homes or groups of single family homes are constructed as a result of using this NWP to authorize discharges of dredged or fill material into waters of the United States. The  $\frac{1}{2}$ -acre limit, as well as the other terms and conditions of this NWP, is consistent with longstanding limits on this and other NWPs, and is appropriate for ensuring that this NWP authorizes only those activities with minimal adverse effects on the aquatic environment. Division engineers can regionally condition this NWP to reduce the acreage limit or restrict or prohibit its use in specific regions or waters. In response to a pre-construction notification, district engineers may exercise discretionary authority to add conditions to the NWP authorization or require an individual permit. The  $\frac{1}{2}$ -

acre and 300 linear foot limits apply to single and complete projects. If a project proponent requests NWP authorization to conduct additional discharges of dredged or fill material into waters of the United States and modify a previously authorized single and complete residential development project, both the previously authorized losses and the additional losses are applied to the  $\frac{1}{2}$ -acre and/or 300 linear foot limits. If the modification to the residential development is a separate single and complete project with independent utility from the previously authorized residential development, then a separate NWP authorization may be issued. The "Definitions" section includes further clarification regarding single and complete projects.

Several commenters objected to providing district engineers with the authority to waive the 300 linear foot limit for the loss of intermittent and ephemeral stream bed on a case-by-case basis after reviewing a pre-construction notification and determining that the proposed activity results in minimal adverse environmental effects. One commenter said that the waiver provision would result in more than minimal cumulative adverse effects on a watershed basis. Another commenter stated that use of the waiver would authorize the losses of large amounts of headwater streams. A few commenters suggested the waiver provision should be removed from this NWP. Three commenters recommended increasing the linear foot limit for the loss of stream bed to 500 feet. Two commenters supported the clarification that a finding of minimal adverse environmental effects would be required to issue a waiver.

Responses to comments regarding the 300 linear foot limit for losses of stream bed and the waiver provision for the loss of greater than 300 linear feet of intermittent and ephemeral stream beds are discussed in a previous section of this preamble. We are retaining the 300 linear foot limit for stream bed impacts, as well as the ability for district engineers to provide written waivers of the 300 linear foot limit for losses of intermittent and ephemeral stream beds.

One commenter recommended that compensatory mitigation be required for all unavoidable impacts to wetlands authorized under this NWP. Several commenters said that the NWP should require permittees to minimize on-and off-site impacts and avoid flooding, because the general conditions do not adequately address flooding or water quality impacts. Several commenters said that this NWP should not authorize residential subdivisions unless the

project proponents can demonstrate those subdivisions will not cause an increased flood hazard on other properties.

We do not agree that it is necessary to require compensatory mitigation for all activities authorized by this NWP to satisfy the minimal adverse environmental effects requirement for a general permit. For many small losses of waters of the United States authorized by this NWP, it is not practicable to require compensatory mitigation to offset those losses, especially in areas where there are no mitigation bank or in-lieu fee program credits available. The requirements for permittee-responsible mitigation in 33 CFR 332.1 through 332.7 impose substantial documentation and planning requirements that affect the practicability of providing ecologically successful permittee-responsible mitigation, especially for small losses of waters of the United States.

Compensatory mitigation for NWP activities is only necessary in cases where the district engineer makes a project-specific determination that compensatory mitigation is needed to ensure that the activity results in minimal individual and cumulative adverse effects on the aquatic environment (see 33 CFR 330.1(e)(3)). General condition 23, mitigation, requires permittees to avoid and minimize adverse effects to waters of the United States on the project site, to the maximum extent practicable. Concerns about adverse effects on floodplains and floodways are more appropriately addressed by the state and local agencies that have the primary responsibility for floodplain management. General condition 10, fills within 100-year floodplains, requires permittees to comply with applicable Federal Emergency Management Agency-approved state or local floodplain management requirements. Most floodplains are uplands, not waters of the United States, and the Clean Water Act Section 404 permit program cannot be used to manage floodplain impacts, except for discharges of dredged or fill material or other pollutants into wetlands and other jurisdictional waters that are located in floodplains. Residential developments, whether they are single units or multiple-unit subdivisions, must comply with all terms and conditions of this NWP, including the requirement that they result in minimal adverse environmental effects.

One commenter said that this NWP should not authorize activities that result in adverse impacts to state or federally listed threatened or

endangered species or their habitats, or where there are rare or imperiled habitat types. One stated that this NWP should not authorize discharges of dredged or fill material below the ordinary high water mark of any water of the United States or areas of fish habitat. One commenter said that attendant features should be limited to a garage, a driveway no more than 16 feet wide, parking or vehicle turn areas, lawns that are no more than 15 feet from the building pad, septic fields, utilities, deck foundations, and access paths. One commenter suggested modifying this NWP to require culverts and other measures to maintain pre-construction drainage patterns on the site. One commenter said this NWP should require on-site sewage treatment systems.

Compliance with the federal Endangered Species Act is addressed by general condition 18. Compliance with state or local threatened or endangered species laws or ordinances, or state or local requirements to avoid rare or imperiled habitats, is the responsibility of the permittee. Since all activities authorized by this NWP require pre-construction notification, district engineers will review proposed activities that involve discharging dredged or fill material into open waters, including fish habitat, to ensure that those activities result in minimal adverse effects on the aquatic environment. The text of the NWP provides examples of the types of attendant features that may be authorized. Further restrictions on those attendant features may be provided through regional conditions imposed by Division engineers or activity-specific conditions added to an NWP 29 authorization by a District engineer. General condition 9, management of water flows, requires permittees to maintain, to the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters, such as streams, except under certain situations identified in the text of the general condition. Sewage treatment system requirements for residential developments are the primary responsibility of state or local governments.

One commenter requested clarification on whether this NWP can be used to authorize phased development projects. Several commenters suggested limiting this NWP to a single use.

General condition 15, single and complete project, states that the same NWP can only be used once for the same single and complete project. If a particular phase of a phased

development project is a single and complete project with independent utility, a separate NWP 29 authorization can be used to authorize that single and complete non-linear project.

Two commenters said that the NWP should require vegetated buffers. One commenter stated that district engineers have too much discretion regarding buffers and the general condition restricts buffers so that they are not as effective as they could be.

Compensatory mitigation for activities authorized by NWP 29 may be provided through the establishment and maintenance of riparian areas next to open waters. Paragraph (f) of general condition 23 addresses the use of riparian areas as compensatory mitigation, with recommended widths. The recommended widths are based in part on the minimum width necessary for riparian areas to help protect or improve water quality, and in part on the principle that the amount of compensatory mitigation must be roughly proportional to the permitted impacts (see 33 CFR 320.4(r)(2)). Since the NWP has an acreage limit of 1/2-acre, any required compensatory mitigation must be roughly proportional to the authorized loss of waters of the United States.

This NWP is reissued as proposed.

**NWP 30. *Moist Soil Management for Wildlife.*** No changes were proposed for this NWP and no comments were received. This NWP is reissued without change.

**NWP 31. *Maintenance of Existing Flood Control Facilities.*** We proposed to modify this NWP to authorize, in cases where a section 404 and/or section 10 permit would be required, the removal of vegetation from levees associated with a flood control project.

Several commenters supported the proposed modification and said that vegetation removal is a critical component of the maintenance of a flood control project to ensure continued effectiveness and integrity of levees and other flood control facilities. Two commenters objected to the proposed modification. One commenter opposed the removal of vegetation from flood control facilities, stating the vegetation has ecological importance. One commenter said that vegetation removal is not regulated by the Corps. One commenter stated that if the plant species proposed to be removed have cultural and medicinal Native American traditional uses, consultation with the Tribe or another type of permit should be required for the activity.

We have retained the proposed language in this NWP, to authorize the removal of vegetation from a levee,

when that activity involves a discharge of dredged or fill material into waters of the United States or is considered to be work in navigable waters of the United States for the purposes of Section 10 of the Rivers and Harbors Act of 1899. We agree that vegetation removal that does not involve such a discharge does not require a DA permit. Division engineers can regionally condition this NWP to identify plant species that have cultural and medicinal uses by Tribes, and to require government-to-government consultation to address impacts to such species. General condition 17, Tribal rights, protects reserved treaty rights, including reserved water rights and treaty fishing and hunting rights. Natural or cultural tribal trust resource concerns can still be addressed through the NWP decisionmaking process, and would not necessarily result in requiring an individual permit.

Several commenters said that vegetation may strengthen the integrity of levees and stated that individual permits should be required for vegetation removal. One commenter stated that vegetation on levees should be allowed or retained as part of levee management and that the vegetation should be removed only if specific levee maintenance or safety concerns are identified. One commenter stated that not allowing flood control districts to remove vegetation from levees would put them into non-compliance with their permits and with other state and local approvals. One commenter said that the removal of vegetation from a levee should only be authorized after Endangered Species Act consultation has been completed.

The decision on whether vegetation needs to be removed from a levee to maintain its functional and structural integrity is more appropriately made by those entities that are responsible for ensuring the integrity and functional effectiveness of that levee. That decision is not the responsibility of the Corps Regulatory Program or its staff. The NWP is only a means to provide Department of the Army authorization for such activities, if a section 404 and/or section 10 permit is required. If the vegetation removal may affect a listed species under the Endangered Species Act, and a Department of the Army permit is required, the Corps will conduct section 7 consultation in accordance with general condition 18, endangered species, unless another Federal agency has already fulfilled the section 7 requirements, or the project proponent has complied with the Endangered Species Act and received an Endangered Species Act Section 10 permit.

Several commenters said that there should be an acreage limit for vegetation removal. Another commenter recommended imposing a linear foot limit on vegetation removal. One commenter recommended revoking this NWP in California.

Since this NWP authorizes maintenance activities, we do not believe there should be an acreage or linear foot limit on vegetation removal. Division engineers may also add regional conditions to this NWP to impose acreage or linear foot limits on vegetation removal.

One commenter stated that many NWP authorizations are related to the maintenance baseline and the NWP should provide more details about the maintenance baseline approval process. This commenter suggested that the NWP specify: the deadline for completion, the responsible party, the regulating entity that approves the maintenance baseline, etc. One commenter requested clarification on the timeframe for approval of the maintenance baseline.

The current terms and conditions of the NWP provide sufficient details on what is needed to establish the maintenance baseline. Approval of the maintenance baseline is to be made within the 45-day review period, which begins once a complete pre-construction notification is received by the appropriate Corps district office. The pre-construction notification must include a description of the maintenance baseline.

Many commenters expressed concern about the mitigation provision of this NWP, especially the one-time limit for mitigation per facility regardless of the number of times maintenance occurs. These commenters said that limiting compensatory mitigation may result in more than minimal adverse environmental effects, including adverse impacts to floodplains and increased flood risk. These commenters recommended requiring mitigation for each maintenance activity. One commenter stated that vegetation removal should not be authorized because effective compensatory mitigation cannot be provided. One commenter said that certain riparian functions, such as shading, and losses of aesthetic values, cannot be provided through off-site mitigation.

We do not agree that compensatory mitigation should be required for each maintenance activity. On-going maintenance of flood control facilities is necessary to ensure that those projects fulfill their intended purposes. Any compensatory mitigation that was required when the maintenance baseline was established is sufficient to offset

losses of aquatic resource functions. If maintenance is done in a timely manner, there is likely to be little in terms of increases in aquatic resource functions between maintenance activities. The purpose of maintaining these flood control facilities is to reduce flood risk. Riparian functions that increased between maintenance activities do not need to be replaced by imposing compensatory mitigation requirements on this NWP.

Several commenters said that the use of this NWP results in more than minimal individual and cumulative impacts, and may also inhibit comprehensive basin-wide flood risk management planning and restoration approaches.

We do not agree that these maintenance activities cause more than minimal adverse effects on the aquatic environment, on an individual or cumulative basis. This NWP is intended as a tool to support appropriate flood management activities, including comprehensive flood risk management planning and restoration processes, where maintenance of existing flood control structures is required.

One commenter recommended modifying the pre-construction notification provision to require a topographic map identifying the disposal site. One commenter said that the 1996 Water Resources Development Act allows for regional variations in vegetation management on levees.

The NWP already requires the prospective permittee to submit information concerning the location of the dredged material disposal site. There are a variety of maps that could be used to provide that information, and we do not believe it should be restricted to topographic maps. We have modified this NWP to state that all dredged material must be placed in an area that has no waters of the United States or in a separately authorized disposal site, since the disposal of dredged material into non-jurisdictional waters and wetlands, as well as uplands, does not require DA authorization. As stated above, the decision on whether to remove vegetation is the responsibility of the entity charged with managing and maintaining the flood control facility.

This NWP is reissued with the modifications discussed above.

**NWP 32. Completed Enforcement Actions.** There were no changes proposed for this NWP. One commenter recommended adding a condition to the NWP requiring that the state be a party to any lawsuit, or have an opportunity to review the consent or settlement agreement. Another commenter requested coordination with any

affected Tribes prior to administering an enforcement action to ensure that Tribal treaty resources are protected.

This NWP only provides Federal authorization under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act, and it is not appropriate to modify this NWP to require state involvement in these actions. States are often involved as co-regulators in enforcement activities, under various authorities, and this NWP in no way undercuts those authorities. General condition 17, tribal rights, states that no activity or its operation may impair reserved tribal rights.

This NWP is reissued as proposed.

**NWP 33. Temporary Construction, Access, and Dewatering.** We did not propose any changes to this NWP. Several commenters recommended that the Corps define the term “temporary.” One commenter said that “temporary” should be less than two years, another stated that one year should be the limit, and a third commenter suggested 90 days as the limit for what constitutes a temporary structure or fill. Several commenters stated that the NWP should require a specific timeframe and deadline for completion of revegetation activities. Other commenters said that any revegetation should use only native plant species associated with the general habitat type that had existed prior to construction.

The term “temporary” should be determined by district engineers on a case-by-case basis, after considering factors such as the type of project, the waters affected by the activity, the construction techniques and equipment used, etc. In response to a pre-construction notification, district engineers can add conditions to the NWP authorization to impose specific time frames for revegetating affected areas. Activity-specific conditions may also be added to the NWP authorization to specify the plant species to be used at the site.

One commenter asked why the NWP would state that a separate section 10 permit is required if a structure is left in place in navigable waters of the United States after completion of construction, especially if the waterbody is not a section 10 water. This commenter wondered how a “structure” constructed in a non-Section 10 water could be left in place and still qualify as a temporary structure.

In some cases, it may be more environmentally beneficial to leave part of a structure in place in navigable waters of the United States, when complete removal of the structure is expected to result in substantial adverse

environmental effects. For example, a structure may be cut near the ocean bottom, but part of the structure and its foundation left in place, because removing the entire structure and its foundation would result in substantial disturbance of the ocean bottom. Leaving those portions of the original structure and foundation in place requires a permit under Section 10 of the Rivers and Harbors Act of 1899 because it constitutes an obstruction that may alter the course, condition, or capacity of navigable waters of the United States. A structure left in place in a waterbody subject only to section 404 jurisdiction does not require section 10 authorization. Such a structure would not require a section 404 permit unless it meets the definition of fill material (see 33 CFR 323.3(c)).

One commenter asked why NWP 33 activities require pre-construction notification for temporary structures, work, and discharges while these types of activities may be authorized under NWPs 3, 12, 13, and 14 without a pre-construction notification.

While temporary structures, work, and fills are authorized by NWPs 3, 12, 13, and 14, those NWPs have terms and conditions to help ensure that those activities result in minimal adverse effects on the aquatic environment. Since NWP 33 can be used to authorize temporary structures, work, and discharges done in association with a wide variety of other categories of activities, that uncertainty makes it necessary to require pre-construction notification for all activities authorized by NWP 33. Such a requirement allows the Corps to review the temporary and permanent impacts that are likely to occur as a result of the overall activity.

One commenter stated that the NWP should never authorize temporary fills that impact more than 1,000 square feet or discharge more than 25 cubic yards into waters of the U.S., and temporary structures or construction mats shall not impact more than  $\frac{1}{10}$ -acre. One commenter stated that the NWP should require that geotextile fabric be installed prior to placement of fill material, and two commenters suggested that temporary culverts and bridges in streams should be required to match the bankfull width and stream slope. Another commenter stated that all slurry resulting from dewatering operation should be discharged through a filter bag or pumped to a sump located away from wetlands and surface waters and allowed to filter through natural upland vegetation, gravel filters, or other engineered devices for a sufficient distance and/or period of time necessary to remove sediment or suspended

particles. One commenter stated that cofferdams should be required to be maintained in good working order throughout the duration of the project.

We do not agree that there should be acreage, linear foot, or cubic yard limits on this NWP since it authorizes temporary structures, work, or discharges, and all activities require pre-construction notification. In response to a pre-construction notification, district engineers can add activity-specific conditions to the NWP authorization to impose limits or require specific best management practices or specific construction techniques to minimize adverse effects to the aquatic environment where necessary.

We have modified this NWP to state that temporary fill must be entirely removed to an area that has no waters of the United States, since the placement of fill material into non-jurisdictional waters and wetlands, as well as uplands, does not require DA authorization.

The NWP is reissued with the modification discussed above.

**NWP 34. Cranberry Production Activities.** We did not propose any changes to the NWP. One commenter said that this NWP should not authorize losses of wetland functions. Two commenters expressed concern that the 10-acre limit would allow significant losses of wetland acreage and functions and values, if the 10-acre limit is applied only to the five year period the NWP is in effect. These commenters proposed making the 10-acre limit apply to future activities. One commenter suggested limiting the NWP authorization to a single cranberry production unit. One commenter said that this NWP should not be reissued.

This NWP does not authorize discharges of dredged or fill material that would result in a net loss of waters of the United States. While there would be some loss of wetland function as wetlands are converted for cranberry production, the NWP requires wetland acreage to be maintained. There would be no loss of wetland acreage over time due to future activities since the NWP does not authorize discharges of dredged or fill material that would result in permanent losses of wetland acres. This NWP applies to single and complete cranberry production activities, which would be identified by district engineers during the review of pre-construction notifications.

This NWP is reissued without change.

**NWP 35. Maintenance Dredging of Existing Basins.** There were no changes proposed for this NWP. Two commenters recommended adding limits to this NWP. Two commenters

said this NWP should not be used in areas with suspected sediment contamination, especially in areas where there might be contamination from fuel. Another commenter stated the applicant should demonstrate that the sediment is not contaminated. One commenter asked that the term "upland" be clarified to state that it means land located above the ordinary high water mark. One commenter stated that this NWP would have greater utility if it authorized beneficial use of dredged material, such as wetland restoration, enhancement, or establishment activities.

Since this NWP authorizes only maintenance dredging activities in existing marina basins, we do not believe it is necessary to add an acreage limit or other type of quantitative limit. Division engineers can regionally condition this NWP to require notification to the district engineer. This NWP is limited to maintenance dredging in marina basins, access channels to marinas, and boat slips, which are likely to have some degree of contaminated sediment in the substrate because of past and present boat use, especially in larger marinas. Removal of such contaminated sediments, and complying with the requirement in the NWP to deposit the dredged material in an upland site, will help ensure the activity results in minimal adverse effects on the aquatic environment. Defining the term "upland" to mean lands located above an ordinary high water mark would be incorrect. There may be wetlands landward of the ordinary high water mark. We have modified this NWP to state that dredged material must be placed in an area that has no waters of the United States, since the disposal of dredged material into non-jurisdictional waters and wetlands, as well as uplands, does not require DA authorization. The district engineer may issue a separate Department of the Army authorization to a project proponent who wants to use the dredged material to restore, enhance, or establish wetlands.

One commenter stated that precautions should be taken to ensure that dredging equipment does not entrain or kill any Federally-listed species and recommend that preemptive trawling around the dredge head be conducted to capture or relocate state or federally listed species.

General condition 18 addresses compliance with the Endangered Species Act, and section 7 consultation is required for any activity that may affect listed species or is located in designated critical habitat.

This NWP is reissued with the modification discussed above.

**NWP 36. Boat Ramps.** We did not propose any changes to this NWP. One commenter said that boat ramps should not be authorized by NWPs because they cause significant environmental impacts, including impacts to Tribal treaty fishing activities and access. One commenter stated that this NWP should be limited to individual riparian lot owners and not authorize commercial boat ramps. One commenter said that the NWP should require notification to the state agency responsible for managing state-owned submerged lands.

The terms and conditions of this NWP (specifically the limits on fill volume and ramp width) will ensure that the NWP authorizes only those activities that result in minimal adverse effects on the aquatic environment. Division engineers may regionally condition this NWP to restrict or prohibit its use in specific waters or geographic areas if they have concerns that more than minimal individual and cumulative adverse environmental effects may occur. In response to a pre-construction notification, district engineer may add activity-specific conditions to the NWP authorization to satisfy the minimal adverse environmental effects requirement. We do not agree that this NWP should be limited to private land owners. Commercial boat ramps that comply with the terms and conditions of this NWP will also result in minimal adverse environmental effects. The potential for adverse effects is based on the footprint of the ramp, which is limited by the conditions of this NWP, not its ownership. State agencies responsible for managing submerged lands may develop their own procedures for regulating and authorizing the construction of boat ramps on submerged lands. The Corps has neither the authority nor the resources to enforce any state requirements with respect to such lands.

Two commenters recommended reducing the pre-construction notification thresholds for this NWP. One commenter suggested limiting discharges of dredged or fill material to 25 cubic yards, with a maximum boat ramp width of 12 feet. Another commenter said that the quantitative limits for this NWP should not be waived. One commenter stated that the current 50 cubic yard limit is too small and should be increased to authorize larger boat ramps.

The pre-construction notification thresholds are sufficient for ensuring that this NWP authorizes activities with minimal individual and cumulative adverse effects on the aquatic

environment. We have retained the provision authorizing district engineers to issue written waivers to the 50 cubic yard and/or 20 foot width limits, if a proposed activity is determined to result in minimal adverse environmental effects. The waiver provision may be used to authorize larger boat ramps, as long as they are determined by the district engineer to result in minimal adverse environmental effects.

One commenter asked for clarification on what is meant by placement in the upland. One commenter said that these activities may affect historic properties and the activity should not be authorized unless the state concurs that there are no documented resources within the permit area.

We have modified paragraph (d) to clarify that all excavated material must be removed to an area that has no waters of the United States, because some wetlands and waters are not subject to Clean Water Act jurisdiction and section 404 permits are not required to discharge dredged or fill material into those non-jurisdictional wetlands and waters. A separate Department of the Army authorization is required if the project proponent wants to deposit the excavated material into waters of the United States. Activities authorized by this NWP must comply with general condition 20, historic properties, as well as general condition 21, discovery of previously unknown remains and artifacts. District engineers will conduct National Historic Preservation Act Section 106 consultation if they determine the proposed activity has the potential to cause effects to any historic property.

This NWP is reissued as proposed.

**NWP 37. Emergency Watershed Protection and Rehabilitation.** No changes were proposed for this NWP. Two commenters stated that in their region, flood control activities including those authorized by this NWP, are important and suggested reducing the 45-day waiting period for pre-construction notifications to 21 days. Two commenters expressed support for allowing district engineers to waive the pre-construction notification requirements in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. One commenter said that although this NWP is intended to authorize watershed protection and rehabilitation, these activities may result in a net loss of waters and appropriate mitigation should be required.

We do not believe it would be appropriate to reduce the pre-construction notification review period

for this NWP from 45 days to 21 days. The NWP provides flexibility for the emergency watershed protection and rehabilitation activities to proceed immediately if there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The NWP does not allow the district engineer to waive the pre-construction notification requirement in cases where there would be unacceptable hazards to life or significant losses of property or economic hardships. If a project proponent wants to use NWP 37 to authorize an emergency watershed protection and rehabilitation activity, pre-construction notification is required. This is a minimally burdensome requirement that can be complied with quickly which allows the district engineer to verify that there is a genuine emergency. In addition, in response to a pre-construction notification, the district engineer may condition the NWP authorization to require compensatory mitigation to offset losses of aquatic resources and ensure that the adverse effects on the aquatic environment are minimal (see 33 CFR 330.1(e)(3) and general condition 23, mitigation).

The NWP is reissued without change.

**NWP 38. Cleanup of Hazardous and Toxic Waste.** We did not propose any changes for this NWP. One commenter stated the NWP should be revoked because hazardous waste cleanup from aquatic areas has the potential to cause significant adverse environment effects during and after the cleanup activities. This commenter said that these activities require site-specific review and should not be authorized by NWP. Another commenter recommended adding a condition to the NWP to require minimization, to the maximum extent possible, of impacts to waters and wetlands, and require restoration of the affected areas.

The cleanup of hazardous and toxic wastes, if conducted properly, will improve the aquatic environment by removing harmful chemicals and other substances that are likely to degrade the quality of wetlands, streams, and other aquatic resources, as well as the functions they provide. This NWP requires pre-construction notification, which will provide the district engineer the opportunity to review the proposed activity, including available site-specific information, to determine if that activity qualifies for NWP authorization. This NWP authorizes cleanup activities conducted, ordered, or sponsored by other government agencies, which have also reviewed those activities. In some cases these activities need to be

commenced quickly and it could cause additional harm to the aquatic environment if they had to wait for an individual permit to be issued. The district engineer may also add activity-specific conditions to the NWP authorization to require compensatory mitigation, including restoration or rehabilitation of affected aquatic resources (see 33 CFR 330.1(e)(3) and general condition 23, mitigation) to satisfy the minimal adverse environmental effects requirement for general permits.

This NWP is reissued without change.

**NWP 39. Commercial and Institutional Developments.** We proposed to modify this NWP by changing 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.

Two commenters expressed support for the proposed modification. One commenter said that intermittent streams should be removed from the waiver provision so that the 300 linear foot limit could be waived only for losses of ephemeral streams. One commenter recommended removing the waiver provision.

We have retained the provision allowing the 300 linear foot limit to be waived for losses of intermittent stream bed, since such activities may, in some cases, result in minimal adverse effects on the aquatic environment. General comments concerning the 300 linear foot limit to the loss of stream bed are discussed in a separate section of the preamble.

One commenter urged the elimination of the pre-construction notification because that requirement results in delays and increases in cost. One commenter recommended conducting a natural heritage database search if a waiver determination is made that the activity will result in minimal adverse effects.

The pre-construction notification requirement is necessary so that all of these activities are reviewed by district engineers to ensure that those activities result in minimal adverse effects on the aquatic environment. District engineers may add conditions to the NWP authorization to require compensatory mitigation or other measures to comply with the minimal adverse environmental effects requirement established for general permits. District engineers may consider information from state natural heritage databases where appropriate when evaluating a

pre-construction notification involving a proposed waiver of the 300 linear foot limit.

Two commenters suggested increasing the acreage limit from 1/2 to one acre. Another said that acreage limits should be established on a regional or watershed basis, instead of a single national acreage limit. Two commenters suggested increasing the linear foot limit to 500 feet. One commenter stated that the NWP should not authorize activities that are not water dependent.

We believe that both the 1/2-acre limit and the 300 linear foot limit are necessary to ensure that this NWP authorizes activities that result only in minimal individual and cumulative adverse effects on the aquatic environment. Division engineers can regionally condition this NWP to further ensure only minimal adverse effects to the aquatic environment occur in a particular area or region, based on region specific conditions. District engineers can also add specific conditions to an NWP authorization to ensure minimal individual or cumulative adverse effects. The statutory basis for authorizing activities by general permits is that they have minimal adverse effects, individually and cumulatively, not that they be water dependent.

One commenter said that commercial and institutional developments are typically phased developments, are larger in scale than other projects, and should not be authorized by NWP. One commenter said that this NWP should not be reissued because these activities result in more than minimal cumulative adverse effects to wetlands and streams. One commenter suggested requiring compensatory mitigation for all activities authorized by this NWP. Two commenters said that this NWP should include a requirement to establish buffers next to waters of the United States, clarification that the limits apply to the project site and not to multiple applicants, and a provision requiring flood protections. One commenter stated industrial facilities that may be authorized by this NWP cause indirect impacts to water quality that could be significant and suggested not reissuing this NWP.

Phased developments may be authorized by general permits, as long as they comply with all applicable terms and conditions of those general permits. In particular, an NWP may only be used once for each single and complete project. The limits in this NWP, which are consistent with those in many other NWPs, will generally ensure minimal adverse effects. In specific watersheds or other geographic areas where a

district engineer is concerned that the use of NWP 39 may result in more than minimal cumulative adverse effects to the aquatic environment, the division engineer may regionally condition this NWP to restrict or prohibit its use to ensure that the threshold for minimal individual and cumulative adverse effects on the aquatic environment is not exceeded. We do not agree that compensatory mitigation should be required for all activities authorized by this NWP. District engineers will add activity-specific conditions to the NWP authorization to require compensatory mitigation in accordance with general condition 23, mitigation (also see 33 CFR 330.1(e)(3)), where necessary to ensure minimal effects. The establishment and maintenance of riparian areas next to open waters, or buffers next to wetlands, may be required as compensatory mitigation, in accordance with general condition 23, mitigation, and the regulations at 33 CFR part 332. The acreage limits of this NWP apply to single and complete projects, even though a single and complete project may have more than one project proponent. In general, a commercial development project in which a developer prepares a large site and then markets individual lots to individual builders would be considered one single and complete project and the acreage limits would apply to the development as a whole. See the definition of "single and complete non-linear project" for further information. General condition 10, fills in 100-year floodplains, requires permittees to comply with applicable state or local floodplain management requirements that have been approved by the Federal Emergency Management Agency. District engineers will review pre-construction notifications requesting NWP 39 authorization for industrial facilities to ensure that adverse effects to water quality caused by the NWP activity are minimal, individually and cumulatively.

One commenter objected to authorizing the expansion of commercial and institutional developments into waters of the United States, stating that it discourages avoidance and minimization and is contrary to the 404(b)(1) Guidelines. One commenter requested clarification whether this NWP applies to new project construction or existing construction projects so the acreage limits are applied cumulatively for both the original construction and any subsequent expansion of the development. One commenter asked whether certain categories of activities

that were not authorized by the 2007 version of NWP 39, specifically new golf courses, new ski areas, or oil or gas wells, could be expanded through the authorization provided by this NWP. Three commenters suggested eliminating the exclusion for the construction of oil and gas wells and attendant features.

The expansion of commercial and institutional developments into waters of the United States may qualify for NWP authorization, as long as it complies with all applicable terms and conditions of the NWP and results in minimal individual and cumulative adverse effects on the aquatic environment. This NWP complies with the 404(b)(1) Guidelines, especially 40 CFR 230.7, which addresses the issuance of general permits. The acreage limit applies to a single and complete project. The expansion of an existing commercial or institutional development may only be authorized under a separate NWP authorization if it is a separate single and complete project with independent utility. For example, one or more phased components of a commercial or institutional development may have independent utility and may be authorized as separate single and complete projects. The expansion of existing golf courses or ski areas may be authorized by this NWP. We agree that the construction of pads for oil and gas wells is a type of commercial development that would be appropriate for inclusion in this NWP. District engineers may add conditions to NWP 39 authorizations to require the removal of these pads and restoration of the site once oil or gas extraction operations have ceased and the wells will no longer be used.

One commenter said that this NWP could be used to authorize activities associated with wind energy generating structures, solar towers, or overhead utility lines, which have the potential to interfere with Department of Defense's long range surveillance, homeland defense, testing, and training missions. This commenter requested that copies of NWP 39 pre-construction notifications and NWP verification letters for these activities be provided to the Department of Defense Siting Clearinghouse, so that the Department of Defense could have an opportunity to coordinate with the project proponent to ensure that long range surveillance, homeland defense, testing, and training missions are not adversely affected by these activities.

We have added a Note at the end of this NWP to require district engineers to send pre-construction notifications and NWP verification letters to the

Department of Defense Siting Clearinghouse if NWP 39 is proposed to be used, and is used, to authorize the construction of wind energy generating structures, solar towers, or overhead transmission lines. The Department of Defense Siting Clearinghouse is responsible for coordinating with the project proponent and resolving any potential effects on Department of Defense long range surveillance, homeland defense, testing, and training missions.

This permit is reissued with the modification discussed above.

**NWP 40. Agricultural Activities.** We proposed to modify this NWP so the 300 linear foot limit applies to all stream losses, not just drainage ditches constructed in streams. To waive the 300 linear foot limit for losses of intermittent or ephemeral stream bed, the district engineer would have to make a project-specific written determination that the activity will result in minimal adverse effects.

Two commenters support the changes and said the modification would ensure NWP 40 authorizes activities with minimal adverse effects on the aquatic environment. One commenter opposed expanding the 300 linear foot limit to all stream losses, stating that the NWP should not authorize the loss of natural streams. Another commenter recommended removing intermittent streams from the waiver provision to limit it to ephemeral streams. One commenter said that waivers for the loss of greater than 300 linear feet of intermittent and ephemeral streams should not be issued until a natural heritage database search was completed. Two commenters stated that the acreage limit and the ability to waive the 300 linear foot limit do not adequately address cumulative impacts and requested the waiver provision be removed.

Comments concerning the 300 linear foot limits for the loss of stream bed and the waiver process are discussed in a previous section of the preamble. We are adopting the proposed language for the waiver provision. We are retaining the provision allowing the 300 linear foot limit to be waived for losses of ephemeral and intermittent stream bed, since such activities may result in minimal adverse effects on the aquatic environment. District engineers may consider information from state natural heritage databases when evaluating a pre-construction notification involving a proposed waiver of the 300 linear foot limit. We believe that both the 1/2-acre limit and 300 linear foot limit for stream bed losses, along with the division engineer's authority to add regional

conditions to this NWP and the district engineer's authority to add activity-specific conditions to an NWP authorization, will ensure that the NWP authorizes activities with minimal individual and cumulative adverse effects on the aquatic environment. Division engineers may also suspend or revoke this NWP in watersheds or other geographic areas if they find that use of the NWP would result in more than minimal cumulative adverse environmental effects.

One commenter stated the ½-acre limit should be based on farm tract and asserted NWP 40 allows for the incremental fill of agricultural wetlands. One commenter stated that roadside stands should not be considered farm buildings for authorization under this permit. Another commenter recommended farm building pads be limited to areas that have been in existing, ongoing, agricultural production since at least 1980. One commenter remarked concern that this NWP allows fills in waters for non-water dependent uses. Another commenter asserted this NWP should not authorize farm ponds in wetlands.

The ½-acre limit applies to a single and complete project. The district engineer will determine, after considering the specific circumstances for a pre-construction notification, whether the single and complete project should be based on a farm tract, property boundary, or other appropriate geographic area. Road stands may be considered farm buildings for the purposes of this NWP. We do not agree that building pads for farm buildings should be limited to existing agricultural areas, or that they should be treated differently than building pads authorized by NWPs 29 or 39. General permits, including NWPs, may authorize activities that are not water-dependent, as long as the general permit is issued in accordance with the requirements in the 404(b)(1) Guidelines at 40 CFR 230.7.

This NWP is reissued as proposed.

**NWP 41. Reshaping Existing Drainage Ditches.** There were no changes proposed for this NWP. Several commenters requested adding more terms and conditions to this NWP to provide requirements concerning slope stability, conducting a natural heritage database search, limiting the NWP to reshaping no more than one mile of drainage ditch, and placing the excavated material in uplands. One commenter suggested replacing the phrase “for the purpose of improving water quality” with “for the purpose of improving water quality or public safety.” This commenter also said the

NWP should authorize drainage improvements beyond the original as-built capacity. One commenter stated that this NWP should not be exempt from compensatory mitigation requirements even though the activity is designed to improve water quality.

We do not agree that the suggested additional terms and conditions are necessary to ensure that this NWP authorizes ditch reshaping activities that have minimal adverse effects on the aquatic environment. The drainage ditch slope is more appropriately determined on a case-by-case basis. District engineers have the discretion to consult state natural heritage databases while reviewing pre-construction notifications. The authorized activities are intended to improve water quality, so there is no need to impose a one mile limit or require compensatory mitigation. Reshaping a drainage ditch to improve water quality may involve discharging dredged or fill material into jurisdictional waters within the ditch. This NWP was originally issued to encourage activities that would help improve water quality within a watershed, not to provide for public safety. Discharging dredged or fill material into waters of the United States to reshape existing drainage ditches primarily for the purposes of public safety may be authorized by other NWPs, regional general permits, or individual permits.

This NWP is reissued as proposed.

**NWP 42. Recreational Facilities.** We proposed to modify this NWP by changing 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.

Two commenters said that the ½-acre limit of this NWP does not ensure minimal adverse effects, and one of these commenters stated that the 300 linear foot limit for stream bed losses does not ensure minimal adverse effects either. Several commenters supported the proposed waiver provision, since it emphasizes that the appropriate test is that the activity results in minimal adverse effects. One commenter suggested removing intermittent streams from the waiver provision because of the potential for significant impacts to intermittent streams.

The ½-acre limit is the appropriate limit to ensure that the activities authorized by this NWP result in minimal adverse effects on the aquatic environment. This limit has been in place over several permit terms and

multiple NWPs and we are not aware of evidence that it has allowed projects that do not meet the minimal effects requirement to be authorized, nor have commenters provided such evidence. Division engineers may regionally condition this NWP to reduce the acreage limit or revoke the NWP if its use would result in more than minimal individual and cumulative adverse effects on the aquatic environment. The 300 linear foot limit for losses of stream bed is also necessary to ensure minimal adverse environmental effects. The waiver provision is discussed in a separate section of the preamble. We are retaining the 300 linear foot limit for stream bed impacts, as well as the ability for district engineers to provide written waivers of the 300 linear foot limit for losses of intermittent and ephemeral stream beds.

One commenter suggested adding a condition to this NWP to limit fill pathways on public lands to six feet wide, with a maximum length of 200 feet, and require open pile or floating boardwalks/docks by prohibiting the discharges below the ordinary high water mark of inland lakes, streams, or the Great Lakes, or areas that otherwise provide fish habitat functions of any kind.

We do not believe the recommended restrictions are necessary to ensure that the NWP authorizes only those activities that result in minimal adverse effects on the aquatic environment. Division engineers may add regional conditions to this NWP to limit certain activities or require specific construction techniques. Division engineers may also restrict or prohibit the use of this NWP in certain waters to protect important resources, such as fish habitat.

One commenter supports requiring pre-construction notification for all activities authorized by this NWP. One commenter said that the activities authorized by this NWP are not similar in nature. One commenter suggested adding a condition requiring recreational facilities to be integrated into the natural landscape and not substantially change pre-construction grades or deviate from natural landscape contours. One commenter requested clarification as to when an easement will not be required.

We have retained the requirement that all project proponents who want to use this NWP must submit a pre-construction notification. This NWP authorizes a specific category of activities (i.e., recreational facilities) and complies with the “similar in nature” requirement of Section 404(e) of the Clean Water Act. We do not agree that it is necessary to require

recreational facilities to be integrated into the natural landscape and not substantially change pre-construction grades. The 1/2-acre and 300 linear foot limits, as well as the requirement to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable on the project site (see general condition 23, mitigation), help ensure that the NWP authorizes activities that result in minimal adverse effects. Conservation easements or other appropriate long-term protection instruments will only be required, if necessary, for areas that are used to provide compensatory mitigation for activities authorized by this NWP.

This permit is reissued as proposed.

**NWP 43. Stormwater Management Facilities.** We proposed to modify this NWP by adding low impact development stormwater management features to the examples of types of stormwater management facilities that may be authorized by this NWP. We also proposed to modify this NWP by changing 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.

One commenter expressed support for the proposed modifications. One commenter suggested that the acreage limit should be increased from 1/2-acre to one acre to increase the utility and usefulness of this NWP. Several commenters said this NWP should not authorize new stormwater management facilities. One commenter stated that the NWP should only authorize the construction of an outfall structure. A couple of commenters said that this NWP should be changed to clarify that only constructed wetlands may be used to detain, retain, or treat stormwater.

We do not agree that the acreage limit for this NWP should be increased from 1/2-acre to one acre. The 1/2-acre limit is necessary to ensure that this NWP authorizes only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment. The construction of new stormwater management facilities may be authorized by this NWP (if all other conditions are met), because those activities often result in minimal adverse environmental effects and help protect the aquatic environment by preventing or reducing the amount of pollutants that enter streams, coastal waters, and other aquatic habitats. Stormwater management facilities are an important

tool for fulfilling the objective of the Clean Water Act, by protecting and restoring the physical, chemical, and biological integrity of our Nation's waters. The construction of stormwater management facilities may involve discharges of dredged or fill material into jurisdictional wetlands, so it would not be appropriate to limit this NWP to constructed wetlands for the detention, retention, or treatment of stormwater.

We have substantially modified the first paragraph of this NWP to clarify how construction and maintenance activities may be authorized by this NWP, including the application of the waste treatment system exclusion at 33 CFR 328.3(a)(8). Section 328.3(a)(8) states that “[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States. The first half of this paragraph provides examples of the types of stormwater management facilities that may be authorized by this NWP, if the construction of those facilities involves discharges of dredged or fill material into waters of the United States. The second half of this paragraph states that to the extent that a section 404 permit is required, this NWP also authorizes discharges of dredged or fill material into waters of the United States for the maintenance of stormwater management facilities. Therefore, this NWP authorizes maintenance activities involving discharges of dredged or fill material if the stormwater management facility is not eligible for the waste treatment system exclusion. A section 404 permit is not required for a discharge of dredged or fill material into a waste treatment system that qualifies for the waste treatment system exclusion at 33 CFR 328.3(a)(8).

Several commenters supported the addition of low impact development stormwater management features to the examples of activities authorized by this NWP. One commenter said that while the construction of low impact development stormwater management features may need a Department of the Army permit in some circumstances, the maintenance of low impact development stormwater management features does not require a section 404 permit. This commenter also stated that requiring Department of the Army permits for maintenance activities in watersheds that have total maximum daily load requirements would result in needless paperwork without any environmental benefits. One commenter requested an explanation of the value of low impact development stormwater management facilities and examples of those facilities that may be authorized

by this NWP. One commenter expressed concern that areas not subject to Clean Water Act jurisdiction, such as swales and upland areas holding waters only for short periods of time, may be considered to be waters of the United States if they are used for low impact development stormwater management features. Several commenters requested a definition for “low impact development stormwater features” in the definitions section. One commenter asked whether hybrid or combined bank protection and stormwater management techniques are authorized by this NWP or authorized by other NWPs.

We have modified the text of this NWP to clarify that the construction of low impact development integrated management features is authorized by this NWP, if the construction involves discharges of dredged or fill material into waters of the United States. We have also provided examples of the types of low impact development integrated management features that may be authorized by this NWP, such as bioretention facilities (e.g., rain gardens), vegetated filter strips, grassed swales, and infiltration trenches. After these low impact development integrated management features are constructed, they may not be waters of the United States and subsequent maintenance may not require further Department of the Army authorization. The jurisdictional status of these features will be determined by district engineers on a case-by-case basis, after applying the appropriate regulations and guidance. The Corps of Engineers wetland delineation manual and the applicable regional supplement will be used to determine whether a particular feature is a wetland under the definition at 33 CFR 328.3(b). Many low impact development integrated management features may not have wetland hydrology because they are designed to improve water infiltration. By modifying this NWP to make it clear that it can be used to authorize discharges of dredged or fill material to construct low impact development integrated management features, we are providing general permit authorization for activities that will help state and local entities comply with the total daily maximum loads established for a watershed or watershed. We do not believe it is necessary to define the term “low impact development stormwater management features” in the Definitions section of the NWPs because the text of the NWP provides examples of those features. This NWP may authorize some minor bank stabilization associated with the construction of a stormwater

management facility. Bank protection may be authorized by this NWP or another appropriate NWP.

One commenter asked whether this NWP authorizes discharges of dredged or fill material for the construction of new stormwater facilities in intermittent or ephemeral streams that are waters of the United States. One commenter recommended prohibiting the construction of new stormwater management facilities in intermittent streams to avoid impacts to numerous rare and threatened and endangered species. Another commenter said this NWP should only authorize activities in ephemeral streams.

We do not believe it is necessary to limit the construction of new stormwater management facilities to ephemeral streams. District engineers will review pre-construction notifications and determine whether the proposed activities will have minimal adverse effects on intermittent and ephemeral streams. Activities authorized by this NWP must also comply with general condition 18, Endangered Species. State-listed rare species may be further protected through the establishment of regional conditions by division engineers, after a public notice and comment process.

Several commenters objected to allowing the district engineer to waive the 300 foot limit for the loss of intermittent or ephemeral stream bed. Another commenter suggested increasing the linear limit for the loss of stream beds to 500 feet before requiring a waiver, to authorize more activities. Several commenters stated the waiver provision should be removed and losses of waters of the United States should be limited to ½-acre or 300 linear feet of stream bed. Another commenter stated that no waivers should be allowed under any circumstances. One commenter suggested that waivers for losses of intermittent and ephemeral stream beds not be issued until the appropriate natural heritage resources database is consulted to inform the minimal adverse impact determination.

We are retaining the provision allowing district engineers to waive the 300 linear foot limit for the loss of intermittent and ephemeral streams, upon making a written determination that the discharge will result in minimal adverse effects. The 300 linear foot limit should not be increased to 500 linear feet, to ensure that any loss of perennial stream bed results in no more than minimal individual and cumulative adverse effects on the aquatic environment. District engineers may use available information, including state or local natural heritage resources

databases, to help make the minimal adverse effects determination.

Some commenters suggested combining the maintenance component of this NWP with NWP 3 since both include maintenance activities. Another commenter suggested limiting this NWP to authorizing only the maintenance of stormwater management facilities constructed and used for the primary purpose of providing stormwater detention, retention and treatment.

As discussed above, we have modified this NWP to clarify that Clean Water Act Section 404 permits would not be required for maintenance activities (or other discharges of dredged or fill materials) involving stormwater management facilities that qualify for the waste treatment system exclusion at 33 CFR 328.3(a)(8) because these are excluded from the definition of waters of the United States. We do not believe it is necessary to combine maintenance authorized by NWP 43 with the maintenance activities authorized by NWP 3, since NWP 3 authorizes a variety of maintenance activities. Some stormwater management facilities may have purposes or uses other than stormwater detention, retention or treatment, so maintenance should still be authorized by this NWP, if a section 404 permit is required and the activity results in minimal adverse effects on the aquatic environment.

One commenter suggested that if a development project is required to install stormwater management facilities, the entire development should be treated as the “area of potential effects” for the purposes of compliance with Section 106 of the National Historic Preservation Act. One commenter recommended requiring any contaminated materials to be properly handled and disposed of.

The permit area for section 106 compliance will be determined by applying the criteria in Appendix C of 33 CFR part 325, the Corps Regulatory Program’s procedures for the protection of historic properties, as well as the interim guidance issued on April 25, 2005, and January 31, 2007. In general, as is made clear in these regulations and guidance, the Corps does not agree that the area of potential effects for an NWP that is needed for a discharge involving one aspect of a development project necessarily encompasses the entire project, though this may be true in individual cases depending on the facts and circumstances. Compliance with general condition 20, Historic Properties, is required for activities authorized by this NWP. In response to a pre-construction notification, the district engineer may add activity-

specific conditions to the NWP authorization to protect waters of the United States from adverse effects due to contaminated materials.

This NWP is reissued with the modifications discussed above.

**NWP 44, Mining Activities.** We proposed to add the 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 activity will result in minimal adverse effects.

One commenter requested the NWP be revoked due to the large scale of these activities and their impacts on water quality. One commenter said this NWP should only authorize mining activities that have been permitted by state agencies. This commenter also stated that this NWP should not authorize peat mining or in-stream gravel mining. One commenter recommended expanding the categories of applicable waters to include tidal waters, since the term “adjacent” has not been adequately defined.

The terms and conditions of this NWP, including the addition of the 300 linear foot limit for the loss of stream bed, help ensure that the NWP authorizes only those activities that have minimal individual and cumulative adverse effects on the aquatic environment. Division engineers can regionally condition this NWP to restrict or prohibit its use in specific waters or categories of waters, or in particular geographic regions. After reviewing a pre-construction notification, the district engineer may add activity-specific conditions to the NWP authorization to require water quality management measures so that the activity causes only minimal degradation of water quality (see general condition 25, water quality), or he or she may exercise discretionary authority and require an individual permit if it is not possible to reduce the adverse effects so that they are no more than minimal. Division engineers may also regionally condition this NWP to prohibit or restrict peat mining or in-stream gravel mining. We do not agree that the NWP should be expanded to authorize discharges of dredged or fill material into tidal waters, since such activities may result in more than minimal adverse effects on the aquatic environment. The term “adjacent” is defined in the Corps regulations at 33 CFR 328.3(c) and is used to identify wetlands that are waters of the United States by virtue of being adjacent to jurisdictional waters.

Many commenters opposed adding the 300 linear foot limit for the loss of stream bed and stated that the 300 linear foot limit should not apply to smaller tributaries. One commenter recommended increasing the linear foot limit to 500 feet. One commenter said the proposed linear foot limit would have the effect of preventing mining of more than one million tons of mineable reserves. One commenter stated that waivers to the 300 linear foot limit should not be issued without evaluating documented natural heritage resources located in the project area.

As stated above, the 300 linear foot limit is being added to help ensure that the NWP authorizes only those activities that result in minimal adverse effects on the aquatic environment and other applicable public interest review factors. Increasing the linear foot limit for the loss of stream bed to 500 feet increases the likelihood that these mining activities would result in more than minimal adverse effects and therefore not comply with the requirements of Section 404(e) of the Clean Water Act. Mining activities that do not qualify for NWP authorization may be authorized by individual permits or other general permits, such as regional general permits issued by district engineers. District engineers will evaluate appropriate information before waiving the 300 linear foot for losses of intermittent or ephemeral stream bed, which may include state natural heritage resource databases. In areas where district engineers have designated state natural heritage sites as critical resources, compliance with general condition 22, designated critical resource waters will protect those natural heritage sites.

This NWP is reissued as proposed.

**NWP 45. Repair of Uplands Damaged by Discrete Events.** We proposed to modify this NWP to clarify that it does not authorize beach restoration. We also proposed to change the Note, to make it clear that the NWP authorizes discharges of dredged or fill material into waters of the United States associated with the restoration of uplands.

One commenter requested that a 1/2-acre limit be placed on activities authorized under this NWP. One commenter said that authorizing activities under this NWP within channel migration zones can have more than minimal adverse environmental effects and impair stream functions if those activities attempt to force a stream back into previously occupied channels. This commenter said the NWP should be conditioned to prohibit fills that would attempt to move the stream

channel to a previous course within the stream channel migration zone. One commenter suggested modifying this NWP to limit it to reconfiguring the affected area, and not authorize increases to the size of structures or fills. Another commenter supported allowing dredging or excavation in all waters of the United States under this NWP in conjunction with the repair of uplands.

We do not believe that it is necessary to impose a 1/2-acre limit to this NWP, because it limits the repair of uplands to the contours, or ordinary high water mark, that existed before the damage occurred. This NWP also limits dredging to the minimum necessary to restore the damaged uplands, and does not authorize significant alterations to pre-event bottom contours of the waterbody. The minor fills authorized by this NWP are unlikely to substantially alter stream migration. Because this NWP is limited to restoring uplands to pre-event configurations, it does not authorize more than minimal changes in the size of structures or fills that may be constructed on or near uplands.

One commenter said that fills should be limited to the post-event ordinary high water mark. Another commenter made a similar recommendation, but suggested that an exception should be provided in cases where there is a need to respond to immediate threats to a primary structure or to infrastructure.

We do not agree that fills should be limited to the post-event ordinary high water mark. The purpose of this NWP is to authorize discharges of dredged or fill material into waters of the United States for the repair of uplands that have been damaged by discrete events and have minimal adverse effects on the aquatic environment. In some cases, it may not be practicable to limit fills to where the new ordinary high water mark is located, in cases where the discrete event changes the location of the ordinary high water mark.

One commenter said that Tribes should be notified to avoid impacts to Tribal treaty natural resources and cultural resources. Two commenters supported the proposed changes to the Note. One commenter stated that all bank stabilization authorized by this NWP must also satisfy the terms and conditions of NWP 13.

Division engineers can regionally condition this NWP to identify areas where there are Tribal treaty natural and cultural resources, so that consultation can be conducted with those Tribes to ensure that impacts to those resources are appropriately considered during review of pre-construction notifications.

General condition 17, Tribal rights, prohibits the impairment of reserved tribal rights such as reserved water rights and treaty fishing and hunting rights. We have retained the proposed changes to the Note at the end of this NWP. This NWP provides separate authorization for discharges of dredged or fill material that are necessary to repair uplands that have been damaged by discrete events, including the placement of fills necessary to stabilize the bank. Unlike NWP 13, this NWP limits bank stabilization so that it does not exceed the land contours that existed before the damage occurred. Nationwide permit 13 may be used in conjunction with this NWP to authorize bank stabilization for restored uplands in cases where it is not practicable to limit bank stabilization to the pre-event ordinary high water mark or contours.

The NWP is reissued as proposed.

**NWP 46. Discharges in Ditches.** We did not propose any changes to this NWP. Most commenters asked why this permit was needed since upland ditches are not subject to Clean Water Act jurisdiction, and any discharges of dredged or fill material into these ditches are exempt by statute under Section 404(f) of the Clean Water Act. Some commenters noted that the Corps does not assert Clean Water Act jurisdiction over many upland ditches and should not attempt to regulate these ditches by reissuing this NWP.

This NWP authorizes discharges of dredged or fill material into a specific category of ditches (i.e., those non-tidal ditches that meet all four criteria in the first paragraph of the NWP), if those ditches have been determined to be waters of the United States. Section 404(f) of the Clean Water Act only exempts discharges of dredged or fill material for the construction or maintenance of irrigation ditches, or the maintenance of drainage ditches, while this NWP authorizes a different set of activities which would require a Section 404 permit. For example, this NWP authorizes discharges of dredged or fill material that may completely fill the specific category of upland ditch described in the NWP, if that ditch is determined to be a water of the United States after either the Corps or EPA makes a jurisdictional determination.

We recognize that many ditches constructed in uplands are not waters of the United States, but there are some ditches constructed in uplands that may be determined to be waters of the United States after evaluating the specific characteristics of those ditches. The preamble to the Corps November 13, 1986, final rule states the non-tidal drainage and irrigation ditches

excavated on dry land are generally not considered to be waters of the United States, but the Corps and EPA reserve the right on a case-by-case basis to determine whether a particular waterbody is a water of the United States (see 51 FR 41217). Joint guidance issued in December 2008 by EPA and the Corps provides additional clarification as to when ditches are and are not considered to be waters of the United States (see [http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008\\_12\\_3\\_wetlands\\_CWA\\_Jurisdiction\\_Following\\_Rapanos120208.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf); p. 12).

Some commenters said there are impacts to upland ditches that could impair water quality downstream and that compensatory mitigation should be required to minimize adverse effects caused by activities authorized by this NWP. One commenter recommended that district engineers evaluate impacts to natural heritage resources during their review of pre-construction notifications.

For those activities authorized by this NWP, the district engineer will review the pre-construction notification and determine whether the activity results in only minimal adverse effects, including whether compensatory mitigation is necessary to ensure that the authorized activity results in minimal adverse effects on the aquatic environment, including water quality. During the review of a pre-construction notification, the district engineer may consult natural heritage resource databases to more effectively evaluate the potential adverse effects on the aquatic environment.

This NWP is reissued as proposed.

**NWP 47. Pipeline Safety Program Designated Time Sensitive Inspections and Repairs.** We proposed to not reauthorize this NWP because it was issued in 2007 in reliance on the development of the Pipeline Repair and Environmental Guidance System (PREGS) by the Pipeline and Hazardous Materials Safety Administration. Since PREGS was not developed and deployed, and paragraph (h) of the NWP required permittees to use PREGS to submit post-construction reports, no activity could be authorized by NWP 47.

Two commenters asked why this NWP was not proposed to be reissued. Three commenters agreed with allowing the NWP to expire and supported the Corps position that designated time sensitive inspections and repairs can be authorized under NWP 3, Maintenance and NWP 12, Utility Line Activities. One commenter said that there should be an NWP to authorize emergency repair activities to fix natural gas

pipeline leaks, pressure malfunctions, natural disaster damage, terrorist threats, or other events that pose a danger to public safety. One commenter suggested issuing a new NWP to authorize activities licensed by the Federal Energy Regulatory Commission's blanket certificate program.

Existing NWPs, such as NWPs 3 and 12, may be used to authorize discharges of dredged or fill material or structures or work in navigable waters of the United States associated with pipeline inspections and repairs. Some of these activities do not require pre-construction notification to qualify for NWP authorization. There are other approaches available, such as emergency permitting procedures, to allow emergency repair activities that do not qualify for general permit authorization to proceed if there is "an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship" (see 33 CFR 325.2(e)(4)). We do not believe it is necessary to develop a new NWP to authorize activities that are granted blanket certificates by the Federal Energy Regulatory Commission. Many of these activities may be authorized by existing NWPs, such as NWPs 3 and 12.

This NWP is not reissued.

**NWP 48. Commercial Shellfish Aquaculture Activities.** We proposed to modify this NWP by removing the reporting requirement, which applied to all activities that did not require pre-construction notification. We also proposed to add the information previously required in that report to the PCN information requirements. This information includes: A map showing the boundaries of the project area, with latitude and longitude coordinates for each corner of the project area; the name(s) of the cultivated species; and whether canopy predator nets are being used. In addition, we proposed to remove the pre-construction notification requirement for changes in species cultivated, as long as those species had been previously cultivated in the waterbody. We proposed to modify this NWP to authorize activities associated with the expansion of existing commercial shellfish aquaculture operations. We requested comments on modifying this NWP or issuing a new NWP to authorize new commercial shellfish aquaculture activities.

Many commenters said the NWP should be reissued, and recommended many changes. Several commenters stated that this NWP should not be reissued. Most commenters expressed support for removing the reporting

requirements for all activities that did not require pre-construction notification, stating that the paperwork was unnecessary given the current regulation of the industry by other entities, such as state and local governments. One commenter said that the reporting requirements should be maintained to ensure protection of resources. Other commenters suggested that pre-construction notification should be required for all activities. Several commenters said that the NWP should only authorize maintenance activities. One commenter stated that shellfish aquaculture methods are sufficiently different for the species cultivated that issuing a single NWP to authorize these activities is inappropriate. Another commenter said that all commercial shellfish aquaculture activities should be authorized under one NWP. Two commenters stated that the NWP should only authorize harvesting that occurs by hand. One commenter stated that these activities may impact tribal fishery access and fishing rights, and coordination with the affected tribes should be required.

We have reissued this NWP and made several changes. Properly sited, operated, and maintained commercial shellfish aquaculture activities support populations of shellfish that provide important ecological functions and services for coastal waters, and should be authorized by a single NWP. We have removed the reporting requirements for this NWP and substantially reduced the number of pre-construction notification thresholds. Division engineers may regionally condition this NWP to establish additional pre-construction notification thresholds if necessary to ensure that this NWP authorizes only those activities that have minimal adverse effects on the aquatic environment. We do not agree that pre-construction notification should be required for all activities authorized by this NWP, because these activities are regulated by a number of other government agencies, especially at the federal and state government levels. In addition, the discharges of dredged or fill material into waters of the United States authorized by this NWP will result in minimal adverse environmental effects to the environmental criteria established under the Clean Water Act. The shellfish populations supported by the activities authorized by this NWP help support the objective of the Clean Water Act because they improve water quality through the conversion of nutrients into biomass (i.e., shellfish growth) and the

removal of suspended materials through filter feeding. Commercially grown shellfish also provide some habitat functions for the aquatic environment. Impacts to submerged aquatic vegetation will, in many cases, be evaluated through the pre-construction notification review process. For commercial shellfish aquaculture activities in new project areas, adverse effects to submerged aquatic vegetation will be minimal because of the ½-acre limit. Impacts to coastal aquatic habitat and species of concern in those habitats are more appropriately addressed through consultation conducted under the Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act and/or Section 7 of the Endangered Species Act.

We do not agree that the NWP should be limited to hand harvesting activities. We have retained the pre-construction notification requirement for activities involving dredge harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation. General condition 17, tribal rights, states that NWP activities may not impair reserved tribal rights, including treaty fishing and hunting rights. In addition, division engineers may regionally condition this NWP to identify areas where Tribes must be notified of these activities and government-to-government consultation conducted to avoid or minimize impacts to tribal fishery access and fishing rights.

One commenter said that the restoration of indigenous species would be prevented if cultivation was limited to only those species that were previously commercially cultivated. Another commenter recommended requiring pre-construction notification if there were a proposed change in species cultivated that was not part of a state-approved list. Some commenters suggested that pre-construction notification should not be required for changes in harvesting methods. Another commenter said that pre-construction notification should be required if the culture method changed from bottom culture to floating or suspended culture to allow district engineers to evaluate potential navigation issues. One commenter indicated that the NWP should authorize demonstration projects less than one acre in size and another said that non-commercial shellfish aquaculture activities should be authorized, since states, local governments, and non-governmental organizations engage in recreational and commercial aquaculture. One commenter recommended adding a provision that would require the

permittee to implement measures to prevent the spread of aquatic nuisance species, such as prohibiting the transfer of materials used for commercial shellfish aquaculture activities from one project site to another unless appropriate measures have been taken to ensure that those materials are free of aquatic nuisance species. This commenter said a note should be added to the NWP, to prohibit the transfer of equipment used in commercial shellfish aquaculture activities from one waterbody to another waterbody, unless that equipment has been allowed to dry out for a minimum of 90 days or treated in accordance with a regional aquatic nuisance control plan, to prevent the introduction of aquatic nuisance species into the other waterbody.

We have modified this NWP to provide more flexibility in the species cultivated, specifically, to allow the cultivation of nonindigenous species as long as those species have been previously cultivated in the waterbody. We recognize that there has been commercial production of nonindigenous species over many years in certain waterbodies, and activities requiring Department of the Army authorization associated with those commercial operations should be authorized by this NWP. We have retained the prohibitions against cultivating aquatic nuisance species defined by the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990. We have also added Note 2 to the NWP, to reduce the risk of introducing aquatic nuisance species by requiring treatment of materials taken from one waterbody to another in accordance with the applicable regional aquatic nuisance species management plan. Division engineers may add regional conditions to the NWP to make permittees aware of the regional aquatic nuisance species management plan that may be applicable to NWP 48 activities.

We agree that pre-construction notification should not be required for changes in harvesting methods because harvesting methods have temporary impacts and result in minimal adverse effects. A possible exception is dredge harvesting in areas inhabited by submerged aquatic vegetation, which still requires pre-construction notification. We also agree that pre-construction notification should be required if the grower proposes to change from bottom culture to floating or suspended culture in a project area, or if it is an activity in a new project area that requires the installation and use of floating or suspended gear, so that effects to navigation can be evaluated. This NWP authorizes

commercial shellfish aquaculture activities undertaken by states, local governments, and non-governmental organizations. Shellfish seeding activities to improve shellfish populations may be authorized by NWP 27. Small recreational shellfish aquaculture activities may be authorized by other applicable NWPs, such as NWP 4. Other recreational shellfish aquaculture activities may be authorized by regional general permits or individual permits. Restoration aquaculture activities may be authorized by NWP 27.

One commenter stated that the structures and fill activities authorized by the NWP were too broad and should be refined. This commenter recommended prohibiting the long-term use of trays if sediment is compacted and diversity is diminished. One commenter said that structures and fill should be limited to shell spat only, while another commenter stated that shell planting should be allowed on any size parcel without pre-construction notification.

The structures and fills authorized by this NWP are limited to those necessary to conduct commercial shellfish aquaculture activities. We have retained the provision that states that the NWP does not authorize attendant features such as docks, piers, boat ramps, stockpiles or staging areas, or the deposition of shell material back into waters of the United States as waste. We have removed the pre-construction notification threshold for commercial shellfish aquaculture activities that are more than 100 acres in size, because we do not believe it is necessary to require pre-construction notification for existing operations with a valid lease, permit, or other appropriate instrument that has been approved by the appropriate state or local government agency, unless the activity triggers any of the pre-construction notification thresholds.

One commenter requested changes to the definition of shell seeding, citing concerns over the use of potentially environmentally damaging materials. Another commenter supported the use of terms such as "suitable substrate" and "appropriate materials" due to the decreasing availability of shell cultch and new research and development regarding materials. One commenter said that use of the term "submerged aquatic vegetation" allowed for the destruction of eelgrass, because eelgrass is often not inundated with tidal waters. One commenter asked whether traditional oyster culture practices were of special concern.

The definition of the term "shellfish seeding" in the Definitions section of

the NWP provides examples of appropriate materials that may be used for shellfish seeding activities. Through the issuance of regional conditions, division engineers can restrict or prohibit the use of certain materials for shellfish seeding. In response to a pre-construction notification, district engineers may add activity-specific conditions to an NWP authorization to prohibit the use of certain materials for shellfish seeding. Eelgrass is commonly considered to be a species of submerged aquatic vegetation and we intend it to be covered by the provisions regarding submerged aquatic vegetation, regardless of whether it is fully submerged in all tidal conditions or not.

Many commenters requested clarification as to when pre-construction notification is required and what constitutes a project area for the purposes of this NWP. Several commenters recommended that pre-construction notifications should only be required once and not for each subsequent reissuance of this NWP if the commercial shellfish aquaculture operation has not changed. One commenter asked if the lease holder is required to provide pre-construction notifications annually if the lease covers an area greater than 100 acres. One commenter inquired whether pre-construction notification is required when the operator is only working on 30 acres of a 200-acre project site. One commenter said that multiple pre-construction notifications should not be required from a lease holder that has multiple 100-acre leases; instead, one pre-construction notification should cover all those leases.

We have reduced the number of pre-construction notification thresholds in this NWP. The pre-construction notification thresholds in this NWP focus on those activities that should be reviewed by district engineers to: (1) Ensure that floating or suspended aquaculture facilities do not cause more than minimal adverse effects on navigation or, (2) ensure that both cultivating species that have not been previously cultivated in the waterbody and dredge harvesting, tilling, or harrowing in areas of submerged aquatic vegetation do not cause more than minimal adverse effects on the aquatic environment.

To support our objective to be more consistent with state and local agencies that regulate commercial shellfish aquaculture activities, we have redefined project area so that it is based on leases or permits issued by an appropriate state or local government agency that is responsible for allocating subtidal or intertidal lands for

commercial shellfish production. The project area may also be based on rights to conduct shellfish aquaculture that are established by treaty, such as treaties executed between the United States Government and Indian Tribes. Project area may also be identified through an easement, lease, deed, or contract which establishes an enforceable property interest to conduct aquaculture activities on subtidal or intertidal lands.

We have removed the pre-construction notification requirement for relocating existing operations into portions of the project area not previously used for aquaculture activities, since the permit or lease issued by the state or local government agency has already authorized that area for use in commercial shellfish aquaculture. There is no need to address expansions in this NWP if the proposed expansions are within the project area authorized by the state or local government lease or other appropriate instrument. For example, pre-construction notification is not required if an operator who is only working on 30 acres of a 200-acre project area decides to conduct operations beyond those 30 acres within the 200 acre project area.

We have removed the pre-construction notification threshold for project areas greater than 100 acres. Since we have limited the pre-construction notification thresholds to focus on activities that may adversely affect submerged aquatic vegetation and changes in operations that may adversely affect navigation or involve species not previously cultivated in the waterbody, most on-going activities will not require pre-construction notification, thereby substantially decreasing the paperwork burden on current commercial shellfish aquaculture operators. The lease holder is not required to provide a pre-construction notification annually no matter what the size of the project area as long as the lease holder has a valid lease, permit, or other appropriate instrument that has been approved by the appropriate state or local government agency for the project area, and none of the pre-construction notification thresholds are triggered. For example, pre-construction notification is not required if the lease holder is only working within an existing authorized 200-acre project area no matter how much or little of that area is cultivated. However, if the lease holder proposes to cultivate a species of oyster in the 200-acre project area not currently present in the waterbody, pre-construction notification would be required. The activities also do not require pre-

construction notification unless the activities involve dredge harvesting, tilling, or harrowing in areas of submerged aquatic vegetation. If the lease holder's operations within the 200-acre project area change from one on-bottom technique to another on-bottom technique, pre-construction notification is not required. However, if the operations are proposed to change from an on-bottom culture method to a floating or suspended culture method, pre-construction notification is required. Lastly, if an operator obtains a lease for a new project area and wishes to conduct any commercial shellfish aquaculture activities in the new project area, pre-construction notification is required.

One commenter said that requiring pre-construction notification for aquaculture relocation and expansion is unnecessary if the area is already leased but transferred to another owner. Another commenter recommended that any NWP authorizations should still be valid when the lease is transferred to another operator and use has not changed. One commenter stated that pre-construction notification should not be required for expansions into newly leased areas since the site conditions are usually the same.

Pre-construction notification is not required for expansions of commercial shellfish activities as long as the expansion occurs within the project area specified by a permit, lease, or other instrument issued by the appropriate state or local agency, and as long as none of the pre-construction notification thresholds are triggered. This would apply to an activity in a new location within the project area, or to an activity that would utilize a larger acreage of the project area, as long as none of those activities require pre-construction notification. If an activity is proposed by an operator in a new project area, however, pre-construction notification is required. An NWP verification can be transferred to a new project proponent, if he or she has obtained an interest in the subtidal or intertidal lands, provided appropriate procedures are followed for the transfer of the NWP verification (see general condition 29, transfer of nationwide permit verifications).

One commenter asked whether or not an NWP verification can be issued prior to a state issuing a lease. Another commenter said that NWP 48 should be delegated to the states who issue leases to reduce duplicative paperwork. One commenter stated that pre-construction notification should not be required when a state already evaluates impacts to submerged aquatic vegetation prior to

granting leases. Another commenter said that certain states do not issue leases in areas with submerged aquatic vegetation, so it is not necessary for the Corps to address that issue.

The district engineer may issue an NWP verification before the state makes its decision on a lease application. It is necessary to respond to a complete pre-construction notification within 45 days to retain the authority to add activity-specific conditions, which would ensure that the NWP activity results in minimal adverse effects on the aquatic environment. Since there is not consistent regulation of commercial shellfish aquaculture activities among all of the states, we do not agree that certain Federal interests, such as navigation and impacts to special aquatic sites, should be delegated to the states. In evaluating a pre-construction notification triggered by potential impacts to submerged aquatic vegetation, the district engineer would consider any evaluation of such impacts that had been previously conducted by the state if this is submitted with the PCN.

Many commenters expressed concerns regarding impacts to species protected under the Endangered Species Act, designated critical habitat, and essential fish habitat. One commenter asked if compliance with the Endangered Species Act was required for both existing and new activities. Another recommended that a detailed eelgrass, macroalgae, and forage fish survey should be required for each pre-construction notification. One commenter stated that NWP authorization should not be granted in areas adjacent to forage fish or critical habitat.

Activities authorized by this NWP must comply with general condition 18, endangered species. Any new or existing activity that involves discharges of dredged or fill material or structures or work in navigable waters of the United States that might affect listed species or designated critical habitat require pre-construction notification to the district engineer, so that Section 7 consultation can be conducted. We do not agree that pre-construction notifications should include surveys for eelgrass, microalgae, or forage fishes. The district engineer may request additional information from the project sponsor if needed to conduct Section 7 consultation. An activity may be authorized in critical habitat if a section 7 biological opinion is issued and impacts to critical habitat are authorized.

One commenter recommended that the Corps work closely with the

National Oceanic and Atmospheric Administration to streamline the review and approval of aquaculture projects. Some commenters said that the commercial shellfish aquaculture industry is not sufficiently regulated at the local, state, or federal level. One commenter said that enforceable conditions need to be added to NWP 48 authorizations to protect the aquatic environment. One commenter recommended implementing a regional ecosystem-based management approach.

We have worked closely with the National Oceanic and Atmospheric Administration and other Federal agencies to develop this NWP, and we disagree that there is not already sufficient government oversight of these activities at the various levels of government. In response to a pre-construction notification, the district engineer may add activity-specific conditions to the NWP authorization to ensure that the authorized activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. A regional ecosystem-based management approach is more appropriately undertaken by Corps districts and interested Federal, State, and local government agencies, not at the national level.

Many commenters expressed concern regarding the environmental impacts associated with expansions of commercial shellfish aquaculture activities and for new activities. One commenter said that expansion proposals should not be reviewed as restoration activities since non-native species are a serious threat. Several commenters stated that the environmental benefits do not offset the environmental impacts, introduction of invasive species, impacts to native species such as flatfish and other sandy bottom species, reduction of species diversity, elimination of native animal and plant species, harassment and destruction of migrating birds, and the introduction of plastics. Other commenters expressed concern regarding impacts from geoduck cultivation and harvesting on the environment as well as on wild geoduck populations, and the cultivation and harvesting of other non-native species. Two commenters stated that geoduck cultivation and harvesting has only minimal impacts.

When properly sited, operated, and maintained, commercial shellfish aquaculture activities generally result in minimal adverse effects on the aquatic environment and in many cases provide environmental benefits by improving water quality and wildlife habitat, and providing nutrient cycling functions.

These activities are subjected to an extensive amount of regulation at the Federal and state government levels, and often the local government level. The introduction of invasive species can occur through many mechanisms, and the types of species approved for commercial aquaculture activities are regulated. This NWP does not authorize discharges of dredged or fill material or structures or work in navigable waters of the United States associated with the cultivation of nonindigenous species that have not been previously cultivated in the waterbody or the cultivation of aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990. Furthermore, division engineers may add regional conditions to the NWP to require permittees to use specific practices that will prevent the spread of aquatic nuisance species. Such measures may vary, depending on the species of concern and which techniques would be the most effective means to prevent the spread of such species. Adverse effects that may result from geoduck cultivation are more appropriately addressed by Corps districts, since this activity is limited in geographic scope. Division engineers may regionally condition this NWP to restrict or prohibit its use to authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States associated with geoduck production.

Several commenters stated that the expansion of commercial shellfish aquaculture activities will result in more than minimal cumulative adverse effects and should not be authorized by NWP. One commenter said that all activities authorized by this NWP should require reporting to assess cumulative effects. Another commenter suggested that cumulative effects on water quality should be evaluated for water bodies with multiple aquaculture facilities.

As stated above, commercial shellfish aquaculture activities provide habitat, water quality, and nutrient cycling functions and when properly sited, operated, and maintained are unlikely to result in more than minimal cumulative adverse effects on the aquatic environment. Division engineers may restrict or prohibit use of this NWP in geographic regions or specific waterbodies where more than minimal cumulative adverse effects may occur.

One commenter stated that shellfish aquaculture activities have economic impacts that were not sufficiently addressed in the draft decision documents. For example, county and

state health agencies are required to regulate water quality, which costs taxpayer money. This commenter said that changes to aesthetics associated with expansion of these activities, such as noise, odor, and viewshed impacts should also be considered. Impacts to recreational uses of the affected waterbodies could occur if expansions greater than 100 acres in size are authorized. This commenter also said that new and expanded operations should not be proposed in national parks or historic monuments, but existing operations should be allowed to continue. The commenter also stated that any projects in river delta regions should be carefully evaluated due to the sensitive nature of these brackish environments.

The draft decision documents briefly discuss economics as one of the public interest review factors that are considered before the Corps issues a permit, including a general permit. Shellfish aquaculture activities, in general, help improve water quality because many of the commercially cultivated species are filter feeders that remove nutrients and suspended materials from the water column. By removing nutrients, eutrophication and similar water quality problems are lessened. Water quality benefits provided by commercially grown shellfish help reduce costs of remediating local water quality problems. Commercial shellfish aquaculture activities have minimal adverse effects to aesthetics, and are likely to result in little change in local baseline levels of noise, odor, or views when compared to other waterfront uses in coastal residential areas, such as private and commercial boats, as well as the piers, wharves, marinas, and anchorage or mooring areas where those vessels are kept. Coastal areas are used by a wide variety of people. Effects on recreational uses of the waterbody should also be considered during the review of specific commercial shellfish aquaculture activities. Division engineers may regionally condition this NWP to restrict or prohibit its use to authorize new project areas and/or new activities in existing project areas in national parks or in the vicinity of historic monuments. The protection of waters near river deltas or other categories of waters is more appropriately accomplished through regional conditions imposed by division engineers.

One commenter stated that because commercial shellfish aquaculture may be limited by farm runoff, increasing production could require farmland to cease in operation. Another commenter

stated that shellfish farming is a good gauge of water quality in an area since poor water quality necessitates closure of shellfish farms. In contrast, another commenter said the potential for aquaculture operations to harvest continuously as farm size increased would result in permanently suspended particulates and increased turbidity which would damage ecosystems.

Changes in farming operations that may be related to commercial shellfish aquaculture activities in nearby waters is outside of the Corps regulatory authority. Such issues are more appropriately addressed by state or local governments, who have the primary responsibility for land use decisions. We recognize that commercial shellfish aquaculture can help improve water quality. Harvesting operations may increase turbidity, but we believe such impacts are temporary and minor.

We received many comments in response to our proposal to consider issuing a new NWP or modifying NWP 48 to authorize new commercial shellfish aquaculture activities. Many commenters supported modifying NWP 48 to authorize new activities, and suggested terms and conditions. One commenter recommended limiting new activities to ten acres or less. One commenter stated that there should be no limits on new activities because shellfish aquaculture has only minimal, short-term adverse environmental impacts, and the shellfish themselves provide valuable ecological services. Two commenters stated that all new shellfish aquaculture activities except floating culture should be authorized under the NWP, because floating facilities have potential to impact navigation. One commenter said limitations on new activities should be imposed on NWP 48 and reconsidered when the proposal to reissue the NWPs is developed in 2016. Other commenters said that new activities should not be authorized by NWP because of their environmental impacts. Another commenter stated that new activities should not be authorized by NWP unless bottom culture methods are used (except for grow-out bags), harvesting is done by hand, and only native species are cultivated. One commenter stated that baseline habitat assessments should be provided and no operations should occur within 180 feet of marine vegetation, eelgrass, or sand dollar beds.

We are modifying NWP 48 to authorize commercial shellfish aquaculture activities in new project areas, provided the project proponent obtains a valid authorization (e.g., a lease or permit from the appropriate state or local government agency

responsible for granting such leases or permits) and the activity will not directly affect more than 1/2-acre of submerged aquatic vegetation beds. Pre-construction notification is required for all commercial shellfish aquaculture activities in new project areas. Pre-construction notification is also required for activities in a project area if they involve dredge harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation or if the activities involve the change from bottom culture to floating or suspended culture in order to assess potential impacts to navigation. In addition, general condition 14, proper maintenance, requires the permittee to properly maintain any authorized structure or fill. Therefore, any authorized commercial shellfish aquaculture activity and its associated equipment shall be properly maintained so as to not pose a hazard to navigation. The pre-construction notification thresholds will provide an opportunity for district engineers to evaluate the potential adverse effects to navigation and vegetated shallows, conservation, and other applicable public interest review factors, and ensure that those adverse effects are minimal. We agree that commercial shellfish aquaculture activities can provide important functions and services to the aquatic environment and should be authorized by NWP, with appropriate notification thresholds and limits. Division engineers may regionally condition this NWP to restrict or prohibit its use in specific waters or geographic areas, if there are concerns that these activities may have more than minimal adverse effects on certain species or specific types of aquatic resources.

This NWP is reissued with the modifications discussed above.

**NWP 49. Coal Remining Activities.** We proposed to clarify how the 40 percent of newly mined area is determined. We also proposed to modify the pre-construction notification provision to require the prospective permittee to submit documentation describing how the overall mine plan will result in a net increase in aquatic resource functions.

Several commenters supported the reissuance of NWP 49 and said no restrictions should be imposed because remining permits are one of the most significant tools to alleviate the environmental effects of past mining activities. Many commenters said this NWP should not be reissued. Some of these commenters stated that these activities result in more than minimal cumulative adverse effects. Many commenters objected to the lack of

limits for filling stream channels and said this NWP should not authorize the construction of valley fills or refuse fills. Other commenters stated that the functional increase associated with remining will still be insufficient to offset adverse effects of filling stream beds and that stream mitigation will not effectively replace lost stream functions.

We believe authorizing remining of an unreclaimed site and requiring actions to restore unreclaimed areas is one of the most effective ways to reverse degraded water quality in a watershed. Therefore, we have not imposed any new limits or restrictions on this NWP. All activities authorized by this NWP must result in net increases in aquatic resource functions, which will help manage cumulative effects on a watershed basis. Cumulative effects assessments have revealed the reduction in acid mine drainage and/or sedimentation in downstream segments of stream channels has resulted in functional improvements in many watersheds. The states of Ohio, Pennsylvania, Virginia, and West Virginia frequently use remining activities to reduce acid mine drainage and sedimentation and have data to demonstrate these improvements.

We do not believe this permit should have linear foot or acreage limits, since this NWP authorizes discharges of dredged or fill material into waters of the United States to reclaim previously mined sites that were unreclaimed, abandoned, forfeited, and typically exhibit poor water quality and present safety hazards. These unreclaimed mines may have unreclaimed highwalls, unvegetated mine spoil, disconnected stream segments, and/or pit impoundments. We, as well as other state and federal agencies, recognize that remining and reclaiming these areas is one of the most successful means for improving water quality, because these activities reduce sedimentation and acid mine drainage. Due to advances in mining technology and equipment, it is now economically viable to remove coal from these unreclaimed and abandoned mine sites. These sites can be combined with adjacent unmined areas to develop a project that is economically viable. In many cases the net result of combining remining of a previously mined site with new surface coal mining activities in adjacent areas is to facilitate reclamation of the older mine site and reduce acid mine drainage and sediment from the older mine site to downstream stream segments. Furthermore, this NWP provides an incentive to remin degraded areas, similar to the 1987 Rahall Amendments to the Clean Water Act, which enables mine operators to

apply for the U.S. Environmental Protection Agency's modified effluent limits developed specifically for remining projects.

Project proponents who want to use this NWP must submit pre-construction notifications. The pre-construction notification describes how the overall mining plan will result in a net increase in aquatic resource functions. If there is an appropriate functional assessment protocol available for the types of aquatic resources in that geographic area, project proponents are encouraged to use that functional assessment protocol to demonstrate how the activity will result in a net increase in aquatic resource functions. The description of the proposed project required by paragraph (b)(3) of general condition 31 should describe the restoration that will take place on the project site. District engineers may add activity-specific conditions to this NWP to require more detailed restoration plans prior to discharging dredged or fill material into waters of the United States, as well as monitoring plans that will be used to assess whether the remining and associated reclamation activities are resulting in net increases in aquatic resource functions. Supplemental compensatory mitigation may be required in some instances, such as the implementation of mitigation projects near the project site, to remove or reduce causes of aquatic resource impairment and ensure that the overall activity not only results in minimal individual and cumulative adverse effects on the aquatic environment but in a net increase in aquatic resource functions, as required by this NWP.

Several commenters indicated the general public should have the right to comment on the proposal before the district engineer issues the NWP verification. One commenter said all activities associated with remining should require individual permits and another commenter objected to combining unmined lands required for restoration with previously mined lands because that would categorize unmined land as unreclaimed land, and result in additional adverse environmental effects. One commenter stated that slurry impoundments should not be authorized by this NWP.

We believe these activities are appropriate for general permit authorization and should not require a public notice and comment process. District engineers may assert discretionary authority and require an individual permit for proposed activities if they believe those activities will result in more than minimal adverse effects on the aquatic

environment. It is appropriate to authorize discharges of dredged or fill material into waters of the United States for some new mining activities, to provide an incentive to restore unreclaimed mine lands, and provide net increases in aquatic resource functions. Impacts to the newly mined area would not be categorized as remining. Adverse effects to waters of the United States associated with the new mining would be subject to the general condition 23, mitigation, and the district engineer may add conditions to the NWP authorization to require mitigation located near the project site or out-of-kind mitigation to compensate for losses of aquatic resource functions. Typical surface coal mining projects, including remining, do not include slurry impoundments, as these impoundments are typically associated with the wastewater resulting from coal processing plants. This NWP does not authorize the construction of coal processing plants.

Many commenters said the Corps is making the review process associated with NWP 49 more onerous, which will decrease the utility of the NWP, and should focus on the environmental benefits that can be realized from this nationwide permit.

The proposed changes to this NWP, which we are adopting, do not make it more difficult to use NWP 49. The requirement to provide information with the pre-construction notification to explain how the overall activity will result in net increases in aquatic resource functions is necessary to ensure compliance with the terms and conditions of the NWP. Clarification of how to apply the 40 percent provision to determine how much new area could be mined will provide consistency in implementation. For example, a site may be proposed to be remined under this NWP. If 30 acres of the site has been previously mined and is proposed to be remined, and 30 acres of the site is unmined and is necessary to make it economically feasible to reclaim the remined area, then 40% of the combined acreage of the remined and reclaimed areas, or 40% of 60 acres which equals 24 acres, can be newly mined. In another example, if you have a 1,000-acre site, and 600 acres are affected by previously unreclaimed mining activities and 200 acres are needed to reclaim the 600 acres, then 40% of 800 acres (the summation of the previously unreclaimed mining activities site and the site needed to reclaim the previously mined site), or 320 acres may be newly mined. As there are only 200 acres remaining at the 1,000-acre site, those 200 acres may be

authorized under NWP 49 for newly mined activities.

One commenter said they did not understand the rationale for establishing the threshold for newly mined areas at 40 percent, if removing the small amount of remaining coal reserves will be far more attractive to coal mine operators if the percentage was increased to allow mining on larger areas of unmined lands. One commenter said the 40 percent limitation becomes an obstacle when the remaining coal seam is deep within the hillside and large amounts of overburden require removal. This commenter suggested increasing the limit for newly mined areas to 50 or 60 percent to encourage more restoration of unclaimed areas. The commenter recommended adding a provision allowing district engineers to waive the 40 percent threshold in certain situations, such as when the operator receives an approved pollution abatement plan with best management practices, the remining activity is located in a completed Acid Mine Drainage Abatement Treatment watershed area, and watersheds with established total daily maximum loads. Several commenters objected to the provision stating that the Corps would 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, stating that it creates duplicative and potentially conflicting layers of regulation to an already highly regulated industry.

The 40 percent limit was established when NWP 49 was first issued in 2007, and was based on the recognition that some new coal mining may have to be conducted to provide incentives to remining and reclaim previously mined lands. The 40 percent limit is intended to facilitate compliance with the minimal adverse effects requirement for the NWPs. We do not agree that it would be appropriate to add a provision allowing district engineers to waive the 40 percent limit. Remining and reclamation activities involving discharges of dredged or fill material into waters of the United States that require larger proportions of newly mined areas may be authorized by individual permits. The expertise provided by the agencies responsible for implementing SMCRA is necessary to help the Corps make its determination of compliance with the terms and conditions of this NWP.

One commenter stated this NWP should look holistically at overall water and site improvements, improvement in the safety of the area by the elimination

of pits and highwalls, and reclamation of sites without the use of public funds.

We have focused this NWP on authorizing those activities that provide net increases in aquatic resource functions. The consideration of overall site improvements, increased safety, and the lack of use of public funds is more appropriately addressed by other agencies or programs.

This NWP is reissued as proposed.

**NWP 50. *Underground Coal Mining Activities.*** We proposed to place a ½-acre limit on this NWP, as well as a 300-linear foot limit for losses of stream bed. We also proposed a provision that allows district engineers to waive the 300 linear foot limit for losses of intermittent or ephemeral stream bed by making a written determination concluding that the discharge of dredged or fill material will result in minimal adverse effects.

Several commenters objected to the reissuance of this NWP, stating that it authorizes activities with more than minimal individual and cumulative adverse effects on the aquatic environment. Several commenters stated that activities authorized by this NWP will result in the loss of stream functions and adversely impact water quality downstream of the mine site. Several commenters said this NWP does not comply with the Section 404(b)(1) Guidelines and that the cumulative impacts analysis is too general and fails to consider past actions.

We have imposed a ½-acre limit on this NWP, as well as a 300 linear foot limit for the loss of stream bed. Pre-construction notification is required for all activities authorized by this NWP, and the permittee may not begin work in waters of the United States until an NWP verification is issued by the district engineer. These requirements, as well as the ability of district engineers to exercise discretionary authority and modify the NWP authorization by imposing activity-specific conditions, will help ensure that the NWP authorizes only those activities with minimal individual and cumulative adverse effects on the aquatic environment. Division engineers may regionally condition this NWP to restrict or prohibit its use in specific geographic regions, waters, or watersheds if the use of this NWP would authorize activities with more than minimal individual and cumulative adverse effects. When reviewing pre-construction notifications, district engineers will also evaluate whether the proposed activity will cause more than minimal direct and indirect adverse effects to water quality downstream of the mine site. The issuance of this NWP complies with

the 404(b)(1) Guidelines, and we have complied with the requirements at 40 CFR 230.7. The cumulative effects analysis provided in the decision document in accordance with the National Environmental Policy Act considers the effects of past actions, to the extent that they have continuing effects on the aquatic environment. Under the 404(b)(1) Guidelines, the cumulative effects analysis involves prediction of the number of discharges likely to be regulated by a general permit until its expiration (see 40 CFR 230.7(b)(3)). That regulation, as well as 40 CFR 230.11(g), does not state that the effects of past actions have to be considered for the purposes of the 404(b)(1) Guidelines analysis, although, as stated above, we have considered such effects in connection with our NEPA analysis.

Several commenters stated that NWP 50 should not have any acreage and/or linear foot limitations as these limits would essentially render the permit unusable for underground mining operations.

We do not agree that the ½-acre limit and the 300 linear foot limit for stream bed losses make this NWP unusable. This NWP authorizes discharges of dredged or fill material into waters of the United States for underground coal mining activities, provided those activities result in minimal adverse effects on the aquatic environment. Since these coal mining activities occur underground, losses of waters of the United States are usually small in size because they are limited to discharges of dredged or fill material in waters of the United States to construct infrastructure and impoundments to support those mining activities. Underground coal mining activities that result in the loss of greater than ½-acre of waters of the United States, or more than 300 linear feet of perennial stream bed, may be authorized by individual permits or, if available, regional general permits.

One commenter stated that districts have incorrectly classified perennial streams and that impacts to special aquatic sites (e.g., riffle and pool complexes) have not been properly considered. Another commenter said that Clean Water Act jurisdiction does not extend to ephemeral and intermittent streams. Several commenters indicated stream mitigation measures are not effective and the Corps has failed to provide a rational explanation as to how mitigation will attenuate cumulative effects.

Classifying a stream as perennial, intermittent, or ephemeral is done by district engineers by evaluating available information on stream flow,

including information that may be submitted by a project proponent in support of a pre-construction notification. A site visit may also be conducted to identify perennial, intermittent, or ephemeral stream segments. Impacts to special aquatic sites such as riffle and pool complexes will be considered when reviewing a pre-construction notification, and discretionary authority will be asserted if the district engineer determines that the adverse effects on the aquatic environment are more than minimal. Both intermittent and ephemeral streams are subject to Clean Water Act jurisdiction if they are determined by district engineers to be waters of the United States after applying the appropriate regulations and guidance. Stream rehabilitation and enhancement activities have been shown to improve the ecological functions provided by those aquatic ecosystems. Stream compensatory mitigation projects must comply with the applicable requirements provided in general condition 23, mitigation, and the compensatory mitigation regulations at 33 CFR 320.4(r) and 33 CFR part 332. District engineers will review and approve mitigation plans, and will require alternative or additional compensatory mitigation if they determine the proposed compensatory mitigation will not be sufficient to successfully offset the losses of aquatic resources caused by the permitted activity. Compensatory mitigation projects must be implemented in accordance with their approved mitigation plans. District engineers will also require monitoring of these compensatory mitigation projects, and require remediation and adaptive management if those mitigation projects are not providing the intended aquatic resource functions. If a district engineer determines that a compensatory mitigation project is not ecologically successful and fails to fulfill its objectives, district engineers may require alternative compensatory mitigation to comply with the mitigation requirements established through conditions added to the NWP authorization.

Several commenters indicated the activities regulated by this NWP are also heavily regulated by SMCRA, the Federal Mine Safety and Health Act (MSHA), and the state mining and water resource programs; therefore, no limits should be imposed on the permit. One commenter said the limits and the waiver process is highly subjective and results in uncertainty in the Regulatory Program. One commenter stated that

limitations imposed on this NWP could potentially require applicants to seek individual permits for all underground mining actions, which may result in a requirement to prepare an environmental impact statement. This commenter said that there should be a transition period without acreage or linear foot limits so that underground coal mining activities could continue to be authorized by this NWP until an individual permit can be obtained. One commenter said that reissuing NWP 50 with the ½-acre and 300 linear foot limits would result in significant job losses for their company, which consists of Native Americans who comprise 62 percent of their workforce. One commenter said that the new limits on this NWP would also increase the Corps workload.

This NWP provides authorization required under Section 404 of the Clean Water Act, for discharges of dredged or fill material into waters of the United States. The acreage and linear foot limits of this NWP are necessary to ensure that authorized activities result in minimal adverse effects on the aquatic environment. Compliance with other laws may be required for surface coal mining activities, but those decisions are made by the agencies responsible for administering those laws. District engineers will consider the criteria in paragraph (1) of section D, "District Engineer's Decision" and other appropriate criteria, when making a minimal effects determination for a proposed NWP activity. Activities that result in the loss of greater than ½-acre of waters of the United States require individual permits, unless those activities qualify for applicable regional general permits. If an individual permit is required, district engineers will determine whether an environmental impact statement is necessary to comply with the requirements of the National Environmental Policy Act. We do not agree that there should be a transition period for these activities, because the acreage and linear foot limits are necessary to comply with Section 404(e) of the Clean Water Act, and past use of this NWP indicates that the average loss of waters of the United States was 0.21 acre per NWP 50 activity. While there might be an increase in the number of individual permits, we do not believe it will be a large workload increase. As with all NWPs, an activity that was authorized under the 2007 NWPs has until March 18, 2013, to be completed under this authorization.

One state agency indicated implementation of the limits would result in increased workload for their staff and requested that funding be

provided to their office to mitigate this increase. One commenter stated that sites which contain reclaimed and abandoned mines associated with deep mining operations with portals and/or bat habitat should be assessed for bat use.

Any workload increase due to the addition of the ½-acre and 300 linear foot limits would be borne primarily by the Corps districts. It does not directly impose additional workload on state agencies. The SMCRA permits required for all mining activities must go through advanced coordination with the U.S. Fish and Wildlife Service regarding endangered bat species and with the State natural resources agencies regarding state listed bat species. Effects to wildlife, including bats, that are not federally-listed as endangered or threatened, or state-listed bat species, will also be addressed through the SMCRA permit process. For federally-listed bat species, activities authorized by this NWP must also comply with general condition 18, endangered species.

This NWP is reissued as proposed. *NWP 51. Land-Based Renewable Energy Generation Facilities.* This NWP was proposed as NWP A 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 stormwater management facilities. We proposed a ½-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.

Several commenters objected to the issuance of this NWP, stating that the Corps had failed to explain why the direct and indirect impacts resulting from the land-based renewable energy projects authorized by this NWP would be minimal, including the impacts caused by construction and operation of these facilities. These commenters said that individual permits should be required for these facilities. One of these commenters said that biomass facilities will significantly add to greenhouse gas

emissions and expressed the belief that biomass facilities will lead to increased land-clearing for harvest, planting and re-planting of trees. Several commenters stated that wind turbines will cause direct mortality on birds and bats and adversely affect critical avian and bat habitat. Two commenters stated that wind-generated energy facilities should incorporate guidelines developed by the U.S. Fish and Wildlife Service to minimize impacts to avian and bat species. One commenter stated that land-based wind and solar renewable energy facilities are not water dependent and should always require individual permits to allow for a thorough alternatives analysis for site selection. Several commenters stated that the activities authorized by this NWP are not similar in nature, since they involve various types of renewable energy facilities that have different adverse environmental effects.

This NWP authorizes discharges of dredged or fill material into waters of the United States for the construction, expansion, or modification of land-based renewable energy facilities. Unless the operation of these facilities involves discharges of dredged or fill material into waters of the United States, the Corps does not authorize, or have any Federal control or responsibility over, their operation. We believe that the construction, expansion, or modification of these facilities has minimal adverse effects on the aquatic environment, individually and cumulatively. Division engineers can regionally condition this NWP to restrict or prohibit its use in waters of the United States, where the discharges of dredged or fill material are likely to result in more than minimal adverse effects on the aquatic environment. While there may be emissions of greenhouse gases during construction activities involving discharges of dredged or fill material into waters of the United States, those direct emissions will generally not exceed de minimis levels of a criteria pollutant or its precursors and are exempted by 40 CFR 93.153. Emissions of greenhouse gases that occur from the operation of a land-based renewable energy generation facility, as well as emissions that occur when harvesting plant material for biomass energy production and operating the energy generation facility, are outside the Corps scope of analysis under the National Environmental Policy Act, because the Corps does not have the legal authority to control such emissions. The 404(b)(1) Guidelines do not include any requirements to assess effects of proposed discharges of

dredged or fill material into waters of the United States on greenhouse gas emissions. Land clearing that may be conducted for the harvesting, planting, and replanting of trees that provide fuel for biomass energy facilities is not authorized by this NWP, and if such activities involve discharges of dredged or fill material into waters of the United States, a separate Department of the Army permit is required.

If the construction, expansion, or modification of a land-based renewable energy facility involves discharges of dredged or fill material into waters of the United States, and that activity may affect an endangered or threatened species, or is located in designated critical habitat, Endangered Species Act Section 7 consultation is required, and the activity cannot proceed until section 7 consultation is completed. We have added general condition 19, migratory birds and bald and golden eagles, to clarify that if an activity regulated by the Corps will result in the "take" of a migratory bird or a Bald or Golden Eagle, and a "take" permit is required from the U.S. Fish and Wildlife Service, it is the responsibility of the permittee to apply for, and obtain, the appropriate "take" permits from the U.S. Fish and Wildlife Service. The draft Land-based Wind Turbine Guidelines developed by the U.S. Fish and Wildlife Service are voluntary guidelines that project proponents may incorporate into their land-based wind energy projects. The Corps does not have the authority to condition this NWP to incorporate the recommendations provided in those guidelines. Water dependency is not a requirement for authorization by general permit, including nationwide permits. The water dependency test in the 404(b)(1) Guidelines guides the alternatives analysis for activities that require individual permits under Section 404 of the Clean Water Act.

The activities authorized by this NWP (i.e., discharges of dredged or fill material into waters of the United States for the construction, expansion, or modification of land-based renewable energy facilities) are similar in nature. The Corps interprets the "similar in nature" requirement in Section 404(e) of the Clean Water Act broadly, to cover general categories of activities. The discharges of dredged or fill material authorized by this NWP will have similar effects on the aquatic environment, by replacing waters of the United States with dry land, or altering their characteristics, when renewable energy facilities are constructed, modified, or expanded.

Two commenters expressed concern that if NWP A is issued, all land-based

renewable energy facilities will require pre-construction notification because they could only be authorized by this NWP. Several commenters stated that NWP A should not be issued because all types of land-based renewable energy facilities can be authorized by existing NWPs, such as NWPs 12, 14, 18, 25, and 39, and it is not necessary to issue a new NWP that requires pre-construction notification for all activities. They also said that the issuance of NWP A would contradict the Corps stated goals of reducing administrative burdens on the regulated public, and utilizing its resources to focus on those projects that could be more environmentally damaging. One commenter stated that the pre-construction notification requirement would cause an unnecessary burden on project proponents, especially the requirement to provide a delineation of waters of the United States in the project area.

We are retaining the requirement that all activities authorized by this NWP require pre-construction notification, so that district engineers can evaluate these activities and add activity-specific conditions, if necessary, to ensure that they result in minimal individual and cumulative adverse effects on the aquatic environment. Other NWPs may be used to authorize discharges of dredged or fill material into waters of the United States for activities that may be associated with land-based renewable energy facilities. We do not intend issuance of this NWP to restrict currently available options for use of other NWPs to authorize any such discharges. For example, NWP 12 may be used to authorize discharges of dredged or fill material associated with the construction, maintenance, repair, or removal of utility lines for land-based renewable energy facilities. Likewise, NWP 14 may be used to authorize road crossings in waters of the United States within a land-based renewable energy facility. Project proponents may specify which NWP they wish to use to provide the requisite Department of the Army authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. If the proposed activity qualifies for authorization under that particular NWP, the district engineer will issue a verification letter. This NWP fulfills the objectives of the NWP program, since many land-based renewable energy projects require discharges of dredge or fill material into waters of the United States that would not qualify for NWPs 12 or 14, or other NWPs that do not require pre-construction notification.

One commenter suggested changing the pre-construction notification

threshold to  $\frac{1}{10}$ -acre, so that compensatory mitigation would not be required for activities resulting in the loss of less than  $\frac{1}{10}$ -acre of waters of the United States. Another commenter said that requiring pre-construction notification for losses of less than  $\frac{1}{10}$ -acre removes incentives to minimize losses of waters of the United States to less than  $\frac{1}{10}$ -acre. Two commenters stated that increasing the pre-construction notification threshold to  $\frac{1}{10}$ -acre would be more consistent with Executive Order 13212, Actions To Expedite Energy-Related Projects.

We do not agree that the pre-construction notification threshold should be increased to  $\frac{1}{10}$ -acre to match the pre-construction notification thresholds for NWP 12 or 14, since utility lines or road crossings may be only partial components of a land-based renewable energy generation facility. It should be noted that NWP 14 requires pre-construction notification for any discharge into a special aquatic site, including wetlands, which means that many NWP 14 activities that result in a loss of less than  $\frac{1}{10}$ -acre require pre-construction notification. Nationwide permit 12 should be used when the only activities that require Department of the Army authorization are discharges of dredged or fill material to construct, maintain, repair, or remove utility lines. Therefore, in Note 1 we state that NWP 12 is to be used to authorize those utility line activities, as long as those activities comply with the terms and conditions of NWP 12, including applicable regional conditions and any case-specific conditions imposed by the district engineer. This NWP authorizes building pads for the renewable energy generation devices and attendant features associated with those devices, such as parking lots and stormwater management facilities. If more than one NWP is used to authorize a land-based renewable energy generation facility, the activity must comply with general condition 28, use of multiple nationwide permits, which states that the loss of waters of the United States cannot exceed the acreage limit of the NWP with the highest specified acreage limit. Compensatory mitigation is at the discretion of the district engineer, and will be required when necessary to ensure that the authorized activity results in minimal individual and cumulative adverse effects on the aquatic environment. Paragraph (a) of general condition 23, mitigation, requires permittees to avoid both temporary and permanent adverse effects to waters of the United States on the project site. The issuance of this

NWP supports the objective of Executive Order 13212, by providing NWP authorization for some activities that would otherwise require individual permits because they do not qualify for any of the existing NWPs.

Two commenters agreed that NWP A is needed but said that many land-based renewable energy projects would not qualify because the losses of waters of the United States frequently exceed the acreage or linear foot limits. One commenter suggested increasing the acreage limit to one acre and the linear foot limit to 500 linear feet of stream bed, and allow the district engineer to waive the 500 linear foot limit if he or she determines that the activity will result in minimal adverse environmental effects. One commenter stated that NWP A should not allow waivers for stream bed losses in excess of 300 linear feet.

We believe that there will be a sufficient number of land-based renewable energy generation facilities authorized by this NWP to warrant its issuance. As with all general permits, this NWP will also provide an incentive for project proponents to reduce losses of waters of the United States to qualify for NWP authorization, instead of having to apply for individual permit authorization, if there are no regional general permits available to authorize these activities. The  $\frac{1}{2}$ -acre and 300 linear foot limits are necessary to ensure that this NWP authorizes only those activities that have minimal individual and cumulative adverse effects on the aquatic environment, and are consistent with the limits in many other NWPs. Division engineers can regionally condition this NWP to reduce the acreage limit or linear foot limits, or revoke this NWP in specific waters or geographic areas where the adverse effects on the aquatic environment may be more than minimal. In response to a pre-construction notification, the district engineer may add activity-specific conditions to the NWP authorization to impose requirements to satisfy the minimal adverse environmental effect requirement. The 300 linear foot limit for the loss of intermittent and ephemeral stream bed can only be waived when the district engineer makes a written determination that the loss of that stream bed will result in minimal adverse environmental effects, after evaluating the site-specific characteristics of the project.

Several commenters said that all pre-construction notifications should be coordinated with other Federal and state agencies. One commenter stated that agency coordination should be required

whenever a request for a waiver of the 300 linear foot limit is being evaluated by the district engineer. One commenter stated that this NWP should not include the waiver provision because of potential impacts to cultural resources and historic properties.

We do not believe it is necessary to coordinate all activities authorized by this NWP with Federal and state agencies. District engineers will carefully evaluate these pre-construction notifications and determine whether the proposed activities qualify for NWP authorization. Agency coordination is required for pre-construction notifications for proposed activities resulting in the loss of intermittent or ephemeral stream bed in excess of 300 linear feet. Activities authorized by this NWP must also comply with general condition 20, historic properties and district engineers will conduct section 106 consultation if a proposed activity may have the potential to cause effects to any historic properties listed, or eligible for listing, on the National Register of Historic Places.

Several commenters requested clarification on whether land-based renewable energy facilities would be considered as single and complete linear projects or single and complete non-linear projects. Several commenters asked if the linear features of these facilities, such as roads, utilities, and transmission lines, could be categorized as linear projects, while the construction of other components of the project, such as parking lots and buildings, would be considered as non-linear projects. A few commenters said terms and conditions should be added to the NWP to specify that the definition of single and complete linear project would always be used for linear components of the overall facility. One commenter stated that the activities authorized by this NWP should be considered one single and complete project because all renewable energy devices and their attendant features, including both linear and non-linear components, are required for the facility to have independent utility.

We have added Note 1 to this NWP to clarify that the NWP authorizes discharges of dredged or fill material into waters of the United States for the construction, expansion, or modification of a land-based renewable energy generation facility, including attendant features within that facility, and that utility lines that are used to transfer energy from the renewable energy generation facility to a distribution system, regional grid, or other facility are generally considered to

be separate single and complete linear projects. Those utility lines may be authorized by NWP 12 or other Department of the Army authorization. A similar approach should be used for roads or other types of utility lines (e.g., sewage or water lines) constructed to provide access to, or service, the land-based renewable energy generation facility. We are using the term "generally" in Note 1 because crossings of waters of the United States have to be at separate and distant locations to be a single and complete project. Crossings that are close together would not be considered separate single and complete projects. Since the configuration of land-based renewable energy generation facilities can vary substantially, district engineers will use their discretion to determine which activities are single and complete linear projects and which activities are single and complete non-linear projects, after evaluating the specific circumstances of a particular project. For example, the devices used to collect wind or solar energy may be arranged in a grid or in a linear configuration.

One commenter asked how the permit area would be determined for land-based renewable energy facilities. Specifically, the commenter asked whether the permit area would be the entire area bound by the perimeter of the facility, or just those areas within the facility where there are discharges of fill material into waters of the United States.

Identifying the permit area for the purposes of compliance with general condition 20, historic properties, is accomplished by applying the criteria in Appendix C to 33 CFR part 325, specifically paragraph 1(g), as well as the interim guidance issued on April 25, 2005 (paragraph 6(d)). The permit area will be determined by district engineers after considering the project-specific circumstances.

Several commenters stated that this NWP should not authorize activities in certain geographic areas, such as the Great Lakes. One commenter said that approval may be required for facilities that would impact state-owned waters or submerged lands.

Division engineers have the authority to suspend or revoke this NWP in specific waters or geographic areas. Division engineers may also add regional conditions to restrict or prohibit its use in certain waters or regions. In response to a pre-construction notification, district engineers may add activity-specific conditions to the NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic

environment. Project proponents must obtain all applicable Federal, state, or local authorizations, such as state permits to authorize activities on state-owned waters or submerged lands.

One commenter said that this NWP could be used to authorize activities associated with wind energy generating structures, solar towers, or overhead transmission lines, which have the potential to interfere with Department of Defense's long range surveillance, homeland defense, testing, and training missions. This commenter requested that copies of pre-construction notifications and NWP verification letters for these activities be provided to the Department of Defense Siting Clearinghouse, so that the Department of Defense could have an opportunity to coordinate with the project proponent to ensure that long range surveillance, homeland defense, testing, and training missions are not adversely affected by these activities.

We have added Note 2 to this NWP to require district engineers to send pre-construction notifications and NWP verification letters to the Department of Defense Siting Clearinghouse if this NWP is proposed to be used to authorize the construction of wind energy generating structures, solar towers, or overhead transmission lines. The Department of Defense Siting Clearinghouse is responsible for coordinating with the project proponent and resolving any potential effects on Department of Defense long range surveillance, homeland defense, testing, and training missions.

Proposed NWP A is issued as NWP 51, with the changes discussed above.

*NWP 52. Water-Based Renewable Energy Generation Pilot Projects.* This NWP was proposed as NWP B to authorize structures or 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, utility lines, and stormwater management facilities. We proposed a  $\frac{1}{2}$ -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.

Several commenters supported the issuance of this NWP. Some of these commenters provided suggestions to improve the NWP. Two commenters said the acreage limit should be increased from  $\frac{1}{2}$ -acre to one acre and the linear foot limit be increased from 300 linear feet to 500 linear feet. One commenter stated that the NWP limits impacts to  $\frac{1}{2}$ -acre without taking into consideration the aggregate capacity of the facility, only the number of generation units. One commenter said the pre-construction notification threshold should be increased to  $\frac{1}{10}$ -acre to be consistent with the pre-construction notification threshold of some of the other NWPs that authorize similar activities, such as NWP 12. This commenter asked why activities associated with water-based renewable energy projects should be subject to closer scrutiny than other energy-related activities.

We are issuing this NWP with the  $\frac{1}{2}$ -acre and 300 linear foot limits, and restricting its use to pilot projects, to ensure that this NWP authorizes only those activities that have minimal adverse effects on the aquatic environment. Division engineers can impose regional conditions on this NWP to decrease these limits, if there is potential for these activities to result in more than minimal adverse effects on the aquatic environment in a particular waterbody or geographic area. Individual permits, with a public notice and comment process, should be required for larger-scale water-based renewable energy generation facilities that are not pilot projects and involve activities that require Department of the Army authorization. Use of technologies other than wind or hydrokinetic devices for water-based renewable energy generation facilities may be authorized by other forms of Department of the Army permits, if such permits are required for the construction, expansion, modification, or removal of those devices. We are requiring pre-construction notification for all activities authorized by this NWP, so that district engineers can evaluate the proposed work and make a project-specific determination that the adverse effects on navigation, the aquatic environment, and other public interest review factors would be minimal, individually and cumulatively. It should be noted that NWP 12 only authorizes discharges of dredged or fill material, or structures or work in navigable waters of the United States, for the construction, maintenance, or repair of utility lines, and that all NWP 12 activities in section 10 waters require

pre-construction notification. Therefore, there are few differences in pre-construction notification thresholds for this NWP and other NWPs that may authorize similar activities. However, as with NWP 51, it is not our intent to limit any currently available options for use of other applicable NWPs to cover discharges of dredge or fill material associated with activities involved in the construction of water-based renewable energy generation pilot projects. Rather, this NWP provides an additional option for authorization of such discharges that are not currently covered by any other NWP.

Several commenters also stated that the limit of 10 generation units should either be eliminated or further defined. Several commenters said the 10 generation unit limit should be removed to allow projects that employ different technologies to be authorized by this NWP. Several commenters said that the total number of generation units should be defined as the total number of units per each single and complete project.

We believe the 10-unit limit is necessary to ensure that these pilot projects are small in scope, to ensure they would not have significant adverse environmental effects. The 10-unit limit, as well as the 1/2-acre and 300 linear foot limits, apply to single and complete projects. The information collected during these pilot projects will be useful in evaluating the potential productivity, feasibility, and environmental effects of larger scale water-based renewable energy generation facilities, which will require other types of authorization if they require DA permits.

Numerous commenters objected to the issuance of this NWP. Most of these commenters said that these activities will result in more than minimal individual and cumulative adverse effects on the aquatic environment. Several commenters said that there is not sufficient understanding of the environmental effects of these activities to warrant issuance of an NWP. Some commenters stated that these activities should be authorized by individual permits, with a full public notice and comment process and National Environmental Policy Act documentation. A few commenters said this NWP should not be used to authorize activities in the Great Lakes.

The terms and conditions of this NWP, including the 1/2-acre limit, the 300 linear foot limit, and the 10-unit limit will ensure that this NWP authorizes only those activities with minimal adverse effects on the aquatic environment. All activities authorized by this NWP require pre-construction notification, which provides district

engineers with the opportunity to review each proposed activity and determine whether the adverse effects on the aquatic environment will be minimal. District engineers may add activity-specific conditions to the NWP authorization which require actions to mitigate adverse environmental effects. District engineers may also exercise discretionary authority to require an individual permit if permit conditions will not be sufficient to comply with the minimal adverse environmental effects requirement for general permits. Division engineers may impose regional conditions to restrict or prohibit the use of this NWP in certain waters or specific geographic areas, including the Great Lakes.

Several commenters requested a definition of the term "pilot project." Some of these commenters said that this term could be interpreted broadly, in part because much of the technology used for water-based renewable energy generation facilities is in the early stages of development. In contrast, another commenter stated that not defining the term "pilot project" would restrict the applicability of this NWP. One commenter suggested that this NWP not be limited to pilot projects. One commenter recommended limiting pilot projects to those that will be used as demonstration projects or test projects to determine the practicability of water-based renewable energy generation at a particular site. One commenter said that this NWP should not be limited to small offshore wind energy pilot projects, and that this NWP should authorize offshore wind energy projects of any duration to encourage the development of renewable energy technologies.

We have added a provision to this NWP that defines the term "pilot project." The definition is similar to how the Federal Energy Regulatory Commission describes hydrokinetic pilot projects in their April 2008 white paper on licensing hydrokinetic pilot projects. The definition in the NWP focuses on the experimental nature of pilot projects, and their use in collecting data on the performance of the device in generating energy for other uses and the effects of the devices on the environment, including the aquatic environment. Due to the recent development of this technology, we believe it is necessary to limit these water-based renewable energy generation facilities to pilot projects, to provide more information on potential adverse effects to the aquatic environment. In a future reissuance of the NWPs, we may consider expanding the scope of this NWP to authorize other small-scale water-based renewable

energy generation facilities. A water-based renewable energy generation facility that is not a pilot project and does not qualify for an applicable regional general permit is more appropriately evaluated through the standard permit process, including a full public interest review.

One commenter stated that even pilot projects may result in more than minimal adverse effects on the aquatic environment because of indirect effects caused by blade strikes on birds and potential obstructions to navigation when these pilot projects are sited in navigable rivers. One commenter said the 10 generation unit limit may not be effective in ensuring that single and complete projects do not cause more than minimal adverse environmental effects on a cumulative basis or comply with monitoring requirements.

District engineers will review pre-construction notifications and determine whether the proposed activity complies with all terms and conditions of the NWP and may add activity-specific conditions, such as authorizing less than 10 units, to minimize adverse effects to navigation, the aquatic environment, and other public interest review factors such as impacts to fish and wildlife values. Indirect effects caused by the operation of these pilot projects, such as wind turbine blade strikes on birds, should be addressed through compliance with the appropriate Federal laws, such as the Endangered Species Act, Migratory Bird Treaty Act, or Bald and Golden Eagle Protection Act. Compliance with the Endangered Species Act is addressed through general condition 18. As stated in general condition 19, project proponents are responsible for obtaining any take permits that may be required under the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act. The project proponent should contact the local office of the U.S. Fish and Wildlife Service to determine whether a take permit is required for that project. Impacts to fish or other aquatic organisms caused by hydrokinetic energy units should be considered by district engineers when reviewing pre-construction notifications for activities authorized by this NWP. District engineers may also suspend or revoke NWP authorizations if they determine those activities are causing more than minimal adverse environmental effects to the aquatic environment. Division engineers may impose regional conditions on this NWP to reduce the number of units authorized by this NWP, or restrict or prohibit its use in specific waters or other geographic areas.

Several commenters requested clarification of applicability of the 300 linear foot stream limit to the ocean floor or the Great Lakes because those waters are not characterized as streams. A few commenters suggested that the 300 linear foot limit does not apply to water-based renewable energy generation pilot projects in the ocean or large rivers, since activities in those waters does not result in a loss of stream bed.

We agree that the 300 linear foot limit does not apply to the construction, expansion, modification, or removal of water-based wind or hydrokinetic renewable energy devices in the ocean, Great Lakes, or large navigable rivers, since those activities do not result in loss of stream bed. The 300 linear foot limit also does not apply to the installation or removal of transmission lines on the ocean floor, the bottom of the Great Lakes, or the substrate of large navigable rivers. Transmission lines placed on the bottom of navigable waters are generally considered to be structures, not fill. District engineers will evaluate the techniques used to place transmission lines on the bottom of navigable waters and determine whether there is a discharge of dredged or fill material, and whether that discharge of dredged or fill results in a loss of waters of the United States subject to the 300 linear foot limit. The installation of transmission lines in these navigable waters in trenches that are backfilled constitutes a temporary impact and is not applied to the 300 linear foot limit for the loss of stream bed. The 300 linear foot limit for the loss of stream bed applies primarily to the construction of land-based attendant features, such as distribution facilities, control facilities, roads, parking lots, and stormwater management facilities. We have added a provision to this NWP to clarify that the placement of a transmission line on the bed of a navigable water of the United States from the renewable energy generation unit(s) to a land-based collection facility is considered a structure regulated under Section 10 of the Rivers and Harbors Act of 1899, and not a discharge of fill material under Section 404 of the Clean Water Act. The placement of the transmission line on the bed of the navigable water is not considered a loss of waters of the United States that applies towards the 1/2-acre limit or 300 linear foot limit of the NWP.

Several commenters requested the addition of more categories of sensitive habitat where this NWP could not be used to authorize structures or work in navigable waters of the United States or discharges of dredged or fill material

into waters of the United States for water-based renewable energy generation pilot projects. Two commenters suggested adding coral reefs to the list of prohibited areas. Another commenter suggested adding National wildlife refuges, state parks, state wildlife management areas, designated significant coastal areas, critical habitats for Federally-listed endangered and threatened species, important bird areas, or any sensitive environmental area. One commenter recommended adding eelgrass beds, seagrass beds, kelp beds, macro-algae beds, vegetated shallows, and shellfish beds to the list of excluded areas.

The proposed NWP B stated that it did not authorize activities in coral reefs. This NWP is also subject to general condition 22, designated critical resource waters, which prohibits using this NWP to authorize discharges of dredged or fill material into critical resource waters and their adjacent wetlands. Critical resource waters include marine sanctuaries and marine monuments managed by the National Oceanic and Atmospheric Administration, and National Estuarine Research Reserves. District engineers may designate additional critical resource waters, after notice and an opportunity for public comment. Division engineers may also impose regional conditions to restrict or prohibit the use of this NWP in specific categories of waters or in certain geographic areas. In response to a pre-construction notification, district engineers may exercise discretionary authority and require an individual permit if the proposed activity will result in more than minimal adverse effects on the aquatic environment.

One commenter said that district engineers should not be authorized to waive the 300 linear foot limit for the loss of intermittent and ephemeral stream bed. One commenter suggested that all pre-construction notifications requesting a waiver of the 300 linear foot limit should be coordinated with the Federal and state resource agencies.

For those losses of more than 300 linear feet of intermittent and ephemeral stream bed that result in minimal adverse effects on the aquatic environment, it is appropriate for district engineers to have the authority to waive the 300 linear foot limit. This approach is consistent with the statutory requirement that activities authorized by general permits, including NWPs, result in minimal individual and cumulative adverse environmental effects. Agency coordination is required for proposed

losses of greater than 300 linear feet of intermittent and ephemeral stream bed.

Two commenters recommended adding a provision to this NWP that requires the removal of structures associated with any activity authorized under this NWP, once the pilot project has been completed. One commenter suggested adding more examples of attendant features that may be authorized by this NWP, such as control rooms, trailers, vaults and sheds since these are common features of land-based distribution facilities.

We have added a paragraph to this NWP that requires the permittee to remove the generation units, transmission lines, and other structures or fills associated with the pilot project once the pilot project is completed, unless they are authorized by a separate Department of the Army authorization, such as another NWP, an individual permit, or a regional general permit. Pilot units may be integrated into a permanent water-based renewable energy generation facility after the experimental phase has been completed, and the permanent facility has been authorized by any required Department of the Army permits. We have also added "removal" to the first sentence of this NWP, to clarify that the NWP also authorizes the removal of structures and fills associated with water-based renewable energy generation pilot projects, if, for example, the removal of structures or fills from navigable waters of the United States would require authorization under Section 10 of the Rivers and Harbors Act of 1899. Furthermore, we added a clarification of "completion of the pilot project," which will be identified as the date of expiration of the FERC (Federal Energy Regulatory Commission) license, or the expiration date of the NWP authorization if no FERC license is issued. If the project proponent wants to continue operating the pilot project after the expiration of the FERC license, he or she should apply for another form of DA permit, such as an individual permit. If the pilot project was only authorized by NWP 52, it may be verified under a reissued NWP 52, if NWP 52 is reissued in 2017. Reauthorization under a reissued NWP 52 may require submission of a new pre-construction notification, to ensure that the pilot project still meets the terms and conditions of the reissued NWP 52. We have added "control facilities" to the list of examples of attendant features.

One commenter recommended adding a note to the NWP to require a mutual agreement between the Corps, the United States Coast Guard, and a prospective permittee to ensure

navigational safety. One commenter stated that the NWP should include a provision requiring compliance with state permit requirements to ensure a consistent and thorough environmental review. One commenter said that this NWP should require project proponents to comply with the Department of the Interior's suggested practices for avian protection to protect birds from electrocution.

We do not agree that it is necessary to require the execution of agreements between the Corps, United States Coast Guard, and the prospective permittee to ensure navigation safety. District engineers will review pre-construction notifications and exercise discretionary authority if the proposed activity will have more than minimal adverse effects on navigation. The permittee must comply with applicable United States Coast Guard requirements to mark or light structures in navigable waters. It is the permittee's responsibility to obtain any other Federal, state, or local authorizations that may be required for the water-based renewable energy generation pilot project. The permittee may voluntarily incorporate into his or her project the Department of the Interior's recommended practices for protecting birds from electrocution. If the proposed NWP activity may affect endangered or threatened bird species, Endangered Species Act Section 7 consultation will be conducted, which may also address potential effects to those species caused by electrocution. In accordance with general condition 19, migratory birds and bald and golden eagles, it is the permittee's responsibility to obtain any "take" permits that may be required under the U.S. Fish and Wildlife Service's regulations governing compliance with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act.

One commenter said that this NWP could be used to authorize activities associated with wind energy generating structures, solar towers, or overhead transmission lines, which have the potential to interfere with Department of Defense's long range surveillance, homeland defense, testing, and training missions. This commenter requested that copies of pre-construction notifications and NWP verification letters for these activities be provided to the Department of Defense Siting Clearinghouse, so that the Department of Defense could have an opportunity to coordinate with the project proponent to ensure that long range surveillance, homeland defense, testing, and training missions are not adversely affected by these activities.

We have added Note 4 to this NWP to require district engineers to send pre-construction notifications and NWP verification letters to the Department of Defense Siting Clearinghouse if this NWP is proposed to be used to authorize the construction of wind energy generating structures, solar towers, or overhead transmission lines. The Department of Defense Siting Clearinghouse is responsible for coordinating with the project proponent and resolving any potential effects on Department of Defense long range surveillance, homeland defense, testing, and training missions.

Proposed NWP B is issued as NWP 52, with the changes discussed above.

#### General Conditions

One commenter suggested reordering the general conditions to better aggregate concepts based on importance to permittees and the resources potentially affected. One commenter recommended placing general conditions 14 and 20 together because they both address cultural resources. One commenter said that proposed general condition 30, pre-construction notification, should become general condition 1 because of its importance for potential users of the NWPs, in terms of the pre-construction notification requirements.

With one exception, we have retained the order of the general conditions because we believe they are in a logical order. We have moved proposed general condition 14, discovery of previously unknown remains and artifacts, to become general condition 21 so that it follows general condition 20, historic properties. We have retained the pre-construction notification general condition in its place as the last general condition (as general condition 31), because the text of the NWPs state which activities require pre-construction notification.

Two commenters suggested new general conditions to minimize construction impacts. One suggestion was to require flagging construction limits to protect nearby aquatic areas and the other recommended a general condition to address temporary crossings or structures.

Requirements to flag construction limits are more appropriately addressed through activity-specific conditions added to an NWP authorization, when the district engineer determines such flagging is necessary to ensure the authorized activity results in minimal adverse effects on the aquatic environment. General condition 13, removal of temporary fills, and general condition 9, management of water

flows, adequately address the concerns about temporary crossings and structures.

One commenter said the phrase "as appropriate" should be deleted from the Note at the beginning of Section C, Nationwide Permit General Conditions.

We have changed this phrase to "as applicable" to clarify that a permittee is responsible for complying with general conditions that are pertinent to a particular NWP activity.

#### Comments on Specific General Conditions

**GC 1. Navigation.** We did not propose any changes to this general condition and no comments were received. The general condition is adopted as proposed.

**GC 2. Aquatic Life Movements.** We proposed to modify this general condition to provide added protection to the aquatic environment by promoting the use of bottomless culverts, when it is practicable to use those types of culverts to maintain movements of aquatic organisms.

Two commenters supported the proposed changes to this general condition. One commenter said that all crossings should be designed by using a stream simulation technique. Another commenter stated that requirements for bottomless culverts should only apply to new activities. Many commenters said that culverts that are installed with their bottoms below the grade of the stream bed can be as effective as bottomless culverts in improving conditions for aquatic life movement while still being cost effective and providing the intended function of allowing movement of aquatic organisms.

Many commenters objected to the proposed changes to this general condition, and most of these commenters requested that the reference to the use of bottomless culverts be removed, stating that in many cases that bottomless culverts are not practicable or cannot be used in many locations. A large number of commenters expressed concern that requiring the use of bottomless culverts would significantly increase costs and would not be feasible. Several commenters disagreed that the use of bottomless or buried culverts reduces overall impacts to streams, and some commenters said that use of bottomless culverts can cause adverse effects to streams by increasing erosion and head cuts. One commenter recommended promoting the use of alternative measures or techniques to maintain aquatic life movements. Some commenters said that the proposed changes to this general condition would

result in all affected activities requiring pre-construction notification.

After evaluating the large number of comments received in response to the proposed changes to this general condition, we have generally reverted back to the text that was in the 2007 general condition, with a few minor changes. We have modified the last sentence of the 2007 general condition to make it clear that the general condition applies to both temporary and permanent crossings, and that those crossings should be designed and constructed to maintain low flows to sustain the movement of indigenous aquatic species. We have not adopted the provision that would have required bottomless culverts to be used where practicable. In addition, we have not incorporated the sentence that explains some of the circumstances where bottomless culverts may not be practicable. In response to a pre-construction notification, the district engineer may evaluate the proposed crossing to determine whether it complies with this general condition. The district engineer may add conditions to the NWP authorization to require measures to sustain aquatic life movements, including bottomless culverts, if appropriate.

Many commenters said that bottomless culverts require complex designs that require pile supported footings and many local and county governments do not have the resources available to design, construct, and maintain bottomless culverts in a manner that ensures roadway safety. Many commenters stated that bottomless culverts need more long-term maintenance and will increase costs and delays. One commenter noted that construction techniques required to install bottomless culverts may result in unsuitable conditions for aquatic life movement. Several commenters expressed concern that footings may deteriorate and undermine the integrity of the structure and increase the possibility of collapse during high flow conditions. Several commenters said bottomless culverts cannot be installed in areas with highly erodible or weak soils. One commenter asserted that bottomless culverts generally cannot support load conditions created by rail traffic.

Because of the various factors that determine appropriate culvert designs for a particular waterbody, we are not adopting the proposed language concerning bottomless culverts. The general condition requires permanent and temporary crossings to be suitably culverted, bridged, or otherwise designed and constructed to fulfill the

objective of the general condition, which is to sustain the movements of aquatic species indigenous to the waterbody, both during and after completion of the activity.

Several commenters stated that requiring bottomless culverts or bottoms of culverts to be below the grade of the stream bed restricts design flexibility that reflects site specific conditions. One commenter said it is not practicable to install the bottoms of culverts below grade in all circumstances. One commenter said that the appropriate structure to allow aquatic life movements to continue should be determined by considering the land cover within the watershed, the variability of stream flow, and the presence or absence of aquatic life. One commenter indicated that it is not possible to bury pre-cast culverts because the bed material would be difficult to place. This commenter also said that below grade structures collect more debris and increase erosion on the downstream side of the culvert. This commenter expressed concern that culvert bottoms installed below grade would cause water to pool and provide habitat for pests such as mosquitoes. One commenter said that below grade culverts direct high velocity flows and create scour holes at the outlet and destabilize the banks. Another commenter stated that sinking a culvert below grade drains land used for row crops and accumulates silt that blocks aquatic life movements.

We have also removed the provision requiring the bottoms of culverts to be installed below the grade of the stream bed unless the stream bed consists of bedrock or boulders. The modified general condition merely states that permanent and temporary crossings of waterbodies must be suitably culverted, bridged, or otherwise designed or constructed, to provide flexibility for using a crossing that is appropriate for the site conditions, while sustaining the movements of aquatic species indigenous to the waterbody.

Many commenters said that the use of bottomless culverts should be limited to perennial streams. A number of commenters stated that many ephemeral and intermittent streams are not capable of supporting aquatic life or do not have sufficient aquatic life movement to justify the expense and technical design requirements for bottomless culverts. Several commenters said this general condition should not apply to ephemeral streams. One commenter stated that bottomless culverts should only be used in waters that support special status aquatic life species. One commenter said the bottomless culvert

requirement should be limited to streams and not required for ditches or other waters. Another commenter expressed concern that installing the bottom of the culvert below grade will tend to dewater wetlands.

The general condition has been reworded to provide flexibility to determine appropriate culvert design based on site-specific characteristics. Crossings of perennial, intermittent, and ephemeral streams must be appropriately designed and constructed to sustain the movement of indigenous aquatic species.

Many commenters requested a definition of the term "practicable" as used in the context of the proposed general condition. One commenter said that regional variability should be considered when determining if it is practicable to use a bottomless culvert. Several commenters asked for more examples of when it would be impractical to use a bottomless culvert. One commenter requested clarification as to who would determine if use of a bottomless culvert is practicable. Many commenters said cost should be a primary factor used to determine if it is practicable to use a bottomless culvert. One commenter stated that there would be additional paperwork requirements necessary to evaluate the practicability of using bottomless culverts.

The proposed provision requiring the use of bottomless culverts where practicable has not been adopted into the final general condition. The term "practicable" is defined in the 404(b)(1) Guidelines at 40 CFR 230.3(q) as "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." However, it is no longer used in this general condition.

One commenter said the general condition should include criteria to be used to determine whether there is a substantial disruption to aquatic life movement. Two commenters asked what threshold would be used to identify a substantial disruption. Another commenter stated that the general condition should list the species that would be covered. One commenter said this general condition would not sustain aquatic life movements during future high flows that are expected as a result of global climate change.

Determining compliance with this general condition is at the discretion of the district engineer. It is not possible to define, on a national basis, what constitutes a substantial disruption of the necessary life cycle movements of aquatic species indigenous to the waterbody. It is not appropriate to

provide a national list of such species, but this condition generally applies to all indigenous species in the waterbody whose life-cycle movement may be affected by the project. How global climate change might affect the flow patterns and volumes of particular streams, rivers, or other waterbodies cannot be predicted with a reasonable degree of certainty. Crossing designs should be based on present conditions, and the crossing may be modified at a later time to accommodate changes in flow patterns and volumes that occur as environmental conditions change.

One commenter stated that additional requirements for proper culvert sizing should be added to this general condition to ensure fish passage and reduce failure. This commenter said that natural bankfull capacity of the stream channel should be maintained. One commenter also recommended that culverts have a width of 1.2 times the bankfull width of the stream, and be embedded a minimum of two feet to maintain connected habitat and a stable stream bed. Another commenter stated that stream crossings should maintain natural flows, substrate, and stream grade from upstream to downstream of the culvert. This commenter suggested adding a provision that states that bridges or bottomless culverts are to be used when practicable.

The proper sizing of culverts is more appropriately addressed through an evaluation of the site for the proposed NWP activity and the surrounding area. The general condition focuses on maintaining the necessary life cycle movements of aquatic species indigenous to the waterbody, not the geomorphic characteristics of the waterbody. Maintenance of water flows, including the proper width and height of culverts, bridges, and other crossings, is more appropriately addressed by general condition 9, management of water flows. We have modified this general condition to require permanent and temporary crossings to be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of indigenous aquatic species.

Two commenters requested that, if the proposed changes to this general condition are adopted, sufficient time should be provided for state, county, and local governments to update their design requirements to include bottomless culverts. One commenter stated it would take approximately two years to develop standards for bottomless and buried culvert installation. Another commenter expressed concern about the expense and time required to revise the plans

and specifications for projects nearly ready for construction.

We do not believe it is necessary to provide a grandfathering provision for the implementation of this general condition. The general condition provides substantial flexibility to design permanent and temporary crossings, and uses a results-driven approach to help ensure that NWP activities have only minimal adverse effects on the movement of indigenous species of aquatic organisms. Existing construction and design standards can be used to satisfy the objective of this general condition.

The general condition is adopted with the modifications discussed above.

**GC 3. Spawning Areas.** We did not propose any changes to this general condition. One commenter said this general condition should be removed, and replaced with regional conditions that require buffers for spawning areas. This commenter reasoned that local buffer requirements would be more appropriate for satisfying the requirements of the Endangered Species Act. Two commenters stated that only requiring avoidance of spawning areas to the maximum extent practicable is not sufficient, and one of those commenters said that the destruction of spawning areas should not be allowed under any circumstances. One commenter recommended modifying this general condition to prohibit activities that adversely affected all spawning areas. One commenter suggested explicitly including forage fish habitat and submerged aquatic vegetation as protected resources in this general condition.

We are retaining this general condition because spawning areas are important components of the aquatic environment and should be addressed at the national level to ensure that NWP activities result in minimal adverse effects on the aquatic environment. Division engineers may impose regional conditions on this NWP to establish buffers to protect spawning areas for particular species. Activities authorized by NWPs must also comply with general condition 18, endangered species. The intent of this general condition is to minimize adverse effects to spawning areas caused by NWP activities, and it is not feasible to completely prohibit activities that may affect spawning areas. In areas where there are documented concerns for fish forage habitat or submerged aquatic vegetation, division engineers can add regional conditions to the NWPs to restrict or prohibit activities in those areas.

This general condition is adopted as proposed.

**GC 4. Migratory Bird Breeding Areas.** We did not propose any changes to this general condition. One commenter said this general condition should be removed and regional conditions should be used instead to establish buffers for migratory bird breeding areas. This commenter also stated that the requirement that NWP activities avoid breeding areas for migratory birds to the maximum extent practicable is not sufficient to protect those areas. One commenter said buffers established through regional conditions would satisfy Endangered Species Act requirements more effectively.

This general condition addresses a national concern for breeding areas for migratory birds, and establishes a consistent, national requirement for regulated activities to avoid these areas to the maximum extent practicable. Nationwide permit activities that may affect migratory birds that are listed as endangered or threatened under the Endangered Species Act, or that may affect designated critical habitat, must comply with general condition 18, endangered species.

This general condition is adopted as proposed.

**GC 5. Shellfish Beds.** We did not propose any changes to this general condition. One commenter said the term "concentrated shellfish populations" should be defined to specify a method to be used to identify such areas, because in some states shellfish beds are prominent features in waterways. Another commenter suggested changing the text of the general condition to state that shellfish beds created as habitat cannot be used for harvesting, and NWPs 4 and 48 could not authorize activities in those areas. One commenter recommended adding restoration projects authorized by NWP 27 to this general condition.

The identification of concentrated shellfish populations for the purposes of determining compliance with this general condition is more appropriately conducted by district engineers using local criteria and methods. Shellfish beds established through habitat restoration projects may be used for growing shellfish for consumption and other uses, and the decision on whether harvesting in those areas should be allowed is at the discretion of Federal, state, and/or local authorities. We have added shellfish seeding or habitat restoration activities authorized by NWP 27 to the list of NWP activities that may occur in areas of concentrated shellfish populations, since NWP 27 activities may improve habitat quality and further increase shellfish populations.

This general condition is adopted with the modification discussed above.

**GC 6. Suitable Material.** We did not propose any changes to this general condition. One commenter recommended that this general condition should explicitly prohibit the use of tires as fill material, because tires can leach toxic amounts of chemicals that are harmful to aquatic species. One commenter said the general condition should be changed so that only environmentally suitable or stable material may be used as fill, because many plastics are unstable when exposed to ultraviolet light or temperature changes. One commenter stated that contaminated sediments should not be used as fill material. One commenter recommended modifying this general condition to minimize impacts to habitat and species caused by the leaching of heavy metals, pesticides, and polycyclic aromatic hydrocarbons.

We do not believe it is necessary to add tires or plastics to the list of examples of unsuitable materials. Prohibiting the use of unsuitable materials is more effective and enforceable than stating that only environmental suitable or stable materials may be used. It is impractical, for the purposes of the NWP program, to establish what would constitute an environmentally suitable material since we are not aware of any Federal standards that could be applied, other than those covered under Section 307 of the Clean Water Act. A similar problem exists for identifying stable materials, because the timeframe that might be used to determine whether a particular material is "stable" would vary by the material. The district engineer will make a case-by-case determination of what constitutes unsuitable material. The current text of the general condition prohibits the use of contaminated sediment as fill material, if it contains toxic pollutants in toxic amounts. The general condition also prohibits the use of materials that contain heavy metals, pesticides, and polycyclic aromatic hydrocarbons in toxic amounts, in accordance with Section 307 of the Clean Water Act.

This general condition is adopted as proposed.

**GC 7. Water Supply Intakes.** We did not propose any changes to this general condition and no comments were received. The general condition is adopted as proposed.

**GC 8. Adverse Effects from Impoundments.** We did not propose any changes to this general condition. One commenter said the general condition should include specific examples of how to reduce impacts associated with

accelerating passage of water and how to prevent the restriction of normal water flows. Another commenter asked for a definition for the term "maximum extent practicable." Two commenters stated that impoundments that cause adverse effects to the aquatic environment by changing water flows should not be authorized by NWPs and should instead require individual permits with agency coordination.

Specific measures for reducing impacts caused by accelerated water flows or restricted water flows have to be determined on a case-by-case basis after considering the environmental characteristics of the site of the NWP activity. It would not be appropriate to establish such measures at a national level. An activity-specific evaluation would also have to be done to determine whether the minimization of these adverse effects has been accomplished to the maximum extent practicable. District engineers will use their discretion to determine compliance with this general condition. The term "practicable" is defined in the 404(b)(1) Guidelines at 40 CFR 230.3(q) as "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." We do not agree that all impoundments should require individual permits; impoundments may be authorized by general permits, including NWPs, as long as they have minimal individual and cumulative adverse effects on the aquatic environment and comply with the applicable terms and conditions, including any general conditions, regional conditions, and activity-specific conditions, of an NWP authorization.

This general condition is adopted as proposed.

**GC 9. Management of Water Flows.** We did not propose any changes to this general condition. One commenter asked for a definition of the term "expected high flows" and said the possibility of high flow events should be anticipated during project implementation. One commenter stated that this general condition should be modified to prohibit changes to stream channels in intertidal areas. One commenter stated that shoreline structures and fills, such as seawalls, bulkheads, and revetments, reflect wave energy that causes deep scouring of the shore, and over-steepened local shore faces. These induced hydraulic effects substantially alter the flow patterns in intertidal features such as ocean and estuarine beaches, wetlands and mudflats.

It would be inappropriate to attempt to define the term "expected high flows" since it would depend on the environmental setting of the NWP activity. To comply with this general condition, the activity should not be substantially damaged by an expected high flow. Activities in stream channels located in intertidal areas are subject to this general condition and if a proposed NWP activity involves the alteration of intertidal stream channels and requires pre-construction notification, the district engineer will evaluate the proposed activity and determine whether it will result in minimal adverse effects on the aquatic environment. Bank stabilization activities should be designed and constructed to withstand expected high flows. Adverse effects to littoral or fluvial processes, or adverse effects caused by deflections of wave energy, should be considered by district engineers when evaluating pre-construction notifications for proposed bank stabilization activities.

This general condition is adopted without change.

**GC 10. Fills Within 100-Year**

**Floodplains.** We did not propose any changes to this general condition. Several commenters explained the benefits of fully functional natural floodplains. Most of the commenters seemed to indicate that the Corps has regulatory jurisdiction over non-wetland floodplains. Several commenters objected to the general condition simply requiring compliance with Federal Emergency Management Agency (FEMA) approved state or local floodplain management requirements. Several commenters said that fills in floodplains identified by state or local FEMA-approved floodplain maps should only be authorized by individual permits, to ensure that state or local floodplain managers are aware of these activities. Two commenters stated that FEMA-approved standards are designed to ensure the public is reasonably safe from flooding, but these standards provide insufficient protection to waterways, floodplains, and other aquatic resources. One commenter said the Corps has an independent obligation to protect waters of the United States and this obligation extends to protection of floodplain resources.

We acknowledge that floodplains provide important ecological functions and services, but it must also be understood that most areas within 100-year floodplains are not subject to Clean Water Act jurisdiction, because a large proportion of the area within 100-year floodplains consists of uplands. The Corps regulatory authority in 100-year

floodplains is usually limited to discharges of dredged or fill material into waters of the United States, including jurisdictional wetlands. The protection of floodplains is more appropriately addressed through land use planning and zoning, which is primarily the responsibility of state and local governments, as well as tribal governments. Land use planning and zoning can provide the holistic approach needed to protect floodplain functions and services, reduce economic losses through flood damage reduction, and protect human health and welfare. If state, local, or tribal governments have zoned areas of 100-year floodplains for residential developments or other uses, and if those activities involve discharges of dredged or fill material into waters of the United States and meet the terms and conditions of an applicable NWP, and the NWP activity results in minimal adverse effects on the aquatic environment or other relevant public interest review factors, then authorization by NWP is appropriate.

This general condition also recognizes that FEMA, in partnership with state and local governments, is the more appropriate authority for floodplain management. It is not the responsibility of the Corps to ensure that project proponents seek any required authorizations from state or local floodplain managers. Such a requirement would not constitute a condition that could be enforced by the Corps. We are not relying on FEMA-approved state or local floodplain management requirements to protect waters of the United States located in 100-year floodplains. The NWP program utilizes other tools, such as regional conditions, the district engineer's ability to exercise discretionary authority to revoke, suspend, or modify an NWP authorization, and add activity-specific conditions to ensure that activities authorized by the NWP results in minimal individual and cumulative adverse effects on the aquatic environment and other public interest review factors.

Two commenters stated that fills in 100-year floodplains result in more than minimal adverse environmental effects and should not be authorized by NWP. One commenter suggested that the Corps evaluate NWP activities in floodplains and riparian areas in a more holistic manner than it did in previous NWP rulemaking efforts. One commenter said that authorizing discharges of fill material in waters of the United States in floodplains affects the ability to manage floodplains so that there are no adverse impacts. One commenter stated that coordination

with the resource agencies should be required to protect habitat and biodiversity in floodplains.

Discharges of dredged or fill material into waters of the United States located in 100-year floodplains often have minimal adverse effects on the aquatic environment, individually and cumulatively. Division engineers can impose regional conditions on one or more NWPs to restrict or prohibit their use in waters of the United States within 100-year floodplains if those NWP activities would result in more than minimal adverse effects on the aquatic environment. In response to a pre-construction notification, district engineers may exercise discretionary authority and require an individual permit if the adverse effects on the aquatic environment would be more than minimal. District engineers may also add activity-specific conditions to an NWP authorization to require measures to minimize adverse effects on the aquatic environment caused by NWP activities. Since the Corps Regulatory Program only regulates discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States, and most areas of 100-year floodplains are not wetlands as defined at 33 CFR 328.3(b) or otherwise waters of the United States under 33 CFR 328.3(a) and associated guidance, the Corps does not have the authority to take a holistic approach to floodplain management. In areas of the country where 100-year floodplains consist mostly of uplands, construction activities in these uplands may have a substantial adverse impact on these 100-year floodplains. We do not agree that agency coordination should be required for fills in 100-year floodplains, because district engineers have the necessary expertise to evaluate pre-construction notifications for potential adverse effects to habitat and biodiversity in these areas.

Two commenters said the general condition should inform permittees of their responsibility to apply for a Conditional Letter of Map Revision from FEMA if they are discharging dredged or fill material into waters of the United States within 100-year floodplains. One commenter recognized that although proposed development projects must comply with all applicable Federal, state, regional and local regulatory requirements, many project proponents do not apply for all required permits. One commenter said that this general condition should be modified to require documentation of compliance with applicable FEMA-approved state or local floodplain management

requirements. One commenter stated that FEMA-approved state or local floodplain management requirements do not adequately protect communities and resources from flood risks.

We do not believe it is the Corps responsibility to notify a prospective permittee of his or her responsibility to apply for a Conditional Letter of Map Revision from FEMA if the overall project would modify the existing regulatory floodway, the effective base flood elevations, or a special flood hazard area. The discharge of dredged or fill material authorized by NWP is likely to be only a small proportion of the overall construction project within the 100-year floodplain. Section E, Further Information, states that obtaining an NWP authorization does not obviate the need to obtain other Federal, state, or local permits, approvals, or authorizations required by law. Building permits to authorize the construction of the overall project are the responsibility of the state or local government, and should be based on compliance with the applicable FEMA-approved state or local floodplain management requirements. It is not the Corps responsibility to ensure that project proponents have complied with the applicable FEMA-approved state or local floodplain management requirements; the state or local governments responsible for floodplain management should enforce the requirements they established to qualify the community for the National Flood Insurance Program. If the floodplain management requirements developed by state or local governments are not adequately protecting communities from flood risks, then the agency that approved those requirements is the appropriate entity to reexamine those requirements.

One commenter requested that the Corps report the extent to which NWPs are being used in floodplains, particularly in areas that have experienced repeated flood damages. Two commenters stated that this general condition ignores the Corps own public interest review processes and does not comply with Executive Order 11988.

The Corps does not track the number of NWP activities that have occurred in floodplains, since our statutory authorities are focused on activities involving discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States. As stated above, many areas of 100-year floodplains are uplands and not waters of the United States. In addition, there is no consistent national coverage in floodplain maps, since such maps are

either not available for some areas of the country or the existing maps are outdated. This general condition is consistent with our regulations on the public interest review, specifically 33 CFR 320.4(g), consideration of property ownership, 33 CFR 320.4(j), other Federal, state, or local requirements, and 33 CFR 320.4(l), floodplain management. Section 320.4(g)(1) states that an “inherent aspect of property ownership is the right to reasonable private use.” Section 320.4(j)(2) states that the primary responsibility for land use planning and zoning is with state and local governments. Section 320.4(l) requires consideration of whether practicable alternatives to floodplain development are available, and if there are no practicable alternatives, then impacts to human health, safety, and welfare, risks of flood losses, and impacts to natural and beneficial aspects of floodplains should be minimized to the maximum extent practicable. This NWP general condition, as well as the other terms and conditions of the NWPs, such as the acreage and linear foot limits for losses of waters of the United States, are consistent with the principles in these regulations because they require avoidance and minimization of adverse effects on the aquatic environment. Executive Order 11988 states that Federal agencies are to consider alternatives to “avoid adverse effects” to floodplains, and “minimize potential harm to or within the floodplain”. The Executive Order also says that agencies should also consider flood hazards in the permit programs they administer. The adoption of general condition 10 into the NWP program is consistent with Executive Order 11988. It is also consistent with Executive Order 13132, Federalism, because it recognizes the cooperative approach the Federal government has taken with state and local governments for floodplain management (i.e., federal review, by FEMA, of state or local floodplain management requirements).

Two commenters suggested reinstating the provisions in the 2002 NWPs that prohibited discharges of dredged or fill material into waters of the United States within mapped 100-year floodplains that would result in above-grade fills for residential, commercial and institutional developments, agriculture activities, recreational facilities, stormwater management facilities, and mining activities.

We do not agree that the approach taken in the 2002 NWPs for fills in 100-year floodplains should be reinstated. There are sufficient safeguards in the

NWPs, including the terms and conditions, pre-construction notification requirements, and the authority for district engineers to exercise discretionary authority and either require individual permits or add conditions to NWP authorizations, to ensure that NWP activities have minimal adverse effects on the aquatic environment, including public interest review factors such as floodplain values and flood hazards.

Three commenters said that using NWPs to authorize discharges of dredged or fill material into waters of the United States will result in increased flood damages in coastal and riparian areas by reducing the amount of aquatic area available to absorb future floods that will likely be larger and more frequent due to climate change. They suggested increasing the application fee for NWPs to cover the estimated cost of permit processing and to offset future economic impacts of authorizing floodplain development.

The flood storage capacity of a coastal or inland floodplain is dependent primarily on its topographic characteristics, including the amount of land area available for storing flood waters. Uplands also provide important ecological services such as flood storage. Flood damage reduction is more effectively accomplished through land use planning and zoning, which as discussed above, is primarily the responsibility of state, local, and tribal governments. Charging application fees for NWP pre-construction notifications or verification requests is not being considered at this time.

This general condition is adopted as proposed.

**GC 11. Equipment.** We did not propose any changes to this general condition. One commenter stated that the condition should be changed to include streams, and not be limited to wetlands or mudflats.

The intent of this general condition is to ensure that heavy equipment used in special aquatic sites such as wetlands and mudflats does not cause more than minimal disturbances to their soils. The substrate of stream beds is generally not considered to be soil, and other general conditions such as general condition 12, soil and sediment controls, are more appropriate to control the movement and disturbance of stream bed sediments. District engineers may also add activity-specific conditions to NWP authorizations, such as requirements to use best management practices, to minimize disturbances to stream beds.

This general condition is adopted as proposed.

**GC 12. Soil Erosion and Sediment Controls.** We did not propose any changes to this general condition. One commenter said the general condition should provide specific steps that will ensure protection of downstream water quality during the construction of permitted activities. Two commenters suggested adding requirements to prevent the erosion of sediments resulting from harvesting shellfish. One commenter stated that disturbed areas should be stabilized and vegetated areas should be restored to pre-construction conditions or improved conditions.

Specific best management practices and other measures to protect downstream water quality are more appropriately addressed by considering the activity-specific environmental setting and adopting practices and measures that will control soil erosion and sediment loads on the site of the authorized activity. District engineers may add conditions to the NWP authorizations to require permittees to use specific best management practices or other techniques to minimize soil erosion and reduce transport of sediment to waters and wetlands. We do not believe it is necessary to modify this general condition to address sediment movement that may occur during shellfish harvesting activities, because such movements are usually minor and temporary and have minimal adverse effects on the aquatic environment. The restoration of areas where temporary fills have been placed, including revegetating those areas, is more appropriately addressed by general condition 13, removal of temporary fills.

This general condition is adopted without change.

**GC 13. Removal of Temporary Fills.** We did not propose any changes to this general condition. One commenter said the general condition should require the removal of temporary fills during periods of low-flow or no-flow so that there will be little or no downstream transport of the fill material.

It would be inappropriate to require that temporary fills be removed only during periods of low-flow or no-flow because it is not always practicable to wait until water flows are low or absent. In addition, more adverse effects to the aquatic environment may occur if the permittee is required to wait until low flow or no flow conditions exist. It is usually best to remove temporary fills as soon as possible to minimize sediment loads to downstream waters or to nearby wetlands. However, general condition 12, soil erosion and sediment controls, encourages permittees to work in waters of the United States during periods of low or no flow, when possible.

This general condition is adopted as proposed.

GC 14. *Proper Maintenance.* We did not propose any changes to this general condition. One commenter recommended changing the general condition to ensure that maintenance activities minimize impacts to waters and maintain downstream water quality. Another commenter suggested adding a provision that would require proper maintenance to ensure compliance with applicable NWP general conditions as well as conditions added to an NWP verification.

The original intent of this general condition was to ensure that NWP activities are maintained so that they do not endanger public safety. There are other general conditions that more directly address minimization (e.g., general condition 23, mitigation) and water quality (e.g., general condition 12, soil erosion and sediment controls, and general condition 25, water quality). We agree that proper maintenance should also be required to comply with the terms and conditions of an NWP authorization, including any activity-specific conditions added to an NWP authorization by the district engineer. For example, road crossings should be properly maintained to continue complying with general condition 2, aquatic life movements.

This general condition is adopted with the change discussed above.

GC 15. *Single and Complete Project.* We did not propose any changes to this general condition. Two commenters recommend removing the term single and complete project. Two commenters said the definition of "single and complete project" is flawed and that the acreage limit of an NWP should apply to the entire project, not just each single and complete project. One commenter suggested changing the general condition to state that an NWP activity cannot be expanded or modified at a later date. Two commenters said the general condition may allow piecemealing under the NWPs.

It has been a long-standing principle in the NWP program that the NWPs authorize single and complete projects. This general condition was added to the NWPs in 2007 to make that clear to users of the NWPs. The general condition is consistent with the NWP regulations at 33 CFR part 330 that were last revised in 1991, especially the definition at 33 CFR 330.2(i). Some of the NWPs issued in the past included terms and conditions stating the NWP authorized single and complete projects. In 2007, we added a general condition to make it clear that all NWPs authorize single and complete projects. As long as

any proposed expansions or modifications of a previously authorized NWP activity comply with the terms of the NWPs, they can be authorized by NWP. Expansions or modifications that are not separate single and complete projects from the previously authorized activity have to comply with the terms and conditions of the NWP, including any acreage or linear foot limits that would apply to both the previously authorized activity and the NWP activity included in the expansion or modification. If the expansion or modification is determined by the district engineer to be a separate single and complete project, then that expansion or modification activity may qualify for separate NWP authorization. We do not agree that this general condition results in piecemealing, because the NWP authorization applies to each single and complete project. District engineers will exercise discretionary authority and require other forms of Department of the Army authorization if the use of the NWP to authorize activities in a watershed or other geographic area will result in more than minimal cumulative adverse effects on the aquatic environment.

This general condition is adopted without change.

GC 16. *Wild and Scenic Rivers.* We proposed to modify this general condition to clarify that information on these rivers should be obtained from the specific Federal land management agency responsible for the designated Wild and Scenic River or study river. One commenter supported reissuing the general condition.

The general condition is adopted as proposed.

GC 17. *Tribal Rights.* We did not propose any changes to this general condition. One commenter stated that the use of the NWPs will be in violation of tribal treaty rights, tribal water quality standards, and the Clean Water Act, and threaten salmon recovery efforts in the Pacific Northwest.

Division engineers may impose regional conditions on the NWPs to restrict or prohibit their use in waters where NWP activities may result in more than minimal adverse effects on the aquatic environment or any other public interest review factor, including fish and wildlife values. We have directed our districts to initiate government-to-government consultation with Tribes to develop and propose regional conditions to protect tribal treaty resources and other resources of importance to Tribes. Under this general condition, no activity may be authorized by NWP if it impairs reserved tribal rights, such as reserved water rights or

treaty fishing and hunting rights. The regional conditioning process helps identify those rights on a geographic basis, so that prospective users of the NWPs and Corps districts are aware of those tribal rights. Nationwide permit activities must also comply with Tribal water quality standards, if those activities involve discharges into waters covered by Tribal water quality standards. Activities authorized by NWPs must also comply with general condition 18, endangered species, which will help support the recovery of listed salmon species.

The general condition is adopted as proposed.

GC 18. *Endangered Species.* We proposed to modify paragraph (a) of this general condition to clarify that both 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. In addition, we proposed to modify paragraph (e) to include definitions of "take" and "harm." Another proposed change was 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. One commenter expressed support for the proposed modifications.

Several commenters requested clarification and definitions for the terms "directly" and "indirectly" as used in paragraph (a). In addition, several commenters objected to the addition of "indirectly" into the general condition, because they believe only direct effects should be considered. Several commenters expressed concern that this will result in the Corps evaluating direct and indirect effects that are far from the NWP activity.

To provide clarification on the use of the terms "direct" and "indirect" in the context of general condition 18 and the NWPs in general, we are adding definitions of "direct effects" and "indirect effects." The definitions were adapted from the definitions provided in the Council of Environmental Quality's National Environmental Policy Act regulations at 40 CFR 1508.8. The definition of "indirect effect" is also generally consistent with the Services' definition within the definition of "effects of the action" at 50 CFR 402.02. The addition of indirect effects to paragraph (a) of the general condition is consistent with the U.S. Fish and Wildlife Service's and National Marine Fisheries Service's Endangered Species

Act Section 7 regulations for considering whether a proposed activity may jeopardize the continued existence of a listed species or may result in the destruction or adverse modification of critical habitat (see the definitions of “destruction or adverse modification” and “jeopardize the continued existence of” at 50 CFR 402.02). The Corps is obligated by the section 7 consultation regulations to consider indirect effects caused by proposed NWP activities, and appropriate distances for such indirect effects will have to be determined on a case-by-case basis by district engineers.

One commenter stated that the district engineer should evaluate the Endangered Species Act (ESA) compliance documentation provided by the Federal agency, and determine whether or not it is sufficient to address ESA compliance for the NWP activity, or whether additional ESA consultation is necessary. Two commenters recommended modifying paragraph (b) to clarify that documentation of compliance with the Endangered Species Act provided by a Federal agency will be sufficient and that Corps review and concurrence with that section 7 consultation is not required. One commenter said that paragraph (b) should make it clear that a state agency operating under federal funding can also provide the section 7 compliance documentation obtained by the Federal agency that oversees its activities, and not have to reinitiate consultation. Another commenter stated that when a non-Federal permittee is operating on behalf of a Federal agency, they should follow paragraph (b) of this general condition instead of paragraph (c).

We have added a sentence to paragraph (b) to state that the district engineer will review the other Federal agencies’ documentation of compliance with the Endangered Species Act and determine whether that compliance is sufficient for the NWP activity, or whether additional ESA consultation is necessary before the activity can be authorized by NWP. We believe this provision is necessary to address situations where the consultation conducted by the other Federal agency does not adequately cover the direct and indirect effects on listed species or designated critical habitat caused by the NWP activity. For similar reasons, we do not agree that it would be appropriate to modify paragraph (b) to explicitly state that state agencies may rely on ESA compliance documentation obtained by the Federal agency that provides them with funding for an activity. District engineers will generally accept another Federal agency’s compliance with section 7, but there

may be situations where that agency’s section 7 compliance does not adequately address the activities authorized by an NWP and their effects on listed species or designated critical habitat. In those situations, the district engineer may conduct additional section 7 consultation to satisfy the requirements of the Endangered Species Act. If it is not sufficient, then the non-Federal permittee has to follow paragraph (c) of this general condition instead.

One commenter said that this general condition places the responsibility for determining whether a proposed activity may affect listed species in the hands of the permittee. One commenter requested clarification on how the “might be affected” threshold in the first sentence is to be determined by an applicant, because it is unclear and leaves room for broad interpretation. One commenter stated that the word “might” in the second sentence of paragraph (c) should be changed to “may.”

It is the Corps’ responsibility to make “may affect” determinations for the purposes of the ESA, and the “might be affected” threshold is intended to be a cautionary threshold to give district engineers the opportunity to evaluate proposed activities and make their effect determinations. Prospective permittees are required to submit pre-construction notifications if the proposed NWP activity has the potential to affect a listed species, is in the vicinity of a listed species, or is located in designated critical habitat. If the Corps determines there will be no effect on listed species or designated critical habitat, then ESA section 7 consultation is not necessary. If the district engineer determines there will be an effect that requires ESA section 7 consultation, then he or she will initiate either formal or informal consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service, as appropriate.

One commenter said paragraph (c) should clearly state that a pre-construction notification is to be submitted if any listed species or designated critical habitat might be affected or is in the vicinity of the project, to ensure that another form of notification is not used. Two commenters stated that 30 days is sufficient for the Corps to notify the applicant of its “may affect” determination and asked why the general condition allows 45 days. Two commenters suggested modifying this general condition to state that if the prospective permittee does not receive a response from the Corps within 45 days,

then he or she can assume that the Corps has determined that there is “no effect” on a listed species. In addition, one of these commenters said that for projects that “may affect” a listed species, if the section 7 consultation is not concluded within 135 calendar days of initiation, the activity would be authorized to proceed as if a “no effect” determination has been made.

We have modified the first sentence of paragraph (c) to state that non-Federal permittees must submit a pre-construction notification if the notification requirement is triggered. The 45-day period in paragraph (c) of this general condition is intended to be consistent with the 45-day review period for pre-construction notifications provided in paragraph (a) of general condition 31, pre-construction notification. Under paragraph (a) of general condition 31, a prospective permittee may not begin an NWP activity that requires pre-construction notification until he or she has been notified in writing that the activity may proceed under the NWP, or 45 calendar days have passed since the district engineer received a complete pre-construction notification and no written notice has been provided to the applicant by the district or division engineer. However, if pre-construction notification was required by paragraph (c) of general condition 18, the prospective permittee may not proceed with the NWP activity until notified by the Corps, even if the 45 calendar days have passed, because the Corps regulations at 33 CFR 330.4(f)(2) state that NWP activities cannot commence until the requirements of the ESA have been satisfied and the district engineer has notified the applicant that the activity is authorized by NWP. It may take more than 135 days to complete section 7 consultation, and the NWP activity may not proceed until after consultation has been completed.

Two commenters requested clarification on what work the prospective permittee is prohibited from conducting prior to the Corps making a determination of “no effect” or until section 7 consultation is completed. Two commenters requested clarification of the term “vicinity” in this general condition.

The work covered by the general condition and the Corps regulations at 33 CFR 330.2(f) depends on the scope of analysis for the ESA section 7 consultation. The Corps follows the U.S. Fish and Wildlife Service’s and National Marine Fisheries Service’s regulations at 50 CFR part 402 and Endangered Species Consultation Handbook to determine the section 7 scope of

analysis. The scope of analysis includes the direct and indirect effects of the NWP activity, as well as the effects of other activities that are interrelated and interdependent with that activity (see 50 CFR 402.02). The section 7 scope of analysis will be determined by district engineers on a case-by-case basis. Generally, the applicant cannot begin any work for which a Department of the Army permit is required until the applicable ESA provisions have been satisfied. The term "vicinity" cannot be defined at a national level, since the extent of the vicinity depends on a variety of factors, including the species that might be affected, the proposed activity, and the environmental setting.

One commenter said pre-construction notification should not be required for NWP activities that require section 7 compliance, if they would not otherwise require a pre-construction notification. This commenter stated that the prospective permittee should only be required to submit the appropriate documentation for section 7 consultation. One commenter stated that this general condition should also apply to state-listed threatened and endangered species.

This general condition is consistent with the NWP regulations at 33 CFR 330.4(f)(2), which requires the prospective permittee to notify the district engineer if any Federally-listed endangered or threatened species, or critical habitat, might be affected or is in the vicinity of the project. The prospective permittee must submit the information required for a pre-construction notification, so that the district engineer will have sufficient information to commence evaluation of the proposed activity and its effects on listed species or critical habitat. It would be inappropriate to expand the scope of this general condition to cover state-listed endangered and threatened species, since that is a regional issue that is best addressed through state laws and regulations. If a state is concerned about the potential impacts of one or more NWPs on state-listed species, the state may ask the Corps district to consider adding regional conditions to help protect state-listed endangered or threatened species.

Two commenters recommended removal of the definitions of "take" and "harm" from this general condition and replacing those definitions with a reference to the Endangered Species Act, to reduce the potential for inconsistencies. One commenter said the Corps should instead use the U.S. Fish and Wildlife Service's regulations to determine what constitutes an effect or jeopardizes any threatened or

endangered species or their critical habitat.

The definition of "take" is identical to the definition in the Endangered Species Act (see 16 U.S.C. 1532(19)). The definition of "harm" is the same as the definition in the U.S. Fish and Wildlife Service's regulations (50 CFR 17.3) and the National Marine Fisheries Service's regulations (50 CFR 222.102). The definitions of "take" and "harm" were added to this condition to provide clarification for users of the NWPs, and facilitate compliance with the Endangered Species Act.

One commenter stated that paragraph (f) should provide web links to the Services' ESA Section 7 regulations and other documents. Another commenter said the Corps should defer to the U.S. Fish and Wildlife Service on effects determinations.

Paragraph (f) provides links to web sites for the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to assist prospective permittees with obtaining information on listed species and other ESA documents. We do not believe it is necessary to provide a link to the Services' section 7 consultation regulations at 50 CFR part 402 since it is the Corps responsibility to conduct section 7 consultation. It is also the Corps responsibility to make "may effect" determinations for the purposes of the ESA and district engineers have the option of soliciting advice from the U.S. Fish and Wildlife and/or the National Marine Fisheries Service prior to making their determinations.

One commenter recommended that surveys be conducted for state- and Federally-listed species prior to the start of construction. Another commenter said the lack of a requirement for surveys makes the pre-construction notification requirement in this general condition ineffective. One commenter said that "objective science" is needed to identify habitats and species that may be affected by activities authorized by NWPs. One commenter stated that the Corps must consider the effects of climate change during the consultation process.

The need for surveys for Federally listed species is to be determined by the district engineer on a case-by-case basis. It is not possible to require surveys for the tens of thousands of activities authorized by NWP each year. Project proponents are encouraged, but not required to contact the U.S. Fish and Wildlife Service or the National Marine Fisheries Service for assistance in determining whether listed species or critical habitat might be affected by the proposed activity. The effects of climate

change on endangered and threatened species and their critical habitat is more appropriately addressed through the section 7 consultation process, since those effects are likely to be site-specific.

The general condition is adopted with the modifications discussed above.

**GC 19. Migratory Bird and Bald and Golden Eagle Permits.** We are adding this new general condition to clarify that permittees are responsible for complying with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act, and obtaining any "take" permits that may be required under the U.S. Fish and Wildlife Service's regulations issued under those two statutes. The Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act differ from the Endangered Species Act in that those two statutes and their implementing regulations establish the project proponent as the responsible party who has to apply to the U.S. Fish and Wildlife Service for take permits, if such permits are required.

The U.S. Fish and Wildlife Service's implementing regulations that establish general permit requirements for migratory birds permits at 50 CFR part 21 state that "[n]o person may take, possess, import, export, transport, sell, purchase, barter, or offer for sale, purchase, or barter, any migratory bird, or the parts, nests, or eggs of such bird except as may be permitted under the terms of a valid permit issued pursuant to the provisions of this part and part 13 of this chapter, or as permitted by regulations in this part, or part 20 of this subchapter (the hunting regulations), or part 92 of subchapter G of this chapter (the Alaska subsistence harvest regulations)." The term "person" is defined at 50 CFR 10.12 as "any individual, firm, corporation, association, partnership, club, or private body, any one or all, as the context requires." These regulations do not identify a federal permitting agency as a "person" responsible for obtaining a take permit, where that federal agency is not actually carrying out the activity that may result in the "take" of a migratory bird. Likewise, the U.S. Fish and Wildlife Service's implementing regulations for the Bald and Golden Eagle Protection Act at 50 CFR part 22 do not include any provisions stating that Federal permitting agencies are responsible for assisting project proponents in obtaining permits to authorize the taking, possession, and transportation within the United States of bald eagles and golden eagles and their parts, nests, and eggs.

Executive Order 13186 discusses the responsibilities of Federal agencies to protect migratory bird for the purposes of the Migratory Bird Treaty Act. The Executive Order applies only to those actions that are directly carried out by Federal agencies (see Section 2, paragraph (h)). Actions carried out by non-Federal entities with Federal assistance are not subject to the Executive Order. Department of the Army permits can be considered a form of Federal assistance since they provide authorization to non-Federal entities to comply with Federal laws such as Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899.

This general condition is adopted.

**GC 20. Historic Properties.** We proposed to modify paragraph (c) of this general condition to make a more general reference to the Corps Regulatory Program's current procedures for compliance with Section 106 of the National Historic Preservation Act, since we are using Appendix C to 33 CFR part 325, as well as various guidance documents to address the Advisory Council on Historic Preservation's revised regulations at 36 CFR part 800.

In response to the February 16, 2011, proposal to reissue the NWPs, including the proposed modification of this general condition, we received comments on the Corps use of Appendix C and the current guidance. Concerns regarding the use of Appendix C and the current guidance are outside the scope of the NWP rule, and are not addressed in this rule.

Several commenters asked whether an NWP authorization or verification would be issued before a State Historic Preservation Officer concurs to an effect determination or formalizes an agreement regarding historic properties. One commenter stated that although the NWP regulations provide that the Corps may issue an NWP before a memorandum of agreement is executed, district engineers have, in some cases, not issued NWP verifications without State Historic Preservation Officer concurrence.

This general condition requires non-Federal permittees to submit pre-construction notifications if the NWP activity may have the potential to cause effects to historic properties. In such cases, the district engineer will initiate section 106 consultation with the appropriate State Historic Preservation Officer or Tribal Historic Preservation Officer. Further consultation may be conducted with the Advisory Council on Historic Preservation, if necessary. The prospective permittee may not

begin the NWP activity until the district engineer notifies him or her that the section 106 consultation has been completed (which may include execution of a memorandum of agreement to address adverse effects or the concurrence of the State or Tribal Historic Preservation Officer), or the activity has no potential to cause effects to historic properties.

One commenter said the Corps should more closely follow paragraph (b) of the general condition and not require redundant section 106 review on projects that are being undertaken by another Federal agency. Three commenters suggested that the Corps section 106 responsibilities should be satisfied if another Federal agency formally accepts responsibility for conducting section 106 consultation and is the lead for this responsibility through either a programmatic agreement or on a project-by-project basis. One commenter said that duplicate regulatory efforts are unnecessary, particularly when another Federal agency has a lead role.

District engineers will generally accept another Federal agency's compliance with section 106, but there may be situations where that agency's section 106 compliance does not adequately address the activities authorized by an NWP and their effects on historic properties. In those situations, the district engineer may conduct additional section 106 consultation to satisfy the requirements of the National Historic Preservation Act. We have added a sentence to paragraph (b) to address these situations.

One commenter said the general condition does not clearly specify who is responsible for the identification and evaluation of historic properties and determination of effects. Another commenter stated that the general condition does not adequately ensure section 106 compliance because the Corps may not receive enough information from permittees to fully take into account the effect a project may have on a historic property. This commenter also said that while paragraph (c) states that prospective permittees may seek assistance from the State or Tribal Historic Preservation Officer and from the National Register of Historic Places, there is no requirement that an applicant consult with these parties or that an applicant coordinate an effect determination with a qualified professional with relevant historic properties experience.

The Corps is ultimately responsible for determining compliance with the requirements of Section 106 of the

National Historic Preservation Act. Non-Federal permittees are required to submit pre-construction notifications if an NWP activity may have the potential to cause effects to historic properties, and the district engineer will evaluate those pre-construction notifications to determine if section 106 consultation is necessary. The general condition also states that district engineers will make reasonable and good faith efforts to identify historic properties and effects on those properties. The district engineer may request additional information from the applicant where necessary to evaluate potential effects of the activity on historic properties or to initiate section 106 consultation. We cannot require prospective permittees to seek assistance from a State Historic Preservation Officer or a Tribal Historic Preservation Officer, search the National Register of Historic Preservation, or consult with qualified historic property professionals. However, this general condition requires prospective permittees to provide a list of " \* \* \* 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," if these properties may be affected. The permittee may obtain such information from the State Historic Preservation Officer or Tribal Historic Preservation Officer, the National Register of Historic Places, or other sources of information on historic properties.

One commenter recommended providing language to clearly state when a pre-construction notification is or is not required based on the presence or absence of known historic properties. This commenter suggested that if a prospective permittee independently determines that no historic properties exist within the boundaries of the project area, then pre-construction notification is not necessary. The commenter also said that if the district engineer has to be notified because of potential effects to historic properties, the notification should not be in the form of a pre-construction notification.

We do not agree that the general condition should be modified to explicitly state that prospective permittees do not have to submit pre-construction notifications if they determine there are no known historic properties within the boundaries of the project area. Such a provision would be inappropriate, because there could be visual or noise effects to historic properties outside of the project area that have to be evaluated through the section 106 consultation process. The

current general condition is the proper approach, in which the prospective permittee seeking NWP authorization is required to submit a pre-construction notification if the proposed activity might have the potential to cause effects to any historic property listed in, or eligible for listing in, the National Register of Historic Places, including previously unidentified properties. A pre-construction notification is the appropriate mechanism to notify the district engineer, because it contains information necessary to begin the evaluation process, to determine whether the proposed activity qualifies for NWP authorization.

One commenter requested clarification of what constitutes the permit area for the purposes of consultation under Section 106 of the National Historic Preservation Act. One commenter asked if a permittee is obligated to have the Corps review an archaeologist's determination that an activity will not impact an historic site. One commenter stated that the general condition is unreasonable and violates federalism.

The criteria for identifying the permit area for the purposes of section 106 are provided in paragraph 1(g) of Appendix C to 33 CFR part 325, in addition to paragraph 6(d) of the April 25, 2005, interim guidance. The permit area will be determined on a case-by-case basis by the district engineer. When a professional cultural resource manager or archaeologist performs an investigation or makes an effect determination, the Corps will generally consider the qualifications of the professional and will review any documentation provided for the purposes of section 106 compliance. This general condition is required because the NWP program must comply with the National Historic Preservation Act, a Federal law. Even though most NWP activities occur on private land, compliance with applicable Federal laws is necessary. This general condition would not interfere with any state or local authorities.

This general condition is adopted with the modifications discussed above.

*GC 21. Discovery of Previously Unknown Remains and Artifacts.* We proposed this new general condition to address circumstances where previously unknown or unidentified historical or archaeological remains are discovered while conducting the NWP activity.

Several commenters expressed support for adding this general condition to the NWPs. Two commenters said the condition should refer to the district engineer instead of "this office" or "we." We have made

these changes to be consistent with the language found in other general conditions.

One commenter stated that the proposed condition relies on the permittee, who is generally not qualified to make determinations concerning remains and artifacts discovered during construction activities. This commenter said that this general condition should require all work to cease immediately and a qualified Corps archaeologist should initiate required consultation.

We believe the revised language in the condition clearly indicates that the Corps will initiate consultation in such instances where a previously unknown historic or archaeological remain is discovered during construction activities. The Corps does not have the authority to prohibit all construction activities on the site in these cases.

Several commenters expressed concern with the use of the term "artifact" in this general condition, and some of them stated that it can have too broad of a definition. One commenter requested clarification as to what constitutes an "artifact." Another commenter said that this general condition should have thresholds to protect significant artifact deposits while allowing work to continue when only minor artifacts are discovered. One commenter suggested that we qualify "artifacts" by adding "artifacts that are potentially eligible for the National Register of Historic Places."

The use of the term artifact is consistent with the definition of "historic property" at 36 CFR 800.16, which states that historic properties include "... artifacts, records, and remains that are related to and located within [historic] properties." Procedures for the protection of historic properties address all properties that may be eligible for inclusion in the National Register of Historic Places, and do not establish quantitative thresholds for when section 106 consultation must occur. The consultation threshold is an effects-based threshold. We do not believe it is necessary to add text clarifying that artifacts are those "that are potentially eligible for the National Register of Historic Places." Eligibility determinations will be made after the discovery of artifacts and remains.

Three commenters stated that the proposed general condition is more restrictive than general condition 3 provided in Appendix A to 33 CFR part 325, the permit form for individual permits. These commenters said the NWP general condition should not be more restrictive than the standard permit condition. Two commenters suggested deleting this general

condition because provisions for the discovery of unknown historic or archaeological remains are already codified in the NWP regulations and in the Corps Regulatory Program's implementing regulations for Section 106 of the National Historic Preservation Act.

The proposed general condition is similar to general condition 3 in Appendix A of 33 CFR part 325. For this new NWP general condition, we have taken the text of general condition 3 in Appendix A and modified it to include Tribes. We have also modified it by adding a provision requiring, to the maximum extent practicable, avoidance of construction activities that could affect the remains and artifacts. We believe the latter provision is necessary to protect those artifacts and remains as much as possible. The addition of Tribes to the condition reflects current section 106 procedures. This general condition can be more restrictive than the standard permit condition in Appendix A because the NWPs may only be used to authorize activities with minimal adverse effects on the aquatic environment and other applicable public interest review factors. While 33 CFR 330.4(g)(3) contains a similar provision, we believe the general condition is needed to comply with applicable cultural resource laws.

Several commenters expressed concern with requiring the permittee to stop work once previously unknown historic or archaeological remains are found. One commenter said this provision is too unpredictable and may result in significant delays. One commenter suggested adding time frames to this general condition to provide predictability and assure permittees that the Corps will proactively seek to resolve any outstanding historic property issues. One commenter recommended clarifying this general condition to state that if a discovery occurs, work should cease only in the area containing remains or artifacts. One commenter objected to the work stoppage provision, stating that once construction begins, substantial investment has been made and the requirement to stop construction indefinitely upon the discovery of a potentially insignificant archaeological resource represents an unacceptable financial risk. This commenter recommended that if we keep this provision as proposed, we impose time frames on identification and consultation in order to provide some predictability to the process.

We believe it is necessary to include a provision in this general condition to require the permittee, once any

previously unknown historic, cultural, or archeological remains or artifacts are found while conducting the NWP activity, to avoid construction activities that could affect those remains and artifacts, to the maximum extent practicable. We recognize that in some circumstances it may not be possible to avoid further construction activities that might affect the remains and artifacts, because those construction activities may have to be completed for safety or minimizing erosion and sedimentation. In addition, the Corps does not have the legal authority to stop construction activities. We have replaced the phrase "stop activities that would adversely affect those" with "avoid construction activities that could affect the" to protect those remains and artifacts as much as possible while preventing other adverse environmental effects from occurring, such as the installation of sediment and erosion control devices to reduce or eliminate sediment inputs to wetlands, streams, and other waters while the necessary Federal, Tribal, and state coordination is conducted. It would not be appropriate to impose timeframes in this general condition, because the amount of time to complete coordination will vary across the country and from case to case. We cannot remove the provision for avoiding construction activities that could affect the remains and artifacts, because Section 106 of the National Historic Preservation Act and other cultural resource laws impose binding requirements on the Corps and other federal agencies.

A few commenters said this general condition should not apply to other Federal agencies with section 106 responsibilities if they are the permittees, since their implementing regulations already contain provisions for the discovery of previously unknown historic or archaeological remains during construction.

We agree that in cases where another federal agency is the lead Federal agency for purposes of compliance with Section 106 of the National Historic Preservation Act, that Federal agency should follow its procedures for addressing post-review discoveries. However, the Corps also has section 106 responsibilities if the NWP activity has the potential to cause effects to an historic property. As long as the lead Federal agency is in compliance with section 106 requirements and this compliance satisfies section 106 requirements for the NWP authorization, the Corps can rely on the lead Federal agency's compliance efforts. Upon notification, the district engineer will let the other Federal

agency know if any further action by the Corps is necessary.

This general condition is adopted with the modifications discussed above.

**GC 22. Designated Critical Resource Waters.** We proposed to modify this general condition to clarify the types of waters subject to the general condition by changing how NOAA's marine sanctuaries are described, which categories of critical resource waters are always subject to this general condition, and how additional critical resource waters can be designated by a district engineer after a public notice and comment process. We also proposed to add proposed new NWPs A and B, now designated NWPs 51 and 52, respectively, to the list of NWPs in paragraph (a).

Several commenters objected to allowing state-designated outstanding national resource waters to be automatically included as designated critical resource waters because of varying designations and criteria across the states. These commenters also said that a state's process to designate such waters may not include the opportunity for public comment and that the designations carry no legal basis. In addition, commenters indicated there are inconsistent approaches by different agencies within the same state for designating outstanding national resource waters. Some commenters said that other state programs, such as those that are responsible for Clean Water Act Section 401 water quality certifications, are capable of adequately addressing the effects of the activity to these state designated waters. One commenter requested a definition of outstanding national resource waters. Two commenters said such waters should have a particular environmental or ecological significance. Two commenters objected to including outstanding national resource waters automatically because that designation may be based only on recreational characteristics. Three commenters suggested that the general condition should be changed to require the district engineer to designate such waters only after issuing a public notice and soliciting comment, and then obtaining concurrence from the state.

This general condition was first adopted in the NWPs issued on March 9, 2000 (see 65 FR 12872). In the preamble to the 2000 NWPs, we stated that " \* \* \* outstanding national resource waters must be identified and approved by the district engineer after public notice and opportunity for comment" (65 FR 12873, third column). In that notice, we also said that state or local officials should not be able to

designate additional waters as critical resource waters without the district engineer providing an opportunity for public notice and comment. We are modifying this general condition to return to our original approach, since there is much disparity across the country in how outstanding national resource waters are identified and designated. Because of the inconsistency in how outstanding national resource waters are designated, we believe it is necessary to provide the public with the opportunity to review and comment on those waters before they become adopted as designated critical resource waters for the purposes of this general condition. Outstanding national resource waters should have environmental and ecological significance, and their designation should not be based solely on recreational uses or characteristics.

Three commenters expressed concern that providing district engineers the ability to designate, after notice and opportunity to comment, additional waters officially designated by a state as having particular environmental or ecological significance would lead large areas of state-designated waters of all types to be removed from being eligible for the NWPs. One commenter said this general condition should be removed because it violates the principles of federalism in Executive Order 13132. This commenter said a district engineer could use state stream designations to identify critical resource waters and override the rights of states to interpret and enforce their own laws.

We are retaining the provision that allows district engineers to designate additional critical resource waters after notice and opportunity for public comment. That process is not substantially different from using the regional conditioning process to restrict or prohibit the use of NWPs in specific waters or geographic areas, which can be delegated by division engineers to district engineers. This general condition is not contrary to Executive Order 13132. The general condition helps support the objective of the Clean Water Act, which is to restore and maintain the physical, chemical, and biological integrity of the Nation's waters. In addition, this general condition helps ensure that the NWPs authorize only those activities that have minimal individual and cumulative adverse effects on the aquatic environment. This general condition only applies to waters and wetlands that are both waters of the United States and designated critical resource waters.

One commenter objected to removing state natural heritage sites from

automatic inclusion in the general condition due to their interest in maintaining the existing protection the general condition provides to areas of unique ecological significance. Another commenter supported the proposed change. One commenter said state natural heritage sites should not be automatically considered critical resource waters because the term is undefined. Another commenter suggested that state natural heritage sites should be limited to those sites that are identified through state legislation. One commenter opposed including state natural heritage sites as potentially being classified as critical resource waters and suggested that the Corps continue to defer to State Historical Preservation Officers to determine effects on historic sites.

While we understand the perspective that state natural heritage sites should be automatically subject to this general condition, we also understand the need for transparency and clarity for the regulated public. Given the variability in waters and wetlands that may be designated as state natural heritage sites, and the different processes that may be used by states to designate their natural heritage sites, we believe it is necessary to provide a public notice and comment process before including state natural heritage sites as designated critical resource waters under this general condition. This approach will help improve compliance with the NWP conditions, because it will make project proponents aware of certain restrictions for the use of specific NWPs. The protection of historic properties is more appropriately addressed through general condition 20, historic properties.

One commenter said the use of an NWP should not be prohibited in critical resource waters when the agency responsible for managing those critical resource waters is conducting the activity. This commenter also suggested that the general condition should not prohibit the use of NWPs, but instead the NWPs listed in paragraph (a) should be moved to the notification provision of paragraph (b) and also require the approval of the agency that manages the designated critical resource water, similar to the approach taking in general condition 16, wild and scenic rivers. One commenter supported protecting critical resource waters but suggested that protection can be provided instead by requiring prior written approval through a state's water quality agency. Another recommended requiring water quality certifications for the NWPs listed in paragraph (b) instead of pre-construction notifications, to ensure that the activities authorized by those NWPs

result in minimal adverse effects on designated critical resource waters and adjacent wetlands.

The purpose of the prohibition in paragraph (a) of this general condition is to exclude the use of those NWPs in critical resource waters that have the potential to result in more than minimal adverse effects on the aquatic environment. The status of the entity who would be conducting the proposed discharge of dredged or fill material is not relevant to the minimal adverse effects determination; instead, it is the environmental effects of the discharge that have to be considered. Discharges of dredged or fill material into waters of the United States that are designated critical resource waters, as well as their adjacent wetlands, may be authorized by other forms of Department of the Army permits, such as individual permits or regional general permits. Wild and Scenic Rivers referenced in general condition 16 are those waters that have been designated as such in accordance with the Wild and Scenic Rivers Act of 1968, a federal law. Similar to state-listed threatened and endangered species, the NWP program cannot be used to ensure compliance with other state or local laws. However, an NWP authorization does not obviate the need for the permittee to obtain other federal, state, or local authorizations, including specific authorizations related to state-protected critical resource waters. The water quality certification process would not be an appropriate alternative to the pre-construction notification requirement in paragraph (b) of this general condition because the evaluation of an NWP pre-construction notification involves consideration of more than water quality issues.

One commenter suggested that pre-construction notifications for NWP activities listed in paragraph (b) proposed in waters identified as critical resources through state processes, should only be coordinated with state authorities. This commenter said the pre-construction notification for simple maintenance and improvement projects creates unnecessary work for the project proponent and the Corps. One commenter recommended adding a list of conservation areas to the general condition, with a requirement that permittees must be in compliance with the site specific management plan of the conservation area.

The district engineer will evaluate the pre-construction notification for an NWP listed in paragraph (b) of this general condition, to determine if the proposed activity will result in minimal adverse effects on the aquatic

environment, including the critical resource water and its adjacent wetlands. Agency coordination is only required for NWP activities that result in the loss of greater than 1/2-acre of waters of the United States. None of the NWPs listed in paragraph (b) have the 300 linear foot limit for the loss of stream beds, so the agency coordination threshold for requests for written waivers for the loss of greater than 300 linear feet of intermittent or ephemeral stream bed would not be triggered. We do not agree that conservation areas should be added to the general condition at the national level, because what constitutes a "conservation area" is likely to vary across the country. District engineers may add specific aquatic conservation areas that meet the definition of critical resource waters to this general condition after a public notice and comment process.

The general condition is adopted as proposed.

**GC 23. Mitigation.** We proposed to modify paragraph (g) to be more consistent with the compensatory mitigation regulations at 33 CFR part 332, by replacing the word "arrangements" with "programs" in describing in-lieu fee programs and replacing the phrase "activity-specific" with "permittee-responsible" when referring to compensatory mitigation implemented by the permittee. In addition, we proposed to add 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. Finally, we proposed 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, is to be identified in conditions added to the NWP authorization. Several commenters supported these proposed changes. One commenter commended the Corps for the flexibility in determining compensatory mitigation requirements.

One commenter stated that paragraph (a) should indicate that when another Federal agency has determined that the activity has been designed to avoid and minimize impacts the district engineer will defer to that agency's determination. Several commenters said this general condition does not adequately stress avoidance of aquatic resources before compensatory mitigation is considered. One

commenter also said the general condition should refer to the measures provided in the 404(b)(1) Guidelines for details on avoiding and minimizing impacts. This commenter also suggested that the prospective permittee should be required to document the steps taken to avoid and minimize impacts, and describe them in the pre-construction notification. In addition, the commenter said that the NWPs should only authorize discharges of dredged or fill material into special aquatic sites when the activity is water dependent or in cases where the prospective permittee clearly demonstrates there are no practicable alternatives available. One commenter stated that the practicable alternative test in the Section 404(b)(1) Guidelines should be used for NWP activities.

The district engineer determines compliance with the terms and conditions of the NWPs, including whether the permittee has avoided and minimized adverse effects to waters of the United States to the maximum extent practicable on the project site. The general condition imposes substantive requirements to avoid and minimize adverse effects to waters of the United States, and district engineers will review pre-construction notifications and determine whether project proponents have satisfied the avoidance and minimization requirement, as well as other applicable provisions of this general condition. District engineers will also determine if proposed activities result in minimal adverse effects on the aquatic environment and qualify for NWP authorization. General permits only need to comply with section 230.7 of the 404(b)(1) Guidelines, which provides the evaluation process for the issuance of Clean Water Act Section 404 general permits, including NWPs. Individual activities that qualify for NWP authorization do not have to implement the avoidance and minimization measures provided elsewhere in the 404(b)(1) Guidelines, although they must still comply with the avoidance and minimization provisions of this general condition, which are designed to ensure that the NWPs collectively comply with the 404(b)(1) Guidelines. Requiring the permittee to provide documentation of avoidance and minimization measures taken would result in unnecessary paperwork requirements, and the current information requirements for complete pre-construction notifications are sufficient. Section 230.7(b)(1) of the 404(b)(1) Guidelines states that the alternatives analyses required by section

230.10(a) are not directly applicable to general permits.

One commenter stated the general condition should address other aspects of mitigation, such as performance standards, monitoring, and contingency actions. One commenter said the general condition does not comply with 33 CFR part 332 because it does not provide any criteria or performance standards for compensatory mitigation. One commenter indicated that monitoring must be required for all mitigation.

We have made several changes to this general condition to make it consistent with the applicable provisions in 33 CFR part 332. We have also added a sentence to paragraph (c)(1) of this general condition to state that compensatory mitigation projects to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332. The general condition provides basic requirements, since the specific details for compensatory mitigation projects (e.g., objectives, ecological performance standards, monitoring requirements, and site protection) are determined on a case-by-case basis by district engineers. We acknowledge that monitoring is required for all compensatory mitigation projects, in accordance with 33 CFR 332.6.

Two commenters stated that the district engineer should have discretion to determine what, if any, compensatory mitigation is required for projects impacting more than  $\frac{1}{10}$ -acre of wetlands, as in some cases, compensatory mitigation may not be necessary, and mitigation ratios of less than one-for-one may be adequate. One commenter said that the Corps cannot require mitigation for NWP activities that result in minimal adverse environmental effects, even if there are wetland losses greater than  $\frac{1}{10}$ -acre, and requested that the Corps change the first sentence of paragraph (c) to state that the mitigation requirement can be waived if the district engineer determines that the impacts of the proposed activity are minimal or some other form of mitigation would be more environmentally appropriate. Several commenters stated that compensatory mitigation should be required for all NWP activities, and all resource types, regardless of the amount of impact.

The 2008 compensatory mitigation rule (33 CFR part 332, as published in the April 10, 2008, edition of the **Federal Register** (73 FR 19594)) established standards and criteria for all compensatory mitigation projects required to offset losses of aquatic resources. The standards and criteria apply to all sources of compensatory

mitigation, including permittee-responsible mitigation, mitigation banks, and in-lieu fee programs. As stated in 33 CFR 332.1(b), the 2008 rule does not change the circumstances under which compensatory mitigation is required. The NWP regulations at 33 CFR 330.1(e)(3) stipulate when compensatory mitigation is to be required for NWP activities—that is, when the district engineer determines the individual and cumulative adverse environmental effects are more than minimal. The requirements at 33 CFR part 332 may affect the practicability of providing compensatory mitigation for all NWP activities that result in the loss of  $\frac{1}{10}$ -acre to  $\frac{1}{2}$ -acre and require pre-construction notification, especially if the NWP activity is not in the service area of an approved mitigation bank or in-lieu fee program with released or advance credits available at the time the NWP pre-construction notification is being evaluated by the district engineer.

In the 2008 mitigation rule, we also discussed our concerns about the failure rates of on-site compensatory mitigation, which are often not ecologically successful because of nearby changes in land use (see 73 FR 19601). We believe it would be inappropriate to require users of the NWP to provide small on-site compensatory mitigation projects to offset losses caused by NWP activities if they are likely to fail. If the district engineer determines that on-site mitigation is likely to be ecologically successful, he or she may require that compensatory mitigation. It may not be practicable to provide off-site compensatory mitigation if the activity is not in the service area of an approved mitigation bank or in-lieu fee program with available credits. It is also important to recognize that not all areas of the country have approved mitigation banks or in-lieu fee programs. If the district engineer determines that compensatory mitigation is necessary to ensure than an NWP activity results in minimal individual and cumulative adverse effects on the aquatic environment, and there are no practicable and ecologically successful compensatory mitigation options available, then he or she will exercise discretionary authority and notify the project proponent that another form of Department of the Army authorization is required, such as an individual permit.

To be consistent with 33 CFR 330.1(e)(3), and to take into account how the requirements of 33 CFR part 332 affect the practicability for providing compensatory mitigation for small wetland losses, we have modified paragraph (c) of this general condition

to state that the district engineer will evaluate the pre-construction notification and may not require compensatory mitigation for losses of greater than  $\frac{1}{10}$ -acre of wetlands if he or she determines that either alternative mitigation (such as additional avoidance and minimization of impacts to waters of the United States on the project site) would ensure that the NWP activity results in minimal individual and cumulative adverse effects on the aquatic environment, or the impacts of the proposed activity are minimal without compensatory mitigation and determines the compensatory mitigation would not be required. We do not agree that compensatory mitigation should be required for all activities authorized by NWPs. For example, compensatory mitigation may not be needed to ensure that the authorized activity results in minimal adverse effects on the aquatic environment. In addition, not all NWP activities require pre-construction notification, and the pre-construction notification thresholds are established so that those NWP activities that generally do not result in more than minimal adverse effects on the aquatic environment can proceed without review by the district engineer. To address exceptions in specific waters or geographic areas, division engineers may add regional conditions to an NWP to lower its pre-construction notification threshold or require pre-construction notification for all activities authorized by that NWP.

One commenter stated that greater than one-for-one mitigation ratios must be required, stream mitigation ratios should address both areal and linear extent, and waivers of the mitigation ratio should not be allowed. One commenter stated that stream or open water mitigation should have a mandatory mitigation ratio of one-for-one for in-kind replacement and two-for-one riparian habitat improvement for any impacts exceeding 50 feet of any stream or waterbody. One commenter stated that mitigation should be required for all stream impacts that exceed 100 feet. One commenter stated that appropriate in-kind mitigation should be provided for any wetland or stream impacts. One commenter also stated that out-of-kind mitigation contradicts the no-net-loss policy.

The amount of compensatory mitigation necessary to ensure that the NWP activity results in minimal adverse effects on the aquatic environment is determined by the district engineer on a case-by-case basis by applying the provisions at 33 CFR 332.3(f). The district engineer will determine whether compensatory mitigation for losses of

stream bed should be required for a particular NWP activity. We do not agree that losses of stream bed should have a threshold for determining when compensatory mitigation should be required for those losses. We have modified paragraph (d) of this general condition by replacing the word "restoration" with "rehabilitation, enhancement, or preservation" to be consistent with 33 CFR 332.3(e)(3), which recognizes streams as "difficult-to-replace" resources.

Out-of-kind mitigation does not contradict the "no overall net loss" goal for wetlands, since out-of-kind wetlands mitigation may be environmentally preferable if another wetland type provided as compensatory mitigation would benefit the watershed more than simply providing in-kind replacement of the wetland being lost as a result of the NWP activity.

One commenter also requested that consideration be given to the cumulative impacts of wetland and stream disturbance. Several commenters said that mitigation cannot be used to bring the adverse effects of the NWPs to a minimal level. Some of these commenters stated that mitigation is not predictable and in many cases is not successful. Two commenters stated that if an NWP activity requires mitigation, then by definition it has more than minimal adverse environmental effects.

Cumulative effects to wetlands and streams are evaluated in the decision documents that are prepared for each NWP by Corps Headquarters, as well as the supplemental decision documents approved by division engineers. Wetland restoration, enhancement, establishment, and preservation activities, and stream rehabilitation, enhancement, and preservation activities (including and riparian area restoration, enhancement, and preservation) can offset losses of aquatic resource functions provided by waters of the United States that are impacted by activities authorized by NWPs. District engineers evaluate compensatory mitigation proposals provided by prospective permittees, to determine whether the compensatory mitigation project will be ecologically successful and be sufficient to offset losses of waters of the United States to ensure that the net adverse effects on the aquatic environment are minimal. The approved mitigation plan must include the applicable components listed in 33 CFR 332.4(c)(2)–(14), including ecological performance standards used to determine if the compensatory mitigation project is achieving its objectives.

The party responsible for providing the compensatory mitigation must implement the approved mitigation plan, and if it is determined that changes are needed to improve ecological success, request approval of those modifications. After the approved compensatory mitigation project is implemented, monitoring is required on a regular basis and monitoring reports must be submitted to the district engineer. The monitoring reports are reviewed by the district engineer and if there are deficiencies in the compensatory mitigation project, the district engineer will work with the responsible party to determine what actions are necessary to fix the compensatory mitigation project so that it will meet its original objectives or comparable objectives that are acceptable to the district engineer. If it is not possible to take adaptive management measures to remediate the compensatory mitigation project, then the district engineer may require alternative compensatory mitigation.

Several commenters said that applicants should be required to submit detailed mitigation plans with their pre-construction notifications and conceptual mitigation proposals are not sufficient. Several commenters also stated that the public should be provided the opportunity to review mitigation plans and provide comments on whether the impacts will be minimal.

We have added a new paragraph (c)(1) to state that the prospective permittee is responsible for proposing an appropriate compensatory mitigation option, if the district engineer determines that compensatory mitigation is needed to ensure that the activity results in minimal adverse effects on the aquatic environment. Another new provision, paragraph (c)(3) of this general condition, states that the mitigation plan may be conceptual or detailed, which is consistent with the Corps regulations at 33 CFR 332.4(c)(1)(ii). We do not believe that public review of compensatory mitigation proposals is necessary. District engineers have the expertise to review compensatory mitigation plans, evaluate their potential for ecological success, and determine whether they will offset losses of aquatic resource functions so that the NWP activity, after considering the required compensatory mitigation, will result in minimal individual and cumulative adverse effects on the aquatic environment.

One commenter asked whether functional assessments used to assess aquatic resources must be approved by the Corps. One commenter said the

general condition should provide clearer requirements to reduce the amount of discretion to be exercised by district engineers. One commenter stated that compensatory mitigation should be linked to the impacts of the project, and both the compensatory mitigation project and the monitoring requirements should last as long as the authorized impacts.

Functional assessments do not have to be formally approved by the Corps, although district engineers may determine that a functional assessment method proposed to be used for a particular aquatic resource or activity is not appropriate. This general condition provides basic principles for addressing mitigation requirements for NWP activities, because it is not possible to cover all possible mitigation options and requirements at the national level. Most activities authorized by NWPs result in the permanent loss of waters of the United States, and it is not practical or necessary to require permanent monitoring of compensatory mitigation projects. The Corps regulations require long-term protection of compensatory mitigation project sites (see 33 CFR 332.7(a)(1), and compensatory mitigation projects should be self-sustaining. Some compensatory mitigation projects may require long-term management, if the district engineer determines that long-term management is appropriate and practicable.

One commenter said that paragraph (f) should be revised to include the option of restoring riparian areas next to open waters. In addition, the commenter stated that the restoration or establishment of riparian areas should not be required on both banks of a stream, because in some cases the permittee may not have authority or legal interest in the land to restore or establish riparian areas on both sides of the stream. This commenter noted that there may be conflicting easements, roads, levees, or other structures in the proposed riparian area, or the area may not support riparian vegetation. One commenter stated that the Corps is inconsistent with use of the term buffer and riparian areas and that buffer is more inclusive and should be used in the general condition instead of riparian areas.

We have added the term "restoration" to the first sentence of paragraph (f) to make it clear that the riparian area may either be restored or established next to open waters. The general condition does not require riparian areas to be established on both sides of a stream. The fifth sentence of this paragraph provides a recommended width for

riparian areas, based on a presumption that the project proponent can restore or establish riparian areas on both sides of the stream. If it is not possible to establish a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or establishing a riparian area along a single bank or shoreline may be sufficient, and we have added language to paragraph (f) of general condition 23 to clarify that this can be acceptable compensatory mitigation. The proposal did not use the term "buffer" and paragraph (f) focuses on providing mitigation next to open waters through the restoration or establishment, maintenance, and legal protection of riparian areas.

One commenter requested that we include the phrase "for resource losses" at the end of the parenthetical in paragraph (b) to be consistent with 33 CFR part 320.4(r)(1). Two commenters stated that it is difficult to provide long-term maintenance of mitigation sites for weed control and invasive species. One commenter asked that definitions for rectifying and reducing be added to the general condition.

We have added "for resource losses" after the word "compensating" in paragraph (b). Before requiring long-term management for compensatory mitigation sites, district engineers will evaluate whether such a requirement would be practicable, as well as appropriate and necessary. We recognize that it may not be appropriate and practical to require long-term management for small permittee-responsible compensatory mitigation project sites, so we have modified paragraph (g) to make it clear that long-term management is necessary only when the district engineer adds conditions to an NWP authorization to require long-term management for the compensatory mitigation project. We do not believe it is necessary to provide definitions of the terms "rectifying" and "reducing" since the commonly understood definitions of these terms are sufficient.

One commenter requested the removal of paragraph (h), stating that it creates confusion and sometimes results in mitigation being required for non-jurisdictional activities, such as non-mechanized, above-ground landclearing for overhead electric transmission lines. Another commenter said that paragraph (h) implies that the Corps has authority over activities it does not regulate, such as the removal of woody vegetation from a wetland when there is no discharge of dredged or fill material into waters of the United States. One commenter requested clarification of the

circumstances under which the Corps would require compensatory mitigation for the conversion of forested and scrub shrub wetlands, and said the phrase "may be required" should be changed to "shall be required." This commenter also said that no waivers should be allowed for mitigation for projects within a utility right of way for forested and scrub shrub wetlands that are permanently converted to emergent wetlands.

Paragraph (h) is being retained, to make it clear that district engineers may require compensatory mitigation for permanent losses of specific aquatic resource functions that are caused by discharges of dredged or fill material into waters of the United States or other regulated activities. Paragraph (h) is part of a general condition that applies only to activities authorized by NWPs. We do not agree that the phrase "may be required" should be replaced with "shall be required" because it is the district engineer's discretion whether to require compensatory mitigation for losses of specific aquatic resource functions.

One commenter recommended adding a new paragraph to this general condition to clarify that any mitigation requirements must be limited to a single and complete linear project. This commenter said that compensatory mitigation should only be required if a specific crossing of a waterbody triggers paragraph (c), (d), or (f) of this general condition, not for other crossings that do not trigger pre-construction notification requirements or mitigation requirements.

We do not believe such an addition to this general condition would be appropriate or necessary. As discussed elsewhere in this notice, district engineers evaluate the entire linear project, even though each separate and distant crossing of waters of the United States may qualify for a separate NWP authorization. District engineers may require compensatory mitigation for all temporary and permanent losses of waters of the United States. District engineers are required to consider cumulative adverse effects in reviewing NWP pre-construction notifications, not just adverse effects from the specific single and complete project to which the notification applies.

One commenter stated that this general condition does not adequately convey the hierarchy of mitigation preference established by 33 CFR part 332. One commenter stated that in-lieu fee arrangements must not be used unless the arrangements comply with the requirements of the in-lieu fee guidance. One commenter stated that

remining of lands results in a net benefit to the aquatic resources, and the Corps should consider this remining as adequate compensatory mitigation and should consider if it is appropriate to create an in-lieu fee program for remining of previously mined areas.

We do not believe it is necessary to include the mitigation options evaluation framework provided in 33 CFR 332.3(b), since that regulation applies to all forms of Department of the Army permits, and the general condition explicitly states that mitigation must comply with part 332. In-lieu fee programs used to provide compensatory mitigation for NWP activities must comply with the applicable provisions in 33 CFR 332.8, unless the district engineer determined that they qualified for the extension of the grandfathering provision provided at 33 CFR 332.8(v)(2). District engineers will determine on a case-by-case basis whether compensatory mitigation should be required for remining activities authorized by NWP.

This general condition is adopted with the modifications discussed above.

**GC 24. Safety of Impoundment Structures.** We proposed to add this new general condition to the NWPs. We received no comments on the proposed general condition. The general condition is adopted as proposed.

**GC 25. Water Quality.** We did not propose any changes to the general condition. Two commenters recommended modifying this general condition to state that activities are not authorized by NWP if the state denies water quality certification, unless the project proponent obtains an individual water quality certification or water quality certification is waived. One commenter suggested adding a provision to state that the district engineer will determine, after a reasonable amount of time (generally 60 days) from the date an application for an individual water quality certification was submitted by the project proponent, that water quality certification is waived unless the Corps and the water quality certification agency agree that additional time is needed. A few commenters said that individual permits should be required for activities in any waters identified as 303(d) listed streams.

We believe that the current wording of this general condition is sufficient to make it clear that an individual water quality certification or waiver must be obtained if the state, Tribe, or EPA had not previously issued water quality certification for an NWP. We also do not believe it is necessary to provide a specific timeframe in the general

condition to reflect the language in 33 CFR 330.4(c)(6), since those timeframes may vary by Corps district because of local agreements with water quality certification agencies. There are a variety of causes of stream impairment for 303(d) listings other than discharges of dredged or fill material (e.g., nutrients, metals, sedimentation, temperature, bacteria, pH, toxics). Reversing those causes of impairment is more appropriately addressed through other Clean Water Act programs.

This general condition is adopted as proposed.

**GC 26. Coastal Zone Management.** We received no comments on the proposed general condition. The general condition is adopted as proposed.

**GC 27. Regional and Case-by-Case Conditions.** We received no comments on the proposed general condition. The general condition is adopted as proposed.

**GC 28. Use of Multiple Nationwide Permits.** We received no comments on the proposed general condition. The general condition is adopted as proposed.

**GC 29. Transfer of Nationwide Permit Verifications.** We received no comments on the proposed general condition. The general condition is adopted as proposed.

**GC 30. Compliance Certification.** We proposed a minor change to this general condition to clarify that we will provide the permittee with the necessary documentation to complete and return to the Corps as the signed certification. One commenter expressed support for the proposed change.

Two commenters recommended including regional conditions to the list of conditions under paragraph (a). One commenter suggested that a separate compliance certification be required for mitigation projects, because permittees submit the compliance certification when the work is completed, not when the compensatory mitigation project is completed. Two commenters said the general condition should be modified to clarify that the success of the required compensatory mitigation would be addressed separately, after evaluation of monitoring reports demonstrates achievement of the performance standards for the compensatory mitigation project.

We have modified paragraph (a) to require the statement to read that the authorized work has been done in accordance with any general, regional and activity-specific conditions to cover all of the conditions that may be applicable to an NWP authorization. We have also changed the first paragraph of this general condition by adding a

sentence to state that the success of any required permittee-responsible mitigation, including the achievement of ecological performance standards, will be addressed separately by the district engineer. Paragraph (b) has also been revised by adding a sentence to address the use of mitigation bank and in-lieu fee program credits to fulfill compensatory mitigation requirements in NWP authorizations. This new sentence states that if mitigation bank credits or in-lieu fee program credits are used, the permittee must submit the documentation required by 33 CFR 332.3(l)(3) to confirm that he or she has secured the appropriate number and resource type of credits from the mitigation bank or in-lieu fee program.

One commenter suggested adding language similar to that provided in NWP 32, to state that it is necessary to comply with all terms and conditions of the NWP, and that the NWP authorization is automatically revoked if the permittee does not comply with all terms and conditions. One commenter suggested that additional funding be allocated to do more on-site compliance inspections. One commenter said there are insufficient monitoring and compliance procedures in the NWPs. One commenter stated that it should be the permittee's responsibility to provide the required proof that the authorized activity was conducted to comply with the terms and conditions of the NWP.

The Note at the beginning of Section C, Nationwide Permit General Conditions, adequately addresses the requirement to comply with all applicable terms and conditions of the NWPs. Funding for compliance inspections is outside of the scope of this rule. Corps districts are required, through our performance measures, to conduct initial compliance inspections for a minimum percentage of the total number of all general permit (including NWP) verifications issued during the preceding fiscal year where authorized work is underway. The purposes of this general condition is for the permittee to submit documentation to the district engineer demonstrating that the authorized activity has been implemented in accordance with the conditions of the NWP authorization. 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.

This general condition is adopted with the modification listed above.

**GC 31. Pre-Construction Notification.** We proposed to modify paragraph (d)(2) to clarify that all NWP activities

resulting in the loss of greater than  $\frac{1}{2}$ -acre of waters of the United States require agency coordination. We also proposed to require agency coordination for certain NWPs when the proposed activity would result in the loss of greater than 1,000 linear feet of intermittent and ephemeral stream bed, in cases where the district engineer is considering waiving the 300 linear foot limit. Another proposed change was to clarify that the district engineer will consider direct and indirect effects caused by the NWP activity when making a minimal adverse effects determination. We also proposed to provide a list of factors to be considered when making minimal effects determinations for the purposes of the NWPs. One commenter supported the proposed list of factors.

One commenter objected to adding more pre-construction notification requirements, stating that it takes several days to weeks for an applicant to prepare pre-construction notification at the high level of detail required by district offices. Several commenters stated that they did not have the time and resources to prepare a pre-construction notifications for all activities. One commenter said the proposed changes that require pre-construction notifications for additional activities would add to the workload of the Corps for projects that are minor in nature.

We have not substantially increased the number of activities that require pre-construction notification. We have issued two new NWPs, and although both of those NWPs require pre-construction notification for all activities, some of the activities authorized by those NWPs may also be authorized by other NWPs that do not require pre-construction notification. A prospective permittee may request authorization under a specific NWP, if the proposed activity qualifies for authorization under that NWP. District engineers have been instructed, through Regulatory Program Standard Operating Procedures, to use the most efficient permit process wherever possible, to make timely permit decisions while protecting the aquatic environment. The two new NWPs issued today will provide a more efficient means of authorizing renewable energy generation facilities and pilot projects, in cases where those activities did not previously qualify for NWP authorization and required individual permits instead.

One commenter expressed concern with delays associated with the pre-construction notification process. Several commenters said some districts

make requests for additional information after the 30-day pre-construction notification completeness determination period ends, and suggested adding a provision to paragraph (a) to state that all requests for additional information must be made within 30 days of receipt of a complete pre-construction notification and that districts are limited to one request for additional information. One commenter said the phrase "as a general rule" should be deleted from paragraph (a). Several commenters said that in many cases, the district engineer fails to describe the specific information that is needed for a pre-construction notification to be deemed complete. Two commenters requested clarification as to whether the activity is authorized by an NWP 30 or 45 days after submitting a complete pre-construction notification.

We have added text to the second sentence of paragraph (a) to state that district engineers must notify prospective permittees within the 30-day completeness review period if the pre-construction notification is incomplete and additional information has to be provided to the district engineer to make the pre-construction notification complete. We have also added a sentence that directs the district engineer to specify, in his or her request for additional information, what information is needed to make the pre-construction notification complete. We have retained the phrase "as a general rule" in the new fourth sentence, which states that district engineers will request additional information only once, because there may be occasions where it is necessary to make an additional request for information. It should be noted that the 30-day period only applies to information necessary to make the PCN complete, which is listed in paragraph (c) of this general condition. Other types of information may also be needed to make a decision on whether the proposed activity qualifies for NWP authorization, such as a conceptual or detailed compensatory mitigation plan, if the applicant only provided a mitigation statement to satisfy the requirement in paragraph (b)(5). A conceptual or detailed mitigation plan is needed to determine whether the proposed compensatory mitigation will be suitable for ensuring compliance with general condition 23, and may be requested after the 30-day completeness review period, but before the 45-day pre-construction notification review period ends. Another example is request for additional information necessary to complete either

Endangered Species Act Section 7 consultation under general condition 18 or National Historic Preservation Act Section 106 consultation under general condition 20. Past rulemaking activities for the NWPs have established a 45-day pre-construction notification review period for the NWPs, and today's final rule retains that time period. Exceptions are for compliance with general condition 18, endangered species, and general condition 20, historic properties. Under those two general conditions, activities that may affect endangered or threatened species or critical habitat, or have the potential to cause effects to historic properties, are not authorized until the required consultations are completed. Another exception is NWP 21, for which activities are not authorized until the applicant receives written verification from the Corps.

One commenter said that "he or she" be removed from paragraph (a)(1) as it is the only location in which personal pronouns are used. Another commenter recommended changing paragraph (a)(2) to state that if the permittee does not receive any written notification from the district engineer within 45 days of submitting a complete pre-construction notification, then the permittee can assume that the district engineer has made a "no effect" determination for endangered species or historic properties.

The use of "he or she" is appropriate in paragraph (a)(1) because it refers to the prospective permittee, who may be an individual, corporation, or other entity. The NWP regulations (see 33 CFR 330.4(f)(2) for Endangered Species Act compliance and 33 CFR 330.4(g)(2) for National Historic Preservation Act compliance), as well as general conditions 18 and 20, state that the activity is not authorized by NWP until the requirements of the Endangered Species Act and/or the National Historic Preservation Act have been satisfied. Those two provisions in the Corps NWP regulations do not allow a prospective permittee to conclude that there is a "no effect" finding for the purposes of compliance with the Endangered Species Act or a "no potential to cause effect" finding for the purposes of compliance with Section 106 of the National Historic Preservation Act if the district engineer does not respond to the pre-construction notification within 45-days in which the applicant stated there might be effects to listed species or designated critical habitat or there may be potential to cause effects to historic properties.

One commenter requested clarification whether the seven items

identified in paragraph (b) of this general condition are a complete list and should not be supplemented. One commenter said that if additional requirements are added to the NWP authorization by the district engineer after the evaluation of the pre-construction notification, those requirements should be subject to public notice and comment.

The seven items listed in paragraphs (b)(1) through (7) of this general condition are required for a pre-construction notification. Additional information may be needed by the district engineer to make a decision on the NWP pre-construction notification, such as a compensatory mitigation proposal if the district engineer disagrees with the prospective permittee's statement that compensatory mitigation is not necessary to ensure the activity results in minimal adverse environmental effects, or information needed to conduct Endangered Species Act Section 7 or National Historic Preservation Act Section 106 consultation. Permit conditions added to an NWP authorization by a district engineer do not need to go through a public notice and comment process because they are incorporated into the authorization to ensure compliance with regulatory and statutory requirements that general permits only authorize activities that have minimal adverse effects on the aquatic environment and other applicable public interest review factors. The Corps regulations do not require public notice and comment for any conditions added to Department of the Army permits, including standard permits, letters of permission, and all categories of general permits.

Two commenters stated that applicants should be required to submit detailed mitigation plans with their pre-construction notifications and conceptual mitigation proposals are not sufficient. One commenter said paragraph (e)(2) should be revised to require the prospective permittee to submit a compensatory mitigation proposal if the activity will result in the loss of greater than 1/10-acre of wetlands.

Paragraph (b)(5) requires the prospective permittee to submit a statement explaining how the mitigation requirement will be satisfied or why the adverse effects of the proposed activity on the aquatic environment are minimal without mitigation. A detailed or conceptual mitigation plan may be submitted with the pre-construction notification, and a conceptual mitigation plan is usually sufficient for making the minimal adverse effects determination. If the proposed mitigation shown in the conceptual

mitigation plan is acceptable, a detailed mitigation plan that complies with the requirements of 33 CFR 332.4(c)(2)–(14) will be required and must be approved by the district engineer before work begins in waters of the United States unless the district engineer determines such prior approval is not practicable or necessary (see paragraph (c)(3) of general condition 23, mitigation).

One commenter said that state agencies operating under Federal funding should be added to paragraphs (b)(6) and (b)(7), for the submittal of documentation demonstrating compliance with Section 7 of the Endangered Species Act or Section 106 of the National Historic Preservation Act. This commenter also stated that pre-construction notifications should be provided electronically as well. One commenter said that a pre-construction notification should include information demonstrating that a project complies with applicable federal and state requirements.

A state agency operating under Federal funding, where the Federal agency has conducted Endangered Species Act Section 7 consultation or National Historic Preservation Act Section 106 consultation for the activity that is being provided Federal funds, may provide that documentation to the district engineer as part of its pre-construction notification, but the district engineer will determine whether that consultation is sufficient for the NWP activity. The NWP regulations at 33 CFR 330.1(e)(1) state that pre-construction notifications must be in writing. We have modified paragraph (d)(4) to state that prospective permittees may also provide electronic files of pre-construction notifications to expedite agency coordination. Compliance with other Federal, state, or local requirements is the responsibility of the permittee, and the Corps does not have the authority to enforce the regulatory requirements of programs administered by other agencies.

Several commenters objected to the requirement for a delineation of special aquatic sites and other waters of the United States under paragraph (b)(4) of this general condition, because requiring a full delineation has become a significant cause of delays and increased costs due to uncertainties regarding the extent of Federal jurisdictional waters under U.S. Supreme Court decisions in 2001 and 2006. One commenter said that in the second sentence of paragraph (b)(4) the term "wetland delineation" should be replaced with "delineation of waters of the United States," because the requirement is for not only a delineation

of wetlands but also of other waters of the United States. One commenter suggested modifying paragraph (b)(4) to clarify that a jurisdictional determination is not required with the submittal of a complete pre-construction notification, just a delineation of waters of the United States, which would be completed by either the prospective permittee or the Corps.

We have modified paragraph (b)(4) to state that a pre-construction notification must include a delineation of wetlands, other special aquatic sites, and other aquatic habitats (e.g., perennial, intermittent, and ephemeral streams, and lakes and ponds) on the project site, instead of a delineation of special aquatic sites and other waters of the United States. Use of the term "waters of the United States" in this paragraph implies that an approved jurisdictional determination would have to be done for a NWP pre-construction notification. An approved jurisdictional determination is an official Corps determination that jurisdictional "waters of the United States" or "navigable waters of the United States," or both, are either present or absent on a particular site, and precisely identifies the limits of those waters on the project site that are determined to be jurisdictional under the Clean Water Act or Sections 9 and 10 of the Rivers and Harbors Act of 1899 (see Regulatory Guidance Letter 08-02). We understand that many users of the NWPs do not want to obtain an approved jurisdictional determination, and that preliminary jurisdictional determinations may be appropriate for the purposes of NWP authorizations.

Under a preliminary jurisdictional determination, the wetlands, other special aquatic sites, and other aquatic habitats on the project site are presumed to be waters of the United States for the purposes of the NWP authorization, and any compensatory mitigation that may be required. A project proponent has the option of requesting an approved jurisdictional determination if he or she believes that some or all of the wetlands, special aquatic sites, or other aquatic habitats are not waters of the United States, and wants an official jurisdictional determination from the Corps. A request for an approved jurisdictional determination should be submitted to the Corps in advance of submitting a pre-construction notification, because the Corps may not be able to make an approved jurisdictional determination within the 45-day pre-construction notification review period, and this NWP rule does not contain a provision stating that approved jurisdictional determinations

are necessary to make a decision on an NWP pre-construction notification.

Several commenters suggested modifying the general condition to allow the applicant to satisfy the pre-construction notification requirement by demonstrating that consultation under the National Historic Preservation Act (NHPA) and/or Endangered Species Act (ESA) has been completed and has resulted in a finding that the project would not adversely affect resources protected under those statutes. One of the commenters also stated that paragraph (e)(1) is incorrect, because the condition refers to a limit of 300 feet, but NWP 13 has a limit of 500 feet that can be waived. One commenter stated that submittal of a pre-construction notification should be required for any NWPs within 303(d) impaired waters and that the applicant should prepare a statement identifying how the project avoids contributing to existing water quality impairments and maintains consistency with any existing Total Daily Maximum Loads (TMDLs).

Pre-construction notification is required for NWP activities that might affect endangered or threatened species listed, or proposed for listing, under the Endangered Species Act (see 33 CFR 330.4(f)(2)). Likewise, pre-construction notification is required for NWP activities that may affect historic properties (see 33 CFR 330.4(g)(2)). It is the Corps responsibility to make effect determinations for the purposes of the NWP authorizations. Information provided by the project proponent for Endangered Species Act or National Historic Preservation Act compliance will be fully considered by the district engineer, but it is the district engineer's decision as to whether the requirements of those acts have been complied with for the NWP authorizations. We have determined that modification of paragraph (e)(1) (which has been moved to paragraph 1 of Section D, District Engineer's Decision) is not necessary, as the 500 linear foot limit for the request for a waiver of NWP 13 is "an otherwise applicable limit" as specified in this text. The state agency that makes water quality certifications for the NWPs has the authority to determine whether an NWP should authorize discharges into 303(d) impaired waters, so we do not believe pre-construction notification should be categorically required for all such discharges. As noted previously, many waters are impaired for pollutants not related to discharges of dredge or fill material.

Two commenters said that under paragraph (c) of this general condition, there are problems with using ENG 4345 for pre-construction notifications,

because the standard permit form requires information that is not listed in paragraphs (b)(2) through (b)(7), and those paragraphs also cite information that is not required by ENG 4345.

The standard permit form, ENG 4345, may be used for pre-construction notifications, and it is not necessary to fill out those fields in ENG 4345 that are not relevant to paragraphs (b)(2) through (b)(7). The prospective permittee must supplement ENG 4345 if the NWP pre-construction notification must include information that is not specifically required by ENG 4345. A permittee is not required to use ENG 4345 for pre-construction notification as long as all required information is included.

Several commenters said that the threshold for agency coordination should be increased, or that interagency coordination is not necessary. In contrast, several commenters stated that the thresholds for agency coordination should be decreased. One commenter said agency coordination should be required for any activity potentially impacting approved mitigation banks, other mitigation areas, or local, state, or Federal public properties. One commenter suggested requiring agency coordination for NWP 12 activities, because they could result in the loss of greater than 1/2-acre of waters of the United States.

We believe the agency coordination thresholds established in paragraph (d)(2) of this general condition are appropriate, and focus on those activities where it would be helpful to solicit the views of the listed agencies prior to making a decision on an NWP pre-construction notification. Potential impacts to mitigation banks, other compensatory mitigation project sites, or other public properties are more appropriately addressed through the district engineer's review, and do not require additional agency coordination under the NWP program. However, agency coordination may be required under other regulations, such as 33 CFR 332.8, which has an interagency review process for the establishment and operation of mitigation banks and in-lieu fee programs. A proposed activity that may directly affect an approved mitigation bank or in-lieu fee project site may require the district engineer to consult with an interagency review team before making a decision on that activity. The limits for NWP 12 apply to single and complete projects, and for each single and complete project the NWP 12 activity may not result in the loss of greater than 1/2-acre of waters of the United States. As discussed elsewhere in this final rule, in response to pre-construction notifications for

NWP 12 activities that are linear projects, district engineers will evaluate the cumulative effects of those linear projects on the aquatic environment when determining whether authorization by NWP is appropriate. We do not believe it is necessary to require agency coordination for those linear projects.

This general condition is adopted with the modifications discussed above.

#### District Engineer's Decision

We have established a new Section D, District Engineer's Decision, by moving paragraph (e) of the proposed general condition 30 (now designated as general condition 31) to a separate section of the NWPs. We believe this is appropriate because the proposed paragraph (e) does not require compliance on the part of the permittee. Therefore, the criteria that district engineers use to determine whether a particular activity is authorized by NWP should not be in the general conditions. The comments received in response to the proposed paragraph (e) of the pre-construction notification general condition have been moved to this new section.

Two commenters objected to the language which states that the district engineer must determine that the proposed NWP activity is not contrary to the public interest. One of these commenters said that Section 404(e) of the Clean Water Act does not require such a public interest review for NWP activities, and this provision should be deleted because it conflicts with other Corps regulations.

The NWP regulations clearly state that the district engineer may exercise discretionary authority if he or she identifies concerns for the aquatic environment under the 404(b)(1) Guidelines or for any factor of the public interest (see 33 CFR 330.1(d)). In addition, the NWP regulations also require the district engineer to review pre-construction notifications and add conditions to the NWP authorization if necessary to ensure that the activity results in minimal individual and cumulative adverse effects on the aquatic environment and the public interest (see 33 CFR 330.1(e)(2)). The Corps issued those regulations under its authority under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899.

One commenter suggested adding definitions of the terms "direct" and "indirect" to the NWPs. Two commenters requested clarification on when a district engineer can exercise discretionary authority for the purposes of the NWP authorization, particularly for those circumstances where pre-

construction notification is not required by the NWP. Several commenters said that the district engineer should also evaluate the environmental benefits of a project.

We have added definitions for the terms “direct effects” and “indirect effects” to the “Definitions” section of the NWPs. District engineers have the authority to modify, suspend, or revoke any NWP authorization (see 33 CFR 330.1(d) and 33 CFR 330.4(e)(2)) when he or she has identified sufficient concerns for the environment or other factors of the public interest. District engineers may also consider environmental benefits that may result when making a decision as to whether an NWP activity results in minimal individual and cumulative adverse effects to the aquatic environment.

One commenter stated that the factors required for a district engineer to make a minimal effects determination on a request for a waiver of the limits of any NWP suggests a level of analysis that is more comparable to the individual permit process, which threatens the availability of the NWPs for prospective permittees.

The evaluation of a request for a waiver of the 300 linear foot limit for the loss of intermittent or ephemeral stream bed, or any other limit that can be waived by the district engineer, is an important tool for maintaining flexibility in the NWP, and authorizing activities that result in minimal individual and cumulative adverse effects on the aquatic environment. The waiver review process is not comparable to the individual permit review process, because it does not require a public notice, National Environmental Policy Act documentation, and a project-specific 404(b)(1) Guidelines analysis.

In response to the proposed considerations for making minimal effects determination, one commenter suggested adding the type of resource that will be affected by the NWP. This commenter also recommended defining the term “minimal effects” as those effects that constitute relatively small changes in the affected environment and insignificant changes in ecological function or hydrology. This commenter said the minimal effects decision may also depend on whether the proposed activity will occur in a special aquatic site, its proximity to nesting or spawning areas, the presence of state- or federally-listed species of concern other than endangered or threatened species, and the amount of permitted or unpermitted aquatic resource loss in the same watershed, stream reach, and/or bay or estuary.

We agree that adding the resource type is appropriate, because the minimal effects threshold may be different for a difficult-to-replace resource such as a stream, bog, fen, or spring. We do not agree that a finding of minimal effects should be based on small changes to the affected environment, ecological function, or hydrology. While the NWPs have acreage or linear foot limits, or inherent limits based on the type of activity authorized, at a small scale those activities result in complete losses of ecological function or hydrology because most discharges of dredged or fill material into waters of the United States replace aquatic areas with dry land. These complete losses of waters of the United States often have minimal individual and cumulative adverse effects on the aquatic environment. It is the environmental setting and other factors listed in the proposed paragraph (e)(1) (which has been changed to paragraph (1) of Section D) that are more appropriate for making the minimal effects determination. It is also the broader watershed or landscape context that is important for determining whether minimal adverse effects on the aquatic environment will result. Proximity to nesting or spawning areas is more appropriately addressed through compliance with general condition 4, migratory bird breeding areas, and general condition 3, spawning areas. Division engineers may impose regional conditions to restrict or prohibit the use of NWPs to authorize activities that may affect state- or federally-listed species of concern if they determine, after the public notice and comment process, it is in the public interest to add such regional conditions to ensure minimal adverse effects. The Corps is required to consider effects within a wetland, stream reach, or coastal waterbody that are caused either by an individual activity, or cumulatively by many such activities authorized by the same NWP, and to determine that such effects are minimal before use of an NWP can be authorized.

We have made additional modifications to the text of this provision of the NWPs. In the first paragraph, we have added a sentence stating that for linear projects, the district engineer will evaluate the individual crossings to determine if they satisfy the terms and conditions of the applicable NWP(s), as well as the cumulative effects of all the crossings authorized by NWPs. This sentence is consistent with the preamble for the NWP final regulation published in the November 22, 1991, issue of the **Federal**

**Register**, in which the definition of “single and complete project” at 33 CFR 330.2(i) was promulgated (see 56 FR 59114).

In paragraphs (2) and (3) of Section D, we have added text to be consistent with the mitigation rule at 33 CFR part 332, with a focus on adding activity-specific conditions to the NWP authorization for compensatory mitigation requirements. We have also added a provision to the end of paragraph (3) stating that the district engineer may determine that prior approval of a mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. This provision is consistent with 33 CFR 332.3(k)(3).

## Definitions

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

*Compensatory mitigation.* We proposed to modify this definition to make it consistent with the definition of this term found in 33 CFR 332.2. We did not receive any comments on the proposed definition and the definition is adopted as proposed.

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

*Direct effects.* In response to several comments, we are adding a definition of “direct effects” to provide clarification to be used with paragraph (1) of Section D, District Engineer’s Decision. We have adapted this definition from the Council of Environmental Quality’s definition in their National Environmental Policy Act regulations at 40 CFR 1508.8(a).

*Discharge.* The proposed definition included the phrase “and any activity that causes or results in such a discharge.”

One commenter said that that phrase should be removed because it is inconsistent with court decisions on the definition of “discharge of dredged material.” We inadvertently included the language in the proposal, and are removing it from the definition.

This definition is adopted with the modification discussed above.

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

*Ephemeral stream.* We did not propose any changes to the definition. One commenter said the definition should be modified to state that for ephemeral streams, flow is also derived from snow melt as well as rainfall. One

commenter requested clarification that the definition of ephemeral stream did not include roadside ditches.

While snow melt may contribute to the flow of ephemeral streams, snow melt also contributes to the flow of intermittent and perennial streams, especially in areas with deep snow packs. The proposed definition appropriately focuses on the duration of flow, and melting snow should not be considered a precipitation event since the development of snow pack occurs over the course of a winter season. Therefore, we are not making the suggested change. Ephemeral streams may, in some circumstances, be channelized or relocated to become roadside ditches, so we do not agree that recommended change should be made.

The definition is adopted as proposed.

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

*High Tide Line.* We proposed to add this as a new definition, based on the definition at 33 CFR 328.3(d). One commenter suggested expanding the definition of storm surges to include build up of water against a coast or a bay by flood waters which cause water levels to exceed spring high tide levels.

We do not agree that the suggested change should be made to this definition, because it would make the definition inconsistent with 33 CFR 328.3(d), which states that storm surges are not to be used to identify the high tide line.

The definition is adopted as proposed.

*Historic property.* We did not receive any comments on the proposed definition. The definition is adopted as proposed.

*Independent utility.* We proposed to add “non-linear” in the first sentence after “complete” and before project to reflect the independent utility test only applies to single and complete non-linear projects.

One commenter requested that the term “independent utility” be eliminated from the nationwide permit program because it discourages assessment of a project’s total impacts. Another commenter asked whether the term independent utility applied to both single and complete non-linear projects and single and complete linear projects.

The concept of “independent utility” is important for the implementation of the NWP program because it provides a useful test to help determine whether proposed activities requiring Department of the Army authorization should be evaluated together for one

permit authorization, or may be evaluated separately to determine if each activity qualifies for its own permit authorization. Despite the independent utility test, the cumulative effects of NWP activities must still be evaluated by district engineers when they review pre-construction notifications or other NWP verification requests. The modified definition makes it clear that the independent utility test only applies to single and complete non-linear projects; however, separate linear projects may have independent utility.

This definition is adopted as proposed.

*Indirect effects.* In response to several comments, we are adding a definition of “indirect effects” to provide clarification to be used with paragraph (1) of Section D, District Engineer’s Decision. We have adapted this definition from the Council on Environmental Quality’s definition in their National Environmental Policy Act regulations at 40 CFR 1508.8(b).

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

*Loss of waters of the United States.* We did not propose any changes to the definition. One commenter said the loss of stream bed should be defined. One commenter suggested revising this definition to state that waters of 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, especially as it relates to utility line construction. Another commenter said that clarification should be provided to state that for the purposes of the NWPs, the loss of waters of the United States generally does not include the cleared area along the utility line right-of-way between two poles or towers supporting overhead power transmission lines. One commenter requested clarification of application of this definition to activities in the ocean, bays, and Great Lakes, especially in the context of NWP 52 activities. This commenter recommended stating, for the purposes of NWP 52, that the loss only applies to the area of the ocean, bay, or Great Lakes occupied by wind towers and associated structures such as meteorological towers and transformers.

The proposed definition stated that the loss of stream bed results from filling or excavating the stream bed, and we do not believe it is necessary to change that definition. The proposed definition also stated that 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. That provision may apply to temporary impacts to waters of the United States caused by utility lines activities, or to any other activity involving temporary filling, flooding, excavation, or drainage. While the presence of an overhead utility line above waters of the United States does not constitute a “loss of waters of the United States,” the construction of a utility line right-of-way for overhead transmission lines may result in losses of waters of the United States if it involves discharges of dredged or fill material into waters of the United States that cause permanent conversions of aquatic areas to dry land or permanent increases to the bottom elevation of a waterbody.

The application of this definition to renewable energy generation facilities in coastal waters and the Great Lakes depends on the type of activity. A structure installed in these waters is generally not considered to result in a loss of waters of the United States, unless it is a pile supported structure that is constructed by placing a series of piles so closely together that they have the effect of fill (see 33 CFR 323.3(c)). If the construction of these facilities and associated structures involves the placement of materials that meet either the definition of “discharge of dredged material” at 33 CFR 323.2(d) or “discharge of fill material” at 33 CFR 323.2(f), such as the placement of riprap at the base of a pile supported structure, then the area of sea bed or lake bed covered by that dredged or fill material would be counted towards the “loss of waters of the United States” for that activity.

The definition is adopted as proposed.

*Non-tidal wetland.* We did not receive any comments on the proposed definition. The definition is adopted as proposed.

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

*Ordinary high water mark.* We did not propose any changes to the definition. One commenter said the definition should state that, for flowing waters, the term ordinary high water mark includes the bankfull stage or elevation, since this indicator can be readily delineated at most locations.

The bankfull elevation is not a useful tool for identifying the ordinary high water marks of streams or rivers in some parts of the country, especially the arid west. In the arid west, the Corps

examines stream geomorphology and vegetation that is responsive to the dominant stream discharge to identify the ordinary high water mark for intermittent and ephemeral streams (see "A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States: A Delineation Manual" published by the Corps Engineer Research and Development Center, report number ERDC/CRREL TR-08-12, dated August 2008).

The definition is adopted as proposed.

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

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

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

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

*Re-establishment.* We proposed 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.

Two commenters objected to the proposed change. The addition of the phrase "and functions" makes this definition consistent with the definition at 33 CFR 332.2, which was promulgated in 2008. The objective of re-establishing aquatic resources is to provide aquatic resource functions.

The definition is adopted as proposed.

*Rehabilitation.* We did not propose any changes to this definition. One commenter expressed support of this definition. The definition is adopted as proposed.

*Restoration.* We did not propose any changes to this definition. One commenter expressed support of this definition. The definition is adopted as proposed.

*Riffle and pool complex.* We did not receive any comments on the proposed definition. The definition is adopted as proposed.

*Riparian areas.* We did not propose any changes to this definition, and we did not receive any comments on the proposed definition. We have changed this definition to more accurately describe where riparian areas occur, and what types of features may be found in riparian areas. We have replaced the word "waterbody" with the phrase "riverine, lacustrine, estuarine, and

marine waters," since the definition of "waterbody" includes wetlands and wetlands by themselves do not have riparian areas. We have also added "wetlands, non-wetland waters, or" between the words "adjacent" and "uplands" since riparian areas are not limited to uplands. There may be wetlands and non-wetland (open) waters such as oxbow lakes and ponds within a riparian area. The definition is adopted with the modifications discussed above.

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

*Single and complete linear project and single and complete non-linear project.* We proposed to take the definition of "single and complete project" and split it into two definitions to clarify the use of the term "single and complete project" for linear and non-linear projects. Our proposal was based on the definition for "single and complete project" at 33 CFR 330.2(i) that was provided in the November 22, 1991, final rule (56 FR 59113).

Many commenters expressed support for the proposal. Most of these commenters also agreed that the independent utility test does not apply to single and complete linear projects. They said the proposed definitions will remove some of the uncertainty and inconsistencies that currently exist with respect to how multiple stream and wetland crossings are evaluated for linear projects as opposed to non-linear projects. One commenter asked for assurance that these new definitions would not materially affect how the Corps evaluates separate crossings of tributaries for the purposes the NWP program.

These two definitions are consistent with the NWP regulations and are not expected to have an effect on the Corps current practices for implementing the NWP program for both linear and non-linear projects.

One commenter opposed differentiating between linear and non-linear projects for the purposes of the definition of single and complete project. One commenter said that references to single and complete linear projects and single and complete non-linear projects should be removed from the NWPs. One commenter stated that these two definitions would complicate the water quality certification process.

The separate definitions established in today's rule will help provide consistent implementation of the NWP program by clarifying how the term "single and complete project" should be applied for different types of activities

authorized by NWP. These definitions are important for efficient implementation of the Corps Regulatory Program and determining whether a particular regulated activity and any related regulated activities qualify for NWP authorization. Therefore, we do not agree that these terms should be removed from the NWP program. The definition of "single and complete project" for the NWPs has been in place since 1991 and the separate definitions provided in today's final rule are consistent with the 1991 definition. Therefore, the use of these definitions should not complicate the water quality certification process.

One commenter requested the addition of examples, such as utility lines, to the definition of single and complete linear project. One commenter asked for clarification on whether the term independent utility only applies to non-linear single and complete projects. Several commenters said the definition of single and complete linear project should preclude district engineers from evaluating separate crossings cumulatively.

The new definitions distinguish between linear and non-linear projects and reflect the fact that while each single and complete non-linear project must have independent utility, each single and complete linear project need not have independent utility within the overall linear project. However, separate linear projects may have independent utility. To clarify what a linear project is, we have added a sentence to the definition of single and complete linear project to state that a linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point. A linear project may involve multiple crossings of streams, wetlands, or other types of waters from the point of origin to the terminal point. Roads and pipelines are examples of linear projects. While each separate and distant crossing of a waterbody associated with a linear project would be considered a separate single and complete project for the purposes of the NWPs, district engineers will also evaluate the cumulative effects of those crossings to determine whether they qualify for NWP authorization.

One commenter said that for an overall linear project the sum total of the losses of waters of the United States associated with that linear project cannot exceed the acreage or linear foot limits for an NWP. Several commenters stated that it was inappropriate to use multiple NWPs to authorize multiple crossings associated with one overall linear project, because it would be

impossible for the district engineer to determine if the overall project had minimal adverse effects on the environment or prevent the Corps from assessing the cumulative effects caused by the overall project. One commenter said these two proposed definitions may conflict with the NWP general conditions.

For single and complete linear projects, each separate and distant crossing of a waterbody, as well as each crossing of other waterbodies along the corridor for the linear project may be permitted by separate NWP authorizations. The acreage and other applicable limits for an NWP would be applied to each crossing, as long as those crossings are far enough apart to be considered separate and distant. District engineers will evaluate the cumulative effects of those linear projects when determining whether authorization by NWP is appropriate. The approach to cumulative effects analysis for linear projects is little different than the cumulative effects analysis for other types of NWP activities, including those circumstances in which more than one NWP is used to authorize a single and complete non-linear project, because cumulative effects are evaluated on a regional basis. Cumulative effects analysis may be done on a watershed basis, or by using a different type of geographic area, such as an ecoregion.

One commenter asked how offshore wind energy projects would be evaluated in accordance with these definitions, especially how the turbines, substations, cables, and associated infrastructure would be considered as either single and complete linear projects or single and complete non-linear projects.

Deciding which definition to apply to a particular project depends on the configuration of the project relative to the locations of waters of the United States within the project boundaries. For offshore wind energy projects, the turbines would be located on structures in a single waterbody as would the transmission cables that transfer the energy from the turbines to a land-based substation, while land-based attendant features might be constructed in separate waterbodies located within a tract of land. The off-shore turbine structures and land-based attendant features may be considered as a single and complete non-linear project, while as discussed above for NWPs 51 and 52, the utility lines that transfer the energy from the renewable energy generation facilities to a distribution system, regional grid, or other facility may be considered to be separate single and

complete linear projects and may be authorized under a separate NWP, such as NWP 12. The district engineer will have to consider the activity-specific circumstances when determining which definition to apply and which NWPs are appropriate to use.

One commenter asked whether district engineers have the authority to change the definitions of single and complete project or independent utility. Two commenters said the term “distant” should be defined in “single and complete linear project.”

The definitions provided in today’s final rule cannot be changed by district engineers, but those definitions will be subject to interpretation after these NWPs go into effect and they are implemented. It is not practical to provide specific definition of “distant” since that must be a judgment call by the district engineer because of the substantial variability in landscapes and environmental conditions across the country.

The definition for “single and complete linear project” is adopted with the modification discussed above. The definition for “single and complete non-linear project” is adopted as proposed.

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

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

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

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

*Structure.* We did not propose any changes to the definition. One commenter requested that we include bridges and culverts in the definition of structures.

Depending on how a bridge or culvert is constructed, and its effects on the aquatic environment, it may be considered a structure or fill. The bridge supports (i.e., bents) may be considered to be a structure for the purposes of this definition. However, placement of a culvert in a water of the United States can have the effect of raising the bottom elevation and thus should be regulated as fill. Accordingly, we are retaining the definition of structure as is presently proposed.

*Tidal wetland.* We did not receive any comments on the proposed definition. The definition is adopted as proposed.

*Vegetated shallows.* We did not receive any comments on the proposed

definition. The definition is adopted as proposed.

*Waterbody.* We did not receive any comments on the proposed definition, but we believe some modification of the definition is necessary to make it simpler and clearer. The revised definition simply says that, for the purposes of the NWPs, a waterbody is a jurisdictional water of the United States. We have removed the text referring to the presence of standing or flowing water above ground and the statement that an ordinary high water mark is an indicator of jurisdiction. The ordinary high water mark indicates the lateral extent of jurisdiction for a non-wetland waterbody in the absence of adjacent wetlands (see 33 CFR 328.4(c)(1)); the jurisdictional status of the waterbody is determined by applying the appropriate regulatory or legal criteria. In cases where the waterbody is a wetland, the lateral extent of the waterbody is the wetland boundary. Likewise, we have revised the last sentence of this definition by removing the phrase “a jurisdictional waterbody displaying an OHWM or other indicators of jurisdiction” and replacing it with “a waterbody determined to be a water of the United States under 33 CFR 328.3(a)(1)–(6)”.

The definition is adopted with the modifications discussed above.

In addition to the comments submitted on definitions provided in the proposed rule, we received a number of comments suggesting the addition of more definitions to the “Definitions” section of the NWPs.

One commenter requested that we define “discrete event” as it pertains to NWP 3 and NWP 45. One commenter asked for a definition of mechanized land clearing as it relates to the first pre-construction notification threshold in NWP 12, to make it clear whether activities that only involve the cutting or removal of vegetation above the ground are, or are not, regulated activities. One commenter said that the definition of fill should be provided in the NWPs to clarify the types of materials allowed or prohibited by the NWPs.

What constitutes a “discrete event” for the purposes of NWPs 3 and 45 is at the discretion of the district engineer, and in both NWPs we provide examples that give context to the term “discrete event.” In NWP 3, storms, floods, and fire are examples of discrete events. For NWP 45, storms and floods provide examples of discrete events. The definition of “discharge of dredged material” at 33 CFR 323.2(d) is used to determine whether mechanized landclearing involves a discharge of

dredged material that is regulated under Section 404 of the Clean Water Act. Project proponents are encouraged to contact the district engineer to determine whether a particular activity involving mechanized clearing of a utility line right-of-way in a forested wetland constitutes a regulated activity, because the equipment and techniques used are important considerations. The definition of the term "fill material" is provided in the Corps regulations at 33 CFR 323.2(e). Nationwide permit activities must comply with general condition 6, suitable material, and it is not feasible to provide a comprehensive list of the types of materials that may be used as fill material for NWP activities.

One commenter suggested adding a definition of "special aquatic sites" in the NWPs. One commenter said the definition of special aquatic sites should include glides, side channels, floodplains, and other types of habitats that create and maintain habitat for salmon and other fish species.

The NWPs have a definition for one of the special aquatic sites listed in the 404(b)(1) Guidelines, specifically riffle and pool complexes and vegetated shallows. Definitions for the other special aquatic sites, that is, sanctuaries and refuges, wetlands, mud flats, and coral reefs, are found at sections 230.40, 230.41, 230.42, and 230.44 of 40 CFR part 230, respectively. Glides, side channels, floodplains, and salmon and fish habitat are not considered special aquatic sites unless they satisfy the criteria at 40 CFR 230.40 through 230.45.

### Regional Conditioning of the Nationwide Permits

Concurrent with this **Federal Register** notice, district engineers are issuing local public notices. In addition to the changes to some NWPs and NWP conditions required by the Chief of Engineers, division and district engineers may propose regional conditions or propose revocation of NWP authorization for all, some, or portions of the NWPs. Regional conditions may also be required by state or Tribal water quality certification or for state Coastal Zone Management Act consistency. District engineers will announce regional conditions or revocations by issuing local public notices. Information on regional conditions and revocation can be obtained from the appropriate district engineer, as indicated below. Furthermore, this and additional information can be obtained on the Internet at <http://www.saj.usace.army.mil/Divisions/Regulatory/HQAvatar.htm> which will

help the public find the home page of the appropriate Corps district office.

### 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:  
CESPK-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-WR-R, 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

## 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

These NWPs will result in a net decrease in the number of permittees who are required to submit a pre-construction notification, especially because of the changes to NWP 48. The content of the pre-construction notification is not changed from the current NWPs, and the paperwork burden will decrease because of the reduced number of pre-construction notifications submitted. The Corps estimates the decreased paperwork burden to be 4,005 hours per year. This is based on an average burden to complete and submit a pre-construction notification of 11 hours, and an estimated 45 NWP 48 activities that will still require pre-construction notifications, rather than 3,150 NWP 48 activities that were previously estimated to require either reporting or pre-construction notification. Prospective permittees who are required to submit a pre-construction notification 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 or submit the required information in a letter. The total burden for filing pre-construction notifications is estimated at 330,000 hours per year (11 hours times 30,000 activities per year requiring pre-construction notification).

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 Orders 12866 and 13563

Under Executive Order 12866 (58 FR 51735, October 4, 1993) and 13563 (76

FR 3821), we must determine whether the regulatory action is “significant” and therefore subject to review by OMB and the requirements of the Executive Orders. The Executive Orders define “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 Orders 12866 and 13563, we determined that this action is a “significant regulatory action” and it was submitted to OMB for review. It is a significant regulatory action because it meets the fourth criterion in the Executive Order.

The most substantive changes to these NWPs are the additional limits imposed on NWP 21, which authorizes discharges of dredged or fill material into waters of the United States associated with surface coal mining activities, the issuance of NWPs 51 and 52, which authorize activities associated with renewable energy generation facilities, and the modifications to NWP 48 which authorize existing and new commercial shellfish aquaculture activities.

The changes to the NWPs that are most likely to result in additional economic costs are the changes to NWP 21, especially the 1/2-acre and 300 linear foot limits and the prohibition against discharges of dredged or fill material to construct valley fills. We have prepared a brief economic analysis to estimate the additional costs that will be imposed on the regulated public as a result of the change to the NWPs. It is available in the docket for this action at [www.regulations.gov](http://www.regulations.gov), docket number COE-2010-0035.

The issuance of NWPs 51 and 52 will reduce the number of renewable energy generation facilities involving activities regulated under section 404 and/or section 10 requiring individual permits. While some components of land-based renewable energy generation facilities, such as road crossings, utility lines, and building pads involving discharges of

dredged or fill material into waters of the United States, have been authorized by NWPs such as NWPs 14, 12, and 39 in the past, the new NWP 51 will provide DA authorization for all components of land-based renewable energy generation facilities that involve discharges of dredged or fill material into waters of the United States. There was no NWP authorization available for water-based renewable energy generation pilot projects, so the new NWP 52 will reduce the number of those activities that require individual permits.

The NWPs support the goals of Executive Order 13563, “Improving Regulation and Regulatory Review” by reducing burdens on the regulated public through a streamlined process for obtaining Department of the Army authorization for activities that will result in minimal individual and cumulative adverse effects on the aquatic environment. The NWPs reissued today, when considered as an overall package of NWPs, will authorize more activities than were previously authorized by NWP, such as water-based renewable energy pilot projects and new commercial shellfish aquaculture activities.

#### **Executive Order 13132**

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires the Corps to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” The issuance of NWPs does not have federalism implications. We do not believe that the 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 NWPs will not impose any additional substantive obligations on State or local governments. Therefore, Executive Order 13132 does not apply to these final NWPs.

#### **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 NWPs 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 NWPs, can be issued for no more than five years. If the current NWPs are not reissued 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 NWPs may be available in some geographic areas, so small entities conducting regulated activities outside those geographic areas would have to obtain individual permits for activities that require DA permits.

Nationwide permits help relieve regulatory burdens on small entities who need to obtain DA permits. They provide an expedited form of authorization, as long as the project proponent meets all terms and conditions of the NWPs. In FY 2010, the Corps issued 32,029 NWP verifications, with an average processing time of 32 days. Those numbers do not include activities that are authorized by NWP, where the project proponent was not required to submit a pre-construction notification or did not voluntarily seek verification that an activity qualified for NWP authorization. The average processing time for the 2,085 standard permits issued during FY 2010 was 221 days. The NWPs issued and reissued today are expected to result in a slight increase in the numbers of activities potentially qualifying for NWP authorization. The estimated numbers of activities qualifying for NWP authorization are provided in the decision documents that were prepared for each NWP. The NWPs issued and reissued today are not expected to significantly increase cost or paperwork burden for authorized activities (relative to the NWPs issued in 2007), including those conducted by small businesses.

The costs for obtaining coverage under an NWP are low. We estimate the average time to prepare and file a pre-construction notification, for those activities where a pre-construction notification is required, is 11 hours. We do not believe this constitutes a “significant economic impact” on project proponents, including small businesses.

Another requirement of Section 404(e) of the Clean Water Act is that general permits, including NWPs, authorize only those activities that result in minimal adverse environmental effects, individually and cumulatively. The terms and conditions of the NWPs, such as acreage or linear foot limits, are imposed to ensure that the NWPs authorize only those activities that result in minimal adverse effects on the aquatic environment and other public interest review factors. In addition to the paperwork burden of filing a pre-construction notification, many NWPs require that low-cost, commonsense practices be used to minimize adverse effects. These requirements also do not constitute “significant economic impacts.”

After considering the economic impacts of these NWPs 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 NWPs, in

cases where there are applicable NWPs 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 these NWPs will not generally impose significant economic costs on small entities, and do not generally impose higher costs on small entities than those of the previous NWPs. 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 increase in the number of activities that can be authorized through these NWPs, because we are issuing two new NWPs and making substantial changes to NWP 48. The changes to NWP 48, commercial shellfish aquaculture activities, will result in fewer project proponents having to submit pre-construction notifications or reports to Corps districts. We have also modified NWP 48 to authorize new commercial shellfish aquaculture activities, which were not previously authorized by NWP. While we are making substantial changes to NWP 21, we are also providing NWP 21 authorization without the new limits for surface coal mining activities previously authorized under the 2007 NWP 21, to have an equitable transition for those surface coal mining activities that cannot complete the authorized work by March 18, 2013. For new NWP 21 activities subject to the new limits and prohibition against valley fills, where the project proponent is considered a small entity, the changes to that NWP will not result in a significant economic impact because the costs for obtaining an NWP 21 authorization is generally higher when compared to other NWPs, and approach the costs for obtaining an individual permit.

#### 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 NWPs issued today 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 NWPs 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, the NWPs issued today are not subject to the requirements of Sections 202 and 205 of the UMRA. For the same reasons, we have determined that the NWPs contains no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the issuance of NWPs 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 NWPs issued today are not subject to this Executive Order because they are not economically significant as defined in Executive Order 12866. In addition, these NWPs do not concern an environmental 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 NWPs issued today do not have tribal implications. They are 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. Corps districts are conducting government-to-government consultation with Indian tribes to develop regional conditions that help protect tribal rights and trust resources, and to facilitate compliance with general condition 17, Tribal Rights.

#### Environmental Documentation

A decision document, which includes an environmental assessment and Finding of No Significant Impact (FONSI), has been prepared for each NWP. These 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 NWPs 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 NWPs 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 NWPs issued today 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 NWPs 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. Some of the NWPs authorize activities that support the supply and distribution of energy.

#### Authority

We are issuing new NWPs and reissuing existing NWPs 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 13, 2012.

**Michael J. Walsh,**

*Major General, US Army, Deputy Commanding General for Civil and Emergency Operations.*

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

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

###### Nationwide Permits

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35. Maintenance Dredging of Existing Basins
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38. Cleanup of Hazardous and Toxic Waste

39. Commercial and Institutional Developments	High Tide Line	such modifications, including the removal of material from the stream channel, must be immediately adjacent to the project or within the boundaries of the structure or fill. This NWP also authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the district engineer, provided the permittee can demonstrate funding, contract, or other similar delays.
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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 31). 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, fish aggregating devices, and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This NWP does not authorize artificial reefs or impoundments and semi-impoundments of waters of the United States for the culture or holding of motile species such as lobster, or the use of covered oyster trays or clam racks. (Sections 10 and 404)

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

**6. Survey Activities.** Survey activities, such as core sampling, seismic exploratory operations, plugging of seismic shot holes and other exploratory-type bore holes, exploratory trenching, soil surveys, sampling, sample plots or transects for wetland delineations, and historic resources surveys. For the purposes of this NWP, the term "exploratory trenching" means mechanical land clearing of the upper soil profile to expose bedrock or substrate, for the purpose of mapping or sampling the exposed material. The area in which the exploratory trench is dug must be restored to its pre-construction elevation upon completion of the work and must not drain a water of the United States. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. This NWP authorizes the construction of temporary pads, provided the discharge does not exceed  $\frac{1}{10}$ -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 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 31.) (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 Interior, Bureau of Ocean Energy Management. Such structures shall not be placed within the limits of any designated shipping safety fairway

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (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 for each single and complete project.

**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, liquefied, 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  $\frac{1}{2}$ -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  $\frac{1}{2}$ -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 or along a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than  $\frac{1}{10}$ -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 31.) (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) within the coastal United States, the Great Lakes, and United States territories, 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, liquefied, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to Section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit (see NWP 15).

**Note 4:** For overhead utility lines authorized by this NWP, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

**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 district engineer waives this criterion by making a written determination concluding that the discharge will result in minimal adverse effects;

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

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

(f) No material is placed in a manner that will be eroded by normal or

expected high flows (properly anchored 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.

Invasive plant species shall not be used for bioengineering or vegetative bank stabilization.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the bank stabilization activity: (1) Involves discharges into special aquatic sites; or (2) is in excess of 500 feet in length; or (3) will involve the discharge of greater than an average of one cubic yard per running foot along the bank below the plane of the ordinary high water mark or the high tide line. (See general condition 31.) (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  $\frac{1}{2}$ -acre of waters of the United States. For linear transportation projects in tidal waters, the discharge cannot cause the loss of greater than  $\frac{1}{3}$ -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  $\frac{1}{10}$ -acre; or (2) there is a discharge in a special aquatic site, including wetlands. (See general condition 31.) (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. (Section 404)

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

**17. Hydropower Projects.** Discharges of dredged or fill material associated with hydropower projects having: (a) Less than 5000 kW of total generating capacity at existing reservoirs, where the project, including the fill, is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; or (b) a licensing exemption granted by the FERC pursuant to Section 408 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and Section 30 of the Federal Power Act, as amended.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (Section 404)

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

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

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

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge or the volume of area excavated exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line, or (2) the discharge is in a special aquatic site, including wetlands. (See general condition 31.) (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.** Discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations.

(a) *Previously Authorized Surface Coal Mining Activities.* Surface coal mining activities that were previously authorized by the NWP 21 issued on March 12, 2007 (see 72 FR 11092), are authorized by this NWP, provided the following criteria are met:

(1) 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, Office of Surface Mining Reclamation and Enforcement;

(2) The permittee must submit a letter to the district engineer requesting re-verification of the NWP 21 authorization. The letter must describe any changes from the previous NWP 21 verification. The letter must be submitted to the district engineer by February 1, 2013;

(3) The loss of waters of the United States is not greater than the loss of waters of the United States previously verified by the district engineer under the NWP 21 issued on March 12, 2007 (i.e., there are no proposed expansions of surface coal mining activities in waters of the United States);

(4) The district engineer provides written verification that those activities will result in minimal individual and cumulative adverse effects and are authorized by NWP 21, including currently applicable regional conditions and any activity-specific conditions added to the NWP authorization by the

district engineer, such as compensatory mitigation requirements; and

(5) If the permittee does not receive a written verification from the district engineer prior to March 18, 2013, the permittee must cease all activities until such verification is received. The district engineer may extend the February 1, 2013, deadline by so notifying the permittee in writing, but the permittee must still cease all activities if he or she has not received written verification from the Corps by March 18, 2013, until such verification is received.

(b) *Other Surface Coal Mining Activities.* Surface coal mining activities that were not previously authorized by the NWP 21 issued on March 12, 2007, are authorized by this NWP, provided the following criteria are met:

(1) 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, Office of Surface Mining Reclamation and Enforcement;

(2) 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 individual and cumulative adverse effects. This NWP does not authorize discharges into tidal waters or non-tidal wetlands adjacent to tidal waters; and

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

*Notification:* For activities under paragraph (b) of this NWP, the permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 31.) (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 31.) 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 18, Endangered Species, and general condition 20, Historic Properties, is required for all NWPs. The concern with historic properties is emphasized in the notification requirements for this NWP because of the 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 31). 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/Missions/CivilWorks/RegulatoryProgramandPermits/GuidanceLetters.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 separate 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, the restoration and enhancement of non-tidal streams and other non-tidal open waters, and the rehabilitation or

enhancement of tidal streams, tidal wetlands, and tidal open waters, provided those activities result in net increases in aquatic resource functions and services.

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to: The removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms, as well as discharges of dredged or fill material to restore appropriate stream channel configurations after small water control structures, dikes, and berms, are removed; the installation of current deflectors; the enhancement, 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; the removal of existing drainage structures, such as drain tiles, and the filling, blocking, or reshaping of drainage ditches to restore wetland hydrology; the installation of structures or fills necessary to establish or re-establish wetland or stream hydrology; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; re-establishment of submerged aquatic vegetation in areas where those plant communities previously existed; re-establishment of tidal wetlands in tidal waters where those wetlands previously existed; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.

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

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

of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

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

**Reversion.** For enhancement, restoration, and establishment activities conducted: (1) In accordance with the terms and conditions of a binding stream or wetland enhancement or restoration agreement, or a wetland establishment agreement, between the landowner and the U.S. Fish and Wildlife Service (FWS), the Natural Resources Conservation Service (NRCS), the Farm Service Agency (FSA), the National Marine Fisheries Service (NMFS), the National Ocean Service (NOS), U.S. Forest Service (USFS), or their designated state cooperating agencies; (2) as voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or (3) on reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) or the applicable state agency, this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (i.e., prior to the restoration, enhancement, or establishment activities). The reversion must occur within five years after expiration of a limited term wetland restoration or establishment agreement or permit, and is authorized in these circumstances even if the discharge occurs after this NWP expires. The five-year reversion limit does not apply to agreements without time limits reached between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS, or an appropriate state cooperating agency. This NWP also authorizes discharges of dredged or fill material in waters of the United States for the reversion of wetlands that were restored, enhanced, or established on prior-converted cropland or on uplands, in accordance with a binding agreement between the landowner and NRCS, FSA, FWS, or their designated state cooperating agencies (even though the restoration, enhancement, or establishment activity did not require a section 404 permit). The prior condition will be documented in the original agreement or permit, and the

determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit. Before conducting any reversion activity the permittee or the appropriate Federal or state agency must notify the district engineer and include the documentation of the prior condition. Once an area has reverted to its prior physical condition, it will be subject to whatever the Corps Regulatory requirements are applicable to that type of land at the time. The requirement that the activity results in a net increase in aquatic resource functions and services does not apply to reversion activities meeting the above conditions. Except for the activities described above, this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion.

**Reporting.** For those activities that do not require pre-construction notification, the permittee must submit to the district engineer a copy of: (1) The binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement, or a project description, including project plans and location map; (2) the NRCS or USDA Technical Service Provider documentation for the voluntary stream enhancement or restoration action or wetland restoration, enhancement, or establishment action; or (3) the SMCRA permit issued by OSMRE or the applicable state agency. The report must also include information on baseline ecological conditions on the project site, such as a delineation of wetlands, streams, and/or other aquatic habitats. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing any activity (see general condition 31), 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 to the district engineer to fulfill the reporting requirement. (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 ½-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 ½-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 31.) (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 area that has no waters of the United States or a separately 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 31). 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 an area that has no waters of the United States, dredged material must be returned to its original location, and the affected areas must be restored to pre-construction elevations. The affected areas must also be revegetated, as appropriate. This permit does not authorize the use of cofferdams to dewater wetlands or other aquatic areas to change their use. Structures left in place after construction is completed require a separate section 10 permit if located in navigable waters of the United States. (See 33 CFR part 322.)

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 31). 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 31.) (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 area that has no waters of the United States 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 an area that has no waters of the United States; and,

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

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge into waters of the United

States exceeds 50 cubic yards, or (2) the boat ramp exceeds 20 feet in width. (See general condition 31.) (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 31). (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 31.) (Sections 10 and 404)

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

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

The discharge must not cause the loss of greater than  $\frac{1}{2}$ -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 31.) (Sections 10 and 404)

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

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

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

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

The discharge must not cause the loss of greater than  $\frac{1}{2}$ -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 31.) (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 31.) (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  $\frac{1}{2}$ -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 31.) (Section 404)

**43. Stormwater Management Facilities.** Discharges of dredged or fill material into non-tidal waters of the United States for the construction of stormwater management facilities, including stormwater detention basins and retention basins and other

stormwater management facilities; the construction of water control structures, outfall structures and emergency spillways; and the construction of low impact development integrated management features such as bioretention facilities (e.g., rain gardens), vegetated filter strips, grassed swales, and infiltration trenches. This NWP also authorizes, to the extent that a section 404 permit is required, discharges of dredged or fill material into non-tidal waters of the United States for the maintenance of stormwater management facilities. Note that stormwater management facilities that are determined to be waste treatment systems under 33 CFR 328.3(a)(8) are not waters of the United States, and maintenance of these waste treatment systems generally does not require a section 404 permit.

The discharge must not cause the loss of greater than  $\frac{1}{2}$ -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 31.) 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  $\frac{1}{2}$ -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 31.) 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 or nourishment.

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

**Notification:** The permittee must submit a pre-construction notification to the district engineer (see general condition 31) 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 31.) (Section 404)

47. [Reserved]

**48. 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 commercial shellfish aquaculture operations in authorized project areas. For the purposes of this NWP, the project area is the area in which the operator is currently authorized to conduct commercial shellfish aquaculture activities, as identified through a lease or permit issued by an appropriate state or local government agency, a treaty, or any other easement, lease, deed, or contract which establishes an enforceable property interest for the operator. This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures into navigable waters of the United States. This NWP also authorizes discharges of dredged or fill material into waters of the United States necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked. This NWP does not authorize:

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

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

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

This NWP also authorizes commercial shellfish aquaculture activities in new project areas, provided the project proponent has obtained a valid

authorization, such as a lease or permit issued by an appropriate state or local government agency, and those activities do not directly affect more than 1/2-acre of submerged aquatic vegetation beds.

**Notification:** The permittee must submit a pre-construction notification to the district engineer if: (1) Dredge harvesting, tilling, or harrowing is conducted in areas inhabited by submerged aquatic vegetation; (2) the activity will include a species not previously cultivated in the waterbody; (3) the activity involves a change from bottom culture to floating or suspended culture; or (4) the activity occurs in a new project area. (See general condition 31.)

In addition to the information required by paragraph (b) of general condition 31, the pre-construction notification must also include the following information: (1) A map showing the boundaries of the project area, with latitude and longitude coordinates for each corner of the project area; (2) the name(s) of the cultivated species; and (3) whether canopy predator nets are being used. (Sections 10 and 404)

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

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

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

**49. Coal Remining Activities.** Discharges of dredged or fill material into non-tidal waters of the United States associated with the remining and reclamation of lands that were previously mined for coal. The activities must already be authorized, or they must currently be in process as part of an integrated permit processing procedure, by the Department of Interior Office of Surface Mining Reclamation and Enforcement, or by states with approved programs under Title IV or Title V of the Surface Mining Control and Reclamation Act (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 31.) (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, Office of Surface Mining Reclamation and Enforcement, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, 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 31.) 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.

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

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States, 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 31.) (Sections 10 and 404)

**Note 1:** Utility lines constructed to transfer the energy from the land-based renewable generation facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate and complete linear project. Those utility lines may be authorized by NWP 12 or another Department of the Army authorization. If the only activities associated with the construction, expansion, or modification of a land-based renewable energy generation facility that require Department of the Army authorization are discharges of dredged or fill material into waters of the United States to construct, maintain, repair, and/or remove utility lines, then NWP 12 shall be used if those activities meet the terms and conditions of NWP 12, including any applicable regional conditions and any case-specific conditions imposed by the district engineer.

**Note 2:** For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

**52. Water-Based Renewable Energy Generation Pilot Projects.** Structures and

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

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

The discharge must not cause the loss of greater than ½-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. The placement of a transmission line on the bed of a navigable water of the United States from the renewable energy generation unit(s) to a land-based collection and distribution facility is considered a structure under Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(b)), and the placement of the transmission line on the bed of a navigable water of the United States is not a loss of waters of the United States for the purposes of applying the ½-acre or 300 linear foot limits.

For each single and complete project, no more than 10 generation units (e.g., wind turbines or hydrokinetic devices) 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 322.5(l)(2). Structures may not be placed in established danger zones or restricted areas as designated in 33 CFR part 334, Federal navigation channels, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard (see 33 CFR 322.5(l)(1)), or EPA or Corps designated open water dredged material disposal areas.

Upon completion of the pilot project, the generation units, transmission lines, and other structures or fills associated with the pilot project must be removed to the maximum extent practicable unless they are authorized by a separate Department of the Army authorization, such as another NWP, an individual

permit, or a regional general permit. Completion of the pilot project will be identified as the date of expiration of the Federal Energy Regulatory Commission (FERC) license, or the expiration date of the NWP authorization if no FERC license is issued.

**Notification:** The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (Sections 10 and 404)

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

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

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

**Note 4:** For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

### *C. Nationwide Permit General Conditions*

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

notice that all of the provisions of 33 CFR 330.1 through 330.6 apply to every NWP authorization. Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

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

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

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

**2. Aquatic Life Movements.** No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species.

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

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

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

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

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

8. *Adverse Effects From*

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

9. *Management of Water Flows.* To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization 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. *Proper Maintenance.* Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable NWP general conditions, as well as any activity-specific conditions added by the district engineer to an NWP authorization.

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

16. *Wild and Scenic Rivers.* 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).

17. *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.

18. *Endangered Species.* (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless 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. The district engineer will review the documentation and determine whether it is sufficient to address ESA compliance for the NWP activity, or whether additional ESA consultation is necessary.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the 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 might be affected by the proposed work or that utilize the designated critical habitat that might 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. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

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

19. *Migratory Birds and Bald and Golden Eagles.* The permittee is responsible for obtaining any "take" permits required under the U.S. Fish and Wildlife Service's regulations governing compliance with the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act. The permittee should contact the appropriate local office of the U.S. Fish and Wildlife Service to determine if such "take" permits are required for a particular activity.

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. The district engineer will review the documentation and determine whether it is sufficient to address section 106 compliance for the NWP activity, or whether additional section 106 consultation is necessary.

(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 on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties 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. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that section 110k of the NHPA (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. *Discovery of Previously Unknown Remains and Artifacts.* If you discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by this permit, you must immediately notify the district engineer of what you have found, and to the maximum extent practicable, avoid construction activities that may affect the remains and artifacts until the required coordination has been completed. The district engineer will initiate the Federal, Tribal and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

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

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

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with general condition 31, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

23. *Mitigation*. The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that 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 for resource losses) 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 either some other form of mitigation would be more environmentally appropriate or the adverse effects of the proposed activity are minimal, 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. Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in minimal adverse effects on the aquatic environment.

(2) 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.

(3) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2)–(14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district

engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)).

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

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

(d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation, such as stream rehabilitation, enhancement, or preservation, 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 NWPs. 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 NWPs.

(f) Compensatory mitigation plans for projects in or near streams or other open waters will normally include a requirement for the restoration or 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. If it is not possible to establish a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or establishing a riparian area along a single bank or shoreline

may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of 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 and performance of the compensatory mitigation project, and, if required, its long-term management.

(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.

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

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

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

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

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

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

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

(Transferee)

(Date)

**30. Compliance Certification.** Each permittee who receives an NWP verification letter from the Corps must

provide a signed certification documenting completion of the authorized activity and any required compensatory mitigation. The success of any required permittee-responsible mitigation, including the achievement of ecological performance standards, will be addressed separately by the district engineer. The Corps will provide the permittee the certification document with the NWP verification letter. The certification document will include:

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

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

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

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

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

(2) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or 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 may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

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

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

(2) Location of the proposed project;

(3) A description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause, including the anticipated amount of loss of water of the United States expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; 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. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (e.g., a conceptual plan), but do not need to be detailed engineering plans);

(4) The PCN must include a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial, intermittent, and ephemeral streams, on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters on the project site, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many 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, or explaining why the adverse effects are minimal and why compensatory mitigation should not be required. 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:**

**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 require pre-construction notification and result in the loss of greater than  $\frac{1}{2}$ -acre of waters of the United States, for NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 activities that require pre-construction notification and will result in the loss of greater than 300 linear feet of intermittent and ephemeral stream bed, and for all NWP 48 activities that require pre-construction notification, the district engineer will immediately provide (e.g., via email, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (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 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. The comments must explain why the agency believes the adverse effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame concerning the proposed activity's compliance with the terms and conditions of the NWPs, including the need for mitigation to ensure the net adverse environmental effects to the aquatic environment of the proposed activity are minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies'

concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

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

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

**D. District Engineer's Decision**

1. In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. For a linear project, this determination will include an evaluation of the individual crossings to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings authorized by NWP. If an applicant requests a waiver of the 300 linear foot limit on impacts to 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, 51 or 52, 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 type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss), the duration of the

adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (e.g., watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional 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 activity 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 activity-specific conditions in the NWP verification the district engineer deems necessary. Conditions for compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k). The district engineer must approve the final mitigation plan before the permittee commences work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the proposed compensatory mitigation plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure 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, including any activity-specific conditions added to the NWP authorization by the district engineer.

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: (a) 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; (b) 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 (c) 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, with activity-specific conditions that state the mitigation requirements. The authorization will include the necessary conceptual or detailed 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 or has determined that prior approval of a final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation.

#### *E. Further Information*

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

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

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

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

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

#### *F. Definitions*

*Best management practices (BMPs):* Policies, practices, procedures, or structures implemented to mitigate the

adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural.

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

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

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

*Discharge:* The term "discharge" means any discharge of dredged or fill material.

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

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

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

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

the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

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

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

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

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

**Loss of waters of the United States:** Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. The loss of stream bed includes the 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 riverine, lacustrine, estuarine, and marine waters with their adjacent wetlands, non-wetland waters, or uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 23.)

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

**Single and complete linear project:** A linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which often involves multiple crossings of one or more waterbodies at separate and distant locations. The term “single and complete project” is defined as that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the United States (i.e., a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

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

must have independent utility (see definition of “independent utility”). Single and complete non-linear projects may not be “piecemealed” to avoid the limits in an NWP authorization.

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

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

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

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

**Structure:** An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial

reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

**Tidal wetland:** A tidal wetland is a 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 NWPs, a waterbody is a jurisdictional water of the United States. If a jurisdictional wetland is adjacent—meaning bordering, contiguous, or neighboring—to a waterbody determined to be a water of the United States under 33 CFR 328.3(a)(1)–(6), 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.

[FR Doc. 2012-3687 Filed 2-17-12; 8:45 am]

**BILLING CODE 3720-58-P**