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Proposal To Reissue and Modify Nationwide Permits; Notice

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

[ZRIN 0710–ZA02]

Proposal To Reissue and Modify Nationwide Permits

AGENCY: Army Corps of Engineers, DoD.

ACTION: Notice.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is soliciting comments for the reissuance of the existing nationwide permits (NWPs), general conditions, and definitions, with some modifications. The Corps is also proposing to issue six new NWPs and one new general condition. The reissuance process starts with today's publication of the proposed NWPs in the **Federal Register** for a 60-day comment period. The purpose of this **Federal Register** notice is to solicit comments on the proposed new and modified NWPs, as well as the NWP general conditions and definitions. Shortly after the publication of this **Federal Register** notice, each Corps district will publish a public notice to solicit comments on their proposed regional conditions for the new and modified NWPs. The comment period for these district public notices will be 45 days.

DATES: Submit comments on or before November 27, 2006.

ADDRESSES: You may submit comments, identified by docket number COE–2006–0005 and/or ZRIN 0710–ZA02, by any of the following methods:

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

E-mail: david.b.olson@usace.army.mil. Include the docket number, COE–2006–0005, and/or the ZRIN number, 0710–ZA02, in the subject line of the message.

Fax: 202–761–0140.

Mail: U.S. Army Corps of Engineers, Attn: CECW–OR/MVD (David B. Olson), 441 G Street NW., Washington, DC 20314–1000.

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

Instructions: Direct your comments to docket number COE–2006–0005 and/or ZRIN 0710–ZA02. All comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through regulations.gov or e-mail. The regulations.gov Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail directly to the Corps without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, we recommend that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

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

Consideration will be given to all comments received within 60 days of the date of publication of this notice.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson at 202–761–4922 or by e-mail at *david.b.olson@usace.army.mil* or access the U.S. Army Corps of Engineers Regulatory Home Page at *http://www.usace.army.mil/inet/functions/cw/cecwo/reg/*.

SUPPLEMENTARY INFORMATION:

Background

The current nationwide permits (NWPs), which were published in the January 15, 2002, issue of the **Federal Register** (67 FR 2020) expire on March 18, 2007. With this **Federal Register** notice, we are beginning the process for reissuing the NWPs so that the reissued NWPs will be in effect as the current NWPs expire.

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

One goal of today's notice is to simplify the text of the reissued NWPs. Since NWPs were first issued in 1977, the NWP program has become increasingly complex. With each issuance or reissuance of NWPs, the text of the permits and the general conditions has become lengthier, and in some cases, redundant language was added that may make them more difficult to comprehend. Compliance with the NWPs and their general conditions is more difficult if users of those permits cannot easily understand the requirements of the NWPs and what they authorize. Simplifying the text will facilitate compliance with the NWPs and thus help protect the aquatic environment.

Federal agencies are required by Executive Order 12866, Regulatory Planning and Review, to draft regulations that are simple and easy to understand, to minimize uncertainty. This principle is also applicable to the NWPs, which are now considered to be rules under the Administrative Procedures Act (APA). In addition, a Presidential Memorandum issued on June 1, 1998, requires Federal agencies to use plain language in government writing, so that rules and other documents are clear to the public and others.

We are proposing to revise the text of the NWPs, general conditions, and definitions so that they are clearer, more concise, and can be more easily understood by the regulated public, government personnel, and interested parties, while retaining terms and conditions that protect the aquatic environment. Making the text of the NWPs clearer and easier to understand will also facilitate compliance with these permits, which will benefit the aquatic environment. This proposal also reflects the Corps support of the administration's goal of improving regulatory efficiency, by making the

NWPs easier to read and understand. The text of the proposed NWPs has been streamlined by removing redundant language and applying a standard format to most NWPs. We are proposing to arrange the NWP general conditions in a different order, so that the conditions that provide environmental protection are first, followed by administrative and procedural general conditions.

Today's proposal to reissue the existing NWPs with some modifications and to issue six new NWPs reflects the Corps commitment to its environmental protection mission and to aquatic resource protection. The NWP program allows the Corps to authorize activities with minimal adverse environmental impacts in a timely manner and protect the aquatic environment. The NWP program also allows the Corps to focus its limited resources on more extensive evaluation of projects that have the potential for causing environmentally damaging adverse effects.

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

Twenty-six of the NWPs proposed for reissuance require pre-construction notification (PCN) for certain activities. Fifteen of those NWPs require PCNs for all activities. Four of the six proposed new NWPs require PCNs. Three of those four new NWPs require PCNs for all activities. Altogether, PCN requirements have been added or expanded for seven permits, relative to the requirements in the current permits. Existing PCN requirements have been dropped in one permit (NWP 5), and reduced in another (NWP 12), because the conditions for authorization under these permits are adequate to ensure minimal individual and cumulative effects without the previously required PCNs. PCN requirements give the Corps the opportunity to evaluate certain proposed NWP activities on a case-by-case basis to ensure that they will have no more than minimal adverse effects on the aquatic environment, individually and cumulatively. This case-by-case review often results in adding case-specific conditions to the NWP authorization to ensure that impacts to the aquatic environment are minimal. Review of PCNs may also result in the Corps asserting discretionary authority to require an individual permit if the district engineer determines, based on the information provided in the notification, that adverse impacts will be more than minimal, either individually or cumulatively, or there are sufficient concerns for any of the Corps public interest review factors.

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

District engineers may impose special conditions on NWP authorizations to ensure that the NWP authorizes only activities that result in minimal individual and cumulative effects on the aquatic environment and are in the public interest. In addition, special conditions will often include compensatory mitigation requirements to reduce the project impacts to the minimal level. Compensatory mitigation may include the restoration, establishment, enhancement, and/or preservation of aquatic habitats, as well as the establishment and maintenance of riparian areas next to streams and other open waters. Compensatory mitigation can be provided through permittee-responsible mitigation, mitigation banks, or in-lieu fee programs.

Process for Reissuing the NWPs

The NWPs reissued on January 15, 2002, became effective on March 18, 2002, and expire on March 18, 2007. The reissuance process starts with today's publication of the proposed NWPs in the **Federal Register** for a 60-day comment period. Requests for a public hearing must be submitted in writing to the address in the **ADDRESSES** section of this notice. These requests must state the reason(s) for holding a public hearing. If we determine that a public hearing or hearings would assist in making a decision on the issuance of the proposed new NWPs, reissuance of existing NWPs, or the NWP general conditions or definitions, a 30-day advance notice will be published in the **Federal Register** to advise interested parties of the date(s) and location(s) for the public hearing(s). Any announcement of public hearings would also be posted as a supporting material in the docket at *www.regulations.gov* as well as the Corps regulatory home page at *http://www.usace.army.mil/inet/functions/cw/cecwo/reg/citizen.htm*

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

After the comment period has ended, we will review the comments received in response to this **Federal Register** notice. Then we will draft the final NWPs, and those final draft NWPs will be subjected to another review by interested Federal agencies. The final issued NWPs will be published in the **Federal Register** by January 2007. These final NWPs will become effective 60 days after their publication. This schedule provides a 60-day period for state and tribal Clean Water Act Section 401 water quality certifications (WQCs), as well as state Coastal Zone Management Act (CZMA) consistency decisions. Within this 60-day period, division engineers will also approve regional conditions and issue supplemental decision documents. Supplemental decision documents address the environmental considerations related to the use of NWPs in a Corps district. The supplemental decision documents will certify that the NWPs, with any regional conditions or geographic revocations, will only authorize activities within that Corps district that result in minimal individual and cumulative adverse effects on the aquatic environment. The regional conditioning and WQC/CZMA processes are discussed below.

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

The proposed NWPs are issued in accordance with Section 404(e) of the Clean Water Act. These NWPs authorize categories of activities that are similar in nature. The ''similar in nature'' requirement does not mean that activities authorized by an NWP must be identical to each other. We believe that the ''categories of activities that are similar in nature'' requirement of section 404(e) is to be interpreted broadly, for practical implementation of

this general permit program. Nationwide permits, as well as other general permits, are intended to reduce administrative burdens on the Corps and the regulated public, by efficiently authorizing activities that have minimal adverse environmental effects.

As for the minimal adverse effects provision of section 404(e), the various terms and conditions of these NWPs, including the provisions in the NWP regulations at 33 CFR 330.1(d) and 33 CFR 330.4(d) that allow district engineers to exercise discretionary authority, ensure compliance with this requirement. A decision document will be prepared for each NWP to address the requirements of the National Environmental Policy Act and generally discuss the anticipated impacts the NWP will have on the Corps public interest review factors. For those NWPs that may authorize discharges of dredged or fill material into waters of the United States, a 404(b)(1) Guidelines analysis will be provided in the decision document. The 404(b)(1) Guidelines analysis will be conducted in accordance with the procedures at 40 CFR 230.7. The preliminary decision documents for the proposed NWPs are available on the internet at: *www.regulations.gov* (docket ID number COE–2006–0005). We are soliciting comments on these preliminary decision documents, and any comments received will be considered when preparing the final decision documents for the NWPs.

Decision of U.S. Court of Appeals for the District of Columbia Circuit

In its July 29, 2005, decision in *National Association of Homebuilders* v. *U.S. Army Corps of Engineers* (Nos. 04–5009, 04–5010, and 04–5011), the U.S. Court of Appeals for the District of Columbia Circuit determined that NWPs are rules under the APA, and are subject to the Regulatory Flexibility Act (RFA). In the ''Administrative Requirements'' section of this preamble, we have addressed the requirements of the RFA. We have also performed other rulemaking analyses that are required by other statutes and executive orders. Those analyses are also provided in the ''Administrative Requirements'' section of this preamble.

National Environmental Policy Act Compliance

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

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

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

The supplemental decision documents issued by division engineers include cumulative effects assessments at the regional (district) level, for each district within the division. For those NWPs that authorize section 404 activities, the supplemental decision documents will also discuss local concerns relating to the Section 404(b)(1) Guidelines, if the national decision documents do not adequately address those issues. If the NWP is not revoked in a district, the supplemental decision document includes a certification that the use of the NWP in that district, with any applicable regional conditions (*i.e.*, applicable in a specific district), will result in minimal cumulative adverse environmental effects. The supplemental decision documents are prepared by Corps districts, but must be approved and formally issued by the appropriate division engineer, since the NWP regulations at 33 CFR 330.5(c) state that the division engineer has the authority to modify, suspend, or revoke NWP authorizations for any specific geographic area within his division. Regional conditions are considered NWP modifications. Therefore, when the process is completed, each district will have approved supplemental decision documents for each NWP, and those supplemental decision documents will assess cumulative effects within that district.

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

Acreage Limits and Pre-Construction Notification Thresholds

We are proposing to retain the current acreage limits for the NWPs, although we are seeking comment on adding an acreage limit for NWP 21, which currently has no acreage limit. We are also proposing to move the provisions of NWP 39 that authorize residential developments to NWP 29 and place a ½ acre limit on the proposed NWP 29. Currently NWP 29 has a ¼ acre limit for single unit residences, but this NWP can be used in all non-tidal waters, including non-tidal wetlands that are adjacent to tidal waters. Single unit residential projects are also permitted to use NWP 39, with a ½ acre limit, if they affect only non-tidal waters, but NWP 39 cannot be used to authorize these activities in non-tidal wetlands adjacent to tidal waters. The revised NWP 29 will have a ½ acre limit, but will only authorize discharges into non-tidal waters, and this NWP could not be used to authorize discharges in non-tidal wetlands that are adjacent to tidal waters. All residential projects impacting non-tidal wetlands adjacent to tidal waters, including single unit residences, will now require authorization by individual permit or

regional general permit. The Corps believes this additional level of environmental protection is warranted for non-tidal wetlands adjacent to tidal waters because of concerns regarding environmental impacts of residential development in coastal areas.

Proposed NWP A, Emergency Repair Activities, has no explicit acreage limit but will be limited to restoring damaged structures, fills, or uplands to the pre-event ordinary high water mark, in cases where regulated activities in waters of the United States are necessary to conduct the restoration. Proposed NWP B, which would authorize discharges in certain types of ditches and canals, has a one acre limit, and proposed NWP C has no acreage limit for conducting time-sensitive repairs of pipelines. Proposed NWP D, Commercial Shellfish Aquaculture Activities, is limited to existing aquaculture activities. The Corps is seeking comment on whether an acreage limit or some other type of limit (*e.g.*, on the total volume of fill material that may be discharged) is needed to ensure that these existing activities have no more than minimal adverse effects. As proposed, this NWP will require a PCN if the activity covers more than 25 acres, or if more than 10 acres is covered with submerged aquatic vegetation. The proposed NWP authorizing coal remining activities (NWP E) is limited to sites where more than 60 percent of the site was previously mined. Proposed NWP F, which authorizes underground coal mining activities, has a ½ acre limit. We are seeking comments on the proposed limits for these NWPs.

We are proposing to simplify the PCN thresholds for NWP 12 by reducing the number of criteria triggering the requirement to submit PCNs from seven to two, since the 1/10 acre PCN threshold will normally capture the activities addressed by the PCN thresholds we are proposing to remove. For NWP 13, PCNs will be required for proposed activities that involve discharges of dredged or fill material into special aquatic sites. We are also proposing to eliminate the PCN thresholds for NWPs 39, 40, 42, and 43. All activities authorized by these permits will now require PCNs.

We are proposing to remove the PCN requirement for NWP 5, which authorizes scientific measuring devices, and rely on the current 25 cubic yard limit for discharges of dredged or fill material to ensure that the NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment. We are also proposing to drop some of the PCN requirements for special situations under NWP 12. Specifically, PCNs would no longer be required for: (1) Mechanized landclearing of forested wetlands in the utility line right-of-way; (2) utility lines constructed in waters of the United States that are greater than 500 linear feet in length; (3) utility lines constructed in waters of the United States where the utility line is parallel to a stream; (4) permanent access roads constructed in waters of the United States for a distance of greater than 500 feet; and (5) permanent access roads constructed in waters of the United States with impervious materials, provided the total losses of waters of the United States are less than 1/10 acre. For those NWP activities that do not require submission of PCNs to district engineers, division engineers can impose regional conditions to require PCNs. We are soliciting comments on the proposed PCN thresholds for the NWPs.

Ephemeral Streams

On June 19, 2006, the Supreme Court issued its decision in the case of *Rapanos et ux, et al,* v. *United States.* This decision raises questions about the jurisdiction of the Clean Water Act, including Section 404, over some intermittent and ephemeral streams and their adjacent wetlands. The Corps will assess jurisdiction regarding such waters on a case-by-case basis in accordance with evolving case law and any future guidance that may be issued by appropriate Executive Branch agencies (*e.g.*, the Department of Justice). The discussion that follows applies to all ephemeral and intermittent streams and adjacent wetlands that remain jurisdictional following *Rapanos.*

We are proposing to provide greater protection for ephemeral streams. For those NWPs that have a 300 linear foot limit for the loss of stream bed, we are proposing to apply that linear foot limit to perennial, intermittent, and ephemeral streams. The 300 linear foot limit is found in the terms of NWPs 29, 39, 40, and 42. For proposed activities resulting in the loss of more than 300 linear feet of intermittent and/or ephemeral stream bed, the district engineer can waive the linear foot limit, if he determines that the proposed activity will result in minimal individual and cumulative adverse effects on the aquatic environment. Waivers of the 300 linear foot limit for the loss of intermittent and ephemeral streams must be in writing.

In the 2002 NWPs, the 300 linear foot limit applied only to perennial and intermittent stream beds, and the 300 linear foot limit could be waived for losses of intermittent stream bed. A waiver could not be issued for impacts resulting in the loss of greater than 300 linear feet of perennial streams (and we are not proposing to change this provision). For ephemeral streams, no waiver process was necessary because impacts to ephemeral streams were not counted towards the 300 linear foot limit for determining compliance with the NWPs.

Applying the linear foot limit to losses of ephemeral stream bed will also simplify administration of the NWP program. It is often difficult to distinguish between intermittent and ephemeral streams in the field. By applying the same thresholds and limits to impacts resulting in the loss of intermittent and ephemeral streams, it will not be necessary to identify which stream reaches are intermittent and which are ephemeral. Many topographic maps do not show the locations of intermittent and ephemeral streams, which results in greater reliance on site visits or information from permit applicants to implement permit conditions related to the 300 linear foot limit.

For those NWPs that have both an acreage limit and a linear foot limit for stream bed impacts, the acreage of stream impacts (*i.e.*, the length of the stream bed filled or excavated times the average width of the stream, from OHWM to OHWM) applies towards that acreage limit. For example, if a proposed NWP 39 activity involves filling 1/10 acre of non-tidal wetlands and 100 linear feet of a stream bed with an average width of 10 feet, the acreage loss of waters of the United States for that activity is 0.123 acre.

As discussed below, we are also proposing to modify the definition of ''loss of waters of the United States'' to include filling or excavating of ephemeral stream beds when determining whether proposed activities exceed the threshold limits of the NWPs.

Compliance With the Endangered Species Act

In its April 6, 2005, decision in *National Wildlife Federation et al.* v. *Les Brownlee (No. 03–1392)*, the U.S. District Court for the District of Columbia determined that the Corps is obligated to consult with the U.S. Fish and Wildlife Service on the effects of the NWPs. In response to that decision, the Corps will conduct Endangered Species Act Section 7(a)(2) consultation. Corps districts will consult with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) for the species that occur in their districts.

Essential Fish Habitat

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

Regional Conditioning of Nationwide Permits

Under Section 404(e), NWPs can only be issued that result in no more than minimal individual and cumulative adverse effects on the aquatic environment. An important mechanism for ensuring compliance with this requirement is an effective regional conditioning process. Coordination with Federal and State agencies and Indian Tribes, and the solicitation of public comments, assist division and district engineers in identifying and developing appropriate regional conditions for the NWPs. Effective regional conditions protect local aquatic ecosystems and helps ensure that the NWPs authorize only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment, and are in the public interest.

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

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

Examples of Corps regional conditions include:

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

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

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

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

• Revoking certain NWPs on a geographic or watershed basis;

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

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

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

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

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

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

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

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

Information on regional conditions and revocation can be obtained from the appropriate district engineer, as indicated below. Furthermore, this and additional information can be obtained on the Internet at *http://www.usace.army.mil/inet/functions/cw/cecwo/reg/district.htm* by clicking on the appropriate link for the Corps district office.

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

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

State or Tribal water quality certification, or waiver thereof, is required by Section 401 of the Clean Water Act, for activities authorized by NWPs which result in a discharge into waters of the United States. In addition, any state with a federally-approved CZMA plan must agree with the Corps determination that activities authorized by NWPs which are within, or will affect any land or water uses or natural resources of the state's coastal zone, are

consistent with the CZMA plan to the maximum extent practicable. Water quality certifications and/or CZMA consistency determinations may be issued without conditions, issued with conditions, or denied for specific NWPs.

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

Section 401 of the Clean Water Act

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

If a state denies a water quality certification for an NWP within that state, then the Corps will deny NWP authorization for the affected activities within that state without prejudice. However, when applicants request approval of such activities, and the Corps determines that those activities meet the terms and conditions of the NWP, the Corps will issue provisional NWP verification letters. The provisional verification letter will contain general and regional conditions as well as any project specific conditions the Corps determines are necessary for NWP authorization. The Corps will notify the applicant that they must obtain a project specific water quality certification, or waiver thereof, before they are authorized to start work in waters of the United States. That is, NWP authorization will be contingent upon obtaining the necessary water quality certification or waiver thereof from the State, Tribe, or EPA where appropriate. Anyone wanting to perform such activities where pre-construction notification to the Corps is not required has an affirmative responsibility to first obtain a project-specific water quality certification or waiver thereof from the Tribe, State, or EPA before proceeding under the NWP. This requirement is provided at 33 CFR 330.4(c).

Section 307 of the Coastal Zone Management Act (CZMA)

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

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

If a State disagrees with the Corps consistency determination for an NWP, then the Corps will deny authorization for the activities within or that would affect the coastal zone without prejudice. However, when applicants request approval of such activities, and the Corps determines that those activities meet the terms and conditions of the NWP, the Corps will issue provisional NWP verification letters. The provisional verification letter will contain general and regional conditions as well as any project specific conditions the Corps determines are necessary for NWP authorization. The Corps will notify the applicant that they must obtain a project specific CZMA consistency determination before they are authorized to start work in waters of the United States. That is, NWP authorization will be contingent upon obtaining the necessary CZMA consistency concurrence from the State. Anyone wanting to perform such activities where pre-construction notification to the Corps is not required has an affirmative responsibility to present a consistency certification to the appropriate State agency for concurrence. Upon concurrence with such consistency certifications by the state, the activity would be authorized by the NWP. This requirement is provided at 33 CFR 330.4(d).

Nationwide Permit Verifications

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

In response to an NWP verification request (PCN), the district engineer reviews the information submitted by the prospective permittee. If the district engineer determines that the activity complies with the terms and conditions of the NWP, he will notify the permittee. Special conditions, such as compensatory mitigation requirements, may be added to the NWP authorization to ensure that the activity results in minimal individual and cumulative adverse effects on the aquatic environment and other public interest factors. The special conditions are incorporated into the NWP verification, along with the NWP text and the NWP general conditions.

If the district engineer reviews the NWP verification request and determines that the proposed activity does not comply with the terms and conditions of an NWP, he will notify the project proponent and provide instructions for applying for authorization under a regional general permit or an individual permit. District engineers will respond to NWP

verification requests within 45 days of receiving a complete PCN. Except for NWP 21, if the project sponsor has not received a reply from the Corps within 45 days, she may assume that the project is authorized, consistent with the information in the PCN. For NWP 21 (Surface Coal Mining), the project sponsor may not begin work before receiving an NWP verification.

Contact Information for Corps District Engineers

Alabama

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

Alaska

Alaska District Engineer, ATTN: CEPOA–CO–R, P.O. Box 6898, Elmendorf AFB, AK 99506–6898.

Arizona

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

Arkansas

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

California

Sacramento District Engineer, ATTN: CESPK–CO–R, 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–OP–F, P.O. Box 889, Savannah, GA 31402–0889.

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, 700 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, P.O. Box 1027, Detroit, MI 48231–1027.

Minnesota

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

Mississippi

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

Missouri

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

Montana

Omaha District Engineer, ATTN: CENWO–OD–R, 106 South 15th Street, Omaha, NE 68102–1618.

Nebraska

Omaha District Engineer, ATTN: CENWO–OD–R, 106 South 15th Street, Omaha, NE 68102–1618.

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, 106 South 15th Street, Omaha, NE 68102–1618.

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, 106 South 15th Street, Omaha, NE 68102–1618.

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–CO–R, 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–OP–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, 190 Fifth Street East, St. Paul, MN 55101–1638.

Wyoming

Omaha District Engineer, ATTN: CENWO–OD–R, 106 South 15th Street, Omaha, NE 68102–1618.

District of Columbia

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

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

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

Puerto Rico and Virgin Islands

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

Request for Comment

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

Discussion of Proposed Modifications to Existing Nationwide Permits

The proposed changes to the existing NWPs fall into two categories:

Category 1 (Cat 1)—Proposed clarification of an existing NWP by making minor changes to the text of the NWP. It does not change the scope of activities authorized by the existing NWP.

Category 2 (Cat 2)—Proposed modification of an existing NWP that changes the scope of activities authorized by that NWP, or its substantive requirements.

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

We are proposing to modify many of the NWPs so that they follow a standard format: A description of activities the NWP authorizes, followed by a description of activities the NWP does not authorized (if applicable). Any pre-construction notification requirements are provided in a separate paragraph. Any ''notes'' for the NWP are provided at the end of the NWP. In many NWPs we are proposing to remove explicit references to the NWP regulations or general conditions, to simplify the text of those NWPs since the regulations and general conditions apply to all NWPs that authorize activities addressed by a particular provision. For example, general condition 3 requires that activities in spawning areas during spawning season be avoided to the maximum extent practicable. This requirement applies to all NWPs that may authorize activities in spawning areas. In cases where specific requirements or actions are necessary to ensure that a particular activity complies with NWP general conditions, district engineers should add special conditions to the NWP authorization for that activity. For example, for an NWP activity that will occur in a stream or other waterbody with spawning areas, special conditions may need to be added to the NWP authorization that impose time-of-year restrictions for conducting that activity, to minimize adverse effects to those spawning areas. If the area in the vicinity of the project site does not contain spawning areas, then this general condition would not apply to that NWP activity.

NWP 3. *Maintenance.* (Cat 2) We are proposing to restructure and simplify this NWP by shifting some of the activities currently authorized by NWP 3 to the proposed new NWP A, Emergency Repair Activities. Specifically we are proposing to remove the last two sentences of paragraph (i) and the entire paragraph (iii) that are in the current NWP 3 to the proposed new NWP A. We are also proposing to remove the definition of ''currently serviceable'' from the first paragraph of this NWP and place that definition in the ''Definitions'' section, because that term is also used in NWP 41, ''Reshaping Existing Drainage Ditches'' and proposed NWP C, ''*Pipeline Safety Program* Designated Time Sensitive Inspections and Repairs.'' The term ''currently serviceable'' means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

We are proposing to move the provisions regarding the removal of accumulated sediments from outfall and intake structures and associated canals from the current NWP 7 (which authorizes construction of outfall and associated intake structures) to paragraph (b) of the proposed NWP 3. The 200 foot linear limit for the removal of accumulated sediments in existing NWP 3 would not apply to situations where sediments are blocking or restricting outfall or intake structures, or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. Pre-construction notification is required for all activities authorized under paragraph (b) of this NWP. The proposed changes to NWP 3 will consolidate within a single NWP the authorization for removal of accumulated sediments from existing structures and from canals associated with intake and outfall structures.

To simplify the text of this NWP, we are proposing to remove the explicit references to the ''water quality'' and ''management of water flows'' general conditions, although these general conditions still apply. We are also proposing to add language to paragraph (c), to clarify that if temporary fills, structures, or work are required to conduct the maintenance activity, then separate authorization may be required. For example, it may be necessary to discharge dredged or fill material into waters of the United States to construct a cofferdam, so that the maintenance activity can be completed. The authorization for the temporary fills, structures, or work may be provided by NWP 33, Temporary Construction, Access, and Dewatering. We are proposing to modify the notification provision of this NWP to require information about original design capacities and configurations of structures and other features where maintenance dredging is proposed. That provision was adapted from the requirements for the current NWP 7 and will allow the district engineer to ensure compliance with the requirement that limits the removal of sediment to the minimum necessary to restore the waterway to its approximate dimensions when the structure was built.

NWP 4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.* (Cat 2) We are proposing to remove the text authorizing shellfish seeding, since that activity would be authorized by proposed NWP D (if the activity is an existing commercial shellfish aquaculture operation) or NWP 27 (if it is conducted for restoration activities).

NWP 5. *Scientific Measurement Devices.* (Cat 2) We are proposing to remove the PCN requirement for discharges of 10 to 25 cubic yards for the construction of small weirs and flumes, however, we would still retain the 25 cubic yard limit for such construction. Division engineers can regionally condition this NWP to require PCNs for certain activities, including discharges that exceed a specified threshold for the construction of small weirs and flumes, where necessary to ensure minimal adverse effects.

NWP 6. *Survey Activities.* (Cat 2) We are proposing to add exploratory trenching to the list of examples of activities authorized by this NWP, as well as a requirement to restore the trenched area to its pre-construction elevations upon completion of the work. District engineers have used this NWP to authorize exploratory trenching, with minimal adverse effects on the aquatic environment. In the text of this NWP, we are proposing a definition of ''exploratory trenching.'' We are also proposing to modify this NWP to authorize the construction of temporary pads used for survey activities, provided the discharge does not exceed 25 cubic yards. The construction of temporary pads is often necessary to provide proper levels for equipment used for core sampling.

NWP 7. *Outfall Structures and Associated Intake Structures.* (Cat 2) We are proposing to change the title of this NWP to more clearly describe what it authorizes. As discussed in the section on the proposed changes to NWP 3, we are proposing to remove the provisions regarding the removal of accumulated sediments from outfall and intake structures and associated canals, and place them in paragraph (b) of NWP 3. This proposed change will simplify NWP 7, and the removal of accumulated sediments may be authorized by NWP 3 instead.

NWP 8. *Oil and Gas Structures on the Outer Continental Shelf.* (Cat 1) We are proposing to change the title of this NWP to more clearly articulate what it authorizes. We are also proposing to modify this NWP to require pre-construction notification for all activities, to allow district engineers to review potential effects on navigation and national security. Requiring PCNs for all activities will also provide district engineers the opportunity to review compliance with fairway regulations, and exercise discretionary authority where limits of shipping safety fairways or traffic separation schemes have not been designated or where changes may occur.

NWP 12. *Utility Line Activities.* (Cat 2) We are proposing several modifications to this NWP. For this proposed modification of this NWP, the ½ acre limit still applies to each single and complete project, as defined at 33 CFR 330.2(i) and the ''Definitions'' section of the NWPs.

To reduce duplication in the NWPs, we are proposing to modify this NWP by removing the provision for the construction of access roads. Permanent or temporary access roads may be authorized by NWPs 14 or 33, respectively, or by individual permits or regional general permits. As a result of this proposed change, Note 2 of the current NWP 12 would be removed.

We are proposing to move the term that requires mitigation for permanent adverse effects to the functions and services of waters of the United States to paragraph (g) of the ''mitigation'' general condition (GC 20). District engineers may require compensatory mitigation for such impacts, if necessary, to ensure that the utility line activity results in minimal individual and cumulative adverse effects on the aquatic environment.

We are also proposing to simplify the PCN thresholds for this NWP, by requiring notification only for those utility line activities that require a section 10 permit or that involve discharges of dredged or fill material resulting in the permanent or temporary loss of greater than 1/10 acre of waters of the United States.

We are proposing to redesignate Note 3 as Note 1, and move the first part of the former Note 1 to the main text of NWP 12. The second part of former Note 1 would become Note 2 of the proposed modification of NWP 12.

NWP 13. *Bank stabilization.* (Cat 2) We are proposing to modify this NWP to clarify that district engineers may authorize bank stabilization activities longer than 500 linear feet, or that result in the discharge of more than one cubic yard of material per running foot below the plane of the ordinary high water mark or high tide line. Bank stabilization activities that exceed either of these thresholds require pre-construction notification. In response to PCNs, district engineers can issue written waivers of these limits provided the proposed activities will result in minimal individual and cumulative adverse effects on the aquatic environment.

We are also proposing to modify this NWP by requiring PCNs for bank stabilization activities that involve discharges of dredged or fill material into special aquatic sites, so that district engineers can authorize those activities if they determine that the individual and cumulative adverse effects on the aquatic environment are minimal. This will replace the current prohibition against the placement of materials in any special aquatic site, including wetlands. In some circumstances, it may be more beneficial to the watershed to stabilize eroding banks, even though small amounts of fringe wetlands or mudflats may be impacted by the bank stabilization activity. District engineers will exercise discretionary authority to require an individual permit if the proposed work would result in more than minimal adverse effects to special aquatic sites.

We are proposing to remove the provision requiring that the ''activity is part of a single and complete project'', since that requirement applies to all NWPs. The phrase ''single and complete project'' is defined at 33 CFR 330.2(i) and the ''Definitions'' section of the NWPs. In place of the general statement

that the NWP may not be used to channelize a water of the United States, we are also proposing to clarify that NWP 13 does not authorize stream channelization activities.

NWP 14. *Linear Transportation Projects.* (Cat 1) We are proposing to restructure this NWP to make it easier to understand, but the general scope of authorized activities is unchanged. The acreage limits and PCN thresholds are the same as before. In the first paragraph of this NWP, we are proposing to replace the word ''crossings'' with ''projects,'' to be consistent with the title of this NWP.

We are proposing to add a new condition to this NWP, to limit stream channel modifications to the minimum necessary to construct or protect linear transportation projects. We are also proposing to add language clarifying that NWP 14 does not authorize temporary construction, access, and dewatering activities; those activities may be authorized by NWP 33. That language is intended to support our objective to reduce duplication in the NWPs, since NWPs 14 and 33 can be combined to authorize single and complete linear transportation projects that involve temporary construction impacts, provided there is compliance with the ''use of multiple nationwide permits'' general condition (GC 24).

We are proposing to remove the explicit requirement that the PCN include a compensatory mitigation proposal. The compensatory mitigation requirements for the NWPs are addressed in the ''mitigation'' general condition (GC 20).

To simplify this NWP, we are also proposing to remove other redundant language: (1) The text requiring delineations of special aquatic sites to be submitted with PCNs, which is addressed by paragraph (b)(4) of the ''pre-construction notification'' general condition (GC 27); (2) the text requiring that the width of the fill be limited to the minimum size necessary, which is addressed by the ''mitigation'' general condition (GC 20); (3) the references to the ''management of water flows'' and ''water quality'' general conditions; and (4) the requirement that the linear transportation project be a single and complete project, since that requirement applies to all NWPs (see 33 CFR 330.2(i)).

NWP 16. *Return Water From Upland Contained Disposal Areas.* (Cat 1) We are proposing to rearrange the text of this NWP so that it will be consistent with the format of the other NWPs. We are not proposing any changes to the terms of this NWP.

NWP 17. *Hydropower Projects.* (Cat 1) We are proposing to rearrange the text of this NWP, without modifying any of its terms or its scope.

NWP 18. *Minor Discharges.* (Cat 2) To enhance protection of the aquatic environment, we are proposing to modify this NWP by applying the 1/10 acre limit to all losses of waters of the United States, not just special aquatic sites. This proposed change will also help simplify this NWP. We are also proposing to eliminate the second sentence of paragraph (b) of this NWP, since the concepts in that sentence are already addressed in the definition of ''loss of waters of the United States.'' We are proposing to remove the text requiring a delineation of special aquatic sites, since it will be addressed in paragraph (b)(4) of the ''pre-construction notification'' general condition (GC 27). We are also proposing to remove the language relating to the requirement that the discharge be part of a single and complete project, since that requirement applies to all NWPs.

NWP 19. *Minor Dredging.* (Cat 1) We are proposing to remove the phrase ''as part of a single and complete project,'' since that requirement applies to all NWPs and it is not necessary to include that phrase in the text of this NWP.

NWP 21. *Surface Coal Mining Operations.* (Cat 1) We are proposing to reissue NWP 21 to authorize discharges of dredged or fill material into waters of the United States associated with surface coal mining operations such as contour mining, mountaintop mining, and area mining. While surface coal mining operations occur throughout the United States, the majority of mines that create excess spoil material are located in the Appalachian coalfields region, many in steep slope terrains. These types of mining frequently result in excess spoil material being created that may not safely be placed back on the mine site. Other permanent impacts may include permanent stream diversions and/or relocations, fill for coal processing plants, and coal processing waste areas. Temporary impacts to waters of the United States frequently include temporary stream relocations, road crossings, and sediment ponds. Surface coal mining activities may also involve disturbances to stream channels. Coal deposits underlie many streams at shallow depths and mining activities routinely divert and relocate watercourses to remove the coal.

An integrated permit processing procedure is envisioned by the Joint Procedures Framework Memorandum of Understanding signed by the Corps, U.S. EPA, U.S. FWS and Office of Surface Mining (OSM) on February 8, 2005. It is a collaborative process in which the Surface Mining Control and Reclamation Act authority chooses to be the lead agency in coordinating interagency review of applications for surface coal mining operations, while preserving the authorities and responsibilities of each agency for permit decisions. This should result in concurrent reviews by the agencies, reduce duplication, and allow for joint pre-application and public meetings and joint site visits. To date at least one state (Ohio) has initiated an integrated permit process, and several other states, such as Washington, are having discussions.

This NWP is used to provide section 404 authorization for surface coal mining activities that have also been authorized by the Office of Surface Mining (OSM) or states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). One of the objectives of NWP 21 is to reduce duplication between the SMCRA and Section 404 permitting processes when authorizing surface coal mining projects. In previous versions of NWP 21, there has not been a limit on either the acreage or linear feet of waters and streams that could be impacted. This was based partly on the belief that the analyses and environmental protection performance standards required by SMCRA, in conjunction with PCN review, are generally sufficient to ensure that NWP 21 activities result in minimal individual and cumulative adverse effects on the aquatic environment. Under SMCRA requirements, surface coal mine operators must minimize adverse impacts to fish and wildlife habitat and material damage to the hydrologic balance within the project area. They must also prevent material damage to the hydrologic balance in surrounding areas. OSM is in the process of developing revisions to its excess spoil disposal rules that would provide additional protection for streams.

However, in processing PCNs for NWP 21, the Corps does not rely solely on the SMRCA process to ensure compliance with the requirements of the Clean Water Act (CWA). Additional measures, such as compensatory mitigation to offset losses of aquatic resource functions, are often needed to ensure that NWP 21 activities result in minimal individual and cumulative adverse effects on the aquatic environment. The SMCRA process is used to identify where surface coal mining activities will occur, and in Appalachia the SMCRA process is used

to identify the number and location of valley fills. The PCN process is used to determine what compensatory mitigation is needed to satisfy the 404(b)(1) Guidelines and ensure that individual and cumulative impacts are minimal. While activities performed to satisfy SMCRA requirements may be considered in determining compensatory mitigation requirements under Section 404, there is no presumption that these activities by themselves are sufficient. Through an April 1999 Memorandum of Understanding (MOU) signed by the COE, EPA, OSM, FWS, and the West Virginia Department of Environmental Protection (WVDEP), the agencies agreed to conduct joint permit application reviews for surface coal mining projects in West Virginia which impacted streams draining watersheds of 250 acres or greater and these activities were required to obtain individual permits. Partly as a result of the MOU, many surface coal mining projects in the Huntington District are now authorized under individual permits. The MOU was rescinded after the Mountaintop Mining/Valley Fill Programmatic Environmental Impact Statement was finalized.

In 2002, the Corps attempted to address concerns about the impacts of NWP 21 by requiring that all NWP 21 projects, of any size, file a PCN with the Corps and wait for written authorization from the Corps before beginning work. In contrast, most NWPs allow the project sponsor to begin work 45 days after filing a complete PCN, unless the sponsor has heard explicitly from the Corps that the work is not authorized.

To further strengthen its process for reviewing PCNs, on March 19, 2004, the Corps issued a standard operating procedure (SOP) for NWP 21 processing. This SOP was developed to improve consistency, and to enhance predictability and certainty. The procedures in the SOP make the NWP 21 PCN review process similar to the individual permit review process, such as the requirement for agency coordination on all proposed NWP 21 activities. The SOP lists the types of information needed by the Corps to make minimal impact determinations for proposed NWP 21 activities. Functional assessments appropriate to the region in which a proposed NWP 21 activity is located are required to assess stream quality and wetland impacts. The SOP also discusses requirements for compensatory mitigation projects, including monitoring requirements and financial assurances, in cases where compensatory mitigation is necessary to ensure that an NWP 21 activity results in minimal individual and cumulative adverse effects on the aquatic environment. Further guidance on compensatory mitigation for impacts to aquatic resources resulting from surface coal mining activities was issued by the Corps on May 7, 2004.

However, we have continued to hear concerns from some stakeholders about the lack of an acreage limit for NWP 21. In response, we are seeking comment on the need for an acreage, or other type, of limit for this NWP. Commenters should address the appropriate scientific and environmental basis for determining whether there is a need for a limit, and discuss types of possible limits (*e.g.*, acreage or stream length impacted, watershed drained). Commenters should also indicate whether it is appropriate to maintain or modify the current notification requirements if a limit is added, since these were adopted partially in response to concerns about the lack of a limit.

The terms and conditions of NWP 21, in conjunction with SMCRA requirements, the PCN review process, and any compensatory mitigation required under general condition 20, will ensure that this NWP authorizes only those activities with minimal individual and cumulative adverse effects on the aquatic environment.

We are proposing to remove the text stating that the district engineer may require a bond to ensure the success of mitigation, since the district engineer has the discretion to impose that requirement on any NWP activity where mitigation is required. As with the current NWP 21, compensatory mitigation for impacts resulting in the loss of aquatic resources that is required by OSM or the state may be considered when determining compensatory mitigation for NWP 21 activities. In accordance with our proposed revisions to the ''pre-construction notification'' general condition (GC 27), all NWP PCNs require submission of delineations of waters of the United States, including special aquatic sites (see paragraph (b)(4) of that general condition).

Division engineers can regionally condition this NWP to impose an acreage or linear foot limit or other special conditions, if there are concerns for the aquatic environment in a particular district, watershed, or other geographic region.

NWP 22. *Removal of Vessels.* (Cat 2) We are proposing rearrange the text of this NWP so that it is in a format similar to the other NWPs. We are also proposing to require a PCN if the vessel removal activity involves discharges of dredged or fill material into special aquatic sites. We are proposing to move the term addressing vessel disposal in waters of the United States to the ''Note'' at the end of the NWP. We are proposing to clarify that vessel disposal in waters of the United States requires separate authorization, if a Corps permit is required.

NWP 23. *Approved Categorical Exclusions.* (Cat 1) We are proposing to modify this NWP by reorganizing the text to make it easier to read. We are proposing to add the phrase ''including pre-construction notification requirements'' to paragraph (c) of this NWP to clarify that some activities eligible for NWP authorization may require submission of PCNs to district engineers prior to commencing the activity. We are also proposing to change the Corps office designation from CECW–OR to CECW–CO to reflect organizational changes at Corps Headquarters.

In the ''Notification'' provision, we are proposing to add a sentence to explain that there are Regulatory Guidance Letters (RGLs) that list the approved activities that require submission of PCNs. Prospective permittees should review the appropriate RGL to determine if an approved activity requires submittal of a PCN to the district engineer prior to beginning the activity. The current activities that have been approved (*i.e.*, the Chief of Engineers has concurred that they are categorically excluded) for use of NWP 23 are provided in RGL 05–07.

We are also proposing to add a ''Note'' to this NWP, to clarify that agencies may submit requests to the Office of the Chief of Engineers to include additional activities as approved for authorization under NWP 23. Upon receipt of such requests, we will conduct a public notice and comment process to determine whether the proposed activities are in fact categorically excluded. Additional activities approved for use of NWP 23 would be announced in an RGL, which would be posted at the internet address indicated in the ''Note.''

NWP 24. *Indian Tribe or State Administered Section 404 Programs.* (Cat 2) We are proposing to modify this NWP to include Indian Tribes. Section 518(e) of the Clean Water Act authorizes the U.S. EPA Administrator to treat an Indian Tribe as eligible for assuming the section 404 permit program. Currently, only two States (Michigan and New Jersey) and no Indian Tribes are approved to administer the section 404 program, and we are proposing to add a note to list those states. We are also proposing to move the text clarifying that certain structures in navigable

waters do not require section 10 permits to a note.

NWP 27. *Aquatic Habitat Restoration, Establishment, and Enhancement Activities.* (Cat 2) We are proposing to change the title of this NWP to more accurately reflect the types of activities it authorizes, since aquatic habitats other than streams and wetlands can be restored, established, or enhanced by activities authorized by this NWP. The term ''creation'' would be replaced with ''establishment,'' to conform with the terminology in Regulatory Guidance Letter 02–02 for wetland project types and the definition in the Council on Environmental Quality's April 2006 report entitled ''Conserving America's Wetlands 2006: Two Years of Progress Implementing the President's Goal.'' We are proposing to modify this NWP to prohibit the conversion of natural wetlands to another aquatic use, but the relocation of non-tidal wetlands on the project site would still be authorized provided certain conditions are met. In addition, we are proposing to add shellfish seeding to the list of examples of authorized activities, since shellfish seeding is used to restore oyster populations.

We are also proposing to modify this NWP to require permittees to submit copies of: Binding wetland enhancement, restoration, or establishment agreements; NRCS documentation for voluntary wetland restoration, enhancement, or establishment actions; or Surface Mining Control and Reclamation Act (SMCRA) permits issued by the Office of Surface Mining or the applicable state agency. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP. Standard PCNs are not required for activities conducted pursuant to one of these instruments (except reversion activities; see below), but the submission of these already prepared documents will allow the Corps to ensure that the conditions for use of the NWP have been satisfied, with minimal burden to the project proponent.

We are proposing to replace ''values'' with ''services'' because ecosystem services provide more objective measures of the importance of aquatic resource functions to human populations. Services are the benefits that humans derive from the functions performed by wetlands and other aquatic resources. Examples of wetland services include flood damage reduction, water quality improvement, and opportunities for viewing birds and other wildlife. Aquatic resource restoration, establishment, and enhancement activities authorized by this NWP are likely to provide ecosystem services that benefit human populations. Values of aquatic resources are difficult to describe objectively, and are usually dependent on the point of view of the person making the assessment. Values may relate to either monetary or non-monetary measures, whereas services can be described in physical terms that are easier to evaluate and address, where necessary, in NWP authorization letters and special permit conditions.

We are proposing to modify the reversion provision of this NWP by adding the Farm Service Agency (FSA) and appropriate designated state cooperating agencies of the U.S. Fish and Wildlife Service, Natural Resources Conservation Service, FSA, National Marine Fisheries Service, and National Ocean Service to the list of agencies that may execute wetland restoration, enhancement, or establishment agreements with landowners. This NWP 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 that has not been abandoned or on uplands, in accordance with a binding agreement between the landowner and NRCS, FSA, FWS, or their designated state cooperating agencies. There may be cases where the designated state cooperating agency has taken over the operational aspects of executing wetland restoration, enhancement, or establishment agreements with landowners for those federal agencies. The Conservation Reserve Enhancement Program (CREP) administered by FSA may involve wetland restoration, enhancement, and/or establishment activities, and this program may be delegated to state agencies for implementation. A CREP contract between the landowner and the administering agency may be for a term of 10 to 15 years. We are also proposing to add the phrase ''or on uplands'' to the third sentence of this paragraph, since wetlands may be established on uplands as a result of an agreement between the landowner and another government agency.

We are also proposing to modify this NWP by moving the requirement to notify the district engineer prior to conducting any reversion activities to the ''Notification'' provision. The ''Notification'' provision requires the permittee or appropriate Federal or State agency to notify the district engineer in accordance with general condition 27. For reversion activities, the permittee must show that the activity qualifies for reversion by providing documentation showing that a prior agreement has expired, or that the reversion activity is otherwise authorized. This documentation may consist of either: (1) A copy of the original wetland enhancement, restoration, or establishment agreement between the landowner and the NRCS, FSA, FWS, or appropriate designated state cooperating agency that shows the expiration date, if the agreement has an expiration date; (2) the NRCS documentation for voluntary wetland enhancement, restoration, and establishment actions demonstrating compliance with NRCS regulations; or (3) a copy of the SMCRA permit issued by the OSM or applicable state agency.

We are proposing to modify the ''Note'' at the end of this NWP, by removing the first sentence. Since the first paragraph of this NWP states that it authorizes only those activities that result in a net increase in aquatic resource functions and services (except for authorized reversion activities), it is redundant to restate this requirement in the Note. We are also proposing to remove the text stating that compensatory mitigation is required for impacts to waters of the United States caused by the authorized construction of compensatory mitigation projects, including mitigation banks and in-lieu fee programs.

In addition, we are proposing to remove the last sentence of the ''Note,'' which states that NWP 27 can be used to authorize the construction of a mitigation bank only when that bank has been approved in accordance with the procedures in the interagency mitigation banking guidance issued on November 28, 1995 (60 FR 58605). This provision is contrary to the 1995 guidance, which states that a bank sponsor may proceed, at his or her own risk, with the construction of the mitigation bank after receiving the Department of the Army permit, if the mitigation banking instrument has not yet been approved.

NWP 29. *Residential Developments.* (Cat 2) We are proposing to combine NWP 29 and the provisions of NWP 39 pertaining to residential developments into a single nationwide permit that authorizes single unit residences (*e.g.*, single family homes) and multiple unit residential developments. In other words, we are proposing that NWP 29 authorize both single unit and multiple unit residential developments while NWP 39 would authorize commercial and institutional developments because residential developments differ from commercial and institutional

developments. In addition, residential developments are often subject to different state and local requirements. We are seeking comments on the appropriateness of having separate NWPs to authorize residential developments and commercial and institutional developments.

We are proposing to require PCNs for all activities authorized by this NWP, to ensure that those activities result in minimal individual and cumulative adverse effects to the aquatic environment and other public interest review factors, such as floodplain values.

The proposed acreage limit is ½ acre, and that acreage limit includes any losses of waters of the United States resulting from filling or excavating stream beds. We are also proposing to impose a 300 linear foot limit on the loss of stream bed. For intermittent and ephemeral stream beds, a district engineer can waive the 300 linear foot limit on a case-by-case basis, if he determines that the adverse effects on the aquatic environment are minimal, individually and cumulatively. These waivers must be issued in writing by the district engineer. The 300 linear foot limit cannot be waived for perennial stream beds.

The proposed modification of this NWP provides more protection of the aquatic environment. The proposed NWP can be used in a narrower scope of waters than the current NWP 29. The current NWP 29 authorizes discharges of dredged or fill material into all non-tidal waters of the United States, including those non-tidal wetlands that are adjacent to tidal waters. The proposed modification of NWP 29 does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters. The current NWP 39 authorizes both single unit and multiple unit residential developments with a ½ acre limit for discharges of dredged or fill material into non-tidal waters, except for non-tidal wetlands adjacent to tidal waters. In effect, the current NWP 29 is being eliminated, and we are proposing to replace it with the provisions of the current NWP 39 that authorize single and multiple unit residential developments.

We are proposing to remove the text requiring permittees to minimize on- and off-site impacts and avoid flooding, since those requirements are addressed by the ''mitigation'' general condition (GC 20) and the ''management of water flows'' general condition (GC 9). We are proposing to remove the text requiring the maintenance of vegetated buffers next to open waters, since paragraph (d) of general condition 20 states that district engineers may require the establishment and maintenance of riparian areas next to streams and other open waters. We are proposing to eliminate the text defining the acreage loss of waters of the United States, since there is a definition of ''loss of waters of the United States'' in the ''Definitions'' section of the NWPs.

We are also proposing to eliminate the condition restricting the use of NWP 29 to those individuals constructing single family homes for personal use, as well as the definitions for ''individual'' and ''parcel of land.'' We believe that it is inappropriate to establish different permits for single and multiple residential development because the impacts to the aquatic environment are determined by the permit conditions themselves (*e.g.*, ½ acre limit) and not the type of residential development or the type of permittee. Each proposed NWP 29 activity will be evaluated through the PCN process to determine if the activity qualifies for NWP authorization.

This NWP can be used to authorize discharges of dredged or fill material into non-tidal waters of the United States (other than non-tidal wetlands adjacent to tidal waters) to construct building foundations and pads, as well as attendant features. The examples of attendant features listed in this NWP were taken from the current NWP 39. The scope of applicable waters is the same as the current NWP 39. We are proposing to retain the residential subdivision provision from the current NWP 39.

In response to a PCN, the district engineer may impose special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, allows for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

NWP 30. *Moist Soil Management for Wildlife.* (Cat 2) We are proposing to modify this NWP by removing the phrase ''performed on non-tidal Federally-owned or managed, State-owned or managed property, and local government agency-owned or managed property, for''. Removal of this phase will allow any landowner to use this NWP to authorize discharges of dredged or fill material into non-tidal waters of the United States for the purpose of managing wildlife habitat and feeding areas. We do not believe this NWP should be restricted to government agencies, since many private landowners have an interest in attracting and supporting various species of wildlife, and can do these activities without causing more than minimal adverse environmental effects.

We are also proposing to remove the phrase ''[t]he repair, maintenance or replacement of existing water control structures; the repair or maintenance of dikes; and'' since those activities may be authorized by NWP 3. In its place, we are proposing to add an explanatory ''Note'' at the end of the NWP. For the reasons provided in the preamble discussion of the definition of ''riparian areas,'' we are proposing to replace the phrase ''vegetated buffers'' with ''riparian areas.''

NWP 31. *Maintenance of Existing Flood Control Facilities.* (Cat 1) We are proposing to remove the last sentence of the first paragraph of this NWP, which discussed certain types of maintenance activities that do not require section 404 permits, since that issue is more appropriately addressed through the Corps current definition of ''discharge of dredged material'' at 33 CFR 323.2(d).

We are proposing to add ''levees'' to the list of features that can be maintained through the authorization provided by this NWP, since levees are often integral parts of flood control facilities. Discharges of dredged or fill material in waters of the United States for levee maintenance may be authorized by this NWP, provided the levees are included in the maintenance baseline.

NWP 32. *Completed Enforcement Actions.* (Cat 1) We are proposing to eliminate the phrase ''For either (i), (ii), or (iii) above,'' from the last paragraph of this NWP. This phrase is unnecessary because permittees must comply with all applicable terms and conditions of any NWP. We are also proposing to remove the phrase ''or fails to complete the work by the specified completion date'' since the completion date should be specified in the court decision, consent decree, or judicial/non-judicial settlement agreement.

NWP 33. *Temporary Construction, Access, and Dewatering.* (Cat 1) We are proposing to divide the first sentence of this NWP into two sentences, to clarify that temporary structures or work in navigable waters of the United States or discharges of dredged or fill material in waters of the United States associated with construction activities that do not require permits from the Corps or the U.S. Coast Guard, as well as those that do require and have obtained such permits, are authorized by this NWP. We are also proposing to move the requirement for a restoration plan from the ''pre-construction notification''

general condition (general condition 13 of the 2002 NWPs) to the ''Notification'' paragraph of this NWP. The PCN must include a restoration plan showing how all temporary fills and structures will be removed and the area restored to pre-project conditions. The restoration plan should also describe reasonable measures for avoidance and minimization of adverse effects to aquatic resources. We are proposing to remove the sentence that states that the district engineer will add special conditions to ensure minimal adverse effects, since the addition of special conditions where necessary to ensure minimal adverse effects is a condition of all NWPs.

NWP 34. *Cranberry Production Activities.* (Cat 1) We are proposing to rearrange the text of this NWP, to conform with the general format of the proposed NWPs, and to eliminate the phrase ''provided the activity meets all of the following criteria:'' since activities must comply with all terms and conditions of an NWP. We are also proposing to remove the text requiring PCNs to include delineations of special aquatic sites, since that requirement is addressed by paragraph (b)(4) of the proposed modification of the ''pre-construction notification'' general condition (GC 27).

We are proposing to modify this NWP to clarify that an existing cranberry production operation needs to submit a pre-construction notification only once during the period that this NWP is valid. The NWP authorization would apply to on-going discharges of dredged or fill material into waters of the United States, provided the 10 acre limit is not exceeded.

NWP 36. *Boat Ramps.* (Cat 2) We are proposing to modify this NWP to allow district engineers to issue, on a case-by-case basis after reviewing pre-construction notifications, waivers to the 50 cubic yard limit for discharges of dredged or fill material into waters of the United States to construct a boat ramp. We are also proposing to allow district engineers to issue waivers to the 20 foot width limit for boat ramps. These waivers can be issued only if, after reviewing a pre-construction notification, the district engineer determines that the adverse effects on the aquatic environment and other factors of the public interest will be minimal. These waivers must be issued in writing by the district engineer.

We are proposing to modify this NWP to require pre-construction notification if the proposed boat ramp involves discharges of more than 50 cubic yards of dredged or fill material into waters of the United States, or if the proposed boat ramp is greater than 20 feet wide.

We are also proposing to remove the text prohibiting the use of material that may cause unacceptable chemical pollution, since that issue is addressed by the ''suitable material'' general condition (GC 6).

NWP 37. *Emergency Watershed Protection and Rehabilitation.* (Cat 1) We are proposing to rearrange the text of this NWP to conform with the format of the proposed modified NWPs, but it will not change the scope of activities authorized by this NWP.

NWP 38. *Cleanup of Hazardous and Toxic Waste.* (Cat 1) We are proposing to modify this NWP by moving the requirement to submit a delineation of waters of the United States to paragraph (b)(4) of the ''pre-construction notification'' general condition (GC 27). We are also proposing to move the last sentence of this NWP to a ''Note'' at the end of the NWP.

NWP 39. *Commercial and Institutional Developments.* (Cat 2) We are proposing to remove residential developments as an authorized activity from this NWP and modify NWP 29 to authorize both single unit and multiple unit residential developments. We believe that NWP 39 should be modified to authorize only commercial and institutional developments because those types of developments differ from residential developments in a number of ways. Commercial and institutional developments are often subject to different state and local requirements than residential developments, such as storm water management and infrastructure requirements. Planning and zoning requirements for residential, commercial, and institutional developments may also be different, which can affect where they are located in a watershed. We are soliciting comments on limiting NWP 39 to authorizing discharges of dredged or fill material into waters of the United States to construct or expand commercial and institutional developments.

We are proposing to modify this NWP to require PCNs for all activities, to ensure that those activities result in minimal individual and cumulative adverse effects on the aquatic environment and other public interest review factors, such as floodplain values. Since PCNs will be required for all activities authorized by this NWP, we are proposing to eliminate the reporting requirement in paragraph (i) of the current NWP 39. For the same reason, we are also proposing to eliminate the ''Note'' from this NWP.

We are also proposing to modify the 300 linear foot limit for the loss of stream bed to apply that limit to ephemeral streams. We are proposing to allow district engineers to waive the 300 linear foot limit, if the loss of intermittent or ephemeral stream bed will have minimal individual and cumulative adverse effects on the aquatic environment. These waivers must be issued in writing by the district engineer.

Another modification we are proposing is to move the requirement to submit a delineation of waters of the United States to paragraph (b)(4) of the ''pre-construction notification'' general condition (GC 27). Since we are proposing to modify this NWP to require PCNs for all activities and because the ''mitigation'' general condition (GC 20) requires permittees to avoid and minimize adverse effects to the maximum extent practicable on the project site, we are proposing to remove the text requiring submittal of a written avoidance and minimization statement and a compensatory mitigation proposal with the PCN. District engineers will review PCNs to ensure that all practicable on-site avoidance and minimization has been accomplished. In response to a PCN, the district engineer may require compensatory mitigation to ensure that the authorized activity results in minimal adverse environmental effects (see 33 CFR 330.1(e)(3)).

We are proposing to remove the text requiring the permittee to establish and maintain, to the maximum extent practicable, riparian areas next to streams and other open waters on the project site, since this issue is addressed by paragraph (e) of general condition 20, which applies to all NWPs, including NWP 39.

We are proposing to remove the references to the general conditions relating to water quality and the management of water flows, since those general conditions apply, as appropriate, to all NWPs.

In response to a PCN, the district engineer may impose special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, allows for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

NWP 40. *Agricultural Activities.* (Cat 2) We are proposing to modify this NWP by eliminating the distinction between permittees that are U.S. Department of Agriculture (USDA) program participants and those permittees who

are not USDA program participants. Participants in USDA programs, as well as non-participants, are eligible to use this NWP for agricultural activities. NRCS would no longer need to determine the applicability of this NWP to authorize agricultural activities resulting in discharges of dredged or fill material into waters of the United States.

We are proposing to modify this NWP to require PCNs for all activities, for case-by-case review by district engineers to ensure that those activities result in minimal individual and cumulative adverse effects to the aquatic environment and other public interest review factors.

We are also proposing to modify this NWP to authorize the construction of farm ponds in non-tidal waters of the United States, excluding perennial streams, where the pond is necessary for agricultural production. This NWP would authorize 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) of the Act. This NWP does not authorize the construction of ponds on non-agricultural land, or the construction of recreational or ornamental ponds. We are proposing to limit discharges of dredged or fill material for the construction of farm ponds to non-tidal waters, other than perennial streams and non-tidal wetlands adjacent to tidal waters, to ensure that the construction of the farm pond results in minimal individual and cumulative adverse effects on the aquatic environment. The construction of ponds in perennial streams is more likely to cause more than minimal adverse effects on the aquatic environment, by disrupting stream geomorphic processes, as well as ecological functions of streams.

Since we are proposing to modify this NWP to require PCNs for all activities, we are removing the explicit requirement to submit a compensatory mitigation plan with the PCN. In response to a PCN, the district engineer may require compensatory mitigation (see 33 CFR 330.1(e)(3)) to ensure that the authorized work results in minimal adverse effects on the aquatic environment. The ''mitigation'' general condition (GC 20) also addresses compensatory mitigation requirements for all NWPs. Any compensatory mitigation required for activities authorized by this NWP that requires section 404 authorization may be authorized by this NWP or NWP 27.

We are proposing to remove the definition of ''farm tract'' and the conditions limiting the use of NWPs 39 and 40 on a particular site, since district engineers will receive PCNs for all activities authorized by this NWP. District engineers will review PCNs for those NWPs to ensure that the proposed work results in minimal individual and cumulative adverse environmental effects.

NWP 41. *Reshaping Existing Drainage Ditches.* (Cat 2) We are proposing to modify this NWP to clarify that it authorizes only the reshaping of drainage ditches constructed in waters of the United States where the purpose of reshaping the ditch is to improve water quality. As a result of this modification, we are also proposing to remove the sentence which states why compensatory mitigation is not required for the activities authorized by this NWP.

The purpose of this NWP is to encourage landowners who need to maintain drainage ditches constructed in waters of the United States to do so in a manner that benefits the aquatic environment. The maintenance of a drainage ditch to its current configuration is exempt under Section 404(f)(1)(C) of the Clean Water Act, and does not require a DA permit. This exemption does not authorize reshaping of existing drainage ditches, so this NWP authorizes reshaping activities that benefit the aquatic environment. This NWP was first issued on March 9, 2000, (65 FR 12818) to authorize, to the extent that a section 404 permit is required, the grading of the banks of a currently serviceable ditch to gentler (shallower) slopes than its current or original configuration. Reshaping a drainage ditch so that it has shallower side slopes can help improve water quality by decreasing the velocity of water flowing through the ditch and by spreading out water flow over a greater area of soil surface. It should also provide more area for plants to become established and grow within the ditch. These changes are likely to help improve water quality by increasing water contact with vegetation and soil microbes, to facilitate the removal of nutrients and other chemical compounds through biogeochemical processes. Slower water flow rates through the ditch should also decrease erosion, also improving water quality.

We are proposing to remove the prohibition against permanent sidecasting of excavated material into waters of the United States, where the excavated material results from the ditch reshaping activity. In cases where there are jurisdictional wetlands or other waters next to the ditch to be reshaped, this prohibition is likely to cause many landowners to maintain the ditch at its originally designed configuration to qualify for the exemption, since the 404(f)(1)(C) exemption allows discharges of dredged or fill material into waters of the United States resulting from ditch maintenance activities.

Since one of the conditions of this NWP states that the centerline of the ditch must remain in approximately the same place, we do not believe that it is necessary to state that this NWP does not authorize stream relocation projects.

NWP 42. *Recreational Facilities.* (Cat 2) We are proposing to simplify this NWP by removing the term which limits its use to those recreational facilities that are integrated into the existing landscape and do not substantially change pre-construction grades or deviate from natural landscape contours. That particular term is problematic in many areas of the United States, especially those regions where the project area for a proposed recreational facility is predominantly uplands. The construction of recreational facilities that result in minimal individual and cumulative adverse effects on the aquatic environment should be authorized by this NWP, regardless of the amount of changes to pre-construction grades or natural landscape contours in areas not subject to regulatory jurisdiction under Section 404 of the Clean Water Act.

We are also proposing to modify this NWP to require PCNs for all activities, so that district engineers will be able to review proposed recreational facilities to ensure that they result in minimal individual and cumulative adverse effects on the aquatic environment.

We are also proposing to remove the text requiring submission of a compensatory mitigation proposal with a PCN, since GC 20 addresses compensatory mitigation requirements for all NWPs. We are proposing to remove the text that explicitly requires water quality management measures, since such measures may be required by district engineers for any NWP on a case-by-case basis in accordance with the ''water quality'' general condition (GC 21).

We are proposing to modify the 300 linear foot limit for the loss of stream bed, by applying that limit to ephemeral streams. We are also proposing to allow district engineers to waive the 300 linear foot limit, if the stream bed is intermittent or ephemeral and the individual and cumulative adverse effects on the aquatic environment are minimal. These waivers must be issued in writing by the district engineer.

This NWP can be used to authorize the construction of ski areas and golf

courses, as long as those activities result in minimal adverse environmental effects and are in the public interest. We are also proposing to expand this NWP to authorize playing fields and basketball and tennis courts. The condition prohibiting the use of this NWP to authorize hotels, restaurants, stadiums, racetracks, arenas, and similar facilities would be retained. District engineers will evaluate PCNs to determine if proposed recreational facilities are authorized by this NWP.

In response to a PCN, the district engineer may impose special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, allows for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

NWP 43. *Stormwater Management Facilities.* (Cat 2) We are proposing to modify this NWP to require PCNs for the construction or expansion of stormwater management facilities, but not for maintenance activities. District engineers will review those PCNs to ensure that proposed activities result in minimal individual and cumulative adverse effects on the aquatic environment and other public interest review factors, including floodplain values.

We are proposing to modify the 300 linear foot limit for the loss of stream bed by applying that limit to ephemeral streams. We are also proposing to allow district engineers to waive the 300 linear foot limit if the stream bed is intermittent or ephemeral and the filling and/or excavation of that stream bed will result in minimal individual and cumulative adverse effects on the aquatic environment. These waivers must be issued in writing by the district engineer.

In addition, we are proposing to remove the requirement for prospective permittees to submit maintenance plans, since the NWP limits maintenance activities to restoring the stormwater management facility to its original design capacity. We are also proposing to remove the requirement to submit compensatory mitigation proposals with PCNs, since mitigation requirements are addressed by GC 20. General condition 20 requires permittees to avoid and minimize impacts to waters of the United States on the project site to the maximum extent practicable, so we are proposing to remove the requirement for submitting an avoidance and minimization statement with the PCN. District engineers will review PCNs to determine if avoidance and minimization has been accomplished to the maximum extent practicable.

We are also proposing to remove the text requiring compliance with the ''management of water flows'' general condition (GC 9), since that general condition generally applies, as appropriate, to all NWPs. We are proposing to remove the requirement for maintenance excavation to be conducted in accordance with an approved maintenance plan, since the maintenance of an existing stormwater management facility is limited to its original design capacity and therefore it is likely to result in minimal adverse effects to the aquatic environment.

NWP 44. *Mining Activities.* (Cat 2) We are proposing to simplify this NWP, and modify it to authorize all types of mining activities except for coal mining. Surface coal mining activities may be authorized by NWP 21. Other types of coal mining activities may be authorized by the proposed new NWP E (Coal Remining Activities) or NWP F (Underground Coal Mining Activities). This NWP would continue to authorize aggregate mining and hard rock/mineral mining activities. We are proposing to retain the ½ acre limit for this NWP. Pre-construction notifications are required for all activities authorized by this NWP, so we do not believe that it is necessary to partition the types of waters where certain types of mining activities can occur. District engineers will review PCNs to ensure that proposed mining activities will result in minimal adverse effects on the aquatic environment, individually and cumulatively, and will exercise discretionary authority if the adverse effects are more than minimal. This NWP authorizes only discharges of dredged or fill material into non-tidal waters of the United States, and does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

The PCN must include a copy of the reclamation plan, if reclamation is required by other statutes. We are proposing to remove the requirement to submit an avoidance and minimization statement, because the ''mitigation'' general condition (GC 20) requires avoidance and minimization of adverse effects to waters of the United States to the maximum extent practicable on the project site. We are proposing to remove the references to the general conditions relating to the ''shellfish beds'' and ''spawning areas'' general conditions (GC 6 and GC 3), since those conditions apply, to the extent appropriate, to all NWPs. We believe that the terms requiring measures to prevent increases in stream gradient and water velocities, and minimizing turbidity, should be removed and the prevention or reduction of such impacts is more appropriately addressed through the NWP general conditions (*e.g.*, GCs 3, 9, and 12), as well as the site-specific review and any case-specific special conditions added to NWP authorizations by district engineers. If the district engineer reviews a PCN and determines that the proposed mining activity will result in more than minimal adverse effects to stream gradient, water velocities, and turbidity, he will exercise discretionary authority and require an individual permit for the activity.

We are also proposing to remove the references to the ''water quality'' general condition (GC 21) and the ''management of water flows'' general condition (GC 9), since those general conditions apply, as appropriate, to all NWPs. We believe that restrictions for hard rock/mineral mining, including beneficiation and mineral processing, are more appropriately addressed through special conditions to NWP verifications, or by regional conditions imposed by division engineers.

In response to a PCN, the district engineer may impose special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, allows for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

Discussion of Proposed New Nationwide Permits

NWP A. *Emergency Repair Activities.* We are proposing to remove paragraph (iii) from the current NWP 3 and issue a new NWP to authorize emergency repair activities. This will simplify NWP 3, and limit that NWP to routine maintenance activities. This proposed NWP requires PCNs for all activities. The PCN must be submitted within 12 months of the date of the damage. This 12 month period is intended to establish that the damage or loss of upland occurred in the recent past, and that the proposed activity is not intended to reclaim lost lands due to gradual erosion processes. The work must be completed within two years of submitting the PCN.

The proposed NWP also authorizes bank stabilization activities to protect the restored uplands, as long as the bank stabilization activity does not extend beyond the ordinary high water mark

(OHWM) that existed before the damaging event occurred. Bank stabilization activities that extend beyond the pre-event OHWM may be authorized by NWP 13, a regional general permit, or an individual permit.

We are proposing to replace the 50 cubic yard limit for minor dredging to remove obstructions from the adjacent waterbody with a condition limiting minor dredging to the minimum necessary to restore bottom contours of the waterbody to their pre-event state. District engineers will review PCNs involving minor dredging for emergency repair activities, to ensure that the authorized work will result in minimal adverse environmental effects. We are also proposing to add a condition which states that project proponents may be required to obtain separate DA authorization, if temporary structures or discharges are necessary to conduct the rehabilitation or repair activity. Separate DA authorization would be required for temporary structures installed in navigable waters of the United States and/or temporary discharges of dredged or fill material into waters of the United States that are necessary to conduct emergency repair activities. The separate DA authorization may be provided by NWP 33, a regional general permit, or an individual permit.

In the ''Note'' at the end of this NWP, we are proposing to modify text taken from paragraph (iii) of NWP 3 to clarify that restoring uplands up to the OHWM in non-tidal waters or the high tide line in tidal waters after a storm, flood, or other discrete event does not require a section 404 permit. If discharges of dredged or fill material to restore uplands lost as a result of a discrete event occur landward of the OHWM or high tide line, and there are no jurisdictional waters or wetlands landward of the OHWM or high tide line, a section 404 permit is not required because there would be no discharge of dredged or fill material into waters of the United States. In response to a PCN, the district engineer will determine, on a case-by-case basis, the location of the OHWM and the high tide line. In the ''Note,'' we are also proposing to include a reference to 33 CFR 328.5, which addresses changes in limits to waters of the United States.

In response to a PCN, the district engineer can exercise discretionary authority and require an individual permit if the proposed activity will result in more than minimal adverse effects on the aquatic environment, individually and cumulatively.

NWP B. *Discharges into Ditches and Canals.* We are proposing a new NWP to authorize discharges of dredged or fill material into certain types of ditches and canals that are determined to be waters of the United States. The proposed NWP will allow a landowner to return his or her land to its prior condition, but only in those cases where the ditches or canals meet all three criteria specified in the NWP. To qualify for this NWP, those ditches and canals must be: (1) Constructed in uplands, (2) receive water from another water of the United States, and (3) divert water to another water of the United States. These three criteria will limit the use of this NWP to those ditches and canals that generally provide few aquatic resource functions. This proposed NWP does not authorize discharges of dredged or fill material into ditches or canals that were constructed in waters of the United States, such as streams.

We are proposing a one acre limit for this NWP. We believe the one acre limit will authorize those activities that have minimal adverse effects on the aquatic environment, individually and cumulatively. Division engineers can regionally condition this NWP to lower the acreage limit or otherwise limit its use. We are proposing to require a PCN if the dredged or fill material will be discharged into more than 500 linear feet of ditch or canal. This proposed NWP is limited to activities that only require section 404 authorization. An individual permit, regional general permit, or another NWP would be needed to authorize discharges of dredged or fill material into ditches and canals that are determined to be navigable waters of the United States under section 10 jurisdiction.

We are seeking comments on this proposed new NWP, including its terms and conditions, such as the proposed one acre limit.

NWP C. *Pipeline Safety Program Designated Time Sensitive Inspections and Repairs.* We are proposing a new NWP to authorize the inspection, repair, rehabilitation, or replacement of any currently serviceable structure or fill for pipelines that are determined to be time-sensitive in accordance with the Pipeline and Hazardous Materials Safety Administration's Pipeline Safety Program (PHP), including its criteria at 49 CFR parts 192 and 195. This NWP would authorize time-sensitive pipeline inspection, repair, rehabilitation, or replacement activities in all waters of the United States, including navigable waters.

The proposed NWP would significantly improve a participating pipeline operator's ability to complete inspection and repair activities, and reduce environmental impacts due to pipeline ruptures. An Interagency Committee (IAC) was convened to implement Section 16 of the Pipeline Safety Improvement Act of 2002 (*see* 49 U.S.C. 60133). The proposed NWP will help satisfy the requirements of this act. The environmental compliance and enforcement programs of the agencies participating in the interagency committee would also help ensure compliance with environmental statutes such as the Endangered Species Act and Section 106 of the National Historic Preservation Act.

Although many of these activities could be authorized by NWPs 3 or 12, we are proposing to issue this NWP so that a time-sensitive inspection and/or repair that meets PHP criteria can proceed without submitting a PCN to the district engineer. To ensure that this NWP would allow these inspections and repairs to proceed in a timely manner, division engineers are not authorized to regionally condition this NWP. This proposed NWP requires project proponents to: (1) Participate in PHP's early notification program, (2) utilize the Pipeline Repair and Environmental Guidance System (PREGS), (3) follow the agreed upon Recommended Best Management Practices (RMBPs), and (4) submit post-construction reports within 7 days of completing the work via PREGS. District engineers can monitor the pipeline inspection and/or repair activity and the use of this NWP through the post-construction reporting in PREGS to ensure that the NWP authorizes activities that have minimal individual and cumulative adverse effects on the aquatic environment. Suspension or revocation of this NWP may occur only if the division engineer has formally determined, in accordance with the procedures at 33 CFR 330.5(c), that the NWP would result in more than minimal adverse environmental effects, either individually or cumulatively, within a particular district, watershed, or other geographic region. District engineers must follow the procedures at 33 CFR 330.5(d) to suspend or revoke a case-specific authorization under this NWP.

The Pipeline and Hazardous Materials Safety Administration and the IAC developed PREGS. Participating pipeline operators and agencies have access to PREGS. This system will provide early notification to participating agencies for upcoming pipeline inspection and repair activities.

The RBMPs have been developed through the IAC to address habitat and resource issues at the national level. These RBMPs apply to pipeline inspection and repair activities, as well as post-activity remediation actions. The RMBPs are available on PREGS.

Pipeline operators are expected to use the RBMPs while conducting inspection and repair activities.

Activities authorized by this NWP must comply with the ''endangered species'' general condition (GC 17) and the ''historic properties'' general condition (GC 18). If a proposed pipeline inspection and/or repair activity may affect endangered or threatened species or critical habitat, section 7 consultation is required. Activities that may affect historic properties require consultation under Section 106 of the National Historic Preservation Act. We are coordinating with PHP to determine who will be the lead federal agency for ESA and section 106 consultation.

NWP D. *Commercial Shellfish Aquaculture Activities.* We are proposing a new NWP to authorize continued operation of existing commercial shellfish aquaculture activities in navigable waters of the United States. This NWP would support the U.S. Department of Commerce's Aquaculture Policy, which is intended to ''assist in the development of a highly competitive, sustainable aquaculture industry in the United States that will meet growing consumer demand for aquatic foods and products that are of high quality, safe, competitively priced and are produced in an environmentally responsible manner with maximum opportunity for profitability in all sectors of the industry.'' The proposed new NWP also supports the National Aquaculture Act of 1980, as amended (16 U.S.C. 2801 *et seq.*), which declared that aquaculture development is in the national interest, and included requirements for Federal agencies to address barriers to aquaculture development.

This NWP authorizes structures or work in navigable waters of the United States, as well as discharges of dredged or fill material into all waters of the United States. Examples of commercial shellfish species for which this NWP could be used to authorize aquaculture activities include oysters, clams, geoducks, mussels, and scallops. The proposed NWP does not authorize commercial aquaculture activities for crustaceans or finfish.

This NWP does not authorize the expansion of existing commercial aquaculture activities or facilities, however we are soliciting comment on this limitation. We are also soliciting comments on whether to impose a limit on the quantity of dredged or fill material that could be discharged into navigable waters, on the acreage of the facility as a whole or of submerged aquatic vegetation, and/or on the types of activities authorized. For example, discharges of dredged or fill material may be necessary to prepare a suitable substrate for shellfish seeding. Should this activity be authorized by the NWP?

There are different types of shellfish seed that can be used to increase shellfish production. Shellfish seed may consist of immature individual shellfish, an individual shellfish attached to a shell or shell fragment (*i.e.,* spat on shell) and shellfish shells or shell fragments placed into waters to provide a substrate for attachment by free swimming shellfish larvae (*i.e.,* natural catch).

To ensure that activities authorized by this NWP result in minimal individual and cumulative adverse effects on the aquatic environment, we are proposing to require pre-construction notification if: (1) The project area is greater than 25 acres; (2) more than 10 acres of the project area is occupied by submerged aquatic vegetation; (3) the permittee intends to relocate existing operations into portions of the project area not previously used for aquaculture activities; or (4) dredge harvesting is conducted in areas inhabited by submerged aquatic vegetation. For the purposes of this NWP, we are proposing to define the project area as the area of navigable waters of the United States occupied by the aquaculture operation. In most cases, the project area will consist of a site for which the operator has obtained a permit, license, or lease from a state or local agency specifically authorizing aquaculture activities in that particular location. The project area may include areas in which there has been no previous aquaculture activity and/or areas that periodically are allowed to lie fallow as part of the normal operation of the facility. Relocation of existing operations into portions of the project area not previously used for aquaculture activities will require a pre-construction notification. Because shellfish require healthy ecosystems for their growth and productivity, in addition to providing the aquatic ecosystem services of improved water quality and increased food production, we believe that there is generally a net overall increase in aquatic resource functions in estuaries or bays where shellfish are produced. We are requesting comments on the potential beneficial and adverse effects that commercial shellfish aquaculture activities have on the aquatic environment. We are also seeking comment on this proposed PCN threshold, including the appropriateness of attempting to quantify these aquatic operations in terms of acres, ecosystem health, shellfish productivity, or some other threshold to ensure minimal adverse effects.

Commercial shellfish aquaculture activities often take place in, and are found to co-exist with, intertidal areas that are occupied by submerged aquatic vegetation (*i.e.,* vegetated shallows). To minimize adverse effects to this type of aquatic habitat, we are proposing to require PCNs if more than 10 acres of the project area is occupied by submerged aquatic vegetation.

This proposed NWP does not authorize the cultivation of new species. In other words, the NWP does not authorize aquaculture activities for those species that were not previously cultivated by the existing commercial shellfish aquaculture activity. The commercial production of a shellfish species that has not been previously commercially produced by the existing facility may be authorized by an individual permit or a regional general permit.

We are proposing that division engineers complete reviews of commercial shellfish aquaculture activities in the estuaries or bays in their areas on a recurring basis, in coordination with interested agency and shellfish producers as appropriate. These reviews would occur at least every 5 years in conjunction with the NWP reissuance cycle, but may occur more frequently.

This NWP is limited to work associated with the continued operation of existing commercial shellfish projects, many of which have been in place for hundreds of years. We feel the potential for adverse environmental impacts from such existing operations is minimal, and we support the objectives of the U.S. Department of Commerce's Aquaculture Policy to increase shellfish productivity in this country. Although new projects are not authorized initially by this NWP, once authorized by another form of Department of the Army permit, such as a regional general permit or an individual permit, the commercial shellfish activities may continue in accordance with the terms and conditions of the issued permit and/or this NWP until expired. We are committed to conducting reviews of commercial shellfish activities to validate, collect data, and ensure that the Corps is authorizing only those activities that result in minimal individual or cumulative adverse effects on the aquatic environment with this NWP or other general permits for aquaculture activities. These reviews will begin as soon as possible (but no later than 2007) in all coastal divisions, and will involve Federal, State and local

agencies, stakeholders and the general public to help the Corps develop regional and special conditions to mitigate impacts to the aquatic environment or other aspects of the public interest which may result from commercial shellfish aquaculture activities.

This NWP authorizes the continued operation of existing commercial shellfish aquaculture activities. Those activities may have been previously authorized by another form of DA authorization. The construction period for a DA permit is the period of time where the permittee is authorized to conduct work in navigable waters of the United States and/or discharge dredged or fill material into waters of the United States. Once the DA permit expires, further authorization is not required to maintain the structures or fills, but if additional work in navigable waters or discharges of dredged or fill material in jurisdictional waters are necessary for the continued operation of those activities, then another DA permit is required. The proposed NWP provides the DA authorization for the continued operation of previously authorized commercial shellfish aquaculture activities. For example, the continued operation of an aquaculture activity may involve removing and replacing structures in navigable waters of the United States on a recurring basis.

New commercial shellfish aquaculture activities or the substantial modification (*e.g.,* the culture of different species) of existing commercial shellfish aquaculture activities in waters of the United States may be authorized by individual permits or regional general permits.

NWP E. *Coal Remining Activities.* We are proposing this new NWP to authorize the restoration of mine sites throughout the United States that are causing physical and/or chemical impacts to waters of the United States. Many of these sites were abandoned or closed prior to the 1977 Surface Mining Control and Reclamation Act (SMRCA) and are currently on state lists for reclamation, although funding is limited. Other sites could include bond forfeitures on active mine sites and ''no cost'' abandoned mine land projects under SMCRA (*e.g.,* government sponsored construction projects). In some cases, due to changes in technology, additional coal may be excavated as part of the reclamation process. In other cases, these sites may be combined with adjacent unmined areas to put together a project that is economically viable. The net result of these larger projects is that sources of pollution to downstream waters, including acid mine drainage and sources of sediment, will be eliminated or substantially diminished when the site is reclaimed. The integrated permit processing procedure and its potential applicability to this NWP is addressed above in the preamble discussion for NWP 21.

As a result of the reclamation activity on these remined areas, local water quality would be improved. Reclamation activities may also involve the construction of emergent wetlands to help improve the quality of water from mines. Net increases in aquatic functions may be determined through available assessment methods, including functional assessments. Assessments may be used to compare ecosystem functions and site conditions that existed prior to remining to the ecosystem functions and site conditions that are predicted to be in place at the site after reclamation has been completed. Reclamation activities may result in the establishment of permanent structures or fills, to sustain ecological functions at the site. Such permanent structures or fills may include treatment wetlands, permanent water diversion structures, and permanent impoundments. Permanent roads may also be constructed, to facilitate site access and maintenance of the reclaimed site.

This NWP authorizes discharges of dredged or fill material into non-tidal waters of the United States. This NWP may be used on sites where the ratio of previously mined areas to new coal removal areas is greater than 60 percent, therefore, we are proposing to allow up to 40 percent of the mine site to include unmined areas. In addition, to qualify for authorization under this NWP, we are requiring that the applicant clearly demonstrate that the overall project, including the reclamation activity and any new mining, will result in a net increase in aquatic resource functions. Such increases in aquatic resource functions will be identified through local functional assessment methods that have been approved for use by the Corps district in that region.

In response to a PCN, the district engineer may impose special conditions on a case-by-case basis to ensure that the adverse effects on the aquatic environment are minimal or exercise discretionary authority to require an individual permit for the work. The issuance of this NWP, as with any NWP, provides for the use of discretionary authority when valuable or unique aquatic areas may be affected by these activities.

NWP F. *Underground Coal Mining Activities.* We are proposing a new NWP to authorize discharges of dredged or fill material into non-tidal waters of the United States resulting from underground coal mining activities. This type of mining involves excavating rock and soil on the surface to expose the coal seam and providing access for people, equipment, and ventilation facilities, a process referred to as ''facing up.'' In steep terrain, excavated material from these ''face-up'' areas may result in small fills if the excavation is limited to providing coal seam access or larger fills if facilities such as fill for coal processing plants and coal processing waste areas are needed. Underground mining may also create fills from excavating non-coal waste rock underground. The mine operator may have to place fill in small streams adjacent to the preparation facility in order to dispose of coal waste from the cleaning and preparation of coal. Similarly, the operator of a preparation facility may need an impoundment in an adjacent stream valley for withdrawal of cleaning process water. The integrated permit processing procedure and its potential applicability to this NWP is addressed in the preamble discussion for NWP 21.

Examples of activities that may be authorized by this NWP include, but are not limited to, treatment facilities for controlling water pollution during mining and reclamation (*e.g.,* acid mine drainage impoundments, sedimentation ponds), access and haul roads, diversion ditches, support facilities, processing areas, and mined waste impoundments or embankments. This NWP would also authorize permanent structures or fills that would remain after reclamation activities have been completed (*e.g.,* permanent diversion structures to minimize erosion and prevent water from contacting toxin-producing deposits).

The proposed NWP has a ½ acre limit, and is limited to discharges of dredged or fill into non-tidal waters of the United States. The NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

The proposed NWP does not authorize coal preparation and processing activities outside of the mine site; those activities may be authorized by NWP 21. Pre-construction notification is required for all activities authorized by this NWP, and if reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification.

Discussion of Proposed Modifications to Nationwide Permit General Conditions

We are proposing to add a ''Note'' to the list of NWP general conditions, to ensure that prospective permittees are aware that they must comply with the general conditions for the NWPs, as well as any regional conditions imposed by division engineers and special conditions added by district engineers. The proposed note encourages prospective permittees to contact the appropriate Corps district office to determine if regional conditions have been added to an NWP. The proposed note also encourages prospective permittees to contact the appropriate Corps district office to determine the status of water quality certification and/or Coastal Zone Management Act consistency for any NWP they wish to use.

We are also proposing to place the general conditions in a different order, to make them easier to read and to facilitate compliance. The general conditions relating to various environmental concerns and public interest review factors are listed first, and are followed by the general conditions relating to administrative requirements.

GC 1. *Navigation.* (Remaining as general condition 1.) We are proposing to modify this general condition by adding two provisions. First, we are proposing to add paragraph (b), which requires permittees to install any safety lights and signals required by the U.S. Coast Guard.

Second, we are proposing to add paragraph (c), which is intended to address future and current conflicts between Corps water resources development projects and structures or other work in navigable waters authorized by Corps permits. There may be cases where activities authorized by DA permits interfere with navigation or any existing or future operation of the United States, and need to be removed. In May 2000, we issued guidance requiring district engineers to add this language as a general condition to all DA permits, including nationwide permit and regional general permit verifications, that authorize activities under Section 10 of the Rivers and Harbors Act of 1899.

Adding paragraph (c) to this general condition will help ensure that permittees are aware that they may need to remove authorized structures or work if the structures or work interfere with free navigation in navigable waters of the United States. This provision applies to all NWPs that authorize section 10 activities, including those that do not require pre-construction notification.

GC 2. *Aquatic Life Movements.* (Formerly general condition 4.) We are proposing to modify the phrase ''necessary life cycle movements,'' by adding ''when known'' following it, to reflect the fact that necessary life cycle movements are not always well understood for the wide variety of indigenous aquatic species inhabiting waters of the United States. This condition still prohibits the substantial disruption of known life cycle movements of aquatic life.

GC 3. *Spawning Areas.* (Formerly general condition 20.) To simplify this general condition, we are proposing to remove the phrase ''including structures or work in navigable waters of the U.S. or discharges of dredged or fill material'' because it merely lists the general types of activities authorized by NWP under sections 10 and 404.

GC 4. *Migratory Bird Breeding Areas.* (Formerly general condition 23.) We are modifying this general condition to cover migratory birds generally (not just waterfowl) that use aquatic habitat as breeding areas. To simplify this general condition, we are proposing to remove the phrase ''including structures or work in navigable waters of the U.S. or discharges of dredged or fill material'' because it merely lists the general types of activities authorized by NWP under sections 10 and 404.

GC 5. *Shellfish Beds.* (Formerly general condition 17.) To simplify this general condition, we are proposing to remove the phrase ''including structures or work in navigable waters of the U.S. or discharges of dredged or fill material'' because it merely lists the general types of activities authorized by NWP under sections 10 and 404. We are also adding a reference to new NWP D, which explicitly authorizes discharges related to existing commercial shellfish aquaculture activities, which will generally include shellfish beds.

GC 6. *Suitable Material.* (Formerly general condition 18.) To simplify this general condition, we are proposing to remove the phrase ''including structures or work in navigable waters of the U.S. or discharges of dredged or fill material'' because it merely lists the general types of activities authorized by NWP under sections 10 and 404.

GC 7. *Water Supply Intakes.* (Formerly general condition 16.) We are proposing to add the phrase ''or improvement'' after the word ''repair'' since it may be necessary for water authorities to modify their intake structures to comply with new regulations or other reasons. To simplify this general condition, we are proposing to remove the phrase ''including structures or work in navigable waters of the U.S. or discharges of dredged or fill material'' because it merely lists the general types of activities authorized by NWP under sections 10 and 404.

GC 8. *Adverse Effects from Impoundments.* (Formerly general condition 22.) We are proposing to remove the last sentence of this general condition, because it merely lists the general types of activities authorized by NWP under sections 10 and 404.

GC 9. *Management of Water Flows.* (Formerly general condition 21.) We are proposing to simplify this general condition, to require permittees to maintain the pre-construction course, condition, capacity, and location of open waters to the maximum extent practicable. Exceptions to this requirement may be made if the primary purpose of the NWP activity is to impound water or if the activity benefits the aquatic environment. For example, stream restoration activities authorized by NWP 27 may alter the pre-construction course, condition, capacity, and location of streams, while providing important aquatic resource functions and services.

GC 10. *Fills within 100-Year Floodplains.* (Formerly general condition 26.) We are proposing to modify this general condition to simply require permittees to comply with applicable state or local floodplain management requirements that have been approved by the Federal Emergency Management Agency (FEMA). As discussed below, instead of the prohibitions imposed by the versions of this general condition that were present in the 2000 and 2002 nationwide permits, we are proposing to address impacts to 100-year floodplains through the case-by-case review that occurs through the PCN process.

This general condition was initially adopted in 2000 and modified in 2002. In the 2002 NWPs, this general condition prohibited the use of NWPs 39, 40, 42, 43, and 44 to authorize discharges of dredged or fill material in waters of the United States resulting in permanent above-grade fills within mapped 100-year floodplains located below headwaters. It also prohibited the use of NWPs 39, 40, 42, and 44 to authorize discharges of dredged or fill material in waters of the United States resulting in permanent above-grade fills within mapped floodways above headwaters.

As noted in other sections of this preamble, we are proposing to require PCNs for all activities authorized by NWP 29 (the proposed modification of which includes residential development

activities authorized by the NWP 39 issued in 2002), as well as NWPs 39, 40, 42, and 44. We are also proposing to require PCNs for NWP 43 activities resulting in the construction or expansion of stormwater management facilities (only maintenance of existing facilities is exempted from the PCN requirement). Thus, any activity that was previously prohibited in the 100-year floodplain by this general condition will now require a PCN.

During the PCN review process, district engineers consider adverse impacts to the aquatic environment, as well as other public interest review factors, including floodplain values and flood hazards (see 33 CFR 330.1(e)(2)). If an NWP activity results in more than minimal adverse effects to the aquatic environment or any other public interest review factor, the district engineer will exercise discretionary authority and require an individual permit. Potential impacts to flood hazards and floodplain values that may be more than minimal can be assessed in greater depth during the individual permit review process. In such cases, the Corps will defer to the FEMA-approved state or local floodplain management requirements.

Where there are regional concerns regarding development activities in 100-year floodplains involving discharges of dredged or fill material into waters of the United States, division engineers can regionally condition certain NWPs to restrict or prohibit use of those NWPs to authorize activities in those floodplains.

One of the environmental benefits of the NWP program is that it provides incentives for project proponents to avoid and minimize impacts to the waters of the United States to qualify for an expedited NWP authorization instead of applying for individual permits, which generally require greater costs and time to obtain. Prohibiting the use of NWPs 39, 40, 42, 43, and 44 removes that incentive to reduce impacts to qualify for general permit authorization. If required to obtain individual permits, project proponents may propose larger activities with greater impacts to waters of the United States within 100-year floodplains.

Modifying this general condition will increase government efficiency, by promoting conformity with other federal, state, and local programs. At the Federal level, the Federal Emergency Management Agency (FEMA) is the lead Federal agency for floodplain management. FEMA programs, such as the National Flood Insurance Program (NFIP) and other floodplain management activities, as well as State and local government land use planning and zoning efforts, allow floodplain development. The NFIP imposes construction standards and requirements for structures built in 100-year floodplains. Those standards and requirements must be met to qualify for flood insurance. State and local governments may impose more restrictive standards and requirements than the NFIP.

To harmonize the NWP program with FEMA's floodplain management programs, we are proposing to revise this general condition. Adverse effects to public interest review factors, especially floodplain values and flood hazards, will be evaluated during the PCN review process for NWPs 29, 39, 40, 42, 43, and 44, as well as other NWPs, to the extent appropriate. Management of floodplain development is more appropriately achieved through state and local government land use planning, which can address impacts to both the aquatic and terrestrial components of 100-year floodplains.

GC 11. *Equipment.* (Formerly general condition 5.) We are proposing to add the phrase ''or mudflats'' to minimize soil disturbance in these special aquatic sites.

GC 12. *Soil Erosion and Sediment Controls.* (Formerly general condition 3.) We are not proposing any changes to this general condition.

GC 13. *Removal of Temporary Fills.* (Formerly general condition 24.) We are proposing to replace the phrase ''their preexisting elevation'' with ''pre-construction conditions'' to clarify that temporarily filled areas are to be restored to the condition they were in prior to construction.

GC 14. *Proper Maintenance.* (Formerly general condition 2.) We are not proposing any changes to this general condition.

GC 15. *Wild and Scenic Rivers.* (Formerly general condition 7.) We are not proposing any changes to this general condition.

GC 16. *Tribal Rights.* (Formerly general condition 8.) We are not proposing any changes to this general condition.

GC 17. *Endangered Species.* (Formerly general condition 11.) We are proposing to add a sentence to paragraph (a) of this general condition to state that no activity which may affect a listed species or critical habitat is authorized by NWP unless Section 7 consultation addressing the effects of the proposed activity has been completed. The district engineer is responsible for making the ''may effect'' determination.

We are also proposing to modify this general condition by adding a provision that requires district engineers to notify prospective permittees within 45 days whether the proposed activity ''may affect'' or will have ''no effect'' to listed species and designated critical habitat. The proposed modification also states that applicants cannot begin proposed activities until: (1) They are notified by the Corps that those activities will result in ''no effect'' on listed species or critical habitat, or (2) Section 7 consultation has been completed (see 33 CFR 330.4(f)(2)). The purpose of the proposed provision is to facilitate compliance with the Endangered Species Act and keep prospective permittees informed of the status of their pre-construction notifications.

GC 18. *Historic Properties.* (Formerly general condition 12.) We are proposing to modify this general condition by adding a provision that requires district engineers to notify prospective permittees within 45 days whether consultation under Section 106 of the National Historic Preservation Act is required. The purpose of the proposed provision is to facilitate section 106 compliance and keep prospective permittees informed of the status of their pre-construction notifications.

We are also proposing to remove the reference to Appendix C to 33 CFR part 325, where our regulations for the protection of historic properties are currently located. On April 25, 2005, we issued revised interim guidance for implementing Appendix C with the Advisory Council on Historic Preservation's revised regulations at 36 CFR part 800. We believe this general condition should have a more general reference to the Corps Regulatory Program's current procedures for section 106 compliance, since we are using Appendix C, the revised interim guidance, and other guidance for section 106 compliance. We are in the process of revising regulatory program procedures for Section 106 compliance.

GC 19. *Designated Critical Resource Waters.* (Formerly general condition 25). This general condition is being simplified but not substantively changed. We are removing wild and scenic rivers and critical habitat for threatened or endangered species from the list of waters to which this general condition applies, because general conditions 15 and 17 already address these waters and the previous version of this general condition merely stated that these other general conditions must be complied with. District engineers will pay particular attention to critical resource waters in determining whether special permit conditions are needed, or whether discretionary authority to

require individual permits should be exercised.

GC 20. *Mitigation.* (Formerly general condition 19.) As discussed above, we are proposing to modify several NWPs (*e.g.*, NWPs 39, 40, and 42) which may authorize discharges of dredged or fill material into wetlands, to require PCNs for all activities. For some wetland impacts authorized by NWPs, such as discharges of dredged or fill material resulting in the loss of small amounts of wetlands, it may not be practicable or appropriate to require compensatory mitigation for those losses. Therefore, we are establishing a threshold of 1/10 acre for compensatory mitigation requirements. For projects that cause losses that exceed this threshold, compensatory mitigation will generally be required. For losses below this threshold, district engineers will review PCNs to determine if compensatory mitigation is necessary to ensure that the work authorized by NWP results in minimal adverse effects on the aquatic environment, individually and cumulatively. Permit applicants whose projects will exceed the 1/10 acre loss threshold must include a description in their PCN of how they intend to satisfy the mitigation requirement.

We are also proposing to remove the paragraph that defines practicable mitigation and provides examples of appropriate and practicable mitigation. As discussed elsewhere in this notice, we are proposing to add a definition of the term ''practicable'' to the ''Definitions'' section of the NWPs, so we do not believe it is necessary to include the definition in this general condition.

We are proposing to modify paragraph (d) of this general condition, to clarify that compensatory mitigation cannot be used to increase the acreage losses allowed by the acreage limits of the NWPs.

For the reasons stated in the preamble discussion for the definition of ''riparian areas'' we are proposing to change the term ''vegetated buffer'' to ''riparian areas.'' District engineers will make case-by-case determinations as to whether the establishment and maintenance of riparian areas is necessary, either in-lieu of or in addition to, wetlands compensatory mitigation, if both open waters and wetlands exist on the project site. Those determinations are based on consideration of watershed needs.

We are also proposing to remove the paragraph stating that compensatory mitigation plans submitted with a PCN may be either conceptual or detailed, because that provision is in paragraph (e) of the ''pre-construction notification'' general condition (GC 27). Conditioning NWP verifications to require the submission of detailed compensatory mitigation plans prior to commencing work in waters of the United States is also addressed by the ''pre-construction notification'' general condition.

We are also proposing to add a new paragraph to this general condition, stating that district engineers may require mitigation when certain functions and services of waters of the United States are permanently adversely affected by NWP activities. This paragraph was adapted from a term in the NWP 12 issued in 2002.

GC 21. *Water Quality.* (Formerly general condition 9.) We are proposing to simplify this general condition by removing paragraph (b) and adding a sentence which states that the district engineer may require water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

GC 22. *Coastal Zone Management.* (Formerly general condition 10.) We are proposing to modify this general condition to clarify that additional measures may be required to ensure that the authorized activity is consistent with State coastal zone management requirements.

GC 23. *Regional and Case-by-Case Conditions.* (Formerly general condition 6.) We are proposing to add U.S. EPA to the list of agencies issuing water quality certifications, since that agency issues water quality certifications in areas where there are no state or tribal water quality standards. We are also proposing to add language clarifying that the state issues Coastal Zone Management Act consistency determinations.

GC 24. *Use of Multiple Nationwide Permits.* (Formerly general condition 15.) The only modification we are proposing is to change the example from a parenthetical expression to a complete sentence.

GC 25. *Transfer of Nationwide Permit Verifications.* We are proposing a new NWP general condition to address the transfer of NWP verifications when the project site is transferred from the project proponent who received the original NWP verification to a new project proponent. The new project proponent may have purchased the project site for the verified NWP activity.

The NWP verification would be transferred to the new owner if the permittee submits a letter to the appropriate Corps district office, and the transferee signs the statement provided in this general condition. The district office would then validate the transfer by sending a confirmation letter to the new permittee.

GC 26. *Compliance Certification* (Formerly general condition 14.) We are proposing only minor grammatical changes to this general condition.

GC 27. *Pre-construction Notification.* (Formerly general condition 13.) We are proposing to simplify this general condition by deleting text that is redundant with the terms of specific NWPs. As part of our efforts to make the NWPs easier to understand, if there is information required to be submitted with a PCN that is only applicable to a particular NWP, those requirements are indicated in the ''Notification'' paragraph of that NWP.

We are proposing to add a sentence to paragraph (a)(3) of this general condition, to clarify that the permittee cannot begin the NWP activity until consultations required by Section 7 of the Endangered Species Act (ESA) and/or Section 106 of the National Historic Preservation Act (NHPA) are completed. The NWP regulations state that if the prospective permittee notifies the district engineer that Federally-listed endangered or threatened species or critical habitat might be affected or are in the vicinity of the project, he or she cannot begin work until notified by the district engineer that the requirements of the ESA have been satisfied (see 33 CFR 330.5(f)(2)). There is a similar provision for compliance with Section 106 of the NHPA at 33 CFR 330.5(g)(2).

We are proposing to modify paragraph (b)(3), which lists the required contents of pre-construction notifications, by deleting the word ''brief'' and clarifying that PCNs must include descriptions of proposed NWP activities that are sufficiently detailed for the district engineer to determine that any adverse impacts to the aquatic environment are minimal, both individually and cumulatively, and to develop any special conditions, including compensatory mitigation, that may be needed to ensure that this requirement is satisfied. We believe that providing more detailed descriptions of proposed NWP activities will facilitate reviews of PCNs.

In paragraph (b)(4), we are also proposing to require that PCNs include delineations of special aquatic sites and other waters of the United States on the project site. We believe that more complete delineations will help expedite reviews of PCNs, by indicating clearly the proposed impacts to waters of the United States. We are also proposing to modify this paragraph to clarify that there may be extended delays if the permittee asks the Corps to

conduct the delineation and the project site is large or contains many wetland areas.

In paragraph (b)(5), we are proposing to add a requirement for the prospective permittee to submit a statement describing how the mitigation requirement will be satisfied for those activities resulting in the loss of greater than 1/10 acre of wetlands.

We are proposing to add a provision to paragraph (d) to clarify the agency coordination process for NWP 37 PCNs. This provision states that emergency watershed protection and rehabilitation activities can proceed immediately, and a district engineer will consider comments received in response to agency coordination of the PCN (*i.e.*, for NWP 37 activities resulting in the loss of greater than 1/2 acre of waters of the United States) when determining if the case-specific NWP 37 authorization should be modified, suspended, or revoked.

In addition, we are proposing to drop one NWP general condition.

GC 27. *Construction Period.* This general condition was first adopted in 2002. During the implementation of the 2002 NWPs, questions arose that have required us to revisit this general condition. Section 404(e)(2) of the Clean Water Act places a five-year limit on general permits issued under section 404. General condition 27 allowed a district engineer to place any completion date on an NWP verification, based on the amount of time a project proponent estimated would be necessary to finish constructing the NWP activity and consideration of the public interest. This general condition did not specify any limits to these completion dates, in effect providing the district engineer with the authority to state that the NWP activity was authorized for any period of time.

The NWP regulations contain a provision that allows permittees to continue work for one year in reliance on an NWP authorization, if that NWP has expired or been modified or revoked, as long as the activity was under construction or under contract to commence construction (see 33 CFR 330.6(b)). If that work cannot be completed within that one-year time period, then the permittee would have to obtain another DA authorization. We believe this provision is sufficient to address the concern with projects that may not be completed before an NWP expires.

Proponents of NWP activities that will require substantial amounts of time to complete (greater than one year beyond the expiration of currently applicable NWPs) should consider whether it would be more advantageous to pursue an individual permit authorization. There is greater flexibility in construction periods that can be authorized by individual permits. An individual permit authorization can also be extended, as long as the district engineer determines that the time extension would be consistent with applicable regulations and would not be contrary to the public interest.

Discussion of Proposed Modifications to Existing Nationwide Permit Definitions

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

Best Management Practices. We are proposing to modify this definition by removing the last sentence, since it does not help define this term. Instead, this sentence describes a potential consequence of implementing best management practices.

Compensatory Mitigation. We are proposing to modify this definition by removing the phrase ''For the purposes of Section 10/404, compensatory mitigation is'' because the definitions in this section apply only to the NWP program. Therefore, it is not necessary to refer to section 10 or section 404. We are also proposing to replace ''creation'' with ''establishment (creation)'' to be consistent with the wetland project types described in Regulatory Guidance Letter 02–02.

Creation. We are proposing to remove this term, and use the definition of ''establishment (creation)'' in its place.

Currently serviceable. We are proposing to move this definition from NWP 3 to the ''Definitions'' section, since this definition applies to more than one NWP (*i.e.*, NWPs 3 and 41, as well as proposed new NWP C).

Enhancement. We are proposing to modify this definition to be consistent with the wetland project type described in Regulatory Guidance Letter 02–02 and the definition in the Council on Environmental Quality's April 2006 report entitled ''Conserving America's Wetlands 2006: Two Years of Progress Implementing the President's Goal.''

Establishment (creation). We are proposing to modify this definition to be consistent with the wetland project type described in Regulatory Guidance Letter 02–02 and the definition in the Council on Environmental Quality's April 2006 report entitled ''Conserving America's Wetlands 2006: Two Years of Progress Implementing the President's Goal.'' This term would also be applied to the development of aquatic resources at upland or deepwater sites.

Farm tract. We are proposing to remove this definition, since this term is not used in the proposed NWPs.

Flood fringe. We are proposing to remove this definition, since this term is not used in the proposed NWPs.

Floodway. We are proposing to remove this definition, since this term is not used in the proposed NWPs.

Loss of waters of the United States. We are proposing to modify this definition by replacing the phrase ''above-grade, at-grade, or below-grade fills'' with ''discharges of dredged or fill material'' to be consistent with the definitions of ''fill material'' and ''discharge of fill material'' issued on May 9, 2002 (67 FR 31129) at 33 CFR 323.2. We are also proposing to eliminate the sentence stating that impacts to ephemeral streams are not included in the linear foot limits for stream impacts in NWPs 39, 40, 42, and 43, because of the proposed changes to those NWPs. For those NWPs with 300 linear foot limits for filling or excavating stream bed, ephemeral streams will be included when determining compliance with that limit. As discussed elsewhere in this notice, the district engineer can issue a written waiver to those linear foot limits for ephemeral and intermittent streams on a case-by-case basis if the proposed work will have minimal individual and cumulative adverse effects on the aquatic environment. We are proposing to add a sentence to this definition to clarify that activities exempt from section 404 permit requirements are not included when calculating the loss of waters of the United States.

Open water. We are proposing to change this definition by adding a sentence that describes what an ordinary high water mark is.

Permanent above-grade fill. We are proposing to remove this definition, since this term is not used in the proposed NWPs.

Practicable. We are proposing to move this definition from the current ''mitigation'' general condition (GC 20) to the ''Definitions'' section of the NWPs.

Pre-construction notification. We are proposing to add this definition to clarify the various circumstances under which a PCN may be submitted.

Preservation. We are proposing to modify this definition to be consistent with the definition for ''protection/maintenance (preservation)'' in Regulatory Guidance Letter 02–02 and the definition in the Council on Environmental Quality's April 2006 report entitled ''Conserving America's

Wetlands 2006: Two Years of Progress Implementing the President's Goal.''

Re-establishment. We are proposing to add this definition, to be consistent with the wetland project type described in Regulatory Guidance Letter 02–02 and the definition in the Council on Environmental Quality's April 2006 report entitled ''Conserving America's Wetlands 2006: Two Years of Progress Implementing the President's Goal.''

Rehabilitation. We are proposing to add this definition, to be consistent with the wetland project type described in Regulatory Guidance Letter 02–02 and the definition in the Council on Environmental Quality's April 2006 report entitled ''Conserving America's Wetlands 2006: Two Years of Progress Implementing the President's Goal.''

Restoration. We are proposing to modify this definition to be consistent with the wetland project type described in Regulatory Guidance Letter 02–02 and the definition in the Council on Environmental Quality's April 2006 report entitled ''Conserving America's Wetlands 2006: Two Years of Progress Implementing the President's Goal.''

Riparian areas. We are proposing to replace the definition of ''vegetated buffers'' with a definition of ''riparian areas'' since the latter term more accurately reflects what is normally required as mitigation for NWP activities where there are streams and other open waters on a project site. Since 1996, we have placed more emphasis in the NWP program on protecting streams and other open waters. Also, with the issuance of Regulatory Guidance Letter 02–02, we have taken a watershed approach to compensatory mitigation, which includes consideration of the ecological functions provided by riparian areas.

In two of the NWPs issued on December 13, 1996 (61 FR 65874), specifically NWPs 29 and 30, we began requiring the establishment and maintenance of vegetated buffers next to open waters, such as streams, to preclude water quality degradation from erosion and sedimentation. That requirement was added to some of the NWPs issued on March 9, 2000 (65 FR 12818). The 2000 NWPs clarified that vegetated buffers could be required only for perennial or intermittent streams or other open waters on the site. The vegetated buffer requirement does not apply to other aquatic resources, such as wetlands.

Since the requirements of past NWPs, as well as the current NWPs, have focused on using vegetated areas next to open waters such as streams to ensure that certain NWP activities result in minimal adverse effects on the aquatic environment, the term ''riparian area'' is more accurate, and more clearly conveys to the regulated public a specific type of mitigation that may be required for some NWPs. The term ''vegetated buffer'' is a vague term, because it can apply to any vegetated area next to some feature in the landscape.

In 2002, the National Research Council (NRC) published a report entitled ''Riparian Areas: Functions and Strategies for Management.'' The proposed definition of ''riparian areas'' was adapted with modifications from the definition developed by the NRC.

Stream channelization. We are proposing to simplify this definition, by generally considering man-made changes to a stream's course, condition, capacity, or location to be stream channelization activities.

Structure. We are proposing to add this definition to the NWPs. The examples in this definition were adapted from 33 CFR 322.2(b).

Vegetated buffer. For the reasons discussed in the preamble discussion of the proposed definition of ''riparian area'' we are proposing to remove this definition.

Waterbody. We are proposing to modify this definition to clarify that a waterbody is a jurisdictional water of the United States, and that it would have flowing or standing water during years with normal patterns of precipitation to the extent that an ordinary high water mark or other indicators of jurisdiction can be determined. The waterbody would include wetland areas. We are also proposing to amend this definition by adding a sentence that describes what an ordinary high water mark is. We are proposing to modify this definition so that a waterbody and its adjacent wetlands would be considered together as a single aquatic unit. The purpose of this definition is not to identify which waterbodies are jurisdictional, but to clarify how adjacent waters of the United States are grouped into waterbodies, especially for the purposes of implementing 33 CFR 330.2(i), which addresses single and complete projects for the NWPs.

Administrative Requirements

Plain Language

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

Paperwork Reduction Act

The proposed NWPs will increase the number of permittees who are required to submit a PCN. The content of the PCN is not changed from the current NWPs, but the paperwork burden will increase because of the increased number of PCNs submitted. The Corps estimates the increased paperwork burden at 4,500 hours per year. This is based on an average burden to complete and submit a PCN of 10 hours, and an estimated 450 additional projects that will require PCNs. Prospective permittees who are required to submit a pre-construction notification (PCN) for a particular NWP, or who are requesting verification that a particular activity qualifies for NWP authorization, may use the current standard Department of the Army permit application form.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. For the Corps Regulatory Program under Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, the current OMB approval number for information collection requirements is maintained by the Corps of Engineers (OMB approval number 0710–0003, which expires on April 30, 2008).

Executive Order 12866

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

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

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

(4) Raise novel legal or policy issues arising out of legal mandates, the

President's priorities, or the principles set forth in the Executive Order.

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

Executive Order 13132

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

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

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

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

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

Nationwide permits automatically expire and become null and void if they are not modified or reissued within five years of their effective date (see 33 CFR 330.6(b)). Furthermore, Section 404(e) of the Clean Water Act states that general permits, including NWPs, can be issued for no more than 5 years. If the current NWPs are not reissued, they will expire on March 18, 2007, and small entities and other project proponents would be required to obtain alternative forms of DA permits (*i.e.*, standard permits, letters of permission, or regional general permits) for activities involving discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States. Regional general permits that authorize similar activities as the 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, provided the project proponent meets all terms and conditions of the NWPs. In FY 2003, the Corps issued 35,317 NWP verifications, with an average processing time of 27 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 times for the 4,035 standard permits and the 3,040 letters of permission issued during FY 2003 were 187 days and 89 days, respectively. The NWPs proposed for reissuance, as well as the proposed new NWPs, 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 draft decision documents that were prepared for each NWP. The revised NWPs are not expected to significantly increase cost or paperwork burden for authorized activities (relative to the current NWPs), including those conducted by small businesses.

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

Another requirement of Section 404(e) of the Clean Water Act is that general permits, including nationwide permits, authorize only those activities that result in minimal adverse environmental effects, individually and cumulatively. The terms and conditions of the 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.

After considering the economic impacts of the proposed nationwide permits on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. Small entities may obtain required DA authorizations through the 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 the revised NWPs will not impose substantially higher costs on small entities than those of the existing 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 than can be authorized through NWPs, because we are adding several new NWPs, and we are removing some limitations in existing NWPs and replacing them with PCN requirements that will allow the district

engineer to judge whether any adverse effects of the proposed project are more than minimal, and authorize the project under an NWP if they are not.

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

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under Section 202 of the UMRA, the agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating a rule for which a written statement is needed, Section 205 of the UMRA generally requires the agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows an agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted. Before an agency establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed, under Section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that the proposed NWPs do not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. The proposed 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, this proposal is not subject to the requirements of Sections 202 and 205 of the UMRA. For the same reasons, we have determined that the proposed NWPs contains no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the proposed issuance and modification 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 proposed NWPs are not subject to this Executive Order because they are not economically significant as defined in Executive Order 12866. In addition, the proposed 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 proposed NWPs do not have tribal implications. It is generally consistent with current agency practice and will not have substantial direct effects on tribal governments, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Therefore, Executive Order 13175 does not apply to this proposal. However, in the spirit of Executive Order 13175, we specifically request comment from tribal officials on the proposed rule.

Environmental Documentation

A preliminary decision document, which includes a draft environmental assessment and Finding of No Significant Impact (FONSI) has been prepared for each proposed NWP. These preliminary decision documents are available at: *www.regulations.gov* (docket ID number COE–2006–0005). 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 proposed NWPs are not expected to negatively impact any community, and therefore are not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.

Executive Order 13211

The proposed 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.

Authority

We are proposing to issue new NWPs, modify existing NWPs, and reissue NWPs without change under the authority of Section 404(e) of the Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*)

Dated: September 18, 2006.

Don T. Riley,

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

Nationwide Permits, Conditions, Further Information, and Definitions

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B. Nationwide Permits

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

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

3. *Maintenance.* (a) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, or current construction codes or safety standards that are necessary to make repair, rehabilitation, or replacement are authorized.

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

structures, etc.) and the placement of new or additional riprap to protect the structure. The removal of sediment is limited to the minimum necessary to restore the waterway in the immediate vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend further than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an upland area unless otherwise specifically approved by the district engineer under separate authorization. The placement of riprap must be the minimum necessary to protect the structure or to ensure the safety of the structure. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the district engineer.

(c) Separate authorization is required for temporary structures or work in navigable waters of the United States or temporary discharges of dredged or fill material into waters of the United States, if those activities are necessary to conduct the maintenance activity and are not exempt from permit requirements. This NWP does not authorize maintenance dredging for the primary purpose of navigation or 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 27). Where maintenance dredging is proposed, 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, clam and oyster digging, and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This NWP does not authorize artificial reefs or impoundments and semi-impoundments of waters of the United States for the culture or holding of motile species such as lobster, or the use of covered oyster trays or clam racks. (Sections 10 and 404.)

5. *Scientific Measurement Devices.* Devices, whose purpose is to measure and record scientific data such as staff gages, tide gages, water recording devices, water quality testing and improvement devices and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards. (Sections 10 and 404.)

6. *Survey Activities.* Survey activities, such as core sampling, seismic exploratory operations, plugging of seismic shot holes and other exploratory-type bore holes, exploratory trenching, soil surveys, sampling, and historic resources surveys. For the purposes of this NWP, the term ''exploratory trenching'' means mechanical land clearing of the upper soil profile to expose bedrock or substrate, for the purpose of mapping and 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 This NWP authorizes the construction of temporary pads, provided the discharge does not exceed 25 cubic yards. 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 of outfall structures and associated intake structures, where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted, or that are otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System Program (Section 402 of the Clean Water Act). The construction of intake structures is not authorized by this NWP, unless they are directly associated with an authorized outfall structure.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (Sections 10 and 404.)

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (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 ½ acre of waters of the United States.

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

Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided that the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6″ to 12″ of the trench should normally be backfilled with topsoil from the trench. 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.

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 does not result in the loss of greater than ½ acre of those waters. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters of the United States to construct substation facilities.

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.

This permit does not authorize the construction or maintenance of access roads. The construction of permanent maintenance roads may be authorized by NWP 14 and the construction of temporary construction roads may be authorized by NWP 33.

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.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) A section 10 permit is required, or (2) the discharge will result in the permanent or temporary loss of greater than 1/10 acre of waters of the United States. (See general condition 27.) (Sections 10 and 404.)

Note 1: Where the proposed utility line is constructed or installed in navigable waters of the United States (*i.e.*, section 10 waters), copies of the PCN 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: Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to Section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit.

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

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

(b) The bank stabilization activity is no more than 500 feet in length, unless this criterion is waived in writing by the district engineer;

(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 this criterion is waived in writing by the district engineer;

(d) No material is of the type, or is placed in any location, or in any manner, to impair surface water flow into or out of any wetland area;

(e) 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,

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

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; (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 27.) (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 ½-acre of waters of the United States. For linear transportation projects in tidal waters, the discharge cannot cause the loss of greater than ⅓-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 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. This NWP does not authorize temporary construction, access, and dewatering necessary to construct the linear transportation project; those activities may be authorized by NWP 33.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge causes the loss of greater than 1/10 acre of waters of the United States; or (2) there is a discharge in a special aquatic site, including wetlands. (See general condition 27.) (Sections 10 and 404.)

Note: Some discharges for the construction of farm roads, 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 bridges across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and

temporary construction and access fills, provided such discharges have been authorized by the U.S. Coast Guard as part of the bridge permit. Causeways and approach fills are not included in this NWP and will require an individual section 404 permit or a regional general 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 on the upland and does not require a section 404 permit. This NWP satisfies the technical requirement for a section 404 permit for the return water where the quality of the return water is controlled by the state through the section 401 certification procedures. The dredging activity may require a section 404 permit (33 CFR 323.2(d)), and will require a section 10 permit if located in navigable waters of the United States. (Section 404)

17. *Hydropower Projects.* Discharges of dredged or fill material associated with hydropower projects having: (a) Less than 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 27.) (Section 404)

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

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

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

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge or the volume of area excavated exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line, or (2) the discharge is in a special aquatic site, including wetlands. (See general condition 27.) (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. *Oil Spill Cleanup.* Activities required for the containment and cleanup of oil and hazardous substances that are subject to the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR part 300) provided that the work is done in accordance with the Spill Control and Countermeasure Plan required by 40 CFR 112.3 and any existing state contingency plan and provided that the Regional Response Team (if one exists in the area) concurs with the proposed containment and cleanup action. (Sections 10 and 404.)

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

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 27.) (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) if there is a discharge of dredged or fill material in a special aquatic site, including wetlands. (See general condition 27.) The permittee cannot commence the activity until informed by the district engineer that compliance with the ''Historic Properties'' general condition is completed.

Note: 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 Corps permit is required for vessel disposal in waters of the United States, a separate Department of the Army authorization will be required.

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 27). 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. Current activities approved for authorization under this NWP are found in the Corps' Regulatory Guidance Letters, which are available at: *http://www.usace.army.mil/inet/functions/cw/cecwo/reg/rglsindx.htm*

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 a State section 404 permit are not included in this NWP, but certain structures will be exempted by Section 154 of Pub. L. 94–587, 90 Stat. 2917 (33 U.S.C. 591) (see 33 CFR 322.3(a)(2)).

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

26. [Reserved]

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

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to: The removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms; the installation of current deflectors; the enhancement, restoration, or establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or establish stream meanders; the backfilling of artificial channels and drainage ditches; the removal of existing drainage structures; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.

This NWP does not authorize the conversion of a stream or natural wetlands to another aquatic use, such as the establishment of an impoundment for waterfowl habitat. This NWP does not authorize stream channelization. However, this NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands, on the project site provided there are net gains in aquatic resource functions and services. For example, this NWP may authorize the establishment of an open water impoundment in a non-tidal emergent wetland, provided the non-tidal emergent wetland is replaced by establishing that wetland type on the project site. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

Reversion. For enhancement, restoration, and establishment activities conducted: (1) In accordance with the terms and conditions of a binding wetland enhancement, restoration, or 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), or their designated state cooperating agencies; (2) as voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS pursuant to NRCS regulations; or (3) on reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the OSM 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, 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 that has not been abandoned 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 will be at that future date. The requirement that the activity result in a net increase in aquatic resource functions and services does not apply to reversion activities meeting the above conditions. Except for the activities described above, this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion.

Reporting: For those activities that do not require pre-construction notification, the permittee must submit to the district engineer a copy of: (1) The binding wetland enhancement, restoration, or establishment agreement; (2) the NRCS documentation for the voluntary wetland restoration, enhancement, or establishment action; or (3) the SMCRA permit issued by OSM or the applicable state agency. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP.

Notification. Except as provided below, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.)

Except for reversion activities, pre-construction notification is not required for:

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

(2) Voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS pursuant to NRCS regulations; or

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

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

Note: This NWP can be used to authorize compensatory mitigation projects, including mitigation banks and in-lieu fee programs. 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 or a multiple unit residential development. 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 this 300 linear foot limit is waived in writing by the district engineer. 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 27.) (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, streams, etc., to preclude water quality degradation due to erosion and sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, etc. associated with the management areas. 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.

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, by 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. Activities, including the 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. This NWP does not authorize the removal of sediment and associated vegetation from the natural water courses except when these activities have been included in the maintenance baseline. All dredged material must be placed in an upland site or an authorized disposal site in waters of the United States, and proper siltation controls must be used.

Maintenance Baseline: The maintenance baseline is a description of the physical characteristics (*e.g.*, depth, width, length, location, configuration, or design flood capacity, etc.) of a flood control project within which maintenance activities are normally authorized by NWP 31, subject to any case-specific conditions required by the district engineer. The district engineer will approve the maintenance baseline based on the approved or constructed capacity of the flood control facility, whichever is smaller, including any areas where there are no constructed channels, but which are part of the facility. The prospective permittee will provide documentation of the physical characteristics of the flood control facility (which will normally consist of as-built or approved drawings) and documentation of the approved and constructed design capacities of the flood control facility. If no evidence of the constructed capacity exists, the approved capacity will be used. The documentation will also include best management practices to ensure that the impacts to the aquatic environment are minimal, especially in maintenance areas where there are no constructed channels. (The Corps may request maintenance records in areas where there has not been recent maintenance.) Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5. Except in emergencies as described below, this NWP cannot be used until the district engineer approves the maintenance baseline and determines the need for mitigation and any regional or activity-specific conditions. Once determined, the maintenance baseline will remain valid for any subsequent reissuance of this NWP. This NWP does not authorize maintenance of a flood control facility that has been abandoned. A flood control facility will be considered abandoned if it has operated at a significantly reduced capacity without needed maintenance being accomplished in a timely manner.

Mitigation: The district engineer will determine any required mitigation one-time only for impacts associated with maintenance work at the same time that

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

Emergency Situations: In emergency situations, this NWP may be used to authorize maintenance activities in flood control facilities for which no maintenance baseline has been approved. Emergency situations are those which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if action is not taken before a maintenance baseline can be approved. In such situations, the determination of mitigation requirements, if any, may be deferred until the emergency has been resolved. Once the emergency has ended, a maintenance baseline must be established expeditiously, and mitigation, including mitigation for maintenance conducted during the emergency, must be required as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer before any maintenance work is conducted (see general condition 27). 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 subject to the Corps or U.S. Coast Guard permit requirements. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. The use of dredged material may be allowed if the district engineer determines that it will not cause more than minimal adverse effects on aquatic resources. Following completion of construction, temporary fill must be entirely removed to upland areas, dredged material must be returned to its original location, and the affected areas must be restored to the pre-project conditions. Cofferdams cannot be used to dewater wetlands or other aquatic areas to change their use. Structures left in place after cofferdams are removed require a section 10 permit if located in navigable waters of the United States. (See 33 CFR part 322.)

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). The pre-construction notification must include a mitigation plan of reasonable measures to avoid and minimize adverse effects to aquatic resources. (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 prior to commencing the activity. For an existing cranberry production operation, the pre-construction notification needs only to be submitted once during the period that this NWP is valid, and the NWP would authorize that existing operation, provided the 10-acre limit is not exceeded. (See general condition 27.) (Section 404.)

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

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

(a) The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or placement of pre-cast concrete planks or slabs, unless the 50 cubic yard limit is waived in writing by the district engineer;

(b) The boat ramp does not exceed 20 feet in width, unless this criterion is waived in writing by the district engineer;

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

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

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

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge into waters of the United States exceeds 50 cubic yards, or (2) the boat ramp exceeds 20 feet in width. (See general condition 27.) (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); or

(b) The U.S. Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 509.13); or

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 27). (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 27.) (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, new ski areas, or oil and gas wells is not authorized by this NWP.

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 this 300 linear foot limit is waived in writing by the district engineer. 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 27.) (Sections 10 and 404.)

40. *Agricultural Activities.* Discharges of dredged or fill material into non-tidal waters of the United States for agricultural activities, including the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized land clearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

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 ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize the relocation of greater than 300 linear feet of existing serviceable drainage ditches constructed in non-tidal streams, unless for drainage ditches constructed in intermittent and ephemeral streams, this 300 linear foot limit is waived in writing by the district engineer.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 27.) (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).

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. The reshaping of the ditch cannot increase drainage capacity beyond the original design capacity nor can it expand the area drained by the ditch as originally designed (*i.e.*, the capacity of the ditch must be the same as originally designed and it cannot drain additional wetlands or other waters of the United States).

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 27.) (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 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 this 300 linear foot limit is waived in writing by the district engineer. 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 27.) (Section 404.)

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

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 this 300 linear foot limit is waived in writing by the district engineer. 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.

Maintenance activities are limited to restoring the original design capacities of the stormwater management facility.

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 27.) (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 ½-acre of non-tidal wetlands. 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 27.) 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.)

A. *Emergency Repair Activities.* This NWP authorizes the repair, rehabilitation, or replacement of 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.

This NWP also 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 that a PCN is filed, unless this condition is waived by the district engineer. This NWP cannot be used to reclaim lands lost to normal erosion processes over an extended period.

Minor dredging is limited to the amount necessary to restore the pre-existing bottom contours of the waterbody. If temporary structures and discharges, including cofferdams, are necessary to conduct the repair, rehabilitation, or replacement of structures or fills, separate authorization is required.

Notification: The permittee must submit a pre-construction notification to the district engineer (see general condition 27) 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: Uplands 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.)

B. *Discharges in Ditches and Canals.* Discharges of dredged or fill material into ditches and canals that are constructed in uplands, receive water from another water of the United States, divert water to another water of the United States, and 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 or canals constructed in streams or other waters

of the United States, or in streams that have been relocated in uplands.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity, if the dredged or fill material will be discharged into more than 500 linear feet of ditch or canal. (See general condition 27.) (Section 404.)

C. *Pipeline Safety Program Designated Time Sensitive Inspections and Repairs.* Activities required for the inspection, repair, rehabilitation, or replacement of any currently serviceable structure or fill for pipelines that have been identified by the Pipeline and Hazardous Materials Safety Administration's Pipeline Safety Program (PHP) within the U.S. Department of Transportation as time-sensitive (see 49 CFR parts 192 and 195) and additional maintenance activities done in conjunction with the time-sensitive inspection and repair activities. All activities must meet the following criteria:

(a) 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 or access fills or dewatering of construction sites;

(b) Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided that the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. 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);

(c) Temporary fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary structures and fills must be removed upon completion of the activity and the affected areas returned to pre-construction conditions;

(d) In wetlands, the top 6'' to 12'' of the trench should normally be backfilled with topsoil from the trench so that there is no change in preconstruction contours;

(e) To the maximum extent practicable, the restoration of open waters must be to the pre-construction course, condition, capacity, and location of the waterbody;

(f) Any exposed slopes and stream banks must be stabilized immediately upon completion of the project;

(g) Additional maintenance activities done in conjunction with the time-sensitive inspection or repair must not result in additional losses of waters of the United States; and,

(h) The permittee is a participant in the Pipeline Repair and Environmental Guidance System (PREGS).

Reporting: The permittee must submit a post construction report to the PHP within seven days after completing the work. The report must be submitted electronically to PHP via PREGS. The report must contain the following information: project sites located in waters of the United States, temporary access routes, stream dewatering sites, temporary fills and temporary structures identified on a map of the pipeline corridor; photographs of the pre- and post-construction work areas located in waters of the United States; and a list of best management practices employed for each pipeline segment shown on the map. (Section 10 and 404.)

D. *Commercial Shellfish Aquaculture Activities.* This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines, and other structures necessary for the continued operation of the aquaculture activity. This NWP also authorizes discharges of dredged or fill material necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked.

This NWP does not authorize the expansion of the project area for the commercial shellfish aquaculture activity. This NWP does not authorize the cultivation of new species (*i.e.*, species not previously cultivated by the existing commercial shellfish aquaculture activity).

Notification: The permittee must submit a pre-construction notification to the district engineer if: (1) The project area is greater than 25 acres; (2) more than 10 acres of the project area is occupied by submerged aquatic vegetation; (3) the permittee intends to relocate existing operations into portions of the project area not previously used for aquaculture activities; or (4) dredge harvesting is conducted in areas inhabited by submerged aquatic vegetation. (See general condition 27.) (Sections 10 and 404.)

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

E. *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, provided the activities are already authorized by the Department of Interior (DOI), Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 or are currently being processed as part of an integrated permit processing procedure. Areas previously disturbed by mining activities include reclaimed mine sites, abandoned mine land areas, or lands under bond forfeiture contracts. The permittee must clearly demonstrate to the district engineer that the reclamation plan will result in a net increase in aquatic resource functions. As part of the project, the permittee may conduct coal mining activities in an adjacent area, provided the newly mined area is less than 40 percent of the area being remined and reclaimed.

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 27.) (Sections 10 and 404.)

F. *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 by the Department of Interior (DOI), Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 or are currently being processed as part of an integrated permit processing procedure.

The discharge must not cause the loss of greater than 1/2 acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. 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. (See general condition 27.) 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.

C. Nationwide Permit General Conditions

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as appropriate, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP.

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, if known, of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. Culverts placed in streams must be installed to maintain low flow conditions.

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.*, excavate, fill, or smother downstream 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 D.

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. 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 any 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 conditions.

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

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

16. *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.

17. *Endangered Species.* (a) No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will 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) Non-federal permittees shall notify the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that may affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. The district engineer will determine whether the proposed

activity ''may affect'' or will have ''no effect'' to listed species and designated critical habitat and will notify the applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. Applicants 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.

(c) 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.

(d) 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, both lethal and non-lethal ''takes'' of protected species are in violation of the ESA. 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/* and *http://www.noaa.gov/fisheries.html* respectively.

18. *Historic Properties.* (a) No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the district engineer has complied with the current procedures for addressing the requirements of Section 106 of the National Historic Preservation Act (NHPA).

(b) The prospective permittee must notify the district engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by the district engineer that the requirements of the NHPA have been satisfied and that the activity is authorized. The district engineer will notify the permittee within 45 days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. If NHPA section 106 consultation is required and will occur under the NWP process, the district engineer will notify the permittee that he or she cannot begin work until consultation is completed.

(c) Information on the location and existence of historic resources can be obtained 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)). For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the pre-construction notification must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

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

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

(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 27, 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.

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

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

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

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

(d) 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 1/2 acre, it cannot be used to authorize any project with greater than 1/2 acre of loss of waters, even if 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 NWPs.

(e) Compensatory mitigation plans for projects in or near streams or other open waters will normally include a requirement for the establishment, maintenance, and legal protection (*e.g.*, conservation easements) of riparian areas next to open waters. In some cases, riparian areas may be the only compensatory mitigation required. Riparian areas should consist of native species. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (*e.g.*, riparian areas 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.

(f) Permittees may propose the use of mitigation banks, in-lieu fee arrangements or separate activity-specific compensatory mitigation. In those cases, the mitigation provisions will specify the party responsible for accomplishing and/or complying with the mitigation plan.

(g) 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.

21. *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.

22. *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 waived (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.

23. *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.

24. *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.

25. *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)

26. *Compliance Certification.* Each permittee who received an NWP verification from the Corps must submit a signed certification regarding the completed work and any required mitigation. The certification form must be forwarded by the Corps with the NWP verification letter and will include:

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

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

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

27. *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 days of the date of receipt and can 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:

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

(2) If 45 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, the permittee cannot begin the activity until any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f) and general condition 17) and/or Section 106 of the National Historic Preservation (see 33 CFR 330.4(g) and general condition 18) is completed. Also, work cannot begin under NWP 21 until the permittee has received written approval from the Corps. If the District or Division Engineer notifies the permittee in writing that an individual permit is required within 45 days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

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

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

(2) Location of the proposed project;

(3) A description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity. The description should be sufficiently detailed to allow the district engineer to determine that the adverse effects of the project will be minimal and any necessary 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 result in a quicker decision.);

(4) The PCN must include a delineation of special aquatic sites and other waters of the United States on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters of the United States, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many wetland areas. Furthermore, the 45 day period

will not start until the delineation has been completed and submitted to the Corps, where appropriate;

(5) If the proposed activity will result in the loss of greater than 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.

(6) For an activity that may adversely affect Federally-listed endangered or threatened species, the PCN must include the name(s) of those endangered or threatened species that may be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work; and

(7) For an activity that may affect a historic property listed in, or eligible for listing in, the National Register of Historic Places, the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

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

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

For activities requiring pre-construction notification to the district engineer that result in the loss of greater than ½-acre of waters of the United States, the district engineer will immediately provide (*e.g.*, via facsimile transmission, overnight mail, or other expeditious manner) a copy of the PCN to the appropriate Federal or state offices (U.S. FWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Office (THPO), and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the district engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately and 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.

As required by Section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act, the district engineer will provide a response to NMFS within 30 days of receipt of any Essential Fish Habitat conservation recommendations.

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

(e) *District Engineer's Decision:* In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If the proposed activity will result in a loss of greater than 1/10 acre of wetlands, the prospective permittee should submit a proposed mitigation plan with the PCN. Applicants may also propose compensatory mitigation for projects with smaller impacts. The district engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed work are minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, after considering mitigation, the district engineer will notify the permittee and include any conditions the district engineer deems necessary. The district engineer must approve any compensatory mitigation proposal before the permittee commences work. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the plan within 45 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.

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

D. Further Information

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

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

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

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

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

E. Definitions

Best management practices (BMPs): Policies, practices, procedures, or structures implemented to mitigate the

adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural.

Compensatory mitigation: The restoration, establishment, enhancement, or preservation of aquatic resources for the purpose of compensating for 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.

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 or deepwater site. Establishment results in a gain in aquatic resource area.

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

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

Loss of waters of the United States: Waters of the United States that include the filled area and other waters that are permanently adversely affected by 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 existing waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and 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 preconstruction 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 (*i.e.*, a water of the United States) that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(b). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (*i.e.*, spring high tide line).

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 (OHWM) can be determined. An OHWM is a line on the shore established by the fluctuations of water and indicated by physical characteristics or other appropriate means that consider the characteristics of the surrounding areas (see 33 CFR 328.3(e)). 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.

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.

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 course substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper

areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

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

Single and complete project: The term ''single and complete project'' is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers (see definition of independent utility). For linear projects, the ''single and complete project'' (*i.e.*, a single and complete crossing) will apply to each crossing of a separate water of the United States (*i.e.*, a single waterbody) at that location. An exception is for linear projects crossing a single waterbody several times at separate and distant locations: each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

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 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 (i.e., spring high tide line) and are inundated by tidal waters two times per lunar month, during spring high tides.

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

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