



DEPARTMENT OF THE ARMY  
U.S. Army Corps of Engineers  
WASHINGTON, D.C. 20314-1000

REPLY TO  
ATTENTION OF:

25 SEP 1992

CECW-OR

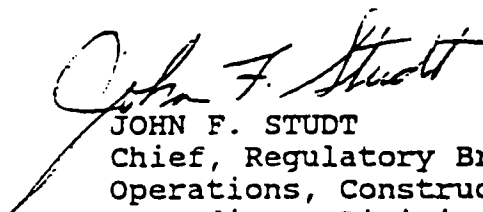
MEMORANDUM FOR ALL MAJOR SUBORDINATE COMMANDS, DISTRICT COMMANDS  
ATTN: Regulatory Branch Chiefs

SUBJECT: Nationwide Permit Qs and As

1. We have prepared additional Questions and Answers (Qs and As) in response to additional questions raised by District and Division offices and the public on the nationwide permit program since the January 15, 1992, Qs & As. These questions are provided for your use and to further explain or clarify the November 22, 1991, regulations. These Qs and As may be furnished to any interested parties.

2. The enclosed Qs and As dated September 24, 1992, supersede the Qs and As issued on January 15, 1992, and transmitted by Memorandum dated January 15, 1992. Also, for easy reference, we have enclosed a Supplement to the January 15, 1992, Qs & As which only contains the new Qs & As. In addition to the new Qs & As we have revised one Q and A which is: Section 401 and CZM Concurrence - No. 7.

Encls

  
JOHN F. STUDDT  
Chief, Regulatory Branch  
Operations, Construction and  
Readiness Division  
Directorate of Civil Works

DISTRIBUTION:  
(SEE PG. 2)

## Qs & As ON NATIONWIDE PERMITS

### I GENERAL

1.Q. Can the district and division engineer delegate their signature authority for nationwide permit decisions?

1.A. Yes. Signature authority may be delegated from the district or division engineer to appropriate levels within the district or division, respectively.

2.Q. How are quantities to be measured for determining cubic yardage for the nationwide permits (NWPs)?

2.A. The volume measurement is to be determined by the material that is discharged (or excavated under Section 10) below the plane of the ordinary high water (OHW) as determined from the ordinary high water mark (OHWM) in non-tidal areas, or the high tide line in tidal areas. Furthermore, as part of an on-going construction project the material placed landward of the OHWM, even though it is below the plane of the ordinary high water as determined from the OHWM, is not included in the volume measurement. In other words, temporarily excavated areas landward of the OHWM that are subsequently filled should not be included in the volume. When measuring quantities in tidal areas, substitute high tide for ordinary high water and high tide line for OHWM.

2.a. Q. May someone use the method of measuring quantities to argue that no discharge takes place, and therefore the Corps has no jurisdiction, because the Corps does not include the quantity of discharge when dredging then backfilling an area below the OHW and landward of the OHWM?

2.a. A. No. The Corps does not have jurisdiction landward of the OHWM. However, if an area landward of the OHWM and below the plane of OHW is excavated and not filled within a reasonable time period as part of an on-going construction project, then the OHWM will be considered to have moved to the new location. Furthermore, the method of measuring quantities under NWPs in no way is intended to relate to or affect (i. e. is completely independent of) the Corps jurisdiction.

2.b. Q. Is backfill material placed in areas excavated channelward of the OHWM to be included in the quantity measurement?

2.b. A. Yes. This answer adopts the quantity measurement provisions of RGL 88-6 except as discussed below. In RGL 88-6 backfill material placed in areas excavated channelward of the OHWM was excluded from the quantity measurement. This exclusion primarily addressed discharges for site work for minor road crossings under NWP 14. NWP 14 no longer has a quantity condition and therefore this exclusion is no longer valid.

2.c. Q. Isn't the correct terminology "ordinary high water (OHW)" rather than "ordinary high water mark (OHWM)?"

2.c. A. The volume should be measured to include that material which is both vertically below the horizontal plane of ordinary high water which intersects the ordinary high water mark (OHWM) and is also horizontally channelward of the vertical plane which intersects the OHWM. (See 33 CFR 328.3(e) and 33 CFR 329.11(a)(1).)

3.Q. Nationwide permits 13, 14, 18, 19, and 26 have language stating that they are for "single and complete" projects, while 330.6(c) states that two or more different nationwide permits can be combined to authorize a "single and complete project." Additional guidance on how to interpret these two statements would assure uniform interpretation in the field.

3.A. NWPs 13, 14, 18, 19, and 26 indicate that the activity they authorize must be "part of a single and complete project" not that the activity itself must be a single and complete project. The intent is to prevent these NWPs from each being used more than once for a single and complete project (e.g., NWP 14 cannot be used twice for one crossing, however, a NWP 14 authorization may be combined with a NWP 13 authorization and a NWP 18 authorization for a single crossing). Furthermore, since a stream crossing is a single and complete project (see 33 CFR 330.2(j)), NWP 14 may be used more than once in a development or highway project, for separate crossings (i.e., separate crossings of different waterbodies or separate and distant crossings of the same waterbody -- see 33 CFR 330.2(i)). In addition, each of the 36 NWPs may be used once as part of a single and complete project.

4.Q How does one reconcile the seeming conflicting guidance contained in 33 CFR 325.1(d)(2) and 33 CFR 330.6(d)? Specifically, the former indicates an overall plan of all activities which are reasonably related to the same project should be included in the same permit application while the latter states portions of a larger project may proceed under a nationwide permit while the DE reviews an individual permit application for other portions.

In a related question, 33 CFR 330.6(d)(1) states that when a portion of a larger project is authorized by a nationwide permit, it is with the understanding that its construction will in no way prejudice the decision on the individual permit for the rest of the project. This, in reality, can and does occur. How can an independent alternatives analysis truly be undertaken? How can a

response to piece-mealing be made? How can a cumulative impact analysis be completed?

4.A These provisions are consistent. The key words in 325.1(d)(2) are "reasonably related to the same project" and in 330.6(d) are "portions of the project qualifying for NWP authorization would have independent utility and are able to function independent of the total project." In other words, the following question should be answered by the DE: If only the NWP activity were built would the project be viable if the individual permit is denied? This same question (for portions of projects or seemingly related projects) should be posed when reviewing activities under 325.1(d)(2). The NWP activity can not prejudice the individual permit decision. If the NWP portion of the larger project would prejudice the decision on the individual permit, then it truly did not have independent utility. In the example given in 325.1(d)(2) as applied to 330.6(d) the dredging would not be allowed to proceed under NWP 19 because it would not have independent utility. Another example would be a proposed phased housing development. If phase I can be built and the developer can leave a viable development if the remaining phases are denied, then Phase I has independent utility and can be allowed to proceed.

While it may be difficult in certain circumstances, the Corps must take precautions to ensure that the alternatives analysis for the individual permit is truly not prejudiced by the activity authorized by the NWP. Piece-mealing is not occurring because the Corps has determined that the NWP activity has independent utility and is not part of a related project. The Corps must document and consider in the cumulative impact analysis all proposed, known, or reasonably foreseeable activities.

5.Q. How long are verifications, issued under the 1986 NWPs, good for?

5.A. Until 12 January 1992, unless the activity qualifies for the "grandfather provision" in the 1986 regulation (33 CFR 330.12). However, the 1991 regulation at 33 CFR 330.6(a)(3)(ii) provides for verifications to remain valid for the specified period of time, if the NWP is reissued without modification or the activity complies with any subsequent modification of the NWP authorization. Furthermore, if the verification expires but the activity qualifies for the grandfather provision no additional verification is required.

6.Q. Are there any errors in the November 22, 1991, Federal Register concerning the NWPs?

6.A. Yes. There are a total of eight errors, four in the Preamble and four in the Regulation. They are:

1. At 56 FR 59112 in the discussion on Section 330.2(d) the sentence beginning with "Accordingly" and ending with "headwaters." should be deleted. It was based on an option that was briefly considered then dropped.

2. At 56 FR 59120 in the discussion on NWP 4 in the next to last sentence change "added" to "to add".

3. At 56 FR 59122 in the discussion on NWP 15 delete from the second sentence "the requirement for notification on this NWP and" and delete the second paragraph. The notification was only proposed for approach fills. When the approach fills were deleted from this NWP the references should also have been deleted.

4. At 56 FR 59131 in the discussion on NWP 40 change in the first sentence of the second paragraph "and removed" to read "but retained". We decided not to remove this when the one acre limit was added but missed the change here.

5. At 56 FR 59136 in the footnote add NWP 34 to the last list of NWPs that would result in discharges and therefore 401 water quality certification is required.

6. At 56 FR 59137 in Section 330.4(d)(6) delete from the fourth sentence (19th line in that paragraph) the word "may" from between the words "and" and "complete". This makes the language the same as Section 330.4(c)(6). However, the requirement is the same either way; that is, when a state has denied 401 certification or CZM concurrence and a 30-day notification is required for a NWP the district engineer will accept the notification, evaluate it according to the PDN procedures and notify the applicant of his decision within the PDN time frame. If the decision by the Corps is to authorize the activity, the applicant will be notified that the activity can only proceed subject to obtaining an individual 401 certification or CZM concurrence.

7. At 56 FR 59136 in the footnote add NWP 33 to the second list of NWPs that may result in a discharge and therefore 401 water quality certification may be required.

8. At 56 FR 59137 at Section 330.4(c)(6) the last sentence in that section should be continued and completed with "unless he determines that such conditions do not comply with the provisions of 33 CFR 325.4." This section will now be consistent with 330.4(d)(6). Also refer to the Qs and As numbered III.1. and IV.9.

Because these errors do not affect the operation and requirements of the NWP program or the NWPs it is likely we will not make these changes in the Federal Register.

7.Q. Page 59118, 1st paragraph of the center column indicates that the NWPs are optional and the prospective permittee may at his option apply for an individual or regional general permit. Does this conflict with 33 CFR 330.4(c)(5) and 330.4(d)(5) which indicates the DE will not process an individual permit qualifying for a NWP solely because a state has denied 401 certification or CZM concurrence? If the Corps determines an activity complies with an NWP can the permittee apply for an individual permit?

7.A. The Corps determines the appropriate type of authorization or type of denial of an activity. If the Corps determines that an activity is denied without prejudice under 33 CFR 330.4(c) and (d) or that an activity complies with an NWP, then the prospective permittee may not apply for nor will the Corps process an individual permit. The optional provision does not apply to the

type of authorization (or denial) but to the terms and conditions. At his option, the prospective permittee may elect to not comply with the terms and conditions of an NWP (as determined by the DE) and is thus entitled to apply for an individual permit for that activity which thus does not qualify for an NWP.

8.Q. May NWPs be used to close enforcement cases?

8.A. Yes. 33 CFR 330.6(e) addresses situations where NWPs may be used for after-the-fact authorization. This provision can be used, as appropriate, to authorize activities, after-the-fact, that qualify for an NWP that requires a PDN. Furthermore, if an activity that qualifies for a new NWP occurs between 12 January 1992 and 21 January 1992 it should normally be considered authorized, after-the-fact, by that NWP in accordance with 33 CFR 330.6(e).

9.Q. Is there a conflict between 33 CFR 330.6(d)(2), 33 CFR 330.6(e), and NWP 32?

9.A. No. NWPs will not be used to authorize activities that are subject to ongoing enforcement actions by the Corps or EPA (330.6(d)(2)). NWPs can be used to authorize some activities after-the-fact when there will not be any enforcement action (330.6(e)). Once an enforcement action has been completed then NWP 32 can be used to settle or close out the case.

10.Q. What are the required fees that must be submitted with the notification as indicated in General Condition 13?

10.A. At this time there are no required fees. This was added because fees were being considered. The requirement for any fees in the future can only occur through the rule-making process as a separate action.

11.Q. Can an NWP be revoked and substituted with a Regional GP?

11.A. Yes. However, generally the Division Engineer should regionally condition an NWP, or issue a Regional GP in addition to the NWP, rather than revoke the NWP and substitute a Regional GP. In certain cases this may be confusing to the public and therefore the Division Engineer may revoke an NWP and substitute a Regional GP, provided it incorporates, at a minimum, all the terms and conditions of the NWP for which it is being substituted. If a district elects to substitute a Regional GP for an activity authorized by an NWP, a Public Notice should be issued to explain the effects of the revocation to the public and the requirements of prospective permittees.

12.Q. Can an applicant perform an activity under any applicable NWP, even though one may appear to be specific to his proposed activity (e.g. using NWP 26 instead of NWP 14 for a minor road crossing)?

12.A. Although several NWPs may be applicable, an applicant can, at his choice, use any NWP for any activity that meets the terms and conditions of that NWP. However, even though an activity may comply with the terms and conditions of any given NWP, the DE may, on a case-by-case basis assert discretionary authority by modifying, suspending, or revoking NWP authorization for a specific activity whenever there are sufficient concerns for the aquatic environment or any other factor of the public interest. For example, the DE may exercise discretionary authority to revoke NWP 26 authorization for a minor road crossing, but allow it to proceed under the terms and conditions of NWP 14.

13.Q. If a project meets the terms and conditions of two separate NWPs and thus could be authorized by either NWP, which NWP is the project authorized by?

13.A. The general permittee, at his/her discretion, may pick which NWP to qualify for, unless the district engineer exercises his discretionary authority.

14.Q. How are cumulative impacts to be considered for linear projects with multiple stream crossings?

14.A. Cumulative impacts should generally be considered on a watershed basis. Therefore, the impacts of multiple stream crossings in the same watershed should be considered cumulatively while stream crossings in different watersheds should not be considered cumulatively.

15.Q. Should old fills be considered in the quantity limits of the NWPs?

15.A. Generally no. Discharges of dredged or fill material placed prior to regulation under the Clean Water Act (e.g., prior to 1972 or the 1975, 1976, or 1977 phase-in dates) should not be included in the quantity measurements. Furthermore, discharges of dredged or fill material, although at the same site, that are determined by the DE to be separate and complete projects should not be added together for the purpose of measuring the quantity limits under the NWPs.

16.Q. When a NWP verification expires prior to the completion of an activity and the general permittee requests reverification, do the notification and coordination procedures of NWP General Condition #13 have to be repeated?

16.A. No. The verification of a NWP authorization (see 33 CFR 330.6(a)) is an acknowledgment that an activity is authorized by the NWP. That is, it meets the terms and conditions of the NWP, including any PDN requirement or activity specific conditions. Although a verification letter expires, the activity continues to be authorized by the NWP subject to any activity specific conditions until the NWP expires (unless it is modified, suspended,

or revoked) and no further verification is required. Furthermore, the PDN process is only required once during the effective period (5 years) of the NWP. If reverification is requested, a PDN is not required, unless the NWP has been modified or the DE determines that there is new information or that there may be changed conditions which may affect whether an activity would be authorized by the NWP. In such cases, the DE will use his discretionary authority to require an additional PDN. Any activity specific conditions imposed by the DE remain in effect after the verification letter expires and also remain in effect if the NWP is reissued, unless the DE specifically removes such activity specific conditions (see 330.4(e)(4)). The above discussion addresses activities that have not been completed. Completed activities are authorized by the NWP in effect at the time the activity is completed subject to any activity specific conditions, in the same manner as individual permits.

17.Q. How often may each NWP be used for linear projects?

17.A. For linear projects each crossing that is a single and complete project, as defined by 33 CFR 330.2(i), is allowed to have each NWP apply once (i.e., one NWP 14, one NWP 26, one NWP 18, one NWP 13, etc. per single and complete project). A linear project is a project for the purpose of getting from point A to point B (e.g., a roadway or a pipeline). The use of each NWP is subject to all terms and conditions, including limiting impacts to the minimum necessary for the crossing. Although a single and complete crossing may involve the use of NWPs 14, 18, and 26, since a PDN is required for wetland fills for NWPs 14 and 18, the Corps will ensure the impacts of the total single and complete crossing are minimal, both individually and cumulatively, and will require any appropriate mitigation.

18.Q. How often may each NWP be used for residential development?

18.A. The use of NWP 26 is addressed in the Qs & As for NWP 26. For the residential development roadways, each single and complete crossing is allowed to have each NWP apply once, except that in certain subdivisions the total aggregate of NWP 26 quantities, including any use of NWP 26 for road crossings, is considered within the entire subdivision (see NWP 26 Qs & As). Furthermore, each property owner/developer within a subdivision may use each NWP once, again except for NWP 26 in certain subdivisions (see NWP 26 Qs & As). (Recognizing that NWP 14 and NWP 18 require a PDN for wetland fills, the DE will review the use of these NWPs and therefore will consider cumulative impacts and the need for mitigation in cases involving multiple use of these NWPs in subdivisions.)



## II PREDISCHARGE NOTIFICATION

1.Q. If the district receives a Predischarge Notification (PDN) that the district can determine immediately has more than minimal impacts, is the district required to notify the agencies in accordance with the Notification general condition prior to notifying the prospective permittee?

1.A. No. If the district is able to immediately determine upon receipt of a PDN that the impacts are more than minimal, then the district should immediately notify the prospective permittee in accordance with the notification general condition and not send the PDN to the agencies. Likewise, if the district can determine that the proposed activity does not comply with the terms and conditions of the NWP the district should immediately notify the prospective permittee and not send the PDN to the agencies.

2.Q. When does the 30 day period start for PDNs received before 21 January 1992?

2.A. The 30 day period for the new NWPs does not start until the effective date of the new regulations (i.e. the 30 day clock does not start until 21 January 1992 for any PDN received prior to that date). Also, the 20 day period for the existing NWPs is not in effect after 24 December 1991 (i.e. PDNs will be accepted and acted on as appropriate, but if the DE fails to act by 13 January 1992 there is no automatic approval under 33 CFR 330.7(a)(1)(3)). However, for PDNs received prior to 21 January 1992 the district should verify if the activity complies with the new NWPs, if possible. Lack of final state 401 certification and CZM consistency positions would prevent such verification from being made prior to 21 January 1992.

3.Q. Is a regional PDN required to comply with the provisions of the NWP notification general condition?

3.A. No. A regional PDN is a PDN required by the division engineer for activities not covered by the PDN notification general condition 13 required by the Chief of Engineers. A regional PDN may simply require notice to the district with time frames and procedures that are different from the Notification General Condition and without coordination with other agencies. However, a regional PDN will not override the requirements of the NWP notification general condition when required by the Chief of Engineers for an NWP.

4.Q. How does the district "document" consideration of agency comments on a PDN?

4.A. Agency comments on PDNs must be given full consideration. The Corps will not respond to the agency and the Corps consideration of the agency comments need only be documented by a

simple statement indicating that "the resource agencies' concerns were considered."

5.Q. NWP general condition 13 requires prospective permittees, when a notification is required, to contact the USFWS/NMFS regarding endangered species and the SHPO regarding historic properties and to provide any response from these agencies. What is the minimum information that the prospective permittee must submit to satisfy this notification requirement? Must the prospective permittee obtain information from these agencies and submit it with the notification? Should the Corps wait for information from these agencies to start the 30 day period?

5.A. This condition requires the prospective permittee to contact those agencies thus providing those agencies the opportunity to provide information to the Corps, either directly or through the prospective permittee. It does not require the prospective permittee or the Corps to obtain or wait for information from those agencies. Furthermore, the prospective permittee is not required to obtain information or conduct surveys requested by those agencies unless the Corps independently determines it is necessary to do so. We encourage prospective permittees to contact those agencies as early as possible. However, the minimum information that must be submitted with the notification is a statement that those agencies were contacted (such contact may occur the day before the notification is submitted). Upon receipt of a notification with such a statement the 30 day time period starts. A lack of response by those agencies does not relieve the Corps or the prospective permittee of complying with the NWP general conditions 11. Endangered Species, and 12. Historic Properties.

6.Q. What is the minimum information that the prospective permittee must submit to the Corps to satisfy the notification requirement in paragraph (b)(3) of general condition 13?

6.A. The information provided by the prospective permittee with the notification need only give a basic idea of the scope of the project. It does not need to be as detailed as that required for an individual permit application. A detailed engineering or architectural drawing or a 404(b)(1) guideline type project purpose statement is not required. Upon receipt of a notification with the required basic information the 30 day time period starts. If some of the basic information is missing from the notification then the notification should be considered incomplete in accordance with 33 CFR 330.1(e)(1).

7.Q. For notifications which include a wetland delineation, when does the 30 day time period begin?

7.A. The 30 day time period will start when a wetland delineation prepared in accordance with the Corps current method for wetland delineations is submitted with the notification. The Corps determines if the wetland delineation is correctly prepared.

Although the 30 day time period starts when a complete notification with any required wetland delineation is submitted, if the Corps determines during the 30 day time period that the wetland delineation is incorrect the 30 day time period will start over beginning when a correct wetland delineation is made, as determined by the Corps. The NWP verification (authorization) will be based on either a verified wetland delineation or on the assumption that the wetland delineation is correct. If subsequent to NWP verification (authorization) it is determined that the wetland delineation is incorrect the Corps must use the procedures of 33 CFR 330.5 in order to modify, suspend, or revoke the authorization.

8.Q. The preamble states that DEs are required to immediately provide a copy of a PDN to the appropriate Federal and State offices. Further, the notification must include a delineation of affected special aquatic sites, including wetlands. Does this require the Districts to forward a copy of the delineation report as part of the notification to the agencies?

8.A. No. The Corps is the Federal agency charged with establishing or verifying Federal jurisdiction. Therefore, the information which should be provided to the agencies as part of the required notification need only include a delineation (e.g. plan view, project map, wetland map) of the special aquatic sites, including wetlands, and not the delineation report supporting this delineation. It may be necessary on a case-by-case basis to provide the agencies with the delineation report later, such as in a situation where the merits of a mitigation plan would be compared against existing wetland functions and values. Inclusion of a delineation report with the copy of the notification should be at the discretion of the District.

9.Q. Should the District be forwarding a copy of the notification to the SHPO, and the Endangered Species Unit of the NMFS and FWS?

9.A. While Districts are not required to provide notifications to these agencies, it may be advisable, under certain circumstances, to coordinate the PDN with these agencies. The most obvious situation would be when the preliminary information from these agencies contained within the applicant's notification, raises concerns about endangered species or historic properties. Additionally, when PDNs are submitted to the Corps without notification by the applicant to FWS or SHPO, and the Corps subsequently forwards the notification to those agencies, then the District Engineer may waive the requirement of the PDN as stated in paragraphs (b)(5)(i) and (ii) on NWP General Condition 13.

10.Q. By what means should an applicant be notified of the outcome of the PDN?

10.A. Oral notification of the decision reached on a PDN is acceptable provided the conversation is sufficiently documented within the file and the applicant is immediately advised in writing

of the final decision, along with the inclusion of any expiration dates (such as those outlined in RGL 90-6), activity-specific conditions or mitigation requirements, or the procedures to follow to apply for an individual permit, if required.

11.Q. If an activity had been verified through the PDN process, as prescribed in the 1991 regulations, does the PDN process have to be repeated for re-verification (i.e. if work has not begun or is not under contract to begin, and the specified time period (generally 2 years) has expired for the verification)?

11.A. No. The PDN process need not be repeated and re-verification is not required if; (1) the proposed activity/project plans have not changed and; the NWP has not since been modified, suspended, or revoked such that the activity would not comply with the terms or conditions of the NWP. Subsequently, the applicant may be advised that the activity still complies with the NWP, which had previously been verified.

12.Q. When does the PDN 30 day clock start and stop? Also, must the mitigation requirements be completed during the 30 day period?

12.A. The 22 November 1991 NWP regulation established a 30 day clock for PDNs. The 30 day period is calendar days and begins upon the day of receipt of a complete PDN, as determined by the Corps (not on the day that the Corps determines it is complete). Once begun, the 30 day clock does not stop for any reason. The Corps must make a decision within 30 days of receipt of a complete PDN whether to authorize the activity under NWP or regional GP or require an individual permit. If the Corps determines that mitigation will be required in order to authorize the project under NWP, or that a mitigation plan submitted with the PDN is inadequate, the decision to authorize must still be made within the 30 calendar days. This decision will be made by the Corps based on the Corps belief that mitigation can be accomplished to offset project impacts to the less than minimal level. The applicant can not begin work in waters of the United States until the Corps has approved the mitigation plan, but the decision to authorize, subject to an approved mitigation plan, must be made within the 30 day PDN time period. The 30 day PDN clock does not stop even if new information is identified. If the new information is identified after the 30 days has lapsed, then the Corps must use the suspension, modification, and revocation procedures.

### III REGIONAL CONDITIONS

1.Q. Are there any limitations on what the district or division engineer is allowed to add as regional or case specific conditions?

1.A. Yes. The following are conditions that will not be added to NWP's by district or division engineers. Such conditions will not:

- a. increase the terms (or limits) of the NWP's.
- b. delete or modify NWP conditions.
- c. change (be inconsistent with) the regulations.
- d. be unenforceable.
- e. require an individual 401 certification or CZM concurrence.
- f. require another agency decision, review, or approval.

2.Q. Are 401 Certification conditions and CZM concurrence conditions to be included as regional conditions?

2.A. Yes. There are two types of regional conditions. First, conditions on state 401 certifications and CZM concurrences automatically become regional conditions on NWP's, unless the division engineer determines that such conditions do not meet the provisions of 33 CFR 325.4 (see Section 401 and CZM Concurrence Qs and As). In such cases the Corps will consider the conditioned 401 certification or CZM concurrence as a denial without prejudice. These regional conditions are added to the NWP either by specifically listing them or by referencing the 401 certification or CZM concurrence. There is no public review or coordination process required for adding such conditions. The second type of regional conditions are those added by the division engineer. Such conditions can be added only after public notice, opportunity for public comment and to request a public hearing, decision and documentation, and notice to the public of the conditions. Such regional conditions may duplicate state 401 certification or CZM concurrence conditions, but generally should not do so.

3.Q. When do regional conditions become effective?

3.A. Regional conditions required by 401 certification or CZM concurrence become effective upon the effective date of the NWP's; however, regional conditions required by the division engineer do not become effective until the district engineer issues a public notice announcing the conditions. Verification decisions should be based on the current status of any regional conditions. However, if the addition of regional conditions is imminent then the verification may be delayed a few days until the public notice is issued. The initial regional conditions should be added as close as possible to the effective date of the NWP's. However, additional regional conditions or modification or revocation of regional conditions may be done at any time prior to the expiration, revocation; or reissuance of the NWP's.

4.Q. May division engineers add regional conditions that reduce quantity limits of NWPs?

4.A. Yes. However, generally this would be difficult to justify on a statewide basis or in large geographic areas. The division engineer must document that individual permits must be required for such activities because the adverse impacts on the environment or other aspects of the public interest are more than minimal individually or cumulatively. The document must recognize the nationwide conditions and limits, any regional conditions, any required predischarge notification and the reason that in the specific area the adverse impacts are more than minimal. This decision can be easier to document for specific geographic areas (e.g., a specific lake) or specific type of water (e.g., gold medal trout streams). In addition, it would be easier to document that a regional predischarge notification is necessary to ensure that the impacts are minimal in certain situations than to document that individual permits are required. Furthermore, the public interest must be viewed from the Federal perspective, that is, not just to conform to state requirements.

5.Q. May division engineers add a regional condition to require a predischarge notification (PDN)?

5.A. Yes. However, the division engineer cannot reduce the requirements for notification of the General Condition 13. Additional requirements can be added by regional condition. Corps division engineers cannot change the 30 day time period but can provide additional time to the agencies, if appropriate. If the division engineer requires notification for activities that do not now require a notification the division engineer may adopt the requirements of General Condition 13 or may establish an entirely different process with different time limits, with or without notice to other agencies. A regional condition will not shift any decision-making responsibility to another agency.

#### IV SECTION 401 CERTIFICATION AND CZM CONCURRENCE

1.Q. What happens if a state does not complete 401 certification or CZM concurrence before 21 January 1992?

1.A. The latest version of any written position taken by a state on 401 certification or CZM concurrence for any of the NWPs between 10 April 1991 and 21 January 1992 will be automatically accepted as the state's position on these NWPs. If the state takes no action during this period on a NWP or NWPs, then on 21 January 1992 the 401 certification will be considered waived or the CZM concurrence will be presumed for such NWP or NWPs.

2.Q. After 21 January 1992 may a state deny 401 certification or CZM concurrence or remove conditions?

2.A. No. The state's position as of 21 January 1992 is its final position. A state may not subsequently deny 401 certifications or CZM concurrences, nor may the state subsequently add conditions to 401 certifications or CZM concurrences. However, a state may subsequently issue 401 certifications or CZM concurrences, and may subsequently remove conditions from past 401 certifications or CZM concurrences.

3.Q. Who is responsible for determining whether conditioned 401 certifications or CZM concurrences are acceptable or should be considered a denial without prejudice?

3.A. The division engineer. See RGL 92-4 and Q & A No. 9 below. HQUSACE (CECW-OR) is available for advise as necessary.

4.Q. If a state issues 401 certifications based on the 1989 Wetland Delineation Manual (WDM), must the Corps enforce conditions relating to activities that occur beyond Corps jurisdiction, as determined using the Corps current method for determining jurisdiction?

4.A. No. The 401 certification and CZM concurrence are only valid for activities that require a Department of the Army permit. The Corps cannot enforce conditions for activities that do not require a permit from the Corps, such as in areas covered by the 1989 WDM but not the 1987 WDM, or in active (ongoing) upland borrow pits, for unregulated drainage activities, or any other unregulated activity.

5.Q. May a state issue a 401 certification for only a 1 year period?

5.A. No. The Corps will consider as a denial without prejudice any 401 certification or CZM concurrence conditioned to be valid for less than the 5 year period of the NWP's. Any such condition will place an undue regulatory burden on the Corps and the public. However, if a state would like to limit the time that its certification is valid by reference to a specific future event, the division engineer may accept such time limit if the division engineer further determines that it would not place an undue burden on the Corps or the public, that such event will only occur once, and that after the specific event occurs the state's position is not expected to change again.

6.Q. May a state condition a 401 certification or CZM concurrence to limit coverage (e.g. by activity, geographic area, or quantity) of an NWP?

6.A. No. Section 401 certification or CZM concurrence conditions

that exclude certain activities or geographic areas should be considered as a denial of the 401 certification or as CZM nonconcurrency for the affected activities or activities in such geographic areas; that is, such activities or activities in such geographic areas are then considered to be denied without prejudice. Subsequently, such activities or activities in such geographic areas may only proceed if a 401 certification or CZM concurrence is obtained by the applicant from the state. Only the division engineer has the discretionary authority to regionally condition an NWP to require individual permits for a class of activities or for a geographic area.

7.Q. May a state condition a 401 certification or CZM concurrence to require a PDN be submitted to the Corps?

7.A. No. Only the Corps may require a PDN. Such a conditioned 401 certification or CZM concurrence should be treated as a denial without prejudice.

8.Q. An applicant has let a contract for construction for less than one acre under NWP 26 prior to 12 January 1992. The applicant's intended construction start is June 1992. The applicant has requested a verification because they desire it or the local jurisdiction requires it. The Corps will not get to the verification until after 21 January 1992. If the state denies 401 certification for 0-1 acres under NWP 26, will the applicant be penalized for requesting a verification when one is not required?

8.A. No. In this case that applicant qualifies for the grandfather provision of 33 CFR 330.12 (Nov 1986 regulation) and is therefore authorized under the November 1986 NWP 26 provided the authorized work is completed within one year (12 January 1993). Any 401 certification or CZM concurrence action by the states on the 21 January 1992 NWPs will in no way affect such authorization under the November 1986 NWPs. The verification should indicate that the activity is authorized under the November 1986 NWP 26 provided that the authorized work is completed within one year.

9.Q. What are the types of 401 certification and CZM conditions which the Corps considers unacceptable, and therefore must be treated as a denial without prejudice?

9.A. Those Section 401 and CZM conditions which the Corps deems unacceptable include conditions which:

1. Conflict with requirements of Corps regulations
2. Require an illegal action by the Corps
3. Require the Corps or another Federal agency to take an action which the Corps or other agency would not otherwise have to take and does not choose to take
4. Increase the extent or scope of the work authorized by the NWP
5. Delete or modify NWP conditions or Section 404 only



conditions.

In such cases the conditioned 401 certification or CZM concurrence should be treated as a denial without prejudice in accordance with 33 CFR 330.4(c)(3) and (d)(3). Otherwise the 401/CZM conditions become regional conditions of the NWP eventhough such conditions may not be enforceable (see Q & A No. 10 below).

10.Q. What is the Corps enforcement responsibility concerning 401/CZM conditions which become regional conditions of the NWP or individual NWP authorization?

10.A.(1) The Corps has the legal authority to enforce such conditions; however, this is a discretionary authority. The DE must establish priorities to enforce violations of the Clean Water Act (CWA) within his limited resources. The Corps does not have the resources to bring enforcement action against all violations of Section 404 of the CWA or Section 10 of the Rivers and Harbors Act or Section 103 of the Marine, Protection, Research and Sancutaries Act, and, generally, does not have the resources to enforce such 401/CZM conditions. In rare cases the DE may exercise his discretion to enforce some 401/CZM conditions, if the DE determines that such enforcement is important enough to forego other enforcement activities.

(2) In response to verification requests or PDNs, the DE should indicate that the activity complies with the terms and conditions of the NWP (if appropriate) subject to the 401/CZM conditions. Furthermore, the permittee should be told that if he/she cannot comply with such 401/CZM conditions then an individual 401 certification or CZM concurrence must be obtained.

11.Q. What happens if a State denies 401 Certification or CZM concurrence on a specific activity prior to the Corps making a decision that the specific activity is authorized by an NWP (i.e., prior to sending the verification letter to the applicant)?

11.A. If the State had previously denied 401 certification or CZM concurrence on the NWP, then the activity is denied without prejudice, unless the DE exercises his discretionary authority or determines that the activity does not meet the terms and conditions of the NWP. The applicant should be notified in accordance with RGL 92-4.

## V \* INDIVIDUAL NATIONWIDE PERMITS

### NATIONWIDE PERMIT 4

1.Q. Does NWP 4 authorize covered oyster trays?

1.A. No. Generally the only aquaculture-related activity authorized by NWP 4 is shellfish seeding, provided it does not occur in wetlands or vegetated shallows.

### NATIONWIDE PERMIT 12

1.Q. Does NWP 12 authorize access roads or foundation construction for transmission towers?

1.A. No. NWP 12 does not authorize overhead transmission lines or activities associated with the overhead transmission lines. Furthermore, NWP 12 does not authorize access roads. However, the temporary access road may be authorized by NWP 33 which requires notification to the DE.

2.Q. Does NWP 12 authorize mechanized landclearing of forested wetland areas for, or associated with, the installation of subaqueous utility lines?

2.A. Yes. However, the clearing must be limited to the minimum necessary for construction and may not change preconstruction contours.

3.Q. Under NWP 12, do the outfall and intake structures have to be directly related to the utility line project?

3.A. Yes.

### NATIONWIDE PERMIT 23

1.Q. Are the currently approved categorical exclusions authorized by the 1992 nationwide permits?

1.A. Yes. Federal agency categorical exclusions were reviewed and approved for the US Coast Guard, the Bureau of Reclamation, and the Federal Highway Administration. These approvals were announced in Regulatory Guidance Letters (RGL) 83-5, 86-2, and 87-10, respectively. Although the RGLs have expired, the approvals remain in effect and such categorical exclusions are authorized by NWP 23. To clarify this issue we are planning to issue a RGL on the approved categorical exclusions.

NATIONWIDE PERMIT 26

1.Q. With regard to the subdivision provision, is the DE's authority to exempt limited to an area 10 acres in size?

1.A. No. The Corps authority to exempt a subdivision is not limited by the aggregate amount of the acreage of waters of the United States that is proposed or expected to be lost in the subdivision. An aggregate total loss of waters of the United States up to 10 acres can occur under NWP 26 regardless of whether or not there is an exemption. However, the aggregate loss can only exceed 10 acres if an exemption has been established. Once an exemption is established for a subdivision, subsequent lot development by individual property owners may proceed as a single and complete project using NWP 26.

2.Q. With regard to the subdivision provision, is NWP 26 expected to be retroactive and if so, is the DE expected to notify potentially affected persons?

2.A. All discharges that have occurred or will occur under the 1986 NWP 26 including those that qualify for the grandfather provision are not affected by the 1991 NWP 26. The 1991 NWP 26 will apply, effective 21 January 1992, in all subdivisions created or subdivided after October 5, 1984, regardless of whether any fill has already been placed in a subdivision. If fill has been authorized in such a subdivision, the aggregate acreage amount will include the previously authorized acreages. The Federal Register serves as legal notice to all affected parties. However, while not required to the DE may notify potentially affected parties as he deems appropriate.

3.Q. What, if any, data should the District collect to determine if a subdivision is eligible for an exemption?

3.A. While the Districts aren't required to collect any data, it would not be unreasonable to request that an applicant produce documentation in the form of real estate contracts, certified subdivision maps, or confirmation from the local municipality, as to the date of the real estate subdivision.

4.Q. Does the subdivision provision apply to all NWPs?

4.A. No. The provision for subdivisions only applies to NWP 26.

5.Q. How are subdivisions created after October 5, 1984, treated, as opposed to those created prior to that date?

5.A. The regulation of post- and pre-1984 subdivisions should be distinguished in the following manner:

A. Post-October 5, 1984 Subdivisions

1. The 1 and 10 acre limits of NWP 26 apply to the aggregate total loss of waters of the U.S. for the entire subdivision.

2. The District Engineer (DE) may, at his discretion, determine if an EXEMPTION would apply. An exemption would apply if:

a. the individual and cumulative adverse environmental effects would be minimal and the property owner had, after October 5, 1984, but prior to January 21, 1992, committed substantial resources in reliance on NWP 26 with regard to a subdivision, in circumstances where it would be inequitable to frustrate his investment-backed expectations, or

b. the individual and cumulative adverse environmental effects would be minimal, high quality wetlands would not be adversely affected, and there would be an overall benefit to the aquatic environment.

3. If the EXEMPTION applies:

a. the 1 and 10 acre limits of NWP 26 then applies to each individual lot owner within the exempted subdivision even if the aggregate total loss of waters of the U.S. in the exempted subdivision exceeds or would exceed 10 acres.

#### B. Pre-October 5, 1984 Subdivisions

1. The 1 and 10 acre limits of NWP 26 apply to each property owner (the property owner may be the developer of an entire subdivision or each individual lot owner).

2. Discretionary Authority - the Division Engineer, at his discretion, may exercise discretionary authority to require individual permits for pre-October 5, 1984, subdivisions.

3. Exceedence of the 10 acre limit of NWP 26 will require processing of an individual permit.

6.Q. How is the term "subdivision" defined for purposes of NWP 26? Does the subdivided property have to change ownership prior to October 5, 1984, in order for each subdivided tract to qualify for NWP 26?

6.A. The term "subdivision" is explicitly defined within the terms of NWP 26. However, to qualify as a "grandfathered" subdivision created prior to October 5, 1984, for purposes of NWP 26, each tract of land must have been divided and received official approval of such subdivision from the appropriate state or local governing agency (e.g. an approved subdivision plan) prior to October 5, 1984. The conceptual subdivision of land is not acceptable. The issue is not whether the subdivided parcels have changed ownership, but rather that the subdivision of land was officially approved prior to October 5, 1984, and that approval can be documented. This being the case, each subdivided parcel could qualify for an

NWP 26 authorization. However, if the District Engineer determines that the individual and cumulative impacts would be greater than minimal, he may exert discretionary authority to require an individual permit.

7.Q. When an exemption is established for a subdivision under NWP 26, is it necessary for subsequent lot development by individual property owners to submit a pre-discharge notification?

7.A. The regulation clearly states that "once the exemption is established for a subdivision, subsequent lot development by individual property owners may proceed using NWP 26". Each individual property owner is eligible for authorization by NWP 26, subject to the terms and conditions of NWP 26. Therefore, individual property owners would only be required to submit a PDN if they were individually to exceed the one acre limitations of the NWP. However, the exemption allows for exceedence of the total aggregate acreage for the entire subdivision, as is allowed for pre-October 5, 1984, subdivisions, unless the Division Engineer exercises discretionary authority.

8.Q. If the DE determines that a post-October 5, 1984, subdivision qualifies for an exemption may the district entertain a single PDN for a group of property owners in a subdivision in lieu of separate PDNs by individual lot owners?

8.A. Yes. In accordance with the limits of NWP 26 and qualification for an exemption under the subdivision provision, individual lot owners need only submit an application pursuant to General Condition 13, if their proposal would exceed one acre. A single property owner or "agent", acting on behalf of a collective group of individual lot owners, may represent a group of individual lot owners in the submission of a single PDN. However, this would only apply if each individual lot owner were to exceed the one acre threshold. Otherwise, there would be no requirement to notify the District of the intent to discharge less than one acre of fill per individual lot owner where an exemption had been given pursuant to the provision for subdivisions in NWP 26. Furthermore, the PDN should include a measure of the acreage impacted through filling, flooding, excavating, or draining for each of the individual lot owners.

9.Q. How does one measure the acreage loss for NWP 26?

9.A. For purposes of NWP 26, the measurement of acreage loss includes the filled area plus waters of the United States that are adversely affected by flooding, excavation, or drainage. While the only activity which requires authorization is the filled area, the permit evaluation should include adverse affects resulting from flooding, excavation, or drainage which would occur as a direct result of the filling activity.

## NATIONWIDE PERMIT 27

1.Q. Is there any intention on the part of the Federal agencies to notify the Corps upon expiration of agreements prior to any reversion of an area to its prior condition or otherwise involve the Corps in the development of such agreements?

1.A. No. The intent is for the appropriate Federal agency to be responsible for the implementation of the agreement with notification to the Corps. Any enforcement issues concerning compliance with such agreements should be referred to the appropriate agency for an interpretation. Any area that is reverted to its prior physical condition will be subject to whatever Corps regulatory requirements or jurisdiction that are in effect at that future date.

2.Q. Is the following condition for NWP 27 acceptable; "the discharge of dredged or fill material associated with the reversion of a restored wetland to its prior condition and use is not authorized"?

2.A. No, this condition is not acceptable for NWP 27 on private land in the case of a binding wetland restoration or creation agreements as specified in NWP 27. If this condition were included as a condition of a water quality certification or coastal zone management concurrence, the NWP should be denied without prejudice. This condition effectively modifies the terms of the NWP and eliminates the incentive to the landowner to restore wetlands. Many landowners would not engage in restoration activities without allowing the option of reversion to prior use and condition. However, if a private landowner voluntarily agrees to not restore the area to its previous condition, then such voluntary agreement should be included in the agreement, and may be added by the District Engineer as an activity specific condition on a case by case basis.

## NATIONWIDE PERMIT 33

1.Q. What activities are included in NWP 33 by the term "or for bridge construction activities not subject to Federal regulation" which was not mentioned as being authorized in the Preamble?

1.A. This was intended to cover those bridges that do not require a permit from the Coast Guard or either a Section 10 or Section 404 permit from the Corps. Usually, such bridges span a waterway but may need some temporary construction work in waters of the United States which requires notification to the Corps.

NATIONWIDE PERMIT 34

1.Q. May NWP 26 be used with NWP 34 to expand cranberry production activities?

1.A. Yes. The regulation at 33 CFR 330.6(c) allows for the multiple use of NWPs, where they are combined to authorize a "single and complete project". However, if a DE determines that there are sufficient concerns for the aquatic environment or any other factor of the public interest, he has the discretionary authority to modify the NWP authorization, or notify the applicant of the requirement to seek authorization either through a regional general or individual permit. Furthermore, a Division Engineer may establish a Regional Condition which would prohibit or restrict the use of certain NWPs in combination.

NATIONWIDE PERMIT 38

1.Q. Does NWP 38 apply to activities associated with response actions at superfund sites?

1.A. No. As indicated in Regulatory Guidance Letter 85-7 a Department of the Army permit is not required for actions at superfund sites taken in accordance with the Comprehensive Environmental Response, Compensation and Liability Act by EPA or the states.

2.Q. Is NWP 38 intended to only authorize government cleanup activities?

2.A. Yes. The cleanup activity must be performed, ordered, or sponsored by a government agency with established legal or regulatory authority.

3.Q. Does NWP 38 override Regulatory Guidance Letter No. 85-7?

3.A. No. Regulatory Guidance Letter No. 85-7 deals specifically with actions subject to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Based on the Environmental Protection Agency's interpretation and application of CERCLA, we do not believe EPA or state response actions undertaken by authority of CERCLA are required to obtain permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act. NWP 38 does apply to all other government agency sponsored activities required to effect the cleanup of hazardous and toxic waste, which are not under the authority of CERCLA.

NATIONWIDE PERMIT 40

1.Q. What are prairie potholes, playa lakes, and vernal pools?

1.A. For the purposes of NWP 40 prairie potholes, playa lakes, and vernal pools are depressional areas within farmed wetlands. The following are general descriptions of these wetlands. A prairie pothole is a depression, generally circular, elliptical, or linear in shape, generally occurring in glacial outwash plains, moraines, till plains, and glacial lake plains. A playa lake is a nearly level lake plain that occupies the lowest parts of closed depressions (basins). Temporary flooding occurs in playa lakes primarily in response to precipitation-runoff events. A vernal pool is a depressional area covered by shallow water for variable periods from winter to spring, but may be completely dry for most of the summer and fall. Vernal pools are often formed due to soils with confining layers, with either nearly impermeable clay layers or iron-silica cemented hardpans.



SUPPLEMENT TO  
NATIONWIDE PERMIT Qs AND AS

I GENERAL

6.Q. Are there any errors in the November 22, 1991, Federal Register concerning the NWP's?

6.A. Yes. There are a total of eight errors, four in the Preamble and four in the Regulation. They are:

7. At 56 FR 59136 in the footnote add NWP 33 to the second list of NWP's that may result in a discharge and therefore 401 water quality certification may be required.

8. At 56 FR 59137 at Section 330.4(c)(6) the last sentence in that section should be continued and completed with "unless he determines that such conditions do not comply with the provisions of 33 CFR 325.4." This section will now be consistent with 330.4(d)(6). Also refer to the Qs and As numbered III.1. and IV.9.

11.Q. Can an NWP be revoked and substituted with a Regional GP?

11.A. Yes. However, generally the Division Engineer should regionally condition an NWP, or issue a Regional GP in addition to the NWP, rather than revoke the NWP and substitute a Regional GP. In certain cases this may be confusing to the public and therefore the Division Engineer may revoke an NWP and substitute a Regional GP, provided it incorporates, at a minimum, all the terms and conditions of the NWP for which it is being substituted. If a district elects to substitute a Regional GP for an activity authorized by an NWP, a Public Notice should be issued to explain the effects of the revocation to the public and the requirements of prospective permittees.

12.Q. Can an applicant perform an activity under any applicable NWP, even though one may appear to be specific to his proposed activity (e.g. using NWP 26 instead of NWP 14 for a minor road crossing)?

12.A. Although several NWP's may be applicable, an applicant can, at his choice, use any NWP for any activity that meets the terms and conditions of that NWP. However, even though an activity may comply with the terms and conditions of any given NWP, the DE may, on a case-by-case basis assert discretionary authority by modifying, suspending, or revoking NWP authorization for a specific activity whenever there are sufficient concerns for the aquatic

environment or any other factor of the public interest. For example, the DE may exercise discretionary authority to revoke NWP 26 authorization for a minor road crossing, but allow it to proceed under the terms and conditions of NWP 14.

13.Q. If a project meets the terms and conditions of two separate NWPs and thus could be authorized by either NWP, which NWP is the project authorized by?

13.A. The general permittee, at his/her discretion, may pick which NWP to qualify for, unless the district engineer exercises his discretionary authority.

14.Q. How are cumulative impacts to be considered for linear projects with multiple stream crossings?

14.A. Cumulative impacts should generally be considered on a watershed basis. Therefore, the impacts of multiple stream crossings in the same watershed should be considered cumulatively while stream crossings in different watersheds should not be considered cumulatively.

15.Q. Should old fills be considered in the quantity limits of the NWPs?

15.A. Generally no. Discharges of dredged or fill material placed prior to regulation under the Clean Water Act (e.g., prior to 1972 or the 1975, 1976, or 1977 phase-in dates) should not be included in the quantity measurements. Furthermore, discharges of dredged or fill material, although at the same site, that are determined by the DE to be separate and complete projects should not be added together for the purpose of measuring the quantity limits under the NWPs.

16.Q. When a NWP verification expires prior to the completion of an activity and the general permittee requests reverification, do the notification and coordination procedures of NWP General Condition #13 have to be repeated?

16.A. No. The verification of a NWP authorization (see 33 CFR 330.6(a)) is an acknowledgment that an activity is authorized by the NWP. That is, it meets the terms and conditions of the NWP, including any PDN requirement or activity specific conditions. Although a verification letter expires, the activity continues to be authorized by the NWP subject to any activity specific conditions until the NWP expires (unless it is modified, suspended, or revoked) and no further verification is required. Furthermore, the PDN process is only required once during the effective period (5 years) of the NWP. If reverification is requested, a PDN is not required, unless the NWP has been modified or the DE determines

that there is new information or that there may be changed conditions which may affect whether an activity would be authorized by the NWP. In such cases, the DE will use his discretionary authority to require an additional PDN. Any activity specific conditions imposed by the DE remain in effect after the verification letter expires and also remain in effect if the NWP is reissued, unless the DE specifically removes such activity specific conditions (see 330.4(e)(4)). The above discussion addresses activities that have not been completed. Completed activities are authorized by the NWP in effect at the time the activity is completed subject to any activity specific conditions, in the same manner as individual permits.

17.Q. How often may each NWP be used for linear projects?

17.A. For linear projects each crossing that is a single and complete project, as defined by 33 CFR 330.2(i), is allowed to have each NWP apply once (i.e., one NWP 14, one NWP 26, one NWP 18, one NWP 13, etc. per single and complete project). A linear project is a project for the purpose of getting from point A to point B (e.g., a roadway or a pipeline). The use of each NWP is subject to all terms and conditions, including limiting impacts to the minimum necessary for the crossing. Although a single and complete crossing may involve the use of NWPs 14, 18, and 26, since a PDN is required for wetland fills for NWPs 14 and 18, the Corps will ensure the impacts of the total single and complete crossing are minimal, both individually and cumulatively, and will require any appropriate mitigation.

18.Q. How often may each NWP be used for residential development?

18.A. The use of NWP 26 is addressed in the Qs & As for NWP 26. For the residential development roadways, each single and complete crossing is allowed to have each NWP apply once, except that in certain subdivisions the total aggregate of NWP 26 quantities, including any use of NWP 26 for road crossings, is considered within the entire subdivision (see NWP 26 Qs & As). Furthermore, each property owner/developer within a subdivision may use each NWP once, again except for NWP 26 in certain subdivisions (see NWP 26 Qs & As). (Recognizing that NWP 14 and NWP 18 require a PDN for wetland fills, the DE will review the use of these NWPs and therefore will consider cumulative impacts and the need for mitigation in cases involving multiple use of these NWPs in subdivisions.)

## II PREDISCHARGE NOTIFICATION

8.Q. The preamble states that DEs are required to immediately provide a copy of a PDN to the appropriate Federal and State

offices. Further, the notification must include a delineation of affected special aquatic sites, including wetlands. Does this require the Districts to forward a copy of the delineation report as part of the notification to the agencies?

8.A. No. The Corps is the Federal agency charged with establishing or verifying Federal jurisdiction. Therefore, the information which should be provided to the agencies as part of the required notification need only include a delineation (e.g. plan view, project map, wetland map) of the special aquatic sites, including wetlands, and not the delineation report supporting this delineation. It may be necessary on a case-by-case basis to provide the agencies with the delineation report later, such as in a situation where the merits of a mitigation plan would be compared against existing wetland functions and values. Inclusion of a delineation report with the copy of the notification should be at the discretion of the District.

9.Q. Should the District be forwarding a copy of the notification to the SHPO, and the Endangered Species Unit of the NMFS and FWS?

9.A. While Districts are not required to provide notifications to these agencies, it may be advisable, under certain circumstances, to coordinate the PDN with these agencies. The most obvious situation would be when the preliminary information from these agencies contained within the applicant's notification, raises concerns about endangered species or historic properties. Additionally, when PDNs are submitted to the Corps without notification by the applicant to FWS or SHPO, and the Corps subsequently forwards the notification to those agencies, then the District Engineer may waive the requirement of the PDN as stated in paragraphs (b)(5)(i) and (ii) on NWP General Condition 13.

10.Q. By what means should an applicant be notified of the outcome of the PDN?

10.A. Oral notification of the decision reached on a PDN is acceptable provided the conversation is sufficiently documented within the file and the applicant is immediately advised in writing of the final decision, along with the inclusion of any expiration dates (such as those outlined in RGL 90-6), activity-specific conditions or mitigation requirements, or the procedures to follow to apply for an individual permit, if required.

11.Q. If an activity had been verified through the PDN process, as prescribed in the 1991 regulations, does the PDN process have to be repeated for re-verification (i.e. if work has not begun or is not under contract to begin, and the specified time period (generally 2 years) has expired for the verification)?

11.A. No. The PDN process need not be repeated and re-verification is not required if; (1) the proposed activity/project plans have not changed and; the NWP has not since been modified, suspended, or revoked such that the activity would not comply with the terms or conditions of the NWP. Subsequently, the applicant may be advised that the activity still complies with the NWP, which had previously been verified.

12.Q. When does the PDN 30 day clock start and stop? Also, must the mitigation requirements be completed during the 30 day period?

12.A. The 22 November 1991 NWP regulation established a 30 day clock for PDNs. The 30 day period is calendar days and begins upon the day of receipt of a complete PDN, as determined by the Corps (not on the day that the Corps determines it is complete). Once begun, the 30 day clock does not stop for any reason. The Corps must make a decision within 30 days of receipt of a complete PDN whether to authorize the activity under NWP or regional GP or require an individual permit. If the Corps determines that mitigation will be required in order to authorize the project under NWP, or that a mitigation plan submitted with the PDN is inadequate, the decision to authorize must still be made within the 30 calendar days. This decision will be made by the Corps based on the Corps belief that mitigation can be accomplished to offset project impacts to the less than minimal level. The applicant can not begin work in waters of the United States until the Corps has approved the mitigation plan, but the decision to authorize, subject to an approved mitigation plan, must be made within the 30 day PDN time period. The 30 day PDN clock does not stop even if new information is identified. If the new information is identified after the 30 days has lapsed, then the Corps must use the suspension, modification, and revocation procedures.

### III REGIONAL CONDITIONS

9.Q. What are the types of 401 certification and CZM conditions which the Corps considers unacceptable, and therefore must be treated as a denial without prejudice?

9.A. Those Section 401 and CZM conditions which the Corps deems unacceptable include conditions which:

1. Conflict with requirements of Corps regulations
2. Require an illegal action by the Corps
3. Require the Corps or another Federal agency to take an action which the Corps or other agency would not otherwise have to take and does not choose to take
4. Increase the extent or scope of the work authorized by the NWP

5. Delete or modify NWP conditions or Section 404 only conditions.

In such cases the conditioned 401 certification or CZM concurrence should be treated as a denial without prejudice in accordance with 33 CFR 330.4(c)(3) and (d)(3). Otherwise the 401/CZM conditions become regional conditions of the NWP eventhough such conditions may not be enforceable (see Q & A No. 10 below).

10.Q. What is the Corps enforcement responsibility concerning 401/CZM conditions which become regional conditions of the NWP or individual NWP authorization?

10.A.(1) The Corps has the legal authority to enforce such conditions; however, this is a discretionary authority. The DE must establish priorities to enforce violations of the Clean Water Act (CWA) within his limited resources. The Corps does not have the resources to bring enforcement action against all violations of Section 404 of the CWA or Section 10 of the Rivers and Harbors Act or Section 103 of the Marine, Protection, Research and Sancutaries Act, and, generally, does not have the resources to enforce such 401/CZM conditions. In rare cases the DE may exercise his discretion to enforce some 401/CZM conditions, if the DE determines that such enforcement is important enough to forego other enforcement activities.

(2) In response to verification requests or PDNs, the DE should indicate that the activity complies with the terms and conditions of the NWP (if appropriate) subject to the 401/CZM conditions. Furthermore, the permittee should be told that if he/she cannot comply with such 401/CZM conditions then an individual 401 certification or CZM concurrence must be obtained.

#### IV SECTION 401 CERTIFICATION & CZM CONCURRENCE

11.Q. What happens if a State denies 401 Certification or CZM concurrence on a specific activity prior to the Corps making a decision that the specific activity is authorized by an NWP (i.e., prior to sending the verification letter to the applicant)?

11.A. If the State had previously denied 401 certification or CZM concurrence on the NWP, then the activity is denied without prejudice, unless the DE exercises his discretionary authority or determines that the activity does not meet the terms and conditions of the NWP. The applicant should be notified in accordance with RGL 92-4.

## V. INDIVIDUAL NATIONWIDE PERMITS

### NATIONWIDE PERMIT 4

1.Q. Does NWP 4 authorize covered oyster trays?

1.A. No. Generally the only aquaculture-related activity authorized by NWP 4 is shellfish seeding, provided it does not occur in wetlands or vegetated shallows.

### NATIONWIDE PERMIT 26

2.Q. What, if any, data should the District collect to determine if a subdivision is eligible for an exemption?

3.A. While the Districts aren't required to collect any data, it would not be unreasonable to request that an applicant produce documentation in the form of real estate contracts, certified subdivision maps, or confirmation from the local municipality, as to the date of the real estate subdivision.

4.Q. Does the subdivision provision apply to all NWPs?

4.A. No. The provision for subdivisions only applies to NWP 26.

5.Q. How are subdivisions created after October 5, 1984, treated, as opposed to those created prior to that date?

5.A. The regulation of post- and pre-1984 subdivisions should be distinguished in the following manner:

#### A. Post-October 5, 1984 Subdivisions

1. The 1 and 10 acre limits of NWP 26 apply to the aggregate total loss of waters of the U.S. for the entire subdivision.

2. The District Engineer (DE) may, at his discretion, determine if an EXEMPTION would apply. An exemption would apply if:

a. the individual and cumulative adverse environmental effects would be minimal and the property owner had, after October 5, 1984, but prior to January 21, 1992, committed substantial resources in reliance on NWP 26 with regard to a subdivision, in circumstances where it would be inequitable to frustrate his investment-backed expectations, or

b. the individual and cumulative adverse environmental effects would be minimal, high quality wetlands would not be adversely affected, and there would be an overall benefit to the aquatic environment.

3. If the EXEMPTION applies:

a. the 1 and 10 acre limits of NWP 26 then applies to each individual lot owner within the exempted subdivision even if the aggregate total loss of waters of the U.S. in the exempted subdivision exceeds or would exceed 10 acres.

B. Pre-October 5, 1984 Subdivisions

1. The 1 and 10 acre limits of NWP 26 apply to each property owner (the property owner may be the developer of an entire subdivision or each individual lot owner).

2. Discretionary Authority - the Division Engineer, at his discretion, may exercise discretionary authority to require individual permits for pre-October 5, 1984, subdivisions.

3. Exceedence of the 10 acre limit of NWP 26 will require processing of an individual permit.

6.Q. How is the term "subdivision" defined for purposes of NWP 26? Does the subdivided property have to change ownership prior to October 5, 1984, in order for each subdivided tract to qualify for NWP 26?

6.A. The term "subdivision" is explicitly defined within the terms of NWP 26. However, to qualify as a "grandfathered" subdivision created prior to October 5, 1984, for purposes of NWP 26, each tract of land must have been divided and received official approval of such subdivision from the appropriate state or local governing agency (e.g. an approved subdivision plan) prior to October 5, 1984. The conceptual subdivision of land is not acceptable. The issue is not whether the subdivided parcels have changed ownership, but rather that the subdivision of land was officially approved prior to October 5, 1984, and that approval can be documented. This being the case, each subdivided parcel could qualify for an NWP 26 authorization. However, if the District Engineer determines that the individual and cumulative impacts would be greater than minimal, he may exert discretionary authority to require an individual permit.

7.Q. When an exemption is established for a subdivision under NWP 26, is it necessary for subsequent lot development by individual property owners to submit a pre-discharge notification?

7.A. The regulation clearly states that "once the exemption is established for a subdivision, subsequent lot development by individual property owners may proceed using NWP 26". Each individual property owner is eligible for authorization by NWP 26, subject to the terms and conditions of NWP 26. Therefore, individual property owners would only be required to submit a PDN



if they were individually to exceed the one acre limitations of the NWP. However, the exemption allows for exceedence of the total aggregate acreage for that entire subdivision, as is allowed for pre-October 5, 1984, subdivisions, unless the Division Engineer exercises discretionary authority.

8.Q. If the DE determines that a post-October 5, 1984, subdivision qualifies for an exemption may the district entertain a single PDN for a group of property owners in a subdivision in lieu of separate PDNs by individual lot owners?

8.A. Yes. In accordance with the limits of NWP 26 and qualification for an exemption under the subdivision provision, individual lot owners need only submit an application pursuant to General Condition 13, if their proposal would exceed one acre. A single property owner or "agent", acting on behalf of a collective group of individual lot owners, may represent a group of individual lot owners in the submission of a single PDN. However, this would only apply if each individual lot owner were to exceed the one acre threshold. Otherwise, there would be no requirement to notify the District of the intent to discharge less than one acre of fill per individual lot owner where an exemption had been given pursuant to the provision for subdivisions in NWP 26. Furthermore, the PDN should include a measure of the acreage impacted through filling, flooding, excavating, or draining for each of the individual lot owners.

9.Q. How does one measure the acreage loss for NWP 26?

9.A. For purposes of NWP 26, the measurement of acreage loss includes the filled area plus waters of the United States that are adversely affected by flooding, excavation, or drainage. While the only activity which requires authorization is the filled area, the permit evaluation should include adverse affects resulting from flooding, excavation, or drainage which would occur as a direct result of the filling activity.

#### NATIONWIDE PERMIT 27

2.Q. Is the following condition for NWP 27 acceptable; "the discharge of dredged or fill material associated with the reversion of a restored wetland to its prior condition and use is not authorized"?

2.A. No, this condition is not acceptable for NWP 27 on private land in the case of a binding wetland restoration or creation agreements as specified in NWP 27. If this condition were included as a condition of a water quality certification or coastal zone management concurrence, the NWP should be denied without prejudice. This condition effectively modifies the terms of the NWP and

eliminates the incentive to the landowner to restore wetlands. Many landowners would not engage in restoration activities without allowing the option of reversion to prior use and condition. However, if a private landowner voluntarily agrees to not restore the area to its previous condition, then such voluntary agreement should be included in the agreement, and may be added by the District Engineer as an activity specific condition on a case by case basis.

#### NATIONWIDE PERMIT 34

1.Q. May NWP 26 be used with NWP 34 to expand cranberry production activities?

1.A. Yes. The regulation at 33 CFR 330.6(c) allows for the multiple use of NWPs, where they are combined to authorize a "single and complete project". However, if a DE determines that there are sufficient concerns for the aquatic environment or any other factor of the public interest, he has the discretionary authority to modify the NWP authorization, or notify the applicant of the requirement to seek authorization either through a regional general or individual permit. Furthermore, a Division Engineer may establish a Regional Condition which would prohibit or restrict the use of certain NWPs in combination.

#### NATIONWIDE PERMIT 38

3.Q. Does NWP 38 override Regulatory Guidance Letter No. 85-7?

3.A. No. Regulatory Guidance Letter No. 85-7 deals specifically with actions subject to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Based on the Environmental Protection Agency's interpretation and application of CERCLA, we do not believe EPA or state response actions undertaken by authority of CERCLA are required to obtain permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act. NWP 38 does apply to all other government agency sponsored activities required to effect the cleanup of hazardous and toxic waste, which are not under the authority of CERCLA.