



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

Southeast Regional Office
263 13th Avenue South
St. Petersburg, Florida 33701-5505
(727)824-5317; FAX (727) 824-5300
<http://sero.nmfs.noaa.gov/>

June 1, 2012

F/SER4:DD

Mr. John Rodi
Regional Administrator
Bureau of Ocean Energy Management
Gulf of Mexico OCS Region
LE-ESS (MS 5432)
1201 Elmwood Park Boulevard
New Orleans, Louisiana 70123-2394

Dear Mr. Rodi:

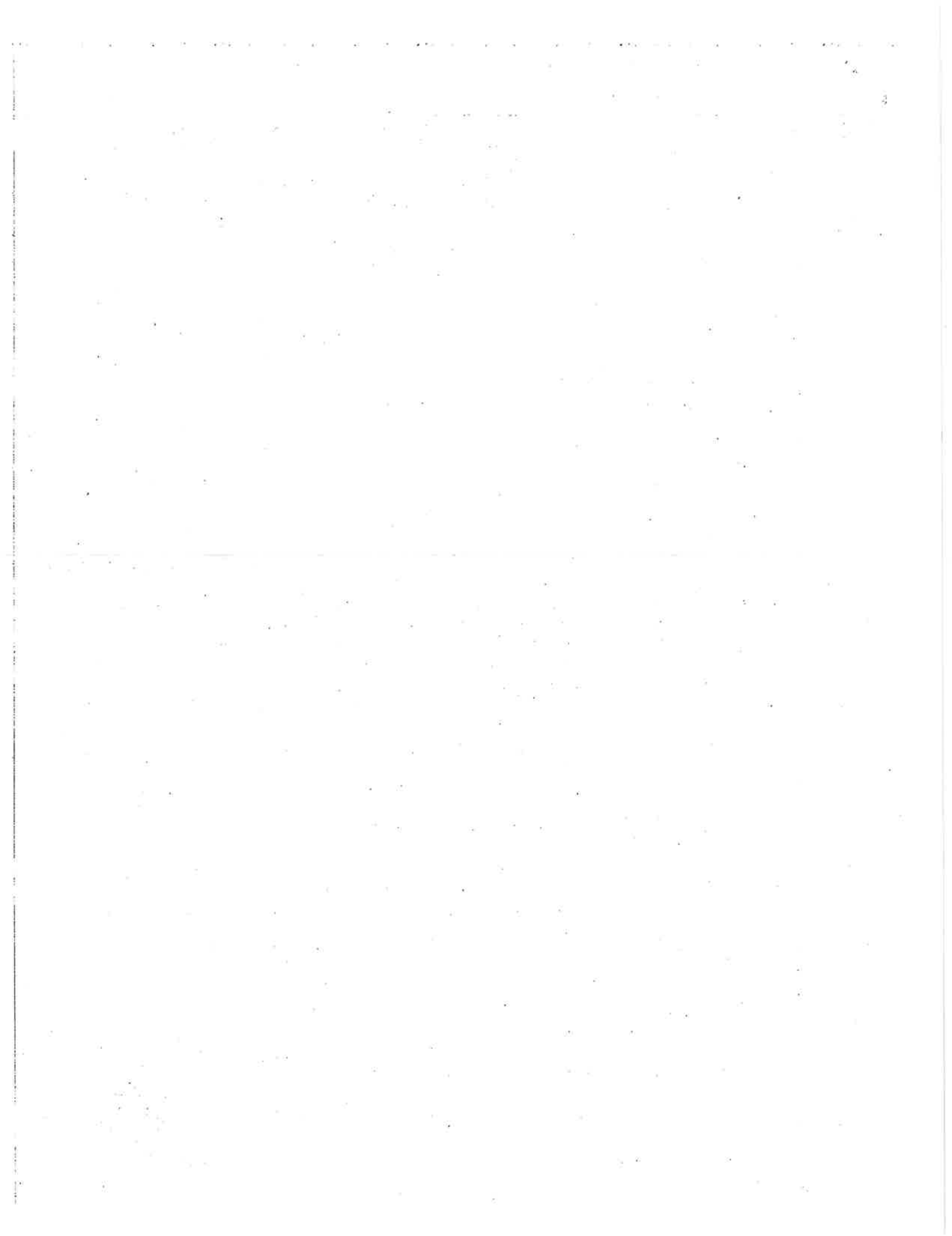
Enclosed are NOAA's National Marine Fisheries Service (NMFS) essential fish habitat (EFH) conservation recommendations in response to your April 12, 2012, request for programmatic EFH Consultation for the Atlantic Outer Continental Shelf Proposed Geological and Geophysical Activities in the Mid-Atlantic and South Atlantic Planning Areas. The EFH Assessment is contained in the draft Programmatic Environmental Impact Statement dated March 2012.

NMFS comments originate from two regions. The contacts for these offices are:

Southeast Region: Ms. Virginia Fay
Assistant Regional Administrator
NMFS Southeast Region
Habitat Conservation Division
263 13th Avenue South
St. Petersburg, Florida 33701-5505

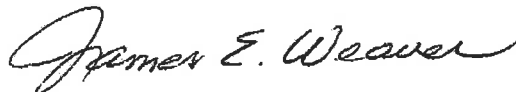
Northeast Region: Mr. Lou Chiarella
Acting Assistant Regional Administrator
NMFS Northeast Region
Habitat Conservation Division
55 Great Republic Drive
Gloucester, Massachusetts, 01930-2276





If we can be of further assistance, please advise.

Sincerely,

A handwritten signature in cursive script that reads "James E. Weaver".

For Roy E. Crabtree, Ph.D.
Regional Administrator

Enclosure

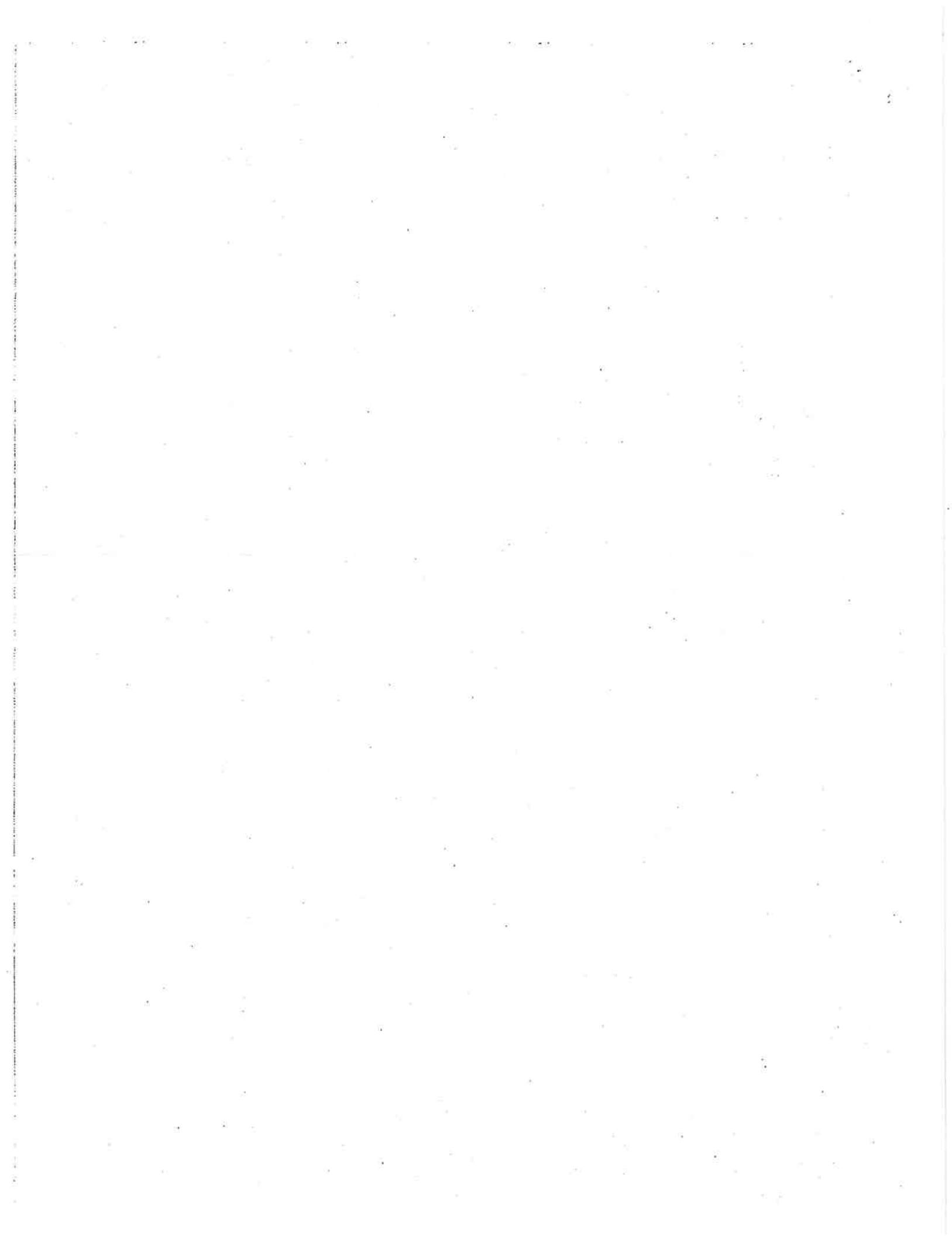
cc: (w/encl.) via electronic mail

F - McCune

F/SER3 - Bernhart, Baker

F/SER4 - Fay, Wilber, Dale

F/NER4 - Chiarella, Boelke, O'Brien



**NOAA NATIONAL MARINE FISHERIES SERVICE
AND
U.S. DEPARTMENT OF INTERIOR
BUREAU OF OCEAN ENERGY MANAGEMENT
ESSENTIAL FISH HABITAT CONSULTATION
FOR
ATLANTIC OUTER CONTINENTAL SHELF REGION
GEOLOGICAL AND GEOPHYSICAL ACTIVITIES IN THE
MID-ATLANTIC AND SOUTH ATLANTIC PLANNING AREAS**

June 1, 2012

BACKGROUND

The Department of Interior's Bureau of Ocean Energy Management (BOEM), Gulf Of Mexico Outer Continental Shelf (OCS) Region prepared a draft programmatic environmental impact statement (DPEIS) for Proposed Geological and Geophysical (G&G) Activities in the Atlantic OCS Mid-Atlantic and South Atlantic Planning Areas. These activities would support three program areas: oil and gas exploration and production; renewable energy; and marine minerals.

The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. §1801 *et seq.*) requires Federal agencies to consult with the Secretary of Commerce, through NOAA's National Marine Fisheries Service (NMFS), with respect to "any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat (EFH) identified under this Act." 16 U.S.C. § 1855(b)(2). Under the Outer Continental Shelf Lands Act (OCSLA; 43 U.S.C. § 1331 *et seq.*), BOEM manages the exploration of OCS oil, gas, and marine minerals and the siting of renewable energy facilities. The OCSLA directs BOEM to ensure geological and geophysical data are obtained in a technically safe and environmentally sound manner. Certain OCS activities authorized by BOEM may result in adverse impacts to EFH, and therefore require EFH consultation. Actions taken by BOEM under the OCSLA are evaluated through the National Environmental Policy Act (NEPA). BOEM (formerly the Minerals Management Service) and NMFS cooperatively developed modified procedures to incorporate EFH consultation into existing NEPA processes by a findings letter dated March 12, 2002. By letter dated April 12, 2012, BOEM transmitted Table 5-1 (DEIS page Tables-76) which outlines the locations of required and optional elements of BOEM's EFH Assessment in the DPEIS and requested a programmatic EFH consultation for the G&G activities. We have determined that a programmatic EFH consultation is not appropriate for this action.

BOEM PROPOSED GEOLOGICAL AND GEOPHYSICAL (G&G) ACTIVITIES:

BOEM identifies the following survey activities which can be expected to result in disturbances to the seafloor (Tables 4-1 and 4-2 on pages Tables-23 and Tables-24) and therefore may result in adverse effects to benthic habitats identified and described as EFH:

Deep Penetration Seismic Surveys

- Nodes and Bottom Cable Surveys
- Vertical Cable Surveys

- Four-dimensional (time-lapse) Surveys
- Vertical Seismic Profile Surveys

Deep Stratigraphic and Shallow Test Drilling

- Continental Offshore Stratigraphic Test Wells
- Shallow Test Drilling

Bottom Sampling

- Cone Penetrometer Tests
- Vibracoring
- Geologic Coring
- Grab Sampling

The DPEIS also analyzes the following categories of proposed G&G activities (Tables 4-1 and 4-2, pages Tables-23 and Tables-24) that are not expected to cause disturbance to the seafloor:

Deep Penetration Seismic Surveys

- Two-dimensional Seismic Exploration Surveys
- Three-dimensional Seismic Exploration Surveys
- Wide Azimuth Surveys

High-Resolution Geophysical Surveys

- Single Airgun
- Boomer/Chirp Subbottom Profiler

Electromagnetic Surveys

- Controlled Source
- Magnetotelluric

Remote Sensing

- Gravity Surveys
- Gravity Gradiometry
- Marine Magnetic Surveys
- Radar Imaging
- Aeromagnetic Surveys

The DPEIS analyzes Marine Debris and Trash, and Accidental Oil Spills (as impact producing factors) and these can result in adverse impacts to EFH including *Sargassum* sp., benthic habitats, and the marine water column.

BOEM managed G&G activities are authorized on the basis of whether or not the proposed activities are: (1) prelease and authorized by permits; or (2) on an existing lease (postlease) and authorized by OCS plan approvals, plan revisions, or by a requirement for notification of BOEM before certain on-lease activities are undertaken. BOEM notes that whether pre- or postlease, all G&G survey types for exploration, development, or decommissioning are subject to the same types of review, especially if bottom-disturbing activity is proposed.

The BOEM Resource Evaluation Program oversees G&G data acquisition and permitting activities, pursuant to regulations at 30 CFR 550 and 551. 30 CFR 551 regulates prelease G&G exploratory (prospecting) operations for oil, gas, and sulphur resources or for scientific research on unleased OCS lands and across leases owned by a third party. Each permit application is subject to a site-specific NEPA evaluation, which is typically an Environmental Assessment (EA). 30 CFR 550 regulates oil and gas activity on the OCS once a lease is acquired. Postlease activities and associated G&G activities are governed by a series of OCS plans: (1) an Exploration Plan (EP) guides the drilling of exploration and delineation wells and (2) depending on the OCS Planning Area, a Development Operations and Coordination Document (DOCD) or a Development and Production Plan (DPP) guides the drilling of development wells and installation of surface or subsurface production facilities. A NEPA evaluation is part of the approval process for OCS plans under BOEM's oil and gas program. The evaluation includes a proposed action at a specific location with specific tool types and intensity of G&G activity, which may be an EA or an Environmental Impact Statement (EIS). The consultations required under environmental law for protected species are typically carried out at the time of the NEPA evaluation for the proposed action of a lease sale where all actions consequent to a lease sale are examined in an EIS, and not for each and every OCS plan.

Many postlease activities are guided by Notices To Leasees and Operators (NTLs). NTLs are formal documents that perform a variety of functions including to: (1) provide clarification, description, or interpretation of a regulation or OCS standard; (2) provide guidelines on the implementation of a special lease stipulation or regional requirement; (3) provide a better understanding of the scope and meaning of a regulation by explaining BOEM interpretation of a requirement; or (4) transmit administrative information.

The G&G information required as part of postlease OCS plans is specified in 30 CFR 550.214. Part of it consists of a shallow hazards survey and report for each proposed well. The report contains an assessment of any seafloor and subsurface geological and manmade features or conditions that may adversely affect drilling operations.

Ancillary activities are postlease operations by lease owners in furtherance of developing oil and gas resources on their lease. Ancillary activities are defined in 30 CFR 550.105 and regulated in 30 CFR 550.207 through 550.210 and include geological and geotechnical, high resolution geophysical, archaeological, biological, physical oceanographic, meteorological, socioeconomic, or other surveys; or various types of modeling studies. In the Gulf of Mexico Region, NTL 2009-G34 Ancillary Activities provides guidance for each type of ancillary activity, the type and level of BOEM review, follow-up actions, and post-survey report requirements. Ancillary activities are subject to conditional NEPA reviews depending on what activity is being proposed. In addition to the NEPA review carried out before a lease sale, the operator would have an approved EP and/or a DOCD or DPP, each of which would have been subject to a NEPA review as part of initial plan approval.

Certain G&G activities inform several OCS plans part of the renewable energy program including the: Site Assessment Plan (SAP), Construction and Operations Plan (COP), and General Activities Plan (GAP). SAPs must be approved by BOEM before site assessment activities can begin on any lease. A COP is a detailed plan for constructing and operating a wind energy facility on a lease. G&G survey results are required to be provided in COPs which must

characterize the extent and seabed conditions of the site. GAPs authorize rights-of-way on unleased OCS lands or leased to a third-party.

ESSENTIAL FISH HABITAT ASSESSMENT

We do not believe the programmatic EFH assessment adequately assesses impacts to EFH. BOEM's DPEIS outlines the locations of required and optional elements of BOEM's EFH Assessment in Table 5-1 (page Tables-76). DPEIS Section 4.2.5 (pages 4-106 through 4-125) describes and analyzes potential impacts to EFH. BOEM has determined that impacts to EFH from seafloor disturbance is expected to be negligible and impacts from accidental fuel spills minor. BOEM's assessment is based on a comparison of the affected areas to the entire extent of the analyzed "area of interest" in the Atlantic Ocean. NMFS does not agree with this determination nor do we believe it is in accordance with the regulatory definition of adverse effects found at 50 CFR Section 600.810(a).

DPEIS Appendix C, Section 3.6.2 discusses BOEM's mitigation philosophy "to mitigate by avoidance." BOEM further indicates all authorizations for seafloor-disturbing activities would be subject to restrictions to protect sensitive benthic communities (e.g., hard/live bottom areas, deepwater coral communities, and chemosynthetic communities), including requirements for mapping and avoidance, as well as pre-deployment photographic survey of areas where bottom-founded instrumentation and appurtenances are to be deployed. BOEM references various mitigation and avoidance measures developed for other OCS regions suggesting similar measures will be employed in the Atlantic OCS. Specifically, DPEIS Section 2.1.2.6.2 and Appendix C, Section 3.6.2 indicates "The BOEM has not developed specific buffer zones for sensitive benthic communities in the Atlantic, but it is expected that they would be similar to those that BOEM uses in the Gulf of Mexico, where the locations of many sensitive bottom communities are known and there is a long history of bottom surveying in association with oil and gas exploration and production." In DPEIS Section 4.2.1.1.2, BOEM recognizes the extent and distribution of sensitive benthic communities is not well understood.

PROGRAMMATIC EFH CONSULTATION AND EFH RECOMMENDATION

We have determined a Programmatic EFH Consultation is not an appropriate mechanism to evaluate EFH impacts of BOEM G&G Activities in the Atlantic OCS based on information available at this time.

We recognize the expanse of ocean that might be surveyed is considerable; however, the number of proposed individual G&G activities requiring BOEM authorization does not appear to be extensive, particularly in the near term. The lack of specific and detailed avoidance measures in the EFH Assessment and supporting DPEIS, in combination with NMFS review of proposed OCS G&G activities and impacts, is the basis for our determination that a Programmatic EFH Consultation is not an appropriate mechanism to evaluate EFH impacts of BOEM G&G activities in the Atlantic OCS. NMFS finds that Atlantic OCS Program activities would have adverse impacts on EFH. Section 305(b)(4)(A) of the Magnuson-Stevens Fishery Conservation and Management Act requires NMFS to provide EFH conservation recommendations. Accordingly, we recommend the following:

1. BOEM shall consult on individual G&G survey activities that may result in adverse impacts to EFH.

Section 305(b)(4)(B) of the Magnuson-Stevens Act and its implementing regulation at 50 CFR Section 600.920(k) require your office to provide a written response to this letter within 30 days of its receipt. If it is not possible to provide a substantive response within 30 days, an interim response should be provided to NMFS. A detailed response then must be provided prior to final approval of the action. Your detailed response must include a description of measures proposed by your agency to avoid, mitigate, or offset the adverse impacts of the activity. If your response is inconsistent with our EFH Conservation Recommendation, you must provide a substantive discussion justifying the reasons for not following the recommendation.

ADDITIONAL RECOMMENDATIONS

DPEIS Appendix C, Section 2.2. indicates there are no active oil and gas leases in the Atlantic OCS. In the event leasing occurs during the period of the proposed action, BOEM may add measures to mitigate the impacts of lease-specific activities in the form of lease stipulations. In addition, BOEM provides additional guidance to lessees and operators through NTLs. Mitigation measures in the form of lease stipulations are added to the lease terms and are therefore enforceable as part of the lease. Appendix C, Section 3.6.2 discusses BOEM's mitigation philosophy "to mitigate by avoidance." BOEM indicates all authorizations for seafloor-disturbing activities would be subject to restrictions to protect sensitive benthic communities (e.g., hard/live bottom areas, deepwater coral communities, and chemosynthetic communities), including requirements for mapping and avoidance, as well as pre-deployment photographic survey of areas where bottom-founded instrumentation and appurtenances are to be deployed. We encourage BOEM to actively engage with NMFS to develop protocols and mitigation measures specific to the Atlantic OCS as those may serve to facilitate a Programmatic or General Concurrence EFH Consultation in the future. In the interim, the NMFS provides the following additional recommendations:

1. **Buffer Distances:** In DPEIS Appendix C, Section 3.6.2. BOEM notes it "...has not developed specific buffer zones for sensitive benthic communities in the Atlantic, but it is expected that they would be similar to those that BOEM uses in the Gulf of Mexico." Buffer and radius distances in the Atlantic should be evaluated in a manner that considers water depth, currents, and the risk of damage to nearby coral or hard bottom habitats. Buffer evaluation should be adaptive and allow opportunities for post-deployment assessment and monitoring results to inform future deployments.
2. **Site Characterization Protocol:** For deployment locations within or adjacent to deepwater coral or hard bottom habitats, site characterization protocols should include:
 - a. Evaluation of existing geophysical and biological data in the areas of interest prior to the initial planning of geophysical and benthic video/photographic surveys.
 - b. Conducting high-resolution multibeam or side-scan sonar surveys to identify coral and hard bottom habitats.
 - c. Surveying proposed and alternative sites with high-resolution video and digital still cameras. Transect spacing of the video and photographic surveys should be coordinated with NMFS.

- d. Remotely operated vehicle (ROV) surveys with an appropriate number of east-west video transects along areas where hard bottom habitats occur. Additional north-south transects should be done along areas of high biological interest. The number and location of east-west and north-south transects should be coordinated with NMFS.
 - e. Still images captured at not less than five-minute intervals while over unconsolidated sediments. When over hard substrates or other areas of biological interest, still images should be taken as soon as the strobe recycles and the ROV has moved far enough to avoid overlapping exposures (no less than three images per minute). Images should also be taken of specific organisms for identification purposes. Still digital images should be processed and analyzed to identify and quantify organisms and bottom types. Results should be used to assess cover, abundance, and species diversity. Images should be geo-referenced.
 - f. Video data collected and reviewed by scientists knowledgeable in the regional deepwater fauna should provide descriptions of the habitat and biota on the videotape during the survey. The video should be reviewed to identify organisms to the lowest taxonomic level practicable and to define biological zones and habitats.
 - g. Digital still images should be analyzed using Coral Point Count with Excel Extensions (CPCe) software (or similar) to determine percent cover of hard bottom substrates and major taxonomic groups in areas of biological interest.
3. **Anchoring Locations:** Anchor deployments for bottom-founded equipment should be limited to areas of sandy bottom with sufficient sediment depth to hold drag embedment anchors. BOEM should determine the thickness of the sediment layer necessary to hold a drag embedment anchor. Additionally, BOEM should require sub-bottom profiling in lease blocks to obtain information on the thickness of the sediment layers present. Based on this information, a map should be produced depicting areas of sufficient sediment depth for the anchors.
 4. **Gear and Anchor Recovery:** BOEM should require plans that describe gear recovery operations. These plans should describe how current direction would be monitored to ensure an ascending gear and anchors would not damage deepwater coral and hard bottom habitat.
 5. **Marine Trash and Debris:** Approval documents prepared by BOEM for Atlantic G&G activities shall incorporate policies similar to those found in the Bureau of Safety and Environmental Enforcement's NTL 2012-G01 Marine Trash and Debris Awareness and Elimination.

REVIEW AND COORDINATION

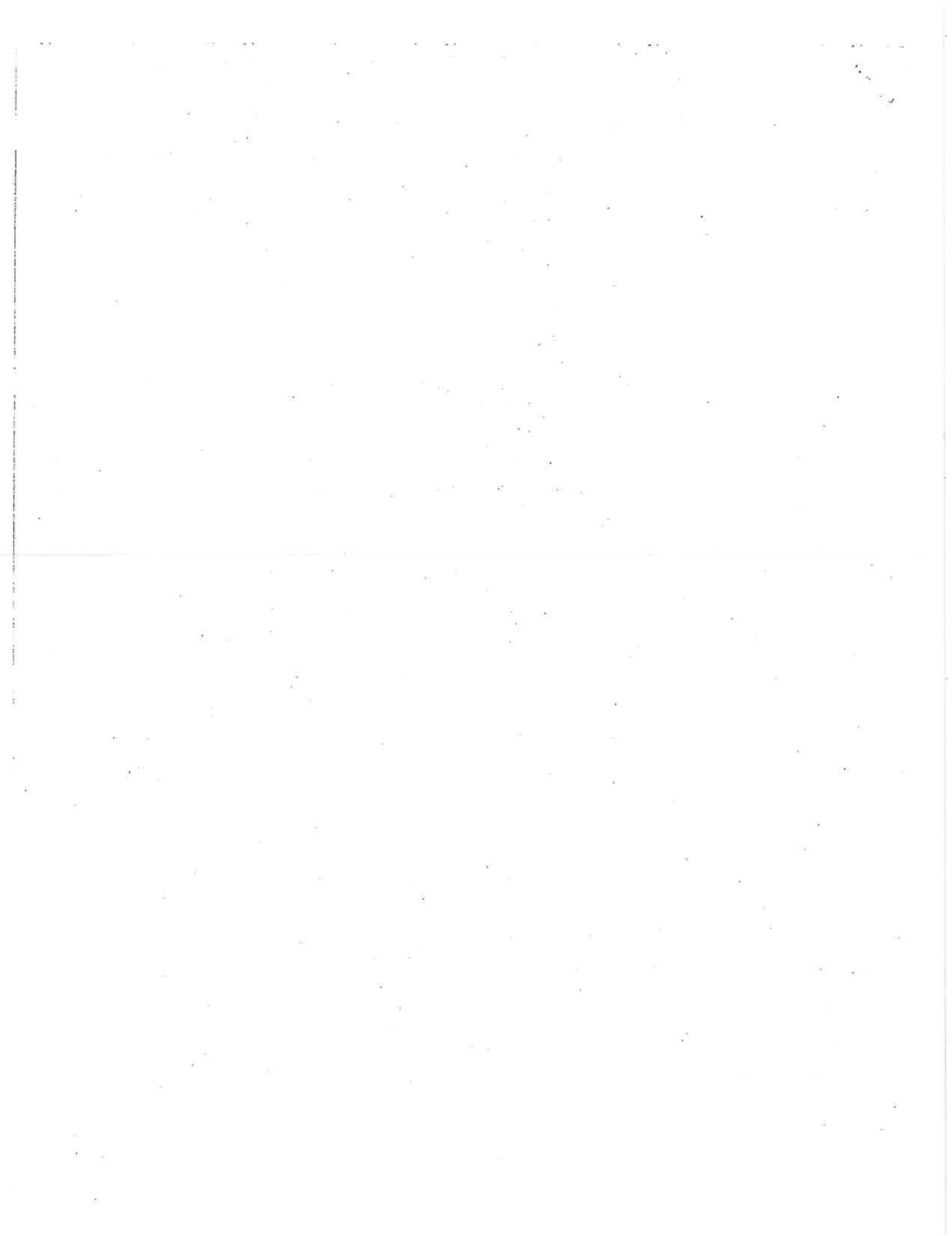
If any modifications are made to BOEM programs described in the EFH Assessment resulting in changes to potential adverse effects on EFH, the BOEM shall notify the appropriate regional NMFS Habitat Conservation Division(s) to initiate discussions regarding the necessity to initiate EFH Consultation. Additionally, we provide the following points of contact in each region for any technical assistance regarding the recommendations above:

Southeast Region: Pace Wilber
Supervisor, South Atlantic Branch
NMFS Southeast Regional Office
Habitat Conservation Division
P.O. Box 12559
Charleston, South Carolina 29422

pace.wilber@noaa.gov
843-762-8601

Northeast Region: Christopher Boelke
Field Offices Supervisor
NMFS Northeast Regional Office
Habitat Conservation Division
55 Great Republic Drive
Gloucester, Massachusetts 01950

christopher.boelke@noaa.gov
978-281-9131





United States Department of the Interior

BUREAU OF OCEAN ENERGY MANAGEMENT

Gulf of Mexico OCS Region
1201 Elmwood Park Boulevard
New Orleans, LA 70123-2394

In Reply Refer To: GM 673E

FEB 19 2014

Mr. John Bullard
Regional Administrator, Northeast Region
National Marine Fisheries Service
55 Great Republic Drive
Gloucester, Massachusetts 01930-2276

Dear Mr. Bullard:

Enclosed is the Bureau of Ocean Energy Management's (BOEM) response to your June 1, 2012, letter containing the National Marine Fisheries Service (NMFS) essential fish habitat (EFH) consultation and conservation recommendations along with additional recommendations to BOEM's proposed actions. Our proposed actions were evaluated in the *Atlantic OCS Proposed Geological and Geophysical Activities in the Mid-Atlantic and South Atlantic Planning Areas, Draft Programmatic Environmental Impact Statement (DPEIS)*. BOEM's responses/clarifications to NMFS' recommendations are in italics.

NMFS: PROGRAMMATIC EFH CONSULTATION AND EFH RECOMMENDATION

We have determined a Programmatic EFH Consultation is not an appropriate mechanism to evaluate EFH impacts of BOEM G&G Activities in the Atlantic OCS based on information available at this time.

We recognize the expanse of ocean that might be surveyed is considerable; however, the number of proposed individual G&G activities requiring BOEM authorization does not appear to be extensive, particularly in the near term. The lack of specific and detailed avoidance measures in the EFH Assessment and supporting DPEIS, in combination with NMFS review of proposed OCS G&G activities and impacts, is the basis for our determination that a Programmatic EFH Consultation is not an appropriate mechanism to evaluate EFH impacts of BOEM G&G activities in the Atlantic OCS. NMFS finds that Atlantic OCS Program activities would have adverse impacts on EFH. Section 305(b)(4)(A) of the Magnuson-Stevens Fishery Conservation and Management Act requires NMFS to provide EFH conservation recommendations. Accordingly, we recommend the following:

1. BOEM shall consult on individual G&G survey activities that may result in

FEB 24 2014

adverse impacts to EFH.

BOEM: At this time, each activity that occurs under this proposed action would receive an environmental review including an EFH Assessment from BOEM. That is, after the application submittal is received, BOEM will review the application and request from the applicant additional information deemed necessary to analyze impacts of the specific activity within specified locations or areas on marine protected species, archaeological resources, biological features, and EFH. During that review, BOEM would draft a site-specific environmental assessment (SEA) with the EFH Assessment as an appendix. On the basis of the SEA and the EFH Assessment, BOEM would then make the determination whether or not proposed specific activities would adversely affect EFH, which would warrant an EFH consultation. As a matter of process, permit applications for all proposed G&G activities in the Atlantic will be posted to BOEM's webpage

(https://www.data.boem.gov/homepg/data_center/other/WebStore/pimaster.asp?appid=5%20).

NMFS: Section 305(b)(4)(B) of the Magnuson-Stevens Act and its implementing regulation at 50 CFR Section 600.920(k) require your office to provide a written response to this letter within 30 days of its receipt. If it is not possible to provide a substantive response within 30 days, an interim response should be provided to NMFS.

BOEM: BOEM sent an extension request dated June 20, 2012.

NMFS: A detailed response then must be provided prior to final approval of the action. Your detailed response must include a description of measures proposed by your agency to avoid, mitigate, or offset the adverse impacts of the activity. If your response is inconsistent with our EFH Conservation Recommendation, you must provide a substantive discussion justifying the reasons for not following the recommendation.

BOEM: This response letter outlines how BOEM proposes to follow NMFS' recommendations.

NMFS: ADDITIONAL RECOMMENDATIONS

DPEIS Appendix C, Section 2.2. indicates there are no active oil and gas leases in the Atlantic OCS. In the event leasing occurs during the period of the proposed action, BOEM may add measures to mitigate the impacts of lease-specific activities in the form of lease stipulations. In addition, BOEM provides additional guidance to lessees and operators through *Notice to Lessees and Operators* (NTL)s. Mitigation measures in the form of lease stipulations are added to the lease terms and are therefore enforceable as part of the lease. Appendix C, Section 3.6.2 discusses BOEM's mitigation philosophy "to mitigate by avoidance." BOEM indicates all authorizations for seafloor-disturbing activities would be subject to restrictions to protect sensitive benthic communities (e.g., hard/live bottom areas, deepwater coral communities, and chemosynthetic communities), including requirements for mapping and avoidance, as well as pre-deployment photographic survey of areas where bottom-founded instrumentation and

appurtenances are to be deployed. We encourage BOEM to actively engage with NMFS to develop protocols and mitigation measures specific to the Atlantic OCS as those may serve to facilitate a Programmatic or General Concurrence EFH Consultation in the future. In the interim, the NMFS provides the following additional recommendations:

1. **Buffer Distances:** In DPEIS Appendix C, Section 3.6.2. BOEM notes it "...has not developed specific buffer zones for sensitive benthic communities in the Atlantic, but it is expected that they would be similar to those that BOEM uses in the Gulf of Mexico." Buffer and radius distances in the Atlantic should be evaluated in a manner that considers water depth, currents, and the risk of damage to nearby coral or hard bottom habitats. Buffer evaluation should be adaptive and allow opportunities for post-deployment assessment and monitoring results to inform future deployments.

BOEM: BOEM agrees with this additional recommendation.

NMFS:

2. **Site Characterization Protocol:** For deployment locations within or adjacent to deepwater coral or hard bottom habitats, site characterization protocols should include:
 - a. Evaluation of existing geophysical and biological data in the areas of interest prior to the initial planning of geophysical and benthic video/photographic surveys.
 - b. Conducting high-resolution multibeam or side-scan sonar surveys to identify coral and hard bottom habitats.
 - c. Surveying proposed and alternative sites with high-resolution video and digital still cameras. Transect spacing of the video and photographic surveys should be coordinated with NMFS.
 - d. Remotely operated vehicle (ROV) surveys with an appropriate number of east-west video transects along areas where hard bottom habitats occur. Additional, north-south transects should be done along areas of high biological interest. The number and location of east-west and north-south transects should be coordinated with NMFS.
 - e. Still images captured at not less than five-minute intervals while over unconsolidated sediments. When over hard substrates or other areas of biological interest, still images should be taken as soon as the strobe recycles and the ROV has moved far enough to avoid overlapping exposures (no less than three images per minute). Images should also be taken of specific organisms for identification purposes. Still digital images should be processed and analyzed to identify and quantify organisms and bottom types. Results should be used to assess cover,

- abundance, and species diversity. Images should be geo-referenced.
- f. Video data collected and reviewed by scientists knowledgeable in the regional deepwater fauna should provide descriptions of the habitat and biota on the videotape during the survey. The video should be reviewed to identify organisms to the lowest taxonomic level practicable and to define biological zones and habitats.
 - g. Digital still images should be analyzed using Coral Point Count with Excel Extensions (CPCe) software (or similar) to determine percent cover of hard bottom substrates and major taxonomic groups in areas of biological interest.

BOEM: BOEM's site-specific evaluations ensure that proposed activities do not set down on sensitive biologic communities by conducting bottom surveys, which may include photography or other methods, to pre-screen areas where equipment or discharges may contact the bottom. The NMFS will be aware of BOEM's mitigations for identifying potentially sensitive benthic communities in the Atlantic when National Environmental Policy Act (NEPA) evaluations are developed for site-specific permit actions under formal consultations and we are certainly willing to entertain reasonable and prudent protective measures for these resources as part of our adaptive management program.

NMFS:

3. **Anchoring Locations:** Anchor deployments for bottom-founded equipment should be limited to areas of sandy bottom with sufficient sediment depth to hold drag embedment anchors. BOEM should determine the thickness of the sediment layer necessary to hold a drag embedment anchor. Additionally, BOEM should require sub-bottom profiling in lease blocks to obtain information on the thickness of the sediment layers present. Based on this information, a map should be produced depicting areas of sufficient sediment depth for the anchors.

BOEM: This recommendation calls for a large effort that BOEM does not believe necessary given the level (minor) and type of projected activities related to this proposed action. Also, this proposed action does not involve leasing activities.

NMFS:

4. **Gear and Anchor Recovery:** BOEM should require plans that describe gear recovery operations. These plans should describe how current direction would be monitored to ensure an ascending gear and anchors would not damage deepwater coral and hard bottom habitat.

BOEM: The "no activity zone" or setback distances from known or potentially sensitive benthic communities that are developed as mitigations during site-specific NEPA evaluations are expected to take account of the spectrum of impacting factors resulting from a

proposed activity. It would include removal of anchoring systems or appurtenances on the sea bottom that are a part of permitted activities. Therefore, a plan would not be required because it would be part of the mitigation.

NMFS:

5. **Marine Trash and Debris:** Approval documents prepared by BOEM for Atlantic G&G activities shall incorporate policies similar to those found in the Bureau of Safety and Environmental Enforcement's NTL 2012-G01 Marine Trash and Debris Awareness and Elimination.

BOEM: BOEM agrees with the recommendation and will prepare guidance similar to the requirements described in NTL 2012-G01 and will have similar mitigations that will apply to Atlantic G&G activities.

NMFS: **REVIEW AND COORDINATION**

If any modifications are made to BOEM programs described in the EFH Assessment resulting in changes to potential adverse effects on EFH, BOEM shall notify the appropriate regional NMFS Habitat Conservation Division(s) to initiate discussions regarding the necessity to initiate EFH Consultation.

BOEM: BOEM agrees with this statement.

Thank you for your comments. Should you have any questions or concerns regarding these responses, please contact Dr. Agatha-Marie Kaller at 504-736-2983 or arie.kaller@boem.gov.

Sincerely,

Orig. Sgd. John L. Rodi

John L. Rodi
Regional Director

cc: Mr. David Dale
Essential Fish Habitat Coordinator
National Marine Fisheries Service
263 13th Avenue South
St. Petersburg, Florida 33701-5505

Mr. Christopher Boelke
Field Offices Supervisor
National Marine Fisheries Service,
Northeast Regional Office
Habitat Conservation Division
55 Great Republic Drive
Gloucester, Massachusetts 01950

Mr. Charles B. Barbee
Chief, Environmental Enforcement Division (HE 3317)
Bureau of Safety and Environmental Enforcement
381 Elden Street
Herndon, Virginia 20170

Mr. TJ Broussard
Chief, Environmental Enforcement Branch (GE 466)
Bureau of Safety and Environmental Enforcement
Gulf of Mexico OCS Region
1201 Elmwood Park Boulevard
New Orleans, Louisiana 70123



FEDERAL REGISTER

Vol. 81

Wednesday,

No. 105

June 1, 2016

Part III

Department of Defense

Department of the Army, Corps of Engineers

33 CFR Chapter II

Proposal To Reissue and Modify Nationwide Permits; Proposed Rule

DEPARTMENT OF DEFENSE**Department of the Army, Corps of Engineers****33 CFR Chapter II**

RIN 0710-AA73

Proposal To Reissue and Modify Nationwide Permits**AGENCY:** Army Corps of Engineers, DoD.**ACTION:** Notice of proposed rulemaking.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is soliciting comments for the reissuance of the existing nationwide permits (NWP), general conditions, and definitions, with some modifications. The Corps is also proposing to issue two new NWPs and one new general condition. The Corps is requesting comment on all aspects of these proposed nationwide permits. The reissuance process starts with this publication of the proposed NWPs in the **Federal Register** for a 60-day comment period. The purpose of this **Federal Register** document 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** document, each Corps district will publish a public notice to solicit comments on its proposed regional conditions for these NWPs.

DATES: Submit comments on or before August 1, 2016.

ADDRESSES: You may submit comments, identified by docket number COE-2015-0017 and/or RIN 0710-AA73, by any of the following methods:

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

Email: NWP2017@usace.army.mil. Include the docket number, COE-2015-0017, in the subject line of the message.

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

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

As explained later, the proposed rule would establish new and revise existing information collection requirements. If you wish to comment on the information collection requirements in this proposed rule, please note that the Office of Management and Budget (OMB) is required to make a decision concerning the collection of information contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**.

Therefore, a comment to OMB on the proposed information collection requirements is best assured of having its full effect if OMB receives it by July 1, 2016.

Instructions: If submitting comments through the Federal eRulemaking Portal, direct your comments to docket number COE-2015-0017. All comments received will be included in the public docket without change and may be made available on-line at <http://www.regulations.gov>, including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through [regulations.gov](http://www.regulations.gov) or email. The [regulations.gov](http://www.regulations.gov) Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to the Corps without going through [regulations.gov](http://www.regulations.gov) your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment we recommend that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: Mr. David Olson at 202-761-4922 or access the U.S. Army Corps of Engineers Regulatory Home Page at <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits.aspx>.

SUPPLEMENTARY INFORMATION:

Background

The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWP) to authorize activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 that will result in no more than minimal individual and cumulative adverse environmental effects. There are currently 50 NWPs. These NWPs were published in the February 21, 2012, issue of the **Federal Register** (77 FR 10184) and expire on March 18, 2017. With this **Federal Register** notice, we are beginning the process for reissuing the NWPs so that the reissued NWPs will be in effect immediately after 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. The Secretary's authority to issue permits has been delegated to the Chief of Engineers and his or her designated representatives. Nationwide permits are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities in jurisdictional waters and wetlands that have no more than minimal adverse environmental impacts (see 33 CFR part 330.1(b)). Activities authorized by NWPs and other general permits must be similar in nature, cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment (see 33 U.S.C. 1344(e)(1)). Nationwide permits can also be issued to authorize activities pursuant to Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR part 322.2(f)). The NWP program is designed to provide timely authorizations for the regulated public while protecting the Nation's aquatic resources.

The phrase "minimal adverse environmental effects when performed separately" refers to the direct and indirect adverse environmental effects caused by a specific activity authorized by an NWP. The phrase "minimal cumulative adverse effect on the environment" refers to the collective direct and indirect adverse environmental effects caused by the all the activities authorized by a particular NWP during the time period that NWP is in effect (a period of no more than 5 years) in a specific geographic region. The appropriate geographic area for assessing cumulative effects is

determined by the decision-making authority for the general permit.

When Corps Headquarters issues or reissues an NWP, it conducts a national-scale cumulative impact assessment in accordance with the National Environmental Policy Act definition of “cumulative impact” at 40 CFR 1508.7. The NEPA cumulative effects analysis prepared by Corps Headquarters for an NWP examines the impact on the environment which results from the incremental impact of its action (*i.e.*, the activities that will be authorized by that NWP) and adds that incremental impact to “other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions” (40 CFR 1508.7). In addition to environmental impacts caused by activities authorized by the NWP, other NWPs, and other types of DA permits, the Corps’ NEPA cumulative effects analysis in each of its national decision documents discusses, in general terms, the environmental impacts caused by other past, present, and reasonably foreseeable future Federal, non-Federal, and private actions. For example, wetlands and other aquatic ecosystems are affected by a wide variety of Federal, non-Federal, and private actions that involve land use/land cover changes, pollution, resource extraction, species introductions and removals, and climate change (Millennium Ecosystem Assessment 2005).

Corps Headquarters fulfills the requirements of NEPA when it finalizes the environmental assessment in its national decision document for the issuance or reissuance of an NWP. An NWP verification issued by a district engineer does not require separate NEPA documentation (see 53 FR 3126, the Corps’ final rule for implementing the National Environmental Policy Act, which was published in the February 3, 1986, issue of the **Federal Register**). When a district engineer issues an NWP verification, he or she is merely verifying that the activity is authorized by an NWP issued by Corps Headquarters. That verification is subject to any activity-specific conditions added to the NWP authorization by the district engineer. When reviewing a request for an NWP verification, the district engineer considers, among other factors, the “cumulative adverse environmental effects resulting from activities occurring under the NWP” (33 CFR 330.5(d)(1)).

If that NWP authorizes discharges of dredged or fill material into waters of the United States, the Corps also conducts a national-scale cumulative

effects analysis in accordance with the 404(b)(1) Guidelines. The 404(b)(1) Guidelines approach to cumulative effects analysis for the issuance or reissuance of general permits is described at 40 CFR 230.7(b).

Corps Headquarters issues a decision document for each NWP, which includes a NEPA environmental assessment, a public interest review, and if applicable, a 404(b)(1) Guidelines analysis. Each NWP is a stand-alone general permit.

When the Corps issues or reissues NWPs, Corps divisions are required to prepare supplemental decision documents to provide regional analyses of the environmental effects of those NWPs. The supplemental decision documents also support the division engineer’s decision on modifying, suspending, or revoking one or more NWPs in a particular region. Nationwide permits are modified on a regional basis through the addition of regional conditions, which restricts the use of the NWPs in those regions that are subject to those regional conditions. Supplemental decision documents include regional cumulative effects analyses conducted under the NEPA definition, and for those NWPs that authorize discharges of dredged or fill material into waters of the United States, regional cumulative effects analyses conducted in accordance with the 404(b)(1) guidelines approach at 40 CFR 230.7(b). The geographic regions considered in a supplemental decision document may be of cumulative adverse environmental effects are made at different geographic scales. In their supplemental decision documents, division engineers will evaluate cumulative effects of each NWP at the scale of a Corps district, state, or other geographic area, such as a watershed or ecoregion. If the division engineer is not suspending or revoking an NWP in a particular region, a supplemental decision document for an NWP includes a statement finding that the use of that NWP in the region will cause only minimal individual and cumulative adverse environmental effects.

For some NWPs, the project proponent may proceed with the NWP activity as long as he or she complies with all terms and conditions of the applicable NWP(s), including regional conditions. When required, water quality certification and/or Coastal Zone Management Act consistency concurrence must be obtained or waived (see general conditions 25 and 26, respectively). Other NWPs require project proponents to notify district engineers of their proposed activities prior to conducting regulated activities,

so that district engineers can make case-specific determinations of NWP eligibility. The notification takes the form of a pre-construction notification (PCN). The purpose of a PCN is to give the district engineer an opportunity to review a proposed NWP activity (generally 45 days after receipt of a complete PCN) to ensure that the proposed activity (*i.e.*, discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States) is authorized by NWP. The PCN requirements for the NWPs are stated in the terms of those NWPs, as well as a number of general conditions, especially general condition 32. Paragraph (b) of general condition 32 lists the information required for a complete PCN. We are also proposing to develop a standard PCN form for use with the 2017 NWPs.

For the 2017 NWPs, the Corps has developed a standard form for PCNs. There will be a separate **Federal Register** notice seeking comment on the NWP PCN form. For more information on the PCN, see the “Administrative Requirements” section of this notice.

Twenty-one of the proposed NWPs require PCNs for all activities, including the two proposed new NWPs. Twelve of the proposed NWPs require PCNs for some activities authorized by those NWPs. Nineteen of the NWPs do not require PCNs, unless notification is required to comply with certain general conditions. All NWPs require PCNs for any proposed activity undertaken by a non-federal entity that might affect listed species or designated critical habitat under the Endangered Species Act (see general condition 18 and 33 CFR part 330.4(f)(2)) or any proposed activity undertaken by a non-federal entity that may have the potential to cause effects to historic properties listed, or eligible for listing in, the National Register of Historic Places (see general condition 20 and 33 CFR 330.4(g)(2)).

Except for NWPs 21, 49, and 50, and activities conducted by non-Federal permittees that require PCNs under paragraph (c) of general conditions 18 and 20, if the Corps district does not respond to the PCN within 45 days of a receipt of a complete PCN the activity is authorized by NWP (see 33 CFR 330.1(e)(1)). Regional conditions imposed by division engineers may also add PCN requirements to one or more NWPs.

When a Corps district receives a PCN, the district engineer reviews the PCN and determines whether the proposed activity will result in no more than minimal individual and cumulative

adverse environmental effects. The district engineer applies the criteria in paragraph 2 of section D, "District Engineer's Decision." The district engineer may add conditions to the NWP authorization, including mitigation requirements, to ensure that the verified NWP activity results in no more than minimal individual and cumulative adverse environmental effects. The district engineer prepares a decision document to explain his or her conclusions. The district engineer will consider cumulative adverse environmental effects within a watershed, county, state, or a Corps district. If the applicant requests a waiver of a linear foot or other NWP limit that is allowed to be waived, and the district engineer determines, after coordinating with the agencies, that the proposed NWP activity will result in no more than minimal adverse environmental effects, the decision document explains the basis for the district engineer's decision. The decision document is part of the administrative record for the NWP verification, and may be made available through a Freedom of Information Act request submitted to the appropriate Corps district office.

Pre-construction notification requirements give the Corps the opportunity to evaluate certain proposed NWP activities on a case-by-case basis to ensure that they will cause no more than minimal adverse environmental effects, individually and cumulatively. Some NWP activities that require PCNs also require agency coordination (see paragraph (d) of general condition 32). This case-by-case review of PCNs often results in district engineers adding activity-specific conditions, including mitigation requirements, to NWP authorizations to ensure that the adverse environmental effects are no more than minimal. Mitigation requirements for NWP activities can include permit conditions (e.g., time-of-year restrictions or use of best management practices) to avoid or minimize adverse effects on certain species or other resources, or compensatory mitigation requirements to offset authorized losses of jurisdictional waters and wetlands so that the net adverse environmental effects are no more than minimal. Any compensatory mitigation required for NWP activities must comply with the Corps' compensatory mitigation regulations at 33 CFR part 332. Review of a PCN may also result in the Corps district asserting discretionary authority to require an individual permit for the proposed activity, if the district

engineer determines, based on the information provided in the PCN and other available information, that adverse environmental effects will be more than minimal, or there are sufficient concerns for any of the Corps public interest review factors (see 33 CFR 330.4(e)(2)). As discussed above, for NWP verifications, district engineers will assess cumulative adverse environmental effects at an appropriate regional scale. If an NWP verification includes multiple authorizations using a single NWP (e.g., linear projects with crossings of separate and distant waters of the United States authorized by NWPs 12 or 14) or non-linear projects authorized with two or more different NWPs (e.g., an NWP 28 for reconfiguring an existing marina plus an NWP 19 for minor dredging within that marina), the district engineer will evaluate the cumulative effects of the applicable NWPs within the appropriate geographic area.

Because the required NEPA cumulative effects and 404(b)(1) Guidelines cumulative effects analyses are conducted by Corps Headquarters in its decision documents for the issuance of the NWPs, district engineers do not need to do comprehensive cumulative effects analyses for NWP verifications. For an NWP verification, the district engineer only needs to assess the cumulative adverse environmental effects of the NWP or NWPs at the appropriate geographic scale (e.g., Corps district, watershed, ecoregion) and include a statement in administrative record stating whether the proposed NWP activity, plus any required mitigation, will result in no more than minimal individual and cumulative adverse environmental effects. If the district engineer determines, after considering mitigation, that there will be more than minimal cumulative adverse environmental effects, he or she will exercise discretionary authority and require an individual permit.

Today's proposal to reissue the 50 existing NWPs with some modifications and to issue two new NWPs reflects the Corps commitment to environmental protection. We are proposing to revise the text of some of the NWPs, general conditions, and definitions so that they are clearer and can be more easily understood by the regulated public, government personnel, and interested parties while retaining terms and conditions that protect the aquatic environment. Making the text of the NWPs clearer and easier to understand will also facilitate compliance with these permits, which will also benefit the aquatic environment. The NWP program allows the Corps to authorize

activities with only minimal adverse environmental impacts in a timely manner. Thus, the Corps is able to better protect the aquatic environment by focusing its limited resources on more extensive evaluations through the individual permit process focused on more rigorous evaluation of activities that have the potential for causing more severe adverse environmental effects.

Through the NWPs, the aquatic environment will also receive additional protection through regional conditions imposed by division engineers and activity-specific conditions added to NWPs by district engineers. These regional conditions and activity-specific conditions further minimize adverse environmental effects, because these conditions can only further restrict use of the NWPs. Nationwide permits also allow Corps district engineers to exercise, on a case-by-case basis, discretionary authority to require individual permits for proposed activities that may result in more than minimal individual and cumulative adverse environmental effects. Nationwide permits help protect the aquatic environment because they provide incentives to permit applicants to reduce impacts to jurisdictional waters and wetlands to meet the restrictive requirements of the NWPs and receive authorization more quickly than they would through the individual permit process. Regional general permits issued by district engineers provide similar environmental protections and incentives to project proponents.

Regional conditions may be imposed on the NWPs by division engineers to take into account regional differences in aquatic resource functions and services across the country and to restrict or prohibit the use of 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 environmental effects. Regional conditions may not be less stringent than the NWPs.

A district engineer may impose activity-specific conditions on an NWP authorization to ensure that the NWP activity will result in no more than minimal individual and cumulative adverse effects on the environment and other public interest review factors. In addition, activity-specific conditions will often include mitigation requirements, including avoidance and

minimization, and possibly compensatory mitigation, to reduce the adverse environmental effects of the proposed activity so that they are no more than minimal. Compensatory mitigation requirements for NWP activities must comply with the applicable provisions of 33 CFR part 332. Compensatory mitigation may include the restoration, establishment, enhancement, and/or preservation of wetlands. Compensatory mitigation may also include the rehabilitation, enhancement, or preservation of streams, as well as the restoration, enhancement, and protection/maintenance of riparian areas next to streams and other open waters. District engineers may also require compensatory mitigation for impacts to other types of aquatic resources, such as seagrass beds, shallow sandy bottom marine areas, and coral reefs.

Compensatory mitigation can be provided through permittee-responsible mitigation, mitigation banks, or in-lieu fee programs. If the required compensatory mitigation will be provided through mitigation bank or in-lieu fee program credits, the permit conditions must comply with the requirements at 33 CFR 332.3(k)(4), and specify the number and resource type of credits that need to be secured by the permittee. If the required compensatory mitigation will be provided through permittee-responsible mitigation, the permit conditions must comply with 33 CFR 332.3(k)(3).

Process for Reissuing the NWPs

The NWPs reissued on February 13, 2012, went into effect on March 19, 2012. Those NWPs expire on March 18, 2017. The process for reissuing the NWPs for the next five-year period 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 explain the reason or reasons why a public hearing should be held. If we determine that a public hearing or hearings would assist in making a decision on the proposed NWPs, general conditions, and 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 document in docket number COE-2015-0017 at www.regulations.gov as well as the Corps Regulatory Program home page at <http://www.usace.army.mil/Missions/>

CivilWorks/RegulatoryProgramandPermits.aspx.

Shortly after the publication of this **Federal Register** notice, Corps district offices will issue public notices to solicit comments on proposed regional conditions. In their district public notices, district engineers may also propose to suspend or revoke some or all of these NWPs if they have issued, or are proposing to issue, regional general permits, programmatic general permits, or section 404 letters of permission for use instead of some or all of these 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 draft final NWPs will be subjected to another review under Executive Order 12866, Regulatory Planning and Review. The Corps will try to publish the final NWPs in the **Federal Register** approximately 90 days before the planned effective date of March 19, 2017, the day after the 2012 NWPs expire. This 90-day period provides coastal state governments the opportunity to make their Coastal Zone Management Act (CZMA) consistency determinations for these NWPs, consistent with 15 CFR 930.36(b). During this 90-day period, state governments, tribal governments, and EPA will make their Clean Water Act Section 401 water quality certifications (WQCs) for these NWPs. The CZMA/WQC and regional conditioning processes are discussed in more detail below.

Within this 90-day period, Corps districts will prepare supplemental decision documents and proposed regional conditions for approval by division engineers before the final NWPs go into effect. Supplemental decision documents address the environmental considerations related to the use of NWPs in a Corps district, state, or other geographic region. The supplemental decision documents will certify that the NWPs, with any regional conditions or geographic suspensions or revocations, will authorize only those activities that result in no more than minimal individual and cumulative adverse effects on the environment or any relevant public interest review factor.

Existing and New Permits

Activities authorized by the 2012 NWPs remain authorized by those NWPs until March 18, 2017. An activity completed under the authorization provided by a 2012 NWP continues to

be authorized by that NWP (see 33 CFR 330.6(b)). Activities authorized by the 2012 NWPs that have commenced or are under contract to commence by March 18, 2017, will have one year (*i.e.*, until March 18, 2018) to complete those activities under the terms and conditions of the 2012 NWPs (see 33 CFR 330.6(b)). Activities previously authorized by the 2012 NWPs that have not commenced or are not under contract to commence by March 18, 2017, will require reauthorization under the 2017 NWPs, provided those activities qualify for authorization under the 2017 NWPs. If those activities no longer qualify for NWP authorization because they do not meet the terms and conditions of the 2017 NWPs (including any regional conditions imposed by division engineers), the project proponent will need to obtain an individual permit, or seek authorization under a regional general permit, if such a general permit is available in the applicable Corps district and can be used to authorize the proposed activity.

National Environmental Policy Act Compliance

We have prepared a draft decision document for each proposed NWP. Each draft decision document contains an environmental assessment (EA). The EA includes the public interest review described in 33 CFR 320.4(b). The EA generally discusses the anticipated impacts the NWP will have on the human environment and the Corps' public interest review factors. If a proposed NWP authorizes discharges of dredged or fill material into waters of the United States, the draft decision document will also include analysis conducted pursuant to guidelines set out in section 404(b)(1) of the Clean Water Act (404(b)(1) Guidelines) in accordance with 40 CFR 230.7. These decision documents evaluate the environmental effects of each NWP from a national perspective.

The draft decision documents for the proposed NWPs are available on the internet at: www.regulations.gov (docket ID number COE-2015-0017) as Supporting Documents. We are soliciting comments on these draft national decision documents, and any comments received will be considered when preparing the final decision documents for the NWPs.

After the NWPs are issued or reissued, division engineers will issue supplemental decision documents to evaluate environmental effects on a regional basis (*e.g.*, state or Corps district). 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 or her division. For some Corps districts, their geographic area of responsibility covers an entire state. For other states, there is more than one Corps district responsible for implementing the Corps Regulatory Program, including the NWP program. In those states, there is a lead Corps district responsible for preparing the supplemental decision documents for all of the NWPs. The supplemental decision documents will discuss regional conditions imposed by division engineers to protect the aquatic environment and ensure that any adverse environmental effects resulting from NWP activities in that region will be no more than minimal, individually and cumulatively.

For the NWPs, the assessment of cumulative effects occurs at three levels: National, regional, and the verification stage. Each national NWP decision document includes a national-scale NEPA cumulative effects analysis. Each supplemental decision document has a NEPA cumulative effects analysis conducted for a region, which is usually a state or Corps district. When a district engineer issues a verification letter in response to a PCN or a voluntary request for a NWP verification, the district engineer prepares a brief decision document. That decision document explains whether the proposed NWP activity, after considering permit conditions such as mitigation requirements, will result in no more than minimal individual and cumulative adverse environmental effects.

If the NWP is not suspended or revoked in a state or a Corps district, the supplemental decision document includes a certification that the use of the NWP in that district, with any applicable regional conditions, will result in no more than minimal cumulative adverse environmental effects.

After the NWPs are issued or reissued, evaluations by a district engineer may result in a recommendation to the division engineer to modify, suspend, or revoke one or more NWPs in a particular geographic region or watershed at a later time. Such a recommendation will occur if the district engineer finds information indicating that the use of an NWP in a particular area may result in more than minimal individual or cumulative adverse environmental effects. In such

cases, the division engineer will amend the applicable supplemental decision documents to account for the modification, suspension, or revocation of those NWPs.

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 and 33 CFR part 330. 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 in Clean Water Act 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 while maintaining environmental protection, by efficiently authorizing activities that have no more than minimal adverse environmental effects, consistent with Congressional intent in the 1977 amendments to the Federal Water Pollution Control Act. Keeping the number of NWPs manageable is a key component for making the NWPs protective of the environment and streamlining the authorization process for those general categories of activities that have no more than minimal individual and cumulative adverse environmental effects.

The various terms and conditions of these NWPs, including the NWP regulations at 33 CFR 330.1(d) and 330.4(e), allow district engineers to exercise discretionary authority to modify, suspend, or revoke NWP authorizations or to require individual permits, and ensure compliance with section 404(e) of the Clean Water Act. For each NWP that may authorize discharges of dredged or fill material into waters of the United States, the national and supplemental decision documents include 404(b)(1) Guidelines analyses. These 404(b)(1) Guidelines analyses are conducted in accordance with 40 CFR part 230.7.

The 404(b)(1) Guidelines analyses in the national and supplemental decision documents also include a cumulative effects analysis, in accordance with 40 CFR 230.7(b) and 230.11(g). A 404(b)(1) Guidelines cumulative effects analysis is provided in addition to the NEPA cumulative effects analysis because the implementing regulations for NEPA and the 404(b)(1) Guidelines define

“cumulative impacts” or “cumulative effects” differently.

2015 Revisions to the Definition of “Waters of the United States”

In the June 29, 2015, edition of the *Federal Register* (80 FR 37054) the U.S. Environmental Protection Agency (EPA) and the Army published a final rule amending the definition of “waters of the United States” in the Corps’ regulations at 33 CFR part 328 and in a number of EPA’s regulations. Numerous parties filed multiple challenges to the 2015 final rule, which currently are pending. On October 9, 2015, the United States Court of Appeals for the Sixth Circuit issued a stay of the rule pending further order of that court.

We are seeking the views of NWP users on how the 2015 revisions to the definition of “waters of the United States” might affect the applicability and efficiency of the proposed NWPs. We are also seeking comments on changes to the NWPs, general conditions, and definitions that would help ensure that activities that result in no more than minimal individual and cumulative adverse environmental effects can continue to be authorized by the NWPs. The objective of such changes is to continue to be consistent with Congressional intent for section 404(e) of the Clean Water Act, which calls for a streamlined authorization process for regulated activities with only minimal adverse environmental effects.

After the final rule defining waters of the United States was published on June 29, 2015, the Corps received letters from several entities requesting that the Corps consider increasing the acreages limits and PCN thresholds for several NWPs. One group suggested increasing the acreage limits and PCN thresholds for NWPs 12, 14, 18, 43, 51, and 52 and another group asked for increases in the acreage limits and PCN thresholds for NWPs 12, 14, 39, 43, 51, and 52. The former group recommended increasing the acreage limits of NWPs 12, 14, 43, 51, and 52 to one acre and the acreage limit of NWP 18 to ½-acre. The latter group said the acreage limits of NWPs 12, 14, 39, 43, 51, and 52 should be raised to two acres. Both of these groups cited the President’s Climate Action Plan and EPA’s proposed Clean Power Plan as reasons to increase the acreage limits and PCN thresholds of these NWPs. They said these NWPs are important tools for meeting goals for natural gas and renewable energy production and transmission, to reduce greenhouse gas emissions. Further, they assert that new and modified infrastructure, some of which would

likely be authorized by NWP 12, 39, 51 and 52, would need to be constructed and operational in the next several years to meet the goals in the Climate Action Plan.¹

Therefore, we are seeking comment on changes in the terms and conditions of the NWPs. These could include changes in acreage and linear foot limits (see below), PCN thresholds, and the use of other tools for complying with the no more than minimal adverse environmental effects requirement for NWPs and other types of general permits. Such tools include using PCNs and the activity- and site-specific review they require and retaining the 1/10-acre threshold for requiring wetland compensatory mitigation (see paragraph (c) of general condition 23).

Acreage Limits and Pre-Construction Notification Thresholds

We are seeking comment on whether to retain the 1/2-acre limit that has been imposed on certain NWPs (*i.e.*, NWPs 12, 14, 21, 29, 39, 42, 43, 44, 50, 51, and 52), or to impose different acreage limits on these NWPs. We are seeking comment on the acreage limits in part because of the suggestions from various entities mentioned in the previous section of this notice. Another reason we are soliciting comments on the acreage limits is to help determine whether there are alternative acreage limits that would be more effective at ensuring that the NWPs continue to meet their intended purpose of providing a streamlined authorization process for activities resulting in no more than minimal individual and cumulative adverse environmental effects. Many of the NWPs listed in the previous sentence have had this 1/2-acre limit since 2000. Nationwide permit 50 was first issued in 2007 and NWPs 51 and 52 were originally issued in 2012. We welcome comments and suggestions for higher or lower acreage limits and those comments and suggestions should include relevant data and other information that explain why the acreage limits should be changed. Different acreage limits can be suggested for NWPs that authorize different categories of activities.

Comments should explain how your recommended changes to acreage limits would help the NWP program continue to comply with Congressional intent for

a streamlined process for authorizing regulated activities that result in no more than minimal individual and cumulative adverse environmental effects. The intent of Congress was articulated through the 1977 amendments to the Federal Water Pollution Control Act (33 U.S.C. 1344(e)). Commenters should consider that general permits are an important tool for protecting the environment by providing incentives to minimize impacts to jurisdictional waters and wetlands to qualify for a streamlined authorization process. If those incentives are removed by reducing the acreage limits so that designing projects to qualify for NWP authorization is no longer practical, project proponents may submit permit applications for activities with substantial adverse environmental impacts. General permits are also an important tool for managing the Corps' Regulatory Program, and allow the Corps to focus its resources on evaluating individual permit applications for proposed activities that have the potential for resulting in substantial adverse environmental impacts.

We are also soliciting comments on changing the PCN thresholds for those NWPs that require pre-construction notification. Pre-construction notifications are an important tool for ensuring that NWP activities result in only minimal and individual and cumulative adverse environmental effects. Pre-construction notifications allow district engineers to evaluate the activity- and site-specific circumstances of proposed NWP activities to decide whether those activities are eligible for NWP authorization or require individual permits. In addition, PCNs provide district engineers with the opportunity to impose activity-specific conditions on NWPs, including mitigation requirements, to comply with the statutory requirements of Section 404(e) of the Clean Water Act. Pre-construction notifications also facilitate compliance with the Endangered Species Act and the National Historic Preservation Act.

There are circumstances where requiring PCNs for all activities authorized by an NWP is not necessary to satisfy the "no more than minimal" adverse environmental effects requirement. We are soliciting comment on whether the PCN thresholds for specific NWPs should be changed to improve the efficiency of the NWP Program while maintaining strong protection of the aquatic environment and other public interest review factors relevant to the Corps' Regulatory Program.

Waivers of Certain Nationwide Permit Limits

Since 2002, certain NWPs have had a 300-linear foot limit for losses of stream bed that could be waived after a district engineer evaluates the PCN and determines that the proposed NWP activity would result in no more than minimal individual and cumulative adverse environmental effects. In the 2012 NWPs, we added a requirement that waivers of certain NWP limits could only be granted through a written determination by a district engineer concluding that the proposed NWP activity would result only in minimal adverse environmental effects. The ability to waive those limits provides flexibility in the NWPs to authorize, after an activity-specific review, activities that are specifically determined by district engineers to result in no more than minimal adverse environmental effects.

In today's proposal, the following NWPs have certain limits that can be waived with a written determination of a district engineer after review of a PCN: NWPs 13, 21, 29, 36, 39, 40, 42, 43, 44, 50, 51, and 52. For all these NWPs, the district engineer can only grant the waiver upon making a written determination that the NWP activity will result in only minimal adverse environmental effects. For NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52, the total loss of waters of the United States, including any waivers of the 300 linear foot limit for the loss of intermittent and ephemeral stream bed, cannot exceed 1/2-acre.

The Corps uses an internal, automated information system to track all individual permit applications and NWP verification requests, as well as verifications for regional general permits and programmatic general permits. That automated information system, known as ORM, is used to record requested amounts of impacts to jurisdictional waters and wetlands, as well as proposed compensatory mitigation. When the Corps issues an individual permit or a general permit verification, Corps district project managers record the amounts of authorized impacts and, if required, compensatory mitigation. The proposed and authorized impacts and compensatory mitigation are recorded as acres or linear feet, or both, depending on the judgment of the Corps project manager. The Corps' automated information system does not specifically track waivers for NWP verifications, but for the 2017 NWPs we will be modifying that system by adding data fields to record the use of waivers for these NWPs.

¹ Nationwide permits 3, 12, and 14 are frequently used to authorize discharges of dredged or fill material into waters of the United States and structures and work in navigable waters of the United States associated with the construction and maintenance of infrastructure, including energy and transportation infrastructure. Nationwide permits 51 and 52 authorize renewable energy projects.

In the 2012 NWP, agency coordination was required for any proposed activity authorized by NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 where the applicant requested a waiver of the 300 linear foot limit for the loss of intermittent or ephemeral stream bed. The agency coordination process is described in paragraph (d)(2) of the “pre-construction notification” general condition, and we are not proposing any changes to that agency coordination process. These waivers can only be issued after an activity-specific evaluation, consideration of agency comments received in response to agency coordination, and the district engineer’s consideration of the nine factors for making minimal effect determinations described in paragraph D.1 in the section entitled “District Engineer’s Decision” (77 FR 10184 at 10287–10288).

To gather more information on the use of waivers, we are soliciting comment on five aspects of waivers:

(1) Making changes to the numeric limits that can be waived;

(2) whether to retain the authority of district engineers to issue activity-specific waivers of certain NWP limits;

(3) whether to impose a linear foot cap on waivers to the 500 linear foot limit for NWPs 13 and proposed NWP B (e.g., a total waiver amount of 1,000 linear feet), and the 20 foot limit (e.g., a total waiver amount of 40 linear feet) in NWP 36;

(4) whether to impose a linear foot cap (e.g., a total waiver amount of 1,000 linear feet) on losses of intermittent and ephemeral stream bed potentially eligible for waivers of the 300 linear foot limit for losses of stream bed in NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52; and

(5) whether to require compensatory mitigation to offset all losses of stream bed (consistent with General Condition 23(d)) authorized by waivers of the 300 linear foot limit for NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52.

Comments on suggested changes to the numeric limits above which a waiver could be issued, and comments on whether to retain or remove the waiver provisions, should be accompanied by data and other information supporting the commenter’s views on these questions. If the ability for district engineers to issue waivers of certain NWP limits is removed, then individual permits would be required for proposed activities with losses of waters of the United States that exceed those limits.

NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 currently have a ½-acre cap on losses of waters of the United States.

Any loss of stream bed, including any losses of intermittent and ephemeral stream bed in excess of 300 linear feet that are waived upon a written determination by the district engineer after agency coordination, counts towards that ½-acre limit. We are seeking comment on whether there should also be a linear foot cap on those waivers, in addition to the ½-acre limit. Commenters supporting a linear foot cap on waivers for the loss of intermittent and ephemeral stream bed should provide a suggested numeric linear foot cap. Commenters should also explain how their suggested linear foot limit will help ensure that these NWPs only authorize activities with no more than minimal adverse environmental effects, and include supporting data and other information.

We are also seeking comment on whether to require compensatory mitigation for all losses of intermittent or ephemeral stream bed authorized by NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 through a district engineer’s written waiver of the 300 linear foot limit. Commenters are encouraged to provide data to support their position including providing data that demonstrate that compensatory mitigation is necessary to reach a finding of minimal impact based on the criteria listed in paragraph 2, section D for specific resource types.

It is important to note that district engineers can only issue those waivers after conducting agency coordination. District engineers fully consider agency comments received during that coordination, including any agency comments recommending requiring compensatory mitigation to ensure that the net adverse environmental effects are no more than minimal. In the NWP program, district engineers require compensatory mitigation on a case-by-case basis when necessary to ensure that proposed NWP activities will result in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR part 330.1(e)(3) and general condition 23).

When making waiver decisions for NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52, as well as compensatory mitigation decisions, district engineers consider the nine factors in paragraph 2 of Section D, District Engineer’s Decision. The factors most relevant to compensatory mitigation decision making are: The environmental setting in the vicinity of the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic

resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss), the duration of the adverse effects (temporary or permanent), and the importance of the aquatic resource functions to the region (e.g., watershed or ecoregion). We are soliciting comment on the appropriateness and practicability of requiring compensatory mitigation for all waivers of the 300 linear foot limit for losses of stream bed, to offset the losses of intermittent and ephemeral stream that are authorized by written waivers issued by district engineers for these NWPs. We are also seeking comments and suggestions on technical approaches for providing compensatory mitigation to offset losses of stream bed authorized by those written waivers.

Compliance With the Endangered Species Act

The Corps has determined that the NWP regulations at 33 CFR 330.4(f) and NWP general condition 18, endangered species, ensure that all activities authorized by NWPs comply with section 7 of the Endangered Species Act (ESA). Those regulations and general condition 18 require non-federal permittees to submit PCNs for any activity that might affect listed species or designated critical habitat. The Corps then evaluates the PCN and makes an effect determination for the proposed NWP activity for the purposes of ESA section 7. The Corps established the “might affect” threshold in 33 CFR 330.4(f)(2) and paragraph (c) of general condition 18 because it is more stringent than the “may affect” threshold for section 7 consultation in the U.S. Fish and Wildlife Service’s (FWS) and National Marine Fisheries Service’s (NMFS) ESA section 7 consultation regulations at 50 CFR part 402. The word “might” is defined as having “less probability or possibility” than the word “may” (Merriam-Webster’s Collegiate Dictionary, 10th edition).

If the project proponent is required to submit a PCN and the proposed activity might affect listed species or critical habitat, the activity is not authorized by NWP until either the Corps district makes a “no effect” determination or makes a “may affect” determination and completes formal or informal ESA section 7 consultation.

When evaluating a PCN, the Corps will either make a “no effect” determination or a “may affect” determination. If the Corps makes a “may affect” determination, it will notify the non-federal applicant and the activity is not authorized by NWP until ESA Section 7 consultation has been completed. If the non-federal project

proponent does not comply with 33 CFR 330.4(f)(2) and general condition 18, and does not submit the required PCN, then the activity is not authorized by NWP. In such situations, it is an unauthorized activity and the Corps district will determine an appropriate course of action to respond to the unauthorized activity.

Federal agencies, including state agencies (e.g., certain state Departments of Transportation) to which the Federal Highway Administration has assigned its responsibilities pursuant to 23 U.S.C. 327, are required to follow their own procedures for complying with Section 7 of the ESA (see 33 CFR 330.4(f)(1) and paragraph (b) of general condition 18). This includes circumstances when an NWP activity is part of a larger overall federal project or action. The federal agency's ESA section 7 compliance covers the NWP activity because it is undertaking the NWP activity and possibly other related activities that are part of a larger overall federal project or action.

On October 15, 2012, the Chief Counsel for the Corps issued a letter to the FWS and NMFS (the Services) clarifying the Corps' legal position regarding compliance with the ESA for the February 13, 2012, reissuance of 48 NWPs and the issuance of two new NWPs. That letter explained that the issuance or reissuance of the NWPs, as governed by NWP general condition 18 (which applies to every NWP and which relates to endangered and threatened species), and 33 CFR 330.4(f), results in "no effect" to listed species or critical habitat, and therefore the reissuance/issuance action itself does not require ESA section 7 consultation. Although the reissuance/issuance of the NWPs has no effect on listed species or their critical habitat and thus requires no ESA section 7 consultation, the terms and conditions of the NWPs, including general condition 18, and 33 CFR 330.4(f) ensure that ESA consultation will take place on an activity-specific basis wherever appropriate at the field level of the Corps, FWS, and NMFS. The principles discussed in the Corps' October 15, 2012, letter apply to this proposed issuance/reissuance of NWPs. Those principles are discussed in more detail below.

The only activities that are immediately authorized by NWPs are "no effect" activities under Section 7 of the ESA and its implementing regulations at 50 CFR part 402. Therefore, the issuance or reissuance of NWPs does not require ESA section 7 consultation because no activities authorized by any NWPs "may affect" listed species or critical habitat without

first completing activity-specific ESA Section 7 consultations with the Services, as required by general condition 18 and 33 CFR 330.4(f). Regional programmatic ESA section 7 consultations may also be used to satisfy the requirements of the NWPs in general condition 18 and 33 CFR 330.4(f)(2) if a proposed NWP activity is covered by that regional programmatic consultation.

ESA section 7 requires each federal agency to ensure, through consultation with the Services, that "any action authorized, funded, or carried out" by that agency "is not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitat." (See 16 U.S.C. 1536(a)(2).) Accordingly, the Services' section 7 regulations specify that an action agency must ensure that the action "it authorizes," including authorization by permit, does not cause jeopardy or adverse modification. (See 50 CFR 402.01(a) and 402.02.) Thus, in assessing application of ESA section 7 to NWPs issued or reissued by the Corps, the proper focus is on the nature and extent of the specific activities "authorized" by the NWPs and the timing of that authorization.

The issuance or reissuance of the NWPs by the Chief of Engineers imposes express limitations on activities authorized by those NWPs. These limitations are imposed by the NWP terms and conditions, including the general conditions that apply to all NWPs regardless of whether pre-construction notification is required. With respect to listed species and critical habitat, general condition 18 expressly prohibits any activity "which 'may affect' a listed species or critical habitat, unless section 7 consultation addressing the effects of the proposed activity has been completed." General condition 18 also states that if an activity "may affect" a listed species or critical habitat, a non-federal applicant must submit a PCN 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." Permit applicants that are Federal agencies should follow their own requirements for complying with the ESA (see 33 CFR 330.4(f)(1)), and if a PCN is required the district engineer will review the federal agency's ESA compliance documentation and determine whether it is sufficient to address ESA compliance for the NWP activity.

Thus, because no NWP can or does authorize an activity that may affect a listed species or critical habitat absent

an activity-specific ESA section 7 consultation, and because any activity that may affect a listed species or critical habitat must undergo an activity-specific consultation before the district engineer can verify that the activity is authorized by NWP, the issuance or reissuance of NWPs has "no effect" on listed species or critical habitat. Accordingly, the action being "authorized" by the Corps (i.e., the issuance or re-issuance of the NWPs themselves) has no effect on listed species or critical habitat.

To help ensure protection of listed species and critical habitat, general condition 18 establishes a higher threshold than the threshold set forth in the Services' ESA section 7 regulations for initiation of section 7 consultation. Specifically, while section 7 consultation must be initiated for any activity that "may affect" listed species or critical habitat, for non-federal permittees general condition 18 requires submission of a PCN to the Corps if "any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat" and prohibits work until "notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized." (See paragraph (c) of general condition 18.) The PCN must "include the name(s) of the endangered or threatened species that might be affected by the proposed work or that utilize the designated critical habitat that might be affected by the proposed work." (See paragraph (b)(7) of general condition 32.) Paragraph (f) of general condition 18 notes that information on the location of listed species and their critical habitat can be obtained from the Services directly, or from their Web sites.

General condition 18 makes it clear to project proponents that an NWP does not authorize the "take" of an endangered or threatened species. Paragraph (e) of general condition 18 also states that a separate authorization (e.g., an ESA section 10 permit or a biological opinion with an "incidental take statement") is required to take a listed species. In addition, paragraph (a) of general condition 18 states that no activity is authorized by NWP which is likely to "directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation" or "which will directly or indirectly destroy or adversely modify the critical habitat of such species." Such activities would require district engineers to exercise their discretionary authority

and subject the proposed activity to the individual permit review process, because an activity that would jeopardize the continued existence of a listed species, or a species proposed for listing, or that would destroy or adversely modify the critical habitat of such species would not result in minimal adverse environmental effects and thus cannot be authorized by NWP.

During the process for developing regional conditions, Corps districts coordinate or consult with FWS and/or NMFS regional or field offices to identify regional conditions that can provide additional assurance of compliance with general condition 18 and 33 CFR 330.4(f)(2). Such regional conditions can add PCN requirements to one or more NWPs in areas inhabited by listed species or where designated critical habitat occurs. Regional conditions can also be used to establish time-of-year restrictions when no NWP activity can take place to ensure that individuals of listed species are not adversely affected by such activities. Corps districts will continue to consider through regional consultations, local initiatives, or other cooperative efforts additional information and measures to ensure protection of listed species and critical habitat, the requirements established by general condition 18 (which apply to all uses of all NWPs), and other provisions of the Corps regulations ensure full compliance with ESA section 7.

Corps district offices meet with local representatives of the FWS and NMFS to establish or modify existing procedures, where necessary, to ensure that the Corps has the latest information regarding the existence and location of any threatened or endangered species or their critical habitat. Corps districts can also establish, through local procedures or other means, additional safeguards that ensure compliance with the ESA. Through formal ESA section 7 consultation, or through other coordination with the FWS and/or the NMFS, as appropriate, the Corps establishes procedures to ensure that NWP activities will not jeopardize any threatened and endangered species or result in the destruction or adverse modification of designated critical habitat. Such procedures may result in the development of regional conditions added to the NWP by the division engineer, or in activity-specific conditions to be added to an NWP authorization by the district engineer.

Based on the fact that NWP issuance or reissuance has no effect on listed species or critical habitat and any activity that "may affect" listed species or critical habitat will undergo activity-

specific ESA section 7 consultation, there is no requirement that the Corps undertake programmatic consultation for the NWP program. The national programmatic consultations conducted in the past for the NWP program were voluntary consultations. Regional programmatic consultation can be conducted by Corps districts and regional or local offices of the FWS and/or NMFS to provide further assurance against potential adverse effects on listed species or critical habitat, and assure other benefits to listed species or critical habitat, such as through the establishment of additional procedures, regional NWP conditions, activity-specific NWP conditions, or other safeguards that may be employed by Corps district offices based on further discussions between the Corps and the FWS and NMFS.

The programmatic ESA section 7 consultations the Corps conducted for the 2007 and 2012 NWPs were voluntary consultations. The voluntary programmatic consultation conducted with the NMFS for the 2012 NWPs resulted in a biological opinion issued on February 15, 2012, which was replaced by a new biological opinion issued on November 24, 2014, after the proposed action was modified and triggered re-initiation of that programmatic consultation. The programmatic consultation on the 2012 NWPs with the FWS did not result in a biological opinion.

In the Corps Regulatory Program's automated information system (ORM), the Corps collects data on all individual permit applications, all NWP PCNs, all voluntary requests for NWP verifications where the NWP or general conditions do not require PCNs, and all verifications of activities authorized by regional general permits. For all written authorizations issued by the Corps, the collected data include authorized impacts and required compensatory mitigation, as well as information on all consultations conducted under section 7 of the ESA. Every year, the Corps evaluates over 30,000 NWP PCNs and requests for NWP verifications when PCNs are not required, and provides written verifications for those activities when district engineers determine those activities result in no more than minimal adverse environmental effects. During the evaluation process, district engineers assess potential impacts to listed species and critical habitat and conduct section 7 consultations whenever they determine NWP activities may affect listed species or critical habitat. District engineers will exercise discretionary authority and require individual permits when

proposed NWP activities will result in more than minimal adverse environmental effects.

Each year, the Corps conducts thousands of ESA section 7 consultations with the FWS and NMFS for activities authorized by NWPs. These section 7 consultations are tracked in ORM. During the period of March 19, 2012, to December 14, 2015, Corps districts conducted 1,188 formal consultations and 7,327 informal consultations for NWP activities under ESA section 7. During that time period, the Corps also used regional programmatic consultations for 7,679 NWP verifications to comply with ESA section 7. Therefore, each year NWP activities are covered by an average of more than 4,300 formal, informal, and programmatic ESA section 7 consultations with the FWS and/or NMFS.

For one of the protective measures in NMFS's 2014 biological opinion, Corps districts posted information to assist prospective NWP users in complying with general condition 18. That implementation guidance was issued on August 5, 2014, and provides general guidance to prospective permittees on whether a PCN should be submitted for a proposed NWP activity to comply with general condition 18. It also directs prospective permittees to NMFS's Web site for additional information on listed species and critical habitat under their jurisdiction. Districts coordinated that document with NMFS regional and field offices and had the option of adding region-specific information. For the 2017 NWPs, we plan to continue using that information document, and expanding it to include information on listed species and critical habitat under the jurisdiction of the FWS.

During the process for reissuing the NWPs, Corps districts will coordinate with regional and field offices of the FWS and NMFS to discuss whether new or modified regional conditions should be imposed on the NWPs to improve protection of listed species and designated critical habitat. Regional conditions must comply with the Corps' regulations for adding permit conditions (33 CFR 325.4), and the Corps decides whether suggested regional conditions identified during this coordination are appropriate for the NWPs. During this coordination, other tools, such as additional regional programmatic consultations or standard local operating procedures, might be identified to facilitate compliance with the ESA while streamlining the process for authorizing activities under the NWPs. Section 7 consultation on regional conditions only occurs when a

Corps districts makes a “may affect” determination and initiates formal or informal section 7 consultation with the FWS and/or NMFS, depending on the species that may be affected. Otherwise, the Corps district coordinates with the FWS and/or NMFS. Regional conditions, standard local operating procedures, and regional programmatic consultations are important tools for protecting listed species and critical habitat and helping to tailor the NWP program to address specific species, their habitats, and the stressors that affect those species.

Compliance With the Essential Fish Habitat Provisions of the Magnuson-Stevens Fishery Conservation and Management Act

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. This approach continues the EFH Conservation Recommendations provided by NMFS Headquarters to Corps Headquarters in 1999 for the NWP program. Corps districts that have EFH designated within their geographic areas of responsibility will coordinate with NMFS regional offices, to the extent necessary, to develop NWP regional conditions that conserve EFH and are consistent the NMFS regional EFH Conservation Recommendations. Corps districts will conduct consultations in accordance with the EFH consultation regulations at 50 CFR 600.920.

Regional Conditioning of Nationwide Permits

Under section 404(e) of the Clean Water Act, NWPs can only be issued for those activities that result in no more than minimal individual and cumulative adverse environmental effects. For activities that require authorization under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403), the Corps’ regulations at 33 CFR 322.2(f) have a similar requirement. An important mechanism for ensuring compliance with these requirements is regional conditions imposed by division engineers to address local environmental concerns. Coordination with federal and state agencies and 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 other resources and helps ensure that

the NWPs authorize only those activities that result in no more than 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 appropriate federal, state, and local agencies, as well as Tribes. The process for adding Corps regional conditions to the NWPs is described at 33 CFR 330.5(c).

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, where regional general permits are issued to authorize activities consistent with that plan that have only minimal adverse environmental effects.
- Revoking certain NWPs in a watershed or other type of geographic area (e.g., a state or county).
- Adding PCN requirements to NWPs to require notification for all activities or lowering PCN thresholds, in certain watersheds or other types of geographic areas, or in certain types of waters of the United States.
- Reducing NWP acreage limits in certain types of waters of the United States or specific waterbodies, or in specific watersheds or other types of geographic regions.
- 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 facilitate compliance with general condition 18, to enhance protection of listed species or critical habitat under the Endangered Species Act.
- Conditions necessary to facilitate compliance with general condition 17, to enhance protection of tribal trust resources, including natural and cultural resources and Indian lands.
- Conditions necessary for ensuring compliance with general condition 20, to protect historic properties.

- Conditions necessary to ensure that NWP activities have no more than minimal adverse effects to Essential Fish Habitat.

Corps regional conditions approved by division engineers cannot remove or reduce any of the terms and conditions of the NWPs, including general conditions. Corps regional conditions cannot lessen PCN requirements. In other words, Corps regional conditions can only be more restrictive than the NWP terms and conditions established by Corps Headquarters when it issues or reissues an NWP.

Water quality certification (WQC) regional conditions are added to the NWPs as a result of water quality certifications issued by states, Tribes, or the U.S. EPA. Regional conditions are added to the NWPs through the state Coastal Zone Management Act consistency review process. These WQC/CZMA regional conditions are reviewed by Corps division engineers to determine whether they are consistent with the Corps regulations for permit conditions at 33 CFR 325.4. Regulatory Guidance Letter 92–4, issued on September 14, 1992, provides additional guidance and information on WQC and CZMA conditions for the NWPs.

At approximately the same time as the publication of this **Federal Register** notice, each Corps district will issue an initial public notice. The public comment period for these district public notices will be 45 days. Those initial public notices will include proposed Corps regional conditions developed by our district offices, and will also request comments or suggestions for additional Corps regional conditions or modifications to the proposed Corps regional conditions.

The public notices issued by the Districts may also include, for informational purposes only, proposed conditions intended to meet the specific requirements of Tribes, states, and EPA for the purposes of obtaining WQC, and the specific requirements of states for obtaining CZMA concurrence. The WQC and CZMA reviews are separate and independent administrative review processes for the NWPs. Public comments on the Tribal, state, or EPA WQC regional conditions or state CZMA regional conditions as proposed by the districts should be sent directly to the Tribe, state, or EPA, as appropriate. The public should not send comments on proposed WQC/CZMA regional conditions to the Corps.

In response to the district’s public notice, interested parties may suggest additional Corps regional conditions or changes to Corps regional conditions. They may also suggest suspension or

revocation of NWP in certain geographic areas, such as specific watersheds or waterbodies. Such comments should include data to support the need for the suggested modifications, suspensions, or revocations of NWPs.

After the NWPs are issued or reissued, the division engineer will issue supplemental decision documents for each NWP in a specific region (*e.g.*, a state or Corps district). Each supplemental decision document will evaluate the NWP on a regional basis (*e.g.*, by Corps district geographic area of responsibility or by state) and discuss the need for NWP regional conditions for that NWP. 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 those activities that will have no more than minimal individual and cumulative adverse environmental effects.

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 after following public notice and comment procedures, if they identify a need to add or modify regional conditions. Information on regional conditions and the suspension or revocation of one or more NWPs in a particular area can be obtained from the appropriate district engineer.

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

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

A Tribal, State, or EPA water quality certification, or waiver thereof, is required by Section 401 of the Clean Water Act, for an activity authorized by NWP which results in a discharge into waters of the United States. In addition, any state with a federally-approved CZMA program must concur with the

Corps' determination that activities authorized by NWPs which are within, or will have reasonably foreseeable effects on any land or water uses or natural resources of the state's coastal zone, are consistent with the CZMA program to the maximum extent practicable. Water quality certifications and/or CZMA consistency concurrences 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 Tribal, state, or EPA water quality standards, other provisions of Tribal/State law, and will be consistent with state CZMA programs/enforceable policies. The NWPs are conditioned to ensure that adverse environmental effects will be no more than 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 Tribal or State review for some activities, to ensure compliance with water quality standards, other appropriate provisions of Tribal/State law, and/or consistency with the state's CZMA programs. 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 Tribe(s), state(s), and regional offices of EPA, as appropriate, to discuss issues of concern and identify regional modifications and other approaches to address the scope of waters, activities, discharges, and PCNs, as appropriate, to resolve these issues.

Please note that in some states the Corps has issued state programmatic general permits (SPGPs) or regional general permits (RGPs), 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 suspension or revocation of the NWPs in states where SPGPs or RGPs 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 (WQC) 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 WQC for an NWP within that state, then the affected activities are not authorized by NWP within that state, until a project proponent obtains an individual WQC for that activity, or a waiver of WQC occurs. However, when applicants request verification of NWP activities that require individual WQC, 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 activity-specific conditions the Corps determines are necessary for NWP authorization. The Corps will notify the applicant that he or she must obtain an activity-specific WQC, or waiver thereof, before he or she is authorized to start discharging dredged or fill material into waters of the United States. That is, NWP authorization will be contingent upon obtaining the necessary WQC or waiver thereof from the Tribe, State, 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 an activity-specific WQC 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 concur or object to the consistency determination for these NWPs following 33 CFR 330.4(d).

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 the Corps' CZMA consistency determinations and thus are not contingent on a State's concurrence with the Corps' consistency determinations.

If a state objects to the Corps' CZMA consistency determination for an NWP, then the affected activities are not authorized by NWP within that state, until a project proponent obtains an individual CZMA consistency concurrence, or sufficient time (*i.e.*, six months) passes after requesting a CZMA consistency concurrence for the applicant to make a presumption of consistency, as provided in 33 CFR 330.4(d)(6). However, when applicants request NWP verifications for 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 activity-specific conditions the Corps determines are necessary for the NWP authorization. The Corps will notify the applicant that he or she must obtain an activity-specific CZMA consistency concurrence before he or she is 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 CZMA consistency certification to the appropriate State agency for concurrence. Upon concurrence with such CZMA 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 prior to commencing the proposed work that an NWP activity complies with the terms and conditions of an NWP. The requirement to submit a PCN is identified in the NWP text, as well as certain general conditions. General condition 18 requires non-federal permittees to submit PCNs for any proposed activity that might affect listed species or critical habitat, if listed species or critical habitat are in the vicinity of the proposed activity, or if the proposed activity is located in critical habitat. General condition 20 requires non-federal permittees to submit PCNs for any proposed activity that may have the potential to cause effects to any historic properties listed in, determined to be eligible for listing in, or potentially eligible for listing in, the National Register of Historic Places.

In the PCN, the project proponent must specify which NWP or NWPs he or she wants to use to provide the required Department of Army (DA) authorization under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899. For voluntary NWP verification requests (where a PCN is not required), the request should also identify the NWP(s) the project proponent wants to use. The district engineer should verify the activity under those NWP(s), as long as the proposed activity complies with all applicable terms and conditions, including any applicable regional conditions imposed by the division engineer. If the proposed activity does not qualify for NWP authorization, the district engineer must exercise discretionary authority and explain why the NWP or NWPs specified by the applicant are not appropriate for authorizing the proposed activity.

Pre-construction notification requirements may be added to NWPs by division engineers through regional conditions to require PCNs for additional activities. For an activity where a PCN is not required, a project proponent may submit a PCN voluntarily, if he or she wants written confirmation that the activity is authorized by an NWP. Some project proponents submit permit applications without specifying the type of authorization they are seeking. In such cases, district engineer will review those applications and determine if the proposed activity qualifies for NWP authorization or another form of DA authorization, such as a regional general permit (see 33 CFR 330.1(f)).

In response to a PCN or a voluntary NWP verification request, the district engineer reviews the information submitted by the prospective permittee. If the district engineer determines that the activity complies with the terms and conditions of the NWP, he or she will notify the permittee. Activity-specific conditions, such as compensatory mitigation requirements, may be added to an NWP authorization to ensure that the NWP activity results in only minimal individual and cumulative adverse environmental effects. The activity-specific conditions are incorporated into the NWP verification, along with the NWP text and the NWP general conditions.

If the district engineer reviews the PCN or voluntary NWP verification request and determines that the proposed activity does not comply with the terms and conditions of an NWP, he or she will notify the project proponent and provide instructions for applying for authorization under a regional

general permit or an individual permit. District engineers will respond to NWP verification requests, submitted voluntarily or as required through PCN, within 45 days of receiving a complete PCN. Except for NWPs 21, 49, and 50, and for proposed NWP activities that require Endangered Species Act Section 7 consultation and/or National Historic Preservation Act section 106 consultation, if the project proponent has not received a reply from the Corps within 45 days, he or she may assume that the project is authorized, consistent with the information provided in the PCN. For NWPs 21, 49, and 50, and for proposed NWP activities that require ESA Section 7 consultation and/or NHPA Section 106 consultation, the project proponent may not begin work before receiving a written NWP verification.

In the January 28, 2013, issue of the **Federal Register** (78 FR 5726), the Corps issued a final rule that amended the NWP regulations to allow district engineers to issue NWP verification letters that are in effect until the NWP expires, instead of two years. That rule took effect on February 27, 2013. That final rule streamlines the verification process for NWP activities.

Contact Information for Corps District Engineers

Contact information for Corps district engineers is available at the following Web page: <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/RegulatoryContacts.aspx>.

Request for Comment

We are proposing to reissue 50 nationwide permits, as well as the general conditions and definitions. We are also proposing to issue two new NWPs and one new general condition. 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 as well as all NWP application procedures including the PCNs. 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

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

NWP 3. *Maintenance*. We are proposing to modify this NWP to state that it also authorizes regulated activities associated with the removal of previously authorized structures or fills. Individual permits include a permit condition requiring modification of the permit and the removal of the authorized structure or fill if the permittee will no longer use it, and will not transfer the authorization and the structures or fills to another party. (See general condition 2 of appendix A to 33 CFR part 325.) General permits might not have a similar condition, so we are proposing to modify this NWP to authorize such removals. The proposed modification to NWP 3 would authorize the removal of the previously authorized structure or fill in those cases where authorization is required (e.g., work in section 10 waters).

We are also proposing to modify paragraph (c) of this NWP to clarify that the use of temporary mats in jurisdictional waters and wetlands is also authorized by this NWP, if those mats are used to minimize impacts during regulated maintenance activities. After the timber mats are used, they are removed and the affected areas are returned to pre-construction elevations. This provision of NWP 3 would only be necessary in circumstances where the Corps district has determined that the use of such mats in jurisdictional waters and wetlands requires DA authorization.

NWP 12. *Utility Line Activities*. We are proposing to modify the “utility lines” paragraph of this NWP to clarify that the NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States for crossings of those waters associated with the construction, maintenance, or repair of utility lines. This change is intended to clarify that NWP 12 does not authorize the construction, maintenance, or repair of utility lines per se. The Corps only authorizes those components of utility lines where the construction, maintenance, or repair involves activities regulated under its jurisdictional authorities (i.e., section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899). Because of the proposed modification, we are proposing to remove the text in this sentence that referred to “excavation, backfill, and bedding” because those activities are covered by the more precise reference to “discharges of dredged or fill material into waters of the United States.” Some excavation activities do not require section 404 authorization.

We are also proposing to modify the definition of “utility line” to make it

clear that utility lines can also include lines, such as optic cables, that communicate through the internet.

In response to a suggestion received during the period that the 2012 NWPs were in effect, we are proposing to add a paragraph to NWP 12 to authorize, to the extent that DA authorization is required, discharges of dredged or fill material into section 404 waters, and structures and work in section 10 waters, necessary to remediate inadvertent returns of drilling muds (also known as “frac-outs”) that can occur during directional drilling operations to install utility lines below jurisdictional waters and wetlands. An inadvertent return takes place when drilling fluids are released through fractures in the bedrock and flow to the surface, and possibly into a river, stream, wetland, or other type of waterbody. The entity making the suggestion expressed concerns about inconsistencies in how inadvertent returns are managed when they occur. The entity also requested that NWP 12 authorize section 404 and section 10 activities that are necessary to remediate inadvertent returns, instead of addressing the needed remediation through enforcement actions. For NWP 12 activities where there is the possibility of such inadvertent returns, district engineers may add conditions to the NWP 12 verification requiring activity-specific remediation plans to address these situations, should they occur during the installation or maintenance of the utility line.

The fluids used for directional drilling operations consist of a water-bentonite slurry. This water-bentonite mixture is not considered a toxic or hazardous substance, but it can adversely affect aquatic organisms if released into bodies of water. Because a frac-out releases a drilling fluid and that fluid is not a material that can be considered “fill material” under 33 CFR 323.2(e), the inadvertent returns of these drilling muds is not regulated under section 404 of the Clean Water Act. However, activities necessary to contain and clean up these drilling fluids may require DA authorization (e.g., temporary fills in waters of the United States, or fills to repair a fracture in a stream bed). For the same reasons as the proposed modification to NWP 3, we are proposing to modify this NWP to state that the use of temporary mats in jurisdictional waters and wetlands is also authorized.

We are proposing to modify Note 1 to remove the requirement to send a copy of the PCN to the National Ocean Service, because there is no need to chart a utility in navigable waters of the

United States unless it is verified as being authorized by NWP 12. Corps districts will still send copies of NWP 12 verifications, when utility lines are installed in waters charted by the National Ocean Service.

In addition, we are proposing to add three new notes to this NWP. The new proposed Note 2 explains that separate and distant crossings of waters of the United States may qualify for separate NWP authorization, consistent with past practices as codified in the NWP regulations issued on November 22, 1991 (see 56 FR 59110) and the definition of “single and complete linear project” promulgated in the 2012 NWPs. In the 1991 final rule, the Corps defined the term “single and complete project” at 33 CFR 330.2(i). In the 2012 NWPs, we clarified the long-standing practices associated with the 1991 final rule by providing separate definitions for “single and complete linear project” and “single and complete non-linear project” (see 77 FR 10184 at 10290 and the associated preamble discussion in the February 21, 2012 issue of the **Federal Register**.)

Proposed Note 2 also points prospective permittees to 33 CFR 330.6(d), which addresses the use of NWPs with individual permits, where components of a larger overall project that have independent utility might be eligible for NWP authorization while other components might require an individual permit because not all crossings of waters of the United States comply with the terms and conditions of the NWPs or regional general permits. For utility lines, § 330.6(d) applies in cases where one or more crossings for a stand-alone utility line are not eligible for NWP authorization, but the remaining crossings for the utility line could satisfy the NWP terms and conditions. If one or more separate and distant crossings of waters of the United States for a stand-alone utility line do not qualify for authorization by NWP or a regional general permit, and an individual permit is required to authorize those crossings, then all the crossings necessary to construct that stand-alone utility line would require an individual permit. A stand-alone utility line is a utility line that has independent utility and can be operated on its own to transport materials or energy from a point of origin to a terminal point.

Section 330.6(d) requires an individual permit for all regulated activities under the Clean Water Act and, if applicable, the Rivers and Harbors Act of 1899, associated with a stand-alone utility line if one or more crossings of waters of the United States

do not qualify for general permit authorization and requires an individual permit. Other utility line segments that can operate independently (*i.e.*, other stand-alone utility lines) can be authorized by NWP if all of the crossings of waters of the United States that require DA authorization are eligible for NWPs, as long as the permit decision document includes an impact analysis for the larger, overall utility line project (see 33 CFR 330.6(d)(1)).

The second new note (proposed Note 3) references the regulation (*i.e.*, 33 CFR 322.5(i)) that specifies the minimum clearances required for aerial electric power transmission lines crossing navigable waters of the United States.

The third new note (proposed Note 5) states that NWP 12 authorizes utility line maintenance and repair activities that do not qualify for the Clean Water Act section 404(f)(1) exemption for maintenance of currently serviceable structures.

NWP 13. *Bank Stabilization.* We are proposing to modify the first paragraph of this NWP to clarify that it authorizes a wide variety of bank stabilization measures. This NWP has never been limited to hard structural measures, such as bulkheads and revetments, for bank stabilization. This NWP can be used to authorize vegetative bank stabilization techniques, including hybrid techniques that involve both hard materials and vegetation components (*e.g.*, bioengineering). For example, a bank may be graded and plant materials installed to stabilize portions of the bank, with rip rap placed at the bottom of the bank for toe protection. Nationwide permit 13 was first issued in 1977; it has never specified any preference for particular approaches to bank stabilization. This NWP has always had the flexibility to authorize a variety of types of bank stabilization measures.

In addition, NWP 13 is used to authorize bank stabilization activities in a variety of types of aquatic environments, such as open coasts, sheltered coasts, rivers and streams, lakes, and other types of waters. The appropriate approach for bank stabilization is dependent on site conditions, and landowners and contractors may have preferences for specific approaches. In addition, there can be a substantial amount of variation in the effectiveness of a particular bank stabilization technique across these different environments. Given that variability and the need to consider site-specific conditions and practicability when selecting an appropriate bank stabilization approach for a site, we believe it is not appropriate to modify

this NWP to require the use of one technique to control bank erosion over other techniques.

We are proposing to modify paragraph (c) of this NWP to clarify that the quantity of the dredged or fill material discharged into waters of the United States must not exceed one cubic yard per running foot below the plane of the ordinary high water mark or the high tide line, as measured along the bank. Some bank stabilization techniques, such as stream barbs, may involve fills that extend from the bank to the streambed. Stream barbs are low rock sills that extend from a stream bank to cross the thalweg of the stream. In other words, not all discharges of dredged or fill material authorized by this NWP must be placed along the bank if the bank stabilization method relies on other fill configurations, and as long as discharges of dredged or fill material into waters of the United States are minimized to the maximum extent practicable.

As discussed below, we are proposing to issue a new NWP to authorize nature-based bank stabilization techniques known as living shorelines. We believe a separate NWP is appropriate to authorize structures and work in navigable waters and discharges of dredged or fill material into waters of the United States for the construction and maintenance of living shorelines. Living shorelines are effective primarily in sheltered, low- to mid- energy coasts (see the 2007 National Research Council Report entitled "Mitigating Shore Erosion along Sheltered Coasts"). In open coasts subject to higher energy regimes such as stronger wave energies and greater erosive forces, hard bank stabilization structures such as revetments and bulkheads or a combination of hard structures and soft, nature-based structures (*e.g.*, hybrid approaches described by the Systems Approach to Geomorphic Engineering (SAGE)²) are more effective at protecting infrastructure and buildings along those coasts. The proposed NWP for living shorelines is intended to complement NWP 13 to provide general permit authorization for these approaches to bank stabilization.

Paragraph (a) of general condition 23 requires that NWP activities avoid and minimize adverse effects to waters of the United States to the maximum extent practicable on the project site (*i.e.*, on-site). Living shorelines involve filling fairly large areas of intertidal and subtidal lands or lake shorelines. The placement of sand fills for marsh plantings and the construction of stone

sills and breakwaters alter shoreline habitats and require consideration of trade-offs of those habitat changes (NRC 2007). Bulkheads and other bank stabilization structures can be constructed near to or landward of the high tide line in estuarine waters, or near to or landward of the mean high water line in lakes; thus resulting in much smaller fill areas in waters of the United States or no fills in waters of the United States if they constructed outside of the Corps' jurisdiction. Additionally, we recognize that bulkheads have indirect effects on nearby jurisdictional waters and wetlands and that living shorelines can provide some important ecological functions and services. Another factor is that there are trade-offs associated with every approach to bank stabilization and those trade-offs are considered by landowners when deciding which bank stabilization approach they will be proposing if they need to obtain DA authorization. The Corps also evaluates these trade-offs when evaluating all bank stabilization proposals.

We are soliciting comments on proposed changes to NWP 13 and the proposed NWP B. We are trying to provide as much equitability as possible between NWP 13 and the new, proposed NWP for living shorelines, so that landowners can consider a variety of options. By providing an efficient authorization option, landowners have incentive to select an environmentally preferable bank stabilization option where appropriate. A few of the terms in NWPs 13 and proposed NWP B are similar. There are different PCN thresholds because living shorelines require substantial amounts of fill material, while bank stabilization methods authorized by NWP 13 involving small amounts of fill to be discharged into waters of the United States, or no discharges into special aquatic sites such as tidal wetlands and vegetated shallows, do not require PCNs.

Another factor is that the Corps' regulations have long recognized that landowners have a general right to protect their property from erosion (see 33 CFR 320.4(g)(2)). The Corps evaluates the potential for the proposed erosion protection measures to cause damage to other landowners' property, adversely affect public health and safety, adversely impact wetland values, and the Corps can inform the applicant about possible alternative methods of bank stabilization. However, that section of our regulations also states that the Corps' advice will be given only as general guidance, and must not compete with private consulting firms. In other

² <http://sagecoast.org/>

words, the Corps cannot mandate a specific approach to bank stabilization. Consideration must also be given to the availability of consultants and contractors qualified to design and build living shorelines. Many landowners prefer bulkheads and revetments because well-constructed bulkheads last approximately 20 years and revetments can last up to 50 years (NRC 2007).

As discussed elsewhere in this notice, we are proposing to develop a standard form for use in submitting PCNs. The proposed PCN form will include two questions for PCNs involving bank stabilization activities. The first question will ask whether the applicant has considered the use of living shorelines, if he or she is submitting a PCN for a bank stabilization activity. The second question will ask if there are consultants and contractors in the area that are qualified to design and construct living shorelines. We will also modify our automated information system to track the responses to those questions. We will use the responses to those questions during evaluations of the use of NWPs 13 and B. The Corps solicits comments on the suitability on those questions and whether other questions should be included on the form.

NWP 14. Linear Transportation Projects. We are proposing to add a note to this NWP similar to proposed Note 2 in NWP 12 to explain that separate and distant crossings of waters of the United States for linear projects may qualify for separate authorization by NWP. Similar to proposed Note 2 in NWP 12, the proposed Note 1 for NWP 14 references 33 CFR 330.6(d) because linear transportation projects also have to comply with the requirements of § 330.6(d). Linear transportation projects can have segments that can operate as stand-alone roads or other types of linear transportation projects. NWP 14 can authorize those segments with independent utility where each separate and distant crossing of waters of the United States qualifies for NWP authorization. If one or more separate and distant crossings of waters of the United States for a stand-alone linear transportation project does not qualify for authorization by NWP or a regional general permit, and an individual permit is required to authorize the crossings, then all the crossings necessary to construct that stand-alone linear transportation project would require an individual permit. Section 330.6(d) requires an individual permit for all regulated activities under the Clean Water Act and, if applicable, the Rivers and Harbors Act of 1899, associated with a stand-alone linear

transportation projects if one or more crossings of waters of the United States do not qualify for general permit authorization and requires an individual permit. Other linear transportation project segments that can operate independently (*i.e.*, other stand-alone linear transportation projects) can be authorized by NWP if all of the crossings of waters of the United States that require DA authorization are eligible for NWPs, as long as the permit decision document includes an impact analysis for the larger, overall linear transportation project (see 33 CFR 330.6(d)(1)).

NWP 19. Minor Dredging. We are proposing to add a sentence requiring the dredged material to be deposited and retained at an area that has no waters of the United States, unless the district engineer specifically authorizes the placement of that dredged material into jurisdictional waters and wetlands through a separate authorization. The new sentence is intended to provide consistency with the NWPs that authorize dredging or similar activities, where the dredged or excavated material requires disposal. The NWPs that currently have that provision are: NWP 31, which authorizes the maintenance of existing flood control facilities, NWP 36 which authorizes boat ramps, and paragraph (b) of NWP 3, which authorizes the removal of accumulated sediments from the vicinity of existing structures. To protect jurisdictional waters and wetlands, dredged or excavated material should be deposited in uplands or other areas not subject to the Corps' jurisdiction, unless the district engineer issues a separate authorization to allow that dredged material to be placed in waters of the United States for a specific use, such as substrate for marsh reestablishment.

NWP 21. Surface Coal Mining Activities. We are proposing to remove paragraph (a) that was in the 2012 NWP 21. The proposed NWP consists of paragraph (b) of the 2012 NWP 21, with a 1/2-acre limit for losses of non-tidal waters of the United States, a 300 linear foot limit for losses of stream bed, and a prohibition against discharges of dredged or fill material into waters of the United States for the construction of valley fills.

As discussed in the February 21, 2012, **Federal Register** notice (77 FR 10184 at 10212), paragraph (a) of the 2012 NWP 21 was intended to "provide an equitable transition to the new limits in NWP 21 and reduce burdens on the regulated public." In that final rule, we also stated that if surface coal mining activities previously authorized by NWP 21 could not be completed before the

2012 NWP 21 expires, or within one year of that expiration date if the activity qualifies for the grandfathering provision at 33 CFR 330.6(b), then the project proponent would have to obtain an individual permit or, if available, a regional general permit authorization to complete the surface coal mining activities in waters of the United States (see 77 FR 10184 at 10209–10210).

NWP 32. Completed Enforcement Actions. We are proposing to modify paragraph (i)(a) of this NWP to clarify that the 5 acre and 1 acre limits apply to the areas adversely affected by the activities that remain after resolution has been achieved. These would be the net adverse effects after any required restoration was conducted to reach resolution.

NWP 33. Temporary Construction, Access, and Dewatering. We are proposing to modify this NWP to change the PCN threshold to require notification only for temporary construction, access, and dewatering activities in navigable waters of the United States. In the 2007 NWPs, we modified NWPs 3, 12, and 14 to authorize temporary structures, fills, and work in jurisdictional waters and wetlands to complete the authorized NWP activity. In the 2012 NWPs we added similar language to NWP 13. While those four NWPs require PCNs for certain activities, when we modified those NWPs we did not add PCN requirements specifically for temporary structures, fills, and work associated with conducting the activities authorized by those NWPs. Based on our experience with those four NWPs and to provide more efficiency in the NWP Program, we believe that it is no longer necessary to require PCNs for NWP 33 activities in section 404-only waters. We are proposing to continue to require PCNs for all NWP 33 activities in section 10 waters, to ensure that each of those activities are reviewed by district engineers on a case-by-case basis to protect navigation and other relevant public interest review factors. Division engineers can add regional conditions to this NWP to require PCNs for temporary construction, access, and dewatering activities in section 404-only waters.

Pre-construction notification will still be required for proposed activities in section 404-only waters that will be conducted by non-federal permittees, when those activities trigger the notification requirements of general condition 18, endangered species, and general condition 20, historic properties. See paragraph (c) of general condition 18 and paragraph (c) of general condition 20.

NWP 35. *Maintenance Dredging of Existing Basins.* We are proposing to modify this NWP to state that all dredged material must be placed in an area that has no waters of the United States, unless placement of the dredged material into waters of the United States is authorized by a separate DA authorization. The proposed change is intended to provide consistency with the proposed changes to NWP 19 and the text of other NWPs that authorize dredging or excavation activities. There may be some situations where disposal of the dredged material into waters of the United States is acceptable, such as using the dredged material for marsh establishment or re-establishment. The district engineer will authorize that disposal into waters of the United States through a separate DA authorization, such as another NWP, a regional general permit, or an individual permit. Please see the rationale provided above in the preamble discussion of the proposed changes to NWP 19.

NWP 39. *Commercial and Institutional Developments.* We are proposing to modify this NWP to clarify that it authorizes discharges of dredged or fill material into waters of the United States to construct wastewater treatment facilities. Wastewater treatment facilities are attendant features for commercial, industrial, and institutional facilities to hold and treat wastewater. Wastewater treatment facilities are excluded from Clean Water Act jurisdiction (see 33 CFR 328.3(b)(1)) and do not require Clean Water Act Section 404 authorization to maintain those facilities. Applicants should be aware that, consistent with current policy, designation of a portion of waters of the United States as a waste treatment system does not alter CWA jurisdiction over any waters upstream and/or adjacent to such system.

NWP 40. *Agricultural Activities.* We are not proposing any changes to this NWP. As discussed below, we are seeking comment on whether any clarifications are need for this NWP. Discharges of dredged or fill material into waters of the United States for normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices are exempt from the requirement to obtain Clean Water Act section 404 authorization, except when those activities trigger the recapture provision of Clean Water Act section 404(f)(2). Normal farming, silviculture and ranching activities that trigger the recapture provision of section 404(f)(2)

can be authorized by individual or general permits. This NWP authorizes a variety of agricultural activities that involve discharges of dredged or fill material into waters of the United States, as long as those activities comply with the terms and conditions of this NWP, including the 1/2-acre limit for losses of waters of the United States, and result in no more than minimal individual and cumulative adverse environmental effects. Nationwide permit 40 can be used to authorize discharges of dredged or fill material into waters of the United States associated with blueberry production. We are soliciting comment on whether any further clarification of NWP 40 is necessary.

NWP 41. *Reshaping Existing Drainage Ditches.* We are soliciting comment on clarifications or changes to NWP 41 that might encourage more landowners to reshape their drainage ditches to help improve local water quality, including suggestions for text to clarify the NWP for circumstances where original configuration information is not available. To facilitate the reshaping of drainage ditches to improve water quality, we are also proposing to remove the requirement to submit a PCN if more than 500 linear feet of ditch is to be reshaped.

This NWP was first issued in 2000 (65 FR 12818 at 12854, March 9, 2000). The intent of this NWP is to authorize the maintenance of drainage ditches that were constructed in waters of the United States in a manner that benefits the aquatic environment. This NWP authorizes changes to the ditch cross section by creating gentler slopes so that there is greater interaction between water in the ditch and soil and vegetation to facilitate the removal of sediment, nutrients, and chemicals from that water. However, this NWP does not authorize reshaping ditches so that they drain larger areas than the original ditch was designed to drain. In other words, this NWP allows the configuration of the ditch to be changed to improve water quality, but not increase the original geographic area drained by the ditch. Determining the original drainage area of a ditch can be accomplished by reviewing records, obtaining technical advice from consultants, or other sources of information. When evaluating compliance with this NWP, Corps district staff will use their judgment, based on such information, to determine whether the activity is in compliance with the requirement not to increase the original drainage capacity of the ditch.

We are soliciting comment on clarifications or changes to NWP 41 that might encourage more landowners to

reshape their drainage ditches to help improve local water quality, including suggestions for text to clarify the NWP for circumstances where original configuration information is not available. To facilitate the reshaping of drainage ditches to improve water quality, we are also proposing to remove the requirement to submit a PCN if more than 500 linear feet of ditch is to be reshaped and are soliciting comment on that change.

NWP 43. *Stormwater Management Facilities.* We are proposing to modify the sentence that states that the maintenance of stormwater management facilities that are determined to be waste treatment systems under 33 CFR 328.3(a)(8) generally does not require a section 404 permit. That provision in the Corps' regulations refers to the waste treatment exclusion in the 1986 definition of "waters of the United States," which appears in the last paragraph of § 328.3(a) in the 1986 final rule (see 51 FR 41250). We are proposing to change the reference to 33 CFR 328.3(a)(8) that was in the text of the 2012 NWP 43 to "33 CFR 328.3(b)(6)" because under the 2015 final rule amending the definition of "waters of the United States" that exclusion applies to "[s]tormwater control features constructed to convey, treat, or stormwater that are created in dry land" We are proposing to remove the word "generally" from this sentence, because under the 2015 final rule defining "waters of the United States," there are no exceptions to the exclusions in 33 CFR 328.3(b) (see the first sentence of § 328.3(b)).

NWP 44. *Mining Activities.* We are proposing changes to the terms of this NWP to clarify the application of the 1/2-acre limit for losses of waters of the United States. The mining activities authorized by this NWP often involve impacts to open waters, such as the mining of sand and gravel from large rivers. Paragraph (a) of the proposed modification states that the loss of non-tidal wetlands cannot exceed 1/2-acre. Paragraph (b) states that the mined area in open non-tidal waters cannot exceed 1/2-acre. Paragraph (c) limits the total impacts under paragraphs (a) and (b) to 1/2-acre. In other words, if the proposed mining activity involves discharges of dredged or fill material into both vegetated non-tidal wetlands and open waters, the acreage loss of non-tidal wetlands plus the acreage of open waters excavated (or dredged, if the mining activity occurs in non-tidal navigable waters of the United States) cannot exceed 1/2-acre. This modification will provide further assurance that this NWP will only

authorize activities with no more than minimal individual and cumulative adverse environmental effects. This NWP also limits the loss of stream bed to 300 linear feet, unless for intermittent and ephemeral streams the district engineer issues a waiver after coordinating with the agencies and making a written determination that the proposed activity will result in no more than minimal adverse environmental effects. The loss of non-tidal waters of the United States, plus the loss of stream bed, cannot exceed ½-acre.

NWP 45. *Repair of Uplands Damaged by Discrete Events.* To provide flexibility in the use of this NWP after major flood events or other natural disasters, we are proposing to modify the PCN requirement to allow district engineers to waive the 12-month deadline for submitting PCNs. The district engineer can waive the 12-month deadline if the prospective permittee can demonstrate funding, contract, or similar delays. Such delays can occur after major storm events if the entities responsible for making decisions regarding disbursement of funds or issuing contracts are short-staffed or receive more requests than can be handled in a timely manner.

NWP 48. *Commercial Shellfish Aquaculture Activities.* We are proposing to modify this NWP to clarify that it authorizes new and continuing commercial shellfish aquaculture operations in authorized project areas. We are proposing to define the project area as the area in which the operator is authorized to conduct commercial shellfish aquaculture activities during the period the NWP is in effect. Those areas can be identified through leases or permits issued by an appropriate state or local government agency, a treaty, or any other easement, lease, deed, contract, or other legally-binding agreement which establishes an enforceable property interest for an operator. Legally-binding agreements can include agreements between operators to conduct shellfish aquaculture on various parcels within project areas in which they have the requisite interests. The proposed changes recognize that in some areas of the country, state or local authorizations are not required for commercial shellfish aquaculture activities if the subtidal or intertidal lands are privately owned. In addition, we are proposing to define a “new commercial shellfish aquaculture operation” as an operation in a project area where commercial shellfish aquaculture activities have not been conducted during the past 100 years.

In addition, we are proposing changes to this NWP to do a better job of taking into account the dynamic nature of commercial shellfish aquaculture activities and to further streamline the authorization process. During the effective period of this NWP, an operator may change the species cultivated in the project area. An operator may also utilize only certain areas in the project area, and allow other areas within the project area to be fallow. If a PCN is required for the commercial shellfish aquaculture activity, either because of the PCN thresholds in the text of the NWP, the requirements of general condition 18, or other general conditions or regional conditions, a PCN only needs to be submitted once during the period this NWP is in effect. The one-time PCN would identify the species expected to be cultivated during the period the 2017 NWP 48 is in effect, and identify the entire project area, including active and fallow areas. If unanticipated changes to the commercial shellfish operation need to occur during this period, and those changes involve activities regulated by the Corps, the operator should contact the Corps district to request a modification of the NWP verification, instead of submitting another PCN.

For the purposes of NWP 48, the project area is not limited to those areas where active commercial shellfish activities are presently occurring. The project area includes all areas in which the operator is authorized to conduct commercial shellfish aquaculture activities, as identified through a lease or permit issued by an appropriate state or local government agency, a treaty, or any other easement, lease, deed, contract, or other legally-binding agreement which establishes an enforceable property interest for the operator. The project area also includes fallow areas, as long as the fallow areas are included in the areas identified in the lease, permit, or other applicable document or agreement.

The information in a PCN must describe, in general terms, the expected plan of operation for the commercial shellfish aquaculture activity during the period this NWP is in effect. The PCN must list the species expected to be cultivated during the time frame the 2017 NWP 48 authorization is in effect, as well as the area(s) expected to be used for cultivation during that period.

We are also proposing to modify the pre-construction notification requirements for this NWP. We are proposing to remove the PCN requirement for dredge harvesting, tilling, or harrowing conducted in areas inhabited by submerged aquatic

vegetation. We are proposing this modification because of the recognition in numerous studies and reports that have shown that vigorous populations of shellfish and submerged aquatic vegetation can coexist in coastal waters (e.g., Dumbauld and McCoy 2015; Tallis et al. 2009) In addition, both submerged aquatic vegetation beds and oyster beds provide habitat for a wide variety of fish and invertebrate species (Hosack et al. 2006). The presence of submerged aquatic vegetation should not prevent the use of NWP 48 to authorize commercial shellfish aquaculture activities because available evidence indicates that both shellfish and submerged aquatic vegetation sustain vibrant populations in the same waterbody. If the commercial shellfish aquaculture activity might affect listed species or critical habitat, then a PCN is required under general condition 18, and the Corps will evaluate effects to submerged aquatic vegetation caused by the commercial shellfish aquaculture activity. For those on-going commercial shellfish aquaculture activities that are covered by a currently valid programmatic biological opinion, programmatic informal consultation concurrence, or activity-specific biological opinion or informal consultation concurrence, the PCN should be expeditiously reviewed by the district engineer.

We are also proposing to remove the notification requirement for changing from bottom culture to floating or suspended culture, because general condition 1 provides sufficient assurance that these activities will have no more than minimal adverse effects on navigation. A third modification to the PCN thresholds is to require PCNs for commercial shellfish aquaculture activities that will include species that have never been cultivated in the waterbody, instead of species that have not “previously” been cultivated in that waterbody. We believe the word “never” provides more clarity than the word “previously.” A fourth modification to the PCN requirements is to require PCNs for commercial shellfish aquaculture activities proposed for areas that have not been used for those activities for the past 100 years, consistent with our proposed definition of “new commercial shellfish aquaculture operations.”

For NWP 48 activities that require PCNs, either because of the terms of NWP 48 or the requirements of general condition 18 or other general or regional conditions, we are proposing to require the PCN to identify all the species that the operator plans to cultivate during the period this NWP is in effect. We are

also proposing to require PCNs to state whether suspended cultivation techniques will be used, as well as information on the general water depths in the project area. A detailed survey of water depths is not required for a PCN.

During the implementation of NWP 48, questions have been raised about the accumulation of sediment in tidal waterbodies where long lines slow water flows so that suspended sediments fall out of the water column, and whether that sediment accumulation is a regulated activity under section 404 of the Clean Water Act. Long lines are used in commercial shellfish aquaculture to grow oysters in the water column, as an alternative to bottom culture. Sediment accretion caused by long lines is not a discharge of dredged or fill material and is not regulated under section 404 of the Clean Water Act because the sediment accumulation is an indirect effect of the use of long lines. Section 404 of the Clean Water Act requires permits for point sources discharging dredged or fill material into waters of the United States, unless those activities are exempt from the requirement to obtain section 404 authorization. Sediment accretion caused by long lines is dispersed throughout the area those long lines are used, and there is no point source. With long lines, there is not a point source discharging dredged or fill material into waters of the United States.

NWP 51. *Land-Based Renewable Energy Generation Facilities*. We are proposing to split Note 1 of the 2012 NWP 51 into two notes. Note 1 explains that utility lines constructed to transfer energy from the land-based renewable energy generation facility to a distribution system, regional grid, or other facility are general considered to be linear projects. Proposed Note 2 states that if the only activities that require DA authorization are utility line crossings or road crossings, those activities should be authorized by NWPs 12 and 14, respectively, if they satisfy the terms and conditions of those NWPs.

Based on comments and questions from stakeholders, we are seeking comment on changing the PCN threshold in this NWP, which currently requires PCNs for all authorized activities. We are soliciting comment on whether changing the PCN threshold so that some NWP 51 activities can proceed without pre-construction notification would streamline the authorization process for regulated activities associated with land-based renewable energy generation facilities while still ensuring that these activities

have no more than minimal adverse environmental impacts. Comments should provide a recommended PCN threshold, such as losses of waters of the United States in excess of $\frac{1}{10}$ -acre or $\frac{1}{4}$ -acre. Pre-construction notification would still be required for all activities that trigger the PCN requirements in general condition 18, endangered species, and general condition 20, historic properties.

NWP 52. *Water-Based Renewable Energy Generation Pilot Projects*. During the period the 2012 NWPs have been in effect, we received a suggestion that this NWP also authorize floating solar energy generation facilities.

In response to that suggestion, we are proposing to modify this NWP to include floating solar energy generation projects in navigable waters of the United States. A single water-based solar renewable energy unit can occupy a substantial area of navigable waters. We are proposing to limit the surface area of navigable waters covered by floating solar energy generation facilities to $\frac{1}{2}$ -acre, but are seeking comment on whether a different limit would be more appropriate for such projects. The current 10-unit limit for water-based wind turbines and hydrokinetic generation units does not seem practical for floating solar generation facilities and for ensuring that adverse effects to navigation and other public interest review factors due to floating solar energy facilities are no more than minimal, individually and cumulatively.

Please note that floating water-based solar energy generation facilities installed in open waters subject only to Clean Water Act section 404 jurisdiction do not require DA authorization unless there is an associated discharge of dredged or fill material into waters of the United States. Water-based solar energy generation facilities are structures floating on the water surface, and structures in section 404-only waters that do not involve discharges of dredged or fill material do not require DA authorization.

On December 22, 2014, the Corps issued guidance clarifying the circumstances when hydrokinetic projects that require authorization from the Federal Energy Regulatory Commission (FERC) or DA authorization under Sections 9 and 10 of the Rivers and Harbors Act of 1899. That guidance concluded that hydrokinetic projects authorized by FERC under the Federal Power Act of 1920 do not require DA authorization under sections 9 or 10 of the Rivers and Harbors Act of 1899. Therefore, NWP 52 would only be used to authorize hydrokinetic projects in

navigable waters that do not require FERC authorization. Nationwide permit 52 can be used to authorize water-based renewable energy generation facilities on the outer continental shelf, if those generation facilities require authorization under section 10 of the Rivers and Harbors Act of 1899. Section 4(f) of the Outer Continental Shelf Lands Act of 1953, as amended (43 U.S.C. 1333(e)) extended the Corps' section 10 authority over installations, artificial islands, and structures on the outer continental shelf (see 33 CFR 320.2(b) and 322.3(b)).

We are requesting comments on modifying this NWP to remove the terms that limited the 2012 NWP 52 to pilot projects. We are also seeking comment on limits of the number of permanent water-based renewable energy generation units that could be authorized by this NWP, if the pilot project limitation is removed in the final NWP. As discussed above, we are also soliciting comment on acreage limits for water-based solar renewable energy generation projects.

Discussion of Proposed New Nationwide Permits

During the period the 2012 NWPs were in effect, the Corps received a number of suggestions for changes to the NWPs, general conditions, and definitions. Suggested modifications of existing NWPs, general conditions, and definitions are discussed above. In response to those suggestions, we are proposing to issue two new NWPs to authorize two categories of activities: The removal of low-head dams and the construction and maintenance of living shorelines. Some low-head dam removals might have been authorized by NWP 27, if those dams were small dams located in headwater streams. However, most low-dam removal requires individual permit authorization because it is not covered by an NWP or regional general permit. The proposed NWP will facilitate the removal of low-head dams that are no longer being used for their intended purposes or are too costly to repair. The removal of low-head dams restores ecological processes in rivers and streams and enhances public safety.

We are also proposing to issue a new NWP that authorizes the construction and maintenance of living shorelines. Many living shorelines require individual permit authorization, and some Corps districts have issued regional general permits to authorize different types of living shorelines. The proposed NWP will provide general permit authorization for the construction and maintenance of living shorelines, which will give landowners

a choice in how they can protect their property under erosion mitigation measures authorized by NWP. Bank stabilization activities are authorized by NWP 13 and if the proposed new NWP is issued, it will provide a similar streamlined authorization process as NWP 13. Both of these NWPs will result in decreased processing times and permit application costs associated with obtaining authorization under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899.

Proposed NWP A. Removal of Low-Head Dams

We are proposing to issue a new NWP to authorize structures and work in navigable waters of the United States, as well as associated discharges of dredged or fill material into waters of the United States, for the removal of low-head dams. One objective for removing such dams would be to restore rivers and streams by removing barriers that adversely affect ecological processes. Another objective would be to facilitate removal of these dams to enhance public safety because many low-head dams are old and poorly maintained, and are potential safety hazards. The proposed NWP will authorize activities that restore rivers and streams, and improve public safety. As discussed below, low-head and other types of dams cause substantial disruption and degradation of the ecological functions performed by rivers and streams. Low-head dams also pose hazards to swimmers and paddlers. The proposed NWP would only authorize the removal of low-head dams. If the landowner or other entity wants to construct a replacement or new dam, he or she would have to obtain a separate Department of the Army authorization to construct a replacement or new dam into waters of the United States.

A large number of low-head or run-of-the river dams were constructed in the United States during the past few centuries to increase water levels to provide water for towns and cities, and industries, as well as power (Tschantz and Wright 2011). Many of those dams were built in the 19th century, and are deteriorating or have been abandoned (Tschantz and Wright 2011). Many of these dams, especially the older dams, no longer serve an economic purpose (Born et al. 1998, Shuman 1995) and are in need of repair or replacement to comply with modern dam safety standards. Low-head dams present a safety hazard, and have been linked to hundreds of deaths since the 1960s (Tschantz 2014).

Graf (1993) estimates there are more than 2,000,000 small dams in the United States, and many of these small dams are low-head dams. Many of these dams need to be replaced or repaired, and the replacement or repair costs are likely to be prohibitive for 90 percent of the dam owners (Shuman 1995). Dam removal may be the only practical economic alternative for protecting public safety and preventing economic losses if they cannot be repaired or replaced. There is also increasing interest in removing these dams to restore rivers and streams, and the ecological functions and services they provide (Born et al. 1998). There is also interest in removing these dams to protect public safety.

Dams cause a number of adverse effects on rivers and streams, such as altering river and stream hydrology, altering sediment transport through the riverine network, changing flooding regimes, fragmenting river and stream habitats, and blocking corridors for movement of fish and other aquatic organisms (Stanley and Doyle 2003, Poff and Hart 2002). Dams also modify nutrient cycling processes in rivers and streams, change water temperatures, and alter the functioning of aquatic and riparian habitats (Poff and Hart 2002). Dams change the communities of aquatic organisms from riverine species that inhabit free-flowing waters to lacustrine species that prefer to live in lakes (Born et al. 1998). Dam removal helps reverse many of these adverse effects, and restore ecological functions performed by rivers and streams and their riparian habitats (O'Connor et al. 2015, Stanley and Doyle 2003, Gregory et al. 2002, Bednarek 2001)

Dams can be classified in a number of ways. One approach to classifying dams is an operational or functional definition: Run-of-the river dams versus storage dams (Poff and Hart 2002). Run-of-the river dams have small hydraulic heads and storage volumes, short residence times, and there is little or no control of the rates at which water is released from the dams (Poff and Hart 2002) because the water is allowed to flow over the dam structure (Csiki and Rhoads 2014). Storage dams have large hydraulic heads and storage volumes, long hydraulic residence times, and there is control over water releases from the dams (Poff and Hart 2002).

Another approach is to classify dams as large or small, based on designated thresholds of dam height and storage capacity. For example, the National Inventory of Dams considers large dams as having high hazard potential or dams with low hazard potential that are either (1) more than 7.6 meters (25 feet) tall with a storage capacity more than

18,500 cubic meters (653,000 cubic feet), or (2) more than 1.8 meters (6 feet) tall with a storage capacity greater than 61,700 cubic meters (2,367,000 cubic feet) (Poff and Hart 2002). Dams classified these three ways listed above can vary considerably in size (Poff and Hart 2002). Dams may be considered “small” if they do not meet or exceed the criteria for large dams under the National Inventory of Dams (e.g., Fencel et al. 2015, Stanley et al. 2002). Dam height is not a good indicator of the storage capacity of a dam because the storage capacity also depends on the shapes of the stream channel and the valley in which the stream is located, and the lateral extent of the dam structure.

The National Inventory of Dams is a congressionally authorized automated information system that catalogues dams in the United States and its territories. The current National Inventory of Dams was published in 2013, and it includes information on 87,000 dams that are more than 25 feet high, can store more than 50 acre-feet of water, or are considered a significant hazard if they were to fail. The National Inventory of Dams is maintained and published by the Corps along with the Association of State Dam Safety Officials, the states and territories, and Federal agencies that regulate dams. Additional information on the National Inventory of Dams is available at: <http://www.agc.army.mil/Media/FactSheets/FactSheetArticleView/tabid/11913/Article/480923/national-inventory-of-dams.aspx> (accessed April 6, 2016).

Run-of-the river dams usually are not higher than the channel banks of the rivers and streams in which they are located (Csiki and Rhoads 2014). Low-head dams are considered run-of-the river dams (Tschantz and Wright 2011). Tschantz and Wright (2011) define low-head dams as dams that pass water over the entire dam structure, and were constructed to raise the water level and provide a source of water for industry, municipal water supply, irrigation, recreation, and to protect utility lines. Low-head dams pass peak flows and are unlikely to hold fine sediment or alter downstream water flows (Poff and Hart 2002, Csiki and Rhoads 2014). They have little effect on downstream hydrologic regimes (Doyle et al. 2005).

For the purposes of this NWP, we are proposing to define a “low-head dam” as “a dam built across a stream to pass flows from upstream over the entire width of the dam crest on an uncontrolled basis.” For this NWP, we are proposing to adapt the definition of “low-head” dam from Tschantz and Wright (2011) because dams that meet

that definition store low volumes of sediment, and therefore sediment releases during low-head dam removal will be more likely to be small and result in no more than minimal adverse environmental effects. Sediment releases from dam removal are less of a problem for low-head dams and dams in wide valleys, because there is not much sediment stored behind those dams (Gregory et al. 2002). During high flows, sediment from the impounded area upstream of the low-head dam is transported over the dam structure, thus preventing the impoundment from filling with sediment (Fencl et al. 2015, Csiki and Rhoads 2014). Because low-head dams do not store large amounts of sediment and low-head dams continue to allow sediment transport through the impoundment, they are not likely to be storing contaminants at levels greater than the levels of contaminants transported along the stream network through normal runoff and sediment transport processes (Poff and Hart 2002). Contaminants usually adhere to fine sediments (*i.e.*, silts, clays) that are more readily transported through the stream network in the suspended sediment load. Low-head dams continue to allow that sediment transport to continue because the water that passes over the crest of the low-head dam carries those fine sediments in suspension. Csiki and Rhoads (2014) found that sediments stored in run-of-the-river dams turn over rapidly because they are regularly flushed out of the impoundment during high flow events. Therefore, low-head dams are likely to be storing little sediment laden with contaminants.

We are soliciting comment on alternative approaches to defining “low-head dams” for the purposes of this NWP. Alternative approaches may define low-head dams in terms of maximum dam heights or reservoir volumes. Commenters suggesting other definitions of low-head dams for use with this NWP should explain how their recommended definitions will be more effective than the proposed definition in helping ensure that NWP A only authorizes those low-head dam removals that result in no more than minimal individual and cumulative adverse environmental effects. Those recommendations should cite scientific studies or reviews in support of those suggested definitions.

Recent reviews and studies have shown that rivers and streams recover quickly after dam removal (*e.g.*, O'Connor et al. 2015, Lovett 2014, Doyle et al. 2005, Stanley et al. 2002). The rate of recovery is dependent on dam size, river size, river channel shape, sediment

volume, and sediment grain size (O'Connor et al. 2015). Sediment released as a result of dam removal are redistributed throughout the downstream segments within months (O'Connor et al. 2015). Different groups of aquatic organisms recover at different rates following dam removal (Doyle et al. 2005, Stanley and Doyle 2003). Dam removal should be viewed in the trade-offs that occur (Stanley and Doyle 2003). There are substantial long-term beneficial ecological outcomes from dam removal (*e.g.*, restored river flows, habitat connectivity, temperature regimes, sediment transport, and migration corridors) and some short-term adverse effects (*e.g.*, sediment releases, increased turbidity, and the potential release of contaminated sediments) (Bednarek 2001).

The proposed NWP will also facilitate the removal of old, deteriorating low-head dams that present threats to public safety. Low-head dams are hazardous to kayakers, canoeists, and others that engage in water-borne recreational activities and try to cross the crests of these dams. These dams can create a reverse roller wave at the base of the downstream side of the dam, and cause fatalities through drowning.

The release of sediments from dams, either through their operation or the removal of dam structures, may or may not result in a discharge of dredged or fill material, as those terms are defined at 33 CFR 323.2. Csiki and Rhoads (2014) concluded that there should be less concern about sediment management when removing run-of-the-river dams because of the minor sediment volumes stored by such dams. The determination of whether a regulated discharge occurs from such sediment releases is made on a case-by-case basis. Regulatory Guidance Letter 05–04, issued by the Corps on August 19, 2005, provides guidance on when sediment releases from dam breaches require DA authorization under section 404 of the Clean Water Act. District engineers will use the information provided in that Regulatory Guidance Letter when evaluating PCNs. When evaluating PCNs, district engineers will also consider whether there is a need to test sediment that might be stored in the impoundment for contaminants, based on a “reason to believe” approach similar to the EPA’s inland testing manual for dredged material. If the district engineer determines that the release of sediments associated with the removal of a low-head dam results in a discharge of dredged or fill material, this NWP would authorize that discharge. The effects of those sediment releases will diminish over time, as the

sediment is transported downstream by the flowing water.

Nationwide permit 27 authorizes the installation, removal, and maintenance of small water control structures, dikes, and berms to restore or enhance streams and other types of aquatic resources. Small water control structures include small dams, and small in-stream dams are typically limited to headwater streams. While DA authorization to remove some low-head dams could be provided by NWP 27, the proposed new NWP would authorize the removal of larger low-head dams, including low-head dams located below the headwaters, that are not authorized by NWP 27. The proposed NWP would authorize the removal of low-head dams regardless of stream size or the location in the stream network in a watershed, as long as the district engineer determines, after reviewing a PCN, that the proposed low-head dam removal activity will result in no more than minimal individual and cumulative adverse environmental effects.

We are seeking comments on this proposed new NWP, including its terms and conditions, such as the definition of “low-head dam.” In response to a PCN, the district engineer may impose activity-specific conditions on an NWP verification to ensure that the adverse environmental effects of the authorized activity are no more than minimal or exercise discretionary authority to require exercise discretionary authority to require an individual permit for the proposed activity.

Proposed NWP B. Living Shorelines

We are proposing to issue a new NWP to authorize structures and work in navigable waters of the United States, and discharges of dredged or fill material into waters of the United States, for the construction and maintenance of living shorelines. While some activities associated with living shorelines can be authorized by NWPs 13 and 27, the construction of living shorelines often requires individual permits because the structures, work, and fills may not fall within the terms and conditions of those NWPs. These activities often require substantial amount of fill discharged into jurisdictional waters and wetlands to achieve appropriate grades to dissipate wave energy, as well as sills or breakwaters to protect the marsh fringe that helps maintain the grade of the substrate. Living shorelines may also alter intertidal and subtidal habitats utilized by endangered or threatened species, and PCNs for this NWP will be evaluated by district engineers to determine if ESA Section 7 consultation

is required to comply with general condition 18.

Living shorelines maintain the continuity of natural land-water interface and provide ecological benefits which hard bank stabilization structures do not, such as improved water quality, resilience to storms, and habitat for fish and wildlife.

We are proposing a separate NWP to authorize the construction and maintenance of living shorelines to provide an efficient mechanism for authorizing these types of projects when they have no more than minimal adverse environmental effects. The current and proposed NWP 13 is an important tool for authorizing a variety of bank stabilization techniques to help protect private and public property and infrastructure. Both NWP 13 and proposed NWP B provide options for implementing the Corps' regulations relating to considerations of property ownership, especially 33 CFR 320.4(g). Section 320.4(g)(2) states that a landowner has the "general right to protect property from erosion" and that "applications to erect protective structures will usually receive favorable consideration."

Living shorelines are designed for erosion control and also sustain habitat functions along a shoreline, resulting in minimal environmental effects on a coastline. Living shorelines provide ecosystem services to society, shoreline stabilization, storm attenuation, food production, nutrient and sediment removal, water quality improvement and carbon sequestration (Barbier et al. 2011). The vegetation and fish utilization in constructed marsh sill can mirror that of nearby natural marshes in just a few growing seasons (Currin et al. 2008; Gittman et al. 2016). Even narrow marshes, like a frequent component of living shoreline designs, have been shown to slow waves and reduce shoreline erosion. It must be noted, shorelines are dynamic environments and the core function of stabilization is not static, but changes over time.

In 2007, the National Research Council (NRC) issued a report entitled: "Mitigating Shore Erosion Along Sheltered Coasts."³ One of the findings in that report was that the lack of a general permit to authorize living shorelines is one of a few factors that discourages the use of that erosion control technique in sheltered coasts. Other studies have made similar findings. The 2007 NRC study and other reports acknowledge that living shorelines are not practical or feasible in all coastal environments. Living

shorelines work best in sheltered coasts, which are defined in the 2007 NRC report as shorelines that front smaller bodies of water, and are not subject to the high energy erosive forces that occur along open coasts. Additional information on living shorelines is available from the Systems Approach to Geomorphic Engineering Group (SAGE), in a publication entitled "Natural and Structural Measures for Shoreline Stabilization."⁴ In 2015, the National Oceanic and Atmospheric Administration issued guidance on living shorelines.⁵

Coastal environments fall along a continuum, and there is no quantifiable measure to identify a sheltered coast. Therefore, judgment must be used to determine whether a particular segment of the shoreline is a sheltered coast where the use of living shorelines to manage erosion will likely be practical and effective. According to the 2007 NRC report, sheltered coasts are typically found in estuaries, bays, lagoons, and coastal deltas.

Depending on site conditions, these areas exhibit a variety of geomorphic features, such as upland bluffs, dunes, beaches, tidal flats, and sand bars. In sheltered coasts, the distance to the opposite shore (*i.e.*, fetch) is generally small, and water depths are usually shallow. These coastal areas are usually subject to low velocity tidal currents and low- or medium-energy waves. In general, the larger the fetch the higher the level of protection needed to reduce erosion and to protect the property.

Living shorelines are generally limited to lower energy, sheltered estuarine waters rather than open estuarine waters and marine waters with higher energy waves and currents. Living shorelines are also used in the Great Lakes, and this proposed NWP would also authorize the construction and maintenance of living shorelines in these waters and other lakes. In lower energy shorelines, sills or breakwaters can provide protection to fringe marshes landward of those structures, but in higher energy coastal environments, wave energy can bypass those structures and erode the substrate, resulting in the loss of the marsh fringe. The combination of a constructed or enhanced marsh fringe with protective sills or breakwaters can help maintain a more natural shoreline and provide more ecological functions and services than hardening shorelines to reduce

erosion. Another living shoreline approach is to construct short, low-profile, sand containment structures perpendicular to the shoreline, place sand between the low-profile sand containment structures, grade the sand to the proper slope to dissipate wave energy, and plant marsh vegetation in the sand to establish or improve a fringe marsh to reduce erosion. This design approach allows organisms more access to and from the intertidal zone than living shorelines constructed with stone sills.

Sills are structures placed in the water outside the seaward edge of a tidal marsh fringe. Sills can be constructed with stone or other materials (*e.g.* oyster, oyster shell bags, coir fiber logs, coir with mussels, etc.) and protect the existing or planted marsh fringe by reducing wave action and erosion. The sill should be the minimum size necessary to protect the marsh fringe. Sills should have breaks to allow aquatic animals to move between the open water and the marsh fringe. Breakwaters are structures consisting of stone or other materials that are constructed offshore to reduce the energy of waves reaching the shoreline, and protect the marsh vegetation planted or recruited along the shore. Breakwaters may be detached from, or attached to, the shoreline.

"Living shoreline" is a broad term that encompasses a range of shoreline stabilization techniques along estuarine coasts, bays, sheltered coastlines, and tributaries. A living shoreline has a footprint that is made up mostly of native material. It incorporates vegetation or other living, natural "soft" elements alone or in combination with some type of harder shoreline structure (*e.g.* oyster reefs or rock sills) for added stability. Living shorelines are designed for erosion control and also sustain habitat function along a shoreline, resulting in minimal environmental effects on a coastline. Living shorelines provide ecosystem services to society, shoreline stabilization, storm attenuation, food production, nutrient and sediment removal, water quality improvement and carbon sequestration. The vegetation and fish utilization in constructed marsh sill can mirror that of nearby natural marshes in just a few growing seasons. Even narrow marshes—like a frequent component of living shoreline designs—have been shown to slow waves and reduce shoreline erosion. It should be noted that shorelines are dynamic environments and the core function of stabilization is not static, but changes over time.

⁴ Available at: <http://sagecoast.org/> (accessed February 4, 2016).

⁵ Available at: http://www.habitat.noaa.gov/pdf/noaa_guidance_for_considering_the_use_of_living_shorelines_2015.pdf (accessed February 5, 2016).

³ Available at <http://www.nap.edu/read/11764/>.

We are seeking comment on the proposal to limit the placement of structures and fills to within 30 feet of the mean high water line or ordinary high water mark. Please note that the proposed 30 foot limit is not a design standard. It is merely intended to establish a limit above which a written waiver from the district engineer is required to obtain NWP authorization. The proposed 30-foot limit was derived by examining some of the literature on the design living shorelines, especially those living shorelines that involve the planting of a marsh fringe with and without sills or other types of protective structures. Sand fills are often needed to establish a grade along the shore that will dissipate wave energy and provide appropriate elevations for the planting of marsh grasses that will further reduce wave energy. A typical grade for sand fills for planted tidal marsh fringe ranges from 8:1 to 10:1 (Hardaway et al. 2010). According to the Maryland Department of the Environment (MDE), marsh establishment projects for shore protection are typically 20 to 25 feet wide and additional encroachment into the water would be needed if sills or other structures are necessary to protect the marsh (MDE 2008). In mid-energy wave environments, wetland marshes need to be around 40 to 70 feet wide with armor stone to protect the marsh (Hardaway et al. 2010).

Based on our review of available information on design specifications for living shorelines, we determined that 30 feet is a moderate encroachment that could authorize a large proportion of living shorelines with no more than minimal adverse environmental effects. We are seeking comments on the proposed 30-foot limit, and welcome suggestions for different limits as long as the commenter provides supporting data or other information for his or her proposed limit. We are also proposing to allow district engineers to waive this 30 foot limit, if they make a written determination concluding that the proposed activity will result in only minimal adverse environmental effects after coordinating the PCNs with the agencies. The project proponent must submit a PCN before a waiver can be issued by the district engineer, and if the district engineer does not provide a written verification authorizing the waiver, then the proposed activity does not qualify for NWP authorization.

The design and construction of living shorelines are dependent on site-specific conditions. This NWP is intended to provide flexibility to authorize living shorelines in a variety of environmental settings, as long as discharges of dredged or fill material

into waters of the United States and structures and work in navigable waters are minimized to the maximum extent practicable. If the district engineer does not provide a written response within 45-days of receipt of a complete PCN, and general conditions 18 and 20 do not apply, a default authorization does not occur for an NWP activity that requires a written waiver from the district engineer. Commenters are encouraged to suggest other limits, and provide a rationale for a recommended alternative limit. We are also soliciting comments on whether district engineers should have the authority to waive this 30-foot limit, if in response to a PCN the district engineer can issue a written waiver based on a site-specific evaluation and a written finding that the proposed living shoreline will result in no more than minimal adverse environmental effects. There are nine criteria used by the Corps to determine whether a proposed NWP activity will result in no more than minimal adverse environmental effects are listed in paragraph 2 of Section D, "District Engineer's Decision."

We are also seeking comment on the other proposed terms of this NWP, as well as the proposed pre-construction notification thresholds. We are proposing to require PCNs for any proposed construction of living shorelines. However, for maintenance and repair activities, pre-construction notification would not be required, unless a PCN is necessary under an applicable NWP general condition or regional conditions imposed by division engineers. For example, maintenance and repair activities conducted by non-federal permittees that might affect a species listed under the Endangered Species Act would require pre-construction notification (see general condition 18).

For activities that require PCNs, district engineers will review those proposed activities, and make site-specific determinations whether the proposed activities will result in no more than minimal individual and cumulative adverse environmental effects. Division engineers can add regional conditions to this NWP to address environmental concerns and other public interest review factors at a regional level.

Discussion of Proposed Modifications to Nationwide Permit General Conditions

GC 12. Soil Erosion and Sediment Controls. To clarify the application of this general condition in tidal waters, we are proposing to modify the last sentence to encourage permittees to conduct work during low tides to

reduce soil erosion and sediment transport during construction activities in waters subject to the ebb and flow of the tide.

GC 16. Wild and Scenic Rivers. We are proposing to modify this general condition to require pre-construction notification for any NWP activity that will 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. Section 7(a) of the Wild and Scenic Rivers Act requires Federal agencies that issue permits or licenses for water resources projects to coordinate with the Federal agency with direct management responsibility for that river. Water resources projects, for the purposes of the Wild and Scenic Rivers Act, include activities that require Department of the Army permits under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. District engineers will coordinate PCNs for those NWP activities that have the potential to adversely affect Wild and Scenic Rivers or study rivers. The managing Federal agency with direct management responsibility for that river will issue a determination with its findings on the proposed NWP activity's effects on the applicable characteristics of the Wild and Scenic River or study river. There are different standards for activities that are within the corridors of these Wild and Scenic Rivers and activities that are outside of those river corridors.

For the purposes of section 7(a) of the Wild and Scenic River Act, there are processes for evaluating water resources projects within a Wild and Scenic River corridor and for evaluating water resources projects outside a Wild and Scenic River corridor. For activities within a Wild and Scenic River's ordinary high water marks (*i.e.*, the activity is below the ordinary high water mark), the Federal agency with direct management responsibility for that river applies a "direct and adverse effect" standard. For an activity located in a river's ordinary high water marks upstream, downstream, or on a tributary to a Wild and Scenic River (*i.e.*, "outside" the Wild and Scenic River corridor), the Federal agency with direct management responsibility for that river evaluates whether the proposed activity will "invade the area or unreasonably diminish" the Wild and Scenic River. After the Federal agency with direct management responsibility for that river makes its determination, it will transmit that determination to the Corps district.

If the Federal agency makes a written determination that the proposed NWP activity will not have a direct and adverse effect on the values that resulted in the designation of that Wild and Scenic River or study river, the district engineer will issue the NWP verification as long as the proposed NWP activity complies with all other applicable terms and conditions. If the Federal agency with direct management responsibility for that river finds that the proposed NWP activity will have a direct and adverse effect on the Wild and Scenic River or study river, it may recommend measures to eliminate those adverse effects. If the prospective permittee modifies the proposed NWP activity to adopt those recommended measures, the district engineer will coordinate the revised PCN with the Federal agency, and then decide whether to issue the NWP verification.

District engineers are encouraged to work out local procedures with Federal agencies with direct management responsibility over Wild and Scenic Rivers and study rivers in their geographic areas of responsibility. Regional conditions may also be added to the NWPs by division engineers to help potential users of the NWPs understand when PCNs need to be submitted to district engineers to comply with this general condition.

GC 18. *Endangered Species*. We are proposing to modify the first paragraph of this general condition to define the terms “direct effects” and “indirect effects.” We are proposing to use definitions from FWS and NMFS regulations and guidance to define these terms for general condition 18, to assist with compliance with this general condition. We are proposing to define “direct effects” as “the immediate effects on listed species and critical habitat caused by the proposed NWP activity.” We are proposing to define “indirect effects” as “those effects on listed species and critical habitat that are caused by the proposed NWP activity and are later in time, but still are reasonably certain to occur.” The definition of “direct effects” is adapted from the FWS and NMFS’s 1998 *Endangered Species Consultation Handbook* (page 4–25) because that term is not defined in their section 7 regulations. The definition of “indirect effects” is adapted from the FWS and NMFS’s section 7 regulations at 50 CFR 402.02.

The implementing regulations for ESA section 7 require Federal agencies to consult with the FWS and/or NMFS on any Federal action that “may affect” listed species or critical habitat. The Federal action is the activity that is

authorized, funded, or carried out, in whole or in part, by that agency. To determine if ESA section 7 consultation is required, the Federal agency evaluates whether its action will directly or indirectly affect listed species or critical habitat.

The term “minimal adverse environmental effect” used for the purposes of the NWPs has a different meaning and regulatory application than the term “may affect,” when that term is used for implementing section 7 of the ESA. The former term is the threshold for determining whether a regulated activity qualifies for NWP authorization. The latter term is used to determine when section 7 consultation is required for a Federal action, such as an activity that may be authorized by an NWP. For the purposes of the NWPs, ESA section 7 consultation is required for NWP activities that may affect listed species or critical habitat. Either formal or informal consultation may be conducted to comply with the requirements of ESA section 7.

General condition 18 requires a non-Federal permittee to submit a pre-construction notification to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project. The term “in the vicinity” cannot be explicitly defined for the purposes of general condition 18 because the “vicinity” is dependent on a variety of factors, such as species distribution, ecology, life history, mobility, and migratory patterns (if applicable), as well as habitat characteristics and species sensitivity to various environmental components and potential stressors. The vicinity is also dependent on the NWP activity and the types of direct and indirect effects that might be caused by that NWP activity.

During formal consultation, ESA section 7 and its implementing regulations require the FWS and NMFS to consider in their biological opinions the direct and indirect effects of the Federal action, as well as the effects of any interrelated or interdependent actions. The FWS and NMFS also consider cumulative effects, as that term is defined in 50 CFR 402.02. Interrelated and interdependent activities are not Federal actions, because they are not authorized, funded, or carried out by the Federal agency. In many instances, the action that triggers the ESA section 7 consultation requirement (e.g., a discharge of dredged or fill material into waters of the United States that requires Corps authorization and may affect a listed species or critical habitat) is a component of a larger overall project, and the biological opinion also

considers the effects of the interrelated and interdependent activities on listed species and critical habitat. Those interrelated and interdependent activities are outside of the jurisdiction of the Corps. Including interrelated and interdependent activities in a formal ESA Section 7 consultation and biological opinion does not grant the Corps any authority to regulate those activities and their effects on listed species and critical habitat. The FWS and NMFS would be responsible for enforcing those provisions of the incidental take statement that apply to the upland activities outside of the Corps’ jurisdiction.

We are proposing to modify paragraph (b) of this general condition to clarify that Federal agencies only need to submit documentation of compliance with section 7 of the Endangered Species Act (ESA) when the terms and conditions of the NWP, or regional conditions imposed by the division engineer, require the submission of a PCN. The NWP regulations at 33 CFR 330.4(f)(1) do not require Federal permittees to submit PCNs if the proposed NWP activity does not otherwise require a PCN. Under section 7(a)(2) of the Endangered Species Act, all Federal agencies are obligated to ensure that their actions do not jeopardize the continued existence of listed species or destroy or adversely modify critical habitat. Therefore, Federal agencies have their own obligations to conduct section 7 consultations to ensure that their actions are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of designated critical habitat. Activities authorized by NWP are usually a component of a larger overall Federal agency action. The federal agency is responsible for ensuring that its overall action, plus any NWP activities that authorize components of their larger overall action, comply with ESA section 7. When a Federal permittee conducts formal section 7 consultation, the FWS and NMFS will consider the direct and indirect effects of that Federal agency’s action, plus the effects caused by interrelated and interdependent activities. The overall action subject to formal section 7 consultation should include those activities for which the Federal permittee is seeking NWP authorization.

It is not the Corps’ responsibility to make sure that other Federal agencies are fulfilling their obligations under section 7 of the ESA. The FWS and NMFS can work with the federal agency if they have concerns about that Federal

agency's compliance with ESA section 7 for a particular Federal action. The proposed change to this paragraph is also consistent with 33 CFR 330.4(f)(1), which states that for the purposes of the NWP Program, Federal agencies should follow their own procedures for complying with ESA section 7. There should not need to be two section 7 consultations for the same Federal action, when another Federal agency's larger action includes an activity for which they are seeking NWP authorization.

We are also proposing to modify paragraph (d) of this general condition to clarify that the district engineer may add activity-specific conditions to an NWP authorization after conducting formal or informal ESA section 7 consultation. The 2012 version of this general condition referred to regional conditions, which are approved by division engineers to modify one or more NWPs in a region. Regional conditions are imposed within a Corps district, state, watershed, or other type of geographic area. Most ESA section 7 consultations done for the purposes of general condition 18 are activity-specific consultations, and therefore it would be more appropriate for this paragraph to refer to conditions added to specific NWP authorizations. Division engineers can impose regional conditions on the NWPs to help protect listed species and designated critical habitat. Regional conditions are usually identified through coordination with the FWS or NMFS instead of formal or informal consultations.

We are also proposing to update the URLs for the Web sites maintained by the FWS and NMFS where information on endangered and threatened species and designated critical habitats can be obtained.

GC 19. *Migratory Birds and Bald and Golden Eagles.* We are proposing to modify this general condition to state that the permittee is responsible for ensuring that his or her action complies with the Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act, instead of stating that the permittee is responsible for obtaining any "take" permits from the U.S. Fish and Wildlife Service. There may be situations where such "take" permits are not required and compliance with these acts may be achieved through other means.

GC 20. *Historic Properties.* Parallel with the proposed modifications of paragraph (b) of general condition 18, we are also proposing to modify paragraph (b) of general condition 20 to state that federal permittees only need to submit documentation of their compliance with section 106 of the

National Historic Preservation Act (NHPA) if the proposed NWP activity requires pre-construction notification because of other terms and conditions, including regional conditions imposed by division engineers. Federal agencies are responsible for complying with the requirements of NHPA section 106. Activities undertaken by other federal agencies that might qualify for NWP authorization are usually parts of a larger overall action and include other activities that not regulated by the Corps. If a State Historic Preservation Officer, Tribal Historic Preservation Officer, or the Advisory Council on Historic Preservation have concerns about the federal agency's compliance with section 106, they can work with the federal agency conducting the larger overall undertaking.

GC 23. *Mitigation.* We are proposing to modify the opening paragraph of this general condition and paragraph (b) to clarify that mitigation can be required by district engineers to ensure that activities authorized by NWPs will result in no more than minimal individual and cumulative adverse environmental effects. The NWP regulations at 33 CFR 330.1(e)(3) state that district engineer first reviews the PCN to determine whether the proposed NWP activity will result in more than minimal individual and cumulative adverse environmental effects. If the district engineer determines the adverse environmental effects of the proposed NWP activity will be more than minimal, he or she will notify the applicant of two options: (1) The applicant can apply for an individual permit, or (2) the applicant can prepare a mitigation proposal to reduce the adverse environmental effects so that they are no more than minimal. If the applicant chooses the latter option, the district engineer will review the mitigation proposal and if it is sufficient to ensure the proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects, he or she will issue an NWP verification with conditions stating the mitigation requirements.

We are proposing to modify paragraph (d) to state that compensatory mitigation for stream losses should be provided through rehabilitation, enhancement, or preservation. This will make paragraph (d) consistent with 33 CFR 332.3(e)(3), which states that streams are difficult-to-replace resources. Compensatory mitigation projects for streams should focus on actions that improve or protect the ecological functions provided by existing streams. The proposed modification uses the word "should"

and if a particular stream restoration project involves re-establishment of the stream, and would have a high likelihood of resulting in the restoration of stream functions and services, then that stream re-establishment project could be determined by the district engineer to be an acceptable compensatory mitigation project for an NWP activity.

In paragraph (e), we are proposing to modify the first sentence to state that compensatory mitigation provided through riparian areas can be accomplished by restoration, enhancement, or preservation of those areas. An existing stream would have had a riparian area at some time in the past, so we are deleting establishment as a compensatory mitigation mechanism. If the riparian area was removed, re-establishing that riparian area is a restoration action. We are proposing to modify the second sentence of this paragraph to state that restored riparian areas should consist of native species. If the compensatory mitigation project involves replanting the riparian area, then native plant species should be used. If an intact riparian area already exists, and that riparian area is already providing important ecological functions and services, then that riparian area should be preserved through site protection mechanisms. Clearing trees from a well-established, functioning riparian area to remove individual trees because they are non-native, in most cases, can do more harm than good. Clearing trees disturbs the soil and makes it more susceptible to erosion, and it will take years for the newly planted vegetation to develop into trees. During the time it takes the riparian area to develop and recover, important ecological functions are likely to be reduced or absent.

In the 2012 version of general condition 23, the requirement to comply with the applicable provisions of the Corps' compensatory mitigation regulations at 33 CFR part 332 is in the paragraph addressing wetland mitigation. Because the Corps' compensatory mitigation regulations at 33 CFR part 332 apply to all types of aquatic resources, including streams, we are proposing to move those requirements to a new separate paragraph (paragraph (f)).

We are proposing to modify paragraph (f)(1) to state that if the district engineer determines compensatory mitigation is required for the proposed NWP activity, the preferred mechanism for providing compensatory mitigation is either mitigation bank credits or in-lieu credits. This proposed modification is consistent with the 2008 mitigation rule,

specifically 33 CFR 332.3(b). That section of the 2008 mitigation rule establishes a hierarchical framework for considering compensatory mitigation options for DA permits. Mitigation banks are a preferred mechanism for providing compensatory mitigation because they “typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation.” (33 CFR 332.3(b)(2)). In-lieu fee programs are preferable to permittee-responsible mitigation because in-lieu fee projects typically involve “larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation.” (33 CFR 332.3(b)(3)). In addition, in-lieu fee programs are required to implement compensation planning frameworks to identify and address high-priority resource needs on a watershed scale. If the district engineer determines that compensatory mitigation is necessary to ensure an NWP activity results in no more than minimal individual and cumulative adverse environmental effects, and the appropriate number and type of mitigation bank credits or in-lieu fee program credits are not available, then the district engineer will require the applicant to submit a permittee-responsible mitigation plan for the district engineer’s review.

In October 2015, the Corps’ Institute for Water Resources released a report entitled: “The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources” (Report number 2015-R-03). A copy of this report is available at: <http://www.iwr.usace.army.mil/Media/NewsStories/tabid/11418/Article/626925/iwr-releases-the-mitigation-rule-retrospective-a-review-of-the-2008-regulations.aspx>. The report examines Corps permit data and compensatory mitigation requirements for the period of 2010 to 2014. The report also looks at the number of approved mitigation banks and in-lieu fee programs under the 2008 mitigation rule. The report uses data from the Corps Regulatory Program’s automated information system, ORM, and the Regulatory In-Lieu Fee and Bank Information System (RIBITS).

During the five-year period examined in the mitigation rule retrospective, 31% of the individual permits issued by Corps districts required compensatory mitigation and 8% of the activities verified as qualifying for general permit authorization required compensatory mitigation. Ten percent of the NWP

verifications issued from 2010 to 2014 required compensatory mitigation. The Corps’ regulations have different thresholds for requiring compensatory mitigation for individual permits and general permits. The threshold for requiring compensatory mitigation for individual permits is found at 33 CFR 320.4(r), which was not changed by the 2008 mitigation rule (see 33 CFR 332.1(b)). The threshold for requiring compensatory mitigation for NWP activities is described in 33 CFR 330.1(e)(3), which was promulgated in 1991 and was not affected by the issuance of the 2008 mitigation rule. Regional general permits issued by Corps districts use a threshold similar to the compensatory mitigation threshold for the NWP program. Compensatory mitigation is required for NWPs and other general permits when necessary to ensure that the authorized activities result in no more than minimal adverse environmental effects.

The report also examined the effectiveness of the Corps Regulatory Program in minimizing impacts to jurisdictional waters and wetlands (see figure 5 of the report). For individual permits and general permits, 89% of the authorized impacts to jurisdictional waters and wetlands were less than 1/2-acre, and 70% of the permitted impacts to jurisdictional waters and wetlands were less than 1/10-acre. The authorized impacts shown in that chart include both permanent and temporary impacts to jurisdictional waters and wetlands. Those data show that project proponents design their projects to reduce those impacts to qualify for NWP authorization. They also minimize wetland losses so that they are less than 1/10-acre, below the threshold in paragraph (c) of general condition 23 for requiring compensatory mitigation for wetland losses.

The mitigation rule retrospective also demonstrates the increased use of mitigation bank credits and in-lieu fee program credits to fulfill compensatory mitigation requirements in individual permits and general permit verifications. This increased use occurs as a result of more mitigation banks and in-lieu fee programs getting approved under the 2008 mitigation rule and more credits becoming available. Concurrent with this increased use of mitigation bank credits and in-lieu fee program credits, there has been a decrease in the use of permittee-responsible mitigation to fulfill compensatory mitigation requirements.

The report also includes charts showing the service areas of approved mitigation banks and in-lieu fee program credits, where those credits

might be available for providing compensatory mitigation for NWP activities and activities authorized by other types of Corps permits. Most of the approved mitigation banks provide wetland credits, some mitigation banks provide stream credits, and a number of mitigation banks provide both wetland and stream credits. There are some approved mitigation banks that provide credits for losses of other types of aquatic resources, and those mitigation banks are relatively rare. However, given the increased availability of mitigation banks and in-lieu fee program credits in much of the country, we are proposing to modify paragraph (f)(1) of general condition 23 to establish a preference for the use of those credits to comply with compensatory mitigation requirements imposed by district engineers to ensure that NWP activities result in no more than minimal individual and cumulative adverse environmental effects. The use of mitigation bank credits and in-lieu fee program credits is also beneficial to permittees because it reduces the amount of time needed to evaluate a PCN. If an applicant proposes permittee-responsible mitigation to fulfill the compensatory mitigation requirements in an NWP verification, more time is needed for Corps district staff to evaluate the proposed mitigation plan and ensure that it complies with all applicable requirements in 33 CFR 332.1 through 332.7. Permittee-responsible mitigation could be used to fulfill the compensatory mitigation requirements for NWP activities, if the appropriate amount and type of mitigation bank or in-lieu fee program credits are not available at the time the NWP verification decision is being made, or if the district engineer determines, after applying the criteria at 33 CFR 332.3(a) and (b), that permittee-responsible mitigation would be acceptable for offsetting the losses caused by a particular NWP activity.

In addition, we are proposing to modify paragraph (i) to make it clear that compensatory mitigation to offset losses of specific functions of jurisdictional waters and wetlands should only be required by district engineers when those losses are caused by regulated activities. For example, removing vegetation in a utility line right-of-way in jurisdictional wetlands by using techniques that do not result in a discharge of dredged or fill material into waters of the United States does not require DA authorization. Consistent with the Corps’ mitigation policy at 33 CFR 320.4(r), compensatory mitigation should only be required for impacts

directly related to the activity that requires DA authorization.

The Corps is seeking public comment on ways to improve how compensatory mitigation conducted under the NWP program is implemented to offset direct, indirect, and cumulative effects. The Corps is particularly interested in factors which District Engineers would consider for deciding when and how much mitigation may be necessary and what additional information could be considered to help inform their mitigation decisions.

GC 30. Compliance Certification. We are proposing to modify this general condition to add a timeframe for submitting the completed certification document. The completed certification should be sent to the district engineer within 30 days of completing the authorized activity or the completion of the implementation of any required compensatory mitigation. We are referring to the implementation of the required compensatory mitigation, instead of the successful completion of compensatory mitigation. For permittee-responsible mitigation, it may be years before the required compensatory mitigation is determined to be ecologically successful, because the monitoring period is a minimum of five years (see 33 CFR 332.6(b)). When credits from mitigation banks or in-lieu fee programs are used to fulfill the compensatory mitigation requirements of NWP activities, implementation refers to securing those credits from the sponsor of the mitigation bank or in-lieu fee program. The Corps district should be notified, through the compliance certification, when the required aquatic resources restoration, enhancement, establishment, or preservation activity has taken place. After the compensatory mitigation project has been implemented, the district engineer will review monitoring reports to ensure that the required compensatory mitigation is fulfilling its objectives and offsetting the authorized impacts.

GC 31. Activities Affecting Structures or Works Built by the United States. Section 14 of the Rivers and Harbors Act of 1899 (33 U.S.C. 408) authorizes the Secretary of the Army to grant permission for the alteration or occupation or use of structures or works built by the United States (*i.e.*, U.S. Army Corps of Engineers federally authorized Civil Works projects) if the Secretary determines that the activity will not be injurious to the public interest and will not impair the usefulness of that project. The authority to issue these section 408 permissions has been delegated to Corps Headquarters, Corps divisions, or Corps

districts depending on the case-specific circumstances for a 408 permission request. Some of these activities also require authorization under section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899, and may be eligible for one or more NWPs.

On July 31, 2014, the Corps issued Engineer Circular 1165–2–216, which provides policy and procedural guidance for evaluating requests for section 408 permissions. The Engineer Circular also states that district engineers cannot make decisions on requests for Clean Water Act section 404 or Rivers and Harbors Act of 1899 section 10 authorizations prior to the Corps making decisions on section 408 requests. In addition, 33 CFR 330.4(b)(5) states that “NWPs do not authorize interference with any existing or proposed Federal project.” That provision of the NWP regulations means that no activity that would alter or temporarily or permanently occupy or use a Corps federal project is authorized by NWP until a required section 408 permission is granted.

The text of 33 CFR part 330.4(b)(5) has been incorporated in the text of the NWPs since 2000 (see 65 FR 12818 at 12897, March 9, 2000). To provide additional clarity and ensure that no activity potentially authorized by NWP can go forward until the project proponent receives a required section 408 permission to alter or occupy structures or works built by the United States, we are proposing to add a new general condition. The new general condition states that a proposed NWP activity that also needs section 408 permission requires submission of a PCN and is not authorized by NWP until the district engineer issues a written NWP verification. The district engineer will not issue a written NWP verification until after the 408 permission has been granted, or the Corps determines that section 408 permission is not required for a particular activity.

Additional information on the section 408 permission process and the timing of the issuance of authorizations by Regulatory Program offices is provided in Engineer Circular 1165–2–216, which is available at: <http://www.usace.army.mil/Missions/CivilWorks/Section408.aspx>.

GC 32. Pre-Construction Notification. We are proposing to modify paragraph (b) by adding a new paragraph (b)(2) to state that the PCN should identify the specific NWP(s) the project proponent wants to use to authorize the proposed activity. Some activities that require DA authorization may be authorized by

more than one NWP, and project proponents can choose to seek authorization under the NWP or NWPs that most readily authorizes that activity. For example, one NWP might have been issued WQC by the state while another NWP that could authorize the same activity might have WQC denied by the state and thus require an individual WQC. Consistent with the Corps Regulatory Program Standard Operating Procedure (SOP) issued in 2009, districts should evaluate permit applications using the least extensive and time consuming review process (see page 9 of the SOP). When an applicant requests authorization under a specific NWP, then the district should evaluate the PCN for that particular NWP.

In addition, we are proposing to modify paragraph (b)(4) to require a description of mitigation measures the applicant intends to use to reduce adverse environmental effects caused by the proposed activity. Such mitigation measures can include on-site avoidance and minimization measures. This change is intended to add efficiency to the PCN review process. Identifying these mitigation measures up-front in the PCN can help reduce the amount of time district engineers take to reach decisions on whether to issue NWP verifications.

For linear projects, we are proposing to change paragraph (b)(4) to make it clear that the PCN should identify all crossings of waters of the United States that require DA authorization. Since the 1991 NWPs were issued, the notification general condition has required the prospective permittee to identify in the PCN “any other NWPs, 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” (see 56 FR 59145). This provision has been present in the “notification” general condition for all the subsequent reissuances of the NWPs. This requirement includes crossings of waters of the United States authorized by non-reporting NWPs, but does not include crossings of waters of the United States that do not require DA authorization, such as utility line crossings accomplished by directional drilling below section 404-only waters, where there is no discharge of dredged or fill material into waters of the United States. We are also proposing to modify paragraph (b)(4) to require, for linear projects, that the PCN include the quantity of proposed losses of waters of the United States for each single and complete crossing of those waters. Each separate and distance crossing of waters of the United States may be eligible for separate NWP authorization, subject to

the discretion of the district engineer and compliance with 33 CFR 330.6(d).

In paragraphs (b)(7) and (8) of this general condition, we are proposing to make changes consistent with the proposed changes to paragraph (c) of general conditions 18 and 20. These changes will also be consistent with 33 CFR 330.4(f)(2) and (g)(2). The requirement to submit PCNs for proposed NWP activities that might affect listed species or critical habitat under the ESA or have the potential to cause effects to historic properties is limited to non-federal permittees. Federal permittees are responsible for following their own procedures for complying with ESA section 7 and NHPA section 106 (see 33 CFR 330.4(f)(1) and (g)(1), respectively).

We are proposing to add paragraph (b)(9) to require the PCN to include a statement from the project proponent confirming that he or she has submitted a written request for a section 408 permission, if the proposed NWP activity will alter or occupy structures or works built by the United States. This proposed new paragraph will help implement the proposed new general condition 31.

To provide flexibility in the submittal of PCNs and supporting information, we are proposing to modify paragraph (c) of this general condition to state that applicants may submit PCNs and supporting information as electronic files. Corps districts should make it clear on their Regulatory home pages how prospective users of the NWPs can submit electronic files of PCNs and supporting information.

In paragraph (d), agency coordination, we are proposing to restructure the text so that there are separate subparagraphs explaining when agency coordination is required and the procedures for agency coordination. We are proposing to require agency coordination for PCNs for proposed NWP 13 activities where the applicants request waivers for one or more of limits of NWP 13 that can be waived with a written activity-specific determination of no more than minimal adverse environmental effects. In paragraph (d)(2), we are also proposing to remove the requirement for agency coordination for all NWP 48 activities that require pre-construction notification. The majority of commercial shellfish aquaculture activities authorized by NWP 48 are on-going operations. We do not believe it is necessary to do agency coordination each time these on-going activities are re-authorized by NWP 48. Since NWP 48 has been used for almost 10 years, we do not believe it is necessary to require agency coordination for other

commercial shellfish aquaculture activities authorized by NWP 48. Corps districts can work out agreements with regional or local offices of the resource agencies if they determine that agency coordination would help provide them with information to help make the no more than minimal adverse environmental effects determination for NWP 48 activities. In addition, Corps districts conduct activity-specific ESA section 7 or Essential Fish Habitat consultations when proposed NWP 48 activities may affect listed species or critical habitat, or may adversely affect Essential Fish Habitat, unless there are regional programmatic consultations that apply to these activities. These section 7 and EFH consultations can also result in exchanges of information from the FWS and/or NMFS that district engineers can use to make their decisions on NWP 48 PCNs.

Discussion of Proposed Modifications to Section D, "District Engineer's Decision"

We are proposing to modify paragraph 1 to state that if an applicant requests authorization under one or more specific NWPs, the district engineer should issue the verification letter for those NWPs, unless he or she exercises discretionary authority to require an individual permit. The district engineer would exercise discretionary authority in cases where the adverse environmental effects would be more than minimal after considering options for appropriate and practicable avoidance, minimization, and compensatory mitigation. The revised text in paragraph 1 refers to the terms of the NWPs. That is, the text of the specific NWP. The word "terms" is defined at 33 CFR 330.2(h) as: "the limitations and provisions included in the description of the NWP itself." The general conditions are the same for all NWPs, so it is the text of the NWP that usually determines eligibility for NWP authorization. An exception is when the division engineer has imposed regional conditions that further restrict a particular NWP so that a proposed activity does not qualify for authorization by that NWP.

We are proposing to modify paragraph 2 to clarify that a condition assessment can also be used to help determine whether a proposed activity will result in no more than minimal adverse environmental effects. In the second sentence of paragraph 3, we are proposing to change the text to state that applicants may also propose compensatory mitigation to offset impacts to other types of waters, such as streams. In the following sentence, we

are proposing to clarify that mitigation measures other than compensatory mitigation may also be used to ensure that a proposed NWP activity results in no more than minimal adverse environmental effects.

In paragraph 4, we are proposing to clarify that the 45-day PCN review period may be extended if general conditions 18, 20, and/or 31 apply and additional time is needed to complete ESA section 7 consultation, NHPA section 106 consultation, or for the Corps to make a decision on a request for section 408 permission. The proposed change to this sentence also includes NWPs 21, 49, and 50, because regulated activities are not authorized by these NWPs until written verifications are issued by district engineers.

Further Information

In item 5, we are proposing to add a cross-reference to proposed new general condition 31. If the Corps issues a section 408 permission, then the NWP activity would not be considered as interfering with the federal project.

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.

We received one suggestion to define "temporary." We believe that district engineers should have the discretion to determine on a case-by-case basis what constitutes a temporary impact versus a permanent impact. The length of time to consider an impact to be "temporary" depends on a variety of factors, including how soon the temporary structures and fills need to be removed after construction has been completed. In some cases they might need to be removed shortly after construction is completed. In other cases more time might be necessary to allow the completed structures and fills to stabilize prior to removing any temporary structures or fills. The appropriate length of time would depend on various factors, such as resource type, hydrodynamics, soils, geology, plant communities, and season. Providing a national definition of "temporary" would be less protective of the environment because it would constrain local decision making. For example, if the authorized structure or fill is not allowed sufficient time to stabilize, it may collapse or be washed away after the temporary structures or fills are removed.

Discharge. We are proposing to modify this definition to make it clear that the use of the term “discharge” in the NWP refers to “discharges of dredged or fill material” and not to discharges of other types of pollutants. Point source discharges of other types of pollutants are regulated under section 402 of the Clean Water Act.

Loss of waters of the United States. We are proposing to modify this definition to clarify that loss of stream bed can be measured by area (e.g., acres, square feet) or by linear feet. For the NWPs that authorize discharges of dredged or fill material into waters of the United States that result in the loss of stream bed through filling or excavation, specified limits may be expressed in acres, linear feet, or both. For example, NWP 12 has a 1/2-acre limit. NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 have both 1/2-acre limits and 300 linear foot limits for losses of stream bed. For those 10 NWPs, the loss of intermittent or ephemeral stream bed can be waived upon a written determination by the district engineer after he or she coordinates the PCN with the resource agencies, as long as the total loss of waters of the United States, including losses of stream bed, does not exceed 1/2-acre.

The Corps Regulatory Program tracks authorized impacts and required compensatory mitigation for all permit actions, including NWP verifications, in its national database (ORM). For each individual permit decision and general permit verification, Corps district project managers are required to record in ORM the initial proposed impacts, the proposed impacts, and the authorized impacts to jurisdictional waters and wetlands. Most of the impacts are entered as acres, and Corps district project managers also have the option of entering impacts in linear feet. The amount of proposed and required compensatory mitigation may be entered as acres or linear feet, or as the number of mitigation bank or in-lieu fee program credits. The units of measure used for recording amounts of impacts and compensatory mitigation at the discretion of the Corps district project manager. In many cases, Corps district project managers enter both acres and linear feet for impacts and compensatory mitigation. Using different units of measure for recording impacts and compensatory mitigation makes it difficult to produce summary data at national and regional levels, and results in double counting if both acres and linear feet are recorded for a particular authorized impact or compensatory mitigation requirement. A uniform metric such as acres is a critical

tool for clear and consistent reporting of the Corps Regulatory Program’s contribution to protecting the Nation’s waters and wetlands.

When a discharge of dredged or fill material into waters of the United States authorized by a Clean Water Act Section 404 permit occurs, or when structures or work in navigable waters of the United States authorized by a Rivers and Harbors Act of 1899 Section 10 permit occur, an area of jurisdictional waters and wetlands is affected. Compensatory mitigation projects restore, enhance, establish, or preserve areas of wetlands and waters. The use of linear feet as a metric for quantifying impacts to wetlands and waters or gains of wetlands and waters through compensatory mitigation projects is misleading. Consider, for example, potential impacts to a 300 linear foot segment of a stream that has a mean width of 20 feet. If the project proponent requests an NWP verification to do bank stabilization along one of the banks of that stream segment, and the fill discharged into the stream has a mean width of 3 feet, then the acreage of the proposed impact to the stream bed is 0.02 acre. As another example, if the project proponent requests NWP authorization to fill the entire 300 linear foot segment of stream, then the proposed impacts to that 20-foot wide stream bed would be 0.14 acre, or seven times the acreage impact for that same 300 linear feet of stream if only a 3-foot wide area of that stream were to be filled along those 300 linear feet. Quantifying stream bed impacts as acres results in more accurate reporting on the impacts of activities authorized by Corps permits on streams and other types of waters.

For some purposes, measuring losses of stream bed in linear feet provides a useful approach for ensuring no more than minimal adverse environmental effects by limiting the length of stream bed that can be filled or excavated, below the acreage limit for that NWP. Some of the NWPs have linear foot limits (e.g., 300 linear feet) that can be waived for losses of intermittent and ephemeral streams if a district engineer makes a written determination that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. Those NWPs that have a linear foot limit for losses of stream bed that can be waived are still subject to the 1/2-acre limit for losses of waters of the United States. The 1/2-acre limit cannot be waived.

The 1/2-acre limit imposes a cap on waivers of the 300 linear foot limit for losses of intermittent and ephemeral

stream bed, to ensure those losses result in no more than minimal adverse environmental effects. For example, for an ephemeral stream bed that has a mean width of 20 feet, no more than 1,089 linear feet of that ephemeral stream could be filled or excavated because of the 1/2-acre limit. For a waiver of the 300 linear foot limit to occur, the district engineer must first coordinate the PCN with the agencies, in accordance with the procedures in paragraph (d) of general condition 32. After conducting this agency coordination, the district engineer must make a written determination whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects, after considering the factors in paragraph 2 of Section D, District Engineer’s Decision. The district engineer may require compensatory mitigation or other forms of mitigation to ensure no more than minimal adverse environmental effects. After conducting agency coordination, the district engineer might also determine that the proposed activity will result in more than minimal adverse environmental effects and exercise discretionary authority to require an individual permit, which would involve a public notice and comment process and the preparation of site-specific environmental documentation.

We are also proposing to clarify that losses of waters of the United States calculated for purposes of determining NWP eligibility are limited to losses caused by activities that require Department of the Army (DA) authorization. Activities that do not require DA authorization, such as activities eligible for Clean Water Act section 404(f) exemptions or the cutting of vegetation from jurisdictional wetlands that do not involve discharges of dredged or fill material, are not considered when calculating losses of waters of the United States.

Ordinary high water mark. We are proposing to change the regulation citation in this definition to 33 CFR 328.3(c)(6) to be consistent with the 2015 revisions to the definition of “waters of the United States” in 33 CFR part 328, as published in the June 29, 2015 issue of the **Federal Register**.

Riparian areas. We are proposing to change the word “adjacent” to “next” in the first sentence of this definition because riparian areas border rivers, streams, and other bodies of water.

Tidal wetland. We are proposing to change the regulation citations in this definition to 33 CFR 328.3(c)(4) (defining wetlands) and 33 CFR 328.3(d) (defining tidal waters) to be consistent

with the 2015 revisions to the definition of “waters of the United States” in 33 CFR part 328, as published in the June 29, 2015 issue of the **Federal Register**.

Administrative Requirements

Plain Language

In compliance with the principles in the President’s Memorandum of June 1, 1998, (63 FR 31885, June 10, 1998) 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 paperwork burden associated with the NWP relates exclusively to the preparation of the PCN. While different NWPs require that different information be included in a PCN, the Corps estimates that a PCN takes, on average, 11 hours to complete. The proposed NWPs would increase the total paperwork burden associated with this program but decrease the net burden on the public. This is due to the fact that there is new paperwork burden associated with the inclusion of two new NWP (both of which have PCN requirements). Since, however, this time would otherwise be spent on completing an individual permit application, which we estimate also takes, on average, 11 hours to complete, the net effect on the public is zero.

The only real change to the public’s paperwork burden from this proposal is a decrease due primarily to a modification to the PCN requirements for NWPs 33 and 48 and, to a lesser extent, a minor increase associated with the minor changes we are proposing to the content required for a complete PCN (see paragraph (b) of general condition 32).

Specifically, we anticipate a reduction in paperwork burden from the proposal to require PCNs only for NWP 33 activities in section 10 waters. There will also be a paperwork reduction because of the proposed change to the PCN thresholds for NWP 48, by eliminating the requirement to submit a PCN for dredged harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation. We estimate that the proposed changes to NWP 33 would result in 210 fewer PCNs, with an estimated reduction of paperwork burden of 2,310 hours. The proposed changes to the PCN thresholds for NWP 48 are expected to result in a reduction of 50 PCNs per year in waters where there are no listed species or critical habitat that would otherwise trigger the requirement to submit PCNs because of general condition 18. We estimate that 50 fewer PCNs will be required for NWP 48 activities, with a reduction of paperwork burden of 550 hours. Therefore, the estimated net change in paperwork burden for this proposed rule is an increase of 385 hours per year. Prospective permittees

who are required to submit a PCN for a particular NWP, or who are requesting verification that a particular activity qualifies for NWP authorization, may use the current standard Department of the Army permit application form.

The following table summarizes the projected changes in paperwork burden for two alternatives relative to the paperwork burden under the 2012 NWPs. The first alternative is this proposal to reissue 50 NWPs and issue two new NWPs. The second alternative would result if NWPs are not issued and reissued and regulated entities would have to obtain standard individual permits to comply with the permit requirements of section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. The 286 standard individual permits included in the row for the 2012 NWPs represent the standard individual permits that would be required for activities that would be authorized by the proposed changes to NWPs 3, 13, 45, and 51 and the two proposed NWPs (NWPs A and B). The estimated five activities that would require authorization by standard individual permit under the proposed 2017 NWPs represent surface coal mining activities that were authorized by paragraph (a) of the 2012 NWP 21 that will not be completed before the 2012 NWP expires and would thus require standard individual permits to complete the surface coal mining activity.

	Number of NWP PCNs per year	Number of NWP activities not requiring PCNs per year	Number of SIPs per year	Estimated changes in NWP PCNs per year	Estimated changes in number of NWP activities not requiring PCNs per year	Estimated changes in number of SIPs per year
2012 NWPs	31,555	31,415	281
Proposed 2017 NWPs	31,490	31,636	5	- 60	+246	- 281
SIPs required if NWPs not reissued	0	0	49,556

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 is currently under review by OMB).

We request comments on the following subjects:

- Whether the collection of information is necessary for the proper functioning of the Corps, including whether the information will have practical utility;
- The accuracy of the Corps’ estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information to be collected; and
- How to minimize the information collection burden on those who are to respond, including the use of appropriate automated, electronic,

mechanical, or other forms of information technology.

We are also seeking comment on the standard form PCN, including its quality, utility, clarity, and ways to minimize its burden. There will be a separate **Federal Register** notice soliciting comment on that NWP PCN form.

If you want to comment on the information collection requirements of this proposed rule, please send your comments directly to OMB, with a copy to the Corps, as directed in the **ADDRESSES** section of this preamble. Please identify your comments with “OMB Control Number 0710-XXXX.”

OMB is required to make a decision concerning the collection of information contained in this proposed rule between 30 to 60 days after publication of this document in the **Federal Register**.

Therefore, a comment to OMB is best assured of having its full effect if OMB receives it by July 1, 2016.

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 under item (4) that the proposed rule is a “significant regulatory action” and the draft proposed rule was submitted to OMB for review.

Executive Order 13132

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires the Corps to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” The proposed issuance and modification of NWP does not have federalism implications. We do not believe that the proposed NWP 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 NWP 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 proposed 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 NWP on small entities, a small entity is defined as: (1) A small business based on Small Business Administration size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

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

Nationwide permits automatically expire and become null and void if they are not modified or reissued within five years of their effective date (see 33 CFR 330.6(b)). Furthermore, section 404(e) of the Clean Water Act states that general permits, including NWP, can be issued for no more than five years. If the current NWP are not reissued, they will expire on March 18, 2017, and small

entities and other project proponents would be required to obtain alternative forms of DA permits (*i.e.*, standard permits, letters of permission, or regional general permits) for activities involving discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States. Regional general permits that authorize similar activities as the NWP may be available in some geographic areas, but small entities conducting regulated activities outside those geographic areas would have to obtain individual permits for activities that require DA permits.

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

Another requirement of section 404(e) of the Clean Water Act is that general permits, including nationwide permits, authorize only those activities that result in no more than minimal adverse environmental effects, individually and cumulatively. The terms and conditions of the NWP, such as acreage or linear foot limits, are imposed to ensure that the NWP authorize only those activities that result in no more than minimal adverse effects on the aquatic environment and other public interest review factors.

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

are proposing to issue two new NWP's. Because those activities required authorization through other forms of DA authorization (e.g., individual permits or regional general permits) we expect a concurrent decrease in the numbers of individual permit and regional general permit authorizations required for these activities.

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

Unfunded Mandates Reform Act

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

We have determined that the proposed NWP's do not contain a federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the

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

Executive Order 13045

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

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

Executive Order 13175

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

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

Environmental Documentation

A draft decision document, which includes a draft environmental assessment and Finding of No Significant Impact (FONSI) has been prepared for each proposed NWP. These draft decision documents are available at: www.regulations.gov (docket ID number COE-2015-0017). They are also available by contacting Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street NW., Washington, DC 20314-1000.

Congressional Review Act

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

Executive Order 12898

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each federal agency conduct its programs, policies,

and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

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

Executive Order 13211

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

Authority

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

Dated: May 18, 2016.

Donald E. Jackson,

Major General, U.S. Army, Deputy Commanding General for Civil and Emergency Operations.

Nationwide Permits, Conditions, Further Information, and Definitions

A. Index of Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions

Nationwide Permits

1. Aids to Navigation
2. Structures in Artificial Canals
3. Maintenance
4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities
5. Scientific Measurement Devices
6. Survey Activities
7. Outfall Structures and Associated Intake Structures
8. Oil and Gas Structures on the Outer Continental Shelf
9. Structures in Fleeting and Anchorage Areas
10. Mooring Buoys
11. Temporary Recreational Structures
12. Utility Line Activities

13. Bank Stabilization
 14. Linear Transportation Projects
 15. U.S. Coast Guard Approved Bridges
 16. Return Water From Upland Contained Disposal Areas
 17. Hydropower Projects
 18. Minor Discharges
 19. Minor Dredging
 20. Response Operations for Oil or Hazardous Substances
 21. Surface Coal Mining Activities
 22. Removal of Vessels
 23. Approved Categorical Exclusions
 24. Indian Tribe or State Administered Section 404 Programs
 25. Structural Discharges
 26. [Reserved]
 27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities
 28. Modifications of Existing Marinas
 29. Residential Developments
 30. Moist Soil Management for Wildlife
 31. Maintenance of Existing Flood Control Facilities
 32. Completed Enforcement Actions
 33. Temporary Construction, Access, and Dewatering
 34. Cranberry Production Activities
 35. Maintenance Dredging of Existing Basins
 36. Boat Ramps
 37. Emergency Watershed Protection and Rehabilitation
 38. Cleanup of Hazardous and Toxic Waste
 39. Commercial and Institutional Developments
 40. Agricultural Activities
 41. Reshaping Existing Drainage Ditches
 42. Recreational Facilities
 43. Stormwater Management Facilities
 44. Mining Activities
 45. Repair of Uplands Damaged by Discrete Events
 46. Discharges in Ditches
 47. [Reserved]
 48. Commercial Shellfish Aquaculture Activities
 49. Coal Remining Activities
 50. Underground Coal Mining Activities
 51. Land-Based Renewable Energy Generation Facilities
 52. Water-Based Renewable Energy Generation Pilot Projects
 - A. Removal of Low-Head Dams
 - B. Living Shorelines
- Nationwide Permit General Conditions
1. Navigation
 2. Aquatic Life Movements
 3. Spawning Areas
 4. Migratory Bird Breeding Areas
 5. Shellfish Beds
 6. Suitable Material
 7. Water Supply Intakes
 8. Adverse Effects from Impoundments
 9. Management of Water Flows
 10. Fills Within 100-Year Floodplains

11. Equipment
12. Soil Erosion and Sediment Controls
13. Removal of Temporary Fills
14. Proper Maintenance
15. Single and Complete Project
16. Wild and Scenic Rivers
17. Tribal Rights
18. Endangered Species
19. Migratory Bird and Bald and Golden Eagle Permits
20. Historic Properties
21. Discovery of Previously Unknown Remains and Artifacts
22. Designated Critical Resource Waters
23. Mitigation
24. Safety of Impoundment Structures
25. Water Quality
26. Coastal Zone Management
27. Regional and Case-by-Case Conditions
28. Use of Multiple Nationwide Permits
29. Transfer of Nationwide Permit Verifications
30. Compliance Certification
31. Activities Affecting Structures or Works Built by the United States
32. Pre-Construction Notification

District Engineer's Decision

Further Information

Definitions

- Best management practices (BMPs)
- Compensatory mitigation
- Currently serviceable
- Direct effects
- Discharge
- Enhancement
- Ephemeral stream
- Establishment (creation)
- High Tide Line
- Historic property
- Independent utility
- Indirect effects
- Intermittent stream
- Loss of waters of the United States
- Non-tidal wetland
- Open water
- Ordinary high water mark
- Perennial stream
- Practicable
- Pre-construction notification
- Preservation
- Re-establishment
- Rehabilitation
- Restoration
- Riffle and pool complex
- Riparian areas
- Shellfish seeding
- Single and complete linear project
- Single and complete non-linear project
- Stormwater management
- Stormwater management facilities
- Stream bed
- Stream channelization
- Structure
- Tidal wetland
- Vegetated shallows
- Waterbody

B. Nationwide Permits

1. *Aids to Navigation.* The placement of aids to navigation and regulatory markers that 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, requirements of other regulatory agencies, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized. This NWP also authorizes the removal of previously authorized structures or fills. Any stream channel modification is limited to the minimum necessary for the repair, rehabilitation, or replacement of the structure or fill; such modifications, including the removal of material from the stream channel, must be immediately adjacent to the project or within the boundaries of the structure or fill. This NWP also authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the district engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(b) This NWP also authorizes the removal of accumulated sediments and debris in the vicinity of existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.) and/or the placement of new or additional riprap to protect the structure. The removal of sediment is

limited to the minimum necessary to restore the waterway in the vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend farther 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 area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. The placement of new or additional riprap must be the minimum necessary to protect the structure or to ensure the safety of the structure. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the district engineer.

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

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

Notification: For activities authorized by paragraph (b) of this NWP, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 32). The pre-construction notification must include information regarding the original design capacities and configurations of the outfalls, intakes, small impoundments, and canals. (Sections 10 and 404)

Note: This NWP authorizes the repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Clean Water Act section 404(f) exemption for maintenance.

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

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

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

recovery of historic resources are not authorized by this NWP. Drilling and the discharge of excavated material from test wells for oil and gas exploration are not authorized by this NWP; the plugging of such wells is authorized. Fill placed for roads and other similar activities is not authorized by this NWP. The NWP does not authorize any permanent structures. The discharge of drilling mud and cuttings may require a permit under section 402 of the Clean Water Act. (Sections 10 and 404)

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Sections 10 and 404)

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (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 1/2-acre of waters of the United States for each single and complete project.

Utility lines: This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States (*i.e.*, section 10 waters) for crossings of those waters associated with the construction, maintenance, or repair of utility lines, including outfall and intake structures. There must be no change in pre-construction contours of waters of the United States. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefied, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and internet, radio, and television communication. The term "utility line" does not include activities that drain a water of the United States, such as drainage tile or french drains, but it does apply to pipes conveying drainage from another area.

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

creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

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

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

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

This NWP may authorize utility lines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (See 33 CFR part 322). Overhead utility lines constructed over section 10 waters and utility lines that are routed in or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

This NWP authorizes, to the extent that DA authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling muds to waters of the United States through sub-soil fissures or fractures (*i.e.*, frac-outs) that might occur during horizontal directional drilling activities to install or replace utility lines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling muds to waters of the United States during horizontal directional drilling activities for the installation or replacement of utility lines.

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if any of the following criteria are met: (1) The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (*i.e.*, water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than $\frac{1}{10}$ -acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials. (See general condition 32.) (Sections 10 and 404)

Note 1: Where the utility line is constructed or installed in navigable waters of the United States (*i.e.*, section 10 waters) within the coastal United States, the Great Lakes, and United States territories, a copy of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the utility line to protect navigation.

Note 2: For utility line activities crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Utility lines with independent utility must comply with 33 CFR 330.6(d).

Note 3: Utility lines consisting of aerial electric power transmission lines crossing navigable waters of the United States must comply with the applicable minimum clearances specified in 33 CFR 322.5(i).

Note 4: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work, in accordance with the requirements for temporary fills.

Note 5: Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to Section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit (see NWP 15).

Note 6: This NWP authorizes utility line maintenance and repair activities do not qualify for the Clean Water Act section 404(f) exemption for maintenance of currently serviceable fills or fill structures.

Note 7: For overhead utility lines authorized by this NWP, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

Note 8: For NWP 12 activities that require pre-construction notification, the PCN must include 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, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

13. Bank Stabilization. Bank stabilization activities necessary for erosion control or prevention, such as vegetative stabilization, sills, rip rap, revetment, gabion baskets, stream barbs, and bulkheads, or combinations of bank stabilization techniques, provided the activity meets all of the following criteria:

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

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

(c) The activity will not exceed an average of one cubic yard per running foot, as measured along the bank, below the plane of the ordinary high water mark or the high tide line, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(d) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

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

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

(g) The activity is not a stream channelization activity; and

(h) The activity must be properly maintained, which may require repairing after severe storms or erosion events. This NWP authorizes those maintenance and repair activities.

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

fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

Native plants appropriate for current site conditions, including salinity, must be used for bioengineering or vegetative bank stabilization.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the bank stabilization activity: (1) Involves discharges into special aquatic sites; or (2) is in excess of 500 feet in length; or (3) will involve the discharge of greater than an average of one cubic yard per running foot along the bank below the plane of the ordinary high water mark or the high tide line. (See general condition 32.) (Sections 10 and 404)

14. *Linear Transportation Projects.* Activities required for the construction, expansion, modification, or improvement of linear transportation projects (e.g., roads, highways, railways, trails, airport runways, and taxiways) in waters of the United States. For linear transportation projects in non-tidal waters, the discharge cannot cause the loss of greater than 1/2-acre of waters of the United States. For linear transportation projects in tidal waters, the discharge cannot cause the loss of greater than 1/3-acre of waters of the United States. Any stream channel modification, including bank stabilization, is limited to the minimum necessary to construct or protect the linear transportation project; such modifications must be in the immediate vicinity of the project.

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

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The loss of waters of the United States exceeds 1/10-acre; or (2) there is a discharge in a special aquatic site, including wetlands. (See general condition 32.) (Sections 10 and 404)

Note 1: For linear transportation projects crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Linear transportation projects with independent utility must comply with 33 CFR 330.6(d).

Note 2: Some discharges for the construction of farm roads or forest roads, or temporary roads for moving mining equipment, may qualify for an exemption under section 404(f) of the Clean Water Act (see 33 CFR 323.4).

Note 3: For NWP 14 activities that require pre-construction notification, the PCN must include 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, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

15. *U.S. Coast Guard Approved Bridges.* Discharges of dredged or fill material incidental to the construction of a bridge across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills, provided the construction of the bridge structure has been authorized by the U.S. Coast Guard under section 9 of the Rivers and Harbors Act of 1899 or other applicable laws. Causeways and approach fills are not included in this NWP and will require a separate section 404 permit. (Section 404)

16. *Return Water From Upland Contained Disposal Areas.* Return water from an upland contained dredged material disposal area. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d), even though the disposal itself occurs in an area that has no waters of the United States and does not require a section 404 permit. This NWP satisfies the technical requirement for a section 404 permit for the return water where the

quality of the return water is controlled by the state through the section 401 certification procedures. The dredging activity may require a section 404 permit (33 CFR 323.2(d)), and will require a section 10 permit if located in navigable waters of the United States. (Section 404)

17. *Hydropower Projects.* Discharges of dredged or fill material associated with hydropower projects having: (a) Less than 5000 kW of total generating capacity at existing reservoirs, where the project, including the fill, is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; or (b) a licensing exemption granted by the FERC pursuant to section 408 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and section 30 of the Federal Power Act, as amended.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (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 32.) (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)). All dredged material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. (Sections 10 and 404)

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

21. *Surface Coal Mining Activities.* Discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations, provided the following criteria are met:

(1) The activities are already authorized, or are currently being processed by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 or as part of an integrated permit processing procedure by the Department of the Interior, Office of Surface Mining Reclamation and Enforcement;

(2) The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal individual and cumulative adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre. This NWP does not authorize discharges into tidal

waters or non-tidal wetlands adjacent to tidal waters; and

(3) The discharge is not associated with the construction of valley fills. A "valley fill" is a fill structure that is typically constructed within valleys associated with steep, mountainous terrain, associated with surface coal mining activities.

Notification: The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 32.) (Sections 10 and 404)

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The vessel is listed or eligible for listing in the National Register of Historic Places; or (2) the activity is conducted in a special aquatic site, including coral reefs and wetlands. (See general condition 32.) If condition 1 above is triggered, the permittee cannot commence the activity until informed by the district engineer that compliance with the "Historic Properties" general condition is completed. (Sections 10 and 404)

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

Note 2: Compliance with general condition 18, Endangered Species, and general condition 20, Historic Properties, is required for all NWPs. The concern with historic properties is emphasized in the notification requirements for this NWP because of the possibility that shipwrecks may be historic properties.

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

(a) That agency or department has determined, pursuant to the Council on Environmental Quality's implementing regulations for the National Environmental Policy Act (40 CFR part 1500 *et seq.*), that the activity is categorically excluded from the requirement to prepare an environmental impact statement or

environmental assessment analysis, 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 32). The activities that require pre-construction notification are listed in the appropriate Regulatory Guidance Letters. (Sections 10 and 404)

Note: The agency or department may submit an application for an activity believed to be categorically excluded to the Office of the Chief of Engineers (Attn: CECW-CO). Prior to approval for authorization under this NWP of any agency's activity, the Office of the Chief of Engineers will solicit public comment. As of the date of issuance of this NWP, agencies with approved categorical exclusions are the: Bureau of Reclamation, Federal Highway Administration, and U.S. Coast Guard. Activities approved for authorization under this NWP as of the date of this notice are found in Corps Regulatory Guidance Letter 05-07, which is available at: <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl05-07.pdf>. Any future approved categorical exclusions will be announced in Regulatory Guidance Letters and posted on this same Web site.

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

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

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

25. *Structural Discharges.* Discharges of material such as concrete, sand, rock, etc., into tightly sealed forms or cells where the material will be used as a

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

26. [Reserved]

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

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to: The removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms, as well as discharges of dredged or fill material to restore appropriate stream channel configurations after small water control structures, dikes, and berms, are removed; the installation of current deflectors; the enhancement, restoration, or establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or establish stream meanders; the backfilling of artificial channels; the removal of existing drainage structures, such as drain tiles, and the filling, blocking, or reshaping of drainage ditches to restore wetland hydrology; the installation of structures or fills necessary to establish or re-establish wetland or stream hydrology; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; re-establishment of submerged aquatic vegetation in areas where those plant

communities previously existed; re-establishment of tidal wetlands in tidal waters where those wetlands previously existed; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.

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

Except for the relocation of non-tidal waters on the project site, this NWP does not authorize the conversion of a stream or natural wetlands to another aquatic habitat type (e.g., the conversion of a stream to wetland or vice versa) or uplands. Changes in wetland plant communities that occur when wetland hydrology is more fully restored during wetland rehabilitation activities are not considered a conversion to another aquatic habitat type. This NWP does not authorize stream channelization. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

Compensatory mitigation is not required for activities authorized by this NWP since these activities must result in net increases in aquatic resource functions and services.

Reversion. For enhancement, restoration, and establishment activities conducted: (1) In accordance with the terms and conditions of a binding stream or wetland enhancement or restoration agreement, or a wetland establishment agreement, between the landowner and the U.S. Fish and Wildlife Service (FWS), the Natural Resources Conservation Service (NRCS), the Farm Service Agency (FSA), the National Marine Fisheries Service (NMFS), the National Ocean Service (NOS), U.S. Forest Service (USFS), or their designated state cooperating agencies; (2) as voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or (3) on reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) or the applicable state agency, this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (i.e., prior to the restoration,

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

Reporting. For those activities that do not require pre-construction notification, the permittee must submit to the district engineer a copy of: (1) The binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement, or a project description, including project plans and location map; (2) the NRCS or USDA Technical Service Provider documentation for the voluntary stream enhancement or restoration action or wetland restoration, enhancement, or establishment action; or (3) the SMCRA permit issued by OSMRE or the

applicable state agency. The report must also include information on baseline ecological conditions on the project site, such as a delineation of wetlands, streams, and/or other aquatic habitats. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing any activity (see general condition 32), except for the following activities:

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

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

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

However, the permittee must submit a copy of the appropriate documentation to the district engineer to fulfill the reporting requirement. (Sections 10 and 404)

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

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

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

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

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

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Sections 10 and 404)

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

Note: The repair, maintenance, or replacement of existing water control structures or the repair or maintenance of dikes may be authorized by NWP 3. Some such activities may qualify for an exemption under section 404(f) of the Clean Water Act (see 33 CFR 323.4).

31. Maintenance of Existing Flood Control Facilities. Discharges of dredged or fill material resulting from activities associated with the maintenance of existing flood control facilities, including debris basins, retention/detention basins, levees, and channels that: (i) Were previously authorized by the Corps by individual permit, general permit, or 33 CFR 330.3, or did not require a permit at the time they were constructed, or (ii) were constructed by the Corps and transferred to a non-Federal sponsor for operation and maintenance. Activities authorized by this NWP are limited to those resulting from maintenance activities that are conducted within the "maintenance baseline," as described in the definition below. Discharges of dredged or fill materials associated with maintenance activities in flood control facilities in any watercourse that have previously been determined to be within the maintenance baseline are authorized under this NWP. To the extent that a Corps permit is required, this NWP authorizes the removal of vegetation from levees associated with the flood control project. This NWP does not authorize the removal of sediment and associated vegetation from natural water courses except when these activities have been included in the maintenance baseline. All dredged material must be placed in an area that has no waters of the United States or a separately authorized disposal site in waters of the United States, and proper siltation controls must be used.

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

constructed design capacities of the flood control facility. If no evidence of the constructed capacity exists, the approved capacity will be used. The documentation will also include best management practices to ensure that the adverse environmental impacts are no more than 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 32). 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 activities authorized by this NWP cannot adversely affect more than 5 acres of non-tidal waters or 1 acre of tidal waters;

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

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

(ii) The terms of a final Federal court decision, consent decree, or settlement agreement resulting from an enforcement action brought by the

United States under section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or

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

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

33. Temporary Construction, Access, and Dewatering. Temporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard. This NWP also authorizes temporary structures, work, and discharges, including cofferdams, necessary for construction activities not otherwise subject to the Corps or U.S. Coast Guard permit requirements. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. The use of dredged material may be allowed if the district engineer determines that it will not cause more than minimal adverse environmental effects. Following completion of construction, temporary fill must be entirely removed to an area that has no waters of the United States, dredged material must be returned to its original location, and the affected areas must be restored to pre-construction elevations. The affected areas must also be revegetated, as appropriate. This

permit does not authorize the use of cofferdams to dewater wetlands or other aquatic areas to change their use. Structures left in place after construction is completed require a separate section 10 permit if located in navigable waters of the United States. (See 33 CFR part 322.)

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the activity is conducted in navigable waters of the United States (*i.e.*, section 10 waters) (see general condition 32). The pre-construction notification must include a restoration plan showing how all temporary fills and structures will be removed and the area restored to pre-project conditions. (Sections 10 and 404)

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

Notification: The permittee must submit a pre-construction notification to the district engineer once during the period that this NWP is valid, and the NWP will then authorize discharges of dredge or fill material at an existing operation for the permit term, provided the 10-acre limit is not exceeded. (See general condition 32.) (Section 404)

35. *Maintenance Dredging of Existing Basins.* The 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. All dredged material must be placed in an area that has no waters of the United States or in a separately authorized disposal site in waters of the United States. Proper siltation controls must be used for the disposal site. (Section 10)

36. *Boat Ramps.* Activities required for the construction of boat ramps,

provided the activity meets all of the following criteria:

(a) The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or in the form of pre-cast concrete planks or slabs, unless the district engineer waives the 50 cubic yard limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(b) The boat ramp does not exceed 20 feet in width, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

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

(d) The excavation is limited to the area necessary for site preparation and all excavated material is removed to an area that has no waters of the United States; and,

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

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge into waters of the United States exceeds 50 cubic yards, or (2) the boat ramp exceeds 20 feet in width. (See general condition 32.) (Sections 10 and 404)

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

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

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

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

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

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

In general, the prospective permittee should wait until the district engineer issues an NWP verification or 45 calendar days have passed before proceeding with the watershed protection and rehabilitation activity. However, in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the emergency watershed protection and rehabilitation activity may proceed immediately and the district engineer will consider the information in the pre-construction notification and any comments received as a result of agency coordination to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

Notification: Except in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 32). (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 32.) (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, wastewater treatment facilities, and recreation facilities such as playgrounds and playing fields. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The construction of new golf courses and new ski areas is not authorized by this NWP.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in only minimal adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre. 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 32.) (Sections 10 and 404)

Note: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

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

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

This NWP also authorizes discharges of dredged or fill material into non-tidal

waters of the United States to relocate existing serviceable drainage ditches constructed in non-tidal streams.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre. 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 32.) (Section 404)

Note: Some discharges for agricultural activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4). This NWP authorizes the construction of farm ponds that do not qualify for the Clean Water Act section 404(f)(1)(C) exemption because of the recapture provision at section 404(f)(2).

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

This NWP does not authorize the relocation of drainage ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage ditch must be approximately the same as the location of the centerline of the original drainage ditch. This NWP does not authorize stream channelization or stream relocation projects. (Section 404)

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

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre. 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 32.) (Section 404)

43. *Stormwater Management Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction of stormwater management facilities, including stormwater detention basins and retention basins and other stormwater management facilities; the construction of water control structures, outfall structures and emergency spillways; and the construction of low impact development integrated management features such as bioretention facilities (*e.g.*, rain gardens), vegetated filter strips, grassed swales, and infiltration trenches. This NWP also authorizes, to the extent that a section 404 permit is required, discharges of dredged or fill material into non-tidal waters of the United States for the maintenance of stormwater management facilities. Note that stormwater management facilities that meet the criteria at 33 CFR part 328.3(b)(6) are not waters of the United States, and maintenance of these waste

treatment systems does not require a section 404 permit.

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

Notification: For the construction of new stormwater management facilities, or the expansion of existing stormwater management facilities, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) Maintenance activities do not require pre-construction notification if they are limited to restoring the original design capacities of the stormwater management facility. (Section 404)

44. *Mining Activities.* Discharges of dredged or fill material into non-tidal waters of the United States for mining activities, except for coal mining activities, provided the activity meets all of the following criteria:

(a) For mining activities involving discharges of dredged or fill material into non-tidal wetlands, the discharge must not cause the loss of greater than 1/2-acre of non-tidal wetlands;

(b) For mining activities involving discharges of dredged or fill material in non-tidal open waters (*e.g.*, rivers, streams, lakes, and ponds) the mined area, including permanent and temporary impacts due to discharges of dredged or fill material into jurisdictional waters, must not exceed 1/2-acre; and

(c) The acreage loss under paragraph (a) plus the acreage impact under paragraph (b) does not exceed 1/2-acre.

The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects.

The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

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 32.) If reclamation is required by other statutes, then a copy of the final reclamation plan must be submitted with the pre-construction notification. (Sections 10 and 404)

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

This NWP does not authorize beach restoration or nourishment.

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

Notification: The permittee must submit a pre-construction notification to the district engineer (see general condition 32) within 12 months of the date of the damage; for major storms, floods, or other discrete events, the district engineer may waive the 12-month limit for submitting a pre-construction notification if the permittee can demonstrate funding, contract, or other similar delays. The pre-construction notification must include documentation, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. (Sections 10 and 404)

Note: The uplands themselves that are lost as a result of a storm, flood, or other discrete event can be replaced without a section 404 permit, if the uplands are restored to the

ordinary high water mark (in non-tidal waters) or high tide line (in tidal waters). (See also 33 CFR 328.5.) This NWP authorizes discharges of dredged or fill material into waters of the United States associated with the restoration of uplands.

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

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Section 404)

47. [Reserved]

48. *Commercial Shellfish Aquaculture Activities.* Discharges of dredged or fill material in waters of the United States or structures or work in navigable waters of the United States necessary for new and continuing commercial shellfish aquaculture operations in authorized project areas. For the purposes of this NWP, the project area is the area in which the operator is authorized to conduct commercial shellfish aquaculture activities, as identified through a lease or permit issued by an appropriate state or local government agency, a treaty, or any easement, lease, deed, contract, or other legally binding agreement that establishes an enforceable property interest for the operator. A "new commercial shellfish aquaculture operation" is an operation in an area where commercial shellfish aquaculture activities have not been conducted during the past 100 years.

This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures into navigable waters of the United States. This NWP also authorizes discharges of dredged or fill material into waters of the United States necessary for shellfish seeding, rearing, cultivating, transplanting, and

harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked.

This NWP does not authorize:

(a) The cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody;

(b) The cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990;

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

(d) Activities that directly affect more than 1/2-acre of submerged aquatic vegetation beds in areas that have not been used for commercial shellfish aquaculture activities during the past 100 years.

Notification: The permittee must submit a pre-construction notification to the district engineer if: (1) The activity will include a species that has never been cultivated in the waterbody; or (2) the activity occurs in an area that has not been used for commercial shellfish aquaculture activities during the past 100 years. (See general condition 32.)

In addition to the information required by paragraph (b) of general condition 32, the pre-construction notification must also include the following information: (1) A map showing the boundaries of the project area, with latitude and longitude coordinates for each corner of the project area; (2) the name(s) of the species that will be cultivated during the period this NWP is in effect; (3) whether canopy predator nets will be used; (4) whether suspended cultivation techniques will be used; and (5) general water depths in the project area (a detailed survey is not required). (Sections 10 and 404)

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

Note 2: To prevent introduction of aquatic nuisance species, no material that has been taken from a different waterbody may be reused in the current project area, unless it has been treated in accordance with the applicable regional aquatic nuisance species management plan.

Note 3: The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 defines "aquatic nuisance species" as "a nonindigenous species that threatens the diversity or abundance of native species or the ecological stability of infested waters, or commercial, agricultural, aquacultural, or recreational activities dependent on such waters."

49. *Coal Remining Activities.* Discharges of dredged or fill material

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

As part of the project, the permittee may conduct new coal mining activities in conjunction with the remining activities when he or she clearly demonstrates to the district engineer that the overall mining plan will result in a net increase in aquatic resource functions. The Corps will consider the SMCRA agency's decision regarding the amount of currently undisturbed adjacent lands needed to facilitate the remining and reclamation of the previously mined area. The total area disturbed by new mining must not exceed 40 percent of the total acreage covered by both the remined area and the additional area necessary to carry out the reclamation of the previously mined area.

Notification: The permittee must submit a pre-construction notification and a document describing how the overall mining plan will result in a net increase in aquatic resource functions to the district engineer and receive written authorization prior to commencing the activity. (See general condition 32.) (Sections 10 and 404)

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

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that

the discharge will result in no more than minimal adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize coal preparation and processing activities outside of the mine site.

Notification: The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 32.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification. (Sections 10 and 404)

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

51. *Land-Based Renewable Energy Generation Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction, expansion, or modification of land-based renewable energy production facilities, including attendant features. Such facilities include infrastructure to collect solar (concentrating solar power and photovoltaic), wind, biomass, or geothermal energy. Attendant features may include, but are not limited to roads, parking lots, and stormwater management facilities within the land-based renewable energy generation facility.

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Sections 10 and 404)

Note 1: Utility lines constructed to transfer the energy from the land-based renewable energy generation facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and

each separate and distant crossing of a waterbody is eligible for treatment as a separate single and complete linear project. Those utility lines may be authorized by NWP 12 or another Department of the Army authorization.

Note 2: If the only activities associated with the construction, expansion, or modification of a land-based renewable energy generation facility that require Department of the Army authorization are discharges of dredged or fill material into waters of the United States to construct, maintain, repair, and/or remove utility lines and/or road crossings, then NWP 12 and/or NWP 14 shall be used if those activities meet the terms and conditions of NWPs 12 and 14, including any applicable regional conditions and any case-specific conditions imposed by the district engineer.

Note 3: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

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

For the purposes of this NWP, the term “pilot project” means an experimental project where the renewable energy generation units will be monitored to collect information on their performance and environmental effects at the project site.

The discharge must not cause the loss of greater than ½-acre of waters of the United States, including the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. The placement of a transmission line on the bed of a navigable water of the United States from the renewable energy generation unit(s) to a land-based collection and distribution facility is considered a structure under Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(b)), and the placement of the transmission line on

the bed of a navigable water of the United States is not a loss of waters of the United States for the purposes of applying the ½-acre or 300 linear foot limits.

For each single and complete project, no more than 10 generation units (e.g., wind turbines or hydrokinetic devices) are authorized. For floating solar panels in navigable waters of the United States, each single and complete project cannot exceed ½-acre in water surface area covered by the floating solar panels.

This NWP does not authorize activities in coral reefs. Structures in an anchorage area established by the U.S. Coast Guard must comply with the requirements in 33 CFR 322.5(l)(2). Structures may not be placed in established danger zones or restricted areas as designated in 33 CFR part 334, Federal navigation channels, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard (see 33 CFR 322.5(l)(1)), or EPA or Corps designated open water dredged material disposal areas.

Upon completion of the pilot project, the generation units, transmission lines, and other structures or fills associated with the pilot project must be removed to the maximum extent practicable unless they are authorized by a separate Department of the Army authorization, such as another NWP, an individual permit, or a regional general permit. Completion of the pilot project will be identified as the date of expiration of the Federal Energy Regulatory Commission (FERC) license, or the expiration date of the NWP authorization if no FERC license is issued.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Sections 10 and 404)

Note 1: Utility lines constructed to transfer the energy from the land-based collection facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate single and complete linear project. Those utility lines may be authorized by NWP 12 or another Department of the Army authorization.

Note 2: An activity that is located on an existing locally or federally maintained U.S. Army Corps of Engineers project requires separate approval from the Chief of Engineers or District Engineer under 33 U.S.C. 408.

Note 3: If the pilot project, including any transmission lines, are placed in navigable waters of the United States (i.e., section 10 waters) within the coastal United States, the Great Lakes, and United States territories, copies of the pre-construction notification

and NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration, National Ocean Service, for charting the generation units and associated transmission line(s) to protect navigation.

Note 4: Hydrokinetic renewable energy generation projects that require authorization by the Federal Energy Regulatory Commission under the Federal Power Act of 1920 do not require separate authorization from the Corps under section 10 of the Rivers and Harbors Act of 1899.

Note 5: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

Proposed NWP A. *Removal of Low-Head Dams.* Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States associated with the removal of low head dams. For the purposes of this NWP, the term “low-head dam” is defined as a dam built across a stream to pass flows from upstream over the entire width of the dam crest on an uncontrolled basis.

All of the removed dam structures must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Sections 10 and 404)

Proposed NWP B. *Living Shorelines.* Living shoreline bank stabilization activities in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction and maintenance of living shorelines to stabilize banks and shores in low- to mid-energy coastal waters and lakes. “Living shoreline” is a broad term that encompasses a range of shoreline stabilization techniques along estuarine coasts, bays, sheltered coastlines, and tributaries. A living shoreline has a footprint that is made up mostly of native material. It incorporates vegetation or other living, natural “soft” elements alone or in combination with some type of harder shoreline structure (e.g., oyster reefs or rock sills) for added stability. Living shorelines should maintain the natural continuity of the land-water interface, and retain or enhance shoreline ecological processes. Living shorelines must have a substantial biological component, either

tidal or lacustrine fringe wetlands or reef structures. The following conditions must be met:

(a) The structures and fill area, including sills, breakwaters, or reefs, cannot extend into the waterbody more than 30 feet from the mean high water line or ordinary high water mark, unless the district engineer waives this criterion by making a written determination concluding that the activity will result in no more than minimal adverse environmental effects;

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

(c) Coir logs, coir mats, stone, native oyster shell, native wood debris and other structural materials must be adequately anchored, of sufficient weight, or installed in a manner that prevents relocation in most wave action or water flow conditions, except for extremely severe storms;

(d) For living shorelines consisting of tidal or lacustrine fringe wetlands, native plants appropriate for current site conditions, including salinity, must be used;

(e) Discharges of dredged or fill material into waters of the United States, and reef structures in navigable waters, must be the minimum necessary for the establishment and maintenance of the living shoreline;

(f) The activity must be designed, constructed, and maintained so that it has no more than minimal adverse effects on water movement between the waterbody and the shore and the movement of aquatic organisms between the waterbody and the shore;

(g) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects; and

(h) The living shoreline must be properly maintained as a living shoreline, which may require repairing sills, breakwaters, and reefs, replacing sand fills, and replanting vegetation after severe storms or erosion events. This NWP authorizes those maintenance and repair activities to the original permitted conditions.

This NWP does not authorize beach nourishment or land reclamation activities.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to

commencing the construction of the living shoreline. (See general condition 32.) The pre-construction notification must include a delineation of special aquatic sites (see paragraph (b)(4) of general condition 32). Pre-construction notification is not required for maintenance and repair activities for living shorelines unless required by applicable NWP general conditions or regional conditions. (Sections 10 and 404)

C. Nationwide Permit General Conditions

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

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

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

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. *Aquatic Life Movements.* No activity may substantially disrupt the necessary life cycle movements of those

species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species.

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

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

5. *Shellfish Beds.* No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWPs 4 and 48, or is a shellfish seeding or habitat restoration activity authorized by NWP 27.

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

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

8. *Adverse Effects From Impoundments.* If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

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

it benefits the aquatic environment (e.g., stream restoration or relocation activities).

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

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

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

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

14. *Proper Maintenance.* Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable NWP general conditions, as well as any activity-specific conditions added by the district engineer to an NWP authorization.

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

16. *Wild and Scenic Rivers.* (a) 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.

(b) If a proposed NWP activity will 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, the permittee must submit a pre-construction notification

(see general condition 32). The district engineer will coordinate the PCN with the Federal agency with direct management responsibility for that river. The permittee shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

(c) Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service). Information on these rivers is also available at: <http://www.rivers.gov/>.

17. *Tribal Rights.* No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

18. *Endangered Species.* (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless section 7 consultation addressing the effects of the proposed activity has been completed. Direct effects are the immediate effects on listed species and critical habitat caused by the NWP activity. Indirect effects are those effects on listed species and critical habitat that are caused by the NWP activity and are later in time, but still are reasonably certain to occur.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. If pre-construction notification is required for the proposed activity, Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under section 7 of the ESA.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that might be affected by the proposed activity or that utilize the designated critical habitat that might be affected by the proposed work. The district engineer will determine whether the proposed activity "may affect" or will have "no effect" to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the activity, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have "no effect" on listed species or critical habitat, or until section 7 consultation has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(d) As a result of formal or informal consultation with the FWS or NMFS the district engineer may add species-specific permit conditions to the NWPs.

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

including breeding, feeding or sheltering.

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

19. *Migratory Birds and Bald and Golden Eagles.* The permittee is responsible for ensuring their action complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting appropriate local office of the U.S. Fish and Wildlife Service to determine applicable measures to reduce impacts to migratory birds or eagles, including whether "incidental take" permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.

20. *Historic Properties.* (a) In cases where the district engineer determines that the activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of section 106 of the National Historic Preservation Act. If pre-construction notification is required for the proposed NWP activity, Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation is not submitted, then additional consultation under section 106 may be necessary. The respective federal agency is responsible for fulfilling its obligation to comply with section 106.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the activity may have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties may be affected by the proposed work or include a vicinity map indicating the location of the historic properties or the

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

(d) The district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). If NHPA section 106 consultation is required and will occur, the district engineer will notify the non-Federal applicant that he or she cannot begin work until section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that section 110k of the NHPA (16 U.S.C. 470h-2(k)) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of Section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with

the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects historic properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

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

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

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, and 52 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and proposed NWP B, notification is required in accordance with general condition 32, for any activity proposed

in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWRPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

23. *Mitigation.* The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal:

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

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed $\frac{1}{10}$ -acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. For wetland losses of $\frac{1}{10}$ -acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects.

(d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation to ensure that the activity results in no more than minimal adverse environmental effects. Compensatory mitigation for losses of streams should be provided through stream rehabilitation, enhancement, or preservation, since streams are difficult-to-replace resources (see 33 CFR 332.3(e)(3)).

(e) Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (*e.g.*, conservation easements) of riparian areas next to open waters. In some cases, the restoration of riparian

areas may be the only compensatory mitigation required. Restored riparian areas should consist of native species. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to establish a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or establishing a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (*e.g.*, riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(f) Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in no more than minimal adverse environmental effects. For the NWRPs, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2) and (3)).

(2) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, restoration of these areas should be the first compensatory mitigation option considered.

(3) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to

ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)).

(4) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan only needs to address the baseline conditions at the impact site and the number of credits to be provided.

(5) Compensatory mitigation requirements (*e.g.*, resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan.

(g) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWRPs. For example, if an NWP has an acreage limit of $\frac{1}{2}$ -acre, it cannot be used to authorize any NWP activity resulting in the loss of greater than $\frac{1}{2}$ -acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that an NWP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the NWRPs.

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

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert 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 environmental effects of the activity to the no more than minimal level.

24. *Safety of Impoundment Structures.* To ensure that all impoundment structures are safely

designed, the district engineer may require non-Federal applicants to demonstrate that the structures comply with established state dam safety criteria or have been designed by qualified persons. The district engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

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

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

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

28. *Use of Multiple Nationwide Permits.* The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed $\frac{1}{3}$ -acre.

29. *Transfer of Nationwide Permit Verifications.* If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by

submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

“When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.”

(Transferee)

(Date)

30. *Compliance Certification.* Each permittee who receives an NWP verification letter from the Corps must provide a signed certification documenting completion of the authorized activity and implementation of any required compensatory mitigation. The success of any required permittee-responsible mitigation, including the achievement of ecological performance standards, will be addressed separately by the district engineer. The Corps will provide the permittee the certification document with the NWP verification letter. The certification document will include:

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

(b) A statement that the implementation of any required compensatory mitigation was completed in accordance with the permit conditions. If credits from a mitigation bank or in-lieu fee program are used to satisfy the compensatory mitigation requirements, the certification must include the documentation required by 33 CFR 332.3(l)(3) to confirm that the permittee secured the appropriate number and resource type of credits; and

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

The completed certification document must be submitted to the district engineer within 30 days of completion of the authorized activity or the implementation of any required compensatory mitigation.

31. *Activities Affecting Structures or Works Built by the United States.* If an NWP activity also requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers (USACE) federally authorized Civil Works project (a “USACE project”), the prospective permittee must submit a pre-construction notification. See paragraph (b)(10) of general condition 32. An activity that requires section 408 permission is not authorized by NWP until the appropriate Corps district office issues the section 408 permission to alter, occupy, or use the USACE project, and the district engineer issues a written NWP verification.

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

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

(2) 45 calendar days have passed from the district engineer’s receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or in the vicinity of the activity, or to notify the Corps pursuant to general condition 20 that the activity may have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is

“no effect” on listed species or “no potential to cause effects” on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or section 106 of the National Historic Preservation (see 33 CFR 330.4(g)) has been completed. Also, work cannot begin under NWP 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee’s right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

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

- (1) Name, address and telephone numbers of the prospective permittee;
- (2) Location of the proposed activity;
- (3) Identify the specific NWP or NWP(s) the prospective permittee wants to use to authorize the proposed activity;
- (4) A description of the proposed activity; the activity’s purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of water of the United States expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; 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, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures. For single and complete linear projects, the PCN must

include the quantity of proposed losses of waters of the United States for each single and complete crossing of waters of the United States. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (e.g., a conceptual plan), but do not need to be detailed engineering plans);

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

(6) If the proposed activity will result in the loss of greater than $\frac{1}{10}$ -acre of wetlands and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied, or explaining why the adverse environmental effects are no more than minimal and why compensatory mitigation should not be required. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(7) For non-Federal permittees, if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat, the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed activity or utilize the designated critical habitat that might be affected by the proposed activity. For any NWP activity that requires pre-construction notification, Federal permittees must provide documentation demonstrating compliance with the Endangered Species Act;

(8) For non-Federal permittees, if the NWP activity may have the potential to cause effects to a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, the PCN must state which historic property may have the potential to be

affected by the proposed activity or include a vicinity map indicating the location of the historic property. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with section 106 of the National Historic Preservation Act;

(9) For an activity that will 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, the PCN must identify the Wild and Scenic River or the “study river” (see general condition 16); and

(10) For an activity that requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers federally authorized civil works project, the pre-construction notification must include a statement confirming that the project proponent has submitted a written request for section 408 permission from the Corps district having jurisdiction over that USACE project.

(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 an NWP PCN and must include all of the applicable information required in paragraphs (b)(1) through (9) of this general condition. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials.

(d) *Agency Coordination:* (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity’s compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the activity’s adverse environmental effects so that they are no more than minimal.

(2) Agency coordination is required for: (i) All NWP activities that require pre-construction notification and result in the loss of greater than $\frac{1}{2}$ -acre of waters of the United States; (ii) NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 activities that require pre-construction notification and will result in the loss of greater than 300 linear feet of stream bed; (iii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iv) proposed NWP B activities in excess of

500 linear feet, that extend into the waterbody more than 30 feet from the mean high water line or ordinary high water mark, or involve discharges into special aquatic sites.

(3) When agency coordination is required, the district engineer will immediately provide (*e.g.*, via email, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (FWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Office (THPO), and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will have 10 calendar days from the date the material is transmitted to telephone or fax the district engineer notice that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse environmental effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame concerning the proposed activity's compliance with the terms and conditions of the NWPs, including the need for mitigation to ensure the net adverse environmental effects of the proposed activity are no more than minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(4) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

(5) Applicants are encouraged to provide the Corps with either electronic files or multiple copies of pre-

construction notifications to expedite agency coordination.

D. District Engineer's Decision

1. In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If a project proponent requests authorization by a specific NWP, the district engineer should issue the verification for that NWP if it meets the terms in the text of that NWP, unless he or she determines, after considering mitigation, that the proposed activity will result in more than minimal adverse environmental effects and exercises discretionary authority to require an individual permit for the proposed activity. For a linear project, this determination will include an evaluation of the individual crossings to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings authorized by NWP. If an applicant requests a waiver of the 300 linear foot limit on impacts to streams or of an otherwise applicable limit, as provided for in NWPs 13, 21, 29, 36, 39, 40, 42, 43, 44, 50, 51, 52, or proposed NWP B, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in only minimal adverse environmental effects.

2. When making minimal adverse environmental effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (*e.g.*, partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (*e.g.*, watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional or condition assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse environmental effects determination. The district engineer

may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns.

3. If the proposed activity requires a PCN and will result in a loss of greater than $\frac{1}{10}$ -acre of wetlands, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for NWP activities with smaller impacts, or for impacts to other types of waters (*e.g.*, streams). The district engineer will consider any proposed compensatory mitigation or other mitigation measures the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed activity are no more than 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 environmental effects are no more than minimal, after considering mitigation, the district engineer will notify the permittee and include any activity-specific conditions in the NWP verification the district engineer deems necessary. Conditions for compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k). The district engineer must approve the final mitigation plan before the permittee commences work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the proposed compensatory mitigation plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure the NWP activity results in no more than minimal adverse environmental effects. If the net adverse environmental effects of the NWP activity (after consideration of the mitigation proposal) are determined by the district engineer to be no more than minimal, the district engineer will provide a timely written response to the applicant. The response will state that the NWP activity can proceed under the terms and conditions of the NWP, including any activity-specific conditions added

to the NWP authorization by the district engineer.

4. If the district engineer determines that the adverse effects of the proposed activity are more than minimal, then the district engineer will notify the applicant either: (a) That the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) that the activity is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level; or (c) that the activity 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 (unless additional time is required to comply with general conditions 18, 20, and/or 31, or to evaluate PCNs for activities authorized by NWPs 21, 49, and 50), with activity-specific conditions that state the mitigation requirements. The authorization will include the necessary conceptual or detailed mitigation plan or a requirement that the applicant submit a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level. When mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan or has determined that prior approval of a final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation.

E. Further Information

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

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

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

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

5. NWPs do not authorize interference with any existing or proposed Federal project (see general condition 31).

F. Definitions

Best management practices (BMPs): Policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from

development. BMPs are categorized as structural or non-structural.

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

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

Direct effects: Effects that are caused by the activity and occur at the same time and place.

Discharge: The term "discharge" means any discharge of dredged or fill material into waters of the United States.

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

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

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

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

against a coast by strong winds such as those accompanying a hurricane or other intense storm.

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

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

Indirect effects: Effects that are caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.

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

Loss of waters of the United States: Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. The loss of stream bed includes the acres or linear feet of stream bed that is filled or excavated as a result of the regulated activity. Waters of the United States temporarily filled,

flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities that do not require Department of the Army authorization, such as activities eligible for exemptions under section 404(f) of the Clean Water Act are not considered when calculating the loss of waters of the United States.

Non-tidal wetland: A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(c)(4). 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 NWP, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of flowing or standing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of "open waters" include rivers, streams, lakes, and ponds.

Ordinary High Water Mark: An ordinary high water mark is a line on the shore established by the fluctuations of water and indicated by physical characteristics, or by other appropriate means that consider the characteristics of the surrounding areas (see 33 CFR 328.3(c)(6)).

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

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

Pre-construction notification: A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-

construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

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

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

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

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

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

Riparian areas: Riparian areas are lands next to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects riverine, lacustrine, estuarine, and marine waters with their adjacent wetlands, non-wetland waters, or uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain

local water quality. (See general condition 23.)

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

Single and complete linear project: A linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which often involves multiple crossings of one or more waterbodies at separate and distant locations. The term "single and complete project" is defined as that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the United States (*i.e.*, a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

Single and complete non-linear project: For non-linear projects, the term "single and complete project" is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete non-linear project must have independent utility (see definition of "independent utility"). Single and complete non-linear projects may not be "piecemealed" to avoid the limits in an NWP authorization.

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

Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and best management practices, which retain water for a period of time to control runoff and/or

improve the quality (*i.e.*, by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

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

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

Structure: An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat

ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

Tidal wetland: A tidal wetland is a wetland (*i.e.*, water of the United States) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(c)(4) and (d), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line, which is defined at 33 CFR 328.3(c)(7).

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

Waterbody: For purposes of the NWP, a waterbody is a jurisdictional water of the United States. If a wetland is adjacent to a waterbody determined to be a water of the United States under 33 CFR 328.3(a)(1) through (5), that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of "waterbodies" include streams, rivers, lakes, ponds, and wetlands.

[FR Doc. 2016-12083 Filed 5-31-16; 8:45 am]

BILLING CODE 3720-58-P