



DECISION DOCUMENT NATIONWIDE PERMIT 12

This document discusses the factors considered by the Corps of Engineers (Corps) during the issuance process for this Nationwide Permit (NWP). This document contains: (1) the public interest review required by Corps regulations at 33 CFR 320.4(a)(1) and (2); (2) a discussion of the environmental considerations necessary to comply with the National Environmental Policy Act; and (3) the impact analysis specified in Subparts C through F of the 404(b)(1) Guidelines (40 CFR Part 230). This evaluation of the NWP includes a discussion of compliance with applicable laws, consideration of public comments, an alternatives analysis, and a general assessment of individual and cumulative effects, including the general potential effects on each of the public interest factors specified at 33 CFR 320.4(a).

1.0 Text of the Nationwide Permit

Oil or Natural Gas Pipeline Activities. Activities required for the construction, maintenance, repair, and removal of oil and natural gas pipelines 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.

Oil or natural gas pipelines: This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of oil and natural gas pipelines. There must be no change in pre-construction contours of waters of the United States. An “oil or natural gas pipeline” is defined as any pipe or pipeline for the transportation of any form of oil or natural gas, including products derived from oil or natural gas, such as gasoline, jet fuel, diesel fuel, heating oil, petrochemical feedstocks, waxes, lubricating oils, and asphalt.

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.

Oil or natural gas pipeline substations: This NWP authorizes the construction, maintenance, or expansion of substation facilities (e.g., oil or natural gas or gaseous fuel custody transfer stations, boosting stations, compression stations,

metering stations, pressure regulating stations) associated with an oil or natural gas pipeline 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 of dredged or fill material into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

Foundations for above-ground oil or natural gas pipelines: This NWP authorizes the construction or maintenance of foundations for above-ground oil or natural gas pipelines in all waters of the United States, provided the foundations are the minimum size necessary.

Access roads: This NWP authorizes the construction of access roads for the construction and maintenance of oil or natural gas pipelines, 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 of dredged or fill material 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 oil or natural gas pipelines 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). Oil or natural gas pipelines routed in, over, or under section 10 waters without a discharge of dredged or fill material may require a section 10 permit.

This NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing oil or natural gas pipelines. 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 fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing oil or natural gas pipelines.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the oil or natural gas pipeline 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 of dredged or fill material, 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: (1) a section 10 permit is required; (2) the discharge will result in the loss of greater than 1/10-acre of waters of the United States; or (3) the proposed oil or natural gas pipeline activity is associated with an overall project that is greater than 250 miles in length and the project purpose is to install new pipeline (vs. conduct repair or maintenance activities) along the majority of the distance of the overall project length. If the proposed oil or gas pipeline is greater than 250 miles in length, the pre-construction notification must include the locations and proposed impacts (in acres or other appropriate unit of measure) for all crossings of waters of the United States that require DA authorization, including those crossings authorized by an NWP would not otherwise require pre-construction notification. (See general condition 32.) (Authorities: Sections 10 and 404)

Note 1: Where the oil or natural gas pipeline is constructed, installed, or maintained 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 oil or natural gas pipeline to protect navigation.

Note 2: For oil or natural gas pipeline 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. Oil or natural gas pipeline activities must comply with 33 CFR 330.6(d).

Note 3: 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 oil or natural gas pipeline must be removed upon completion of the work, in accordance with the requirements for temporary fills.

Note 4: Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, and may require a permit from the U.S. Coast Guard pursuant to the General Bridge Act of 1946. However, any discharges of dredged or fill material into waters of the United States associated with such oil or natural gas pipelines will require a section 404 permit (see NWP 15).

Note 5: This NWP authorizes oil or natural gas pipeline maintenance and repair activities that do not qualify for the Clean Water Act section 404(f) exemption for maintenance of currently serviceable fills or fill structures.

Note 6: 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)(4) 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).

1.1 Requirements

General conditions of the NWPs are in the Federal Register notice announcing the issuance of this NWP. Pre-construction notification requirements, additional conditions, limitations, and restrictions are in 33 CFR part 330.

1.2 Statutory Authorities

- Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403)
- Section 404 of the Clean Water Act (33 U.S.C. 1344)

1.3 Compliance with Related Laws (33 CFR 320.3)

1.3.1 General

Nationwide permits are a type of general permit designed to authorize certain activities that have no more than minimal individual and cumulative adverse environmental effects and generally comply with the related laws cited in 33 CFR 320.3. Activities that result in more than minimal individual and cumulative adverse environmental effects cannot be authorized by NWPs. Individual review of each activity authorized by an NWP will not normally be performed, except when pre-construction notification to the Corps is required or when an applicant requests verification that an activity complies with an NWP. Potential adverse impacts and compliance with the laws cited in 33 CFR 320.3 are controlled by the terms and conditions of each NWP, regional and case-specific conditions, and the review process that is undertaken prior to the issuance of NWPs.

The evaluation of this NWP, and related documentation, considers compliance with each of the following laws, where applicable: Section 10 of the Rivers and Harbors Act of 1899; Sections 401, 402, and 404 of the Clean Water Act; Section 307(c) of the Coastal Zone Management Act of 1972, as amended; Section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended; the National Environmental Policy Act of 1969; the Fish and Wildlife Act of 1956; the Migratory Marine Game-Fish Act; the Fish and Wildlife Coordination Act, the Federal Power Act of 1920, as amended; the National Historic Preservation Act of 1966; the Interstate Land Sales Full Disclosure Act; the Endangered Species Act; the Deepwater Port Act of 1974; the Marine Mammal Protection Act of 1972; Section 7(a) of the Wild and Scenic Rivers Act; the Ocean Thermal Energy Act of 1980; the National Fishing Enhancement Act of 1984; the Magnuson-Stevens Fishery and Conservation and Management Act, the Bald and Golden Eagle Protection Act; and the Migratory Bird Treaty Act. In addition, compliance of the NWP with other Federal requirements, such as Executive Orders and Federal regulations addressing issues such as floodplains, essential fish habitat, and critical resource waters is considered.

1.3.2 Terms and Conditions

Many NWPs have pre-construction notification requirements that trigger case-by-case review of certain activities. Two NWP general conditions require case-by-case review of all activities that may adversely affect Federally-listed endangered or threatened species or historic properties (i.e., general conditions 18 and 20, respectively). General condition 16 restricts the use of NWPs for activities that are located in Federally-designated wild and scenic rivers. None of the NWPs authorize the construction of artificial reefs. General condition 28 addresses the use of an NWP with other NWPs to authorize a single and complete project, to ensure that the acreage limits of each of the NWPs used to authorize that project are not exceeded.

In some cases, activities authorized by an NWP may require other federal, state, or local authorizations. Examples of such cases include, but are not limited to: activities that are in marine sanctuaries or affect marine sanctuaries or marine mammals; the ownership, construction, location, and operation of ocean thermal conversion facilities or deep water ports beyond the territorial seas; activities that result in discharges of dredged or fill material into waters of the United States and require Clean Water Act Section 401 water quality certification; or activities in a state operating under a coastal zone management program approved by the Secretary of Commerce under the Coastal Zone Management Act. In such cases, a provision of the NWPs states that an NWP does not obviate the need to obtain other authorizations required by law. [33 CFR 330.4(b)(2)]

Additional safeguards include provisions that allow the Chief of Engineers, division engineers, and/or district engineers to: assert discretionary authority and require an individual permit for a specific activity; modify NWPs for specific activities by adding special conditions on a case-by-case basis; add conditions on a regional or

nationwide basis to certain NWP; or take action to suspend or revoke an NWP or NWP authorization for activities within a region or state. Regional conditions are imposed to protect important regional concerns and resources. [33 CFR 330.4(e) and 330.5]

1.3.3 Review Process

The analyses in this document and the coordination that was undertaken prior to the issuance of the NWP fulfill the requirements of the National Environmental Policy Act (NEPA), the Fish and Wildlife Coordination Act, and other acts promulgated to protect the quality of the environment.

All NWPs that authorize activities that may result in discharges into waters of the United States require compliance with the water quality certification requirements of Section 401 of the Clean Water Act. NWPs that authorize activities within, or affecting land or water uses within a state that has a Federally-approved coastal zone management program, must also be certified as consistent with the state's program, unless a presumption of concurrence occurs. The procedures to ensure that the NWPs comply with these laws are described in 33 CFR 330.4(c) and (d), respectively.

1.4 Public Comments and Responses

For a summary of the public comments received in response to the September 15, 2020, Federal Register notice, refer to the preamble in the Federal Register notice announcing the reissuance of this NWP. The substantive comments received in response to the September 15, 2020, Federal Register notice were used to improve the NWP by changing NWP terms and limits, pre-construction notification requirements, and/or NWP general conditions, as necessary.

The Corps proposed to modify this NWP to limit it to oil or natural gas pipeline activities, and issue two new NWPs to authorize electric utility line and telecommunications activities (proposed new NWP C, now designated as NWP 57) and utility line activities for water and other substances (proposed new NWP D, now designated as NWP 58). The Corps also invited public comment on national construction standards and best management practices that could be incorporated into the text of NWP 12 to help ensure that this NWP authorizes only those activities (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) that result in no more than minimal individual and cumulative adverse environmental effects.

General Comments

Some commenters expressed their support for dividing NWP 12 into three separate NWPs while some commenters objected to that aspect of the proposed rule. Many

commenters stated that the Corps should reissue NWP 12 in its current form. One commenter said that the 2017 NWP 12 contains sufficient PCN thresholds and conditions to provide appropriate environmental protections. One commenter objected to the proposed modifications to NWP 12 made in response to E.O. 13783, Promoting Energy Independence and Economic Growth, stating that these changes would make it easier for oil and gas pipeline activities to occur at the expense of the environment. Several commenters said that the Corps should limit the number of activities authorized by this NWP because continuing to authorize these activities contributes to cumulative effects to natural resources.

After reviewing the comments received in response to proposed NWPs 12, C, and D, the Corps is finalizing and issuing these NWPs. Nationwide permit 12 authorizes oil or natural gas pipeline activities, NWP 57 authorizes electric utility line and telecommunications activities, and NWP 58 authorizes utility line activities for water and other substances. These NWPs are issued to fulfill the objective of the NWP program, which is to authorize, with little, if any, delay or paperwork certain activities having no more than minimal impacts (33 CFR 330.1(b)). The proposed modifications to NWP 12 were made, in part, to respond to the direction provided by E.O. 13738, which is to revise existing regulations that “unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.” In this NWP, the Corps has retained the terms and conditions that are necessary to ensure that the activities authorized by this NWP result in no more than minimal individual and cumulative adverse environmental effects. The Corps acknowledges that the use of the NWPs to authorize activities during the 5-year period the NWP is in effect results in some cumulative adverse environmental effects, but the limits, PCN requirements, general conditions, and the ability of division and district engineers to modify, suspend, and revoke NWP authorizations all help to ensure that this NWP causes no more than minimal cumulative adverse environmental effects at the national, regional, and site scales.

A few commenters stated that the proposed NWP 12 would result in reduced opportunities for the Corps and for the public to evaluate the impacts of oil and natural gas pipeline activities on water resources and the environment in general. One of these commenters said that the Corps should provide additional opportunities for public involvement. One commenter stated that public participation opportunities during the NWP permitting process are sufficient; and expanding the existing requirements at the district level would cause unwarranted delays in permitting. One commenter suggested that the Corps should notify the public of proposed NWP 12 activities. A few commenters said that pipelines can cause significant direct and indirect impacts to fish and wildlife habitat and water quality associated with an increase in watershed runoff.

The public is provided an opportunity to comment on the Corps’ proposal to issue, reissue, or modify an NWP when Corps Headquarters publishes its proposed rule in the Federal Register to start the public comment period. However, after an NWP is

issued, there is no public comment process for specific NWP activities. If, for a proposed oil or natural gas pipeline activity, the district engineer exercises discretionary authority and requires an individual permit for that activity, the public will have an opportunity to provide comments in response to the public notice issued by the Corps district. When reviewing PCNs for proposed oil or natural gas pipeline activities, district engineers consider the potential direct and indirect impacts on fish and wildlife habitat and water quality, as well as other public interest review factors identified in 33 CFR 320.4(a)(1).

One commenter said that natural gas pipeline activities authorized by NWP 12 comply with industry standards that are protective of the environment and public safety. One commenter stated that pipelines provide a safe, reliable, efficient, and cost-effective way to move bulk liquids, particularly over long distances, and that the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration concurs with that statement. The Corps acknowledges these comments.

One commenter said that while oil or natural gas pipelines may be regulated by other agencies, the Corps is not relieved of its obligation to conduct a NEPA analysis for leaks or spills. A few commenters stated that the Corps must consider in its NEPA review the impacts that could result from authorizing a pipeline that would carry toxic material, including leaks or spills, and that the draft decision document doesn't take the required "hard look".

In the national decision document for the issuance of this NWP, the Corps discusses leaks or spills that may occur during the construction and/or operation of oil or natural gas pipelines. The Corps does not have the authority to take actions to prevent or control potential leaks or spills that may occur during the construction or operation of oil or natural gas pipelines. Since the Corps does not regulate the release of oil, natural gas, or products derived from oil or natural gas, it is not required to perform a detailed analysis of the effects of those possible future leaks or spills because those leaks or spills are not an effect of the Corps' proposed action (see the definition of "effects or impacts" at 40 CFR 1508.1(g)).

One commenter stated that pipeline abandonment issues in NWP 12 should be treated consistently across the districts and recommended that the NWP 12 terms should provide this consistency. A few commenters said that NWP 12 should continue to authorize emergency installation, replacement or repair of utility lines. One commenter requested that the Corps clarify the types of time-sensitive activities, including integrity digs, that are authorized under NWPs 12 and 3. One commenter requested clarification of the scope of maintenance activities under NWP 12. One commenter said that the Corps should facilitate the construction, repair, and/or replacement of climate resilient underground linear infrastructure to support climate adaptive and resilient energy systems through the issuance of general permits.

Corps districts have discretion to determine on a case-by-case basis how to address pipeline abandonment activities. Nationwide permit 12 can be used to authorize emergency installation, replacement or repair of utility lines. The reduction of the number of PCN thresholds for this NWP may facilitate the implementation of these emergency activities by reducing delays in securing NWP authorization. The Corps does not believe that it is necessary add text to the NWP to specifically address integrity digs, because discharges of dredged or fill material into waters of the United States for integrity digs can be considered part of maintenance, which is included in the first sentence of this NWP. The activities authorized by this NWP can contribute to the construction, repair, and/or replacement of climate resilient underground linear infrastructure to support climate adaptive and resilient energy systems.

One commenter stated that the Corps should ensure that activities authorized by NWP 12 do not commence construction in uplands in protected critical habitats until the ESA section 7 consultation process has been completed. A few commenters indicated concern that cumulative impacts are not adequately considered in the decision document for NWP 12. A few commenters asserted that the scope of the cumulative impacts has proven to be more than minimal. One of these commenters stated that the draft decision document for NWP 12 already acknowledges that the cumulative impacts are more than minimal. A few commenters said that the Corps should consider the cumulative upstream and downstream impacts of its actions regarding oil and natural gas pipelines, including climate impacts. A few commenters expressed concern for potential effects on drinking water and aquifers. One commenter expressed a general concern for waterways affected by NWP 12 activities.

The Corps does not have the authority to prevent project proponents from conducting activities in uplands before they receive NWP verifications from district engineers in response to PCNs. The national decision documents issued by Corps Headquarters address cumulative impacts in accordance with the Clean Water Act Section 404(b)(1) Guidelines at 40 CFR 230.7 for the issuance of general permits. The Council on Environmental Quality's NEPA regulation at 40 CFR 1508.1(g)(3) repealed the 1978 definition of "cumulative impact," so under the current NEPA regulations the cumulative effects analysis for an NWP is similar to the approach the Corps uses under 40 CFR 230.7(b)(3): estimating the number of times the NWP is anticipated to be used during the 5-year period it will be in effect, the authorized impacts to jurisdictional waters and wetlands, and the compensatory mitigation required to offset losses of jurisdictional waters and wetlands. Those impacts, and the compensatory mitigation, are evaluated against the current environmental setting (i.e., the affected environment), which includes the past and present effects of human activities and natural events that have shaped the current environmental setting. The Corps does not have the authority to regulate the operation of any oil or natural gas pipeline, or the emissions that result from combustion of oil or natural gas, or from the industrial processes that derive other products from oil or natural gas. Therefore, under the current NEPA regulations, the Corps is not required to

evaluate those upstream and downstream impacts, including potential impacts on the planet's climate. The national decision document for this NWP considers effects on water supply and conservation as part of the public interest review. When reviewing PCNs, district engineers will evaluate the effects of proposed NWP activities on waterways.

Activities Authorized by NWP 12

One commenter said that the first sentence of NWP 12 should be revised as follows: "Activities required for the construction, replacement, maintenance, repair and removal of oil, natural gas and gaseous fuel pipelines and 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." The Corps declines to make this change because it is covered by the definition of "oil or natural gas pipeline" provided in the second paragraph of this NWP.

Oil or natural gas pipelines. One commenter stated that if the Corps moves forward with limiting NWP 12 to oil or natural gas pipeline activities, it should also delete the phrase "including outfall and intake structures" because oil and natural gas pipelines and distribution systems do not contain water outfall or water intake pipe structures. The Corps has made this change to the second paragraph of this NWP.

A few commenters said that the terms "oil", "gas", and "natural gas", and "petrochemicals" are vague and overbroad for the purposes of determining compliance with the proposed NWPs and can have various meanings, and that any proposed changes should be subjected to notice and comment procedures. A few commenters stated that terms associated with the proposed NWP 12 that require clarification include "utility lines," since pipeline activities authorized by NWP 12 might be both pipelines and utility lines; "other substances," because gas and petrochemicals can be found in many types of infrastructure and industrial products; and "gas" and "natural gas," because liquified petroleum gas is not a natural gas.

The Corps has made changes to the definition of "oil or natural gas pipeline" to take into account the wide variety of products that may be derived from oil or natural gas and transported in these pipelines. In response to comments received in response to the 2020 Proposal, and to provide additional clarity on the types of products that may be transported by oil or natural gas pipelines versus utility line activities that may be authorized by NWP 58, the Corps has replaced the term "petrochemical products" with the phrase "products derived from oil or natural gas, such as gasoline, jet fuel, diesel fuel, heating oil, petrochemical feedstocks, waxes, lubricating oils, and asphalt." The revised definition was developed using information from the U.S. Energy Administration.¹

A few commenters said that the proposed definition of "oil or natural gas pipeline"

¹ <https://www.eia.gov/energyexplained/oil-and-petroleum-products/> (accessed November 4, 2020).

for the proposed NWP 12 is inadequate and inconsistent with the definitions in the Oil Pollution Act. One commenter suggested the Corps add "and derivatives" after 'petrochemical products' for clarity. One commenter suggested removal of the phrase "for any purpose" from the proposed definition of "oil or natural gas pipeline" because it creates uncertainty about what activities may actually be authorized by the NWP.

The Corps developed its own definition because this NWP also authorizes regulated activities associated with natural gas pipelines and products derived from oil or natural gas. The Corps has deleted "for any purpose" because NWP 12 is now limited to oil or natural gas pipeline activities.

One commenter stated that the existing NWP 12 uses the category "utility lines" which is still used in proposed NWPs C and D, but the proposed NWP 12 uses the new term "oil and natural gas pipelines" which causes conflicting redundancies with various aspects of the proposed NWPs 12, C, and D. One commenter said that many of natural gas pipe construction and repair projects that will need NWP authorization involve pipelines that will be used to transport geologic natural gas as well as other lower carbon gaseous fuels such as renewable natural gas, hydrogen, and power-to-gas methanated hydrogen. This commenter said that to avoid confusion and streamline the process for these projects, the Corps should not split off any buried pipe-based utility lines into the proposed new NWP D. One commenter remarked that the Corps should clarify that NWP 12 is available for underground pipelines and utility lines whether they carry geologic natural gas or a blend with lower-carbon gaseous fuels.

Nationwide permits 12, 57, 58 authorize activities for different types of utility lines, so there will be some redundancies because of similarities among these different types of utility lines, but there are also some differences, which result in different text in each of these NWPs. Nationwide permit 12 authorizes oil or natural gas pipeline activities that may carry different types of natural gas. Nationwide permit 58 can be used to authorize pipeline activities that require DA authorization and are used to convey hydrogen, methanated hydrogen, or carbon dioxide.

Oil or natural gas pipeline substations. One commenter said that the paragraph on substations in the proposed NWP 12 should be revised to state that it authorizes construction, maintenance, replacement or expansion work in a non-tidal jurisdictional water for an oil or natural gas or gaseous fuel custody transfer station, boosting station, compression station or metering and/or pressure regulating station. One commenter said that if the Corps issues proposed new NWP C, then the references to "substations" should be removed from NWP 12 and replaced with boosting or compressor stations and natural gas metering and pressure regulating station. This commenter also recommended revising the fourth paragraph in the proposed NWP 12 to state that it authorizes construction, maintenance, replacement or expansion work in a non-tidal jurisdictional water for an oil or natural gas or gaseous fuel custody transfer station, boosting station, compression station

or metering and/or pressure regulating station. One commenter noted that the term “natural gas pipeline substation” is used in the proposed language for the proposed NWP 12 and requested clarification regarding how above-ground natural gas facilities including district regulators and gate stations fit into NWP 12.

The Corps has modified this paragraph to provide examples of substations associated with oil or natural gas pipelines. This NWP can be used to authorize discharges of dredged or fill material into waters of the United States for above-ground natural gas facilities including district regulators and gate stations.

Access roads. One commenter said that only temporary access roads should be authorized by NWP 12, and that permanent access roads are more appropriately authorized under NWP 14. The Corps disagrees, and is retaining the NWP authorization for permanent access roads, because access roads associated with utility lines are not usually available for public use.

One commenter said that the proposal to add the word “over” to activities that are routed in or under navigable waters subject to Section 10 of the Rivers and Harbors Act of 1899 is unnecessary as structures routed over section 10 waters would be considered bridges and be regulated under Section 9 of the Rivers and Harbors Act of 1899. The Corps has modified the second sentence of the seventh paragraph of this NWP by adding the word “may” because there may be circumstances where section 10 authorization is required for oil or natural gas pipelines routed over navigable waters of the United States.

A few commenters stated that the Corps does not have jurisdiction over inadvertent returns, leaks, or spills. One commenter said that NWP 12 should continue to authorize the remediation of inadvertent returns of fluids during drilling operations without additional changes. A few commenters stated that the Corps has not sufficiently evaluated the risks, impacts, and mitigation measures associated with inadvertent returns of drilling fluid. A few commenters expressed appreciation for the clarification in the decision document that the Corps’ jurisdiction is limited to authorizing temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids through sub-soil fissures or fractures that might occur during horizontal directional drilling.

The Corps does not have jurisdiction over inadvertent returns, leaks, or spills that may occur during horizontal directional drilling to install or replace oil or natural gas pipelines. The eighth paragraph of 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 fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing oil or natural gas pipelines. The purpose of this paragraph is to provide authorization for regulated activities that are necessary to remediate inadvertent returns of drilling fluids to reduce adverse environmental effects that might be caused by releases of

drilling fluids to the surrounding environment.

One commenter expressed support for retaining the clarification that NWP 12 authorizes temporary mats for moving equipment. A few commenters said that the Corps should stop considering temporary mats/panels as a regulated activity or clarify that they are not to be considered as a “loss of waters” for the purposes of PCN requirements because of their temporary effects. One commenter requested clarification that activities resulting in the loss of greater than 1/10-acre of waters of the United States require a PCN to the Corps, but temporary discharges do not count toward that 1/10-acre PCN threshold.

The determination as to whether the use of timber mats in waters of the United States for oil or natural gas pipeline activities constitutes a discharge of dredged or fill material into waters of the United States should be made by district engineers after evaluating site-specific and activity-specific circumstances. Any discharge of dredged or fill material into waters of the United States that results in a loss of greater than 1/10-acre of waters of the United States requires pre-construction notification. As explained in the definition of “loss of waters of the United States,” waters of the United States temporarily filled, flooded, excavated, or drained, but restored pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States.

One commenter said there is inconsistency in the text of NWP 12 because it states that there must be no change in pre-construction contours of waters of the United States, but NWP 12 also authorizes losses of waters of the United States. This commenter recommended revising the text of NWP 12 to state that “there must be no change in pre-construction contours which results in permanent loss of waters of the United States.” One commenter stated that the Corps should adopt a strict interpretation of the amount of “temporary fill” authorized by this NWP for the purposes of assessing cumulative impacts and should also consider the timing and duration of temporary fills, including temporary mats. This commenter indicated that permitted temporary fills generally occur in stages and not all at the same time.

Some activities authorized by NWP 12 (e.g., the construction of substations and permanent access roads) result in permanent fills while other authorized activities, such as the placement of temporary fills, require restoration to pre-construction elevations. Temporary fills do not contribute to cumulative impacts because they are removed upon completion of the work and the permittee is required to restore the affected area to pre-construction elevations. The Corps acknowledges that temporary fills may occur during different stages of construction, maintenance, repair, or removal of an oil or natural gas pipeline activity.

Pre-Construction Notification Thresholds

Many commenters opposed reducing the number of PCN thresholds in this NWP. Several commenters suggested that reducing the PCN requirement would result in

the NWP authorizing activities that have more than minimal adverse environmental effects, including cumulative effects. Many of these commenters suggested retaining the existing PCN thresholds. One of these commenters requested further clarification regarding which activities would no longer require PCNs. A few of these commenters stated that maintaining the status quo creates greater regulatory certainty to the industry. Many commenters said that reducing the PCN thresholds for this NWP undermines the Corps' ability to ensure that authorized activities NWP will result in no more than minimal individual and cumulative adverse environmental effects, and reduces the opportunity for the Corps to require individual permits when adverse environmental effects would be more than minimal. One commenter remarked that the proposed reduction in PCN thresholds would cause increased harm to rivers, streams, and wetlands.

The Corps proposed to retain those PCN thresholds associated with NWP 12 activities that result in losses of waters of the United States or have potential effects on navigation. To reduce regulatory burdens in response to E.O. 13783, the Corps proposed to remove a number of PCN thresholds because of the requirement in the NWP to restore temporary impacts to pre-construction elevations or because they are already addressed by another PCN threshold. If a proposed NWP 12 activity does not trigger any of the three PCN thresholds in the text of the NWP, or a PCN threshold in the text of one of the NWP general conditions (e.g., general condition 18, endangered species and general condition 20, historic properties), then pre-construction notification is not required for the proposed activity unless a division engineer has imposed a regional condition to require PCNs in a particular geographic region. Division engineers can add regional conditions to add PCN thresholds that were removed from the text of NWP 12, if he or she determines the PCN threshold is necessary to ensure that the NWP authorizes only those activities that have no more than minimal adverse environmental effects. Adverse effects to rivers, streams, and wetlands are generally caused by the discharges of dredged or fill material or structures or work authorized by this NWP, not by the presence or absence of a PCN threshold.

Many commenters expressed support for proposed reduction in PCN thresholds for NWP 12 and the associated reduced administrative burden that reduction would provide. One commenter voiced support for the reduction in PCN requirements as it would reduce the potential for infrastructure litigation and encourage private investment. One commenter stated that PCN thresholds should be removed when they are duplicative or burdensome. One commenter said that if the PCN requirements to be removed are truly redundant it would pose no additional burden on the regulated public.

The Corps acknowledges these comments, and the Corps' intent with these changes is to reduce burdens on the regulated public and focus the PCN thresholds on those activities that have some potential to cause more than minimal adverse environmental effects. For these activities, district engineers should be given the opportunity to evaluate these activities on a case-by-case basis.

Many commenters stated that the PCN process incentivizes permittees to avoid, minimize, and compensate for impacts to aquatic resources in order to reduce permitting delays. Some of these commenters said that the reduced PCN requirements would result in violations to general condition 23, mitigation. One commenter stated that the remaining PCN thresholds and the other NWP 12 terms and conditions reasonably limit the adverse environmental effects of the activities authorized by NWP 12. One commenter said that the Corps should encourage the districts to refrain from adding PCN thresholds to this NWP, specifically through regional conditions. A few commenters expressed concern that the reduction of PCN thresholds will likely be subject to litigation. One commenter suggested that any resulting litigation could cause uncertainties for the industries that rely on the NWP program.

The NWPs provide incentives for project proponents to reduce impacts to waters of the United States to obtain DA authorization in less time than is required under the individual permit process. Reducing the number of PCNs does not violate general condition 23. The NWPs authorize activities that have no more than minimal individual and cumulative adverse environmental effects, and it is not necessary to require compensatory mitigation for every NWP activity. The PCN thresholds themselves do not limit adverse environmental effects; the adverse environmental effects caused by regulated activities authorized by an NWP are limited by the constraints in the text of the NWP (e.g., the 1/2-acre limit, requirements to restore temporary impacts to pre-construction elevations) and in the NWP general conditions. Division engineers have the authority to add regional conditions to replace the PCN thresholds that were in prior versions of NWP 12, if those division engineers determine that adding those PCN thresholds is necessary to ensure that the NWP only authorizes those activities that result in no more than minimal individual and cumulative adverse environmental effects. While potential litigation risk is a consideration when contemplating changes, other factors such as administrative efficiency, reduction of regulatory burdens, and other approaches for maintaining environmental protections are other considerations that the Corps considers as well.

A few commenters stated that the proposed reduction in PCN thresholds could expedite permit processing time and preclude a thorough review by the Corps. One commenter said that reducing the number of PCN thresholds would allow for the potential for spills near stream beds. One commenter opposed the simplified PCN requirements, stating that the proposal does not improve inter-agency coordination or reduce impacts on the environment. One commenter said that PCNs should be required for all NWP 12 activities. One commenter stated that the Corps fails to show how compliance with Clean Water Act Section 404(e) would be achieved without a process to track all NWP activities.

The reduction in PCN thresholds allows Corps districts to shift their resources towards evaluating proposed activities that require DA authorization that have the

potential for greater adverse environmental effects. Reducing the number of PCN thresholds will not alter the potential for spills to occur near stream beds because spills are accidents and not planned activities that the Corps would evaluate as part of a PCN. The reduction in the number of PCN thresholds in NWP 12 does not alter any agency coordination procedures because agency coordination is not required for any NWP 12 activities. It is not necessary to require PCNs for all NWP 12 activities, because many of the activities authorized by NWP 12 result in only temporary impacts to aquatic resources. The Corps does not have to track all NWP activities to comply with Section 404(e) of the Clean Water Act. Since the inception of the NWP program in 1977, many of the NWPs have not require pre-construction notification, thus the changes that are being finalized are not a departure from the Corps practice or procedures.

A few commenters said that reducing the PCN requirement does not comply with the Corps' mandate under ESA section 7 to ensure consultation occurs when necessary. One commenter said that PCN should be required for all maintenance activities in waters of the United States, especially if the waters contain ESA-listed species. A few commenters opposed reducing the number of PCN thresholds for NWP 12 because the PCN process allows state natural resource agencies to provide expertise in determining the effect of projects on state resources, affected species, and their habitat. A few commenters stated the reduced number of PCN thresholds would not comply with the NHPA. One commenter said that the proposed reduction in PCN thresholds could have potential impacts to cultural resources and affect the protection of historic properties. Several commenters said that the proposed reduction of PCN thresholds poses risks of significant impacts to tribal rights and treaty-reserved resources.

General condition 18 addresses compliance with section 7 of the ESA. Under paragraph (c) of general condition 18, 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 even if a PCN is not otherwise required. This includes maintenance activities that might affect listed species or designated critical habitat. None of the activities authorized by NWP 12 require coordination with state natural resource agencies, and the PCN thresholds that have been removed from NWP 12 did not require that coordination.

General condition 20 addresses compliance with section 106 of the NHPA. Under paragraph (c) of general condition 20, non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might 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 even if a PCN is not otherwise required. The reduction in PCN thresholds for NWP 12 does not change the PCN requirement in general condition 20. During the process for issuing these NWPs, Corps districts have been consulting or coordinating with tribes to identify

regional conditions or coordination procedures to ensure that activities authorized by NWP 12 and other NWPs do not have substantial adverse effects on tribal rights and, as appropriate, treaty reserved resources. Division engineers can add PCN requirements to address tribal concerns as appropriate.

One commenter objected to the lack of a PCN threshold based on pipeline diameter. One commenter requested that the Corps provide additional information regarding the outcomes of PCN reviews under the current NWPs and an explanation for how environmental protection would be maintained without the PCN review process. One commenter stated that the Corps should clearly identify the information required by all applicants to support the analysis of temporal and cumulative impacts and recommended separate analyses for all impacts to waters of the United States within the total impact limitation of 1/2-acre.

Pre-construction notification thresholds are established for activities that have the potential to result in more than minimal adverse environmental effects, and pipeline diameter has not been demonstrated to have potential to be a useful PCN threshold. During their reviews of PCNs, district engineers document their conclusions as to whether the proposed activity will result in no more than minimal adverse environmental effects, or whether it is necessary to exercise discretionary authority and require an individual permit for the proposed activity. This documentation includes the district engineer's consideration of cumulative effects.

In the paragraphs below, the Corps discusses each of the five PCN thresholds it proposed to remove to simplify the PCN requirements for this NWP. The Corps discusses the comments received and provides responses to those comments. In the paragraphs that follow, the Corps uses the term "utility line" because it proposed the same PCN thresholds for NWP 12 and proposed new NWPs C and D (now designated as NWPs 57 and 58, respectively in this final rule). Also discussed below is the Corps' proposal to add a new PCN threshold to NWP 12 for new oil or natural gas pipelines greater than 250 miles in length.

(i) The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way. Many commenters said that allowing mechanized land clearing through forested wetlands without requiring PCNs will cause more than minimal adverse environmental effects and recommended that this PCN threshold requirement be retained. Many commenters said that PCNs should be required for mechanized land clearing associated with NWP 12 to prevent the loss of wetland resources, functions and services, including water quality, erosion control, and flood mitigation. A few commenters suggested a maximum acreage for forest clearing activities without a PCN associated with NWP 12. One commenter stated that the PCN threshold should be modified to require PCNs for "loss or permanent conversion."

If construction of an oil or natural gas pipeline involves mechanized land clearing in a forested wetland for the right-of-way for that pipeline, the installation of the

pipeline must cause no change in pre-construction contours of waters of the United States. Any temporary fills must be removed upon completion of construction, and the affected areas restored to pre-construction elevations. If there are any permanent fills associated with the mechanized land clearing of a forested wetland, and the loss of waters of the United States is greater than 1/10 acre, a PCN is required. In areas where temporary fills occur, the wetlands in the right-of-way will remain, although there may be a conversion in wetland type. Those wetlands will continue to perform wetland functions, including hydrologic functions, biogeochemical cycling, and habitat functions, but there may be some changes to those functions and the degree to which the wetlands perform those functions. Division engineers can impose regional conditions to require PCNs for mechanized land-clearing in a forested wetland, and they can add regional conditions to impose an acreage limit on impacts resulting from mechanized land-clearing of forested wetlands.

Many commenters said that PCNs should be required for mechanized land clearing in forested wetlands to allow district engineers to consider avoidance, minimization, and the need for compensatory mitigation, as compliance with the 404(b)(1) guidelines, and further recommended retention of this PCN threshold. One of these commenters stated that temporary impacts should also be considered. Many commenters expressed concern that mechanized land clearing in forested wetlands would result in the long-term and/or permanent conversion of these areas to emergent and scrub-shrub wetlands, and further indicated that these scrub-shrub and emergent wetlands do not provide the same degree of ecological functions and services or provide the same values. Several of these commenters asserted that this conversion in wetland type causes more than minimal adverse effects to the environment.

Paragraph (a) of general condition 23 requires project proponents to design and construct their NWP activities to avoid and minimize temporary and permanent adverse effects to waters of the United States to the maximum extent practicable at the project site (i.e., on site). Division engineers can add regional conditions to this NWP to require PCNs and compensatory mitigation for mechanized land-clearing of forested wetlands. Activities that are authorized by NWPs do not require activity-specific evaluation under the 404(b)(1) Guidelines (see 40 CFR 230.5(b)). Emergent and scrub-shrub wetlands perform valued wetland functions, even though those functions differ to some degree from the functions performed by forested wetlands.

A few commenters stated that clearing of forested wetlands can impact wetland hydrology and soils through rutting and soil compaction by machinery. Many commenters stated that a review of pre- and post-construction hydrogeomorphic method assessments demonstrates significant permanent impacts to forested wetlands resulting from mechanized land clearing and temporary discharges. Several commenters said that forested wetlands along the Gulf Coast provide vital stopover areas for migratory birds and that the proposed removal of this PCN

threshold would be most profound along the Gulf Coast where pipelines are regularly constructed through forested wetlands.

The text of this NWP that applies to the construction of the pipeline requires that there is no change in pre-construction contours of waters of the United States. If there are permanent impacts to certain features of these forested wetlands, those impacts are caused by the activities authorized by NWP 12, not the presence or absence of any PCN threshold. Soil compaction can be caused by a variety of activities other than discharges of dredged or fill material. If the activity results in a loss of greater than 1/10-acre of waters of the United States, then the project proponent is required to submit a PCN. For those Corps districts in the Gulf Coast, division engineers add regional conditions to require PCNs for mechanized land-clearing activities in forested wetlands.

Several commenters said that the Corps does not cite any sources for stating that mechanized land clearing in forested wetlands usually results in only temporary impacts. A few commenters stated that the Corps has not provided any scientific rationale demonstrating that loss of forested wetland would not result in more than minimal adverse environmental effects. A few commenters said that the consensus in the scientific literature contradicts the Corps' assertion, with multiple studies and practices indicating that mechanized clearing results in irreversible and permanent alteration of forested wetland's functions. One commenter cited paragraph (i) of general condition 23 which allows district engineers to require mitigation for the permanent conversion of wetland types to offset losses of specific functions. One commenter said that the functions of forested wetlands have been estimated by the Corps to have a value of \$10,401 per acre per year. A few commenters stated that mechanized land clearing can result in sediment disturbance and potential water quality impacts in wetland areas. A few commenters stated that removing the PCN requirement for mechanized land clearing in forested wetlands would make NWP 12 vulnerable to litigation.

The text of NWP 12 requires temporary impacts to be restored after the pipeline is constructed. If the construction of the pipeline results in the loss of greater than 1/10-acre of waters of the United States, then the project proponent is required to submit a PCN to the Corps. The removal of the PCN threshold is an administrative decision to improve regulatory efficiency, reduce redundancy, and focus the district engineer's evaluation efforts on proposed activities that have the potential to result in more than minimal adverse environmental effects. If mechanized land-clearing causes irreversible and permanent alteration of forested wetland's functions, it is because of the physical effects of the discharge of dredged or fill material into waters of the United States and the periodic maintenance in the pipeline right-of-way that causes those changes in wetland functions. The Corps regulates the former, but does not regulate the mowing and cutting of vegetation to maintain the plant community in the pipeline right-of-way as herbaceous vegetation or scrub-shrub vegetation. Paragraph (i) of general condition 23 is retained in these NWPs, so for those NWP 12 activities that require PCNs, district engineers can require

compensatory mitigation to offset permanent losses of certain wetland functions.

One commenter stated that impacts to forested wetlands are permanent or semi-permanent and should not be considered temporary. One commenter suggested the cumulative effects of forested wetland conversion cannot be tracked without a PCN requirement. One commenter stated that the removal of the PCN for mechanized land clearing in forested wetlands is a change with implications for market growth of the ecological restoration industry. One commenter stated that mechanized land clearing can increase non-point source pollution in a water of the United States and can increase nutrient loading in first and second order streams. One commenter said that mechanized land clearing in forested wetlands is associated with an increase in the spread of invasive species.

Forested wetlands that have been converted to herbaceous or scrub-shrub wetlands continue to function as wetlands. Therefore, from a wetland perspective, the impacts caused by the below-ground installation of the pipeline are temporary as long as temporary fills are removed and the affected area is restored to pre-construction elevations. Although the wetland type has changed as a result of the activity, district engineers can require compensatory mitigation to offset losses of specific wetland functions for those NWP 12 activities that require PCNs. If the permittee wants to conduct mechanized land clearing of a forested wetland for an oil or natural gas pipeline right-of-way, he or she must restore the disturbed soils so that there is no change in pre-construction contours of waters of the United States in that right-of-way. If there will be permanent changes in pre-construction contours in waters of the United States, and the area of those permanent changes will exceed 1/10-acre, then a PCN is required. Permanent adverse effects can be addressed through the PCN review process. Where appropriate to ensure minimal adverse effects on the environment in a particular region, division engineers can add regional conditions to require PCNs for mechanized land clearing in a forested wetland right-of-way.

(ii) The utility line in waters of the United States, excluding overhead lines, exceeds 500 feet. One commenter stated that the 500 linear foot PCN threshold should be maintained since the 1/10-acre threshold only covers losses of waters of the United States and retaining it would allow the district engineer to evaluate the site-specific conditions and make an informed decision. One commenter said that removal of the 500 linear foot PCN threshold limits the Corps ability to review projects that will affect habitat, ecosystems, and the environment on tribal lands and within tribal usual and accustomed areas that cross state lines and international borders and further indicated that this would constitute a violation of the United States and trust and responsibility and obligation to protect treaty resources.

The 1/10-acre PCN threshold for losses of waters of the United States provides an opportunity for district engineers to evaluate site-specific conditions and determine whether the proposed oil or natural gas pipeline activities are authorized by NWP 12. The 1/10-acre PCN threshold also provides district engineers with the

opportunity to assess potential effects on habitat, ecosystems, environmental conditions on tribal lands, and tribal usual and accustomed areas. District engineers can work with tribes to develop coordination procedures to help protect treaty resources. In addition, activities authorized by NWP 12 must comply with general condition 17, tribal rights.

One commenter said that if this PCN threshold is removed, the Corps cannot evaluate the impacts of temporary losses or determine if specific restoration or mitigation measures are necessary, or if an individual permit would be necessary. One commenter said that the proposal to remove the 500 linear foot PCN threshold should be coterminous with other section 404 permitting requirements, but since this justification does not apply in all situations it is inappropriate. An example cited by this commenter is utility lines directionally drilled under wetlands.

Temporary impacts should not normally require PCNs because the aquatic resources and the functions they provide should recover after the temporary fills are removed and the affected area restored to pre-construction elevations. The removal of the 500 linear foot PCN threshold improves the Corps' efficiency in administering the section 404 program. Further, it is consistent with section 404 permitting requirements, because the Corps determines which activities should require PCNs to trigger review on a case-by-case basis.

(iii) The utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to or along the stream bed that is within that jurisdictional area. One commenter stated that installing pipelines that run parallel to a watercourse can have significant impacts on hydrogeomorphology of the watercourse and lead to substantial erosion and degradation. A few commenters recommended retention of the requirement for a PCN when the proposed activity would run parallel to and within a stream bed, citing the potential for those activities to downgrade aquatic resource functions.

As discussed in the 2020 Proposal (85 FR 57326), the Corps proposed to remove this PCN threshold because the text of NWP 12 requires restoration of these temporary impacts. The third paragraph of NWP 12 addresses the requirements for trenching and backfilling underground oil or natural gas pipelines to ensure those impacts are temporary and do not result in a loss of waters of the United States. The ninth paragraph of NWP 12 also addresses the requirements for restoring temporary fills, so that those fills do not result in losses of jurisdictional waters and wetlands. Further, in Corps districts where the construction of oil or natural gas pipelines in jurisdictional waters and wetlands parallel to a stream channel have the potential to cause more than minimal individual and cumulative adverse environmental effects, division engineers may add regional conditions to NWP 12 to require PCNs for these activities.

(iv) Permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 linear feet. Several commenters said that the

PCN requirement for permanent access roads should be retained to ensure NWP 12 activities not authorize more than minimal adverse effects. One commenter opposed the removal of the PCN threshold for associated access roads and culvert-related activities so that district engineers can evaluate potential impacts to fish passage.

The PCN threshold for losses of greater than 1/10-acre of waters of the United States applies to permanent access roads, and that PCN threshold is sufficient for providing district engineers with the opportunity to review those activities to determine if they qualify for NWP authorization. The Corps is removing this PCN threshold for above-grade permanent access roads because it is redundant with the 1/10-acre PCN threshold. Concerns about potential impacts to fish passage are addressed by NWP general condition 2. General condition 2 states that no NWP 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. Furthermore, general condition 2 requires all permanent and temporary crossings of waterbodies to be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species.

(v) Permanent access roads are constructed in waters of the United States with impervious materials. A few commenters suggested a maximum length for impervious surfaces without a PCN associated with NWP 12. The current PCN requirement for losses of waters of the United States greater than 1/10-acre is sufficient to trigger activity-specific review for permanent access roads constructed with impervious materials, to allow district engineers to determine whether a particular proposed access road will result in no more than minimal adverse environmental effects.

Proposed addition of a PCN threshold for new oil or natural gas pipeline activities greater than 250 miles in length.

Many commenters objected to the proposed PCN threshold for new oil or natural gas pipelines that are greater than 250 miles in length, stating that it is arbitrary and capricious, and indicated that there is no reasonable basis for the 250-mile threshold. One commenter expressed support for the addition of the 250-mile pipeline length PCN requirement. One of the commenters said that this PCN threshold is inconsistent with other PCN thresholds. Many commenters objected to removing the current PCN thresholds and replacing them with the 250-mile PCN threshold. One commenter expressed support for the proposal to require that PCNs include information on all discharges associated with a pipeline, including those that would not otherwise require a PCN. One commenter stated that the phrase "associated with an overall project" was unclear and undefined.

As discussed in the 2020 Proposal, this PCN threshold is being added for new oil or

natural gas pipelines to provide district engineers the opportunity to review all crossings of waters of the United States for new long-distance oil or natural gas pipelines to ensure that the activities authorized by NWP 12 will result in no more than minimal individual and cumulative adverse environmental effects (see 85 FR 57327). Given the concerns expressed by numerous commenters regarding the potential cumulative adverse environmental effects that may be caused by NWP 12 activities, this is not an arbitrary or capricious addition to the PCN requirements for NWP 12. This new PCN threshold is not a replacement for the PCN thresholds the Corps is removing from NWP 12. It is a new PCN threshold to address stakeholder concerns about cumulative effects. The phrase “associated with an overall project” refers to the entire oil or natural gas pipeline that is greater than 250 miles in length.

Several commenters supported a scope or length-based PCN threshold but suggested that the Corps adopt more protective PCN thresholds in place of the proposed 250-mile threshold. One of these commenters said that significant cumulative environmental impacts are likely to occur at a much lower length. One of these commenters suggested changing the distance in this PCN threshold to 25 miles, while commenter another suggested 75 miles, and a third commenter suggested a 5-mile threshold. One commenter said that the Corps should require PCNs for any proposed oil or natural gas pipeline activity resulting in five or more crossings.

The Corps believes that this new PCN threshold, plus the other two PCN thresholds in NWP 12 (i.e., activities requiring section 10 authorization, and discharges resulting in the loss of greater than 1/10-acre of waters of the United States), are sufficiently protective of the aquatic environment by providing information to district engineers to conduct case-specific reviews of proposed NWP 12 activities that have the potential to result in more than minimal individual and cumulative adverse environmental effects. In furtherance of the Corps’ review of cumulative effects, paragraph (b)(4) of NWP general condition 32 requires PCNs for proposed NWP activities for linear projects to include and 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 Corps finds that a length of 250 miles is both a good indicator of potential cumulative effects of an oil or natural gas pipeline while minimizing the potential for inconsistent implementation of the PCN requirement across districts. Although the Corps agrees that using a threshold of five or more crossings is based on a numerical impact, it could be more challenging to implement since there may be proposed oil or natural gas pipeline activities where there are five or more crossings and none of those crossings require PCNs.

One commenter suggested replacing the PCN threshold for new oil or natural gas pipeline activities with lengths of greater than 250 miles with a PCN requirement for oil or natural gas pipeline activities that cross state or district boundaries. Several commenters objected to the proposed 250-mile PCN threshold, but some of these

commenters said that the acreage PCN threshold is sufficient to ensure no more than minimal adverse environmental effects. A few commenters remarked that the length of a pipeline is not a predictor of its crossings of waters of the United States or environmental impacts and that this PCN threshold has no link to the Corps' regulatory authority. A few commenters stated that the 250-mile PCN threshold is inconsistent with the other proposed utility line activity permits as they do not contain that PCN threshold. One commenter objected to the 250-mile PCN threshold because it is limited to new oil or natural gas pipelines (i.e., the material to be transported after the pipeline is constructed).

As discussed above, the purpose of this new PCN threshold is to provide information to district engineers to facilitate their review of the cumulative effects that may be caused by new long-distance oil or natural gas pipelines that have waterbody crossings that require NWP 12 authorization. These new long-distance oil or natural gas pipelines may be constructed within a single state or Corps district. The Corps agrees that the number of aquatic resources and their distribution in the landscape is variable, and therefore the number of crossings of waters of the United States is similarly variable. However, the Corps finds that a length of 250 miles is both a good indicator of potential cumulative effects of an oil or natural gas pipeline while minimizing the potential for inconsistent implementation of the PCN requirement across districts. In addition, some oil or natural gas pipeline crossings may not require DA authorization because they are installed through horizontal directional drilling, do not involve a waterbody subject to Section 10 of the Rivers and Harbors Act, and do not involve discharges of dredged or fill material into waters of the United States. The Corps does not believe that this PCN threshold is necessary for new NWPs 57 and 58 because long-distance electric utility lines are often constructed as overhead utility lines and utility lines for water and other substances (e.g., potable water, wastewater, sewage) are often constructed to serve local communities and thus are likely to be shorter in overall length.

One commenter stated that the Corps' Regulatory Impact Analysis for the proposed rule is flawed because it assumes the new 250-mile PCN requirement would result in no additional PCNs. One commenter said that if the Corps does move forward with a 250-mile PCN threshold for new oil or natural gas pipeline activities that applicants be allowed to provide the PCNs based on desktop data as some areas may not be accessible for field surveys if the project is in the development stage. One commenter stated that the 250-mile PCN threshold would result in the majority of pipeline projects being constructed without review and would result in damage to historic properties. One commenter said that the 250-mile threshold has no scientific or technical basis.

The new 250-mile PCN requirement is unlikely to require more PCNs for NWP 12 activities because the likelihood of a new oil or natural gas pipeline greater than 250 miles in length not having any crossings of waters of the United States that require PCNs under the other PCN thresholds is extremely small. In addition, the requirement to provide in the PCN the locations and proposed impacts for all

crossings of waters of the United States that require DA authorization, including those crossings authorized by an NWP would not otherwise require preconstruction notification, does not trigger a requirement for the project proponent to submit full PCNs for those other non-PCN crossings of waters of the United States. This portion of the new PCN requirement is nearly identical to an existing requirement in paragraphs (b)(4)(i) and (ii) of general condition 32. Paragraph (b)(4)(i) requires the project proponent to include in the PCN 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 DA authorization but do not require pre-construction notification.

Furthermore, paragraph (b)(4)(ii) of general condition 32 currently requires project proponents to include in PCNs for linear projects where one or more single and complete crossings require pre-construction notification, the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those waters and wetlands. This quantification also must include those single and complete crossings authorized by an NWP not requiring PCNs. The only additional information required by the 250-mile PCN threshold is the location of all non-PCN crossings. The Regulatory Impact Analysis for this final rule has been updated to identify this new PCN threshold as a change. The lack of discussion of the proposed 250-mile PCN threshold in the Regulatory Impact Analysis for the proposed rule was an error. When a project proponent develops a proposal for a new oil or natural gas pipeline, some degree of environmental analysis and review is needed to determine whether there are any crossings of waters of the United States that require DA authorization, and whether any of those crossings require PCNs. The new PCN threshold should not impose any additional burdens on the regulated public. New oil or natural gas pipelines must comply with general condition 20 for historic properties as do all activities authorized by an NWP.

One commenter objected to the proposed 250-mile PCN threshold, and limiting it to the installation of new oil or natural gas pipelines (versus conducting repair or maintenance activities) along the majority of the distance of the overall project length, stating that a PCN requirement should be triggered even if short distances of the pipeline are being replaced. A few commenters stated that the proposed 250-mile PCN threshold is counter to, and could undermine, the Corps' longstanding definition of a single and complete linear project, and would allow district engineers to require individual permits because of the length of pipeline and cumulative impacts regardless of the independent utility of the separate and distant crossings.

The maintenance of existing oil or natural gas pipelines is likely to have fewer adverse environmental effects than the construction of new oil or natural gas pipelines, because those maintenance activities occur to existing pipelines for which some degree of adverse environmental effects has already occurred and a current environmental setting that includes the existing pipeline. The 250-mile PCN

threshold does not undermine the Corps' definition of single and complete linear project because each separate and distant crossing of waters of the United States can continue to be authorized by an NWP. If one crossing of waters of the United States for an oil or natural gas pipeline requires an individual permit, then 33 CFR 330.6(d) applies and the district engineer will determine which activities require individual permits and which activities can be authorized by an NWP. Section 330.6(d) of the Corps' NWP regulations, as well as Note 2 of NWP 12, remain in effect. Section 330.6(d) and Note 2 maintain the Corps' long-standing process regarding the use of NWPs and individual permits to authorize linear projects such as oil or natural gas pipelines.

One commenter stated that the 250-mile PCN threshold would discourage pipeline developers from avoiding and minimizing impacts to waters of the United States, and from planning longer routes to avoid sensitive resources. One commenter said that the 250-mile PCN threshold will add an unnecessary layer of uncertainty and litigation risk. One commenter stated that a 250-mile PCN threshold would authorize potentially significant pipeline activities without any district or division review. One commenter stated that oil or natural gas pipelines greater than 250 miles in length are so large they are bound to cause more than minimal effects and should not be approved under an NWP. One commenter stated that the length of the utility line should not be used as a PCN threshold; environmental conditions and impacts should be used instead.

Regardless of the addition of the 250-mile PCN threshold, pipeline developers are still required to comply with paragraph (a) of NWP general condition 23, which requires project proponents to avoid and minimize losses of waters of the United States on the project site, including permanent and temporary losses of those resources. The purpose of the new PCN threshold is to add a mechanism to provide information for the district engineer's cumulative effects determination and the district engineer's decision on whether to issue NWP verifications for the proposed crossings of waters of the United States. The information on all of the crossings will inform whether or not the cumulative adverse environmental effects of all crossings are or are not more than minimal. This PCN threshold also provides the district engineer to require an individual permit for the proposed oil or natural gas pipeline activities when he or she determines the cumulative adverse environmental effects of the proposed crossings of waters of the United States are more than minimal. This may help reduce litigation risk. The 250-mile PCN threshold provides information for the district engineer's review, who also uses information on current environmental conditions and potential impacts of the proposed NWP activities to determine whether NWP authorization is appropriate for these NWP 12 activities. Division engineers do not have a role in reviewing NWP PCNs.

Other Provisions of NWP 12

One commenter said that Note 2 should be reissued with no changes, as it clarifies concepts such as "single and complete project," "single and complete non-linear

project,” “independent utility,” and the interaction of the NWP’s with individual permits. The Corps has reissued Note 2 with no changes. Note 2 differs from the 250-mile PCN threshold in that an individual permit is required for the proposed oil or natural gas pipeline if one or more crossings of waters of the United States does not qualify for NWP authorization. Under the 250-mile PCN threshold, an individual permit is required if the district engineer determines the cumulative adverse environmental effects of all crossings of waters of the United States that require DA authorization will result in more than minimal cumulative adverse environmental effects.

A few commenters objected to authorizing separate and distant crossings as single and complete projects. These commenters believe that the practice causes more than minimal cumulative adverse effects. A few commenters expressed opposition to allowing multiple “single and complete” project authorizations of the same pipeline to be authorized by the NWP 12, stating that it would be more appropriate to consider the entire pipeline as a single and complete project. One of these commenters said that more individual permits should be required for these activities.

The authorization of separate and distant crossings of waters of the United States as single and complete projects for the purposes of NWP authorization is a long-standing practice consistent with the Corps’ regulations at 33 CFR 330.2(i).

One commenter expressed concern with the cumulative effects analyses for multiple single and complete crossings and the inability to account for NWP activities that do not require PCNs. One commenter said that the proposed reissuance of NWP 12 is arbitrary and capricious and in violation of the Clean Water Act because it allows unlawful piecemealing of large pipelines and other linear projects to avoid individual permit review. One commenter stated that an entire pipeline project should be subject to NEPA review, including a cumulative review of all impacts to waters of the United States.

Paragraph (b)(4) of NWP general condition 32 requires project proponents to include in PCNs 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 DA authorization but do not require pre-construction notification. This information is used by district engineers to determine whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects.

Activities authorized by NWP 12 are not subject to additional NEPA review, because Corps Headquarters fulfills the requirements of NEPA when it finalizes the national decision document for the issuance or reissuance of the NWP. The national decision document includes an assessment of effects of the Corps proposed action (i.e., the issuance or reissuance of the NWP’s) in accordance with the Council on

Environmental Quality's definition of "effects or impacts" at 40 CFR 1508.1(g) in their NEPA regulations. This analysis of effects or impacts under NEPA includes the projected use of the NWP over the 5-year period it is expected to be in effect. For an NWP that authorizes discharges of dredged or fill material into waters of the United States, the national decision document also includes a cumulative impact analysis conducted in accordance with 40 CFR 230.7(b)(3).

One commenter stated that acreage limits and thresholds should remain constant with separate consideration at each single and complete crossing of waters of the United States authorized by NWP 12. One commenter said that each crossing should require a separate permit. One commenter expressed concern that the phrase "separate and distant" is not defined and would not prevent a pipeline from being used multiple times in close proximity and/or on the same waterbody under NWP 12. Another commenter said that no additional definition of "separate and distant" is necessary. One commenter stated that the Corps should impose an overall limit on cumulative effects allowed for a project with multiple "single and complete" crossings.

Nationwide permit 12 has a 1/2-acre limit for each single and complete project. As discussed above, and in 33 CFR 330.2(i), each separate and distant crossing of waters of the United States may qualify for a separate NWP authorization. The Corps declines to define the phrase "separate and distant" because what constitutes separate and distant crossings can vary across the country because of differences in the distribution of waters and wetlands in the landscape, local hydrologic conditions, local geologic conditions, and other factors. What constitutes separate and distant crossings is more appropriately determined by district engineers on a case-by-case basis. When reviewing a PCN, the district engineer considers the cumulative effects of all crossings of waters of the United States for the oil or natural gas pipeline activity, and applies the 10 criteria listed in paragraph 2 of Section D, District Engineer's Decision.

One commenter said that Note 4 should refer to the General Bridge Act of 1946 instead of Section 9 of the Rivers and Harbors Act of 1899. The Corps has made this change to Note 4.

With respect to Note 5 of this NWP, a few commenters requested that the Corps provide clarification and examples of exempted utility line activities under Section 404(f) of the Clean Water Act. One commenter suggested that the Corps provide examples of utility line activities that do not qualify for the exemption. In accordance with the 1989 Memorandum of Agreement Between the Department of the Army and the U.S. EPA Concerning the Determination of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the Clean Water Act, the U.S. EPA has the authority to determine which activities are eligible for the Clean Water Act section 404(f) exemptions.

Comments on Proposal to Issue Separate NWPs for Different Utility Line Sectors

Many commenters expressed support for dividing oil and natural gas pipeline activities from other types of utility line activities. Several commenters acknowledged that the three types of utility lines are of varying sizes and lengths, constructed with different methods, and have different relative impacts to streams and wetlands. One commenter said that the proposed division of NWP 12 into three separate NWPs ensures that the activities authorized by these NWPs are substantially similar in nature and will further ensure that each of the NWPs will have no more than minimal adverse effects on the environment. One commenter stated that permitting utility line activities through three separate NWPs helps reduce litigation risk for some types of utility line activities.

The Corps acknowledges that issuing three separate NWPs for different types of utility lines helps ensure that the categories of activities authorized by these NWP are substantially similar in nature and that they will result in no more than minimal individual and cumulative adverse environmental effects. The issuance of three NWPs for different categories of utility line activities may also help reduce regulatory uncertainty for electric utility line operators, telecommunications companies, state, tribal, and local water authorities, and other entities that construct, maintain, and operate these utility lines. It may also provide diversity and stability to the NWP program and allow Corps districts to continue to authorize categories of utility line activities by an NWP in the event that one of the three NWPs is invalidated or stayed by a federal court. Most of the past litigation on NWP 12 has been for oil or natural gas pipelines, not electric and telecommunications lines or utility lines that convey potable water, wastewater, sewage and other such substances. Issuing separate NWPs for electric utility line and telecommunications activities and for utility lines for water and other substances will help provide some degree of regulatory certainty for the entities that construct and maintain those types of utility lines. These separate NWPs will also benefit the people who rely on electric utility lines and telecommunication lines and utility lines for water and other substances to deliver energy, information, entertainment, potable water, and other goods and services. The public will also benefit from the removal of sewage and wastewater to protect public health and the environment.

A few commenters requested that if NWP 12 is divided that the Corps be clear that all provisions relating to substations, foundations, and access roads, and as well as provisions on inadvertent returns of drilling fluids, temporary structures and fills (including use of temporary mats), and accompanying notes, remain with the same legal effect and with no additional restrictions. The Corps has written these three NWPs in a consistent manner to provide a similar framework for authorizing regulated activities associated with utility lines, utility line substations, access roads, actions to remediate inadvertent returns, and the authorization of temporary impacts for construction and other activities.

One commenter suggested that the Corps issue separate NWPs for utility lines based on the distinction as to whether they are overhead utility lines, such as

electric and telecommunication lines, or underground utility lines. One commenter requested that the Corps change the proposed NWP 12 to authorize “underground pipeline or utility line related activities.” Several commenters said that buried linear utility lines have substantially similar environmental effects on waters of the United States. One commenter indicated there is variability and no reasonable justification for dividing the NWPs based on above-ground and below-ground activity types. A few commenters said that the construction of oil, natural gas, water, and other utilities typically require more ground and vegetation disturbance than the construction methods for electrical utility lines. These commenters also stated that electrical utility lines have more flexibility to avoid aquatic resources, and that discharges of dredged or fill material associated with electric utility lines typically have a smaller footprint than they do for other in-ground utility lines. One commenter said that the Corps should keep all buried, underground utility lines in NWP 12, rather than create a new NWP for utility line activities for water and other substances, because best management practices for protecting waters from trenching or boring for pipes are similar in nature regardless of the product to be carried in the pipe.

After reviewing the public comments, the Corps determined that issuing separate NWPs for oil or natural gas pipeline activities, electric utility line and telecommunications activities, and utility line activities for water and other substances would be the best approach for reducing regulatory uncertainty for different utility line sectors.

One commenter suggested that the Corps further distinguish between natural gas and petroleum liquids in recognition of the differences in environmental consequences of potential leaks. One commenter recommended that the Corps further distinguish between large interstate natural gas pipelines and smaller intrastate natural pipelines and service lines.

The Corps does not have the authority to address the environmental consequences of leaks from oil or natural gas pipelines. Those environmental consequences are more appropriately addressed by federal, state, and local government agencies that have the legal authority to require operators of oil or natural gas pipelines to take actions in response to leaks.

Many commenters objected to the proposed separation of NWP 12 into three NWPs and requested that the 2017 NWP 12 be retained in its historic form. Many of these commenters said that the Corps should focus its concerns on the environmental impacts of the authorized activities rather than the type of material transported by various utility lines. Several commenters objected to the proposed division of the NWP 12 activities indicating that it would cause additional complications to permitting utility line activities rather than streamlining the process. One commenter remarked that there are no substantive differences between the three proposed NWPs and therefore issuing separate NWPs is unnecessary. Several commenters said that issuing three separate utility line NWPs will increase litigation risk and

uncertainty for the regulated public.

As discussed above, the Corps believes that separating NWP 12 into three different NWPs to authorize utility line activities for different utility line sectors will help enhance regulatory certainty for utility line sectors that are not a frequent target for litigation because of the lower degree of concern about the potential direct and indirect environmental impacts of the substances those utility line sectors carry (e.g., electricity, potable water, wastewater). As with any change in the NWP program, prospective permittees will experience some challenges associated with those changes, but over time they will adjust to those changes and can realize the benefits of those changes. Prior versions of NWP 12 have been subjected to litigation, so the issuance of three separate NWPs for utility line activities is likely to pose no greater litigation risk than prior versions of NWP 12.

One commenter said that the Corps only analyzed differences but not similarities among these different types of utility lines. A few commenters said that the proposed division of NWP 12 activities is an abrupt and unjustified departure from the long-standing view that utility lines are activities that are substantially similar. One of these commenters said that the proposed change is a departure from the NWPs that were first promulgated in 1977. A few commenters said that a general permit should encompass activities that are similar in nature consistent with Section 404(e) of the Clean Water Act.

When proposing to issue new NWPs for activities that were authorized by a previous NWP, discussing the differences among those NWPs and the associated categories of activities is an important part of explaining the proposed action. The changes are being proposed through the normal rulemaking process, and are being made in response to events that have raised concerns about potential increases in regulatory uncertainty for specific categories of regulated entities. When the NWPs were first issued in 1977, there were 15 NWPs. When the NWPs were last issued in December 2016, there were 52 NWPs. The number of NWPs has increased substantially over time in response to changes in the Corps Regulatory Program, litigation, studies, and other factors. The three utility line NWPs being issued in this final rule represent categories that are similar in nature (i.e., oil/natural gas; electricity, including communications carried by electricity; and water, wastewater, sewage, stormwater, and other substances). Section 404(e) of the Clean Water Act does not specify how broad or narrow categories of activities authorized by NWPs and other general permits must be. The Corps has substantial discretion to identify categories of activities that are appropriate for NWPs and other general permits.

One commenter noted that the Corps' response to public comments for the 2017 NWPs rejected the idea that utility line activities are not substantially similar, stating that the Corps explained that the agency interprets the 'categories of activities that are similar in nature' requirement broadly to keep the NWP program manageable in terms of the number of NWPs. A few commenters said that the history of the NWPs indicates that there is no prior precedent in past NWP rulemaking for arbitrarily

dividing NWP's that are intended to cover categories of activities that are similar in nature. One of these commenters further indicated that the mining NWP's (21, 44, 49, and 50) and the development NWP's (29 and 39) are not analogous as their development came about differently, indicating that they largely had to do with the end of NWP 26.

As discussed above, Section 404(e) of the Clean Water Act gives the Corps substantial discretion in how broad or narrow to define categories of activities for general permit authorization. The proposal to issue three separate NWP's for utility line activities instead of reissuing NWP to authorize all utility line activities was made, in part, in response to concerns about regulatory uncertainty for various utility line sectors. The proposal is also an opportunity to tailor the NWP's so that they will authorize activities that have no more than minimal individual and cumulative adverse environmental effects by making targeted changes to the text of each of these NWP's, as appropriate.

This proposal is consistent with prior NWP rulemaking efforts, in which the Corps issued new NWP's to authorize categories of activities with numerous similarities in the text of the NWP, including acreage limits and other limits, PCN thresholds, and categories of waters in which those NWP's may be used to authorize discharges of dredged or fill material into waters of the United States. For example, in 2007 the Corps issued two new NWP's to authorize discharges of dredged or fill material into waters of the United States for coal mining activities (see 72 FR 11092). The Corps issued NWP 49 for coal remaining activities and NWP 50 for underground coal mining activities. These two coal mining NWP's were issued even though the Corps had issued and reissued NWP 21 for surface coal mining activities over time since NWP 21 was first issued in 1982 (47 FR 31794).

In 2000, the Corps issued five new NWP's and modified six existing NWP's to replace NWP 26, which authorized discharges of dredged or fill material into headwaters and isolated waters (65 FR 12818). Four of the new NWP's (NWP 39 for residential, commercial, and institutional developments; NWP 40 for agricultural activities; NWP 42 for recreational facilities; and NWP 43 for stormwater management facilities) authorized discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. Each of these NWP's had a 1/2-acre limit for losses of non-tidal waters of the United States. The categories of activities established for these four NWP's were based on the operational purposes they served, which the Corps does not have the authority to regulate. Those operational purposes included providing places for people to live, work, learn, and produce goods and services (NWP 39); agriculture activities, including farm buildings (NWP 40); recreational facilities and associated features (NWP 42); and stormwater management facilities (NWP 43).

Similar to these NWP's, the three NWP's the Corps is issuing to authorize various sectors of utility line activities are differentiated by the substances those utility lines carry, despite the Corps' lack of authority to regulate the substances being

conveyed by those utility lines. If Congress had intended the categories of general permits issued under Section 404(e) of the Clean Water Act to be based on the activity the Corps regulates (i.e., discharges of dredged or fill material into waters of the United States), it would not have written the text of section 404(e) to refer to “any category of activity involving discharges of dredged or fill material.” The text of section 404(e) clearly allows the Corps to issue any number of NWP that authorize discharges of dredged or fill material into waters of the United States. Furthermore, those categories can be based on how the authorized activity will be used after the project proponent has completed the construction activities associated with the discharges of dredged or fill material into waters of the United States, and how people will use the completed activities even though the Corps generally has no authority to regulate how the constructed facilities are operated. These principles apply to the three NWPs the Corps is issuing for these three utility line sectors.

One commenter said that the proposed changes to NWP 12 and the proposed issuance of separate NWPs for other types of utility lines are not consistent with congressional intent to reduce administrative burdens and the Administration’s policy on infrastructure development and maintenance. This commenter cited Executive Order 13777, “Enforcing the Regulatory Reform Agenda” (February 24, 2017), Executive Order 13783, “Promoting Energy Independence and Economic Growth” (March 28, 2017), and the 2018 “Legislative Outline for Rebuilding Infrastructure in America.”

The Corps believes that this issuance of these three NWPs (NWPs 12, 57, and 58) are consistent with priorities for infrastructure development because they will help reduce regulatory uncertainty and burdens on the regulated public. The issuance of these NWPs will not cause any increases in the number of activities authorized by an NWP or the number of activities requiring individual permits. The three NWPs are consistent in general structure, but they have some differences because of the different types of substances those utility lines convey and how those utility lines are designed and constructed.

Several commenters stated that the proposed division of NWP 12 activities into separate NWPs discourages the beneficial and common practice of joint trenching and the use of utility corridors where various types of utilities are co-located, and further indicated that these features should be permissible under NWP 12 as a single and complete project. Several commenters said that the proposal to issue three separate NWPs would increase costs and delays associated with energy infrastructure projects. A few commenters stated that the division of NWP 12 into three NWPs would increase the number of permits needed by some applicants. One commenter cited NWP general condition 28 as a reason not to divide NWP 12 into three different NWPs for different types of utility lines.

The issuance of these three NWPs will not discourage joint trenching and the use of utility corridors for multiple utility lines. For example, if a project proponent proposes to construct a water line next to an oil or natural gas pipeline, the provisions of NWP

general condition 28, use of multiple NWP, would apply. For each crossing of a separate and distant waterbody, both NWP 58 and 12 could be used, as long as the loss of waters of the United States at each single and complete project does not exceed 1/2-acre. The issuance of these three NWP will not cause increased costs and delays for energy infrastructure projects, except for a relatively brief period of time as the transition from the 2017 NWP to the 2021 NWP occurs. The Corps acknowledges that there will be some increases in the number of permits that project proponents will need to obtain, but those permits will generally be used concurrently, and consistent with general condition 28. The use of multiple NWP to authorize single and complete projects is a longstanding practice in the NWP program.

A few commenters said that when the Corps considers whether to make changes to an established and well-functioning NWP program, it should be conscious of how changes to the framework for permitting utility lines will affect the investment community, and in turn the country's ability to continue to deliver competitively-priced energy from diverse sources to U.S. consumers and other end-users, and to further domestic energy independence. A few commenters remarked that pipeline and other infrastructure operators need regulatory certainty to build, maintain, and upgrade pipelines and other utility infrastructure. One commenter expressed support for the Corps' efforts to improve the NWP program, but cautioned the Corps to avoid changes that could introduce inefficiencies. A few commenters said that the proposed division of NWP 12 into three separate NWP would likely introduce unnecessary strain on agency resources, delays in the permit reviews, regulatory inconsistency in the permitting process. One commenter objected to dividing the NWP 12 into three separate NWP because they are very similar and can be more easily tracked and understood as one category.

The Corps acknowledges that there will be some challenges and opportunities with these changes to the NWP program, but it should also be noted that the NWP program changes each time the Corps goes through the rulemaking process to issue or reissue the NWP and that adjustments need to be made under the new NWP. The issuance of NWP 57 will help support renewable energy generation facilities and the transfer of electricity from those generation facilities to residential, commercial, industrial, and other users. The NWP will continue to provide regulatory certainty for pipelines and other types of utility lines. None of these three NWP require agency coordination, so other federal agencies should not be adversely affected by the splitting of NWP 12 into three separate NWP.

One commenter said that if the Corps were to move forward with the division of the NWP 12 activities it must take into consideration the differences between distribution and transmission pipelines as the physical characteristics of the pipelines inherent in these different uses may have a larger effect on waters of the United States than the material being transported. A few commenters suggested that if NWP 12 were reissued without change, over time the use of NWP 12 would shift from oil and gas pipelines to other utility sectors to account for new investment

in more secure and resilient utility systems, and that a two-year period is an inadequate sampling for this decision making effort.

The Corps does not agree that is necessary to address differences between distribution and transmission pipelines. These NWP's authorize utility lines of various sizes, and the Corps focuses its analysis of potential adverse environmental effects or impacts that are caused by the activities that are directly related to the Corps' regulatory authority (i.e., discharges of dredged or fill material into waters of the United States regulated under Section 404 of the Clean Water Act and structures and work in navigable waters of the United States regulated under Section 10 of the Rivers and Harbors Act of 1899). The Corps does not believe it is useful to engage in speculation about potential future trends in the number of oil or natural gas pipelines versus the number of electric utility lines and telecommunications lines versus the number of utility lines carrying water and other substances. The Corps estimated the potential permitting changes using data on NWP verifications issued between March 19, 2017, and March 19, 2019, which provides a robust sample size.

One commenter said that that, according to the Congressional Research Service, the Corps does not have a centralized database or other information on the number of individual permits it issues for pipeline and utility line projects, nor does it have a database on the utility line activities that are authorized by NWP 12, and that any attempt by the Corps to draw out a reasoned, data-driven basis for dividing NWP 12 into three separate NWP's is premature at this time.

The Corps does have a centralized database that tracks NWP verifications issued, regional general permit verifications issued, and individual permits issued, including the types of activities authorized by those general permits and individual permits. From that data, the Corps was able to estimate the number of NWP activities that were likely associated with oil or natural gas pipelines, electric and telecommunications lines, and utility lines for water and other substances.

One commenter stated that dividing the NWP 12 would add complexity to ESA and NHPA compliance. One commenter said that the Corps appropriately recognizes that the techniques used to construct water and electric utility lines have fewer impacts to waters of the United States than other uses of NWP 12 involving transport of petrochemicals. The issuance of these three NWP's will not add complexity to ESA or NHPA compliance because they must comply with the same NWP general conditions, including general condition 18, endangered species, and general condition 20, historic properties. A single compliance process under either law can serve multiple NWP's for those activities that may use NWP 12 and 58, for example.

A few commenters stated that there is no logical grouping to be found for dividing the proposed NWP activities based on pipe diameter, size, and any associated ground disturbances. A few commenters said that the Corps' information on

diameter and pipeline lengths are based upon incomplete generalizations that do not withstand scrutiny. One commenter stated that justification for dividing NWP 12 cannot be based upon the diameter of the pipeline or conduit. One commenter remarked that the size of the pipe may determine a minimum width of a trench but that some smaller pipelines may require larger trenches depending on the circumstance and that this is not a valid criterion for separating the NWPs. One commenter said that the Corps failed to make a persuasive case that length of a utility line would be a determining factor when considering ground disturbances and division of the NWP activities. One commenter said that with respect to the Corps' jurisdiction under Section 10 of the Rivers and Harbors Act of 1899, it is the presence of a pipeline that affects navigation, not the substance it contains.

The discussion in the preamble to the 2020 Proposal regarding the differences among the three utility line sectors that were the basis for the modified NWP 12 and the proposed new NWP C and D was intended to demonstrate that there are some differences among those sectors. The final NWPs are based on sectors, not construction techniques or sizes of the utility lines. The text of the three NWPs makes no references to the diameters or length of the utility lines. The Corps agrees that for utility lines that cross navigable waters of the United States and require section 10 authorization, the Corps focuses its evaluation on potential effects on navigation, not the substance being conveyed by the utility line.

A few commenters said that the Corps' jurisdiction as related to these NWPs is limited to its statutory authorities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. One commenter expressed concern that the proposed issuance of separate NWPs could lead the Corps to consider factors outside of its statutory authority. A few commenters stated that consideration of the type of substances that can be conveyed by a utility constitutes overreach of the Corps' statutory jurisdiction. These commenters went on to reference statements from the Corps that it does not regulate the operation of oil and natural gas pipelines, but that the Corps regulates discharges of dredged or fill material into waters of the United States associated with their construction.

The Corps recognizes that under these three NWPs the Corps' statutory authority is limited to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. However, for these three NWPs and many of the other NWPs, the categories of activities authorized by those NWPs relate to how the constructed activities will be used (e.g., residences for NWP 29, recreational facilities for NWP 42, land-based renewable energy generation for NWP 51), even though the Corps does not have the authority to regulate the operation of the constructed structure or fill. As discussed above, the text of section 404(e) recognizes that the Secretary could issue any number of general permits, including NWPs, for any number of categories of activities involving discharges of dredged or fill material into waters of the United States.

A few commenters said that the terms used to describe the applicability of NWP 12

cause ambiguous situations with respect to which substances would qualify as oil, gas, or petrochemicals and to which NWP would apply. These commenters also indicated confusion associated with common situations where petrochemical products are added to non-petroleum products prior to transport and generally suggested the source of the material to be transported has little or no bearing on the methods for construction, maintenance, repair or replacement of the pipeline on the best management practices needed to protect waters of the United States.

The Corps has attempted to provide more clarity regarding the differentiation of utility line sectors that would fall under NWPs 12, 57, or 58. The Corps recognizes that there may be situations where a prospective permittee may be unsure which NWP applies. The prospective permittee could coordinate with the appropriate Corps district to get assistance in identify which NWP would be most appropriate for a particular project. If the project proponent is contemplating constructing different types of utility lines for a particular project, multiple NWPs could be used as long as the project proponent complies with NWP general condition 28, which addresses use of multiple NWPs for a single and complete project.

General Comments on Best Management Practices.

A few commenters supported the incorporation of specific best management practices (BMPs) for the utility line NWPs. A few commenters said that adding additional BMPs or standards to this NWP would result in redundant requirements to manage on these projects without providing additional benefits. A few commenters said that division engineers can tailor standards to meet region-specific needs and issue additional regional conditions with their discretionary authority. One commenter stated that the BMPs for protecting water features during trenching, boring, or sleeving construction methods for installing, replacing, or maintaining pipes at stream or wetland crossings are similar in nature, regardless of what product will travel in the pipeline once construction is completed. One commenter stated that the three categories of utility lines under proposed NWPs 12, C, and D, would authorize sufficiently similar activities and require the same or similar environmental provisions in order to meet the no more than minimal impacts requirement under section 404(e) of the Clean Water Act. One commenter said that because of the overarching federal regulatory regime, NWP 12 and its general conditions, regional conditions added by division engineers, and applicable state requirements there are no additional BMPs that could be practically or lawfully added to NWP 12.

The Corps agrees that there are no national best management practices to add to NWPs 12, 57, and 58. As discussed below, a few commenters submitted suggestions for best management practices. The Corps has considered those best management practices, and has concluded that best management practices are more appropriately addressed as regional conditions added to the NWPs by division engineers or activity-specific conditions added NWP authorizations by district engineers.

A few commenters said that imposing additional best management practice requirements would risk conflict or redundancy with other applicable regulations. A few commenters suggested that if the Corps were to become aware of best management practices to add to NWP 12 then it should conduct a subsequent notice and comment procedure for these BMPs as none were specifically proposed. A few commenters indicated that a 60-day notice is inadequate for stakeholders and agencies to compile BMPs and best available science for the invitation to comment. One commenter recommended that the Corps maintain the existing NWPs and instead conduct an extensive outreach campaign to stakeholders to determine BMPs for the utility line NWPs. One commenter said that when developing industry specific standards and BMPs, the duration and location of temporary fill impacts across a project site should be taken into consideration. One commenter requested that the Corps provide examples the types of construction methods for access roads that are considered to minimize adverse effects to waters of the United States as noted in several NWPs.

The Corps has decided not to add any best management practices to NWPs 12, 57, and 58. After reviewing the BMPs suggested by commenters, the Corps determined that the text of these NWPs already include some common BMPs, such as requiring the top 6 to 12 inches of the trench to normally be backfilled with topsoil from the trench, constructing the trench so that it does not drain waters of the United States through a French drain effect, or stabilizing exposed slopes and stream banks immediately after completion of construction of the stream crossing.

Comments on Best Management Practices for NWP 12.

One commenter said that impacts from work on natural gas pipelines and gas utility lines are minimal and temporary, and BMPs under the existing NWP 12 protect waters of the United States. One commenter stated that if the Corps decides to impose any BMPs on interstate natural gas pipelines they must not conflict with the FERC's Plan and Procedures. Several commenters stated that The U.S. Department of Transportation (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) Office of Pipeline Safety imposes stringent pipeline safety regulations under 49 C.F.R. Part 192 on natural gas interstate transmission pipelines and gas utility intra-state natural gas transmission and distribution utility lines. One commenter stated that the 2017 NWP 12 provides adequate environmental protections under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899, and that no additional industry-specific standards or BMPs should be added to the NWPs as national enforceable terms. One commenter stated that pipeline rights-of-way should be maintained in herbaceous condition within 10-feet centered on the pipeline. One commenter stated that applicants should have to produce containment and clean up contingency plans as BMPs for all of the utility line permits. One commenter said that a trench should not be constructed or backfilled in a manner that would redirect shallow groundwater flow paths, to avoid altering vegetative communities or flow in

streams downslope of the trenches. One commenter said that appropriate measures should be taken to maintain water quality conditions downstream of the site.

As discussed above, the Corps is not adding any BMPs to the text of NWP 12, 57, and 58 that were not in the proposed texts of these NWPs.

Best management practices recommendations. One commenter said that a list of BMP manuals that support oil and gas pipeline development and maintenance activities in Appendix G of the document titled “Considering Best Practices for Managing Pipeline Permitting.” Several of these documents are excellent resources for best management practices related to impacts to wetlands and streams. One commenter recommended the following BMPs for NWP 12:

- All excavations should be backfilled with the excavated material after installation of the appropriate structures.
- Side-cast spoil material from trench excavation should be placed on the side of the trench opposite streams and wetlands.
- Spoil material from trench excavation should be placed on the side of the trench to be reused as backfill with the A-horizon placed back in its original position.
- Excess spoil material must be removed to an approved upland disposal site.
- Stream banks at crossings must be restored after construction has been completed.
- Disturbed stream banks can be restored by planting woody vegetation and by using bioengineering techniques for stream bank stabilization.
- Right-of-ways through and adjacent to streams and through forested wetlands should be maintained in low growing, woody vegetation to minimize erosion and sedimentation. Maintenance of this right-of-way should be conducted with mowing rather than with chemicals to reduce the potential for contamination and negative impacts on aquatic resources.
- If chemicals are used, a 50-foot buffer on either side of the stream crossing should be established in order to retain the riparian vegetation while reducing the amount of chemical runoff into the aquatic environment.
- Any open trench must be temporarily fenced to reduce the likelihood of wildlife becoming trapped and must include a ramped section which would allow wildlife to escape.
- A full visual inspection of every open trench section must be made daily to identify any trapped wildlife in need of rescue.

One commenter provided an example list of industry BMPs, but indicated that should the Corps chose to incorporate them in the text of NWP 12 and the other utility NWPs, it must understand that all BMPs are not appropriate to all circumstances. This commenter provided the following list of BMPs:

- Requiring, where appropriate, a plan to address the prevention, containment, and cleanup of sediment or other materials caused by inadvertent returns of drilling fluids.

- Requiring notification to the Corps and implementation of a remediation plan in the event of an inadvertent return of drilling fluids.
- Siting poles and tower foundations outside of surface waters where practicable.
- Visually marking waters of the United States near work areas.
- Using techniques that minimize rutting and damage to wetlands, such as installing mats prior to placing or driving equipment over wetlands or streams for temporary access or using wide-track equipment.
- Establishing stockpiling/work areas outside of surface waters.
- Construction monitoring during routine inspection and maintenance activities to avoid unauthorized discharges into surface waters.

A few commenters suggested modifying the text of NWP 12 to encourage the use of directional drilling. One commenter said that when horizontal directional drilling (HDD) is not possible, the flume method should be the required method for use of the NWP 12 over the dam-and-pump or open-cut stream crossing methods in order to minimize impacts to aquatic resources. One commenter suggested when HDD is used the permittee should erect sediment control measures between the drill site and nearby sensitive resources to prevent drilling mud releases from reaching sensitive resources, conduct regular on-site briefings for personnel to identify and locate sensitive resources, and maintain response equipment on-site or in an accessible location and in good working-order. One commenter suggested that HDD contractors should be required to employ a full-time, qualified on-site mud engineer to continuously monitor the drilling fluid circulation and returns as a preventative measure.

The Corps declines to add text to NWPs 12, 57, and 58 to encourage horizontal directional drilling. The use of horizontal directional drilling is more appropriately determined on a case-by-case basis. The Corps lacks the authority to require HDD contractors to employ a full-time, qualified on-site mud engineer to monitor drilling fluid circulation and potential inadvertent returns of drilling fluid.

One commenter said that Congress did not intend the NWP program to be used to streamline the authorization of major infrastructure projects and that each water crossing for major pipeline projects that transport highly toxic and dangerous materials should require individual permit reviews. A few commenters stated that environmental impact statements should be required for oil or natural gas pipelines. One commenter said that a programmatic ESA consultation should be completed for this NWP. One commenter stated that the construction and operation of oil and gas pipelines pose significant risk to protected species and should require individual permits. Another commenter said that the Corps must determine the environmental safety of HDD at a particular location and associated mitigation measures. One commenter suggested a definition for "stand-alone project" to require that all the crossings within major watersheds are evaluated together as single and complete since the cumulative impacts would be to one system.

Section 404(e) of the Clean Water Act provides the Corps with the authority to issue NWP's to authorize categories of activities involving discharges of dredged or fill material into waters of the United States to streamline the authorization process for these activities, as long as they result in no more than minimal individual and cumulative adverse environmental effects. Section 404(e) does not prohibit the issuance of general permits for utility lines and other infrastructure projects. As many commenters recognized, the Corps does not have the discretion to control the types of substances conveyed by oil or natural gas pipelines or other types of utility lines. Compliance with the Endangered Species Act is discussed in Section III of this final rule: Compliance with Relevant Statutes. The Corps declines to add a definition of "stand-alone project" because cumulative impacts are already evaluated by district engineers over appropriate geographic regions, such as watersheds, Corps districts, states, etc.

A few commenters stated that NWP 12 should be revised to consider the protection of tribal treaty rights. One commenter said that the Corps should conduct tribal consultation for the reissuance of the NWP 12. One commenter suggested the Corps adopt a policy of early consultation with Indian Tribes and other actors on these types of projects, above the timeline required by the NHPA section 106 process to allow the Corps to preemptively address concerns and avoid delays, litigation, and other increased costs. One commenter said that the draft NWP 12 decision document fails to address the high correlation of pipeline construction projects with rates of missing and murdered Indigenous women and children and indicated that the Corps had not consulted the tribes on the matter. One commenter stated that there are a variety of utility lines that have direct, indirect, and cumulative impacts on treaty reserved resources and that the proposed changes require additional review to fully understand the extent of potential resource impacts. One commenter requested the Corps continue to require PCNs in Washington State to adequately protect treaty resources.

Tribal treaty rights are addressed through NWP general condition 17 for all NWP's, including NWP 12. Consultation with tribes on the proposed NWP's is discussed in Section V of this final rule (Administrative Requirements), in the section for E.O. 13175. The draft decision document does not discuss pipeline construction projects and missing and murdered people because that issue is more appropriately addressed by local, state, tribal, and federal law enforcement officials. Concerns about potential impacts to treaty resources in Washington State are more appropriately addressed through regional conditions, which can add PCN requirements to this NWP, where appropriate.

2.0 Purpose and Need for the Proposed Action

The proposed action is the issuance of this NWP to authorize discharges of dredged or fill material into waters of the United States under Section 404 of the Clean Water Act and structures and work in navigable waters of the United States

under Section 10 of the Rivers and Harbors Act of 1899 for oil or natural gas pipeline activities that result in no more than minimal individual and cumulative adverse environmental effects. This proposed action is needed for efficient implementation of the Corps Regulatory Program, by authorizing with little, if any, delay or paperwork this category of activities, when those activities have no more than minimal individual and cumulative adverse environmental effects. The NWP also provides an incentive to project proponents to reduce impacts to jurisdictional waters and wetlands to receive the required authorization under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 in less time than it takes to obtain individual permits for those activities. Issuing an NWP to authorize activities that have no more than minimal adverse environmental effects instead of processing individual permit applications for these activities, reduces regulatory burdens on the public, benefits the environment through reduced losses of jurisdictional waters and wetlands, and allows the Corps to allocate more of its resources towards evaluating proposed activities requiring authorization under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 that have the potential to cause more substantial adverse environmental effects.

3.0 Alternatives

This evaluation includes an analysis of alternatives based on the requirements of NEPA, which requires a more expansive review than the Clean Water Act Section 404(b)(1) Guidelines. The alternatives discussed below are based on an analysis of the potential environmental impacts and impacts to the Corps, Federal, Tribal, and state resource agencies, general public, and prospective permittees. Since the consideration of off-site alternatives under the 404(b)(1) Guidelines does not apply to specific projects authorized by general permits, the alternatives analysis discussed below consists of a general NEPA alternatives analysis for the NWP.

3.1 No Action Alternative (Do Not Reissue or Modify the Nationwide Permit)

The no action alternative would be to allow this NWP to continue to authorize activities until it expires on March 18, 2022, and not reissue the NWP. After the NWP expires, the no action alternative would require individual permits to be processed for activities that were authorized by this NWP, unless Corps districts issued regional general permits to authorize a similar category of activities.

3.2 Reissue the Nationwide Permit With Modifications So That It Only Authorizes Oil or Natural Gas Pipeline Activities

This alternative consists of modifying and reissuing the NWP while issuing separate NWPs to authorize electric utility line and telecommunications activities (proposed

new NWP C) and utility line activities for water and other substances (proposed new NWP D). This alternative also includes considering changes to the terms and conditions of this NWP after evaluating the comments received in response to the proposal to reissue this NWP. This alternative consists of adding, changing, or removing quantitative limits on this NWP, changing pre-construction notification thresholds and requirements, or adding or removing conditions and other provisions in this NWP. This alternative includes the mechanisms in the Corps' NWP program regulations where division and district engineers can modify, suspend, or revoke NWP authorizations on a regional or case-by-case basis to ensure that the NWP authorizes only those activities that result in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.5(c) and (d)).

In the September 15, 2020, Federal Register notice, the Corps requested comments on the proposed reissuance of this NWP and to split NWP 12 into three separate NWPs: NWP 12 would continue to authorize oil or natural gas pipeline activities; proposed new NWP C would authorize electric utility line and telecommunications activities; and proposed new NWP D would authorize utility line activities for water and other substances.

3.3 Reissue the Nationwide Permit Without Modifications

This alternative consists of reissuing the 2017 NWP 12 to continue to authorize utility line activities for all types of substances. This alternative also involves consideration of changes to the terms and conditions of this NWP after evaluating the comments received in response to the proposal to issue this NWP. This alternative consists of adding, changing, or removing quantitative limits on this NWP, changing pre-construction notification thresholds and requirements, or adding or removing conditions and other provisions in this NWP. This alternative includes the mechanisms in the Corps' NWP program regulations where division and district engineers can modify, suspend, or revoke NWP authorizations on a regional or case-by-case basis to ensure that the NWP authorizes only those activities that result in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.5(c) and (d)).

4.0 Affected Environment

This environmental assessment is national in scope because the NWP may be used across the country, unless the NWP is revoked or suspended by a division or district engineer under the procedures in 33 CFR 330.5(c) and (d), respectively. The affected environment consists of terrestrial and aquatic ecosystems in the United States, as they have been directly and indirectly affected by past and present federal, non-federal, and private activities. The past and present activities include activities authorized by the various NWPs issued from 1977 to 2017, activities

authorized by other types of Department of the Army (DA) permits, as well as other federal, tribal, state, and private activities that are not regulated by the Corps. Aquatic ecosystems are also influenced by past and present activities in uplands, because those land use/land cover changes in uplands and other activities in uplands have indirect effects on aquatic ecosystems (e.g., MEA 2005a, Reid 1993). Due to the large geographic scale of the affected environment (i.e., the entire United States), as well as the many past and present human activities that have shaped the affected environment, it is only practical to describe the affected environment in general terms. In addition, it is not possible to describe the environmental conditions for specific sites where the NWP's may be used to authorize eligible activities.

The total land area in the United States is approximately 2,260,000,000 acres, and the total land area in the contiguous United States is approximately 1,891,000,000 acres (Bigelow and Borchers 2017). Land uses in the United States as of 2012 is provided in Table 4.1 (Bigelow and Borchers 2017). Of the land area in the entire United States, approximately 60 percent (1,370,000,000 acres) is privately owned (Bigelow and Borchers 2017). Of the remaining lands in the United States, the federal government hold 28 percent (644,000,000 acres), state and local governments own 8 percent (189,000,000 acres), and 3 percent (63,000,000 acres) is held in trust by the Bureau of Indian Affairs (Bigelow and Borchers 2017).

Table 4.1. Major land uses in the United States – 2012 (Bigelow and Borchers 2017).

Land Use	Acres	Percent of Total
Agriculture	1,186,000,000	52.5
Forest land	502,000,000	22.2
Transportation use	27,000,000	1.2
Recreation and wildlife areas	254,000,000	11.2
National defense areas	27,000,000	1.2
Urban land	70,000,000	3.1
Miscellaneous use	196,000,000	8.5
Total land area	2,260,000,000	100.0

4.1 Quantity of Aquatic Ecosystems in the United States

There are approximately 283.1 million acres of wetlands in the United States; 107.7 million acres are in the conterminous United States and the remaining 175.4 million acres are in Alaska (Mitsch and Hernandez 2013). Wetlands occupy less than 9 percent of the global land area (Zedler and Kercher 2005). According to Dahl (2011), wetlands and deepwater habitats cover approximately 8 percent of the land area in the conterminous United States. Rivers and streams comprise approximately 0.52 percent of the total land area of the continental United States (Butman and Raymond 2011). Therefore, the wetlands, streams, rivers, and other

aquatic habitats that are potentially waters of the United States and subject to regulation by the Corps under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 comprise a minor proportion of the land area of the United States. The remaining land area of the United States (more than 92 percent, depending on the proportion of wetlands, streams, rivers, and other aquatic habitats that are subject to regulation under those two statutes) is outside the Corps regulatory authority.

Dahl (1990) estimated that approximately 53 percent of the wetlands in the conterminous United States were lost in the 200-year period from the 1780s to 1980s, while Alaska lost less than one percent of its wetlands and Hawaii lost approximately 12 percent of its original wetland acreage. In the 1780s, there were approximately 221 million acres of wetlands in the conterminous United States (Dahl 1990). California lost the largest percentage of its wetlands (91 percent), whereas Florida lost the largest acreage (9.3 million acres) (Dahl 1990). During that 200-year period, 22 states lost more than 50 percent of their wetland acreage, and 10 states have lost more than 70 percent of their original wetland acreage (Dahl 1990).

Frazer et al. (1983) evaluated wetland status and trends in the United States during the period of the mid-1950s to the mid-1970s. During that 20-year period, approximately 7.9 million acres of wetlands (4.2 percent) were lost in the conterminous United States. Much of the loss of estuarine emergent wetlands was due to changes to estuarine subtidal deepwater habitat, and some loss of estuarine emergent wetlands was due to urban development. For palustrine vegetated wetlands, nearly all of the losses of those wetlands were due to agricultural activities (e.g., conversion to agricultural production).

The U.S. Fish and Wildlife Service also examined the status and trends of wetlands in the United States during the period of the mid-1970s to the 1980s, and found that there was a net loss of more than 2.6 million acres of wetlands (2.5 percent) during that time period (Dahl and Johnson 1991). Freshwater wetlands comprised 98 percent of those wetland losses (Dahl and Johnson 1991). During that time period, losses of estuarine wetlands were estimated to be 71,000 acres, with most of that loss due to changes of emergent estuarine wetlands to open waters caused by shifting sediments (Dahl and Johnson 1991). Conversions of wetlands to agricultural use were responsible for 54 percent of the wetland losses, and conversion to other land uses resulted in the loss of 41 percent of wetlands (Dahl and Johnson 1991). Urban development was responsible for five percent of the wetland loss (Dahl and Johnson 1991). The annual rate of wetland loss has decreased substantially since the 1970s (Dahl 2011), when wetland regulation became more prevalent (Brinson and Malvárez 2002).

Between 2004 and 2009, there was no statistically significant difference in wetland acreage in the conterminous United States (Dahl 2011). According to the 2011 wetland status and trends report, during the period of 2004 to 2009 urban

development accounted for 11 percent of wetland losses (61,630 acres), rural development resulted in 12 percent of wetland losses (66,940 acres), silviculture accounted for 56 percent of wetland losses (307,340 acres), and wetland conversion to deepwater habitats caused 21 percent of the loss in wetland area (115,960 acres) (Dahl 2011). Some of the losses occurred to wetlands that are not subject to Clean Water Act jurisdiction and some losses are due to activities not regulated under Section 404 of the Clean Water Act, such as unregulated drainage activities, exempt forestry activities, or water withdrawals. From 2004 to 2009, approximately 100,020 acres of wetlands were gained as a result of wetland restoration and conservation programs on agricultural land (Dahl 2011). Another source of wetland gain is conversion of other uplands to wetlands, resulting in a gain of 389,600 acres during the period of 2004 to 2009 (Dahl 2011). Inventories of wetlands, streams, and other aquatic resources are incomplete because the techniques used for those studies cannot identify some of those resources (e.g., Dahl (2011) for wetlands; Meyer and Wallace (2001) for streams).

Losses of vegetated estuarine wetlands due to the direct effects of human activities have decreased significantly due to the requirements of Section 404 of the Clean Water Act and other laws and regulations (Dahl 2011). During the period of 2004 to 2009, less than one percent of estuarine emergent wetlands were lost as a direct result of human activities, while other factors such as sea level rise, land subsidence, storm events, erosion, and other ocean processes caused substantial losses of estuarine wetlands (Dahl 2011). The indirect effects of other human activities, such as oil and gas development, water extraction, development of the upper portions of watersheds, and levees, have also resulted in coastal wetland losses (Dahl 2011). Eutrophication of coastal waters can also cause losses of emergent estuarine wetlands, through changes in growth patterns of marsh plants and decreases in the stability of the wetland substrate, which changes those marshes to mud flats (Deegan et al. 2012).

The Emergency Wetlands Resources Act of 1986 (Public Law 99-645) requires the USFWS to submit wetland status and trends reports to Congress (Dahl 2011). The latest status and trends report, which covers the period of 2004 to 2009, is summarized in Table 4.2. The USFWS status and trends report only provides information on acreage of the various aquatic habitat categories and does not assess the quality or condition of those aquatic habitats (Dahl 2011).

Table 4.2. Estimated aquatic resource acreages in the conterminous United States in 2009 (Dahl 2011).

Aquatic Habitat Category	Estimated Area in 2009 (acres)
Marine intertidal	227,800
Estuarine intertidal non-vegetated	1,017,700
Estuarine intertidal vegetated	4,539,700
All intertidal waters and wetlands	5,785,200
Freshwater ponds	6,709,300
Freshwater vegetated	97,565,300
• Freshwater emergent wetlands	27,430,500
• Freshwater shrub wetlands	18,511,500
• Freshwater forested wetlands	51,623,300
All freshwater wetlands	104,274,600
Lacustrine deepwater habitats	16,859,600
Riverine deepwater habitats	7,510,500
Estuarine subtidal habitats	18,776,500
All wetlands and deepwater habitats	153,206,400

The acreage of lacustrine deepwater habitats does not include the open waters of Great Lakes (Dahl 2011).

The Federal Geographic Data Committee has established the Cowardin system developed by the U.S. Fish and Wildlife Service (USFWS) (Cowardin et al. 1979) as the national standard for wetland mapping, monitoring, and data reporting (Dahl 2011) (see Federal Geographic Data Committee (2013)). The Cowardin system is a hierarchical system which describes various wetland and deepwater habitats, using structural characteristics such as vegetation, substrate, and water regime as defining characteristics. Wetlands are defined by plant communities, soils, or inundation or flooding frequency. Deepwater habitats are permanently flooded areas located below the wetland boundary. In rivers and lakes, deepwater habitats are usually more than two meters deep. The Cowardin et al. (1979) definition of “wetland” differs from the definition used by the Corps and U.S. EPA for the purposes of implementing Section 404 of the Clean Water Act. The Corps-U.S. EPA regulations defines wetlands as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.” [33 CFR 328.3(c)(4); 40 CFR 230.3(o)(3)(iv)] The Cowardin et al. (1979) requires only one factor (i.e., wetland vegetation, soils, hydrology) to be present for an area to be a wetland, while the Corps-U.S. EPA

wetland definition requires all three factors to be present under normal circumstances (Tiner 2017, Mitsch and Gosselink 2015). The NWI produced by applying the Cowardin et al. (1979) definition is the only national scale wetland inventory available. There is no national inventory of wetland acreage based on the Corps' wetland definition at 33 CFR 328.3(c)(16).

There are five major systems in the Cowardin classification scheme: marine, estuarine, riverine, lacustrine, and palustrine (Cowardin et al. 1979). The marine system consists of open ocean on the continental shelf and its high energy coastlines. The estuarine system consists of tidal deepwater habitats and adjacent tidal wetlands that are usually partially enclosed by land, but may have open connections to open ocean waters. The riverine system generally consists of all wetland and deepwater habitats located within a river channel. The lacustrine system generally consists of wetland and deepwater habitats located within a topographic depression or dammed river channel, with a total area greater than 20 acres. The palustrine system generally includes all non-tidal wetlands and wetlands located in tidal areas with salinities less than 0.5 parts per thousand; it also includes ponds less than 20 acres in size. Approximately 95 percent of wetlands in the conterminous United States are freshwater wetlands, and the remaining 5 percent are estuarine or marine wetlands (Dahl 2011).

According to Hall et al. (1994), there are more than 204 million acres of wetlands and deepwater habitats in the State of Alaska, including approximately 174.7 million acres of wetlands. Wetlands and deepwater habitats comprise approximately 50.7 percent of the surface area in Alaska (Hall et al. 1994).

The National Resources Inventory (NRI) is a statistical survey conducted by the Natural Resources Conservation Service (NRCS) (USDA 2018) of natural resources on non-federal land in the United States. The NRCS defines non-federal land as privately owned lands, tribal and trust lands, and lands under the control of local and state governments. Acreages of palustrine and estuarine wetlands and the land uses those wetlands are subjected to are summarized in Table 4.3. The 2015 NRI estimates that there are 110,638,500 acres of palustrine and estuarine wetlands on non-Federal land and water areas in the United States (USDA 2018). The 2015 NRI estimates that there are 49,598,800 acres of open waters on non-Federal land in the United States, including lacustrine, riverine, and marine habitats, as well as estuarine deepwater habitats.

Table 4.3. The 2015 National Resources Inventory acreages for palustrine and estuarine wetlands on non-federal land, by land cover/use category (USDA 2018).

National Resources Inventory Land Cover/Use Category	Area of Palustrine and Estuarine Wetlands (acres)
cropland, pastureland, and Conservation Reserve Program land	17,300,000
forest land	65,800,000
rangeland	7,800,000
other rural land	14,600,000
developed land	1,500,000
water area	3,600,000
Total	111,000,000

The land cover/use categories used by the 2015 NRI are defined below (USDA 2018). Croplands are areas used to produce crops grown for harvest. Pastureland is land managed for livestock grazing, through the production of introduced forage plants. Conservation Reserve Program land is under a Conservation Reserve Program contract. Forest land is comprised of at least 10 percent single stem woody plant species that will be at least 13 feet tall at maturity. Rangeland is land on which plant cover consists mostly of native grasses, herbaceous plants, or shrubs suitable for grazing or browsing, and introduced forage plant species. Other rural land consists of farmsteads and other farm structures, field windbreaks, marshland, and barren land. Developed land is comprised of large urban and built-up areas (i.e., urban and built-up areas 10 acres or more in size), small built-up areas (i.e., developed lands 0.25 to 10 acres in size), and rural transportation land (e.g., roads, railroads, and associated rights-of-way outside urban and built-up areas). Water areas are comprised of waterbodies and streams that are permanent open waters.

The wetlands data from the Fish and Wildlife Service’s Status and Trends study and the Natural Resources Conservation Service’s National Resources Inventory should not be compared, because they use different methods and analyses to produce their results (Dahl 2011).

Leopold, Wolman, and Miller (1964) estimated that there are approximately 3,250,000 miles of river and stream channels in the United States. This estimate is based on an analysis of 1:24,000 scale topographic maps. Their estimate does not include many small streams. Many small streams, especially headwater streams, are not mapped on 1:24,000 scale U.S. Geological Survey (USGS) topographic maps (Leopold 1994) or included in other inventories (Meyer and Wallace 2001), including the National Hydrography Dataset (Elmore et al. 2013). Many small

streams and rivers are not identified through maps produced by aerial photography or satellite imagery because of inadequate image resolution or trees or other vegetation obscuring the visibility of those streams from above (Benstead and Leigh 2012). In a study of stream mapping in the southeastern United States, only 20 percent of the stream network was mapped on 1:24,000 scale topographic maps, and nearly none of the observed intermittent or ephemeral streams were indicated on those maps (Hansen 2001). Another study in Massachusetts showed that 1:25,000 metric scale topographic maps exclude over 27 percent of stream miles in a watershed (Brooks and Colburn 2011). For a 1:24,000 scale topographic map, the smallest tributary found by using 10-foot contour interval has a drainage area of 0.7 square mile and length of 1,500 feet, and smaller stream channels are common throughout the United States (Leopold 1994). Benstead and Leigh (2012) found that the density of stream channels (length of stream channels per unit area) identified by digital elevation models was three times greater than the drainage density calculated by using USGS maps. Elmore et al. (2013) made similar findings in watersheds in the mid-Atlantic, where they determined that the stream density was 2.5 times greater than the stream density calculated with the National Hydrography Dataset. Due to the difficulty in mapping small streams, there are no accurate estimates of the total number of river or stream miles in the conterminous United States that might be considered as “waters of the United States.”

The quantity of the Nation’s aquatic resources presented by studies that estimate the length or number of stream channels (see above) or the acreage of wetlands (USFWS status and trends studies, National Wetland Inventory (NWI), and Natural Resources Inventory (NRI) are underestimates, because those inventories do not include many small wetlands and streams. The USFWS status and trends study does not include Alaska, Hawaii, or the territories. The underestimate of national wetland acreage by the USFWS status and trends study and the NWI is primarily the result of the minimum size of wetlands detected through remote sensing techniques and the difficulty of identifying certain wetland types through those remote sensing techniques. The remote sensing approaches used by the USFWS for its NWI maps and its status and trends reports result in errors of omission that exclude wetlands that are difficult to identify through photointerpretation (Tiner 2017). These errors of omission are due to wetland type and the size of target mapping units (Tiner 2017). Therefore, it is important to understand the limitations of the source data when describing the environmental baseline for wetlands using maps and studies produced by remote sensing, especially in terms of wetland quantity.

Factors affecting the accuracy of wetland maps made by remote sensing include: the degree of ease or difficulty in identifying a particular wetland type, map scale, the quality and scale of the source information (e.g., aerial or satellite photos), the environmental conditions when the imagery was obtained, the time of year the imagery was obtained (e.g., leaf-off versus leaf on), the quality of the images, the minimum mapping unit (or target mapping unit), the mapping equipment, and the skills of the people drawing the maps (Tiner 2017). In general, wetland types that

are difficult to identify through field investigations are likely to be underrepresented in maps made by remote sensing (Tiner 2017). Wetlands difficult to identify through remote sensing include evergreen forested wetlands, wetlands and the drier end of the wetland hydrology continuum, and significantly drained wetlands (Tiner 2017). Wetland types that are more readily identified and delineated through remote sensing techniques include ponds, marshes, bogs, and fens (Tiner 2017). In the most recent wetland status and trends report published by the U.S. Fish and Wildlife Service, the target minimum wetland mapping unit was 1 acre, although some easily identified wetlands as small as 0.1 acre were identified in that effort (Dahl 2011). The National Wetland Inventory identifies wetlands regardless of their jurisdictional status under the Clean Water Act (Tiner 2017).

Activities authorized by NWP's will adversely affect a smaller proportion of the Nation's wetland base than indicated by the wetlands acreage estimates provided in the most recent status and trends report, or the NWI maps for a particular region.

Not all wetlands, streams, and other types of aquatic resources are subject to federal jurisdiction under the Clean Water Act (Mitsch and Gosselink 2015). Two U.S. Supreme Court decisions have identified limits to Clean Water Act jurisdiction. In 2001, in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (531 U.S. 159) the U.S. Supreme Court held that the use of isolated, non-navigable, intrastate waters by migratory birds is not, by itself a sufficient basis for exercising federal regulatory authority under the Clean Water Act (see 80 FR 37056). In the Supreme Court's 2006 decision in *Rapanos v. United States*, (547 U.S. 715), one justice stated that waters and wetlands regulated under the Clean Water Act must have a "significant nexus" to downstream traditional navigable waters. Four justices (the plurality) concluded that Clean Water Act jurisdiction applies only to relatively permanent waters connected to traditional navigable waters and to wetlands that have a continuous surface connection to those relatively permanent waters. The remaining justices in *Rapanos* stated that Clean Water Act jurisdiction applies to waters and wetlands that meet either the significant nexus test or the Plurality's test.

There are 94,133 miles of shoreline in the United States (NOAA 1975). Of that shoreline, 88,633 miles are tidal shoreline and 5,500 miles are shoreline along the Great Lakes and rivers that connect those lakes to the Atlantic Ocean. More recently, Gittman et al. (2015) estimated that there are 99,524 miles of tidal shoreline in the conterminous United States.

4.2 Quality of Aquatic Ecosystems in the United States

The USFWS status and trends study does not assess the condition or quality of wetlands and deepwater habitats (Dahl 2011). Information on water quality in waters and wetlands, as well as the causes of water quality impairment, is collected by the U.S. EPA under Sections 305(b) and 303(d) of the Clean Water Act. Table

4.4 provides U.S. EPA’s most recent national summary of water quality in the Nation’s waters and wetlands.

Table 4.4. National summary of water quality data (U.S. EPA, https://iaspub.epa.gov/waters10/attains_nation_cy.control accessed 11/27/2020).

Category of water	Total waters	Total waters assessed	Percent of waters assessed	Good waters	Threatened waters	Impaired waters
Rivers and streams	3,533,205 miles	1,110,961 miles	31.4	518,293 miles	4,495 miles	588,173 miles
Lakes, reservoirs and ponds	41,666,049 acres	18,629,795 acres	44.7	5,390,570 acres	30,309 acres	13,208,917 acres
Bays and estuaries	87,791 square miles	56,141 square miles	63.9	11,516 square miles	0 square miles	44,625 square miles
Coastal shoreline	58,618 miles	4,627 miles	7.9	1,298 miles	0 miles	3,329 miles
Ocean and near coastal waters	54,120 square miles	6,944 square miles	12.8	726 square miles	0 square miles	6,218 square miles
Wetlands	107,700,000 acres	1,242,252 acres	1.2	569,328 acres	0 acres	672,924 Acres
Great Lakes shoreline	5,202 miles	4,460 miles	85.7	106 miles	0 miles	4,354 miles
Great Lakes open waters	196,343 square miles	39,231 square miles	20.0	1 square mile	0 square miles	39,230 square miles

Waters and wetlands classified by states as “good” meets all their designated uses. Waters classified as “threatened” currently support all of their designated uses, but if pollution control measures are not taken one or more of those uses may become impaired in the future. A water or wetland is classified by the state as “impaired” if any one of its designated uses is not met. The definitions of “good,” “threatened,” and “impaired” are applied by states to describe the quality of their waters (the above definitions were found in the metadata in U.S. EPA (2015)). Designated uses include the “protection and propagation of fish, shellfish and wildlife,” “recreation in and on the water,” the use of waters for “public water supplies, propagation of fish, shellfish, wildlife, recreation in and on the water,” and “agricultural, industrial and other purposes including navigation.” (40 CFR 130.3). These designated uses are assessed by states in a variety of ways, by examining various physical, chemical and biological characteristics, so it is not possible to use the categories of “good,” “threatened,” and “impaired” to infer the level of ecological functions and services these waters perform.

According to the latest U.S. EPA national summary data, 52.9 percent of assessed rivers and streams, 70.9 percent of assessed lakes, reservoirs, and ponds, 79.5 percent of assessed bays and estuaries, 71.9 percent of assessed coastal shoreline, 89.5 percent of assessed ocean and near coastal waters, 54.2 percent of assessed wetlands, 97.6 percent of assessed Great Lakes shoreline, and 100 percent of Great Lakes open water are impaired.

For rivers and streams, 34 causes of impairment were identified, and the top 10 causes are pathogens, sediment, nutrients, organic enrichment/oxygen depletion, temperature, metals (other than mercury), polychlorinated biphenyls, mercury, habitat alterations, and turbidity. The top 10 primary sources of impairment for the assessed rivers and streams are: unknown sources, agriculture, hydromodification, atmospheric deposition, habitat alterations not directly related to hydromodification, unspecified non-point source, municipal discharges/sewage, natural/wildlife, urban-related runoff/stormwater, and silviculture (forestry).

Thirty-three causes of impairment were identified for lakes, reservoirs, and ponds. The top 10 causes of impairment for these waters are: mercury, nutrients, polychlorinated biphenyls, turbidity, organic enrichment/oxygen depletion, metals (other than mercury), pH/acidity/caustic conditions, salinity/total dissolved solids/chlorides/sulfates, algal growth, and nuisance exotic species. For lakes, reservoirs, and ponds, the top 10 sources of impairment are: atmospheric deposition, unknown sources, agriculture, natural/wildlife, unspecified non-point source, other sources, urban-related runoff/stormwater, legacy/historic pollutants, municipal discharges/sewage, and hydromodification.

Twenty-eight causes of impairment were identified for bays and estuaries. The top 10 causes of impairment for these waters are: polychlorinated biphenyls, nutrients, mercury, turbidity, dioxins, toxic organics, metals (other than mercury), pesticides, pathogens, and organic enrichment/oxygen depletion. For bays and estuaries, the top 10 sources of impairment are: legacy/historic pollutants, urban-related runoff/stormwater, unknown sources, atmospheric deposition, municipal discharges/sewage, unspecified non-point sources, other sources, natural/wildlife, agriculture, and industrial.

Coastal shorelines were impaired by 16 identified causes, the top 10 of which are: mercury, pathogens, turbidity, organic enrichment/oxygen depletion, pH/acidity/caustic conditions, nutrients, oil and grease, temperature, cause unknown – impaired biota, and algal growth. The top 10 sources of impairment of coastal shorelines are municipal discharges/sewage, urban-related runoff/stormwater, unknown sources, recreational boating and marinas, hydromodification, industrial, unspecified non-point sources, agriculture, legacy/historic pollutants, and land application/waste sites/tanks.

Ocean and near coastal waters were impaired by 16 identified causes, the top 10 of

which are: mercury, organic enrichment/oxygen depletion, pathogens, metals (other than mercury), pesticides, turbidity, nuisance exotic species, total toxics, pH/acidity/caustic conditions, and polychlorinated biphenyls. The top 10 sources of impairment of ocean and near coastal waters are: atmospheric deposition, unknown sources, unspecified non-point sources, other sources, recreation and tourism (non-boating), recreational boating and marinas, urban-related runoff/stormwater, hydromodification, municipal discharges/sewage, and construction.

For wetlands, 23 causes of impairment were identified, and the top 10 causes are: organic enrichment/oxygen depletion, mercury, metals (other than mercury), salinity/total dissolved solids/chlorides/sulfates, pathogens, nutrients, toxic inorganics, temperature, pH/acidity/caustic conditions, and turbidity. The 10 primary sources for wetland impairment are: unknown sources, natural/wildlife, agriculture, atmospheric deposition, resource extraction, hydromodification, unspecified non-point sources, other, land application/waste sites/tanks, and groundwater loadings/withdrawals.

For Great Lakes shorelines, 12 causes of impairment were identified, and the top 10 causes are: polychlorinated biphenyls, dioxins, mercury, pesticides, toxic organics, pathogens, nutrients, nuisance exotic species, sediment, and habitat alterations. The 10 primary sources for Great Lakes shoreline impairment are: atmospheric deposition, unknown sources, legacy/historic pollutants, agriculture, municipal discharges/sewage, hydromodification, urban-related runoff/stormwater, habitat alterations (not directly related to hydromodifications), industrial, and unspecified non-point sources.

For Great Lakes open waters, 8 causes of impairment were identified, and those causes are: polychlorinated biphenyls, mercury, dioxins, pesticides, toxic organics, nutrients, metals (other than mercury), and sediment. The 8 sources for Great Lakes open water impairment are: atmospheric deposition, unknown sources, agriculture, municipal discharges/sewage, unspecified non-point sources, industrial, urban-related runoff/stormwater, and legacy/historic pollutants.

Water quality standards are established by states, with review and approval by the U.S. EPA (see Section 303(c) of the Clean Water Act and the implementing regulations at 40 CFR part 131). Under Section 401 of the Clean Water Act States review proposed discharges to determine compliance with applicable water quality standards.

Most causes and sources of impairment identified by states in the water quality summary discussed above are not due to activities regulated under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act of 1899. Inputs of sediments into aquatic ecosystems can result from erosion occurring within a watershed (Beechie et al. 2013, Gosselink and Lee 1989). As water moves through a watershed it carries sediments and pollutants to streams (e.g., Allan 2004, Dudgeon et al. 2005, Paul and Meyer 2001) and wetlands (e.g., Zedler and Kercher

2005, Wright et al. 2006). Non-point sources of pollution (i.e., pollutants carried in runoff from farms, roads, and urban areas) are largely uncontrolled (Brown and Froemke 2012) because the Clean Water Act only requires permits for point sources discharges of pollutants (i.e., discharges of dredged or fill material regulated under section 404 and point source discharges of other pollutants regulated under section 402). Habitat alterations as a cause or source of impairment may be the result of activities regulated under section 404 and section 10 because they involve discharges of dredged or fill material or structures or work in navigable waters, but habitat alterations may also occur as a result of activities not regulated under those two statutes, such as the removal of vegetation from upland riparian areas. Hydrologic modifications may or may not be regulated under section 404 or section 10.

The indirect effects of changes in upland land use (which are highly likely not to be subject to federal control and responsibility, at least in terms of the Corps Regulatory Program), including the construction and expansion of upland developments, have substantial adverse effects on the quality (i.e. the ability to perform hydrologic, biogeochemical, and habitat functions) of jurisdictional waters and wetlands because those upland activities alter watershed-scale processes. Those watershed-scale processes include water movement and storage, erosion and sediment transport, and the transport of nutrients and other pollutants.

Habitat alterations as a cause or source of impairment may be the result of activities regulated under section 404 and section 10 because they involve discharges of dredged or fill material into jurisdictional waters or structures or work in navigable waters, but habitat alterations may also occur as a result of activities not regulated under those two statutes, such as the removal of vegetation from upland riparian areas. Hydrologic modifications may or may not be regulated under section 404 or section 10, depending on whether those hydrologic modifications are the result of discharges of dredged or fill material into waters of the United States regulated under Section 404 of the Clean Water Act or structures or work in navigable waters of the United States regulated under Section 10 of the Rivers and Harbors Act of 1899. When states, tribes, or the U.S. EPA establish total maximum daily loads (TMDLs) for pollutants and other impairments for specific waters, there may be variations in how these TMDLs are defined (see 40 CFR part 130).

As discussed below, many anthropogenic activities and natural processes affect the ability of jurisdictional waters and wetlands to perform ecological functions. Stream and river functions are affected by activities occurring in their watersheds, including the indirect effects of land uses changes (Beechie et al. 2013, Allan 2004, Paul and Meyer 2001). Booth et al. (2004) found riparian land use in residential areas also strongly affects stream condition because many landowners clear vegetation up to the edge of the stream bank. The removal of vegetation from upland riparian areas and other activities in those non-jurisdictional areas do not require DA authorization. Wetland functions are also affected by indirect effects of land use activities in the land area that drains to the wetland (Zedler and Kercher 2005, Wright et al. 2006).

Human activities within a watershed or catchment that have direct or indirect adverse effects on rivers, streams, wetlands, and other aquatic ecosystems are not limited to discharges of dredged or fill material into waters of the United States or structures or work in a navigable waters. Human activities in uplands have substantial indirect effects on the structure and function of aquatic ecosystems, including streams and wetlands, and their ability to sustain populations of listed species. It is extremely difficult to distinguish between degradation of water quality caused by upland activities and degradation of water quality caused by the filling or alteration of wetlands (Gosselink and Lee 1989).

The U.S. Environmental Protection Agency (U.S. EPA) has undertaken the National Wetland Condition Assessment (NWCA), which is a statistical survey of wetland condition in the United States (U.S. EPA 2016). The NWCA assesses the ambient conditions of wetlands at the national and regional scales. The national scale encompasses the conterminous United States. The regional scale consists of four aggregated ecoregions: Coastal Plains, Eastern Mountains and Upper Midwest, Interior Plains, and West. In May 2016, U.S. EPA issued a final report on the results of its 2011 NWCA (U.S. EPA 2016).

The 2011 NWCA determined that, across the conterminous United States, 48 percent of wetland area (39.8 million acres) is in good condition, 20 percent of the wetland area (12.4 million acres) is in fair condition, and 32 percent (19.9 million acres) is in poor condition (U.S. EPA 2016). The 2011 NWCA also examined indicators of stress for the wetlands that were evaluated. The most prevalent physical stressors were vegetation removal, surface hardening via conversion to pavement or soil compaction, and ditching (U.S. EPA 2016). In terms of chemical stressors, most wetlands were subject to low exposure to heavy metals and soil phosphorous, but substantial percentages of wetland area in the West and Eastern Mountains and Upper Midwest ecoregions were found to have moderate stressor levels for heavy metals (U.S. EPA 2016). For soil phosphorous concentrations, stressor levels were high for 13 percent of the wetland area in the Eastern Mountains and Upper Midwest ecoregion (U.S. EPA 2016). Across the conterminous United States, for biological stressors indicated by non-native plants, 61 percent of the wetland area exhibited low stressor levels (U.S. EPA 2016). When examined on an ecoregion basis, the Eastern Mountains and Upper Midwest and Coastal Plains ecoregions had high percentages of wetland area with low non-native plant stressor levels, but the West and Interior Plains ecoregions had small percentages of areas with low non-native plant stressor levels (U.S. EPA 2016).

4.3 Aquatic resource functions and services

Functions are the physical, chemical, and biological processes that occur in ecosystems (33 CFR 332.2). Wetland functions occur through interactions of their physical, chemical, and biological features (Smith et al. 1995). Wetland functions depend on a number of factors, such as the movement of water through the

wetland, landscape position, surrounding land uses, vegetation density within the wetland, geology, soils, water source, and wetland size (NRC 1995). In its evaluation of wetland compensatory mitigation in the Clean Water Act Section 404 permit program, the National Research Council (2001) recognized five general categories of wetland functions:

- Hydrologic functions
- Water quality improvement
- Vegetation support
- Habitat support for animals
- Soil functions

Hydrologic functions include short- and long-term water storage and the maintenance of wetland hydrology (NRC 1995). Water quality improvement functions encompass the transformation or cycling of nutrients, the retention, transformation, or removal of pollutants, and the retention of sediments (NRC 1995). Vegetation support functions include the maintenance of plant communities, which support various species of animals as well as economically important plants. Wetland soils support diverse communities of bacteria and fungi which are critical for biogeochemical processes, including nutrient cycling and pollutant removal and transformation (NRC 2001). Wetland soils also provide rooting media for plants, as well as nutrients and water for those plants. These various functions generally interact with each other, to influence overall wetland functioning, or ecological integrity (Smith et al. 1995; Fennessy et al. 2007). As discussed earlier in this report, the Corps regulations at 33 CFR 320.4(b) list wetland functions that are important for the public interest review during evaluations of applications for DA permits, and for the issuance of general permits.

Not all wetlands perform the same functions, nor do they provide functions to the same degree (Smith et al. 1995). Therefore, it is necessary to account for individual and regional variation when evaluating wetlands and the functions and services they provide. The types and levels of functions performed by a wetland are dependent on its hydrologic regime, the plant species inhabiting the wetland, soil type, and the surrounding landscape, including the degree of human disturbance of the landscape (Smith et al. 1995).

Streams also provide a variety of functions, which differ from wetland functions. Streams also provide hydrologic functions, nutrient cycling functions, food web support, and corridors for movement of aquatic organisms (Allan and Castillo 2007). When considering stream functions, the stream channel should not be examined in isolation. The riparian corridor next to the stream channel is an integral part of the stream ecosystem and has critical roles in stream functions (NRC 2002). Riparian areas provide many of the same general functions as wetlands (NRC 1995, 2002). Fischenich (2006) conducted a review of stream and riparian corridor functions, and through a committee, identified five broad categories of stream functions:

- Stream system dynamics
- Hydrologic balance

- Sediment processes and character
- Biological support
- Chemical processes and landscape pathways

Stream system dynamics refers to the processes that affect the development and maintenance of the stream channel and riparian area over time, as well as energy management by the stream and riparian area. Hydrologic balance includes surface water storage processes, the exchange of surface and subsurface water, and the movement of water through the stream corridor. Sediment processes and character functions relate to processes for establishing and maintaining stream substrate and structure. Biological support functions include the biological communities inhabiting streams and their riparian areas. Chemical processes and pathway functions influence water and soil quality, as well as the chemical processes and nutrient cycles that occur in streams and their riparian areas. Rivers and streams function perform functions to different degrees, depending on watershed condition, the severity of direct and indirect impacts to streams caused by human activities, and their interactions with other environmental components, such as their riparian areas (Allan 2004, Gergel et al. 2002).

Ecosystem services are the benefits that humans derive from ecosystem functions (33 CFR 332.2). The Millennium Ecosystem Assessment (2005a) describes four categories of ecosystem services: provisioning services, regulating services, cultural services, and supporting services. For wetlands and open waters, provisioning services include the production of food (e.g., fish, fruits, game), fresh water storage, food and fiber production, production of chemicals that can be used for medicine and other purposes, and supporting genetic diversity for resistance to disease. Regulating services relating to open waters and wetlands consist of climate regulation, control of hydrologic flows, water quality through the removal, retention, and recovery of nutrients and pollutants, erosion control, mitigating natural hazards such as floods, and providing habitat for pollinators. Cultural services that come from wetlands and open waters include spiritual and religious values, recreational opportunities, aesthetics, and education. Wetlands and open waters contribute supporting services such as soil formation, sediment retention, and nutrient cycling.

Aquatic ecosystems in the current affected environment provide a wide variety of ecological functions and services to differing degrees (MEA 2005a) to human communities. Degraded ecosystems can provide ecological functions and services that continue to provide some conservation value (Weins and Hobbs 2015).

Examples of services provided by wetland functions include flood damage reduction, maintenance of populations of economically important fish and wildlife species, maintenance of water quality (NRC 1995, MEA 2005a) and the production of populations of wetland plant species that are economically important commodities, such as timber, fiber, and fuel (MEA 2005a). Wetlands can also provide important climate regulation and storm protection services (MEA 2005a).

Stream functions also result in ecosystem services that benefit society. Streams and their riparian areas store water, which can reduce downstream flooding and subsequent flood damage (NRC 2002, MEA 2005a). These ecosystems also maintain populations of economically important fish, wildlife, and plant species, including valuable fisheries (MEA 2005a, NRC 2002). The nutrient cycling and pollutant removal functions help maintain or improve water quality for surface waters (NRC 2002, MEA 2005a). Streams and riparian areas also provide important recreational opportunities. Rivers and streams also provide water for agricultural, industrial, and residential use (MEA 2005a).

Freshwater ecosystems provide services such as water for drinking, household uses, manufacturing, thermoelectric power generation, irrigation, and aquaculture; production of finfish, waterfowl, and shellfish; and non-extractive services, such as flood control, transportation, recreation (e.g., swimming and boating), pollution dilution, hydroelectric generation, wildlife habitat, soil fertilization, and enhancement of property values (Postel and Carpenter 1997).

Marine ecosystems provide a number of ecosystem services, including fish production; materials cycling (e.g., nitrogen, carbon, oxygen, phosphorous, and sulfur); transformation, detoxification, and sequestration of pollutants and wastes produced by humans; support of ocean-based recreation, tourism, and retirement industries; and coastal land development and valuation, including aesthetics related to living near the ocean (Peterson and Lubchenco 1997).

Costanza et al. (2014) estimated the value of ecosystem services, by general categories of ecosystem type. Their estimates, based on data analysis conducted in 2011 and using the 2007 value of the U.S. dollar, are provided in Table 4.5. The ecosystem categories providing the highest values of ecosystem services by acre per year were coral reefs (\$142,661 per acre per year), followed by tidal marshes and mangrove wetlands (\$78,506 per acre per year). Forested and floodplain wetlands had a value of \$10,401 per acre per year.

Table 4.5 – Estimates of the value of ecosystem services, by ecosystem category (Costanza et al. 2014)

Ecosystem category	2007\$ per acre per year
Marine	554
open ocean	24
coastal	3,622
• estuaries	11,711
• seagrass/algae beds	11,711
• coral reefs	142,661
• coastal shelf	900
Terrestrial	1,985
forest	1,539
• tropical	2,180
• temperate/boreal	1,270
grass/rangelands	1,687
wetlands	56,770
• tidal marsh/mangroves	78,506
• swamps/floodplains	10,401
lakes/rivers	5,067
desert	-
tundra	-
ice/rock	-
cropland	2,255
urban	2,698

Activities authorized by this NWP will provide a wide variety of goods and services that are valued by society. For example, oil and natural gas pipelines are important components of industrial infrastructure, including energy generation and transmission infrastructure. They convey oil, natural gas, and petrochemicals to constructed components of human communities, such as industrial facilities, energy generation facilities, commercial buildings, and residences. When natural ecosystems are converted to human-dominated ecosystems, there are tradeoffs between the losses in ecosystem services provided by natural ecosystems and the gains in goods and services provided by land use changes, resource extraction, harvesting, and other activities (MEA 2005c). For thousands of years, human communities have altered landscapes and ecosystems to serve their needs, such as food, safety, and commerce, and made trade-offs by increasing certain ecosystem functions and services while reducing other ecosystem functions and services (Karieva et al. 2007).

4.4 Human Activities and Natural Factors that Affect the Quantity and Quality of Aquatic Ecosystems in the United States

The affected environment is the current environmental setting against which the environmental effects of the proposed action is evaluated, to determine whether the

issuance of the NWP will have a significant impact on the quality of the human environment. The affected environment is also used as a basis for comparison to determine whether activities authorized by the NWP will result in no more than minimal individual and cumulative adverse environmental effects when added to the current environmental setting.

For thousands of years, humans have caused substantial impacts on ecosystems and the ecological functions and services they provide (Ellis et al. 2010, Evans and Davis 2018). Around the beginning of the 19th century, the degree of impacts of human activities on the Earth's ecosystems began to exceed the degree of impacts to ecosystems caused by natural disturbances and variability (Steffen et al. 2007). All of the Earth's ecosystems have been affected either directly or indirectly by human activities (Vitousek et al. 1997). Over 75 percent of the ice-free land on Earth has been altered by human occupation and use (Ellis and Ramankutty 2008). Approximately 33 percent of the Earth's ice-free land consists of lands heavily used by people: urban areas, villages, lands used to produce crops, and occupied rangelands (Ellis and Ramankutty 2008). For marine ecosystems, Halpern et al. (2008) determined that there are no marine waters that are unaffected by human activities, and that 41 percent of the area of ocean waters are affected by multiple anthropogenic stressors (e.g., land use activities that generate pollution that go to coastal waters, marine habitat destruction or modification, and the extraction of resources). The marine waters most highly impacted by human activities are continental shelf and slope areas, which are affected by both land-based and ocean-based human activities (Halpern et al. 2008). Human population density is a good indicator of the relative effect that people have had on local ecosystems, with lower population densities causing smaller impacts to ecosystems and higher population densities having larger impacts on ecosystems (Ellis and Ramankutty 2008). Human activities such as urbanization, agriculture, and forestry alter ecosystem structure and function by changing their interactions with other ecosystems, their biogeochemical cycles, and their species composition (Vitousek et al. 1997). Changes in land use reduce the ability of ecosystems to produce ecosystem services, such as food production, reducing infectious diseases, and regulating climate and air quality (Foley et al. 2005).

Ecosystems are not separate from human communities, and they are interdependent and comprise a single social-ecological system (Folke et al. 2011). Social-ecological systems are altered by human activities, as well as natural perturbations and changing environmental conditions, but they possess resilience and adaptive capacities that allow them to continue to provide ecological functions and services when properly managed (Chapin et al. 2010). Social-ecological systems exist at a number of scales, ranging from local to regional to global (Folke et al. 2010). Despite the prevalence of human activities altering landscapes and seascapes and the ecosystems within those landscapes and seascapes over long periods of time, many of those ecosystems continue to provide ecological functions and services to varying degrees (Clewell and Aronson 2013). Disturbances to ecosystems, landscapes, and seascapes may result in those systems recovering to

their original state through biotic and abiotic characteristics and processes that provide resilience, or those systems may be transformed to a different ecological state (i.e., an alternative stable state) (van Andel and Aronson 2012). From the perspective of social-ecological systems, resilience is defined by Folke et al. (2010) as the capacity of a social-ecological system to withstand disturbance and undergo changes, while retaining its ability to exhibit similar structure, functions, and interactions. If the ecosystem, landscape, or seascape changes to an alternative stable state, the alternative stable state may be considered an improvement or degradation, depending on the perspective of the person evaluating the change (Backstrom et al. 2018, van Andel and Aronson 2012). This NWP will be used to authorize certain activities that require DA authorization in these social-ecological systems, and the potential environmental consequences of the reissuance of this NWP is evaluated under the current environmental setting and the potential impacts to jurisdictional waters and wetlands that may occur during the 5-year period this NWP is anticipated to be in effect. The environmental consequences of the reissuance of this NWP is also considered for the various public interest review factors in section 6.0 of this document, which include social and ecological components.

Recent changes in climate have had substantial impacts on natural ecosystems and human communities (IPCC 2014). Climate change, both natural and anthropogenic, is a major driving force for changes in ecosystem structure, function, and dynamics (Millar and Brubaker 2006). However, there are other significant drivers of change to aquatic and terrestrial ecosystems. In addition to climate change, aquatic and terrestrial ecosystems are also adversely affected by land use and land cover changes, natural resource extraction (including water withdrawals), pollution, species introductions, and removals of species (NAS and RS 2019, Staudt et al. 2013, Bodkin 2012, MEA 2005a) and changes in nutrient cycling (Julius et al. 2013). During the past century, changes to ecosystems have been driven primarily by changes in biological factors, such as land use/land cover changes and the spread of non-native species, but in the future changes in abiotic processes, such as climate change and nitrogen deposition, may become predominant drivers of ecosystem change (Radeloff et al. 2015). The current contribution of climate change to changes in ecosystems is small compared to other anthropogenic causes of change to ecosystems (Radeloff et al. 2015, Williams et al. 2019) that are identified above, especially land use and land cover changes.

The affected environment (i.e., the current environmental setting) has been shaped by a wide variety of human activities. Wetlands, streams, and other aquatic resources and the ecological functions and services they provide are directly and indirectly affected by changes in land use and land cover, alien species introductions, overexploitation of species, pollution, eutrophication due to excess nutrients, resource extraction including water withdrawals, climate change, and various natural disturbances (MEA 2005a). A more detailed list of activities is provided below in Table 4.6. Activities regulated and authorized by the Corps under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of

1899 through NWP, individual permits, letters of permission, and regional general permits comprise a small subset of those activities. The impacts of human activities have altered, to some degree, all ecosystems, including the quantity and quality of wetlands, streams, and other aquatic resources in the United States, and the ecological functions and services they provide. Other federal, non-federal, and private activities also contribute to the current environmental setting by changing the quantity and quality of aquatic resources and the ecological functions and services they provide. Human activities that have affected ecosystems, landscapes, and seascapes may have legacy effects that continue under the current environmental setting and affected the quantity of those resources and the ecological functions and services they provide.

Table 4.6 – Human activities and natural factors that cause changes in aquatic ecosystems and the functions and services they perform

Resource type(s)	Human activities and natural factors that drive ecosystem change	Reference(s)
wetlands and waters (generally)	<ul style="list-style-type: none"> • land use/land cover changes • alien species introductions • species overexploitation • pollution • eutrophication • resource extraction (e.g., water withdrawals) • climate change • natural disturbances 	MEA (2005a)
rivers and streams	<ul style="list-style-type: none"> • agriculture • urban development • industrial development • deforestation • mining • water removal • flow alteration • invasive species • point source and non-point source pollution • dams (hydroelectric, water supply) and navigational aids such as locks • dredging • erosion • filling • overfishing • road construction • drainage and channelization • sediment deposition • boating 	Palmer et al. (2010) Carpenter et al. (2011) Allan (2004) NRC (1992)

Resource type(s)	Human activities and natural factors that drive ecosystem change	Reference(s)
wetlands	<ul style="list-style-type: none"> • wetland conversion through drainage, dredging, and filling • hydrologic modifications that change wetland hydrology and hydrodynamics • pollutants (point source and non-point source), including nutrients and contaminants • waterfowl and wildlife management activities • agriculture and aquaculture activities • flood control and stormwater protection (e.g., severing hydrologic connections between rivers and floodplain wetlands) • silvicultural activities • agricultural activities • urban development • mining activities • water withdrawals, aquifer depletion • river management (e.g., channelization, navigation improvements, dams, locks, weirs) • altered sediment transport • introductions of non-native species • land subsidence, erosion 	<p>Mitsch and Gosselink (2015) Mitsch and Hernandez (2013) Wright et al. (2006) Zedler and Kercher (2005) Brinson and Malvárez (2002)</p>
seagrass beds	<ul style="list-style-type: none"> • dredging • coastal development activities • degradation of water quality • sediment and nutrient runoff from adjacent lands • physical disturbances • natural processes, such as herbivore grazing, physical disturbances caused by waves and tidal currents • invasive species • diseases • commercial fishing activities • aquaculture • algal blooms • low light availability • nutrient limitations • global climate change 	<p>Borum et al. (2013) Waycott et al. (2009) Orth et al. (2006)</p>

coral reefs	<ul style="list-style-type: none"> • overexploitation/overfishing • destructive fishing practices • nutrients, sediments, pesticides, and other pollutants (point source and non-point source) • nutrient loading • changes in storm frequency and intensity • increasing ocean surface temperatures • ocean acidification • coastal land uses, including development and agriculture • coral mining • sea level rise • invasive species • diseases • bleaching • global climate change 	Sheppard (2014) MEA (2005a) Hughes et al. (2003)
coastal areas	<ul style="list-style-type: none"> • development activities, including the construction of residences, commercial buildings, industrial facilities, resorts, and port developments • agricultural and forestry activities • point source and non-point source pollution (nutrients, organic matter, other pollutants) • aquaculture • fishing activities • overharvesting of species • intentional and unintentional introductions of non-native species • dredging • reclamation • shore protection and other structures • habitat modifications • changes to hydrology and hydrodynamics • global climate change • shoreline erosion • pathogens and toxins • debris and litter 	Robb (2014) Day et al. (2013) Lotze et al. (2006) MEA (2005b) NRC (1994)
oceans	<ul style="list-style-type: none"> • pollution (point and non-point source) • fishing activities • changes in sea temperatures • ultraviolet light • ocean acidification • species invasions • commercial activities • other human activities • benthic structures • offshore energy infrastructure (e.g., wind farms, pipelines) 	Halpern et al. (2015) Halpern et al. (2008)

Wetlands, streams, and other aquatic resources and the functions and services they provide are directly and indirectly affected by changes in land use and land cover, alien species introductions, overexploitation of species, pollution, eutrophication due

to excess nutrients, resource extraction including water withdrawals, climate change, and various natural disturbances (MEA 2005a). Freshwater ecosystems such as lakes, rivers, and streams are altered by changes to water flow, climate change, land use changes, additions of chemicals, resource extraction, and aquatic invasive species (Carpenter et al. 2011). Cumulative effects to wetlands, streams, and other aquatic resources that form the current environmental setting are the result of landscape-level processes (Gosselink and Lee 1989). As discussed in more detail below, cumulative or aggregate effects to aquatic resources are caused by a variety of activities (including activities that occur entirely in uplands) that take place within a landscape unit, such as the watershed for a river or stream (e.g., Allan 2004, Paul and Meyer 2001, Leopold 1968) or the contributing drainage area for a wetland (e.g., Wright et al. 2006, Brinson and Malvárez 2002, Zedler and Kercher 2005).

There is little national-level information on the current ecological state of the Nation's wetlands, streams, and other aquatic resources, or the general degree to which they perform various ecological functions, although reviews have acknowledged that most of these aquatic resources are degraded to some degree (Zedler and Kercher 2005, Allan 2004) or impaired (U.S. EPA 2015) because of various activities, disturbances, and other stressors. Therefore, the analysis in this environmental assessment is a qualitative analysis.

There is a wide variety of causes and sources of impairment of the Nation's rivers, streams, wetlands, lakes, estuarine waters, and marine waters (U.S. EPA 2015), which also contribute to cumulative effects to these aquatic resources. Many of those causes of impairment are point and non-point sources of pollutants that are not regulated under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act of 1899. Two common causes of impairment for rivers and streams, habitat alterations and flow alterations, may be due in part to activities regulated by the Corps under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. Habitat and flow alterations may also be the caused by activities that do not involve discharges of dredged or fill material or structures or work in navigable waters. For wetlands, impairment due to habitat alterations, flow alterations, and hydrology modifications may involve activities regulated under section 404, but these causes of impairment may also be due to unregulated activities, such as changes in upland land use that affects the movement of water through a watershed or contributing drainage area or the removal of vegetation.

The Millennium Ecosystem Assessment (MEA 2005a) broadly defines wetlands as inland wetlands (e.g., swamps, marshes, lakes, rivers, peatlands, and underground water habitats), coastal and near-shore marine wetlands (e.g., coral reefs, mangroves, seagrass beds, and estuaries), and human-made wetlands (e.g., rice fields, dams, reservoirs, and fish ponds). According to the MEA (2005a), the principal drivers of direct change to estuarine and marine wetlands include the conversion of saltwater marshes, mangroves, seagrass meadows, and coral reefs

to other land uses, diversions of freshwater flows, increased inputs of nitrogen, overharvesting various species, water temperature changes, and species introductions. These changes are indirectly driven by increases in human populations in coastal areas (MEA 2005a). Robb (2014) identified a number of threats to estuaries and estuarine habitats such as salt marshes, seagrass beds, and sand flats. Those threats include land-based activities in surrounding watersheds, such as development activities, agricultural activities, forestry activities, pollution, freshwater diversions, shoreline stabilization, waterway impairments, and inputs of debris and litter. With respect to activities occurring directly in coastal waters, Robb (2014) identified the following threats: shoreline development, the construction and operation of port facilities, dredging, marine pollution, aquaculture activities, resource extraction activities, species introductions, and recreational activities. Changing climate conditions also pose threats to estuaries through sea level rise, changing water temperatures, ocean acidification, and changing precipitation patterns (Robb 2014).

Marine and coastal waters are affected by human activities in the ocean, coastal areas, and watersheds that drain to those marine and coastal waters (Korpinen and Andersen 2016). In marine and coastal environments, human activities and other disturbances that affect resources in those waters can come from a variety of sources, including water-based activities (e.g., transportation, fishing, mariculture, power generation, and tourism) and land-based activities (e.g., urban and suburban development, agriculture, non-point source pollution, forestry activities, power generation, and mining activities) (Clark Murray et al. 2014).

Activities that affect wetland quantity and quality include: land use changes that alter local hydrology (including water withdrawal), clearing and draining wetlands, constructing levees that sever hydrologic connections between rivers and floodplain wetlands, constructing other obstructions to water flow (e.g., dams, locks), constructing water diversions, inputs of nutrients and contaminants, and fire suppression (Brinson and Malvárez 2002). Wetland loss and degradation is caused by hydrologic modifications of watersheds, drainage activities, logging, agricultural runoff, urban development, conversion to agriculture, aquifer depletion, river management, (e.g., channelization, navigation improvements, dams, weirs), oil and gas development activities, levee construction, peat mining, and wetland management activities (Mitsch and Hernandez 2013). Upland development adversely affects wetlands and reduces wetland functionality because those activities change surface water flows and alter wetland hydrology, contribute stormwater and associated sediments, nutrients, and pollutants, cause increases in invasive plant species abundance, and decrease the diversity of native plants and animals (Wright et al. 2006). Many of the remaining wetlands in the United States are degraded (Zedler and Kercher 2005). Wetland degradation and losses are caused by changes in water movement and volume within a watershed or contributing drainage area, altered sediment transport, drainage, inputs of nutrients from non-point sources, water diversions, fill activities, excavation activities, invasion by non-native species, land subsidence, and pollutants (Zedler and

Kercher 2005). According to Mitsch and Gosselink (2015), categories of activities that alter wetlands include: wetland conversion through drainage, dredging, and filling; hydrologic modifications that change wetland hydrology and hydrodynamics; highway construction and its effects on wetland hydrology; peat mining; waterfowl and wildlife management; agriculture and aquaculture activities; water quality enhancement activities; and flood control and stormwater protection.

The ecological condition of rivers and streams is dependent on the state of their watersheds (NRC 1992), because they are affected by activities that occur in those watersheds, including agriculture, urban development, deforestation, mining, water removal, flow alteration, and invasive species (Palmer et al. 2010, Allan 2004). Land use changes affect rivers and streams through increased sedimentation, larger inputs of nutrients (e.g., nitrogen, phosphorous) and pollutants (e.g., heavy metals, synthetic chemicals, toxic organics), altered stream hydrology, the alteration or removal of riparian vegetation, and the reduction or elimination of inputs of large woody debris (Allan 2004). Agriculture is the primary cause of stream impairment, followed by urbanization (Foley et al. 2005, Paul and Meyer 2001). Agricultural land use adversely affects stream water quality, habitat, and biological communities (Allan 2004). Urbanization causes changes to stream hydrology (e.g., higher flood peaks, lower base flows), sediment supply and transport, water chemistry, and aquatic organisms (Paul and Meyer 2001). Leopold (1968) found that land use changes affect the hydrology of an area by altering stream flow patterns, total runoff, water quality, and stream structure. Changes in peak flow patterns and runoff affect stream channel stability. Stream water quality is adversely affected by increased inputs of sediments, nutrients, and pollutants, many of which come from non-point sources (Paul and Meyer 2001, Allan and Castillo 2007).

The construction and operation of water-powered mills in the 17th to 19th centuries substantially altered the structure and function of streams in the eastern United States (Walter and Merritts 2008) and those effects have persisted to the present time. In urbanized and agricultural watersheds, the number of small streams has been substantially reduced, in part by activities that occurred between the 19th and mid-20th centuries (Meyer and Wallace 2001). Activities that affect the quantity and quality of small streams include residential, commercial, and industrial development, mining, agricultural activities, forestry activities, and road construction (Meyer and Wallace 2001), even if those activities are located entirely in uplands.

Waycott et al. (2009) estimated that the areal extent of seagrass beds across the world has declined by nearly 30 percent since the late 19th century. They identified two main categories of causes for that decline: direct impacts from dredging and coastal development activities, and indirect impacts from degradation of water quality. Submersed aquatic vegetation is affected by a wide variety of human activities such as dredging in seagrass meadows, anchoring vessels in seagrass beds, coastal development activities, increased sediment inputs from a variety of sources including land development activities, habitat conversions resulting from mariculture activities, increased nutrient inputs to coastal waters, and climate

change (MEA 2005a). According to Orth et al. (2006), seagrasses are threatened by numerous stressors, such as sediment and nutrient runoff from adjacent lands, physical disturbances, overgrazing, invasive species, diseases, commercial fishing activities, aquaculture, algal blooms, and global climate change. Human activities that contribute to cumulative effects to submerged aquatic vegetation include coastal development, hard shore stabilization structures, land uses changes in surrounding watersheds that increase inputs of sediments, nutrients, and pollutants to waters inhabited (or could be inhabited) by seagrasses, discharges of pollutants directly into waters, aquaculture activities, and boating activities (Orth et al. 2017, Orth et al. 2006). Orth et al. (2017, 2006) did not quantify how frequently each of these stressors pose threats to seagrasses. the relative contributions of each of the identified human activities that affect seagrasses. Submersed aquatic vegetation may be affected by natural processes, such as herbivore grazing, physical disturbances caused by waves and tidal currents, and other stressors such as low light availability, higher temperatures, or nutrient limitations (Borum et al. 2013). Boating activities (e.g., mooring, use of propellers) and fish and shellfish harvesting activities can also contribute to cumulative impacts to submersed aquatic vegetation beds (Fonseca et al. 1998). The recovery of submersed aquatic vegetation from anthropogenic and natural disturbances can vary by species, and is dependent in part on the reproductive mechanisms of those species (Borum et al. 2013, Fonseca et al. 1998). At the meadow or landscape scale, seagrass beds can fully recover after disturbance within 5 years, but recovery can take longer if there are persistent environmental changes persist or seagrass seeds or other propagules are not available to reestablish seagrasses in the affected area (O'Brien et al. 2018).

A variety of human activities have caused, and are continuing to cause declines in corals and coral reefs. Coral reefs are adversely affected by pollution, including sedimentation, excess nutrients, oil discharges, pesticides, and sewage (Sheppard 2014; MEA 2005a; Hughes et al. 2003). Shoreline development activities, development activities in watersheds draining to coastal waters, and agriculture activities in coastal watersheds also contribute to declines in corals and coral reefs (Sheppard 2014; MEA 2005a; Hughes et al. 2003). The pollution may be in runoff from nearby lands or discharged directly into waters inhabited by corals. Corals and coral reefs are also harmed by overexploitation, including overfishing, as well as destructive fishing practices (MEA 2005a) and anchors used by boats (Sheppard 2014). Climate change and associated increases in storm frequency and intensity, diseases, water temperatures, and coral bleaching also contribute to declines in corals and coral reefs (Sheppard 2014; MEA 2005a; Hughes et al. 2003). Invasive species have also affected corals and coral reefs (Sheppard 2014).

For aquatic ecosystems, climate change affects water quality, biogeochemical cycling, and water storage (Julius et al. 2013). Climate change will also affect the abundance and distribution of wetlands across the United States, as well as the functions they provide (Mitsch and Gosselink 2015). Climate change results in increases in stream temperatures, more waterbodies with anoxic conditions, degradation of water quality, and increases in flood and drought frequencies (Julius

et al. 2013). The increasing carbon dioxide concentration in the atmosphere also changes the pH of the oceans, resulting in ocean acidification (RS and NAS 2014), which adversely affects corals and some other marine organisms.

In the United States, approximately 39 percent of its population lives in counties that are next to coastal waters, the territorial seas, or the Great Lakes (NOAA 2013). Those counties comprise less than 10 percent of the land area of the United States (NOAA 2013). Humans have been altering estuarine waters and coastal areas for millennia, but those changes have rapidly accelerated over the past 150 to 300 years (Lotze et al. 2006). Coastal waters are also affected by a wide variety of activities. Day et al. (2013) identified the following general categories of human activities that impact estuaries: physical alterations (e.g., habitat modifications and changes in hydrology and hydrodynamics), increases in inputs of nutrients and organic matter (enrichment), releases of toxins, and changes in biological communities as a result of harvesting activities and intentional and unintentional introductions of new species. The major drivers of changes to coastal areas are: development activities that alter coastal forests, wetlands, and coral reef habitats for aquaculture and the construction of urban areas, industrial facilities, and resort and port developments (MEA 2005b). Dredging, reclamation, shore protection and other structures (e.g., causeways and bridges), and some types of fishing activities also cause substantial changes to coastal areas (MEA 2005b). Nitrogen pollution to coastal zones change coral reef communities (MEA 2005b). Adverse effects to coastal waters are caused by habitat modifications, point source pollution, non-point source pollution, changes to hydrology and hydrodynamics, exploitation of coastal resources, introduction of non-native species, global climate change, shoreline erosion, and pathogens and toxins (NRC 1994). Over the course of history, in estuarine waters human activities caused declines of greater than 90 percent of important species, losses of more than 65 percent of seagrasses and wetland habitat, substantially degraded water quality, and facilitated introductions of new species (Lotze et al. 2006).

Substantial alterations of coastal hydrology and hydrodynamics are caused by land use changes in watersheds draining to coastal waters, the channelization or damming of streams and rivers, water consumption, and water diversions (NRC 1994). Approximately 52 percent of the population of the United States lives in coastal watersheds (NOAA 2013). Eutrophication of coastal waters is caused by nutrients contributed by waste treatment systems, non-point sources, and the atmosphere, and may cause hypoxia or anoxia in coastal waters (NRC 1994). Changes in water movement through watersheds may also alter sediment delivery to coastal areas, which affects the sustainability of wetlands and intertidal habitats and the functions they provide (NRC 1994). Most inland waters in the United States drain to coastal areas, and therefore activities that occur in inland watersheds affect coastal waters (NRC 1994). Inland land uses, such as agriculture, urban development, and forestry, adversely affect coastal waters by diverting fresh water from estuaries and by acting as sources of nutrients and pollutants to coastal waters (MEA 2005b).

Coastal wetlands have been substantially altered by urban development and changes to the watersheds that drain to those wetlands (Mitsch and Hernandez 2013). Coastal habitat modifications are the result of dredging or filling coastal waters, inputs of sediment via non-point sources, changes in water quality, or alteration of coastal hydrodynamics (NRC 1994). Coastal development activities, including those that occur in uplands, affect marine and estuarine habitats (MEA 2005a). The introduction of non-native species may change the functions and structure of coastal wetlands and other habitats (MEA 2005a). Fishing activities may also modify coastal habitats by changing habitat structure and the biological communities that inhabit those areas (NRC 1994).

In order to effectively understand and manage ecosystems, including aquatic ecosystems, it is necessary to take into account how people and societies have reshaped aquatic and terrestrial resources over time (Ellis 2015), through the effects of human activities on those ecosystems. This includes permitting programs that regulate activities in aquatic resources and other types of natural resources. The current state of an ecosystem (e.g., a wetland or an estuary) can range from “near natural” (i.e., minimally disturbed) to semi-natural to production systems such as agricultural lands to overexploited (i.e., severely impaired) (van Andel and Aronson 2012). Degradation occurs when an ecosystem is subjected to a prolonged disturbance (Clewell and Aronson 2013), and the degree of degradation can be dependent, in part, on the severity of disturbance. Disturbances can be caused by human activities or by natural events, such as changes to ecosystems caused by ecosystem engineers (e.g., beavers) and other organisms, storms, fires, or earthquakes. Two important factors that affect how aquatic ecosystems and other ecosystems respond to disturbances are resistance and resilience.

For ecosystems, stability is the ability of an ecosystem to return its starting state after one or more disturbances cause a significant change in environmental conditions (van Andel et al. 2012). Resistance is the ability of an ecosystem to exhibit little or no change in structure or function when exposed to a disturbance (van Andel et al. 2012). Resilience is the ability of an ecosystem to regain its structural and functional characteristics in a relatively short amount of time after it has been exposed to a disturbance (van Andel et al. 2012). Human activities can change the resilience of ecosystems (Gunderson 2000). In some situations, resilience can be a positive attribute (e.g., the ability to withstand disturbances), and in other situations, resilience can be a negative attribute (e.g., when it is not possible to restore ecosystem because it has changed to the degree where it is resistant to being restored) (Walker et al. 2004). The concept of ecological resilience presumes the existence of multiple stable states, and the ability of ecosystems to tolerate some degree of disturbance before transitioning to an alternative (different) stable state (Gunderson 2000). A regime shift (i.e., a change from one stable state to an alternative stable state) can occur when human activities reduce the resilience of an ecosystem, or functional groups of species within that ecosystem, or when there are changes in the magnitude, frequency, and duration of

disturbances (Folke et al. 2004). Folke et al. (2004) and Gunderson (2000) provide examples of aquatic ecosystems that can exist in multiple stable states.

An example of a regime change in an estuary is a shift from an estuary with clear waters and benthic communities dominated by seagrasses, to an estuary with turbid waters dominated by phytoplankton that has insufficient light for seagrasses to grow and persist (Folke et al. 2004). Another example of a regime shift is where an increase in nutrients to a wetland (likely from many sources in the area draining to that wetland) causes a wetland's plant community from a diverse plant community dependent on low nutrient levels to a monotypic plant community dominated by an invasive species that can persist under the higher nutrient levels (Gunderson 2000).

Determining whether an ecosystem altered by human activities is degraded or in an alternative stable state depends on the perspective of the person making that judgment (Hobbs 2016). That judgment is dependent in part on the ecological functions and services currently being provided by the alternative stable state and the value local stakeholders place on those ecosystem functions and services. In other words, different people may have different views on the current ecological state of a particular ecosystem (Hobbs 2016, Walker et al. 2004): some people may think it is degraded and other people may think it continues to provide important ecological functions and services. It is also important to understand that degradation falls along a continuum, ranging from minimally degraded to severely degraded, since all ecosystems have been directly or indirectly altered by human activities to some degree. Degraded ecosystems can continue to provide important ecological functions and services, although they may be different from what they provided historically. In summary, the affected environment or current environmental setting consists of a variety of aquatic and terrestrial resources that have been subjected to varying degrees of disturbance by human activities, and provide different degrees of aquatic resource functions and services.

5.0 Environmental Consequences

5.1 General Evaluation Criteria

This document contains a general assessment of the reasonably foreseeable effects of the individual activities authorized by this NWP and the anticipated cumulative effects of the activities authorized by this NWP during the 5-year period it is anticipated to be in effect. In the assessment of these individual and cumulative effects, the terms and limits of the NWP, pre-construction notification requirements, and the standard NWP general conditions are considered. The NWP general conditions include mitigation measures that reduce individual and cumulative adverse environmental effects. The supplemental documentation provided by division engineers will address how regional conditions affect the individual and cumulative effects of the NWP.

The environmental effects of proposed activities are evaluated by assessing the direct and indirect effects that those activities have on the current environmental setting (Canter 1996). The current environmental setting is the product of the cumulative or aggregated effects of human activities that have persisted over time, as well as the natural processes that have influenced, and continue to influence, the structure, functions, and dynamics of ecosystems. The current environmental setting includes the present effects of past activities authorized by previously issued versions of this NWP and other NWPs. The current environmental setting can vary substantially in different areas of the country and in different waterbodies. The current environmental setting is dependent in part on the degree to which past and present human activities have altered aquatic and terrestrial resources in a particular geographic area over time. For a particular site in which an NWP may take place, the current environmental setting can range from highly developed/overexploited (e.g., urban areas, where human impacts to ecosystems are highest) to production systems (e.g., agricultural lands) to seminatural (e.g., parks) to near natural (e.g., wilderness areas, where human impacts to ecosystems are lowest) (van Andel and Aronson 2012). Human impacts on semi-natural ecosystems are lower than human impacts to production ecosystems (van Andel and Aronson 2012). Since humans have altered aquatic and terrestrial environments in numerous, substantial ways for thousands of years (e.g., Evans and Davis 2018, Ellis 2015), the current environmental setting takes into account how human activities and changing biotic and abiotic conditions have modified existing aquatic and terrestrial resources.

The terms “cumulative effects” and “cumulative impacts” has been defined in various ways. For example, the National Research Council (NRC) (1986) defined “cumulative effects” as the on-going degradation of ecological systems caused by repeated perturbations or disturbances. MacDonald (2000) defines “cumulative effects” as the result of the combined effects of multiple activities that occur in a particular area that persist over time. Cumulative effects are caused by the interaction of multiple activities in a landscape unit, such as a watershed or ecoregion (Gosselink and Lee 1989). Cumulative effects can accrue in a number of ways. Cumulative effects can occur when there are repetitive disturbances at a single site over time, and the resource is not able to fully recover between each disturbance. Cumulative effects can also occur as a result of multiple activities occurring in a geographic area over time.

Consistent with the definitions cited above, the cumulative impacts of this NWP are the product of how many times this NWP is 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 across the country during the 5-year period this NWP is anticipated to be in effect. In section 8.2.2 of this document, the Corps estimates the number of times this NWP will be used during the 5-year period it is expected to be in effect, as well as estimates of the acreage of permanent and temporary impacts, and the acreage of compensatory mitigation required by district engineers to offset

losses of jurisdictional waters and wetlands. The individual and cumulative impacts of activities authorized by this NWP are evaluated against the current environmental setting. This approach is consistent with the Council on Environmental Quality's definition of "effects or impacts" at 40 CFR 1508.1(g): "Effects or impacts means changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives." The estimated use of this NWP, as well as the estimated authorized impacts and required compensatory mitigation, over the next 5 years are reasonably foreseeable and have a reasonably close causal relationship to the reissuance of this NWP.

The following evaluation comprises the NEPA analysis, the public interest review specified in 33 CFR 320.4(a)(1) and (2), and the impact analysis specified in Subparts C through F of the 404(b)(1) Guidelines (40 CFR Part 230).

The issuance of an NWP is based on a general assessment of the effects on public interest and environmental factors that are likely to occur as a result of using this NWP to authorize activities in waters of the United States. As such, this assessment must be speculative or predictive in general terms. Since NWPs authorize activities across the nation, projects eligible for NWP authorization may be constructed in a wide variety of environmental settings, and affect waters and wetlands of varying quality, from severely degraded to performing one or more functions to a high degree. Nationwide permit activities may result in permanent or temporary losses of aquatic resources, or partial or complete losses of aquatic resources. Therefore, it is difficult to predict all of the direct and indirect impacts that may be associated with each activity authorized by an NWP. For example, the NWP that authorizes 25 cubic yard discharges of dredged or fill material into various types of waters of the United States may be used to fulfill a variety of project purposes, and the direct and indirect effects may vary depending on the specific activity and the environmental characteristics of the site in which the activity takes place. Therefore, certain NWPs require pre-construction notification for certain activities to provide district engineers the opportunity to review proposed activities on a case-by-case basis and determine whether they will result in no more than minimal individual and cumulative adverse environmental effects.

Indication that a factor is not relevant to a particular NWP does not necessarily mean that the NWP would never have an effect on that factor, but that it is a factor not readily identified with the authorized activity. Factors may be relevant, but the adverse effects on the aquatic environment are negligible, such as the impacts of a boat ramp on water level fluctuations or flood hazards. Consistent with 40 CFR 1501.8(g), only the reasonably foreseeable effects or impacts that have a reasonably close causal relationship to the activities authorized as a result of the reissuance of this NWP are evaluated in detail in the environmental assessment for this NWP. Division and district engineers will impose, as necessary, additional conditions on the NWP authorization or exercise discretionary authority to address regionally or locally important factors or to ensure that the authorized activity results

in no more than minimal individual and cumulative adverse environmental effects. In any case, adverse effects will be controlled by the terms, conditions, and additional provisions of the NWP. For example, Section 7 Endangered Species Act consultation will be required for all activities that may affect endangered or threatened species or critical habitat (see 33 CFR 330.4(f) and NWP general condition 18).

In a specific watershed, division or district engineers may determine that the cumulative adverse environmental effects of activities authorized by this NWP are more than minimal. Division and district engineers will conduct more detailed assessments for geographic areas that are determined to be potentially subject to more than minimal cumulative adverse environmental effects. Division and district engineers have the authority to require individual permits in watersheds or other geographic areas where the cumulative adverse environmental effects are determined to be more than minimal, or add conditions to the NWP either on a case-by-case or regional basis to require mitigation measures to ensure that the cumulative adverse environmental effects of these activities are no more than minimal. When a division or district engineer determines, using local or regional information, that a watershed or other geographic area is subject to more than minimal cumulative adverse environmental effects due to the use of this NWP, he or she will use the revocation and modification procedure at 33 CFR 330.5. In reaching the final decision, the division or district engineer will compile information on the cumulative adverse effects and supplement the information in this document.

The Corps expects that the convenience and time savings associated with the use of this NWP will encourage applicants to design their projects within the scope of the NWP rather than request individual permits for projects which could result in greater adverse impacts to the aquatic environment. The minimization encouraged by the issuance of this NWP, as well as compensatory mitigation that may be required for specific activities authorized by this NWP, is likely to help reduce cumulative effects to the Nation's wetlands, streams, and other aquatic resources.

5.2 Impact Analysis

This NWP authorizes activities (i.e., structures or work in navigable waters of the United States and/or discharges of dredged or fill material into waters of the United States) for the construction, maintenance, repair, or removal of oil or natural gas pipelines and associated facilities. The acreage limit for this NWP is 1/2 acre.

The potential impacts of activities authorized by this NWP on the Corps' public interest review factors listed in 33 CFR 320.4(a)(1) are discussed in more detail in section 6.0 of this document. The potential impacts on the aquatic environment that could be caused by discharges of dredged or fill material into waters of the United States authorized by this NWP are discussed, in general terms, in section 8.0 of this document in the Clean Water Act Section 404(b)(1) Guidelines analysis.

The terms of this NWP, including any acreage limits or any other quantitative limits in the text of the NWP, the protections provided by many of the NWP general conditions, plus any regional conditions imposed by division engineers and activity-specific conditions imposed by district engineers will help ensure that the activities authorized by this NWP result in no more than minimal individual and cumulative adverse environmental effects. An additional safeguard is the ability of district engineers to exercise discretionary authority and require project proponents to obtain individual permits for proposed activities whenever a district engineer determines that a proposed activity will result in more than minimal individual or cumulative adverse environmental effects after considering any mitigation proposed by the applicant (see 33 CFR 330.1(e)(3)).

The Council on Environmental Quality's NEPA regulations at 40 CFR 1508.1(g) defines "effects or impacts" as "changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives, including those effects that occur at the same time and place as the proposed action or alternatives and may include effects that are later in time or farther removed in distance from the proposed action or alternatives." Furthermore, 40 CFR 1508.1(g)(2) states that:

[a] "but for" causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.

Therefore, the impact analysis in this environmental assessment focuses on the impacts or effects that are reasonably foreseeable and have a reasonably close causal relationship to the activities authorized by this NWP under the Corps' permitting authorities (i.e., work in navigable waters regulated under Section 10 of the Rivers and Harbors Act of 1899 and/or discharges of dredged or fill material into waters of the United States regulated under Section 404 of the Clean Water Act).

This NWP authorizes discharges of dredged or fill material into waters of the United States. The Corps' regulations define "dredged material" as "material that is excavated or dredged from waters of the United States." [33 CFR 323.2(c)] The term "discharge of dredged material" means "any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States." [33 CFR 323.2(d)(1)] The term "discharge of dredged material" includes, but is not limited to, (1) the addition of dredged material to a specified discharge site located in waters of the United States; (2) the runoff or overflow from a contained land or water disposal area; and (3) any addition,

including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation. [33 CFR 323.2(d)(1)]

Under 33 CFR 323.2(d)(2), the term “discharge of dredged material” does not include any of the following:

(1) discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps or applicable State section 404 program.

(2) Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.

(3) Incidental fallback.

The term “fill material” is defined at 33 CFR 323.2(e)(1) as meaning “material placed in waters of the United States where the material has the effect of: (1) replacing any portion of a water of the United States with dry land; or (2) changing the bottom elevation of any portion of a water of the United States. Examples of fill material include: “rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.” [33 CFR 323.2(e)(2)] “Fill material” does not include trash or garbage (see 33 CFR 323.2(e)(3)). Discharges of trash or garbage may be regulated under Section 402 of the Clean Water Act or other federal, state, or local laws and regulations.

The Corps’ regulations define the term “discharge of fill material” as meaning “the addition of fill material into waters of the United States.” [33 CFR 323.2(f)] Examples of discharges of fill material provided in section 323.2(f) include, but are not limited to, the following activities: (1) the placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; (2) the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; (3) site-development fills for recreational, industrial, commercial, residential, or other uses; (4) causeways or road fills; (5) dams and dikes; (6) artificial islands; (7) property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; (8) beach nourishment; (9) levees; (10) fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous

utility lines; (11) placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; (12) placement of overburden, slurry, or tailings or similar mining-related materials; and (13) artificial reefs. Under 33 CFR 323.2(f), the term “discharge of fill material” does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

Discharges of dredged or fill material into a jurisdictional water or wetland authorized under Section 404 of the Clean Water Act may result in the complete or partial loss of stream bed, wetland area, or area of another type of aquatic resource. That complete or partial loss of aquatic ecosystem area may result in a complete or partial loss of aquatic resource functions and services. The direct effects to jurisdictional waters and wetlands caused by activities authorized by this NWP may change those waters and wetlands to components of the built environment or uplands, convert an aquatic resource type to another aquatic resource type, or alter the functions and services provided by those waters and wetlands. The direct effects to jurisdictional waters and wetlands caused by activities authorized by this NWP may be permanent or temporary. The indirect effects to jurisdictional waters and wetlands caused by activities authorized by this NWP may also convert an aquatic resource type to another aquatic resource type. The indirect effects to jurisdictional waters and wetlands caused by activities authorized by this NWP may be permanent or temporary. The contribution of activities authorized by this NWP to cumulative or aggregate effects to ocean waters, estuarine waters, lakes, wetlands, streams, and other aquatic resources is also dependent on the degree or magnitude to which the potentially affected aquatic resources perform ecological functions and services. Nearly all ocean waters, estuaries, lakes, wetlands, streams, and other aquatic resources have been directly and indirectly affected by human activities over time (e.g., Halpern et al. 2008 for oceans, Lotze et al. 2006 for estuaries, Zedler and Kercher (2005) for wetlands, Allan 2004 for streams), including land uses in areas that drain to these aquatic resources.

Discharges of dredged or fill material into waters of the United States authorized by this NWP may alter the ecological functions and services performed by those jurisdictional waters and wetlands. Some ecological functions and services may be enhanced, some ecological functions and services may be diminished or eliminated, and other ecological functions and services might not be affected by specific activities authorized by this NWP. Some discharges of dredged or fill material into jurisdictional waters and wetlands authorized by this NWP may convert those waters and wetlands to dry lands while other discharges of dredged or fill material may change the structure and functions of those waters and wetlands, while allowing those waters and wetlands to continue to exist as waters of the United States and provide some ecological functions and services.

This NWP also authorizes structures or work in navigable waters of the United States. Structures or work in navigable waters of the United States may alter the ecological functions and services performed by those navigable waters. The Corps’

regulations for Section 10 of the Rivers and Harbors Act of 1899 in 33 CFR part 322 define the term “structure” as including, “without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other obstacle or obstruction.” [33 CFR 322.2(b)] The Corps’ section 10 regulations define the term “work” as including, “without limitation, any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States.” [33 CFR 322.2(c)] Under this NWP, the section 10 authorization applies to discharges of dredged or fill material into waters of the United States that are also navigable waters under Section 10 of the Rivers and Harbors Act of 1899.

Structures or work in navigable waters of the United States does not typically result in losses of navigable waters, but they may change the ecological functions and services performed by those waters. Examples of exceptions would include fills in navigable waters to create fast land along the shoreline, or artificial islands. Structures and work in navigable waters may alter the physical, chemical, and biological characteristics of those waters, but they generally do not result in a loss in the quantity of navigable waters. Structures and work in navigable waters may alter the ecological functions and services provided by those waters. Those alterations will vary, depending on the specific characteristics of the specific activity authorized by this NWP and the environmental setting in which the NWP activity may occur. The environmental setting will vary from site to site, and from region to region across the country.

The individual environmental impacts are the environmental impacts caused by an activity authorized by this NWP, including the direct and indirect impacts caused by the specific NWP activity at the project site. In the context of the Corps’ public interest review (33 CFR 320.4(a)(1) and Section 404(e) of the Clean Water Act, the cumulative environmental impacts are the environmental impacts caused by the activities authorized by this NWP during the 5-year period the NWP is anticipated to be in effect. Both the individual and cumulative environmental impacts are evaluated against the current environmental setting, which is described at a national scale in section 4.0 of this document. The current environmental setting varies substantially throughout the United States. In some areas of the country, the current environmental setting is the result of substantial alteration of waterbodies and other ecosystems by various human activities, but in other areas of the country, the current environmental setting has been less affected by various human activities, and those alterations are more subtle and more difficult to discern (Clewell and Aronson 2013). The categories of human activities that have altered aquatic ecosystems are discussed in section 4.4 of this document, and are summarized in Table 4.6. The types of ecological functions and services provided by aquatic ecosystems also vary considerably by region and by specific ecosystems, with some ecosystems performing ecological functions and services to a high degree, and other ecosystems performing ecological functions and services to a lesser degree.

The analysis of environmental consequences in this environmental assessment is a qualitative analysis because of the lack of quantitative data at a national scale on the various human activities and natural factors that may concurrently alter the current environmental setting during the 5-year period this NWP is expected to be in effect. As discussed in section 4.4, the activities authorized by this NWP are just one category among many categories of human activities and natural factors that affect ocean waters, estuarine waters, lakes, wetlands, streams, and other aquatic resources, and the ecological functions and services they provide.

As discussed in section 4.0 of this document and the Millennium Ecosystem Assessment (2005c), all ecosystems have been affected by human activities to some degree. According to Clewell and Aronson (2013), anthropogenic and natural disturbances to ecosystems can be placed in three categories: (1) stress with maintenance of ecosystem integrity; (2) moderate disturbance where the ecosystem can recover in time through natural processes; and (3) impairment, which may result in a more severe disturbance that may require human intervention (e.g., restoration) to prevent the ecosystem from changing into an alternative, perhaps less functional ecological state. Ecosystems can often tolerate gradual changes and continue to provide ecological functions and services before those changes reach a threshold, that when crossed, causes the ecosystem to change abruptly into an alternative stable state (Scheffer et al. 2001). For some ecosystems, multiple impacts or disturbances can cause an ecosystem to pass a threshold can result in substantial changes to that ecosystem, but for other ecosystems the changes may be more subtle (Folke et al. 2004). It is difficult to predict where these thresholds are, and ecosystems may exhibit little change before that threshold is reached (Scheffer et al. 2009).

The severity of potential impacts to aquatic resources caused by NWP activities is dependent, in part, on ecosystem resilience and resistance, whether the permitted impacts are temporary or permanent, and how the affected resources respond to the permitted impacts. Impacts to aquatic resources caused by NWP activities may result in a partial, total, or no loss of aquatic resource functions and services, depending on the specific characteristics of the NWP activity and the environmental setting in which those impacts occur. In addition, the duration of the adverse effects (temporary or permanent) caused by NWP activities, can be influenced by the resilience and resistance of the aquatic resource to disturbances caused by those NWP activities. Since there is considerable variation across the country in terms of the types of aquatic resources, the ecological functions and services they provide, and their resilience and resistances to disturbances caused by NWP activities, other human activities, and natural disturbances, the environmental consequences of the issuance of this NWP will vary by site and by region. Given the geographic scope in which this NWP can be used to authorize activities that require DA authorization and the wide variability in aquatic resource structure, functions, and dynamics from site to site and from region to region, the analysis of environmental consequences is a qualitative analysis.

The environmental effects or impacts that are likely to be caused by individual activities authorized by this NWP are evaluated against the current environmental setting (i.e., the affected environment, which is described at a national scale in section 4.0 of this document). The current environmental setting is the result of human activities altering ecosystems over thousands of years (Perring and Ellis 2013), as well as natural changes in environmental conditions that have occurred over time. Since historical baselines (i.e., the state of ecosystems in the absence of modifications caused by human activities) no longer exist in most areas, ecosystem management decisions should be made by using contemporary baselines that acknowledge how humans have dominated and changed ecosystems over long periods of time (Kopf et al. 2015). Permit decisions are an example of management decisions for ecosystems such as oceans, estuaries, lakes, rivers, streams, and wetlands, where the proposed impacts that require a permit are evaluated against the current environmental setting to decide whether the permit (e.g., an NWP authorization) should be issued by the regulatory authority.

The impacts of activities authorized by this NWP during the 5-year period it is anticipated to be in effect are evaluated against the current affected environment, to determine the potential severity of those anticipated impacts in light of the human alterations and natural changes to aquatic ecosystems that have occurred over time and space. This evaluation takes into account how the activities authorized by this NWP might affect aquatic ecosystems, the resilience of aquatic ecosystems, and the ability of aquatic ecosystems to continue to provide ecological functions and services after the authorized activities have occurred. When evaluating pre-construction notifications, district engineers should be taking into account the current environmental setting, as well as how the jurisdictional waters and wetlands might respond as a result of conducting the NWP activity, including how resilient those waters and wetlands are to disturbances caused by discharges of dredged or fill material and/or structures or work in navigable waters.

Compensatory mitigation required by district engineers for specific activities authorized by this NWP may help reduce the contribution of those activities to the cumulative effects caused by NWPs on the Nation's wetlands, streams, and other aquatic resources, by providing ecological functions to partially or fully replace some or all of the aquatic resource functions lost as a result of those activities. Mitigation requirements, including compensatory mitigation requirements for the NWPs, are described in general condition 23. Compensatory mitigation projects must also comply with the applicable provisions of 33 CFR part 332. District engineers will establish compensatory mitigation requirements on a case-by-case basis, after evaluating pre-construction notifications. Compensatory mitigation requirements for individual NWP activities will be specified through permit conditions added to NWP authorizations. When compensatory mitigation is required, the permittee is required to submit a mitigation plan prepared in accordance with the requirements of 33 CFR 332.4(c). Credits from approved mitigation banks or in-lieu fee programs may also be used to satisfy compensatory mitigation requirements for NWP authorizations.

Monitoring is required to demonstrate whether the permittee-responsible mitigation project, mitigation bank, or in-lieu fee project is meeting its objectives and providing the intended aquatic resource structure and functions. If the compensatory mitigation project is not meeting its objectives, adaptive management will be required by the district engineer. Adaptive management may involve taking actions, such as site modifications, remediation, or design changes, to ensure the compensatory mitigation project meets its objectives (see 33 CFR 332.7(c)).

The estimated use of this NWP during the 5-year period the NWP is expected to be in effect and the estimated impacts to wetlands, streams, and other aquatic resources in the United States, plus the estimated acreage of compensatory mitigation, is provided in section 8.2.2 of this document. Division and district engineers will monitor the use of this NWP on a regional and case-specific basis, and under their authorities in 33 CFR 330.5(c) and (d), modify, suspend, or revoke NWP authorizations in situations when the use of the NWP will result in more than minimal cumulative adverse environmental effects. Because the activities authorized by this NWP constitute only a small proportion of the categories of human activities that directly and indirectly affect ocean waters, estuarine waters, lakes, wetlands, streams, and other aquatic resources, the activities authorized by this NWP over the next 5 years are likely to result in only a minor incremental change to the current environmental setting for ocean waters, estuarine waters, lakes, wetlands, streams, and other aquatic resources and the ecological functions and services they provide.

Under 33 CFR 330.4(f)(2), for an NWP activity proposed by a non-federal permittee, the district engineer will review the pre-construction notification and if she or he determines the proposed NWP activity may affect listed species or designated critical habitat, section 7 consultation will be conducted with the U.S. Fish and Wildlife Service (U.S. FWS) or National Marine Fisheries Service (NMFS) depending on which species the district engineer determined may be affected by the proposed NWP activity. During the ESA section 7 consultation process the U.S. FWS or NMFS will evaluate the effects caused by a proposed NWP activity, the environmental baseline, the status of the species and critical habitat, and the effects of any future state or private activities that are reasonably certain to occur within the action area. For formal ESA section 7 consultations, the U.S. FWS or NMFS will formulate their opinion as to whether the proposed NWP activity is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat (see 50 CFR 402.14(g)). The ESA section 7 consultation requirements may also be fulfilled through informal consultation, when the U.S. FWS or NMFS provide their written concurrence that the proposed activity is not likely to adversely affect endangered or threatened species or their designated critical habitat (see 50 CFR 402.13(c)).

When determining whether a proposed NWP activity will cause no more than minimal individual and cumulative adverse environmental effects, the district engineer will consider the direct and indirect effects caused by the NWP activity. He

or she will also consider the cumulative adverse environmental effects caused by activities authorized by the NWP and whether those cumulative adverse environmental effects are no more than minimal. 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. These criteria are listed in the NWPs in Section D, "District Engineer's Decision." The district engineer may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns.

Additional conditions can be placed on proposed activities on a regional or case-by-case basis by division or district engineers to ensure that the activities have no more than minimal individual and cumulative adverse environmental effects. Regional conditions added to this NWP will be used to account for differences in aquatic resource functions, services, and values across the country, ensure that the NWP authorizes only those activities with no more than minimal individual and cumulative adverse environmental effects, and allow each Corps district to prioritize its workload based on where its efforts will best serve to protect the aquatic environment. Regional conditions can prohibit the use of an NWP in certain waters (e.g., high value waters or specific types of wetlands or waters. Specific NWPs can also be revoked on a geographic or watershed basis where the individual and cumulative adverse environmental effects resulting from the use of those NWPs are more than minimal.

In high value waters, division and district engineers can: 1) prohibit the use of the NWP in those waters and require an individual permit or regional general permit; 2) decrease the acreage limit for the NWP; 3) lower the pre-construction notification threshold of the NWP to require pre-construction notification for NWP activities with smaller impacts in those waters; 4) require pre-construction notification for some or all NWP activities in those waters; 5) add regional conditions to the NWP to ensure that the individual and cumulative adverse environmental effects are no more than minimal; or 6) for those NWP activities that require pre-construction notification, add special conditions to NWP authorizations, such as compensatory mitigation requirements, to ensure that the adverse environmental effects are no more than minimal. NWPs can authorize activities in high value waters as long as the individual and cumulative adverse environmental effects are no more than minimal.

The construction and use of fills for temporary access for construction may be

authorized by NWP 33 or regional general permits. The related activity must meet the terms and conditions of the specified permit(s). If the activity is dependent on portions of a larger project that require an individual permit, this NWP will not apply. [See 33 CFR 330.6(c) and (d)]

5.3 Impact Analysis for Alternatives to the Proposed Action

5.3.1 No Action Alternative (Do Not Reissue or Modify the Nationwide Permit)

The no action alternative would not achieve one of the goals of the Corps' Nationwide Permit Program, which is to regulate with little, if any, delay or paperwork certain activities having minimal impacts (33 CFR 330.1(b)). The no action alternative would also reduce the Corps' ability to pursue the current level of review for other activities that have greater adverse effects on the aquatic environment, including activities that require individual permits as a result of division or district engineers exercising their discretionary authority under the NWP program. The no action alternative would also reduce the Corps' ability to conduct compliance actions.

If this NWP is not available, substantial additional resources would be required for the Corps to evaluate these minor activities through the individual permit process, and for the public and federal, tribal, and state resource agencies to review and comment on the large number of public notices for these activities. In a considerable majority of cases, when the Corps publishes public notices for proposed activities that result in no more than minimal adverse environmental effects, the Corps typically does not receive responses to these public notices from either the public or federal, tribal, and state resource agencies. Therefore, processing individual permits for these minimal impact activities is not likely to result in substantive changes to those activities. Another important benefit of the NWP program that would not be achieved through the no action alternative is the incentive for project proponents to design their projects so that those activities meet the terms and conditions of an NWP. The Corps believes the NWPs have significantly reduced adverse effects to the aquatic environment because most applicants modify their activities that require DA authorization to comply with the NWPs and avoid the longer permit application review times and larger costs typically associated with the individual permit process.

Under the no action alternative, district engineers may issue regional general permits or programmatic general permits to authorize similar categories of activities that would have no more than minimal adverse environmental effects that could have been authorized by this NWP. However, those regional general permits or programmatic general permits may have different quantitative limits, different restrictions, and other permit conditions, and those quantitative limits, restrictions, and permit conditions may result in the authorization of activities that have greater, similar, or lesser adverse environmental effects than the activities that would have

been authorized by this NWP. Under the no action alternative, there may be differences in consistency in implementation of the Corps Regulatory Program among Corps districts. District engineers can tailor their regional general permits and programmatic general permits to effectively address the specific categories of aquatic resources found in their geographic areas of responsibility, the specific categories of activities that occur in those geographic areas, and the ecological functions and services those categories of aquatic resources provide. The environmental consequences of this aspect of the no action alternative are more difficult to predict because of the potential variability of regional general permits and programmatic general permits among Corps districts across the country, when such general permits are available to authorize a similar category of activities as this NWP authorizes. If this NWP is not reissued, districts would have to draft, propose, and issue regional general permits or programmatic general permits through the public notice and comment process and prepare applicable environmental documentation to support their decisions on whether to issue those regional general permits or programmatic general permits. It would take a substantial amount of time to issue those regional general permits and programmatic general permits, and in the interim proposed activities would have to be authorized through the individual permit process.

5.3.2 Reissue the Nationwide Permit With Modifications So That It Only Authorizes Oil or Natural Gas Pipeline Activities

This NWP was proposed 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 for the construction, maintenance, repair, and removal of oil and natural gas pipelines and associated facilities that have no more than minimal individual and cumulative adverse environmental effects. The Corps has considered suggested changes to the terms and conditions of this NWP, as well as modifying or adding NWP general conditions, as discussed in section 1.4 of this document and the preamble of the Federal Register notice announcing the reissuance of this NWP.

Changing the terms and conditions of this NWP would likely result in changes the number of activities authorized by this NWP, and the environmental impacts of authorized activities. The environmental consequences of changing the terms and conditions of this NWP may vary, depending on whether modifications for the reissued NWP are more restrictive, less restrictive, or is similarly restrictive compared to previously issued versions of this NWP. The environmental consequences of changing the terms and conditions of this NWP are also dependent on the application of existing tools used to ensure that activities authorized by this NWP will only have no more than minimal adverse environmental effects. Those tools include the quantitative limits of the NWP, the pre-construction notification process, and the ability of division and district engineers to modify, suspend, or revoke this NWP on a regional or case-by-case basis.

Changing the national terms and conditions of this NWP may change the incentives for project proponents to reduce their proposed impacts to jurisdictional waters and wetlands to qualify for NWP authorization, and receive the required DA authorization for regulated activities in less time than it would take to receive individual permits for those activities. Under the individual permit process, the project proponent may request authorization for activities that have greater impacts on jurisdictional waters and wetlands, and may result in larger losses of aquatic resource functions and services. The NWP program has been effective in reducing losses of jurisdictional waters and wetlands, with a substantial majority of losses of waters of the United States authorized by NWP being 1/10-acre or less (see figure 5.1 of the regulatory impact analysis for this rule).

The environmental consequences of division engineers exercising their discretionary authority to modify, suspend, or revoke this NWP on a regional basis may be a reduction in the number of activities that could be authorized by this NWP in a region or more NWP activities requiring pre-construction notification through regional changes in the PCN requirements for this NWP. The environmental consequences are likely to include reduced losses of waters of the United States because regional conditions can only further condition or restrict the applicability of an NWP (see 33 CFR 330.1(d)). The modification, suspension, or revocation of this NWP on a regional basis by division engineers may also reduce the number of activities authorized by this NWP, which may increase the number of activities that require standard individual permits. If more activities require standard individual permits, permitted losses of jurisdictional waters and wetlands may increase because standard individual permits have no quantitative limits.

An environmental consequence of regional conditions added to the NWPs by division engineers is the enhanced ability to address differences in aquatic resource functions, services, and values among different regions across the nation. Corps divisions may add regional conditions to the NWPs to enhance protection of the aquatic environment in a region (e.g., a Corps district, state, or watershed) and address regional concerns regarding jurisdictional waters and wetlands and other resources (e.g., listed species or cultural resources) that may be affected or impacted by the activities authorized by this NWP. Division engineers can also revoke an NWP in a region if the use of that NWP results in more than minimal adverse environmental effects, especially in high value or rare waters or wetlands. When an NWP is issued or reissued by the Corps, division engineers issue supplemental documents that evaluate potential impacts of the NWP at a regional level, and assess cumulative impacts caused by this NWP on a regional basis during the period this NWP is in effect. [33 CFR 330.5(c)]

An environmental consequence of district engineers modify, suspending, or revoking this NWP on a case-by-case basis is the ability of district engineers to address site-specific conditions, including the degree to which aquatic resources on the project site provide ecological functions and services. Activity-specific modifications may also address site-specific resources (e.g., listed species or

cultural resources) that may be affected by NWP activities. The environmental consequences of modification of this NWP on an activity-specific basis by district engineers may be further reductions in losses of waters of the United States for specific activities authorized by NWP because of mitigation required by district engineers during their reviews of PCNs to ensure that those activities result in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.1(e)(3)). Examples of mitigation that may be required by district engineers include permit conditions requiring compensatory mitigation to offset losses of waters of the United States or conditions added to the NWP authorization to prohibit the permittee from conducting the activity during specific times of the year to protect spawning fish and shellfish. If a proposed NWP activity will result in more than minimal adverse environmental effects, then the district engineer will exercise discretionary authority and require an individual permit. The individual permit review process requires a project-specific alternatives analysis, including the consideration of off-site alternatives, and a public interest review.

5.3.3 Reissue the Nationwide Permit Without Modifications

The 2017 NWP authorized discharges of dredged or fill material into waters of the United States and structures and work in navigable waters of the United States for 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.

In the September 15, 2020, proposal the Corps proposed to reissue this NWP to limit it to oil or natural gas pipeline activities, and to issue separate NWPs for electric utility line and telecommunications activities (proposed new NWP C) and utility line activities for water and other substances (proposed new NWP D). Under this alternative, the Corps would not issue NWPs C and D and NWP 12 would be reissued to authorize utility line activities for all types of utility lines, with similar terms and conditions as the 2017 NWP 12.

Retaining the current terms and conditions of this NWP would likely result in little or no changes in the number of activities authorized by this NWP, and the environmental impacts of authorized activities. Project proponents would likely continue to design their project to qualify for NWP authorization. Retaining the current national terms and conditions of this NWP would likely continue to provide incentives for project proponents to reduce their proposed impacts to jurisdictional waters and wetlands to qualify for NWP authorization, and receive the required DA authorization for regulated activities in less time than it would take to receive individual permits for those activities. Under this alternative, for those activities that require individual permits project proponents may request authorization for activities that have greater impacts on jurisdictional waters and wetlands, and may result in larger losses of aquatic resource functions and services. The NWP program has been effective in reducing losses of jurisdictional waters and wetlands, with a

substantial majority of losses of waters of the United States authorized by NWP being 1/10-acre or less (see figure 5.1 of the regulatory impact analysis for this rule).

Under this alternative, the environmental consequences of division engineers exercising their discretionary authority to modify, suspend, or revoke this NWP on a regional basis would be similar to the environmental consequences discussed in section 5.3.2. Corps divisions may add regional conditions to the NWPs to enhance protection of the aquatic environment in a region (e.g., a Corps district, state, or watershed) and address regional concerns regarding jurisdictional waters and wetlands and other resources (e.g., listed species or cultural resources) that may be affected or impacted by the activities authorized by this NWP. Division engineers can also revoke an NWP in a region if the use of that NWP results in more than minimal adverse environmental effects, especially in high value or rare waters or wetlands. When an NWP is issued or reissued by the Corps, division engineers issue supplemental documents that evaluate potential impacts of the NWP at a regional level, and assess cumulative impacts caused by this NWP on a regional basis during the period this NWP is in effect. [33 CFR 330.5(c)]

The modification and reissuance of this NWP adopts the alternative identified in section 3.2 of this document. The Corps has considered the comments received in response to the proposed rule, and made changes to the NWPs, general conditions, and definitions to address those comments. Division engineer may add regional conditions to this NWP to help ensure that the use of the NWPs in a particular geographic area will result in no more than minimal individual and cumulative adverse environmental effects. District engineers may also add regional conditions to this NWP to help ensure compliance with other applicable laws, such as Section 7 of the Endangered Species Act, Section 106 of the National Historic Preservation Act, and the essential fish habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act. Division engineers may also add regional conditions to this NWP to fulfill its tribal trust responsibilities.

Corps divisions and districts also monitor the use of this NWP and the authorized impacts identified in NWP verification letters. At a later time, if warranted, a division engineer may add regional conditions to further restrict or prohibit the use of this NWP to ensure that it does not authorize activities that result in more than minimal adverse environmental effects in a particular geographic region (e.g., a watershed, landscape unit, or seascape unit). To the extent practicable, division and district engineers will use regulatory automated information systems and institutional knowledge about the typical adverse effects of activities authorized by this NWP, as well as substantive public comments, to assess the individual and cumulative adverse environmental effects resulting from regulated activities authorized by this NWP.

6.0 Public Interest Review

6.1 Public Interest Review Factors (33 CFR 320.4(a)(1))

For each of the 20 public interest review factors, the extent of the Corps consideration of expected impacts resulting from the use of this NWP is discussed, as well as the reasonably foreseeable cumulative adverse effects that are expected to occur. The Corps decision-making process involves consideration of the benefits and detriments that may result from the activities authorized by this NWP.

(a) Conservation: The activities authorized by this NWP may modify the natural resource characteristics of the project area. Compensatory mitigation, if required for activities authorized by this NWP, should result in the restoration, enhancement, establishment, or preservation of aquatic habitats that will offset losses to conservation values. Leaks from oil or natural gas pipelines or their substations may alter conservation values in the vicinity of the oil or natural gas pipeline. Conservation values of the local area may also be changed by the construction of access roads for the oil or natural gas pipeline. For those activities that require pre-construction notification, the district engineer will review the proposed activity and may add permit conditions to ensure that adverse effects to conservation are no more than minimal.

Discharges of dredged or fill material that convert wetlands, streams, and other aquatic resources to upland areas may result in permanent losses of aquatic resource functions and services. Temporary fills and fills that do not convert waters or wetlands to dry land may cause short-term or partial losses of aquatic resource functions and services. During construction of oil or natural gas pipelines, where horizontal directional drilling is used to install or replace a portion of the pipeline, there is a possibility of inadvertent returns of drilling fluids that could adversely affect wetlands, streams, and other aquatic resources. Those inadvertent returns of drilling fluids are not considered discharges of dredged or fill material that require Clean Water Act section 404 authorization. Activities necessary to remediate these inadvertent returns of drilling fluids may involve activities that require DA authorization, and those activities may be authorized by NWP 12. The establishment of oil or natural gas pipeline rights-of-way may cause changes in land cover and habitat type. Some species may benefit from changes in habitat type and other species may be adversely affected by changes in habitat type (Richardson et al. 2017).

(b) Economics: Oil or natural gas pipelines activities are likely to have positive impacts on the local economy. During construction, these activities will generate jobs and revenue for local contractors as well as revenue to building supply companies that sell construction materials. Oil or natural gas pipelines provide energy to residences and schools, as well as factories, offices, stores, and other places of business, to allow those facilities to operate. They also transport oil to

processing plants where the oil can be transformed into a variety of products, such as plastics, that are used for a wide variety of purposes.

(c) Aesthetics: Oil or natural gas pipeline activities may alter the visual character of some waters of the United States. The extent and perception of these changes may vary, depending on the size and configuration of the activity, the nature of the surrounding area, and the public uses of the area. Oil or natural gas pipeline activities authorized by this NWP can also modify other aesthetic characteristics, such as air quality and the amount of noise. The increased human use of the project area and surrounding land may also alter local aesthetic values. Spills from oil pipelines may alter aesthetics in the vicinity of the pipeline.

(d) General environmental concerns: Activities authorized by this NWP may affect general environmental concerns, such as water, air, noise, and land pollution. The authorized activities will also affect the physical, chemical, and biological characteristics of the environment. Adverse effects to the chemical composition of the aquatic environment will be controlled by general condition 6, which states that the material used for construction must be free from toxic pollutants in toxic amounts. General condition 23 requires mitigation to minimize adverse effects to the aquatic environment through avoidance and minimization at the project site. Compensatory mitigation may be required by district engineers to ensure that the net adverse environmental effects are no more than minimal. Specific environmental concerns are addressed in other sections of this document.

Oil or natural gas pipeline activities and associated facilities may also contribute to other general environmental concerns, including potential adverse effects to aquatic and terrestrial environments and to the atmosphere during their construction, maintenance, and operation. During the operation of oil or natural gas pipelines, the oil, natural gas, or petrochemical substances carried by those pipelines may leak into surrounding areas. For oil pipelines, operators are required to comply with the Pipeline and Hazardous Materials Safety Administration's safety requirements, and have plans for addressing the risk of oil spills. Oil spills are also addressed through the Oil Pollution Act of 1990, which is administered by the U.S. Environmental Protection Agency and the U.S. Coast Guard. The U.S. EPA is responsible for oil spills in inland waters and the U.S. Coast Guard is responsible for oil spills in coastal waters and deepwater ports. For natural gas pipelines, there may be gas leaks during the operation of those pipelines. The Federal Energy Regulatory Commission regulates the interstate transmission of natural gas and oil, and issues licenses for interstate natural gas pipelines. For natural gas pipelines, the U.S. Department of Transportation's Pipeline and Hazardous Pipeline Materials Safety Administration is responsible for regulating the operation of the pipeline during its lifetime, including imposing requirements to address potential leaks of natural gas from the pipeline. The U.S. Department of Transportation is also responsible for setting the federal safety standards for natural gas (and other) pipelines and related facilities

Other potential adverse environmental effects from oil or natural gas pipeline construction, maintenance, repair, or replacement activities may be inadvertent returns of drilling fluids that may occur during horizontal directional drilling activities. These drilling fluids may be released into aquatic and terrestrial environments and may contribute to cumulative adverse environmental effects to those environments. Inadvertent returns of drilling fluids are not regulated under Section 404 of the Clean Water Act because they are not discharges of dredged or fill material. They may be regulated under Section 402 of the Clean Water Act or under state laws and regulations. This NWP contains provisions that allow permittees to quickly take actions that require DA authorization (e.g., discharges of dredged or fill material into waters of the United States to contain inadvertent returns of drilling fluids) to respond to inadvertent returns to minimize the adverse environmental effects of those inadvertent returns.

For oil or natural gas pipelines, general environmental concerns may include the burning of the fossil fuels that occurs after the oil or natural gas reaches its destination, which produce carbon dioxide that contribute to greenhouse gas emissions. The Corps does not have the authority to control the burning of fossil fuels or the adverse environmental effects that are caused by burning those fossil fuels to produce energy.

A variety of pollutants might be released into the environment during the operation and maintenance of oil or natural gas pipelines. Those pollutants may be discharged through either point sources or non-point sources and reach jurisdictional waters and wetlands. Point-source discharges would likely require National Pollutant Discharge Elimination System Permits under Section 402 of the Clean Water Act, which is administered by U.S. EPA or by states with approved programs. Pollutants may also be discharged through spills and other accidents. Operations and maintenance activities may also have other direct and indirect effects on wetlands, streams, and other aquatic resources. The Corps does not have the authority to regulate operations and maintenance activities that: (1) do not involve discharges of dredged or fill material into waters of the United States; (2) involve activities exempt from Clean Water Act Section 404 permit requirements under section 404(f) of the Act; and (3) do not involve structures or work requiring DA authorization under Sections 9 or 10 of the Rivers and Harbors Act of 1899. The Corps does not have authority under Section 404 of the Clean Water Act to regulate the placement of trash or garbage into waters of the United States because trash and garbage are excluded from the regulatory definition of "fill material" (see 33 CFR 323.2(e)(3)). Operations and maintenance activities regulated by the Corps are considered during the pre-construction notification review process.

(e) Wetlands: The construction, maintenance, repair, or removal of oil or natural gas pipelines and associated facilities may result in the loss or alteration of wetlands. For the construction or maintenance of oil or natural gas pipelines impacts to wetlands are often temporary, unless the site contains forested wetlands that are not allowed to regenerate because of maintenance of the pipeline right-of-

way or because of permanent fills in wetlands. The construction of oil or natural gas pipeline rights-of-way through forested wetlands may result in the conversion of forested wetlands to scrub-shrub or emergent wetlands. Those conversions may be permanent to maintain the oil or natural gas pipeline in good, operational order. The conversion of wetlands to other types of wetlands may result in the loss of certain wetland functions, or the reduction in the level of wetland functions being performed by the converted wetland. District engineers have the authority to require mitigation to offset losses of wetland functions caused by regulated activities (see paragraph (i) of general condition 23, mitigation). The construction of oil or natural gas pipeline substations may result in the permanent loss of wetlands. Wetlands may also be converted to other uses and habitat types. Forested wetlands may not be allowed to grow back in the oil or natural gas pipeline right-of-way so that the oil or natural gas pipeline will not be damaged and can be easily maintained. Only shrubs and herbaceous plants may be allowed to grow in the right-of-way. Some wetlands may be temporarily impacted if those wetlands are located in temporary staging areas. These wetlands will normally be restored, unless the district engineer authorizes another use for the area, but the plant community may be different, especially if the site was originally forested.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The loss or alteration of wetlands may alter natural drainage patterns. Wetlands can reduce erosion by stabilizing the substrate. Wetlands can also act as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation may adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation can also provide habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, can act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water.

General condition 23 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation may be required to offset losses of waters of the United States so that the net adverse environmental effects are no more than minimal. General condition 22 prohibits the use of this NWP to discharge dredged or fill material in designated critical resource waters and adjacent wetlands, which may include high value wetlands. Division engineers can impose regional conditions on this NWP to restrict or prohibit its use in high value wetlands. District engineers can also exercise discretionary authority to require an individual permit if high value wetlands will be affected by the activity and the activity will result in more than minimal adverse environmental effects. District engineers may also add case-specific special conditions to the NWP authorization to reduce impacts to wetlands or require compensatory mitigation to offset losses of wetlands.

(f) Historic properties: General condition 20 states that in cases where the district

engineer determines that the proposed NWP activity may have the potential to cause effects to 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 have been satisfied.

(g) Fish and wildlife values: This NWP authorizes certain oil or natural gas pipeline activities in all waters of the United States. Discharges of dredged or fill material into waters of the United States for the construction of oil or natural gas pipeline substations is limited to non-tidal waters, excluding non-tidal waters adjacent to tidal waters. Waters of the United States often provide habitat to many species of fish and wildlife. Activities authorized by this NWP may alter the habitat characteristics of streams, wetlands, and other waters of the United States, which may decrease the quantity and quality of fish and wildlife habitat. The construction of oil or natural gas pipeline right-of-ways may fragment existing habitat and increase the amount of edge habitat in the area, causing changes in local species composition.

The construction or replacement of oil or natural gas pipelines and the establishment and maintenance of their rights-of-way may fragment terrestrial and aquatic ecosystems and may affect local fish and wildlife values. Habitat fragmentation may occur without a loss of habitat. For example, during the establishment of a pipeline right-of-way, a forested wetland may be converted to a herbaceous wetland without habitat loss. In this example, the herbaceous wetland may have different habitat functions than the forested wetland, but could still provide habitat for a number of species. In a review of studies that examined ecological responses to habitat fragmentation where the total amount of habitat did not change, Fahrig (2017) found that most of the ecological responses were positive. Examples of the positive ecological responses identified by Fahrig (2017) included increased habitat, diversity, increased functional connectivity, positive edge effects, enhanced stability of predator-prey relationships, and landscape complementation. Substations may leak fluids, or the liquids or gases carried by the oil or natural gas pipelines those substations support. predator-prey relationships, and landscape complementation. Substations may leak fluids, or the liquids or gases carried by the oil or natural gas pipelines those substations support.

Wetland, riparian, and estuarine vegetation often provides food and habitat for many species, including foraging areas, resting areas, corridors for wildlife movement, and nesting and breeding grounds. Open waters may provide habitat for fish and other aquatic organisms. Fish and other motile animals may avoid the project site during construction and maintenance. Woody riparian vegetation usually shades streams, which can reduce water temperature fluctuations and provide habitat for fish and other aquatic animals. Riparian and estuarine vegetation can provide organic matter that is consumed by fish and aquatic invertebrates. Woody riparian vegetation can create habitat diversity in streams when trees and large shrubs fall into the channel, forming snags that provide habitat and shade for fish. The morphology of a stream channel may be altered by activities authorized by this NWP, and subsequently affect fish populations. However, pre-construction

notification is required for certain activities authorized by this NWP, which will provide district engineers with opportunities to review those activities, assess potential impacts on fish and wildlife values, and ensure that the authorized activities result in no more than minimal adverse environmental effects.

Compensatory mitigation may be required by district engineers to restore, enhance, establish, and/or preserve wetlands to offset losses of waters of the United States. Stream rehabilitation, enhancement, and preservation activities may be required as compensatory mitigation for impacts to streams. The establishment and maintenance of riparian areas next to open and flowing waters may also be required as compensatory mitigation. These methods of compensatory mitigation are expected to provide fish and wildlife habitat values.

General condition 2 will reduce adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the necessary life cycle movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized activity has only minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized activity cannot have more than minimal adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

For an NWP activity, compliance with the Bald and Golden Eagle Protection Act (16 U.S.C. 668(a)-(d)), the Migratory Bird Treaty Act (16 U.S.C. 703; 16 U.S.C. 712), and the Marine Mammal Protection Act (16 U.S.C. 1361 et seq.) is the responsibility of the project proponent. General condition 19 states that 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.

Consultation pursuant to the essential fish habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act will occur as necessary for proposed NWP activities that may adversely affect essential fish habitat. Consultation may occur on a case-by-case or regional programmatic basis. Division and district engineers can impose regional and special conditions to ensure that activities authorized by this NWP will result in only minimal adverse effects on essential fish habitat.

(h) Flood hazards: The activities authorized by this NWP may affect the flood-holding capacity of the 100-year floodplain, including surface water flow velocities. Changes in the flood-holding capacity of the 100-year floodplain may impact human health, safety, and welfare. Compliance with general condition 9 will reduce flood hazards. This general condition requires the permittee to maintain, to the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters, except under certain circumstances. General condition 10 requires the

activity to comply with applicable FEMA-approved state or local floodplain management requirements. Much of the land area within 100-year floodplains is upland, and outside of the Corps scope of review.

(i) Floodplain values: Activities authorized by this NWP may adversely affect the flood-holding capacity of the floodplain, as well as other floodplain values. The fish and wildlife habitat values of floodplains may be adversely affected by activities authorized by this NWP, by modifying or eliminating areas used for nesting, foraging, resting, and reproduction. The water quality functions of floodplains may also be adversely affected by these activities. Modification of the floodplain may also adversely affect other hydrological processes, such as groundwater recharge.

Compensatory mitigation may be required for activities authorized by this NWP, which will offset losses of waters of the United States and provide water quality functions and wildlife habitat. General condition 23 requires avoidance and minimization of impacts to waters of the United States to the maximum extent practicable at the project site, which will reduce losses of floodplain values. The requirements of general condition 23 will minimize adverse effects to floodplain values, such as flood storage capacity, wildlife habitat, fish spawning areas, and nutrient cycling for aquatic ecosystems. Compliance with general condition 10 will ensure that authorized activities in 100-year floodplains will not cause more than no more than minimal adverse effects on flood storage and conveyance.

(j) Land use: Activities authorized by this NWP may change the land use from natural to developed. Activities authorized by this NWP may occur on lands that have already been substantially modified by human activities. The installation of oil or natural gas pipelines may induce more development in the vicinity of the project. Since the primary responsibility for land use decisions is held by state, local, and tribal governments, the Corps scope of review with respect to land use is limited to significant issues of overriding national importance, such as navigation and water quality (see 33 CFR 320.4(j)(2)).

(k) Navigation: Activities authorized by this NWP must comply with general condition 1, which states that no activity may cause more than minimal adverse effects on navigation. This NWP requires pre-construction notification for all activities in section 10 waters, which will allow the district engineer to review the pre-construction notification and determine if the proposed activity will adversely affect navigation.

Under paragraph (c) of general condition 1, the permittee may 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. The Corps may require these actions if, in the opinion of the Secretary of the Army or his or her authorized representative, the structure or work will cause unreasonable obstruction to the free navigation of the navigable waters.

(l) Shore erosion and accretion: The activities authorized by this NWP may have minor direct effects on shore erosion and accretion processes, since the NWP does not authorize the construction of oil or natural gas pipeline substations in tidal waters. The construction of oil or natural gas pipelines are likely to have only minimal adverse effects on shore erosion and accretion. However, NWP 13, regional general permits, or individual permits may be used to authorize bank stabilization projects associated with oil or natural gas pipeline activities, which may affect shore erosion and accretion.

(m) Recreation: Activities authorized by this NWP may change the recreational uses of the area. Certain recreational activities, such as bird watching, hunting, and fishing may no longer be available in the area. Changes in habitat caused by the activities authorized by this NWP, such as discharges of dredged or fill material into waters of the United States to construct an oil or natural gas pipeline right-of-way, may attract certain species of wildlife, such as birds and mammals, that prefer edge habitat, thereby potential increasing some recreational opportunities. Some oil or natural gas pipeline activities may eliminate certain other recreational uses of the area, such as camping and hiking.

(n) Water supply and conservation: Activities authorized by this NWP may adversely affect both surface water and groundwater supplies. Activities authorized by this NWP can also affect the quality of water supplies by adding pollutants to surface waters and groundwater, but many causes of water pollution, such as discharges regulated under Section 402 of the Clean Water Act, are outside the Corps' control and responsibility. Some water pollution concerns may be addressed through the water quality management measures that may be required for activities authorized by this NWP. Division and district engineers can prohibit the use of this NWP in watersheds for public water supplies, if it is in the public interest to do so. General condition 7 prohibits discharges in the vicinity of public water supply intakes. Compensatory mitigation may be required for activities authorized by this NWP, which may help improve the quality of surface waters. For oil or natural gas pipeline activities that involve horizontal directional drilling activities, this NWP authorizes activities that may necessary to remediate inadvertent returns of drilling fluids, to minimize the effects of those inadvertent returns on water supplies.

(o) Water quality: Oil or natural gas pipeline activities in wetlands and open waters may have adverse effects on water quality. These activities can result in increases in sediments and pollutants in the water. The loss of wetland and riparian vegetation may adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland and riparian vegetation can also provide habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, may act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water column. Wetlands and riparian areas may also decrease the velocity of flood waters, removing suspended sediments from the water column and reducing turbidity. Riparian vegetation can also serve an important role in the

water quality of streams by shading the water from the intense heat of the sun. Compensatory mitigation may be required for activities authorized by this NWP, to ensure that the activity does not have more than minimal adverse environmental effects, including water quality. Wetlands and riparian areas restored, established, enhanced, or preserved as compensatory mitigation may provide local water quality benefits.

A variety of pollutants might be released into the environment during the operation and maintenance of oil or natural gas pipelines. Those pollutants may be discharged through either point sources or non-point sources and reach jurisdictional waters and wetlands. Point-source discharges would likely require National Pollutant Discharge Elimination System Permits under Section 402 of the Clean Water Act, which is administered by U.S. EPA or by states with approved programs. Pollutants may also be discharged through spills and other accidents.

During the construction, maintenance, and repair of oil or natural gas pipelines and related activities, small amounts of oil and grease from construction equipment may be discharged into the waterway. Because most of the construction is likely to occur during a relatively short period of time, the frequency and concentration of these discharges are not expected to have more than minimal adverse effects on overall water quality. For oil or natural gas pipeline activities that involve horizontal directional drilling activities, this NWP authorizes activities that may necessary to remediate inadvertent returns of drilling fluids, to minimize the effects of those inadvertent returns on water quality.

Activities authorized by this NWP may require Section 401 water quality certification, since the NWP authorizes discharges of dredged or fill material into waters of the United States. Most water quality concerns are addressed by the state or tribal section 401 certifying authority. In accordance with general condition 25, the permittee may be required to implement water quality management measures to minimize the degradation of water quality. Water quality management measures may involve the installation of stormwater management facilities to trap pollutants and the establishment and maintenance of riparian areas next to waters of the United States. Riparian areas may help protect downstream water quality and enhance aquatic habitat.

(p) Energy needs: The oil or natural gas pipeline activities authorized by this NWP may induce higher rates of energy consumption in the area by making natural gas and petroleum products more readily available to consumers. Additional power plants or oil refineries may be needed to meet increases in energy demand, but these issues are beyond the Corps' control and responsibility. This NWP may be used to authorize the expansion of existing infrastructure to provide energy to new residential, commercial, and institutional developments, as well as other energy consumers.

(q) Safety: The oil or natural gas pipeline activities authorized by this NWP will be

subject to Federal, state, and local safety laws and regulations. Therefore, the activities authorized by this NWP are not likely to adversely affect the safety of the project area. The Federal Energy Regulatory Commission is responsible for ensuring that natural gas pipelines and aboveground facilities, such as substations, are safely constructed and installed. After the natural gas is flowing in the new system, the Department of Transportation's Pipeline and Hazardous Materials Safety Administration's. Operators of oil pipelines are required to comply with the Pipeline and Hazardous Materials Safety Administration's safety requirements, and have plans for addressing the risk of oil spills. Pipelines carrying other types of substances must comply with other applicable federal and state laws and regulations during their operations. For example, the Federal Energy Regulatory Commission regulates the interstate transmission of natural gas, and issues licenses for interstate natural gas pipelines.

(r) Food and fiber production: Activities authorized by this NWP may adversely affect food and fiber production, especially when oil or natural gas pipeline activities are constructed on agricultural land. Oil or natural gas pipelines often require easements, which may take some agricultural land out of production. These activities may reduce the amount of available farmland in the nation, unless that land is replaced by converting other land, such as forest, to agricultural land. The loss of farmland is more appropriately addressed through the land use planning and zoning authorities held by state and local governments. Food production may be increased by activities authorized by this NWP. For example, this NWP can authorize the construction or expansion of natural gas lines that provide energy to commercial food production facilities, such as bakeries, canneries, and meat processing plants.

(s) Mineral needs: Activities authorized by this NWP may increase demand for aggregates and stone, which may be used to construct oil or natural gas pipelines, substations, and access roads. Oil or natural gas pipeline activities authorized by this NWP may increase the demand for other building materials, such as steel, aluminum, and copper, which are made from mineral ores.

(t) Considerations of property ownership: The NWP complies with 33 CFR 320.4(g), which states that an inherent aspect of property ownership is a right to reasonable private use. The NWP provides expedited DA authorization for oil or natural gas pipeline activities, provided those activities comply with the terms and conditions of the NWP and result in no more than minimal adverse environmental effects. The owners or operators of oil or natural gas pipelines may obtain easements to place their oil or natural gas pipelines on lands they do not own.

6.2 Additional Public Interest Review Factors (33 CFR 320.4(a)(2))

6.2.1 Relative extent of the public and private need for the proposed structure or work

This NWP authorizes the construction, maintenance, repair, and removal of oil or natural gas pipelines and associated facilities, provided those activities have no more than minimal individual and cumulative adverse environmental effects. These activities typically satisfy public and private needs for the conveyance of oil or natural gas. The need for this NWP is based upon the number of these activities that occur annually with only minimal individual and cumulative environmental adverse effects.

6.2.2 Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work

Most situations in which there are unresolved conflicts concerning resource use arise when environmentally sensitive areas are involved (e.g., special aquatic sites, including wetlands) or where there are competing uses of a resource. The nature and scope of the activity, when planned and constructed in accordance with the terms and conditions of this NWP, reduce the likelihood of such conflict. In the event that there is a conflict, the NWP contains provisions that are capable of resolving the matter (see section 1.2 of this document).

General condition 23 requires permittees to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable on the project site. Consideration of off-site alternative locations is not required for activities that are authorized by general permits. General permits authorize activities that have only minimal individual and cumulative adverse effects on the environment and the overall public interest. The district engineer will exercise discretionary authority and require an individual permit if the proposed activity will result in more than minimal adverse environmental effects on the project site. The consideration of off-site alternatives can be required during the individual permit process.

6.2.3 The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited

The nature and scope of the activities authorized by the NWP will most likely restrict the extent of the beneficial and detrimental effects to the area immediately surrounding the oil or natural gas pipeline activity. Activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects because of the terms and conditions in this NWP, the pre-construction notification review process, regional and activity-specific conditions imposed by division and district engineers, and the authority of division and district engineers to modify, suspend, or revoke this NWP on a regional or activity specific basis to ensure that the authorized activities result in no more than minimal individual and cumulative adverse environmental effects.

The terms, conditions, and provisions of the NWP were developed to help ensure that individual and cumulative adverse environmental effects are no more than minimal. Specifically, NWPs do not obviate the need for the permittee to obtain other Federal, state, or local authorizations required by law. The NWPs do not grant any property rights or exclusive privileges (see 33 CFR 330.4(b) for further information). Additional conditions, limitations, restrictions, and provisions for discretionary authority, as well as the ability to add activity-specific or regional conditions to this NWP, will provide further safeguards to the aquatic environment and the overall public interest. There are also provisions to allow suspension, modification, or revocation of the NWP.

7.0 Endangered Species Act

No activity is authorized by any NWP if that activity is likely to jeopardize the continued existence of a threatened or endangered species as listed or proposed for listing under the Federal Endangered Species Act (ESA), or to destroy or adversely modify the critical habitat of such species (33 CFR 330.4(f)). If the district engineer determines a proposed NWP activity may affect listed species or designated critical habitat, he or she will conduct ESA section 7 consultation with the U.S. Fish and Wildlife Services (USFWS) and/or National Marine Fisheries Service (NMFS) as appropriate. The proposed NWP activity is not authorized until the ESA section 7 consultation process is completed or the district engineer determines the proposed NWP activity will have no effect on listed species or designated critical habitat. Current local procedures in Corps districts are effective in ensuring compliance with ESA. Those local procedures include regional programmatic consultations and the development of Standard Local Operating Procedures for Endangered Species (SLOPES). The issuance or reissuance of an NWP, as governed by NWP general condition 18 (which applies to every NWP and which relates to endangered and threatened species and critical habitat) and 33 CFR 330.4(f), results in “no effect” to listed species or critical habitat, because no activity that “may affect” listed species or critical habitat is authorized by NWP unless ESA Section 7 consultation with the USFWS and/or NMFS 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 under its regulations at 33 CFR part 326 to respond to the unauthorized activity. Unauthorized activities may also be subject to the prohibitions of Section 9 of the ESA.

Each activity authorized by an NWP is subject to general condition 18, which states that “[n]o 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

designated critical habitat or critical habitat proposed for such designation.” In addition, general condition 18 explicitly states that the NWP does not authorize “take” of threatened or endangered species, which will ensure that permittees do not mistake the NWP authorization as a Federal authorization to take threatened or endangered species. General condition 18 also requires a non-federal permittee to submit a pre-construction notification to the district engineer if any listed species or designated critical habitat (or proposed species or proposed critical habitat) might be affected or is in the vicinity of the project, or if the project is located in designated or proposed critical habitat. 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 USFWS’s and NMFS’s 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). Since “might” has a lower probability of occurring, it is below the threshold (i.e., “may affect”) that triggers the requirement for ESA section 7 consultation for a proposed Federal action. This general condition also states that, in such cases, non-federal permittees 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.

Under the current Corps regulations (33 CFR 325.2(b)(5)), the district engineer must review all permit applications for potential impacts on threatened and endangered species or critical habitat. For the NWP program, this review occurs when the district engineer evaluates the pre-construction notification or request for verification. Nationwide permit general condition 18 requires a non-federal applicant to submit a pre-construction notification to the Corps if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat (or critical habitat proposed for such designation). Based on the evaluation of all available information, the district engineer will initiate consultation with the USFWS or NMFS, as appropriate, if he or she determines that the proposed activity may affect any threatened and endangered species or designated critical habitat. Consultation may occur during the NWP authorization process or the district engineer may exercise discretionary authority to require an individual permit for the proposed activity and initiate section 7 consultation during the individual permit process. If the district engineer determines a proposed NWP activity is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat, he or she will initiate a conference with the FWS or NMFS. If ESA Section 7 consultation or conference is conducted during the NWP authorization process, then the applicant will be notified that he or she cannot proceed with the proposed NWP activity until section 7 consultation is completed.

If the district engineer determines that the proposed NWP activity will have no effect on any threatened or endangered species or critical habitat, then the district engineer will notify the applicant that he or she may proceed under the NWP

authorization as long as the activity complies with all other applicable terms and conditions of the NWP, including applicable regional conditions. When the Corps makes a “no effect” determination, that determination is documented in the record for the NWP verification.

In cases where the Corps makes a “may affect” determination, formal or informal Section 7 consultation is conducted before the activity is authorized by NWP. A non-federal permit applicant cannot begin work until notified by the Corps that the proposed NWP activity will have “no effect” on listed species or critical habitat, or until ESA Section 7 consultation has been completed (see also 33 CFR 330.4(f)). Federal permittees are responsible for complying with ESA section 7(a)(2) and should follow their own procedures for complying with those requirements (see 33 CFR 330.4(f)(1)). Therefore, permittees cannot rely on complying with the terms of an NWP without considering ESA-listed species and critical habitat, and they must comply with the NWP conditions to ensure that they do not violate the ESA. General condition 18 also states that district engineers may add activity-specific conditions to the NWPs to address ESA issues as a result of formal or informal consultation with the USFWS or NMFS.

Each year, the Corps conducts thousands of ESA section 7 consultations with the USFWS and NMFS for activities authorized by NWPs. These section 7 consultations are tracked in ORM. During the period of March 19, 2017, to October 20, 2020, Corps districts conducted 1,294 formal consultations and 8,233 informal consultations under NWP PCNs where the Corps verified that the proposed activities were authorized by NWP. During that time period, the Corps also used regional programmatic consultations for 21,677 NWP verifications to comply with ESA section 7. Therefore, each year an average of 8,700 formal, informal, and programmatic ESA section 7 consultations are conducted with the USFWS and/or NMFS in response to NWP PCNs, including those activities that required PCNs under paragraph (c) of general condition 18. In a study on ESA section 7 consultations tracked by the USFWS, Malcom and Li (2015) found that during the period of 2008 to 2015, the Corps conducted the most formal and informal section 7 consultations, far exceeding the numbers of section 7 consultations conducted by other federal agencies. For a linear project authorized by NWPs 12, 14, 57, or 58, where the district engineer determines that one or more crossings of waters of the United States that require Corps authorization “may affect” listed species or designated critical habitat, the district engineer usually initiates a single section 7 consultation with the USFWS and/or NMFS for all of those crossings that he or she determines “may affect” listed species or designate critical habitat. The number of section 7 consultations provided above represents the number of NWP PCNs that required some form of ESA section 7 consultation, not the number of single and complete projects authorized by NWP that may be included in a single PCN. A single NWP PCN may include more than one single and complete project, especially if it is for a linear project such as an oil or natural gas pipeline or road with multiple separate and distant crossings of jurisdictional waters and wetlands from its point of origin to its terminal point.

Section 7 consultations are often conducted on a case-by-case basis for activities proposed to be authorized by NWP that may affect listed species or critical habitat, in accordance with the USFWS's and NMFS's interagency regulations at 50 CFR part 402. Instead of activity-specific section 7 consultations, compliance with ESA may also be achieved through formal or informal regional programmatic consultations. Compliance with ESA Section 7 may also be facilitated through the adoption of NWP regional conditions. In some Corps districts SLOPES have been developed through consultation with the appropriate regional offices of the USFWS and NMFS to make the process of complying with section 7 more efficient.

Corps districts have, in most cases, established informal or formal procedures with local offices of the USFWS and NMFS, through which the agencies share information regarding threatened and endangered species and their critical habitat. This information helps district engineers determine if a proposed NWP activity may affect listed species or their critical habitat and, when a "may effect" determination is made, initiate ESA section 7 consultation. Corps districts may utilize maps or databases that identify locations of populations of threatened and endangered species and their critical habitat. Where necessary, regional conditions are added to one or more NWPs to require pre-construction notification for NWP activities that occur in known locations of threatened and endangered species or critical habitat. Any information provided by local maps and databases and any comments received during the pre-construction notification review process will be used by the district engineer to make a "no effect" or "may affect" determination for the pre-construction notification.

Based on the safeguards discussed in this section, especially general condition 18 and the NWP regulations at 33 CFR 330.4(f), the Corps believes that the activities authorized by this NWP comply with the ESA. Although the Corps continues to believe that these procedures ensure compliance with the ESA, the Corps has taken some steps to provide further assurance. Corps district offices meet with local representatives of the USFWS and NMFS to establish or modify existing procedures such as regional conditions, 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 SLOPES or other tools, additional safeguards that ensure compliance with the ESA. Through ESA Section 7 formal or informal consultations, the Corps ensures that no activity is authorized by any NWP if that activity is likely to jeopardize the continued existence of a threatened or endangered species as listed or proposed for listing under the ESA, or to destroy or adversely modify the critical habitat of such species. Other tools such as ESA section 7 conferences, SLOPES, the development of regional conditions added to the NWP by the division engineer, and conditions added to a specific NWP authorization by the district engineer help ensure compliance with the ESA.

If informal section 7 consultation is conducted, and the USFWS and/or NMFS

issues a written concurrence that the proposed activity may affect, but is not likely to adversely affect, listed species or designated critical habitat based on conservation measures incorporated in the project to avoid or minimize potential effects to ESA resources, the district engineer will add conditions (e.g., conservation measures) to the NWP authorization. If the USFWS and/or NMFS does not issue a written concurrence that the proposed NWP activity “may affect, but is not likely to adversely affect” listed species or critical habitat, the Corps will initiate formal section 7 consultation if it changes its determination to “may affect, likely to adversely affect.”

If formal section 7 consultation is conducted and a biological opinion is issued, the district engineer will add conditions to the NWP authorization to incorporate appropriate elements of the incidental take statement of the biological opinion into the NWP authorization, if the biological opinion concludes that the proposed NWP activity is not likely to jeopardize the continued existence of listed species or adversely modify or destroy critical habitat. If the biological opinion concludes that the proposed NWP activity is likely to jeopardize the continued existence of listed species or adversely modify or destroy critical habitat, the proposed activity cannot be authorized by NWP and the district engineer will instruct the applicant to apply for an individual permit. The incidental take statement includes reasonable and prudent measures and terms and conditions such as mitigation, monitoring, and reporting requirements that minimize incidental take. To fulfill its obligations under Section 7(a)(2) of the ESA, the Corps will determine which elements of an incidental take statement are appropriate to be added as permit conditions to the NWP authorization (see 33 CFR 325.4(a)). The appropriate elements of the incidental take statement are those reasonable and prudent measures and terms and conditions that: (1) apply to the activities over which the Corps has control and responsibility (i.e., structures or work in navigable waters and/or the discharges of dredged or fill material into waters of the United States), and (2) the Corps has the authority to enforce under its permitting authorities. Incorporation of the appropriate elements of the incidental take statement into the NWP authorization through binding, enforceable permit conditions may provide the project proponent an exemption from the “take” prohibitions in ESA Section 9 (see Section 7(o)(2) of the ESA).

The Corps can modify this NWP at any time that it is deemed necessary to protect listed species or their critical habitat, either through: 1) national general conditions or national-level modifications, suspensions, or revocations of the NWPs; 2) regional conditions or regional modifications, suspensions, or revocations of NWPs; or 3) activity-specific permit conditions (modifications) or activity-specific suspensions or revocations of NWP authorizations. Therefore, although the Corps has issued the NWPs, the Corps can address any ESA issue, if one should arise. The NWP regulations also allow the Corps to suspend the use of some or all of the NWPs immediately, if necessary, while considering the need for permit conditions, modifications, or revocations. These procedures are provided at 33 CFR 330.5.

8.0 Clean Water Act Section 404(b)(1) Guidelines Analysis

The 404(b)(1) Guidelines compliance criteria for general permits are provided at 40 CFR 230.7. This 404(b)(1) Guidelines compliance analysis includes analyses of the direct, secondary, and cumulative effects on the aquatic environment caused by discharges of dredged or fill material authorized by this NWP.

For activities authorized by general permits, the analysis and documentation required by the 404(b)(1) Guidelines are to be performed at the time of issuance of a general permit, such as an NWP. The analysis and documentation will not be repeated when activities are conducted under the NWP. The 404(b)(1) Guidelines do not require reporting or formal written communication at the time individual activities are conducted under an NWP, but a particular NWP may require appropriate reporting. [40 CFR 230.6(d) and 230.7(b)]

8.1 Evaluation Process (40 CFR 230.7(b))

8.1.1 Alternatives (40 CFR 230.10(a))

General condition 23 requires permittees to avoid and minimize discharges of dredged or fill material into waters of the United States to the maximum extent practicable on the project site. The consideration of off-site alternatives is not directly applicable to general permits (see 40 CFR 230.7(b)(1)).

8.1.2 Prohibitions (40 CFR 230.10(b))

This NWP authorizes discharges of dredged or fill material into waters of the United States, which may require water quality certification. Water quality certification requirements will be met in accordance with the procedures at 33 CFR 330.4(c).

No toxic discharges are authorized by this NWP. General condition 6 states that the material must be free from toxic pollutants in toxic amounts.

This NWP does not authorize discharges of dredged or fill material into waters of the United States that are likely to jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of critical habitat. Reviews of pre-construction notifications, regional conditions, and local operating procedures for endangered species will ensure compliance with the Endangered Species Act. Refer to general condition 18 and to 33 CFR 330.4(f) for information and procedures.

This NWP will not authorize discharges of dredged or fill material into waters of the United States that violate any requirement to protect any marine sanctuary. Refer to section 8.2.3(j)(1) of this document for further information.

8.1.3 Findings of Significant Degradation (40 CFR 230.10(c))

Potential impact analysis (Subparts C through F): The potential impact analysis specified in Subparts C through F is discussed in section 8.2.3 of this document. Mitigation required by the district engineer will ensure that the adverse effects on the aquatic environment caused by discharges of dredged or fill material into waters of the United States are no more than minimal.

Evaluation and testing (Subpart G): Because the terms and conditions of the NWP specify the types of discharges of dredged or fill material into waters of the United States that are authorized, as well as those that are prohibited, individual evaluation and testing for the presence of contaminants will normally not be required. If a situation warrants, provisions of the NWP allow division or district engineers to further specify authorized or prohibited discharges of dredged or fill material into waters of the United States and/or require testing. General condition 6 requires that materials used for construction be free from toxic pollutants in toxic amounts.

Based upon Subparts B and G, after consideration of Subparts C through F, and because NWPs can authorize only those discharges of dredged or fill material into waters of the United States that result in no more than minimal individual and cumulative adverse environmental effects, the discharges of dredged or fill material into waters of the United States authorized by this NWP will not cause or contribute to significant degradation of waters of the United States.

8.1.4 Factual determinations (40 CFR 230.11)

The factual determinations required in 40 CFR 230.11 are discussed in section 8.2.3 of this document.

8.1.5 Appropriate and practicable steps to minimize potential adverse impacts (40 CFR 230.10(d))

As demonstrated by the information in this document, as well as the terms, conditions, and provisions of this NWP, actions to minimize adverse effects (Subpart H) have been thoroughly considered and incorporated into the NWP. General condition 23 requires permittees to avoid and minimize discharges of dredged or fill material into waters of the United States to the maximum extent practicable on the project site. Compensatory mitigation may be required by the district engineer to ensure that the net adverse effects on the aquatic environment are no more than minimal.

8.2 Evaluation Process (40 CFR 230.7(b))

8.2.1 Description of permitted activities (40 CFR 230.7(b)(2))

As indicated by the text of this NWP in section 1.0 of this document, and the discussion of potential impacts in section 5.0, the activities authorized by this NWP are sufficiently similar in nature and environmental impact to warrant authorization under a single general permit. Specifically, the purpose of the NWP is to authorize discharges of dredged or fill material into waters of the United States for the construction, maintenance, repair, or removal of oil or natural gas pipelines and associated facilities. The nature and scope of the impacts are controlled by the terms and conditions of the NWP.

The activities authorized by this NWP are sufficiently similar in nature and environmental impact to warrant authorization by a general permit. The terms of the NWP authorize a specific category of activity (i.e., discharges of dredged or fill material for the construction, maintenance, repair, or removal of oil or natural gas pipeline activities and associated facilities) into a specific category of waters (i.e., waters of the United States subject to Clean Water Act jurisdiction). The terms of the NWP do not authorize discharges of dredged or fill material into waters of the United States for the construction of oil or natural gas pipeline substations in tidal waters or in non-tidal wetlands adjacent to tidal waters. The restrictions imposed by the terms and conditions of this NWP will result in the authorization of discharges of dredged or fill material into waters of the United States that have similar impacts on the aquatic environment, namely the replacement of aquatic habitats, such as certain categories of non-tidal wetlands, with oil or natural gas pipelines and associated facilities. Many of the impacts relating to the construction, maintenance, repair, or removal of oil or natural gas pipeline activities are likely to be temporary.

If a situation arises in which the discharges of dredged or fill material into waters of the United States require further review, or is more appropriately reviewed under the individual permit process, provisions of the NWPs allow division and/or district engineers to take such action.

8.2.2 Cumulative effects (40 CFR 230.7(b)(3))

The 404(b)(1) Guidelines at 40 CFR 230.11(a) define cumulative effects as "...the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material." For the issuance of general permits, such as this NWP, the 404(b)(1) Guidelines require the permitting authority to "set forth in writing an evaluation of the potential individual and cumulative impacts of the categories of activities to be regulated under the general permit." [40 CFR 230.7(b)] More specifically, the 404(b)(1) Guidelines cumulative effects assessment for the issuance or reissuance of a general permit is to include an evaluation of "the number of individual discharge activities likely to be regulated under a general permit until its expiration, including repetitions of individual discharge activities at a single location." [40 CFR 230.7(b)(3)] If a situation arises in which cumulative effects are likely to be more than minimal and the proposed discharges of dredged or fill material into waters of the United States require further

review, or is more appropriately reviewed under the individual permit process, provisions of the NWP allow division and/or district engineers to take such action.

Based on reported use of this NWP during the period of March 19, 2017, to March 18, 2019, the Corps estimates that this NWP will be used approximately 8,110 times per year on a national basis, resulting in permanent or temporary impacts to approximately 615 acres of waters of the United States, including jurisdictional wetlands. The reported use includes pre-construction notifications submitted to Corps districts, as required by the terms and conditions of the NWP as well as regional conditions imposed by division engineers. The reported use also includes voluntary notifications to submitted to Corps districts where the applicants request written verification in cases when pre-construction notification is not required. The reported use does not include activities that do not require pre-construction notification and were not voluntarily reported to Corps districts. The Corps estimates that 1,450 NWP 12 activities will occur each year that do not require pre-construction notification, and that these activities will impact 17 acres of jurisdictional waters each year.

Based on reported use of this NWP during that time period, the Corps estimates that 8 percent of the NWP 12 verifications will require compensatory mitigation to offset the authorized impacts to waters of the United States and ensure that the authorized activities result in only minimal adverse effects on the aquatic environment. The verified discharges of dredged or fill material into waters of the United States that do not require compensatory mitigation will have been determined by Corps district engineers to result in no more than minimal individual and cumulative adverse effects on the aquatic environment without compensatory mitigation. During the period of 2021-2026, the Corps expects little change to the percentage of NWP 12 verifications requiring compensatory mitigation, because there have been no substantial changes in the mitigation general condition or the NWP regulations for determining when compensatory mitigation is to be required for NWP activities. The Corps estimates that approximately 415 acres of compensatory mitigation will be required each year to offset authorized impacts. The demand for these types of activities could increase or decrease over the five-year duration of this NWP.

Based on these annual estimates, the Corps estimates that approximately 47,750 activities could be authorized over a five-year period until this NWP expires, resulting in impacts to approximately 3,160 acres of waters of the United States, including jurisdictional wetlands. Approximately 225 acres of compensatory mitigation would be required to offset those impacts. The authorized impacts are expected to result in only minor changes to the affected environment (i.e., the current environmental setting), which is described in section 4.0 of this document.

Compensatory mitigation is 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 (33 CFR 332.2). For discharges of dredged or fill material into waters of the United States authorized by NWPs, compensatory mitigation and other forms of mitigation may be used to ensure that the adverse environmental effects are no more than minimal, individually and cumulatively (33 CFR 330.1(e)(3); NWP general condition 23). Restoration is usually the first compensatory mitigation option considered because the likelihood of ecological success is greater (33 CFR 332.3(a)(2)). As discussed below, restoration of wetlands and streams can increase the ecological functions and services provided by those aquatic resources. However, restoration typically cannot return a degraded wetland or stream to a prior historic condition because of changes in environmental conditions at various scales over time (e.g., Higgs et al. 2014, Jackson and Hobbs 2009, Zedler and Kercher 2005; Palmer et al. 2014), and many of those environmental changes are beyond the control of the mitigation provider. Therefore, it is important to establish realistic goals and objectives for wetland and stream restoration projects (e.g., Hobbs 2007, Ehrenfeld 2000).

Rey Banayas et al. (2009) concluded that restoration activities can increase biodiversity and the level of ecosystem services provided. However, such increases do not approach the amounts of biodiversity and ecosystem services performed by undisturbed reference sites. The ability to restore ecosystems to provide levels of ecological functions and services similar to historic conditions or reference standard conditions is affected by human impacts (e.g., urbanization, agriculture) to watersheds or other landscape units and to the processes that sustain those ecosystems (Zedler et al. 2012, Hobbs et al. 2014). Those changes need to be taken into account when establishing goals and objectives for restoration projects (Zedler et al. 2012), including compensatory mitigation projects. The ability to reverse ecosystem degradation to restore ecological functions and services is dependent on the degree of degradation of that ecosystem and the surrounding landscape, and whether that degradation is reversible (Hobbs et al. 2014). Most studies of the ecological performance of compensatory mitigation projects have focused solely on the ecological attributes of the compensatory mitigation projects, and few studies have also evaluated the aquatic resources impacted by permitted activities (Kettlewell et al. 2008), so it is difficult to assess whether compensatory mitigation projects have fully or partially offset the lost functions provided by the aquatic resources that are impacted by permitted activities.

Wetland restoration, enhancement, and establishment projects can provide wetland functions, as long as the wetland compensatory mitigation project is placed in an appropriate landscape position, has appropriate hydrology for the desired wetland type, and the watershed condition will support the desired wetland type (NRC 2001). Site selection is critical to find a site with appropriate hydrologic conditions and soils to support a replacement wetland that will provide the desired wetland functions and services (Mitsch and Gosselink 2015). In a meta-analysis of 70 wetland restoration studies, Meli et al. (2014) concluded that wetland restoration activities increase biodiversity and ecosystem service provision in degraded

wetlands, but the degree of recovery is context dependent. They identified the following factors as influencing wetland restoration outcomes: wetland type, the main cause of degradation, the type of restoration action conducted, and the assessment protocol used to evaluate restoration outcomes. Moreno-Mateos et al. (2015) reviewed the recovery trajectories of 628 wetland restoration and creation projects and concluded that restoring or establishing wetland hydrology is of primary importance, and is more likely to be ecologically successful if wetland hydrology can be achieved by re-establishing water flows instead of extensive earthwork. In addition, they determined that, with respect to the plant community, natural revegetation is sufficient for recovery and development of most wetland types after wetland hydrology is restored or established.

The ecological performance of wetland restoration, enhancement, and establishment is dependent on practitioner's understanding of wetland functions, allowing sufficient time for wetland functions to develop, and allowing natural processes of ecosystem development (self-design or self-organization) to take place, instead of over-designing and over-engineering the replacement wetland (Mitsch and Gosselink 2015). The likelihood of ecological success in wetland restoration varies by wetland type, with the higher rates of success for coastal, estuarine, and freshwater marshes, and lower rates of success for forested wetlands and seagrass beds (Lewis et al. 1995). In its review, the NRC (2001) concluded that some wetland types can be restored or established (e.g., non-tidal emergent wetlands, some forested and scrub-shrub wetlands, seagrasses, and coastal marshes), while other wetland types (e.g., vernal pools, bogs, and fens) are difficult to restore and should be avoided where possible. Restored riverine and tidal wetlands achieved wetland structure and function more rapidly than depressional wetlands (Moreno-Mateos et al. 2012). Because of its greater potential to provide wetland functions, restoration is the preferred compensatory mitigation mechanism (33 CFR 332.3(a)(2)). Bogs, fens, and springs are considered to be difficult-to-replace resources and compensatory mitigation should be provided through in-kind rehabilitation, enhancement, or preservation of these wetlands types (33 CFR 332.3(e)(3)).

In its review of outcomes of wetland compensatory mitigation activities, the NRC (2001) stated that wetland functions can be replaced by wetland restoration and establishment activities. They discussed five categories of wetland functions: hydrology, water quality, maintenance of plant communities, maintenance of animal communities, and soil functions. It is difficult to restore or establish natural wetland hydrology, and water quality functions are likely to be different than the functions provided at wetland impact sites (NRC 2001). Reestablishing or establishing the desired plant community may be difficult because of invasive species colonizing the mitigation project site (NRC 2001). The committee also found that establishing and maintaining animal communities depends on the surrounding landscape. Soil functions can take a substantial amount of time to develop, because they are dependent on soil organic matter and other soil properties (NRC 2001). The NRC (2001) concluded that the ecological performance in replacing wetland functions

depends on the particular function of interest, the restoration or establishment techniques used, and the extent of degradation of the compensatory mitigation project site and its watershed.

The ecological performance of wetland restoration and enhancement activities is affected by the amount of changes to hydrology and inputs of pollutants, nutrients, and sediments within the watershed or contributing drainage area (Wright et al. 2006). Wetland restoration is becoming more effective at replacing or improving wetland functions, especially in cases where monitoring and adaptive management are used to correct deficiencies in these efforts (Zedler and Kercher 2005). Wetland functions take time to develop after the restoration or enhancement activity takes place (Mitsch and Gosselink 2015, Gebo and Brooks 2012), and different functions develop at different rates (Moreno-Mateos 2012, NRC 2001). Irreversible changes to landscapes, especially those that affect hydrology within contributing drainage areas or watersheds, cause wetland degradation and impede the ecological performance of wetland restoration efforts (Zedler and Kercher 2005). Gebo and Brooks (2012) evaluated wetland compensatory mitigation projects in Pennsylvania and compared them to reference standards (i.e., the highest functioning wetlands in the study area) and natural reference wetlands that showed the range of variation due to human disturbances. They concluded that most of the wetland mitigation sites were functioning at levels within with the range of functionality of the reference wetlands in the region, and therefore were functioning at levels similar to some naturally occurring wetlands. The ecological performance of mitigation wetlands is affected by on the landscape context (e.g., urbanization) of the replacement wetland and varies with wetland type (e.g., riverine or depressionnal) (Gebo and Brooks 2012). Moreno-Mateos et al. (2012) conducted a meta-analysis of wetland restoration studies and concluded that while wetland structure and function can be restored to a large degree, the ecological performance of wetland restoration projects is dependent on wetland size and local environmental setting. They found that wetland restoration projects that are larger in size and in less disturbed landscape settings achieve structure and function more quickly.

Under the Corps' regulations, streams considered to be are difficult-to-replace resources and compensatory mitigation should be provided through stream rehabilitation, enhancement, and preservation since those techniques are most likely to be ecologically successful (see 33 CFR 332.3(e)(3)). For the purposes of this section, the term "stream restoration" is used to cover river and stream rehabilitation and enhancement activities. Restoration can be done on large rivers and small streams, and sometimes entire stream networks (Wohl et al. 2015), in a variety of watershed land use settings, including urban and agricultural areas.

River and stream restoration activities can improve the functions performed by these aquatic ecosystems, and the ecosystem services they provide (Wohl et al. 2015, Beechie et al. 2010). Because of changes in land use and other changes in the watershed that have occurred over time, stream restoration can improve stream functions but cannot return a stream to a historic state (Wohl et al. 2015, Roni et al.

2008). Improvements in ecological performance of stream restoration projects is dependent on the restoration method and how outcomes are assessed (Palmer et al. 2014). The ability to restore the ecological functions of streams is dependent on the condition of the watershed draining to the stream being restored because human land uses and other activities in the watershed affect how that stream functions (Palmer et al. 2014). Ecologically successful stream restoration activities depend on addressing the factors that most strongly affect stream functions, such as water quality, water flow, and riparian area quality, rather than focusing solely on restoring the physical habitat of streams (Palmer et al. 2010, Roni et al. 2008), especially the stream channel.

To be effective, stream restoration activities need to address the causes of stream degradation, which are often within the watershed and outside of the stream channel (Palmer et al. 2014). Actions that focus on restoring processes and connectivity are more likely to be successful than channel reconfiguration efforts (Hawley 2018). Stream rehabilitation and enhancement projects, including the restoration and preservation of riparian areas, provide riverine functions (e.g., Allan and Castillo (2007) for rivers and streams, NRC (2002) for riparian areas). Ecologically effective stream restoration can be conducted by enhancing riparian areas, removing dams, reforestation, and implementing watershed best management practices that reduce storm water and agricultural runoff to streams (Palmer et al. 2014). Process-based stream restoration is intended to address the causes of stream degradation, and should be conducted at the appropriate scale for the cause of stream degradation, such as the watershed or stream reach (Beechie et al. 2010). Process-based stream restoration has substantial potential to re-establish the physical, chemical, and biological processes that sustain riverine ecosystems, including their floodplains (Beechie et al. 2010). Process-based stream restoration can also reduce long-term restoration costs (Beechie et al. 2013, Hawley 2018).

Restoration of incised streams can be accomplished allowing beavers to construct dams in these streams, or by placing structures in the stream channel that mimic the effects that beaver dams have on these streams (DeVries et al. 2012). Examples of stream restoration and enhancement techniques include: dam removal and modification, culvert replacement or modification, fish passage structures when connectivity cannot be restored or improved by dam removal or culvert replacement, levee removal or setbacks, reconnecting floodplains and other riparian habitats, road removal, road modifications, reducing sediment and pollution inputs to streams, replacing impervious surfaces with pervious surfaces, restoring adequate in-stream or base flows, restoring riparian areas, fencing streams and their riparian areas to exclude livestock, improving in-stream habitat, recreating meanders, and replacing hard bank stabilization structures with bioengineering bank stabilization measures (Roni et al. 2013). Miller and Kochel (2010) recommend that stream restoration projects allow the stream channel to self-adjust in response to changing hydrologic and sediment regimes in the watershed, and include other restoration actions such as re-establishing riparian areas next to the

stream channel and excluding livestock from the riparian area and stream channel. Large and medium sized rivers can be restored through various approaches, including levee setbacks, levee removal, or creating openings in levees, to restore or improve connectivity between the river and the floodplain, as well as other ecological and geomorphic processes (Wohl et al. 2015). Dam removal, as well as changes in dam operations that provide environmentally-beneficial flows of water and sediment, can also restore functions of rivers and larger streams (Wohl et al. 2015).

Hydrologic restoration can be more effective than in-stream habitat restoration projects (Hawley 2018) because they can help address alterations in watershed hydrology through land use and other watershed changes. Examples of hydrologic restoration approaches include reforestation, floodplain restoration, bankfull wetlands, detention basins, beaver reintroduction, and placement of large woody debris into the stream channel. Restoration actions outside of the stream channel, such as constructed wetlands, storm water management ponds, and revegetating riparian areas, can result in significant improvements in the biodiversity, community structure, and nutrient cycling processes of downstream waters (Smucker and Detenbeck 2014). Non-structural and structural techniques can be used to rehabilitate and enhance streams, and restore riparian areas (NRC 1992). Examples of non-structural stream restoration practices include removing disturbances to allow recovery of stream and riparian area structure and function, restoring natural stream flows by reducing or eliminating activities that have altered stream flows, preserving or restoring floodplains, and restoring and protecting riparian areas, including fencing to exclude livestock and people that can degrade riparian areas (NRC 1992).

Form based restoration efforts, such as channel reconfiguration, can cause substantial adverse impacts to riverine systems through earthmoving activities (which can cause substantial increases in sediment loads) and the removal of riparian trees and other vegetation, with little demonstrable improvements in stream functions (Palmer et al. 2014). In-stream habitat enhancement activities, such as channel reconfiguration and adding in-stream structures, have resulted in limited effectiveness in improving biodiversity in streams (Palmer et al. 2010). In an evaluation of 644 stream restoration projects, Palmer et al. (2014) concluded that stream channel reconfiguration does not promote ecological recovery of degraded streams, but actions taken within the watershed and in riparian areas to restore hydrological processes and reduce pollutant inputs to streams can improve stream functions and ecological integrity. Stream restoration activities should also include consideration of social factors, especially the people that live in the floodplain or near the river or stream (Wohl et al. 2015). These social factors may also impose constraints on what restoration actions can be taken.

Seagrass beds are dynamic ecosystems that can persist for long periods of time or change from season to season (Fonseca et al. 1998). Seagrass beds can be restored, but these restoration activities generally have lower rates of ecological

success than the restoration of other wetland types, such as estuarine and freshwater marshes (Lewis et al. 1995). The restoration and natural recovery of seagrasses requires consideration of addressing impediments that occur at various scales, including larger scale problems such as water quality and land use practices (Orth et al. 2006). The ecological success of seagrass restoration can be influenced by the dynamics of coastal environments and various stressors (e.g., reduced water quality/eutrophication, construction activities, dredging, other direct impact, natural disturbances) that affect seagrasses (van Katwijk et al. 2016). Realistic expectations should be established for seagrass restoration activities because of our limited understanding of seagrasses and the challenges of controlling conditions in open coastal waters (Fonseca 2011).

Site selection is critical for successful restoration of seagrasses (Fonseca 2011, Fonseca et al. 1998). Ecologically successful seagrass restoration is dependent on finding sites where seagrass beds recently existed (Fonseca et al. 1998). The ecological outcomes of seagrass restoration activities is also affected by the size of the restoration project, with larger restoration efforts more likely to be ecologically successful and sustainable because larger projects can produce positive feedbacks that facilitate the establishment and persistence of seagrasses (van Katwijk et al. 2016). At some proposed seagrass restoration sites, it may be infeasible to change the site from a stable unvegetated state to a stable vegetated state through seagrass planting efforts (Fonseca 2011). Small scale restoration activities may be overwhelmed by natural processes that prevent seagrasses from becoming reestablished (Fonseca 2011). Another impediment to ecologically successful seagrass restoration is bioturbation, which can impede natural seagrass recruitment (Fonseca 2011) or disturb plantings. Bioturbation can be caused by animals such as shrimp, crabs, ducks, fish, and urchins, and result in stable, unvegetated benthic habitats (Fonseca 2011).

Fonseca (2011) recommends locating seagrass restoration activities in areas with water depths similar to nearby natural seagrass beds, at a sufficient size to achieve restoration goals, with characteristics that are similar to those at other ecologically successful seagrass restoration projects, and where anthropogenic disturbances can be reduced or removed. Restoration of submersed aquatic vegetation beds requires taking actions to reduce inputs of sediment, nutrients, and organic matter into estuarine waters and avoiding physical damage from boating activities and fishing gear (Waycott et al. 2009). Controlling these stressors has been more effective at restoring seagrass beds than seagrass transplantation efforts (Waycott et al. 2009). Potential restoration sites need to have sufficient light, moderate nutrient loads, suitable salinity and water temperatures, available seeds and other propagules, and an absence of mechanical disturbances that will destroy or degrade plants (Fonseca et al. 1998). Seagrass recovery is affected by numerous factors, such as the characteristics of the target seagrass species, disturbance intensity, disturbance characteristic(s), environmental conditions, disturbance history, the condition of existing seagrass beds, population structure, reproductive capacity, timing, and feedbacks between biotic and abiotic components at the site

(O'Brien et al. 2018).

As discussed in section 4.0, the status of waters and wetlands in the United States as reported under the provisions of Sections 303(d) and 305(b) of the Clean Water Act exhibits considerable variation, ranging from “good” to “threatened” to “impaired.” One of the criteria that district engineers consider when they evaluate proposed NWP activities is the “degree or magnitude to which the aquatic resources perform these functions” (see paragraph 2 of Section D, “District Engineer’s Decision.” The quality of the affected waters is considered by district engineers when making decisions on whether to require compensatory mitigation for proposed NWP activities to ensure no more than minimal adverse environmental effects (see 33 CFR 330.1(e)(3)), and amount of compensatory mitigation required (see 33 CFR 332.3(f)). The quality of the affected waters also factors into the determination of whether the required compensatory mitigation offsets the losses of aquatic functions caused by the NWP activity.

The compensatory mitigation required by district engineers in accordance with general condition 23 and through activity-specific conditions added to the NWP authorization is expected to provide aquatic resource functions and services to offset some or all of the losses of aquatic resource functions caused by the activities authorized by this NWP, and reduce the incremental contribution of those activities to the cumulative effects on the Nation’s wetlands, streams, and other aquatic resources. The required compensatory mitigation must be conducted in accordance with the applicable provisions of 33 CFR part 332, which requires development and implementation of approved mitigation plans, as well as monitoring to assess ecological success in accordance with ecological performance standards established for the compensatory mitigation project. The district engineer will evaluate monitoring reports to determine if the compensatory mitigation project has fulfilled its objectives, is ecological successful, and offsets the permitted impacts. If the monitoring efforts indicate that the compensatory mitigation project is failing to meet its objectives, the district engineer may require additional measures, such as adaptive management or alternative compensatory mitigation, to address the compensatory mitigation project’s deficiencies. [33 CFR 332.7(c)]

According to Dahl (2011), during the period of 2004 to 2009 approximately 489,620 acres of former upland were converted to wetlands as a result of wetland reestablishment and establishment activities. Efforts to reestablish or establish wetlands have increased wetland acreage in the United States.

The individual and cumulative adverse effects on the aquatic environment resulting from the activities authorized by this NWP, including compliance with all applicable NWP general conditions as well as regional conditions imposed by division engineers and activity-specific conditions imposed by district engineers, are expected to be no more than minimal. The Corps expects that the convenience and time savings associated with the use of this NWP will encourage applicants to design their projects within the scope of the NWP, including its limits, rather than

request individual permits for projects that could result in greater adverse impacts to the aquatic environment. Division and district engineers will restrict or prohibit this NWP on a regional or case-specific basis if they determine that these activities will result in more than minimal individual and cumulative adverse effects on the aquatic environment.

8.2.3 Section 404(b)(1) Guidelines Impact Analysis, Subparts C through F

(a) Substrate: Discharges of dredged or fill material into waters of the United States may alter the substrate of those waters, and may replace the aquatic area with dry land and change the physical, chemical, and biological characteristics of the substrate. The original substrate may be removed or covered by other material, such as concrete, asphalt, soil, gravel, etc. Temporary fills may be placed upon the substrate, but must be removed upon completion of the activity (see general condition 13). Higher rates of erosion may result during construction, but general condition 12 requires the use of appropriate measures to control soil erosion and sediment.

(b) Suspended particulates/turbidity: Depending on the method of construction, soil erosion and sediment control measures, equipment, composition of the bottom substrate, and wind and current conditions during construction, fill material placed in open waters may temporarily increase water turbidity. Pre-construction notification is required for certain activities authorized by this NWP, which allows the district engineer to review those activities and ensure that the individual and cumulative adverse effects on the aquatic environment are no more than minimal. Particulates may be resuspended in the water column during removal of temporary fills. The turbidity plume may be limited to the immediate vicinity of the disturbance and should dissipate shortly after each phase of the construction activity. General condition 12 requires the permittee to stabilize exposed soils and other fills, which will reduce turbidity. In many localities, sediment and erosion control plans are required to minimize the entry of soil into the aquatic environment. Nationwide permit activities cannot create turbidity plumes that smother important spawning areas downstream (see general condition 3).

(c) Water: Discharges of dredged or fill material into waters of the United States for oil or natural gas pipeline activities may affect some characteristics of water, such as water clarity, chemical content, dissolved gas concentrations, pH, and temperature. The construction of oil or natural gas pipelines, oil or natural gas substations, and access roads may change the chemical and physical characteristics of the waterbody by introducing suspended or dissolved chemical compounds or sediments into the water. Changes in water quality has potential to affect the species and quantities of organisms inhabiting the aquatic area. Water quality certification is required for discharges of dredged or fill material into waters of the United States authorized by this NWP, which will help ensure that the discharge complies with applicable water quality requirements. Permittees may be required to implement water quality management measures to ensure that the

authorized discharge of dredged or fill material into waters of the United States does not result in more than minimal degradation of water quality. Stormwater management facilities may be required to prevent or reduce the input of harmful chemical compounds into the waterbody. The district engineer may require the establishment and maintenance of riparian areas next to open waters, such as streams. Riparian areas can help improve or maintain water quality, by removing nutrients, moderating water temperature changes, and trapping sediments.

(d) Current patterns and water circulation: Discharges of dredged or fill material into waters of the United States authorized by this NWP may adversely affect the movement of water in the aquatic environment. Certain oil or natural gas pipeline activities authorized by this NWP require pre-construction notification to the district engineer, who will review the proposed discharges of dredged or fill material to ensure that adverse effects to current patterns and water circulation are no more than minimal. General condition 9 requires the authorized activity to be designed to withstand expected high flows and to maintain the course, condition, capacity, and location of open waters to the maximum extent practicable. General condition 10 requires activities to comply with applicable FEMA-approved state or local floodplain management requirements, which will reduce adverse effects to surface water flows.

(e) Normal water level fluctuations: The discharges of dredged or fill material into waters of the United States authorized by this NWP may have adverse effects on normal patterns of water level fluctuations due to tides and flooding. Most oil or natural gas pipeline activities are likely to have little effect on normal water level fluctuations because they occupy a small proportion of the land surface or are installed under the surface of the substrate. The NWP requires the removal of temporary fills after completion of the authorized work, and restoration of affected areas to pre-construction elevations. General condition 9 requires the permittee to maintain the pre-construction course, condition, capacity, and location of open waters, to the maximum extent practicable. To ensure that the NWP does not authorize activities that adversely affect normal flooding patterns, general condition 10 requires NWP activities to comply with applicable FEMA-approved state or local floodplain management requirements.

(f) Salinity gradients: The discharges of dredged or fill material into waters of the United States authorized by this NWP may adversely affect salinity gradients, if the oil or natural gas pipelines are located in estuarine or marine waters. There may be an outfall structure associated with an oil or natural gas pipeline that could release freshwater into marine or estuarine waters, thereby altering the salinity of those waters in the vicinity of the outfall structure.

(g) Threatened and endangered species: No activity is authorized by any NWP if that activity is likely to jeopardize the continued existence of a threatened or endangered species as listed or proposed for listing under the Endangered Species Act of 1973, as amended, or to destroy or adversely modify the critical habitat of

such species. See 33 CFR 330.4(f) and paragraph (a) of general condition 18. For NWP activities, compliance with the Endangered Species Act is discussed in more detail in section 7.0 of this document.

(h) Fish, crustaceans, molluscs, and other aquatic organisms in the food web.

Certain discharges of dredged or fill material into waters of the United States authorized by this NWP require pre-construction notification to the district engineer, which will provide an opportunity for the district engineer to review certain proposed discharges and add permit conditions, such as mitigation measures, to ensure that adverse effects to fish and other aquatic organisms in the food web are no more than minimal. Fish and other motile animals are likely to avoid the project site during construction, repair, or removal activities. Sessile or slow-moving animals in the path of discharges, equipment, and building materials may be destroyed. Some aquatic animals may be smothered by the placement of dredged or fill material. Motile animals are likely to return to those areas that are temporarily impacted by the NWP activity and restored or allowed to revert back to preconstruction conditions. Aquatic animals might not return to sites of permanent fills. Benthic and sessile animals are likely to recolonize sites temporarily impacted by the activity, after those areas are restored. Discharges of dredged or fill material into waters of the United States that alter the riparian zone, especially floodplains, may adversely affect populations of fish and other aquatic animals, by altering stream flow, flooding patterns, and surface and groundwater hydrology.

Division and district engineers can add conditions to this NWP to prohibit discharges of dredged or fill material into waters of the United States during important stages of the life cycles of certain aquatic organisms. Such time of year restrictions can prevent adverse effects to these aquatic organisms during reproduction and development periods. General conditions 3 and 5 address protection of spawning areas and shellfish beds, respectively. General condition 3 states that activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. In addition, general condition 3 also prohibits activities that result in the physical destruction of important spawning areas. General condition 5 prohibits activities in areas of concentrated shellfish populations. General condition 9 requires the maintenance of pre-construction course, condition, capacity, and location of open waters to the maximum extent practicable, which will help minimize adverse impacts to fish, shellfish, and other aquatic organisms in the food web.

(i) Other wildlife: Discharges of dredged or fill material into waters of the United States authorized by this NWP may result in adverse effects to other wildlife associated with aquatic ecosystems, such as resident and transient mammals, birds, reptiles, and amphibians, through the destruction of aquatic habitat, including breeding and nesting areas, escape cover, travel corridors, and preferred food sources. This NWP does not authorize discharges of dredged or fill material that are likely to jeopardize the continued existence of Federally-listed endangered and threatened species or result in the destruction or adverse modification of critical

habitat. Compensatory mitigation, including the establishment and maintenance of riparian areas next to open waters, may be required for discharges of dredged or fill material into waters of the United States authorized by this NWP, which will help offset losses of aquatic habitat for wildlife. General condition 4 requires that activities in breeding areas for migratory birds must be avoided to the maximum extent practicable.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: General condition 22 prohibits the use of this NWP to discharge dredged or fill material in NOAA-managed marine sanctuaries and marine monuments and National Estuarine Research Reserves. The district engineer will exercise discretionary authority and require an individual permit for proposed discharge of dredged or fill material into waters of the United States in sanctuaries and refuges if he or she determines that the proposed discharge will result in more than minimal adverse effects on the aquatic environment.

(2) Wetlands: District engineers will review pre-construction notifications for certain discharges of dredged or fill material into waters of the United States authorized by this NWP to ensure that the adverse effects on wetlands are no more than minimal. Some activities authorized by this NWP (e.g., discharges of dredged or fill material into jurisdictional wetlands to construct oil or natural gas pipeline substations, permanent access roads, or foundations to support above-ground oil or natural gas pipelines, may result in permanent wetland losses. Some discharges of dredged or fill material into waters of the United States authorized by this NWP may result in temporary impacts to wetlands, and those wetlands will be restored to pre-construction elevations after temporary fills are removed, and revegetated as appropriate. Some discharges of dredged or fill material into waters of the United States authorized by this NWP may convert wetlands to different types (e.g., a forested wetland to an herbaceous or scrub-shrub wetland), which may occur in an oil or natural gas pipeline right-of-way. For some discharges of dredged or fill material into waters of the United States authorized by this NWP, there may be losses of wetlands in cases where the authorized discharge of dredged or fill material involves permanent fills in jurisdictional wetlands to convert those areas to dry land. Division engineers may add regional conditions to this NWP to restrict or prohibit its use in certain high value wetlands. Compensatory mitigation may be required by district engineers to offset wetland losses authorized by this NWP. See paragraph (e) of section 6.1 for a more detailed discussion of impacts to wetlands.

(3) Mud flats: Discharges of dredged or fill material into waters of the United States authorized by this NWP may result in temporary or permanent impacts to mud flats, if the discharge of dredged or fill material into waters of the United States for the construction, maintenance, repair, and removal of oil and natural gas pipelines and associated facilities occurs in coastal waters. Small portions of mud flats may be destroyed by the construction or repair of oil or natural gas pipelines.

Some impacts to mudflats authorized by this NWP may convert portions of a mudflat to another habitat type. Pre-construction notification is required for certain discharges of dredged or fill material into waters of the United States authorized by this NWP and the pre-construction notification must include a delineation of special aquatic sites, including mud flats. District engineers will review these pre-construction notifications and determine whether the proposed discharges will result in no more than minimal individual and cumulative adverse effects on the aquatic environment.

(4) Vegetated shallows: Discharges of dredged or fill material into waters of the United States authorized by this NWP may result in temporary or permanent adverse effects to vegetated shallows. District engineers will receive pre-construction notifications for all oil or natural gas pipeline activities in section 10 waters to determine if those discharges of dredged or fill material into waters of the United States will result in only minimal adverse effects on the aquatic environment, including vegetated shallows in navigable waters. Division engineers can add regional conditions to this NWP to restrict or prohibit its use in vegetated shallows. For those discharges of dredged or fill material into waters of the United States that require pre-construction notification, the district engineer will review the proposed discharge and may exercise discretionary authority to require the project proponent to obtain an individual permit if he or she determines the proposed discharge will result in more than minimal adverse effects on the aquatic environment.

(5) Coral reefs: Discharges of dredged or fill material into waters of the United States authorized by this NWP may result in permanent or temporary impacts to coral reefs. Pre-construction notification is required for all section 10 activities authorized by this NWP, so that the district engineer can review each proposed discharge of dredged or fill material into waters of the United States and ensure that it results in no more minimal adverse environmental effects on the aquatic environment, including coral reefs. If the proposed discharge of dredged or fill material into waters of the United States will result in more than minimal adverse effects on the aquatic environment, the district engineer will exercise discretionary authority to require the project proponent to obtain an individual permit. Division engineers may also add regional conditions to this NWP to restrict or prohibit its use in coral reefs.

(6) Riffle and pool complexes: Some discharges of dredged or fill material into waters of the United States authorized by this NWP, such as stream crossings for oil or natural gas pipelines, may result in permanent or temporary impacts to riffle and pool complexes. This NWP requires the removal of temporary fills after the authorized work has been completed, and restoration of the affected area to pre-construction elevations. Division engineers can add regional conditions to this NWP to restrict or prohibit its use in riffle and pool complexes. Pre-construction notification is required for certain discharges of dredged or fill material into waters of the United States for oil or natural gas pipeline activities authorized by this NWP, which will allow district engineers to review those proposed discharges. If the district

engineer determines the adverse environmental effects caused by the proposed discharge of dredged or fill material into waters of the United States are more than minimal, he or she will exercise discretionary authority to require the project proponent to obtain an individual permit.

(k) Municipal and private water supplies: See paragraph (n) of section 6.1 for a discussion of potential impacts to water supplies.

(l) Recreational and commercial fisheries, including essential fish habitat: The discharges of dredged or fill material into waters of the United States authorized by this NWP may adversely affect waters of the United States that act as habitat for populations of economically important fish and shellfish species. Division and district engineers can add conditions to this NWP to prohibit discharges during important life cycle stages, such as spawning or development periods, of economically valuable fish and shellfish. All oil or natural gas pipeline activities requiring section 10 authorization require submission of pre-construction notifications to the district engineer, which will allow review of each discharge in navigable waters to ensure that adverse effects to economically important fish and shellfish are no more than minimal. Compliance with general conditions 3 and 5 will ensure that the authorized activity does not adversely affect important spawning areas or concentrated shellfish populations. As discussed in paragraph (g) of section 6.1, there are procedures to help ensure that individual and cumulative impacts to essential fish habitat are no more than minimal. For example, division and district engineers can impose regional and activity-specific conditions to ensure that discharges of dredged or fill material into waters of the United States authorized by this NWP will result in only minimal adverse effects on essential fish habitat.

(m) Water-related recreation: See paragraph (m) of section 6.1 above.

(n) Aesthetics: See paragraph (c) of section 6.1 above.

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: General condition 22 prohibits the use of this NWP to authorize discharges of dredged or fill material in designated critical resource waters and adjacent wetlands, which may be located in parks, national and historical monuments, national seashores, wilderness areas, and research sites. This NWP can be used to authorize discharges of dredged or fill material into waters of the United States in parks, national and historical monuments, national seashores, wilderness areas, and research sites if the manager or caretaker wants to conduct discharges of dredged or fill material into waters of the United States and those activities result in no more than minimal adverse effects on the aquatic environment. Division engineers can add regional conditions to the NWP to prohibit its use in designated areas, such as national wildlife refuges or wilderness areas.

9.0 Determinations

9.1 Finding of No Significant Impact

Based on the information in this document, the Corps has determined that the discharges of dredged or fill material into waters of the United States and structures and work in navigable waters of the United States authorized by the issuance of this NWP will not have a significant impact on the quality of the human environment. During the five-year period this NWP will be in effect, the activities authorized by this NWP will result in only minor changes to the affected environment described in section 4.0 of this environmental assessment. Therefore, the preparation of an environmental impact statement is not required for the issuance of this NWP.

9.2 Public Interest Determination

In accordance with the requirements of 33 CFR 320.4, the Corps has determined, based on the information in this document, that the issuance of this NWP 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 for oil or natural gas pipeline activities is not contrary to the public interest.

9.3 Section 404(b)(1) Guidelines Compliance

This NWP has been evaluated for compliance with the 404(b)(1) Guidelines, including Subparts C through G. Based on the information in this document, the Corps has determined that the discharges authorized by this NWP comply with the 404(b)(1) Guidelines, with the inclusion of appropriate and practicable conditions, including mitigation measures required by the NWP general conditions, that minimize adverse effects on affected aquatic ecosystems. The discharges of dredged or fill material into waters of the United States authorized by this NWP will result in only minor changes to the current environmental setting described in section 4.0 of this document, and will have no more than minimal individual and cumulative adverse effects on the aquatic environment during the 5-year period this NWP is in effect.

9.4 Section 176(c) of the Clean Air Act General Conformity Rule Review

This issuance of this NWP has been analyzed for conformity applicability pursuant to regulations implementing Section 176(c) of the Clean Air Act. It has been determined that the activities authorized by this permit will not exceed de minimis levels of direct emissions of a criteria pollutant or its precursors and are exempted

by 40 CFR 93.153. Any later indirect emissions are generally not within the Corps continuing program responsibility and generally cannot be practicably controlled by the Corps. For these reasons, a conformity determination is not required for this NWP.

FOR THE COMMANDER

Dated: 4 January 2021

A handwritten signature in blue ink, appearing to read "W H G Jr", with a stylized flourish at the end.

William H. Graham Jr.
Major General, U.S. Army
Deputy Commanding General for Civil and
Emergency Operations

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