DECISION DOCUMENT
NATIONWIDE PERMIT 39

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 impacts, 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

Commercial and Institutional Developments. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of commercial and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, storm water management facilities, and recreation facilities such as playgrounds and playing fields. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The construction of new golf courses and new ski areas is not authorized by this NWP.

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (Sections 10 and 404)

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

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 Authority

- 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

NWPs are a type of general permit designed to authorize certain activities that have minimal individual and cumulative adverse effects on the aquatic environment and generally comply with the related laws cited in 33 CFR 320.3. Activities that result in more than minimal individual and cumulative adverse effects on the aquatic environment 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: 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). 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 prohibits the use of an NWP with other NWPs, except when the acreage loss of waters of the United States does not exceed the highest specified acreage limit of the NWPs used to authorize the single and complete project.

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 NWPs; 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 water quality certification. 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. 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 Comment and Response

For a summary of the public comments received in response to the February 16, 2011,

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 February 16, 2011, 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 clarify that the 300 linear foot limit for losses of intermittent and ephemeral stream bed can only be waived if the district engineer makes a written determination concluding that the discharge will result in minimal adverse effects.

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

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

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

The pre-construction notification requirement is necessary so that all of these activities are reviewed by district engineers to ensure that those activities result in minimal adverse effects on the aquatic environment. District engineers may add conditions to the NWP authorization to require compensatory mitigation or other measures to comply with the minimal adverse environmental effects requirement established for general permits. District engineers may consider information from state natural heritage databases where appropriate when evaluating a pre-construction notification involving a proposed waiver of the 300 linear foot limit.

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

We believe that both the 1/2-acre limit and the 300 linear foot limit are necessary to ensure that this NWP authorizes activities that result only in minimal individual and cumulative adverse effects on the aquatic environment. Division engineers can regionally condition this NWP to further ensure only minimal adverse effects to the aquatic environment occur in a particular area or region, based on region specific conditions. District engineers can also add

specific conditions to an NWP authorization to ensure minimal individual or cumulative adverse effects. The statutory basis for authorizing activities by general permits is that they have minimal adverse effects, individually and cumulatively, not that they be water dependent.

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

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

One commenter objected to authorizing the expansion of commercial and institutional developments into waters of the United States, stating that it discourages avoidance and

minimization and is contrary to the 404(b)(1) Guidelines. One commenter requested clarification whether this NWP applies to new project construction or existing construction projects so the acreage limits are applied cumulatively for both the original construction and any subsequent expansion of the development. One commenter asked whether certain categories of activities that were not authorized by the 2007 version of NWP 39, specifically new golf courses, new ski areas, or oil or gas wells, could be expanded through the authorization provided by this NWP. Three commenters suggested eliminating the exclusion for the construction of oil and gas wells and attendant features.

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

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

We have added a Note at the end of this NWP to require district engineers to send pre-construction notifications and NWP verification letters to the Department of Defense Siting Clearinghouse if NWP 39 is proposed to be used, and is used, to authorize the construction of wind energy generating structures, solar towers, or overhead transmission lines. The Department of Defense Siting Clearinghouse is responsible for coordinating with the project proponent and resolving any potential effects on Department of Defense long range surveillance, homeland defense, testing, and training missions.

2.0 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.

2.1 No Action Alternative (No Nationwide Permit)

The no action alternative would not achieve one of the goals of the Corps Nationwide Permit Program, which is to reduce the regulatory burden on applicants for activities that result in minimal individual and cumulative adverse effects on the aquatic environment. 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 the Corps exercising its 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 minimal adverse effects on the aquatic environment, the Corps typically does not receive responses to these public notices from either the public or Federal, Tribal, and state resource agencies. 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 projects to comply with the NWPs and avoid the delays and costs typically associated with the individual permit process.

In the absence of this NWP, Department of the Army (DA) authorization in the form of another general permit (i.e., regional or programmatic general permits, where available) or individual permits would be required. Corps district offices may develop regional general permits if an NWP is not available, but this is an impractical and inefficient method for activities with minimal individual and cumulative adverse effects on the aquatic environment that are conducted across the Nation. Not all districts would develop these regional general permits for a variety of reasons. The regulated public, especially those companies that conduct activities in more than one Corps district, would be adversely affected by the widespread use of regional general permits because of the greater potential

for lack of consistency and predictability in the authorization of similar activities with minimal individual and cumulative adverse effects on the aquatic environment. These companies would incur greater costs in their efforts to comply with different regional general permit requirements between Corps districts. Nevertheless, in some states Corps districts have issued programmatic general permits to take the place of this and other NWPs. However, this approach only works in states with regulatory programs comparable to the Corps Regulatory Program.

2.2 National Modification Alternatives

Since the Corps Nationwide Permit program began in 1977, the Corps has continuously strived to develop NWPs that authorize activities that result only in minimal individual and cumulative adverse effects on the aquatic environment. Every five years the Corps reevaluates the NWPs during the reissuance process, and may modify an NWP to address concerns for the aquatic environment. Utilizing collected data and institutional knowledge concerning activities authorized by the Corps regulatory program, the Corps reevaluates the potential impacts of activities authorized by NWPs. The Corps also uses substantive public comments on proposed NWPs to assess the expected impacts. This NWP was developed to authorize the construction of building pads and foundations for commercial and institutional developments, as well as their attendant features, that have minimal individual and cumulative adverse effects on the aquatic environment. 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 the preamble of the Federal Register notice announcing the reissuance of this NWP.

In the February 16, 2011, Federal Register notice, the Corps requested comments on the proposed reissuance of this NWP. The Corps proposed to modify this NWP to clarify that the 300 linear foot limit for losses of intermittent and ephemeral stream bed can only be waived if the district engineer makes a written determination concluding that the discharge will result in minimal adverse effects.

2.3 Regional Modification Alternatives

An important aspect for the NWPs is the emphasis on regional conditions to address differences in aquatic resource functions, services, and values across the nation. All Corps divisions and districts are expected to add regional conditions to the NWPs to enhance protection of the aquatic environment and address local concerns. Division engineers can also revoke an NWP if the use of that NWP results in more than minimal adverse effects on the aquatic environment, especially in high value or unique wetlands and other waters.

Corps divisions and districts also monitor and analyze the cumulative adverse effects of the NWPs, and if warranted, further restrict or prohibit the use of the NWPs to ensure that the NWPs do not authorize activities that result in more than minimal adverse effects on the aquatic environment. 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 NWPs, as well as substantive public comments, to assess the individual and cumulative adverse effects on the aquatic environment resulting from regulated activities.

2.4 Case-specific On-site Alternatives

Although the terms and conditions for this NWP have been established at the national level to authorize most activities that have minimal individual and cumulative adverse effects on the aquatic environment, division and district engineers have the authority to impose case-specific special conditions on NWP authorizations to ensure that the authorized activities will result in minimal individual and cumulative adverse effects.

General condition 23 requires the permittee to minimize and avoid impacts to waters of the United States to the maximum extent practicable on the project site. Off-site alternatives cannot be considered for activities authorized by NWPs. During the evaluation of a pre-construction notification, the district engineer may determine that additional avoidance and minimization is practicable. The district engineer may also condition the NWP authorization to require compensatory mitigation to offset losses of waters of the United States and ensure that the net adverse effects on the aquatic environment are minimal. As another example, the NWP authorization can be conditioned to prohibit the permittee from conducting the activity during specific times of the year to protect spawning fish and shellfish. If the proposed activity will result in more than minimal adverse effects on the aquatic environment, then the district engineer will exercise discretionary authority and require an individual permit. Discretionary authority can be asserted where there are concerns for the aquatic environment, including high value aquatic habitats. The individual permit review process requires a project-specific alternatives analysis, including the consideration of off-site alternatives, and a public interest review.

3.0 Affected Environment

The affected environment consists of terrestrial and aquatic ecosystems. The total land area in the United States is approximately 2,300,000,000 acres, and the total land area in the contiguous United States is approximately 1,894,000,000 acres (Lubowski et al. 2006) . Land uses in 48 states of the contiguous United States as of 2002 is provided in Table 3.1 (Lubowski et al. 2006). In the contiguous United States, approximately 67 percent of the land is privately owned, 31 percent is held by the United States government, and two percent is owned by state or local governments (Dale et al. 2000). Developed non-federal lands comprise 4.4 percent of the total land area of the contiguous United States (Dale et al. 2000).

Table 3.1. Agricultural and non-agricultural land uses in the 48 states (Lubowski et al. 2006).

Land Use	Acres	Percent of Total
Agriculture	1,171,000,000	61.8
Forest land	425,000,000	22.4
Transportation use	27,000,000	1.4
Recreation and wildlife areas	100,000,000	5.3
National defense areas	15,000,000	0.8
Urban land	59,000,000	3.1
Miscellaneous use	97,000,000	5.1
Total land area	**1,894,000,000**	**100.0**

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 also http://www.fgdc.gov/standards/projects/FGDC-standards-projects/wetlands/fgdc-announce , accessed December 12, 2011). 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 less than two meters deep.

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 coastline. 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).

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 3.2.

Table 3.2. 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).

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 2009) 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. The land use determined by 2007 NRI is summarized in Table 3.3. The 2007 NRI estimates that there are 110,671,500 acres of palustrine and estuarine wetlands on non-Federal land and water areas in the United States (USDA 2009). The 2007 NRI estimates that there are 48,471,100 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 3.3. The 2007 National Resources Inventory acreages for palustrine and estuarine wetlands on non-federal land, by land cover/use category (USDA 2009).

National Resources Inventory Land Cover/Use Category	Area of Palustrine and Estuarine Wetlands (acres)
cropland, pastureland, and Conservation Reserve Program land	16,790,300
forest land	66,043,100
rangeland	7,940,300
other rural land	14,744,800
developed land	1,571,900
water area	3,581,100
Total	110,671,500

The land cover/use categories used by the 2007 NRI are defined below (USDA 2009). Croplands are areas used to produce crops adapted 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, by stream order. This estimate does not include many small streams. Many small streams are not mapped on 1:24,000 scale U.S. Geological Survey topographic maps (Leopold 1994) or included in other analyses (Meyer and Wallace 2001). In a study of stream mapping in the southeastern United States, only 20% 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). For a 1:24,000 scale topographic map, the smallest tributary found by using 10-foot contour

interval has drainage area of 0.7 square mile and length of 1,500 feet, and smaller channels are common throughout the United States (Leopold 1994). 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 may be classified as "waters of the United States."

The USFWS status and trends study does not assess the condition or quality of wetlands and deepwater habitats (Dahl 2011). The Nation's aquatic resource base is underestimated by the USFWS status and trends study, the National Wetland Inventory (NWI), and studies that estimate the length or number of stream channels within watersheds (see above). The status and trends study does not include Alaska and Hawaii. The underestimate by the status and trends study and the NWI results from the minimum size of wetlands detected through remote sensing techniques and the difficulty of identifying certain wetland types through those remote sensing techniques. The NWI maps do not show small or linear wetlands (Tiner 1997) that may be directly impacted by activities authorized by NWPs. For the latest USFWS status and trends study, most of the wetlands identified are larger than 1 acre, but the minimum size of detectable wetlands varies by wetland type (Dahl 2011). Some wetland types less than one acre in size can be identified; the smallest wetland detected for the most recent status and trends report was 0.1 acre (Dahl 2011). Because of the limitations of remote sensing techniques, certain wetland types are not included in the USFWS status and trends study: seagrass beds, submerged aquatic vegetation, submerged reefs, and certain types of forested wetlands (Dahl 2011). Therefore, activities authorized by NWPs 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.

Information on water quality in waters and wetlands, as well as the causes of water quality impairment, is collected by the U.S. Environmental Protection Agency (U.S.EPA) under sections 305(b) and 303(d) of the Clean Water Act. Table 3.4 provides U.S. EPA's most recent national summary of water quality in the Nation's waters and wetlands.

Table 3.4. The 2010 national summary of water quality data (U.S. EPA 2012).

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	965,693 miles	27.3	445,079 miles	6,369 miles	514,246 miles
Lakes, reservoirs and ponds	41,666,049 acres	18,796,765 acres	45.1	5,833,964 acres	38,681 acres	12,924,120 acres
Bays and estuaries	87,791 square miles	32,830 square miles	37.4	11,045 square miles	17 square miles	21,768 square miles
Coastal shoreline	58,618 miles	9,143 miles	15.6	1,746 miles	0 miles	7,396 miles
Ocean and near coastal waters	54,120 square miles	1,275 square miles	2.4	968 square miles	0 square miles	307 square miles
Wetlands	107,700,000 acres	1,311,645 acres	1.2	208,944 acres	805 acres	1,101,895 acres
Great Lakes shoreline	5,202 miles	4,431 miles	85.2	78 miles	0 miles	4,353 miles
Great Lakes open waters	60,546 square miles	53,332 square miles	88.1	62 square miles	0 square miles	53,270 square miles

According to the 2010 national summary (U.S. EPA 2012), 53% of assessed rivers and streams, 66% of assessed bays and estuaries, 81% of assessed coastal shoreline, 24% of assessed ocean and near coastal waters, and 84% of assessed wetlands are impaired.

For rivers and streams, 34 causes of impairment were identified, and the top 10 causes were pathogens, sediment, nutrients, organic enrichment/oxygen depletion, polychlorinated biphenyls, habitat alterations, metals (excluding mercury), mercury, flow alterations, and temperature. The primary sources of impairment for the assessed rivers and streams were agriculture, atmospheric deposition, unknown sources, hydrology modification, urban-related runoff/stormwater, wildlife, municipal discharges/sewage, unspecified non-point sources, habitat alterations, and resource extraction.

For wetlands, 27 causes of impairment were identified, and the top 10 causes were organic enrichment/oxygen depletion, pathogens, mercury, metals (excluding mercury), habitat alterations, nutrients, flow alterations, toxic inorganics, total toxics, and sediment. The primary sources for wetland impairment were "unknown," wildlife, municipal discharges/sewage, agriculture, atmospheric deposition, industrial, hydrology modifications, resource extraction, other, and unspecified non-point sources.

Most causes and sources of impairment 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. 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.

Not all of the Nation's aquatic resources are subject to regulatory jurisdiction under Section 404 of the Clean Water Act. Waters of the United States subject to Section 404 of the Clean Water Act are defined at 33 CFR part 328. Some wetlands are not subject to Clean Water Act jurisdiction because they do not meet the criteria at Part 328. In its decision in *Solid Waste County of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the U.S. Supreme Court ruled that Clean Water Act jurisdiction does not apply to isolated, intrastate, non-navigable waters based on their use as habitat for migratory birds. Tiner (2003) estimated that in some areas of the country, the proportion of wetlands that are geographically isolated, and may not be subject to Clean Water Act jurisdiction is approximately 20 to 50 percent of the wetland area, and there are other areas where more than 50 percent of the wetlands are geographically isolated. Geographically isolated wetlands comprise a substantial proportion of the wetlands found in regions with arid, semi-arid, and semi-humid climates, as well as areas with karst topography (Tiner 2003). However, it is difficult to determine from maps or aerial photographs whether wetlands are hydrologically isolated from other waters, because there may be small surface hydrologic connections that are not included on those maps or detected by those photographs (Tiner 2003). The scope of waters subject to Clean Water Act jurisdiction has also been affected by the U.S. Supreme Court decision in the consolidated cases of *Rapanos v. U.S.* and *Carabell v. U.S.*, but there have been no formal studies to estimate the proportion of wetlands, streams, and other aquatic resources that may have been affected by that decision.

This NWP authorizes discharges of dredged or fill material into non-tidal waters of the United States, but it does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters. These waters are included in the palustrine, lacustrine, and riverine systems of the Cowardin classification system.

Wetland functions are the biophysical processes that occur within a wetland (King et al. 2000). Wetlands provide many functions, such as habitat for fish and shellfish, habitat for waterfowl and other wildlife, habitat for rare and endangered species, food production, plant production, flood conveyance, flood-peak reduction, flood storage, shoreline stabilization, water supply, ground water recharge, pollutant removal, sediment accretion, and nutrient uptake (NRC 1992).

Functions provided by streams include sediment transport, water transport, transport of nutrients and detritus, habitat for many species of plants and animals (including endangered or threatened species), and maintenance of biodiversity (NRC 1992). Streams also provide hydrologic functions, nutrient cycling functions, food web support, and corridors for movement of aquatic organisms (Allan and Castillo 2007).

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).

Activities authorized by this NWP will provide a wide variety of goods and services that are valued by society. Commercial developments provide facilities for the exchange of goods and services, such as shopping centers, retail outlets, small businesses, business offices, and repair facilities. Institutional developments provide facilities for medical care, law enforcement, dental services, education, community services, and government services. This NWP may also be used to authorize the construction and maintenance of roads, utility lines, and other infrastructure associated with the commercial or institutional development, but other NWPs may be used to authorize these activities.

4.0 Environmental Consequences

4.1 General Evaluation Criteria

This document contains a general assessment of the foreseeable effects of the individual activities authorized by this NWP and the anticipated cumulative effects of those activities. 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 supplemental documentation provided by division engineers will address how regional conditions affect the individual and cumulative effects of the 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. Therefore, it is difficult to predict all of the 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 waters of the United States may be used to fulfill a variety of project purposes. 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. Only the reasonably foreseeable direct or indirect effects are included 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 locally important factors or to ensure that the authorized activity results in no more than minimal individual and cumulative adverse effects on the aquatic environment. 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 activities that may affect endangered or threatened species or critical habitat.

4.2 Impact Analysis

This NWP authorizes discharges of dredged or fill material into non-tidal waters of the United States for the construction and expansion of building pads and foundations and attendant features for commercial and institutional facilities. This NWP does not authorize discharges of dredged or fill material into tidal waters or non-tidal wetlands adjacent to tidal waters. The acreage limit for this NWP is 1/2 acre. This NWP also limits the loss of stream bed to no more than 300 linear feet, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects.

Pre-construction notification is required for all activities authorized by this NWP. The pre-construction notification requirement allows district engineers to review proposed activities on a case-by-case basis to ensure that the individual and cumulative adverse effects of those activities on the aquatic environment are minimal. If the district engineer determines that the adverse effects of a particular project are more than minimal after considering mitigation, then discretionary authority will be asserted and the applicant will be notified that another form of DA authorization, such as a regional general permit or individual permit, is required (see 33 CFR 330.4(e) and 330.5).

Additional conditions can be placed on proposed activities on a regional or case-by-case basis to ensure that the activities have minimal individual and cumulative adverse effects on the aquatic environment. Regional conditioning of 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 minimal individual and cumulative adverse effects on the aquatic environment, 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), lower pre-construction notification thresholds, or require pre-construction notification for some or all NWP activities in certain watersheds or types of waters. Specific NWPs can also be revoked on a geographic or watershed basis where the individual and cumulative adverse 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) add regional conditions to the NWP to ensure that the individual and cumulative adverse environmental effects are minimal; or 4) 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 effects on the aquatic environment are minimal. NWPs can authorize activities in high value waters as long as the individual and cumulative adverse effects on the aquatic environment are minimal.

The construction and use of fills for temporary access for construction may be authorized by NWP 33 or regional general permits issued by division or district engineers. The related activity must meet the terms and conditions of the specified permit(s). If the discharge 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)]

4.3 Cumulative Effects

The Council on Environmental Quality's NEPA regulations define cumulative effects as: "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." [40 CFR 1508.7.] Therefore, the NEPA cumulative effects analysis for an NWP is not limited to activities authorized by the NWP or other DA permits and includes Federal and non-Federal activities that affect the Nation's wetlands, streams, and other aquatic resources. The cumulative effects analysis should focus on specific categories of resources instead of the environmental effects caused by a particular action, and it requires identification of the stressors that cause degradation of those resources, including those caused by actions unrelated to the proposed action (CEQ 1997). The geographic scope of the cumulative impacts analysis is the United States and its territories, where the NWP may be used to authorize specific activities that require DA authorization. The temporal scope of the cumulative effects analysis includes past actions that have affected the Nation's wetlands, streams, and other aquatic resources, as well as present actions and reasonably foreseeable future actions that are affecting, or will affect, wetlands, streams, and other aquatic resources. The present effects of past federal, non-federal, and private actions are included in the affected environment, which is described in Section 3.0. The affected environment includes current aggregate effects of past actions, which are captured in recent national information on the quantity and quality of wetlands, streams, and other aquatic

resources that is summarized in Section 3.0.

In addition to the activities authorized by this NWP, there are many activities that contribute to cumulative effects on wetlands, streams, and other aquatic resources in the United States, and alter the quantity of those resources and the functions they provide. Activities authorized by past versions of NWP 39, as well as other NWPs, individual permits, letters of permission, and regional general permits have resulted in direct and indirect impacts to wetlands, streams, and other aquatic resources. Those activities may have legacy effects that have added to the cumulative effects and affected the quantity of those resources and the functions they provide. Discharges of dredged or fill material that do not require DA permits because they are exempt from section 404 permit requirements can also adversely affect the quantity of the Nation's wetlands, streams, and other aquatic resources and the functions they provide. Discharges of dredged or fill material that convert wetlands, streams, and other aquatic resources to upland areas result in permanent losses of aquatic resource functions. 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.

Cumulative effects to wetlands, streams, and other aquatic resources in the United States are not limited to the effects caused by 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. Other federal, non-federal, and private activities also contribute to the cumulative effects to wetlands, streams, and other aquatic resources, by changing the quantity of those resources and the functions they provide. Cumulative effects to wetlands, streams, and other aquatic resources are the result of landscape-level processes (Gosselink and Lee 1989). As discussed in more detail below, cumulative 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).

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). 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 (Allen 2004). Agriculture is the primary cause of stream impairment, followed by urbanization (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.

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). 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).

Coastal waters are also affected by a wide variety of activities. Most inland waters in the United States drain to coastal areas, and therefore activities that occur in inland watersheds affect coastal waters (NRC 1994). 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). 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). 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 (Millennium Ecosystem Assessment 2005). 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 (Millennium Ecosystem Assessment 2005). The introduction of non-native species may change the functions and structure of coastal wetlands and other habitats

(Millennium Ecosystem Assessment 2005). 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). 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). Fishing activities may also modify coastal habitats by changing habitat structure and the biological communities that inhabit those areas (NRC 1994).

There is also little information on the ecological condition or the Nation's wetlands, streams, and other aquatic resources, or the amounts of functions they provide, although reviews have acknowledged that most of these resources are degraded (Zedler and Kercher 2005, Allan 2004) or impaired (U.S. EPA 2012) because of various activities and other stressors. These data deficiencies make it more difficult to characterize the affected environment to assess cumulative effects.

As discussed in Section 3.0 of this document 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 2012), which also contribute to cumulative effects to 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.

Many of the activities discussed in this cumulative effects section that affect wetlands, streams, and other aquatic resources are not subject to regulation under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act of 1899.

Dahl (1990) estimates that approximately 53 percent of the wetlands in the conterminous United States were lost in the 200-year period covering the 1780s to 1980s. 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% of wetland losses (61,630 acres), rural development resulted in 12% of wetland losses (66,940 acres), silviculture accounted for 56% of wetland losses (307,340 acres), and wetland conversion to deepwater

habitats caused 21% 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 (389,600 acres during 2004 to 2009) (Dahl 2011). Inventories of wetlands, streams, and other aquatic resources are incomplete because the techniques used cannot identify some of those resources (e.g., Dahl (2011) for wetlands; Meyer and Wallace (2001) for streams).

Compensatory mitigation required by district engineers for specific activities authorized by this NWP will help reduce the contribution of those activities to the cumulative effects 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. Compensatory mitigation requirements for the NWPs are described in general condition 23 and 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. 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 contribution of this NWP to the cumulative effects to aquatic resources in the United States during the five year period that the NWP would be in effect, in terms of the estimated number of time this NWP would be used until it expires and the projected impacts and compensatory mitigation, is provided in Section 6.2.2. The activities authorized by this NWP will result in minor contributions to the cumulative effects that have occurred to wetlands, streams, and other aquatic resources in the United States because, as discussed in this section, they are one of many activities that affect those resources. The causes of cumulative effects discussed in this section include past, present, and reasonably foreseeable future federal, non-federal, and private activities. For the national-scale cumulative effects analysis presented in this section, it is not possible to quantify the relative contributions of the various activities that affect the quantity of wetlands, streams, and other aquatic resources and the functions they provide, because such data are not available at the national scale.

In a specific watershed, division or district engineers may determine that the cumulative adverse 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 effects. Division and district engineers have the authority to require individual permits in watersheds or other geographic areas where the cumulative adverse 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 effects are 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 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 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, will help reduce cumulative effects to the Nation's wetlands, streams, and other aquatic resources.

5.0 Public Interest Review

5.1 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, will result in the restoration, enhancement, establishment, or preservation of aquatic habitats that will offset losses of conservation values. The adverse effects of activities authorized by this NWP on conservation will be minor.

(b) Economics: The construction or expansion of commercial and institutional developments will 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. Commercial developments provide locations for businesses to conduct transactions, manufacture goods, and provide services.

Commercial and institutional developments provide places for people to work. Attendant features associated with these types of developments will provide employment opportunities for the operation and maintenance of these facilities. These developments also change the value of the land, and can benefit the surrounding community through profits earned from tourism. Developments authorized by this NWP will also benefit the community by improving the local economic base, which is affected by employment, tax revenues, community services, and property values.

(c) Aesthetics: Commercial and institutional development activities will alter the visual character of some waters of the United States. The extent and perception of these changes will vary, depending on the size and configuration of the development, the nature of the surrounding area, and the public uses of the area. Developments 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 will also alter local aesthetic values.

(d) General environmental concerns: Activities authorized by this NWP will 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. The adverse effects of the activities authorized by this NWP on general environmental concerns will be minor. 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 effects on the aquatic environment are minimal. Specific environmental concerns are addressed in other sections of this document.

(e) Wetlands: Activities authorized by this NWP may result in the loss or alteration of wetlands. This NWP does not authorize activities in tidal wetlands or in non-tidal wetlands adjacent to tidal waters. In most cases, the affected wetlands will be permanently filled, especially where buildings, roads, utilities, and other permanent fills are located, resulting in the permanent loss of aquatic resource functions and values. Wetlands may also be converted to other uses and habitat types. Some areas of the development will be graded and filled to install lawns and ornamental plants, which will replace the wetlands in those areas. Some wetlands may be temporarily impacted by the activity through the use of temporary staging areas and access roads. These wetlands will 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. For NWP 39 activities requiring pre-construction notification, compensatory mitigation may be required to offset the loss of wetlands and ensure that the adverse effects to the aquatic environment are minimal.

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 reduce erosion by stabilizing the substrate. Wetlands also act

as storage areas for stormwater and flood waters. Wetlands may act as groundwater discharge or recharge areas. The loss of wetland vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, 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 by district engineers to ensure that the net adverse effects on the aquatic environment are 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 regionally condition this NWP to restrict or prohibit the use of this NWP in high value non-tidal wetlands. District engineers will also exercise discretionary authority to require an individual permit if the wetlands to be filled are high value and the activity will result in more than minimal adverse effects on the aquatic environment. District engineers can also add case-specific special conditions to the NWP authorization to provide protection to wetlands or require compensatory mitigation to offset losses of wetlands.

(f) Historic properties: General condition 20 states that the NWPs cannot authorize activities that affect historic properties listed, or eligible for listing in, the National Register of Historic Places, until the district engineer has complied with the Corps current procedures for addressing the requirements of Section 106 of the National Historic Preservation Act.

(g) Fish and wildlife values: This NWP authorizes activities in non-tidal waters of the United States, including non-tidal wetlands and streams, which provide habitat to many species of fish and wildlife. Activities authorized by this NWP may alter the habitat characteristics of streams and wetlands, decreasing the quantity and quality of fish and wildlife habitat. Wetland and riparian vegetation provides food and habitat for many species, including foraging areas, resting areas, corridors for wildlife movement, and nesting and breeding grounds. Open waters provide habitat for fish and other aquatic organisms. Woody riparian vegetation shades streams, which reduces water temperature fluctuations and provides habitat for fish and other aquatic animals. Riparian vegetation provides organic matter that is consumed by fish and aquatic invertebrates. Woody riparian vegetation creates 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, which can affect fish populations. However, pre-construction notification is required for all activities authorized by this NWP, which provides the district engineer with an opportunity to review the proposed activity and assess potential impacts on fish and wildlife values and ensure that the authorized activity results in minimal adverse effects on the aquatic environment. Compensatory mitigation may be required by district engineers to restore, enhance, establish, and/or preserve wetlands to offset losses of jurisdictional wetlands. Stream rehabilitation,

enhancement, and preservation activities may be required as compensatory mitigation for impacts to streams. Riparian areas next to open and flowing waters may also be required as compensatory mitigation. These methods of compensatory mitigation will provide fish and wildlife habitat values.

General condition 2 will reduce the adverse effects to fish and other aquatic species by prohibiting activities that substantially disrupt the movement 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 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.

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.), including any requirements to obtain take permits, is the responsibility of the project proponent for a particular NWP activity. General condition 19 states that the permittee is responsible for obtaining any "take" permits required under the U.S. Fish and Wildlife Service's regulations governing compliance with the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act.

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 programmatic basis. Division and district engineers can impose regional and special conditions to ensure that activities authorized by this NWP will result in minimal adverse effects on essential fish habitat.

(h) Flood hazards: The activities authorized by this NWP may affect the flood-holding capacity of 100-year floodplains, including surface water flow velocities. Changes in the flood-holding capacity of 100-year floodplains may impact human health, safety, and welfare. To minimize these adverse effects, general condition 10 requires authorized activities to comply with any applicable FEMA-approved sate or local floodplain management requirements. Compliance with general condition 9 will also 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. 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 affect the flood-holding capacity of the floodplain, as well as other floodplain values. The fish and wildlife habitat values of floodplains will 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. Since each activity authorized by this NWP requires pre-

construction notification, district engineers will review the proposed activities to ensure that those activities result in minimal adverse effects on the aquatic environment.

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 mitigation requirements of general condition 23 will help ensure that the adverse effects of these activities on floodplain values are minimal. The requirements of general condition 10 will minimize adverse effects to the flood storage capacity of 100-year floodplains. Compliance with general condition 9 will also ensure that activities in 100-year floodplains will not cause more than minimal adverse effects on flood storage and conveyance.

(j) Land use: Activities authorized by this NWP will often change the land use from natural to developed. The change in land use will alter the character of the area, usually resulting in the loss of open space. The general public will benefit from the public buildings that will be authorized by this permit. Changes in land use to commercial and institutional developments will, in most cases, provide economic benefits for the surrounding community. These developments may induce further development on nearby parcels of land. Since the primary responsibility for land use decisions is held by state, local, and Tribal governments, the Corps scope of review 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 will not adversely affect navigation, because these activities must comply with general condition 1. This NWP requires pre-construction notification for all activities, which will allow district engineers to review proposed activities and determine if there will be any adverse effects on navigation. If these developments are built near navigable waters, there may be secondary effects to navigation because new piers, marinas, or boat ramps may be constructed to satisfy the needs for navigable access for the users of the commercial and institutional developments.

(l) Shore erosion and accretion: The activities authorized by this NWP will have minor direct effects on shore erosion and accretion processes, since the NWP is limited to activities in non-tidal waters. However, NWP 13, regional general permits, or individual permits may be used to authorize bank stabilization projects associated with commercial or institutional developments, 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, but other recreational facilities, such as playgrounds, playing fields, and golf courses, may be constructed as part of the commercial or institutional development and provide recreational activities in the area. Some developments may eliminate recreational uses of the area.

(n) Water supply and conservation: Activities authorized by this NWP may adversely affect both surface water and groundwater supplies. Developments authorized by this NWP will increase demand for potable water in the region. The construction of building pads, foundations, and attendant features such as roads and parking lots will increase the amount of impervious surface in the area, which may decrease replenishment of 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 scope of review. Some water pollution concerns can be addressed through the water quality management measures that may be required for activities authorized by this NWP. The quantity and quality of local water supplies may be enhanced through the construction of water treatment facilities. 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 will help improve the quality of surface waters.

(o) Water quality: Commercial and institutional development activities in wetlands and open waters may have adverse effects on water quality. These activities can result in increases in nutrients, sediments, and pollutants in the water. The loss of wetland and riparian vegetation will adversely affect water quality because these plants trap sediments, pollutants, and nutrients and transform chemical compounds. Wetland and riparian vegetation also provides habitat for microorganisms that remove nutrients and pollutants from water. Wetlands, through the accumulation of organic matter, act as sinks for some nutrients and other chemical compounds, reducing the amounts of these substances in the water column. Wetlands and riparian areas also decrease the velocity of flood waters, removing suspended sediments from the water column and reducing turbidity. Riparian vegetation also serves 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 those activities do not have more than minimal adverse effects on the aquatic environment, including water quality. Wetlands and riparian areas restored, established, enhanced, or preserved as compensatory mitigation may provide local water quality benefits.

During construction of these developments, small amounts of oil and grease from construction equipment may be discharged into the waterway. Because most of the construction will 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.

This NWP requires a Section 401 water quality certification, since it 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 agency. In accordance with general condition 25, the permittee may be required to develop and implement water quality management measures that minimizes the degradation of the downstream aquatic environment, including water quality. The district engineer may require water quality management measures to

ensure that adverse effects to water quality are minimal. Water quality management measures may involve the installation of stormwater management facilities to trap pollutants and the establishment and maintenance of vegetated buffers next to open waters. The establishment and maintenance of riparian areas may be required for activities authorized by the NWP, if there are streams or other open waters on the project site. The riparian areas will protect downstream water quality and enhance the aquatic habitat.

(p) Energy needs: The developments authorized by this NWP may increase energy consumption in the area, especially electricity, natural gas, and petroleum products. Additional power plants or oil refineries may be needed to meet increases in energy demand, but these issues are beyond the Corps scope of review. Existing infrastructure may have to be expanded to provide energy to new developments. The installation of utility lines to the authorized development is likely to have minimal adverse effects on the aquatic environment.

(q) Safety: The developments authorized by this NWP will be subject to Federal, state, and local safety laws and regulations. Therefore, this NWP will not adversely affect the safety of the project area.

(r) Food and fiber production: Activities authorized by this NWP may adversely affect food and fiber production, especially where commercial and institutional developments are constructed on farmland. The construction of building pads and attendant features on farmland reduces the amount of available agricultural land in the nation, unless that land is replaced by converting other land, such as forest, to agricultural land. The loss of farmland is outside of the Corps scope of review. On the other hand, food production may be increased by activities authorized by this NWP. For example, this NWP can authorize the construction or expansion of facilities used for commercial food production, such as bakeries, canneries, and meat processing plants.

(s) Mineral needs: Activities authorized by this NWP may increase demand for aggregates and stone, which are used to construct buildings and roads. Developments 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 discharges of dredged or fill material to construct commercial and institutional developments, provided the activity complies with the terms and conditions of the NWP and results in minimal adverse effects on the aquatic environment.

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

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

This NWP authorizes discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for commercial and institutional developments, including their attendant features, that have minimal individual and cumulative adverse effects on the aquatic environment. These activities satisfy public and private needs for places to conduct commercial and institutional activities. The need for this NWP is based upon the number of these activities that occur annually with minimal individual and cumulative adverse effects on the aquatic environment.

5.2.2 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 minimal individual and cumulative adverse effects on the aquatic environment and overall public interest. District engineers will exercise discretionary authority and require an individual permit if the proposed activities 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.

5.2.3 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 commercial or institutional development. Activities authorized by this NWP will have minimal individual and cumulative adverse effects on the aquatic environment.

The terms, conditions, and provisions of the NWP were developed to ensure that individual and cumulative adverse environmental effects are 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.

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

The 404(b)(1) compliance criteria for general permits are provided at 40 CFR 230.7.

6.1 Evaluation Process (40 CFR 230.7(b))

6.1.1 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.

6.1.2 Prohibitions (40 CFR 230.10(b))

This NWP authorizes discharges of dredged or fill material into waters of the United States, which 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 will be 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 activities that 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 the violation of any requirement to protect any marine sanctuary. Refer to section 6.2.3(j)(1) of this document for further information.

6.1.3 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 6.2.3 of this document. Mitigation required by the district engineer will ensure that the adverse effects on the aquatic environment are minimal.

Evaluation and testing (Subpart G): Because the terms and conditions of the NWP specify the types of discharges 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 and/or require testing.

Based upon Subparts B and G, after consideration of Subparts C through F, the discharges authorized by this NWP will not cause or contribute to significant degradation of waters of the United States.

6.1.4 Factual determinations (40 CFR 230.11)

The factual determinations required in 40 CFR 230.11 are discussed in section 6.2.3 of this document.

6.1.5 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 minimal.

6.2 Evaluation Process (40 CFR 230.7(b))

6.2.1 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 4.0, 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 or expansion of commercial and institutional building pads and foundations and attendant features. 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 or expansion of commercial and institutional developments and their attendant features) in a specific category of waters (i.e., non-tidal waters, except for non-tidal wetlands adjacent to tidal waters). The restrictions imposed by the terms and conditions of this NWP will result in

the authorization of activities that have similar impacts on the aquatic environment, namely the replacement of aquatic habitats, such as certain categories of non-tidal wetlands, with commercial or institutional structures and attendant features that provide support and amenities for those commercial or institutional developments.

If a situation arises in which the activity requires 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.

6.2.2 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)] If a situation arises in which cumulative effects are likely to be more than minimal and the proposed activity requires 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.

Based on reported use of this NWP during the period of August 1, 2009, to July 31, 2010, the Corps estimates that this NWP will be used approximately 700 times per year on a national basis, resulting in impacts to approximately 110 acres of waters of the United States, including jurisdictional wetlands. The Corps estimates that approximately 350 acres of compensatory mitigation will be required to offset these impacts. The demand for these types of activities could increase or decrease over the five-year duration of this NWP. Using the current trend, approximately 3,500 activities could be authorized over a five year period until this NWP expires, resulting in impacts to approximately 550 acres of waters of the United States, including jurisdictional wetlands. Approximately 1,750 acres of compensatory mitigation would be required to offset those impacts. Compensatory mitigation is the restoration (re-establishment or rehabilitation), establishment, 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]

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). The success of wetland restoration, enhancement, and establishment is dependent on the technical expertise of the mitigation provider, allowing sufficient time for wetland structure and functions to develop, and recognizing the ability for ecosystems to undergo self-design during their development (Mitsch and Gosselink 2007). Most studies of compensatory mitigation success 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 has fully or partially offset the lost functions provided by the aquatic resources that are impacted by permitted activities. In its review, the NRC (2001) concluded that some wetland types can be successfully restored or established (e.g., non-tidal emergent wetlands, some forested and scrub-shrub wetlands, sea grasses, and coastal marshes), while other wetland types (e.g., vernal pools, bogs, and fens) are difficult to restore and should be avoided where possible. Because of its greater potential to successfully 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. Wetland functions develop at different rates in wetland restoration and establishment projects (NRC 2001). 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 success of 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 success 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 successful, especially in cases where monitoring and adaptive management are used to correct deficiencies in these efforts (Zedler and Kercher 2005). Irreversible changes to landscapes, especially those that affect hydrology within contributing drainage areas or watersheds , cause wetland degradation and impede the success of wetland restoration efforts (Zedler and Kercher 2005).

Streams 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 successful (see 33 CFR 332.3(e)(3)). Stream rehabilitation is usually the most effective compensatory mitigation mechanism since restoring a stream to a historic state is not possible because of changes in land use and other activities in a watershed (Roni et al. 2008). 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). Non-structural and structural techniques can be used to rehabilitate and enhance streams, and restore riparian areas (NRC 1992). Non-structural practices include removing disturbances to allow passive recovery of streams and riparian areas, reducing or eliminating activities that have altered stream flows to restore natural flows, preserving or restoring floodplains, and restoring and protecting riparian areas, including fencing those areas to exclude livestock and people (NRC 1992). Structural rehabilitation and enhancement techniques include channel, bank, and/or riparian area modifications to improve habitat and dam removal (NRC 1992). Road improvements, riparian rehabilitation, reconnecting floodplains to their rivers, and installing in-stream habitat structures have had varying degrees of success in stream rehabilitation activities (Roni et al. 2008). Success of these rehabilitation activities is strongly dependent on addressing impaired water quality and insufficient water quantity, since those factors usually limit the biological response to stream rehabilitation efforts (Roni et al. 2008). Ecologically successful stream rehabilitation and enhancement activities depend on addressing the factors that most strongly affect stream functions, especially water quality, water flow, and riparian quality, and not focusing solely on rehabilitating or enhancing the physical habitat of streams (Palmer et al. 2010).

The compensatory mitigation required by district engineers in accordance with general condition 23 and activity-specific conditions will 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 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 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 and is ecological successful. [33 CFR 332.6] 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 been successful in increasing wetland acreage in the United States.

The individual and cumulative adverse effects on the aquatic environment resulting from the activities authorized by this NWP will be 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.

6.2.3 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 will alter the substrate of those waters, usually replacing the aquatic area with dry land, and changing the physical, chemical, and biological characteristics of the substrate. The original substrate will 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 will temporarily increase water turbidity. Pre-construction notification is required for all activities authorized by this NWP, which will allow district engineers to review each activity and ensure that adverse effects on the aquatic environment are minimal. Particulates will be resuspended in the water column during removal of temporary fills. The turbidity plume will normally 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, developers are required to develop and implement sediment and erosion control plans to minimize the entry of soil into the aquatic environment. NWP activities cannot create turbidity plumes that smother important spawning areas downstream (see general condition 3).

(c) Water: Commercial and institutional developments can affect some characteristics of water, such as water clarity, chemical content, dissolved gas concentrations, pH, and temperature. The construction or expansion of these developments can 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 can affect the species and quantities of organisms inhabiting the aquatic area. Water quality certification is required for activities authorized by this NWP that result in discharges of dredged or fill material into waters of the United States, which will ensure that the activities do not violate applicable water quality standards. Permittees may be required to implement water quality management measures to ensure that the authorized activities do not result in more than minimal degradation of water quality. Storm water 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 help improve or maintain water quality, by removing nutrients, moderating water temperature changes, and trapping sediments.

(d) Current patterns and water circulation: Activities authorized by this NWP may adversely affect the movement of water in the aquatic environment. All activities authorized by this NWP require pre-construction notification, which will help ensure that adverse effects to current patterns and water circulation are minimal. Road crossings and other fills within a commercial or institutional development may alter water flow patterns and circulation. 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 activities authorized by this NWP will not adversely affect normal patterns of water level fluctuations due to tides and flooding. This NWP does not authorize activities in tidal waters. 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. General condition 9 requires the permittee to maintain the pre-construction course, condition, capacity, and location of open waters, to the maximum extent practicable.

(f) Salinity gradients: The activities authorized by this NWP are unlikely to adversely affect salinity gradients, since the NWP is restricted to discharges of dredged or fill material into non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters.

(g) Threatened and endangered species: The Corps believes that the procedures currently in place result in proper coordination under Section 7 of the Endangered Species Act (ESA) and ensure that activities authorized by this NWP will not jeopardize the continued existence or any listed threatened and endangered species or result in the destruction or adverse modification of critical habitat. The Corps also believes that current local procedures in Corps districts are effective in ensuring compliance with ESA.

Under general condition 18, no activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed.

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 the critical habitat of such species." In addition, general condition 18 explicitly states that the NWP does not authorize the taking 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 might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat. 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. Based on the evaluation of all available information, the district engineer will initiate consultation with the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS), as appropriate, if he or she determines that the proposed activity may affect any threatened and endangered species or 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 consultation through the individual permit process. If ESA consultation is conducted during the NWP authorization process without the district engineer exercising discretionary authority, then the applicant will be notified that he or she cannot proceed with the proposed activity until ESA consultation is complete. If the district engineer determines that the activity will have no effect on any threatened and endangered species or critical habitat, then the district engineer will notify the applicant that he or she may proceed under the NWP authorization.

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 activity may affect listed species or their critical habitat and, if necessary, initiate ESA 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 NWPs to require pre-construction notification for NWP activities that occur in known locations of threatened and endangered species or critical habitat. For activities that require agency coordination during the pre-construction notification process, the USFWS and NMFS will review the proposed activities for potential impacts to threatened and endangered species and their 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" decision.

Based on the safeguards discussed above, especially general condition 18 and the NWP regulations at 33 CFR 330.4(f), the Corps has determined that the activities authorized by this NWP will not jeopardize the continued existence of any listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat. 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, where necessary, to ensure that the Corps has the latest information regarding

the existence and location of any threatened or endangered species or their critical habitat. Corps districts can also establish, through local procedures or other means, additional safeguards that ensure compliance with the ESA. Through formal consultation under Section 7 of the Endangered Species Act, or through other coordination with the USFWS and/or the NMFS, as appropriate, the Corps will establish procedures to ensure that the NWP will not jeopardize any threatened and endangered species or result in the destruction or adverse modification of designated critical habitat. Such procedures may result in the development of regional conditions added to the NWP by the division engineer, or in special conditions to be added to an NWP authorization by the district engineer.

(h) Fish, crustaceans, molluscs, and other aquatic organisms in the food web. All activities authorized by this NWP require pre-construction notification to the district engineer, which will allow review of each activity in open waters to ensure that adverse effects to fish and other aquatic organisms in the food web are minimal. Fish and other motile animals will avoid the project site during construction. Sessile or slow-moving animals in the path of discharges, equipment, and building materials will be destroyed. Some aquatic animals may be smothered by the placement of fill material. Motile animals will return to those areas that are temporarily impacted by the activity and restored or allowed to revert back to preconstruction conditions. Aquatic animals will not return to sites of permanent fills. Benthic and sessile animals are expected to recolonize sites temporarily impacted by the activity, after those areas are restored. Activities 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. Some species of fish spawn on floodplains, which could be prevented if the development involves clearing or filling the floodplain. Commercial and institutional development activities in the vicinity of streams may alter habitat features by increasing surface water flow velocities, which can increase erosion and reduce the amount of habitat for aquatic organisms and destroy spawning areas. These types of development activities, if located in the vicinity of streams, can also cause more unstable flow regimes, such as higher peak flows, more frequent dry periods, and more frequent flooding, which may decrease the amount of habitat for aquatic animals.

Division and district engineers can place conditions on this NWP to prohibit discharges 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: Activities authorized by this NWP will result in adverse effects on 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 activities that 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 activities authorized by this NWP, which will help offset losses of aquatic habitat for wildlife. General condition 4 states 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: The activities authorized by this NWP will have minimal adverse effects on waters of the United States within sanctuaries or refuges designated by Federal or state laws or local ordinances. 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. District engineers will exercise discretionary authority and require individual permits for specific projects in waters of the United States in sanctuaries and refuges if those activities will result in more than minimal adverse effects on the aquatic environment.

(2) Wetlands: The activities authorized by this NWP will have minimal adverse effects on wetlands. District engineers will review pre-construction notifications to ensure that the adverse effects on the aquatic environment are minimal. Division engineers can regionally condition this NWP to restrict or prohibit its use in certain high value wetlands. See paragraph (e) of section 5.1 for a more detailed discussion of impacts to wetlands.

(3) Mud flats: The activities authorized by this NWP will have minimal adverse effects on mud flats, since it does not authorize activities in tidal waters.

(4) Vegetated shallows: The activities authorized by this NWP will have minimal adverse effects on vegetated shallows in tidal waters, since it does not authorize activities in tidal waters. Activities in non-tidal vegetated shallows may be authorized by this NWP, but district engineers will review pre-construction notifications to determine if those activities will result in minimal adverse effects on the aquatic environment. If the non-tidal vegetated shallows are high value and the proposed activity 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.

(5) Coral reefs: The activities authorized by this NWP will have minimal adverse effects on coral reefs, since it does not authorize activities in tidal waters.

(6) Riffle and pool complexes: Activities in riffle and pool complexes may be

authorized by this NWP, but district engineers will review pre-construction notifications to determine if those activities will result in minimal adverse effects on the aquatic environment. If the riffle and pool complexes are high value and the proposed activity 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.

(k) Municipal and private water supplies: See paragraph (n) of section 5.1 for a discussion of potential impacts to water supplies.

(l) Recreational and commercial fisheries, including essential fish habitat: The activities 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 condition this NWP to prohibit discharges during important life cycle stages, such as spawning or development periods, of economically valuable fish and shellfish. All activities authorized by this NWP require pre-construction notification to the district engineer, which will allow review of each activity in open waters to ensure that adverse effects to economically important fish and shellfish are minimal. Compliance with general conditions 3 and 5 will ensure that the authorized activities do not adversely affect important spawning areas or concentrated shellfish populations. As discussed in paragraph (g) of section 5.1, there are procedures to help ensure that individual and cumulative impacts to essential fish habitat are minimal. For example, division and district engineers can impose regional and special conditions to ensure that activities authorized by this NWP will result in minimal adverse effects on essential fish habitat.

(m) Water-related recreation: See paragraph (m) of section 5.1 above.

(n) Aesthetics: See paragraph (c) of section 5.1 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 activities in parks, national and historical monuments, national seashores, wilderness areas, and research sites if the manager or caretaker wants to conduct activities in waters of the United States and those activities result in minimal adverse effects on the aquatic environment. Division engineers can regionally condition the NWP to prohibit its use in designated areas, such as national wildlife refuges or wilderness areas.

7.0 Determinations

7.1 Finding of No Significant Impact

Based on the information in this document, the Corps has determined that the issuance of this NWP will not have a significant impact on the quality of the human environment. Therefore, the preparation of an Environmental Impact Statement is not required.

7.2 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 is not contrary to the public interest.

7.3 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, necessary to minimize adverse effects on affected aquatic ecosystems. The activities authorized by this NWP will result in minimal individual and cumulative adverse effects on the aquatic environment.

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

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:

13 Feb 2012

Michael J. Walsh
Major General, US Army
Deputy Commanding General
for Civil and Emergency Operations

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