DECISION DOCUMENT
NATIONWIDE PERMIT 21

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

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

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

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 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 adverse effects on the aquatic

environment, individually or cumulatively, cannot be authorized by NWPs. Individual review of each activity authorized by an NWP will not normally be performed, except when preconstruction 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; and the Magnuson-Stevens Fishery and Conservation and Management 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 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 17 and 18). General condition 15 restricts the use of NWPs for activities that are located in Federally-designated wild and scenic rivers. None of the NWPs authorize artificial reefs. General condition 24 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 which may result in discharges of dredged or fill material 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 September 26, 2006, Federal Register notice, refer to the preamble in the Federal Register notice announcing the reissuance of this NWP. The substantive comments received in response to the September 26, 2006, Federal Register notice were used to improve the NWP by changing NWP terms and limits, notification requirements, and/or NWP general conditions, as necessary.

We proposed to change the title of this NWP. We also proposed allowing authorization of projects by this NWP that were currently being processed as part of an integrated permit processing procedure in lieu of an authorization from the Department of Interior, Office of Surface Mining (OSM) or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act (SMCRA) of 1977. The Corps, the Environmental Protection Agency, OSM, and the U. S. Fish and Wildlife Service entered into a Memorandum of Understanding on February 8, 2005. This MOU envisioned a collaborative process in which the SMCRA authority chooses to be the lead agency in coordinating interagency review of applications for surface coal mining operations while preserving the authorities and responsibilities of each agency for permit decisions.

We believe there may be some confusion regarding the intent of the term "surface" coal mining operations. The Corps did not intend to restrict use of this NWP to only a particular type of coal mining technique. Any coal mining activities can be considered for

authorization under NWP 21 to the extent the activities occur on the surface of the land. In particular, while discharges associated with underground coal mining activities now require authorization under NWP 50 rather than NWP 21, surface processing activities associated with underground coal mining may still be authorized by this permit provided they meet the conditions for its use.

There were numerous comments regarding limitations on NWP 21. A number of commenters recommended limits on the length of stream that could be filled under NWP 21, and other commenters recommended an overall limit on impacts to waters of the United States of 1/2 acre. One commenter suggested that the threshold limits should be 2 acres and 1,500 linear feet. Three commenters recommended a 300 linear foot limit on filling streams and a 1/2 acre limit on impacts to all waters, and that these impacts could not be waived by the district engineer. Two other commenters concurred with the 300 foot limit but also suggested not allowing the use of NWP 21 in watersheds where the cumulative amount of filled streams was already causing more than minimal harm. Several commenters stated that any linear foot limits should apply to all streams, ephemeral, intermittent, and perennial. One commenter said that this NWP should not authorize discharges into perennial streams. Another commenter stated that the use of NWP 21 should not be allowed if more than 10 percent of the headwater streams in the watershed had been filled or otherwise degraded. One commenter stated that a 250-acre watershed limit was appropriate but that drainage areas was not the only factor that should be considered in determining if a project should qualify for NWP 21.

There were also a substantial number of comments that objected to limitations on NWP 21. Many commenters stated that acreage limits that may be appropriate for eastern states would not be appropriate for western states and would be unnecessarily restrictive. Two commenters suggested issuing two versions of NWP 21, one for the western United States and another for the eastern United States. They discussed the differences in mining and reclamation techniques and believed the Corps should recognize these differences by establishing two NWPs for coal mining. One commenter noted that acreage limits need to be larger for the western United States. A number of commenters suggested that regional conditions could be used to address the issue of limits. Several commenters noted that there was no compelling scientific or environmental basis or rationale to establish limits on NWP 21. They noted that due to hydrologic, climatic, and ecological variations, there was no defensible way to establish a specific threshold below which impacts could be said to be "minimal" across the vastly differing geographical and hydrological regimes where mining occurs. Several commenters stated that arbitrary and unnecessary thresholds would slow the permit process and result in a loss of coal production, which could be construed as a "takings" that violated substantive due process rights. Other commenters noted that limiting the use of NWP 21 would result in a loss in royalty and tax revenues and increases to the cost of the nation's energy supply by restricting coal production. One commenter noted that it would take more of the Corps' limited resources to review surface mining projects as individual permits. One commenter stated that thresholds would also impact the Corps' ability to comply with Executive Order 13212, which requires federal agencies to expedite their review of permits for energy related projects. One commenter noted that if a 2-acre

limit were established for NWP 21, more than 60 percent of the nation's coal production would not be eligible for the NWP. One commenter stated that a 3-acre limit in the western United States would have a significant impact on Western mining operations. One commenter noted that if a limit of less than 50 acres was adopted, the Corps' would not achieve its goal of focusing its limited resources on projects that have the potential for more environmentally damaging adverse effects. Two commenters believed safeguards were in place to ensure impacts do not cause more than minimal individual or cumulative effects. They noted that general condition 20, Mitigation, requires compensatory mitigation to offset the adverse effects to the aquatic environment, and that there was no need for arbitrarily chosen acreage limits because the mitigation requirement counterbalances all adverse effects.

This NWP is used to provide section 404 authorization for surface coal mining activities that have also been authorized by the Office of Surface Mining or states with approved programs under Title V of the Surface Mining Control and Reclamation Act (SMCRA). Previously, there have been no limits associated with impacts to waters of the United States for NWP 21. This was based partly on the belief that the analyses and environmental protection performance standards required by SMCRA in conjunction with the pre-construction notification requirement, are generally sufficient to ensure that NWP 21 activities result in minimal individual and cumulative adverse impacts on the aquatic environment.

Furthermore, we believe the change in NWP 21 in 2002, which requires not only notification to the Corps for all projects that may be authorized by this permit but also explicit authorization from the Corps before the activity can proceed, has strengthened the environmental protection for projects authorized by this permit. One commenter requested that this requirement be removed from this NWP. However, we continue to believe that this 2002 change helps ensure that no activity authorized by this permit will result in greater than minimal adverse impacts, either individually or cumulatively, on the aquatic environment, because it requires a case-by-case review of each project. If the district engineer determines through this case-by-case review that the activity has the potential to result in more than minimal adverse effects to the aquatic environment, he or she can exercise discretionary authority to require an individual permit. Also, because of the case-by-case review and the requirement for written verification, we do not agree that it is necessary to prohibit discharges of dredged or fill material into perennial streams.

Lastly, the Corps recognizes that there are vast differences in coal mining techniques not only between the western and eastern parts of the United States, but also within the Illinois Coal Basin and the Appalachian Coal Fields themselves. There are also considerable differences in geological, topographical, climatological, hydrological and ecological regimes in the areas where coal resources are located across the United States. Furthermore, no specific scientific or environmental basis for determining a uniform national limit on NWP 21 was submitted for consideration. As noted above, there were several comments suggesting specific limits but no ecological rationale was supplied to support these specific limits. Several commenters did submit information from the Programmatic Environmental Impact Statement (PEIS) for mountaintop mining/valley fill. However, the PEIS did not

support or determine appropriate limits for NWP 21. Based on these considerations along with the fact that the impacts to waters vary greatly depending on the mining techniques and the environmental factors in the area, we have determined that establishing a specific threshold limit would not be practical on a national basis. We believe that regional conditions, as appropriate, and site-specific review of each pre-construction notification will ensure that NWP 21 authorizes activities with no more than minimal adverse effects on the aquatic environment, individually and cumulatively. The Corps has determined that it is both efficient and environmentally protective to issue an NWP 21 that can be used to authorize most activities that have no more than minimal adverse effects on the aquatic environment and allow division engineers to establish regional conditions that determine appropriate limits for impacts to waters based on the functions and values of aquatic resources within their division.

There were three commenters who noted that the division engineer has the discretion to add regional terms and conditions to NWP 21 and that acreage limitations should be determined at the regional level. The Corps agrees, based on the discussion above regarding limitations, that regional conditions are the best way to address regional concerns regarding surface coal mining activities and NWP 21. Division engineers can add regional conditions to any NWP to further restrict the use of the NWP to ensure that the NWP authorizes only activities with no more than minimal adverse effects on the aquatic environment in a particular watershed or other geographic region. The division engineer cannot modify the NWP by adding regional conditions to make the NWP less restrictive (see 33 CFR 330.1(d)). The use of regional conditions recognizes that functions and values of aquatic resources differ greatly across the country.

Three commenters noted that NWP 21 allows the Corps to exercise discretionary authority during the pre-construction notification review process for any project which has the potential to cause more than minimal individual and cumulative adverse impacts on the aquatic environment.

We agree with these commenters. The pre-construction notification requirements of all NWPs allows for a case-by-case review of activities that have the potential to result in more than minimal adverse effects to the aquatic environment. If the adverse effects on the aquatic environment are more than minimal, then the district engineer can either add special conditions to the NWP authorization to ensure that the activity results in no more than minimal adverse environmental effects or exercise discretionary authority to require an individual permit. While many NWPs allow the permittee to assume authorization if he or she has not heard back from the Corps within 45 days of submitting a complete pre-construction notification, NWP 21 requires written verification before the project can proceed. This ensures that adequate time is available to the Corps to review the extensive documentation that pre-construction notifications for NWP 21 often include, coordinate with other agencies as necessary, and determine whether exercise of discretionary authority is necessary to ensure no more than minimal effects.

One commenter stated that the scope of analysis for NWP 21 review should extend beyond

the effects of fills in waters. Another commenter noted that the Clean Water Act is clear that general permits may only be issued if the permitted activities have minimal impacts on the environment as a whole and not just the aquatic environment.

Several commenters stated that NWP 21 should not be reissued, in order to protect wildlife habitat, outdoor recreation, the quality of life in rural communities and environmental integrity. A myriad of comments were received itemizing impacts related to authorizations associated with NWP 21. These impacts included irreversible damages to the American people, the destruction of lives and the natural and cultural heritage of Appalachia, Montana and Wyoming, loss of hunting opportunities, the exploitation of impoverished areas by large corporations, global warming, landslides, blasting, truck traffic on roads not designed or built to handle heavy loads, harm to bird populations, destruction of valuable hardwood trees, loss of medicinal plants, affects on the tourism/vacation home industry, and local sickness. Several commenters stated that mined areas cannot be restored to pre-mining conditions, such as native forest. Several commenters expressed concern about coal slurry damaging downstream areas.

All of these impacts are outside of the Corps' scope of analysis pursuant to the National Environmental Policy Act (NEPA). The Corps evaluation of coal mining activities is focused on impacts to aquatic resources. Mining in general is permitted under a separate Federal law, the Surface Mining Control and Reclamation Act. Impacts associated with surface coal mining and reclamation operations are appropriately addressed by the Office of Surface Mining or the applicable state agency. Under these circumstances, the Corps' NEPA implementing regulations clearly restrict the Corps' scope of analysis to impacts to aquatic resources.

Several commenters supported the Memorandum of Understanding (MOU) between the EPA, Corps, OSM and the USFWS regarding the integrated permit process for coal mining mentioned in the proposed NWP language. Some suggested the integrated permit process along with the Standard Operating Procedure (SOP) for NWP 21 be mandatory under NWP 21. Some commenters stated that the integrated permit process does not eliminate the dual review of section 404 and SMCRA as the MOU intended, while other commenters stated that the integrated permit process was unlawful because through it, the Corps has delegated its section 404 authority to the states processing the SMCRA permit applications. One of the commenters supporting the MOU stated that the current integrated permit process did not meet the goal of the MOU, as evidenced by its failure in Ohio, since dual reviews were still being undertaken by the regulatory agencies.

The MOU recommends that Federal and state agencies coordinate reviews of coal mining permit applications, with the SMCRA agency as the lead agency. Currently, in areas that have developed or are in the process of developing an integrated permit process, the agencies have elected to make the process voluntary. The integrated permit process does not eliminate the regulatory responsibilities of the participating agencies, but allows the various permit applications to be reviewed concurrently while utilizing information from one application to fulfill required sections of other applications, where appropriate. The process

allows for timelier reviews while providing the framework for better environmental protection. The Ohio integrated permit process is still in use for those who choose to use it.

Several commenters suggested that a state programmatic or regional general permit or other methods (e.g., a national MOU) be developed to reduce the duplication of effort by the regulatory agencies, therefore reducing cost and delays in receiving authorizations.

State programmatic and regional general permits are developed at the district level. The Corps supports and participates in such efforts where possible.

Several commenters stated that coal mining is the most environmentally regulated activity, and SMCRA, along with Sections 401 and 402 of the Clean Water Act, already require analyses of all of the factors addressed under Section 404 of the Clean Water Act. Therefore, as the above-referenced programs already regulate impacts to aquatic resources, including impacts related to water quality, endangered species, historic properties, and the hydrologic regime, further review by the Corps only creates an additional administrative burden without any real benefits.

The Corps understands coal mining is covered by many environmental regulations; however the Corps has determined that SMCRA, in its current form, does not remove the need, either legally or substantively, for independent authorization under Section 404 of the Clean Water Act. Consequently, this NWP does not duplicate the SMCRA permit process. The Corps continues to work with the other agencies to avoid potential duplication of efforts and uses appropriate work and studies done by or for other agencies (e.g., surveys/findings under the Endangered Species Act or Section 106 of the National Historic Preservation Act as well as SMCRA permit documentation) in its analysis of the proposed project.

Several commenters stated that mitigation done for NWP 21 is scientifically indefensible and, absent such mitigation, the projects authorized under NWP 21 have more than minimal adverse effect and are therefore impermissible. They stated that current mitigation projects have so far been unsuccessful and referenced a court case in the Southern District of West Virginia (Ohio Valley Environmental Coalition v. Bulen), where they noted that a Corps official stated that he did not know of a single instance of successful headwater stream creation. Also, the commenters stated that the Corps did not include any specific guidelines for how to assess stream function in order to determine the adequacy of compensatory mitigation. They also stated that the Corps has not shown that mitigation will offset the impacts authorized under NWP 21 or that off-site enhancement of streams would fully compensate for functions of streams that are destroyed. Other commenters stated that the Corps mistakenly allows the mitigation requirements of SMCRA and state water quality laws to satisfy the independent requirements of Section 404 of the Clean Water Act. They stated that allowing a permittee to claim a compensatory mitigation or reclamation activity already required under SMCRA as compensatory mitigation under the Clean Water Act is "double-counting" and improperly blurs the requirements of sequencing (i.e., avoidance, minimization, mitigation) imposed under the 404(b)(1) guidelines. Other commenters recommended that mitigation of 1:1 should be required in order to achieve no net loss, and

that mitigation also be required for potential, as well as actual, impacts. Several commenters stated that final reclamation of wetland habitat will most likely exceed the required compensatory mitigation.

In order to ensure that an activity results in no more than minimal adverse effect on the aquatic environment, the Corps will add permit conditions that require compensatory mitigation that meets specified success criteria. The Corps will generally require the permittee to monitor the mitigation site for five years and, if the mitigation site does not meet the success criteria at that time, remediation or additional mitigation will be required. This ensures that the authorized activity will not result in a net loss in aquatic functions. The Corps has increased its compliance efforts to ensure that projects authorized by DA permits are constructed as authorized and that mitigation is successful.

We are currently developing new stream functional assessment protocols to identify and quantify the functions lost through authorized impacts and the functions gained or enhanced through mitigation. We removed the language from the proposed NWP 21 that required the applicant to furnish a SMCRA or state-approved mitigation plan. The Corps recognizes that SMCRA does not require "mitigation" per-se, but does require "reclamation/restoration", and that some states require "mitigation" above Corps requirements. The Corps coordinates with the SMCRA and state resource agencies to achieve appropriate aquatic restoration on mine sites, which can reduce or eliminate off-site compensatory mitigation needs. The Corps does not consider this "double-counting", because the areas restored are only counted once in the replacement of aquatic resource functions. As long as the functions lost as a result of the permitted activity are mitigated through the onsite restoration or enhancement, it does not matter if the restoration also meets other goals unrelated to the Section 404 impacts. General condition 20 establishes the framework for achieving no net loss of waters/wetlands, as well as the sequential review of mitigation on-site. The Corps takes into account the fact that, in certain areas and circumstances, any Corps compensatory mitigation requirement may be fully encompassed or exceeded by requirements under other authorities. As long as the impacts to the aquatic environment are fully mitigated, the Corps will not require additional compensation.

Several commenters requested that NWP 21 be withdrawn and that the Corps consider authorizations under state or regional permits where cumulative impacts and mitigation measures can be evaluated on a more focused level that assures minimal impacts on the environment.

Division and district engineers have the authority to revoke or modify any or all of the NWPs and require authorizations for proposed projects by other general permits or individual permits. This should be determined on a local level.

Several commenters stated that the burial or other degradation of hundreds of miles of Appalachian streams from mining demands a thorough, independent review, public notice, and analysis of alternatives and minimization, which is provided only through the individual permit process. A few commenters stated that coal mining rearranges the natural landscape

and deserves to be studied on a case-by-case basis. One commenter stated that each project should be independently evaluated with proper safeguards in place to include meaningful bonds that would be sufficient to cover remediation costs when companies declare bankruptcy.

A careful case-specific determination that a project will result in no more than minimal impacts is necessary for a project to be authorized by this NWP. The pre-construction notification process for NWP 21, which requires the applicant to wait until he or she receives verification from the Corps, provides this case-specific determination. If the District Engineer determines that a particular proposal will result in more than minimal adverse environmental effects, he will assert discretionary authority and require an individual permit. Bonding is covered under general condition 20. The Corps notes that the SMCRA permitting process provides for public notice and comment on all coal mining permits.

A few commenters stated that the Secretary of the Army can only issue NWPs by making an up-front determination that the activities authorized by each NWP category will cause only minimal adverse effects and the Corps cannot ignore harm already done when assessing cumulative impacts. The commenters stated that the Corps has no reasoned basis or substantial evidence to support its determinations that the individual or cumulative environmental impacts associated with NWP 21 will be minimal. Several commenters similarly stated that compensatory mitigation could not be used to reduce the net adverse impacts to the minimal level in order to qualify for general permits. Therefore, NWP 21 exceeds the definition of minimal adverse environmental effects and all coal mining should be reviewed under the individual permit process. A number of commenters stated that surface coal mining results in significant ecological damage to headwater stream systems, when considered both individually and cumulatively, and it cannot be reasonably assumed that those stream losses can be mitigated into insignificance.

We believe our process for NWP 21 ensures that activities authorized by the NWP result in no more than minimal adverse impacts to the aquatic environment because each project is reviewed on a case-by-case basis and the district engineer either makes a minimal impacts determination on the project or asserts discretionary authority and requires an individual permit. Additionally, as noted above, division engineers can add regional conditions to any NWP to further restrict the use of the NWP to ensure that the NWP authorizes only activities with no more than minimal adverse effects on the aquatic environment in a particular watershed or other geographic region. Each district tracks losses of waters of the United States authorized by Department of the Army permits, including NWPs, as well as compensatory mitigation achieved through aquatic resource restoration, creation, and enhancement.

In addition, we believe that the Corps can rely on mitigation in making a minimal adverse environmental effects determination.

One commenter requested that the Corps clarify what constitutes a "single and complete

surface coal mining operation" since approved mines can expand through either the addition of substantial acreages or the addition of small acreages (incidental boundary revisions). This commenter asked whether all revisions, including incidental boundary revisions, are considered as single and complete coal mining operations.

District engineers use the criteria in the definition of "single and complete project," which is found in the "Definitions" section of the NWPs, when identifying single and complete coal mining operations. District engineers will determine, on a case-by-case basis, whether the expansion of an existing mine constitutes a separate single and complete project.

Many commenters opposed the reissuance of NWP 21 because of the potential impacts to the aquatic environment and water resources. Several commenters expressed concerns about impacts to water supplies and drinking water, downstream water uses, and recreational opportunities such as fishing. Concerns were also expressed about water pollution, the effects of burying streams that support aquifers, and loss of streams and wetlands. This NWP requires compliance with all of the general conditions for the NWPs, which address many of these concerns. Additionally, many of these factors will be evaluated during the project-specific evaluation.

One commenter noted that NWP 21 does not provide the public an opportunity to comment on the specific conditions of a permit that will affect their communities and watersheds.

Section 404(e) of the Clean Water Act provides the statutory authority for the issuance of general permits on a nationwide basis for any category of activities. The Corps establishes NWPs in accordance with section 404(e), by publishing and requesting comments on the proposed permits. The general public has the opportunity to comment on NWPs at this time. In order to address the requirements of the National Environmental Policy Act, the Corps prepares a decision document for each NWP along with a 404(b)(1) Guidelines analysis. The decision document discusses the anticipated impacts on the Corps' public interest factors from a national perspective. NWPs are issued at the conclusion of this process. The individual projects that are proposed for authorization under an NWP are not given a permit but a verification or authorization that the project complies with an NWP. There are no requirements for public comments on specific projects authorized under NWPs. However, in the case of NWP 21, all projects must have undergone a separate SMCRA review process the provides for public notice and comment.

Several commenters recommended that NWP 21 be eliminated because it fails to require that the applicant demonstrate that there are no practicable alternatives to placing fill in waters of the United States, a requirement of Section 404(e) of the Clean Water Act. The commenters stated that the Corps wrongly assumes the SMCRA process to be comparable to Section 404 and the 404(b)(1) Guidelines. The commenters noted that, in fact, SMCRA does not require the applicant to choose the method of coal waste management that avoids and minimizes impacts and is least damaging to waters of the United States.

The Corps does not assume that other state or Federal agencies conduct a review that is

comparable to the section 404(b)(1) Guidelines. Although analysis of offsite alternatives is not required in conjunction with general permits, each proposed project is evaluated for onsite avoidance and minimization, in accordance with general condition 20, and is not authorized under the NWP if the adverse impacts to waters of the United States are more than minimal.

Five commenters noted that coal slurry impoundments should not be allowed by an NWP and that NWPs can only be issued for activities that are similar in nature and that valley fills and coal slurry impoundments are not similar in nature.

The Corps has determined that slurry impoundments and valley fills are part of surface coal mining activities and are therefore similar in nature. The "similar in nature" requirement does not mean that activities authorized by an NWP must be identical to each other. We believe the "categories of activities that are similar in nature" requirement of Section 404(e) is to be interpreted broadly, for practical implementation of the NWP program.

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 adverse effects on the aquatic environment, individually or cumulatively. 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 or 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 work 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 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 adverse effects on the aquatic environment, individually or cumulatively. 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 discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations authorized by the Department of the Interior's Office of Surface Mining or states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977, provided those activities have minimal adverse effects on the aquatic environment. This NWP also authorizes surface coal mining operations being processed under integrated permit processing procedures. The Corps has considered alternative terms and applicable waters for this NWP, as well as modifying or adding NWP general conditions, as discussed in the preamble of the Federal Register notice announcing the issuance of this NWP.

In the September 26, 2006, Federal Register notice, the Corps requested comments on the proposed reissuance of this NWP. The Corps proposed to change this NWP by including activities authorized through integrated permit processing procedures developed in response to the Joint Procedures Framework Memorandum of Understanding that was signed by the Corps, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, and the Office of Surface Mining on February 8, 2005.

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. When conducting such assessments, division and district engineers can only consider those activities regulated by the Corps under Section 10 of the Rivers and Harbors Act, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972. Adverse impacts resulting from activities outside of the Corps scope of review, such as the construction or expansion of upland developments, cannot be considered in the Corps analysis of cumulative adverse effects on the aquatic environment.

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 adverse effects on the aquatic environment, division and district engineers have the authority to impose case-specific special conditions on an NWP authorization to ensure that the authorized work will result in minimal adverse effects.

General condition 20 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 work during specific times of the year to protect spawning fish and shellfish. If the proposed work 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 contiguous United States is approximately 1,930,000,000 acres (Dahl 2006). Alaska is 366,050,000 acres in size and Hawaii is 4,110,720 acres in size (source: http://www.usgs.gov/state/ , accessed July 25, 2005). Terrestrial ecosystems comprise more than 93 percent of the contiguous United States and most are abundant compared to aquatic ecosystems, which make up the remainder (Dahl 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).

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 2006) (see also http://www.fgdc.gov/standards/projects/FGDC-standards-projects/wetlands/fgdc-announce , accessed April 3, 2006). 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 vegetation type, soils, and flooding frequency. Deepwater habitats are permanently flooded areas located below the wetland boundary. In rivers and lakes, deepwater habitats are usually more than two meters deep.

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 2006).

The Emergency Wetlands Resources Act of 1986 (Public Law 99-645) requires the USFWS to submit wetland status and trends reports to Congress (Dahl 2006). The latest status and trends report, which covers the period of 1998 to 2004, is summarized in Table 3.1.

Table 3.1. Estimated aquatic resource acreages in the conterminous United States in 2004 (Dahl 2006).

Aquatic Habitat Category	Estimated Area in 2004 (acres)
Marine	128,600
Estuarine intertidal non-vegetated	600,000
Estuarine intertidal vegetated	4,571,700
All intertidal waters and wetlands	5,300,300
Palustrine non-vegetated	6,633,900
Palustrine vegetated	95,819,800
• Palustrine emergent wetlands	26,147,000
• Palustrine forested wetlands	52,031,400
• Palustrine shrub wetlands	17,641,400
All palustrine aquatic habitats	102,453,700
Lacustrine deepwater habitats	16,773,400
Riverine deepwater habitats	6,813,300
Estuarine subtidal habitats	17,717,800
All aquatic habitats	149,058,500

The acreage of lacustrine deepwater habitats does not include the open waters of Great Lakes (Dahl 2006).

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) (2003) 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 2003 NRI is summarized in Table 3.2. The 2003 NRI estimates that there are 110,760,000 acres of palustrine and estuarine wetlands on non-Federal land and water areas

in the United States (NRCS 2003).

Table 3.2. The 2003 National Resources Inventory acreages for palustrine and estuarine wetlands on non-federal land, by land cover/use category (NRCS 2003).

National Resources Inventory Land Cover/Use Category	Area of Palustrine and Estuarine Wetlands (acres)
cropland, pastureland, and Conservation Reserve Program land	16,730,000
forest land	65,440,000
rangeland	7,740,000
other rural land	15,800,000
developed land	1,590,000
water area	3,460,000
Total	110,760,000

The land cover/use categories used by the 2003 NRI are defined below (NRCS 2003). 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.

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 2006). 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 2006 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 2.5 acres, but the minimum size of detectable wetland varies by wetland type (Dahl 2006). 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 0.005 acre (Dahl 2006). 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, certain types of forested wetlands, and emergent wetlands along the Pacific coast (Dahl 2006). 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.

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).

This NWP authorizes discharges of dredged or fill material into waters of the United States. Surface coal mining activities typically occur 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 nutrient cycling functions, food web support, and transport organisms (Allan 1995).

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 goods and services that are valued by society. For example, coal extracted through surface coal mining operations provide energy for a wide range of uses. Energy produced from coal may be converted into electrical energy that is used by residents, businesses, industry, and other entities.

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, the anticipated cumulative effects of those activities, and the potential future losses of waters of the United States that are estimated to occur until the expiration date of the NWP. In the assessment of these individual and cumulative effects, the terms and limits of the NWP, notification requirements, and the standard NWP general conditions are considered. The supplementary 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 waters of the United States for surface coal mining operations that are already authorized by the Office of Surface Mining, approved state agencies, or through integrated permit processing procedures. These operations include contour mining, mountaintop mining, and area mining.

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 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 work has minimal 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 or 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 notification thresholds, or require notification for all work in certain watersheds or types of waters. Specific NWPs can also be revoked on a geographic or watershed basis where the 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) impose an acreage limit for the NWP; 3) add regional conditions to the NWP to ensure that the adverse environmental effects are minimal; or 4) for those activities that require 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 work 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 Impacts

The cumulative impacts of an NWP generally depends on the number of times the permit is used on a national basis. However, in a specific watershed, division or district engineers may determine that the cumulative adverse effects of activities authorized by NWPs 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 where the cumulative adverse effects are more than minimal, or add conditions to the NWP either on a case-by-case or regional basis to ensure that the cumulative adverse effects are minimal. When division or district engineers determine that a geographic area is subject to more than minimal cumulative adverse effects due to the use of the NWPs, they will use the revocation and modification procedure at 33 CFR 330.5. In reaching the final decision, they will compile information on the cumulative adverse effects and supplement this document.

Based on reported use of this NWP during fiscal year 2003 and the period of July 1, 2005 to June 30, 2006, the Corps estimates that this NWP will be used approximately 217 times per year on a national basis, resulting in impacts to approximately 64 acres of waters of the United States, including jurisdictional wetlands. The Corps estimates that approximately 108 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 1,085 activities could be authorized over a five year period until this NWP expires, resulting in impacts to approximately 320 acres of waters of the United States, including jurisdictional wetlands. Approximately 540 acres of compensatory mitigation would be required to offset those impacts. The required compensatory mitigation will attenuate cumulative impacts on the Nation's aquatic resources, so that the net 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 rather than request individual permits for projects which could result in greater adverse impacts to the aquatic environment.

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 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. The required compensatory mitigation 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: Surface coal mining operations will have positive impacts on local economies. These activities will generate jobs and revenue for local contractors as well as revenue to companies that sell mining equipment and construction materials. The sale of coal extracted from these mines will generate revenue for mining companies. The energy provided by coal-burning power plants will provide power for businesses, including manufacturing industries, as well as residences and recreational facilities. Activities 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: Surface coal mining operations 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 mining operations and any associated fills, the nature of the surrounding area, and the public uses of the area. Activities authorized by this NWP can also modify other aesthetic characteristics, such as air quality and the amount of noise. The increased human use of the project area and surrounding land 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 work 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 20 requires mitigation to minimize adverse effects to the aquatic environment through avoidance and minimization at the project site. Compensatory mitigation required by district engineers will 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: Surface coal mining operations may result in the destruction of wetlands. In most cases, the affected wetlands will be permanently filled, especially where rocks and soil from mining operations are deposited, resulting in the permanent loss of aquatic resource functions and values. Wetlands may also be converted to other uses and habitat types. Some wetlands may be temporarily impacted by the work 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. Compensatory mitigation may be required to offset the loss of wetlands and ensure that the adverse effects to the aquatic environment are minimal. Reclamation activities may also result in the restoration of wetlands.

Wetlands provide habitat, including foraging, nesting, spawning, rearing, and resting sites for aquatic and terrestrial species. The destruction 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 20 requires avoidance and minimization of impacts to waters of the United States, including wetlands, at the project site. Compensatory mitigation required by district engineers will ensure that the net adverse effects on the aquatic environment are minimal. General condition 19 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 wetlands. District engineers will also exercise discretionary authority to require an individual permit if the wetlands to be filled are high value and the work 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 18 states that in cases where the district engineer determines that the activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act have been satisfied. Reviews required under the Surface Mining Control and Reclamation Act will also ensure compliance with the National Historic Preservation Act.

(g) Fish and wildlife values: This NWP authorizes activities in waters of the United States, including streams and wetlands, 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, notification is required for all activities authorized by this NWP, which provides the district engineer with an opportunity to review the proposed work and assess potential impacts on fish and wildlife values and ensure that the authorized activity results in minimal adverse effects on the aquatic environment. The district engineer must verify in writing that the proposed work will result in minimal adverse effects on the aquatic environment, individually and cumulatively. Compensatory mitigation required by district engineers to restore, enhance, establish, and/or preserve wetlands and other aquatic habitats will offset losses of waters of the United States, and provide fish and wildlife habitat. The establishment and maintenance of riparian areas next to open and flowing waters may also be required as compensatory mitigation. These methods of compensatory mitigation 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 necessary life cycle movements of indigenous aquatic species, unless the primary purpose of the activity is to impound water. Compliance with general conditions 3 and 5 will ensure that the authorized work has minimal adverse effects on spawning areas and shellfish beds, respectively. The authorized work cannot have more than minimal adverse effects on breeding areas for migratory birds, due to the requirements of general condition 4.

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 the activity to comply with applicable FEMA-approved state or local floodplain management requirements. The requirements of general condition 10 will help ensure that the activities authorized by this NWP will have minimal adverse effects on flood hazards. 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 floodplains, 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. All activities authorized by this NWP require pre-construction notification, so that district engineers can review the proposed work on a case-by-case basis 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 20 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 20 will help ensure that the adverse effects of these activities on floodplain values are minimal. 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 change land use. The mining of coal and the deposition of rock and soil from the mining operation will change the character of the land. Reclamation required for activities authorized by this NWP will restore natural land uses. 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 must comply with general condition 1, which states that no activity may cause more than minimal adverse effects on navigation. This NWP requires pre-construction notification for all activities, which will allow district

engineers to review the proposed work and determine whether adverse effects on navigation will be minimal.

(l) Shore erosion and accretion: The activities authorized by this NWP will have minor direct effects on shore erosion and accretion processes, since surface coal mining operations are usually located on inland areas. NWP 13, regional general permits, or individual permits may be used to authorize bank stabilization projects associated with surface coal mining activities, which may affect shore erosion and accretion.

(m) Recreation: Activities authorized by this NWP may change the recreational uses of the area. Certain recreational activities, such as bird watching, hunting, and fishing may no longer be available in the area during the mining operation, but these activities may resume after the mined area has been successfully reclaimed. Some surface coal mining operations may permanently 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. Surface coal mining operations may increase the demand for potable water in the region. The deposition of rock and soil from surface coal mining operations may alter groundwater recharge areas, which could decrease replenishment of groundwater supplies. Surface water flow patterns may be affected by the authorized work. Activities authorized by this NWP can also affect the quality of water supplies by adding pollutants and toxic chemicals 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. 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 maintain or improve the quality of surface waters.

(o) Water quality: Surface coal mining operations in wetlands and open waters will have adverse effects on water quality. These activities can cause 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 the work does 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 will provide local water quality benefits.

During surface coal mining operations, small amounts of oil and grease from mining and construction equipment may be discharged into the waterway. 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, because 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. The Office of Surface Mining or the state mining agency may require the permittee to implement water quality management measures that minimize the degradation of the downstream aquatic environment, including water quality. 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: During the mining operation, the activities authorized by this NWP may increase energy consumption in the area, especially electricity, natural gas, and petroleum products. The coal extracted from mines will be used to fuel power plants, thereby providing energy to people. Existing infrastructure may have to be expanded to distribute the electricity generated by power plants to cities and other areas.

(q) Safety: The activities 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 rock and soil from surface coal mining operations are deposited in farm fields. The use of farmland for the disposal of mined material and wastes 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 more appropriately addressed through the land use planning and zoning authority held by state and local governments.

(s) Mineral needs: Activities authorized by this NWP may increase demand for aggregates and stone, which could be used for mining activities. Activities authorized by this NWP may increase the demand for other building materials, such as steel, aluminum, and copper, which are made from mineral ores.

(t) Considerations of property ownership: The NWP complies with 33 CFR 320.4(g), which states that an inherent aspect of property ownership is a right to reasonable private use. The NWP provides expedited DA authorization for activities in waters of the United States for surface coal mining operations, 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 waters of the United States for surface coal mining activities that have minimal adverse effects on the aquatic environment, individually and cumulatively. These activities satisfy public and private needs for energy. The need for this NWP is based upon the large number of these activities that occur annually with minimal 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 20 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 work 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 work authorized by the NWP will most likely restrict the extent of the beneficial and detrimental effects to the area immediately surrounding the surface coal mining operation. Activities authorized by this NWP will have minimal 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 20 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 17 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 20 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 required by the district engineer will 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 for surface coal mining operations that are either: (1) authorized by the Office of Surface Mining or states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977, or (2) being processed under integrated permit processing procedures. 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 surface coal mining operations) in a specific category of waters (i.e., waters of the United States). 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 or modification of aquatic habitats, with fills associated with surface coal mining operations, such as valley fills, permanent stream diversions, impoundments, processing plants, and road crossings.

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 cumulative effects, including the number of activities likely to be authorized under this NWP, are discussed in section 4.3 of this document. If a situation arises in which 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.

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 rock, soil, gravel, etc. Temporary fills may be placed upon the substrate, but must be removed upon completion of the work (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. Notification is required for all discharges, which will allow the district engineer 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, contractors 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: Surface coal mining operations may affect some characteristics of water, such as water clarity, chemical content, dissolved gas concentrations, pH, and temperature. These activities may change the chemical and physical characteristics of the waterbody by

introducing suspended or dissolved chemical compounds or sediments into the water. Changes in water quality 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 work does not violate applicable water quality standards. Permittees may be required to implement water quality management measures to ensure that the authorized work does not result in more than minimal degradation of water quality. Impoundments 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 to the district engineer, which will help ensure that adverse effects to current patterns and water circulation are minimal. Road crossings within a surface coal mining operation 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. The activities authorized by this NWP do not occur 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.

(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 17, 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 17, which states that "[n]o activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will destroy or adversely modify the critical habitat of such species." In addition, general condition 17 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 17 also requires non-federal permittees to notify the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat. 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 regulated 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 endangered species or their critical habitat and, if necessary, initiate 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 notification for 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 work 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 17 and the NWP regulations at 33 CFR 330.5(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 ESA, the Corps has taken some steps to provide further assurance. Corps district offices have met 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 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, including discharges into open waters, require 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 work 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 work, 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 activity involves clearing or filling the floodplain. Surface coal mining operations conducted 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.

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 may 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 19 prohibits the use of this NWP to discharge dredged or fill material in NOAA-designated marine sanctuaries, National Estuarine Research Reserves, coral reefs, state natural heritage sites, and outstanding national resource waters. 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 for all activities 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. District engineers will review pre-construction notifications for all activities 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 waterbodies.

(4) Vegetated shallows: The activities authorized by this NWP will have minimal adverse effects on vegetated shallows. District engineers will review pre-construction notifications for all activities 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 vegetated shallows.

(5) Coral reefs: The activities authorized by this NWP will have minimal adverse effects on coral reefs, since it is limited to surface coal mining operations.

(6) Riffle and pool complexes: Activities in riffle and pool complexes may be authorized by this NWP, but district engineers will review all proposed activities 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 work 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 discharges into open waters require 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 work does 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 impacts to essential fish habitat are minimal, individually or cumulatively. 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 19 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 work 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 not result in significant degradation of 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: MAR - 1 2007

DON T. RILEY
Major General, U.S. Army
Director of Civil Works

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