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REVIEW OF 12 NATIONWIDE PERMITS PURSUANT TO EXECUTIVE ORDER 13783

Executive Summary

The US. Army Corps of Engineers (Corps) issues nationwide permits (NWPs) to authorize certain activities that require Department of the Army permits under Section 404 of the Clean Water Act and/or Section 10 of the River and Harbor Act of 1899. Section 404(e) of the Clean Water Act states that NWPs and other general permits may only authorize activities that "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment". Under section 404(e), nationwide permits can only be issued for a 5-year period, and must be renewed before they expire. The Corps issues and reissues the NWPs through the Administrative Procedure Act rulemaking process, and are considered significant regulatory actions under Executive Order 12866, Regulatory Planning and Review. There are currently 52 NWPs, and the NWPs were last reissued on December 21, 2016, and published in the *Federal Register* on January 6, 2017.

Executive Order 13783, Promoting Energy Independence and Economic Growth, was promulgated on March 28, 2017. The EO states that "*it is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation*". Section 2(a) of EO 13783 requires the review of agency existing regulations, of which the NWPs are one, that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear resources. This report reviews 12 NWPs that authorize activities associated with the development or use of domestically produced energy resources, and makes recommendations for changes that could be made to support the objectives of E.O. 13783.

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Summary of Draft Recommendations

<u>1/2-Acre Limit</u>: The 1/2-acre limit should be retained for those NWPs covered in this report where that limit currently applies (i.e., NWPs 12, 21, 39, 50, 51, and 52). Since it was first adopted in 2000, the 1/2-acre limit has allowed thousands of activities to be authorized by NWP. It has also been effective in ensuring that the NWPs with that acreage limit only authorize those activities requiring Department of the Army authorization that result in no more than minimal individual and cumulative adverse environmental effects. Where feasible, project proponents will design their projects to avoid and minimize losses of jurisdictional waters and wetlands on the project site to comply with the 1/2-acre limit and qualify for NWP authorization.

<u>300 Linear Foot Limit</u>: Several of the NWPs have, in addition to the 1/2-acre limit for losses of waters of the United States, a 300 linear foot limit for filling and excavating stream bed. This 300 linear foot limit can be waived by a district engineer if the affected stream is an intermittent or ephemeral stream, and the district engineer makes a written determination that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects and the loss of stream bed (plus any other losses of jurisdictional waters and wetlands) does not exceed the 1/2-acre limit. The Corps recommends removing the 300 linear foot limit from those NWPs included in this review where it currently applies (i.e., NWPs 21, 39, 50, 51, and 52) because of the challenges and associated costs in determining whether a particular stream segment is a perennial, intermittent, or ephemeral and potentially eligible for a waiver of the 300 linear foot limit. Removal of the 300 linear foot limit would streamline the NWP authorization process and reduce processing times. All proposed activities authorized by these NWPs require pre-construction notification (PCN), which allows the Corps to review each proposed activity. The 1/2-acre limit and PCN requirements are sufficient to ensure that activities authorized by these NWPs will result in no more than minimal adverse environmental effects. Although under the current NWPs the 300 linear foot limit can be waived for losses of intermittent and ephemeral stream beds, distinguishing between perennial, intermittent, and ephemeral stream segments requires additional analysis and increases review times. Removal of the 300 linear foot limit would reduce costs to the regulated public and the Corps, resulting in more equivalency between these NWPs and the other NWPs.

Nationwide Permit (NWP) 3 – Maintenance. This NWP authorizes the repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. It also authorizes the removal of accumulated sediments and debris outside the immediate vicinity of existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.). After NWP 3 was reissued on December 21, 2016, the Corps has been asked whether this NWP authorizes small amounts of riprap to protect the structure or fill that repaired, rehabilitated, or replaced, without the need to submit a PCN. The structures and fills repaired,

rehabilitated, or replaced under this NWP often are related to energy production, distribution, and use. The Corps recommends modifying this NWP to authorize small amounts of riprap to protect those structures and fills, without a PCN requirement.

NWP 7 – Outfall Structures and Associated Intake Structures. This NWP authorizes activities related to the construction or modification of outfall structures and associated intake structures. Outfall and intake structures may be associated with energy generation facilities, such as power plants. The Corps recommends making no changes to this NWP because it already provides a streamlined authorization process for these activities.

NWP 8 – Oil and Gas Structures on the Outer Continental Shelf. This NWP authorizes structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of the Interior, Bureau of Ocean Energy Management. Most of the compliance with applicable laws is done by the Bureau of Ocean Energy Management when it approves leases on the outer continental shelf for these activities. Therefore, the Corps recommends not making any changes to this NWP.

NWP 12 – Utility Line Activities. This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of utility lines, including outfall and intake structures. It also authorizes the construction, maintenance, or expansion of substation facilities associated with a power line or utility line in non-tidal waters of the United States, foundations for overhead utility lines, and the construction and maintenance of utility line access roads. The Corps recommends modifying this NWP to simplify the pre-construction notification thresholds, by reducing the number of PCN thresholds from 7 to 2. Pre-construction notification would be required for utility lines crossing navigable waters subject to section 10 of the Rivers and Harbors Act of 1899 and for utility line activities resulting in the loss of greater than 1/10-acre of waters of the United States.

NWP 17 – Hydropower Projects. This NWP authorizes hydropower projects having: (a) Less than 5000 kW of total generating capacity at existing reservoirs, where the project is licensed by the Federal Energy Regulatory Commission; or (b) a licensing exemption granted by the Federal Energy Regulatory Commission. The Hydropower Regulatory Efficiency Act of 2013 changed the definition of "small hydroelectric power project" by raising the generating capacity limit from 5,000 kW to 10,000 kW. The Corps recommends modifying this NWP to change the generating capacity threshold in (a) from 5,000 kW to 10,000 kW to be consistent with the definition of "small hydroelectric power project" in 16 U.S.C. 2705(d).

NWP 21 – Surface Coal Mining Activities. This NWP authorizes discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations. It has a 1/2-acre limit, which includes a 300 linear foot limit for losses of stream bed. Prior to 2012, this NWP did not have an acreage limit, and it relied in part on

the review conducted under Title V of the Surface Mining Control and Reclamation Act of 1977 or an integrated permit processing procedure by the Department of the Interior, Office of Surface Mining Reclamation and Enforcement, to ensure that activities authorized by NWP 21 result in no more than minimal individual and cumulative adverse environmental effects. As discussed above, the Corps recommends removing the 300 linear foot limit for losses of stream bed. In addition, the Corps recommends removing the provision requiring the permittee to receive a written authorization from the Corps before commencing with the activity, to be consistent with the other NWPs requiring PCNs and allowing default authorizations to occur if the Corps district does not respond to the PCN within 45 days of receipt of a complete PCN.

NWP 33 – Temporary Construction, Access, and Dewatering. This NWP authorizes temporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard. For the 2017 NWPs, the Corps modified this NWP to reduce the number of activities requiring pre-construction notification. Prior to 2017 all NWP 33 activities required PCNs. For the 2017 NWP 33, the Corps modified the PCN requirements for this NWP, from requiring PCNs for all authorized activities to requiring PCNs only for activities occurring in waters waters subject to section 10 of the Rivers and Harbors Act of 1899. The Corps recommends making no additional changes to this NWP.

NWP 39 – Commercial and Institutional Developments. This NWP authorizes discharges of dredged or fill material into non-tidal waters of the United States for the construction of commercial and institutional developments and attendant features. This NWP can be used to authorize power plants, refineries, oil wells and drilling pads, and other types of energy projects. Pre-construction notification is required for all activities authorized by this NWP. The Corps recommends modifying this NWP to remove the 300 linear foot limit for losses of stream bed and the associated waiver provision for intermittent and ephemeral streams. The Corps would rely on the 1/2-acre limit and the PCN review process to ensure that this NWP only authorizes activities that will result in no more than minimal individual and cumulative adverse environmental effects.

NWP 49 – Coal Remining Activities. This NWP authorizes discharges of dredged or fill material into non-tidal waters of the United States associated with the remining and reclamation of lands that were previously mined for coal. This NWP has no acreage limit because it requires the overall mining plan (including any coal mining in areas that were not previously mined) to will result in a net increase in aquatic resource functions. The Corps recommends removing the provision requiring the permittee to receive a written authorization from the Corps before commencing with the activity, to be consistent with the other NWPs requiring PCNs and allowing default authorizations to occur if the Corps district does not respond to the PCN within 45 days of receipt of a complete PCN.

NWP 50 – Underground Coal Mining Activities. This NWP authorizes discharges of dredged or fill material into non-tidal waters of the United States associated with underground coal mining and reclamation operations. It has a 1/2-acre limit, which includes a 300 linear foot limit for losses of stream bed. As discussed above, the Corps recommends removing the 300 linear foot limit for losses of stream bed. The Corps also recommends removing the provision requiring the permittee to receive a written authorization from the Corps before commencing with the activity, to be consistent with the other NWPs requiring PCNs and allowing default authorizations to occur if the Corps district does not respond to the PCN within 45 days of receipt of a complete PCN.

NWP 51 – Land-Based Renewable Energy Generation Projects. This NWP authorizes discharges of dredged or fill material into non-tidal waters of the United States for the construction, expansion, or modification of land-based renewable energy production facilities, including attendant features. It has a 1/2-acre limit, which includes a 300 linear foot limit for losses of stream bed. As discussed above, the Corps recommends removing the 300 linear foot limit for losses of stream bed.

NWP 52 – Water-Based Renewable Energy Generation Pilot Projects. This NWP authorizes structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction, expansion, modification, or removal of water-based wind, water-based solar, wave energy, or hydrokinetic renewable energy generation pilot projects and their attendant features. For land-based attendant features, it has a 1/2-acre limit, which includes a 300 linear foot limit for losses of stream bed. As discussed above, the Corps recommends removing the 300 linear foot limit for losses of stream bed.

Appendix C to 33 CFR part 325 – Procedures for the Protection of Historic Properties. Consistent with the direction and goals of both EO 13777 and EO 13783, the Corps recommends that the Administration issue an official statement declaring that 33 CFR part 325, Appendix C, ***Procedures for the Protection of Historic Properties***, a longstanding regulation promulgated by the U.S. Army Corps of Engineers for use specifically in its Regulatory Program for compliance with the National Historic Preservation Act, is an acceptable "Federal Agency Program Alternative" under 36 CFR 800.14, and shall substitute for all of Subpart B of said regulation, and is fully consistent with the ACHP's regulations. Rulemaking to amend Appendix C is not necessary because the Corps issued guidance in 2005 and 2007 to make the Corps' procedures in Appendix C fully consistent with the ACHP's regulations.

REVIEW OF 12 NATIONWIDE PERMITS PURSUANT TO EXECUTIVE ORDER 13783

Executive Order 13783, Promoting Energy Independence and Economic Growth, was promulgated on March 28, 2017. The EO states that "*it is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation*". Section 2(a) of EO 13783 requires the review of agency existing regulations, of which the nationwide permits (NWPs) are one, that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear resources. Section 2(b) defines "burden" as actions that "unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources". The NWPs are being reviewed and recommendations are being developed by considering how their requirements and use might materially: 1) affect the design and/or location of domestic energy production; 2) affect the design and/or location of drilling or mining of energy production resources, and 3) limit the use of certain sources of energy, such that the development of domestically produced energy resources from a certain sector may be negatively affected (e.g., coal, oil, natural gas, nuclear, renewable).

General Information

The US. Army Corps of Engineers (Corps) issues nationwide permits (NWPs) to authorize certain activities that require Department of the Army permits under Section 404 of the Clean Water Act and/or Section 10 of the River and Harbor Act of 1899.

Nationwide permits are a type of general permit intended to reduce administrative burdens on the Corps and the regulated public while maintaining environmental protection, by efficiently authorizing activities that have no more than minimal adverse environmental effects, consistent with Congressional intent in the 1977 amendments to the Federal Water Pollution Control Act. Under Section 404(e) of the Clean Water Act, the Secretary of the Army, acting through the Chief of Engineers, can issue general permits to authorize categories of activities that have no more than minimal individual and cumulative adverse environmental effects. General permits authorize activities that require Corps authorization under section 404 of the CWA (for discharges of dredged or fill material into waters of the United States) and section 10 of the Rivers and Harbors Act of 1899 (for structures and work in navigable waters). General permits can be issued by the Corps for a period of no more than five years. Historically, Nationwide Permits have served the Nation well by streamlining the authorization process for those general categories of activities that have no more than minimal individual and cumulative adverse environmental effects. Project proponents that conduct activities that require Corps authorization will often design their projects to qualify for the streamlined authorization

process provided by NWPs, regional general permits, and programmatic general permits. In FY 2016, 94% of the written permit authorizations issued by the Corps were general permit verifications. Eighty-seven percent of those activities were verified by Corps districts in 60 days or less. In FY 2016, 6% of the written permit authorizations issued by the Corps were individual permits, and 58% of those individual permits were issued in 120 days or less (the 58% excludes individual permits that required formal ESA section 7 consultations).

The NWP program authorizes approximately 65,000 activities each year: 35,000 activities that are reported to Corps districts and 30,000 activities that are not required to report to Corps districts based upon estimates. Activities that require Corps authorization but are not eligible for NWP authorization may be permitted via regional general permits, programmatic general permits, letters of permission, and standard individual permits. In FY 2016, the 38 Corps districts issued 32,700 NWP verifications, 18,100 regional general permit verifications, 4,900 programmatic general permit verifications, 1,500 letters of permission, and 1,700 standard individual permits. Therefore, NWP verifications comprise more than half of the written Department of the Army authorizations issued each year.

The NWP program provides a three- tiered approach to ensure compliance with section 404(e) of the Clean Water Act. Those three tiers are: (1) The terms and conditions of the NWPs issued by Corps Headquarters; (2) the authority of division engineers to modify, suspend, or revoke NWPs on a regional basis; and (3) the authority of district engineers to modify, suspend, or revoke NWPs on a case-by-case basis. The Corps interprets the requirement for general permits to authorize categories of activities that are similar in nature broadly, to provide program efficiency, to keep the number of NWPs manageable, and to facilitate implementation by the Corps and project proponents that need to obtain Department of the Army (DA) authorization for activities that have only minimal adverse environmental effects.

The following NWPs are frequently used to authorize discharges of dredged or fill material into water of the United States and structures and work in navigable water of the United States associated with the development or use of domestically produced energy resources:

NWP 3. Maintenance
NWP 7. Outfall Structures and Associated Intake Structures
NWP 8. Oil and Gas Structures on the Outer Continental Shelf
NWP 12. Utility Line Activities
NWP 17. Hydropower Projects
NWP 21. Surface Coal Mining Activities
NWP 33. Temporary Construction, Access, and Dewatering
NWP 39. Commercial and Institutional Developments
NWP 49. Coal Remining Activities
NWP 50. Underground Coal Mining Activities
NWP 51. Land-Based Renewable Energy Generation Facilities

NWP 52. Water-Based Renewable Energy Generation Pilot Projects

In many cases, permittees may proceed with activities authorized by NWPs without notifying the appropriate District Engineer. However, some NWPs require prospective permittees to notify District Engineers prior to commencing the authorized activity. With some exceptions, after 45 days have passed a permittee may proceed with a proposed NWP activity requiring pre-construction notification unless otherwise notified by the District Engineer in writing within the45 calendar day review period. All 12 of the NWPs evaluated here require pre-construction notifications under the circumstances specified in each NWP (i.e., 7, 8, 12, 17, 21, 33, 39, 49, 50, 51, and 52).

Many NWP activities, and all of the 12 NWPs, are frequently (almost always) components of larger overall projects. The Corps' authorities under the NWP program are limited to discharges of dredged or fill material into waters of the United States that are regulated under Section 404 of the Clean Water Act, and structures and work in navigable waters that are regulated under Section 10 of the Rivers and Harbors Act of 1899. The Corps does not regulate other components of those larger overall projects, such as activities that occur in upland areas. In many cases, the NWPs are authorizing minor features that are part of those larger overall projects. For some NWP activities, other Federal agencies are the lead agency for NEPA compliance or compliance with other federal laws such as the Endangered Species Act and the National Historic Preservation Act.

Application of EO 13783 Review

In general, and specifically the 12 NWPs being evaluated here, NWPs are already generally consistent with the principles outlined in EO 13783. They provide a streamlined process for obtaining DA authorizations required by law. NWPs provide both economic and environmental benefits by encouraging project proponents to avoid and minimize their proposed impacts to waters of the United States. Project proponents are able to design their proposed activities to fall within the scope of the NWPs, rather than applying for individual permits for activities that could result in greater adverse impacts to the aquatic environment, and take more time and cost to move through the regulatory process. For an analysis of the monetized benefits of the NWPs, refer to the Regulatory Impact Analysis at Appendix C. The costs of the NWPs relate to the paperwork burden associated with completing the PCNs. See the section on Paperwork Reduction Act for a response to comments and additional discussion of the paperwork burden at Appendix B.

Section 404(e) of the Clean Water Act allows the Corps to issue general permits, including NWPs, to authorize categories of activities that will result in no more than minimal adverse environmental impacts, individually and cumulatively. The Corps has adopted terms and conditions for the NWPs to be sufficiently protective of the aquatic environment while

allowing activities that result in only minimal adverse environmental effects to be conducted. A large majority of authorized fills in jurisdictional waters and wetlands authorized by NWPs and other general permits and individual permits are less than 1/10-acre. When making no more than minimal adverse environmental effects determinations for proposed NWP activities, the district engineer considers the adverse effects to the aquatic environment and any other factor of the public interest (e.g., 33 CFR 330.1(d)). The use of the term ''no more than minimal adverse environmental effects'' does not expand the Corps' scope of analysis. The Corps' control and responsibility remains limited to the activities it has the authority to regulate, the waters and wetlands it has the authority to regulate, and the effects to the environment caused by those activities.

Every 5 years the NWPs are subject to a multi-agency peer review process, through the rulemaking requirements of Executive Order 12866, Regulatory Planning and Review, led by OMB. The Corps solicited public comments for the reissuance of the NWPs, general conditions, and definitions last year. The proposed rule was published in the Federal Register on June 1, 2016 (see 81 FR 35186). With respect to the NWPs that specifically impact the development or use of domestically produced energy resources, the Corps received approximately 53,200 form letters opposing the reissuance of NWP 12 (utility line activities) and over 700 form letters opposing the reissuance of NWP 21 (surface coal mining activities). In addition to the various form letters, the Corps received several hundred individual comment letters. Those individual comment letters, as well as examples of the various form letters, are posted in the www.regulations.gov docket (COE–2015–0017). The Corps reviewed and fully considered all comments received in response to the proposed rule when developing the final rule that was published in the Federal Register (Vol. 82, No. 4, Part III, pp. 1860-2008) on January 6, 2017, and which went into effect on March 19, 2017. Relevant comments were also considered for this review of the 12 NWPs associated with energy projects and activities. The following summary table presents the 12 NWPs, pertinent facts and changes, if any.

Summary of the Twelve 2017 Nationwide Permits[1], EO 13783 Review

Nationwide Permit	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes made in 2016	Other Information
NWP 3 – Maintenance (Authorities: Section 10 of the Rivers and Harbors Act of 1899 (section 10) and Section 404 of the Clean Water Act (section 404))						
(a) Repair, rehabilitation, or replacement of previously authorized, currently serviceable structures or fills	authorizes only minor deviations for maintenance	PCN not required	no	all waters of the U.S.	Clarify that NWP authorizes removal of previously authorized structures and fills.	Does not authorize: maintenance dredging for the primary purpose of navigation; beach restoration; or new stream channelization or stream relocation projects. Limits stream channel modification to the minimum necessary for the maintenance activity.
(b) Discharges associated with removal of accumulated sediments and debris in the vicinity of existing structures, including intake and outfall structures and associated canals	200 feet from structure; minimum necessary to restore capacity intake or outfall or associated canal	all activities	yes	all waters of the U.S.	Remove provision authorizing the placement of new or additional riprap to protect the structure (riprap may be authorized by NWP 13).	
(c) Temporary structures, fills, and work necessary to conduct maintenance activity		PCN not required	no	all waters of the U.S.	Clarify that NWP authorizes use of temporary mats, if regulated by the district.	Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations
NWP 7 – Outfall Structures and Associated Intake Structures (Authorities: sections 10 and 404)	none	all activities	yes	all waters of the U.S.	none	Activity must comply with National Pollutant Discharge Elimination System Program.

[1] This table summarizes the Nationwide Permits (NWPs) that were issued on December 21, 2016, and published in the Federal Register on January 6, 2017 (82 FR 1860).

Nationwide Permit	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes made in 2016	Other Information
NWP 8 – Oil and Gas Structures on the Outer Continental Shelf (Authority: section 10)	none	all activities	no	navigable waters of the U.S.	none	Limited to facilities in areas leased by the Bureau of Ocean Energy Management of the Department of the Interior.
NWP 12 – Utility Line Activities (Authorities: sections 10 and 404)	1/2 acre	• a section 10 permit is required • mechanized land clearing in forested wetlands for the right-of-way • discharges that result in the loss of >1/10 acre	yes, if PCN required	see text of NWP	Authorize the use of temporary mats. Add notes referencing concepts from definition of "single and complete linear project" and 33 CFR 330.6(d). Add note with reference to Corps regulations for required minimum clearances of overhead electric power transmission lines over navigable waters.	Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations.
utility lines		• utility line exceeds 500 linear feet in waters of the U.S. • utility line runs parallel to a stream bed within jurisdictional area		all waters of the U.S., including navigable waters	Clarify that NWP only authorizes crossings of waters of the United States associated with the construction, maintenance, and repair of utility lines. Add internet as form of communication carried by utility lines. Authorize regulated activities associated with remediation for inadvertent returns of drilling fluids that may occur during horizontal directional drilling operations to install utility lines. Add note stating that NWP authorizes utility line maintenance and repair activities that do not qualify for the CWA Section 404(f) exemption for maintenance.	Must restore area to pre-construction contours. For overhead utility lines, district engineer coordinates PCN and NWP verification letter with Department of Defense Siting Clearinghouse.
utility line substations				non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters		
foundations for overhead utility line towers, poles, and anchors				all waters of the U.S.		Separate footings for each tower leg should be used where feasible.

Nationwide Permit	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes made in 2016	Other Information
access roads		• above-grade permanent access roads exceeding 500 feet; • permanent access roads constructed with impervious materials		non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters		Access roads must be constructed to minimize adverse effects to waters of the U.S.
NWP 17 – Hydropower Projects (Authority: section 404)	none	all activities	yes	all waters of the U.S., except navigable (i.e., section 10) waters	none	Applies to activities licensed by the Federal Energy Regulatory Commission or activities exempt from licensing requirements.
NWP 21 – Surface Coal Mining Activities (Authorities: sections 10 and 404)	• 1/2 acre • 300 linear feet of stream bed, but DE can waive for intermittent and ephemeral streams • No valley fills	All activities	yes	non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters	Remove paragraph that authorized surface coal mining activities that were previously authorized by the 2007 NWP 21. Clarify that any losses of stream bed are applied to the 1/2-acre limit.	Activities must be authorized, or currently being processed by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977.
NWP 33 – Temporary Construction, Access, and Dewatering (Authorities: sections 10 and 404)	none	all activities in navigable (i.e., section 10) waters	yes	all waters of the U.S.	Require PCNs only for activities in navigable (i.e., section 10) waters.	Associated primary activity must be authorized by Corps or U.S. Coast Guard, or be exempt from permit requirements. PCN must include restoration plan.
NWP 39 – Commercial and Institutional Developments (Authorities: sections 10 and 404)	• 1/2 acre • 300 linear feet of stream bed but DE can waive for intermittent and ephemeral streams	all activities	yes	non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters	Clarify that any losses of stream bed are applied to the 1/2-acre limit. Add wastewater treatment facilities to the list of examples of attendant features.	Does not authorize construction of new golf courses or new ski areas. Authorizes the construction of oil or gas wells. For wind energy generating structures, solar towers, or overhead transmission lines, district engineer coordinates PCN and NWP verification with Department of Defense Siting Clearinghouse.

Nationwide Permit	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes made in 2016	Other Information
NWP 49 – Coal Remining Activities (Authorities: sections 10 and 404)	Limited to sites that were previously mined for coal, but new mining may be conducted in adjacent areas if the newly mined area is less than 40 percent of the area being remined plus any unmined area needed for reclamation.	all activities	yes	non-tidal waters of the U.S.	None	Permittee must demonstrate net increase in aquatic resource functions through reclamation. Activities must be authorized by the Department of the Interior, Office of Surface Mining, or by states with approved programs under Title IV and V of the Surface Mining Control and Reclamation Act of 1977 or are currently being processed as part of an integrated permit processing procedure. Prospective permittee must receive written authorization prior to commencing the activity. Corps will review the SMCRA determination regarding the amount of previously unmined area necessary for the reclamation and make an independent determination of the amount needed.
NWP 50 – Underground Coal Mining Activities (Authorities: sections 10 and 404)	• 1/2 acre • 300 linear feet of stream bed but DE can waive for intermittent and ephemeral streams	all activities	yes	non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters	Clarify that any losses of stream bed are applied to the 1/2-acre limit.	Activities must be authorized by the Department of the Interior, Office of Surface Mining, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 or are currently being processed as part of an integrated permit processing procedure. If reclamation required, a copy of the plan must be submitted with PCN. Does not authorize coal preparation and processing activities outside of the mine site. Prospective permittee must receive written authorization prior to commencing the activity.

Nationwide Permit	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes made in 2016	Other Information
NWP 51 – Land-Based Renewable Energy Generation Facilities (Authorities: sections 10 and 404)	• 1/2 acre • 300 linear feet of stream bed but DE can waive for intermittent and ephemeral streams	• discharges that result in the loss of >1/10 acre	yes	non-tidal waters of the U.S., except non-tidal wetlands adjacent to tidal waters	Change the PCN threshold to 1/10-acre. Clarify that any losses of stream bed are applied to the 1/2-acre limit. Revise Note 2 to include NWP 14 activities.	Authorizes construction, expansion or modification of land-based renewable energy production facilities, including attendant features. If only activity requiring DA authorization is utility line, then NWP 12 shall be used. Utility lines transferring energy to a distribution system, regional grid, or other facility are generally considered to be separate single and complete linear projects. For wind energy generating structures, solar towers, or overhead transmission lines, district engineer coordinates PCN and NWP verification with Department of Defense Siting Clearinghouse.

Nationwide Permit	Limits	Pre-Construction Notification (PCN) Threshold	Delineation Required?	Applicable Waters	Changes made in 2016	Other Information
NWP 52 – Water-Based Renewable Energy Generation Pilot Projects (Authorities: sections 10 and 404)	• 1/2 acre • 300 linear feet of stream bed but DE can waive for intermittent and ephemeral streams • No more than 10 generation units • Floating solar panels in section 10 waters limited to 1/2-acre in size	all activities	yes	all waters of the U.S. except in coral reefs	Add floating solar panels in navigable (i.e., section 10) waters to the list of activities authorized by this NWP, with a 1/2-acre limit. Add wave energy devices. Clarify that any losses of stream bed are applied to the 1/2-acre limit. Add note stating that hydrokinetic renewable energy generation projects authorized by the Federal Energy Regulatory Commission under the Federal Power Act of 1920 do not require separate authorization under Section 10 of the Rivers and Harbors Act of 1899.	Authorizes construction, expansion, modification, or removal of water-based renewable energy generation pilot projects and their attendant features. Limited to "pilot projects." Placement of a transmission line on bed of a navigable water of U.S. from generation unit to land-based collection facility is considered a structure under section 10 and is not considered a loss of waters of the U.S. Prohibits activities in coral reefs. Structures in anchorage areas must comply with U.S. Coast Guard requirements. Does not authorize structures in established danger zones, restricted areas, etc. Upon completion of pilot project, associated structures and/or fills must be removed unless authorized by separate DA permit. Utility lines transferring energy to a distribution system, regional grid, or other facility are generally considered to be separate and complete linear projects. An activity located on an existing, maintained Corps project requires separate approval under 33 USC 408. For wind energy generating structures, solar towers, or overhead transmission lines, district engineer coordinates PCN and NWP verification with Department of Defense Siting Clearinghouse.

Although the current NWPs went into effect during this Administration, it is important to note that preparatory, research, coordination, compliance, and policy work began a couple of years in advance. The final NWPs were cleared by OMB on December 21, 2016, and were issued by the Corps that same day. Therefore, the focus of this regulatory review will reconsider policy approaches and thresholds as well as re-reviewing policy comments focusing on requirements, if any, that unnecessarily obstruct, delay, curtail or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources.

Acreage Limits for the 2017 NWPs

The Corps requested comment on whether to retain the 1/2-acre limit that has been imposed on a number of NWPs, to include NWPs 12, 21, 44, 50, 51, and 52, or to impose different acreage limits. In the June 1, 2016, proposed rule the Corps' request for comments on the proposed acreage limits for the 2017 NWPs was made in part because of concerns about the potential effects of the June 29, 2015, final rule defining waters of the United States subject to Clean Water Act jurisdiction (see 81 FR 35191-35192). Prior to the publication of the June 1, 2016, proposed rule a number of regulated entities expressed their concerns to the Corps that the 2015 final rule defining "waters of the United States" would increase the number of waters and wetlands subject to Clean Water Act jurisdiction and cause many activities that were previously eligible for NWP authorization to require individual permits because the acreage limits in the 2012 NWPs would be exceeded for some activities requiring DA authorization. The 2015 final rule defining "waters of the United States" is currently stayed by the U.S. Court of Appeals for the Sixth Circuit and the regulations and guidance that were in effect before the 2015 final rule went into effect are being used to identify waters and wetlands subject to Clean Water Act jurisdiction. In the June 1, 2016, proposed rule the Corps also solicited comments on whether to change the acreage limits and pre-construction notification (PCN) thresholds for those NWPs that have acreage limits or acreage thresholds for PCNs.

The proportion of commenters stating that the acreage limits for the NWPs should remain unchanged was roughly the same as the proportion of commenters recommending increases in acreage limits. Recommendations for changing the 1/2-acre limit ranged from reducing the limit to 5,000 square feet to increasing the limit to 2 acres. After thoughtful consideration of the comments, coordination with other Federal agencies as part of the EO 12866 process, the Corps determined that retaining the 1/2-acre limit, along with applicable PCN thresholds, should continue to provide effective environmental protection (no more than minimal adverse environmental effects), while allowing district engineers the flexibility they need to take into account site-specific characteristics of any affected aquatic resources and other factors when deciding whether proposed activities are authorized by NWP. Additionally, division engineers may, at any time, modify NWPs on a regional basis to reduce acreage limits and add other restrictions or prohibitions through regional conditions. Although the Corps considered recommendations to have different acreage limits based upon the quality of the aquatic resources involved, the Corps determined as they had for previous reissue actions, that this would be impracticable, in part because the rapid ecological assessment methods that would be needed to implement such an approach are not uniformly available across the country for all

types of jurisdictional waters and wetlands. In addition, there are other factors that need to be taken into account when making no more than minimal adverse environmental effect determinations. See paragraph 2 of Section D, District Engineer's Decision, for list of factors district engineers consider when making no more than minimal adverse environmental effect determinations for the NWPs. The multiple factors that need to be considered when reviewing NWP PCNs to determine whether a particular activity is eligible for NWP authorization preclude the use of a simple tool to make those decisions.

In the final rule published in the January 6, 2017, edition of the Federal Register, the Corps responded to comments regarding the Sixth Circuit's stay of the 2015 final rule defining "waters of the United States." The Corps acknowledged that if the Sixth Circuit's stay is lifted and the 2015 final rule goes into effect, the Corps would evaluate the effect of the 2015 final rule on the implementation of the 2017 NWPs. The Corps stated that it would conduct rulemaking in accordance with the Administrative Procedure Act if it determined such rulemaking would be necessary to address changes in the geographic scope of Clean Water Act jurisdiction (see 82 FR 1869) to maintain the efficiencies of the NWP program.

The 1/2-acre limit should be retained for those NWPs where it currently applies (i.e., NWPs 12, 21, 44, 50, 51, and 52). Section 404(e) of the Clean Water Act states that NWPs and other general permits may only authorize activities that "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment". In the 2017 NWPs, criteria are provided to district engineers regarding a number of factors to consider when making their effects determinations (see paragraph 2 of section D, District Engineer's Decision). The combination of acreage and other numeric limits, with the PCN requirements, provide district engineers with the opportunity and the responsibility to make site-specific decisions on whether the "no more than minimal individual and cumulative adverse environmental effects" requirement has been satisfied. In addition, the division engineers have the authority to modify, suspend, or revoke any NWP by reducing the national limits on a regional basis. Extant PCN requirements allow district engineers to evaluate proposed activities on a case-by-case basis and impose conditions to ensure that those activities cause no more than minimal effects. If an applicant would like to pursue an activity that will result in impacts that exceed the ½-acre limit they can do so under the standard individual permit process.

Additionally, the Corps requested comment on whether to retain the 300 linear foot limit for losses of stream bed that was included in a number of NWPs, including 21, 44, 50, 51, and 52. Recommendations ranged from no limit, to a 500-foot limit, to no limit for intermittent and ephemeral streams. After thoughtful consideration of all comments, coordination with other Federal agencies as part of the EO 12866 process, the Corps decided to retain the 300 linear foot limit. However, in the 2017 NWPs district engineers have the authority (as they have had since the 2002 NWPs) to waive the 300 linear foot limit on a case-by-case basis if they determine that the loss of intermittent or ephemeral stream bed (up to 1/2 acre) would result

in no more than minimal adverse environmental effects, individually and cumulatively. The Corps determined that this approach appropriately balanced proposed activity and environmental protection interests.

The preamble to the NWPs issued on December 21, 2016, stated that 300 linear foot limit should be retained for those NWPs where it currently applies (i.e., NWPs 21, 44, 50, 51, and 52). Section 404(e) of the Clean Water Act states that NWPs and other general permits may only authorize activities that "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment". Guidance has been provided to district engineers regarding a number of factors to consider when making their effects determinations. The combination of linear foot and other numeric limits, provides district engineers with the opportunity and the responsibility to make site-specific decisions on whether the "no more than minimal adverse environmental effects" requirement has been satisfied. In addition, the division engineers have the authority to modify, suspend, or revoke any NWP to reduce the national limits on a regional basis. The current PCN requirements allow district engineers to evaluate proposed activities on a case-by-case basis and impose conditions to ensure that those activities cause no more than minimal effects. If an applicant would like to pursue an activity that will result in impacts that exceed the 300 linear foot limit, and the district engineer does not issue a waiver of that 300 linear foot limit, he or she can apply for a permit under the standard individual permit process.

Discussion and Evaluation of the 12 Nationwide Permits

NWP 3. Maintenance. (a) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized. This NWP also authorizes the removal of previously authorized structures or fills. Any stream channel modification is limited to the minimum necessary for the repair, rehabilitation, or replacement of the structure or fill; such modifications, including the removal of material from the stream channel, must be immediately adjacent to the project. This NWP also authorizes the removal of accumulated sediment and debris within, and in the immediate vicinity of, the structure or fill. This NWP also authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the district engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(b) This NWP also authorizes the removal of accumulated sediments and debris outside the immediate vicinity of existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.). The removal of sediment is limited to the minimum necessary to restore the waterway in the vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend farther than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization.

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

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

<u>Notification</u>: For activities authorized by paragraph (b) of this NWP, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 32). The pre-construction notification must include information regarding the original design capacities and configurations of the outfalls, intakes, small impoundments, and canals. (<u>Authorities</u>: Section 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act (Sections 10 and 404))

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

<u>Comments on Proposed NWP 3, Response to Comments, and Action for the Final NWP 3</u>: We proposed to modify this NWP to state that it also authorizes regulated activities associated with the removal of previously authorized structures or fills. We also proposed to modify paragraph (c) of this NWP to clarify that the use of temporary mats in jurisdictional waters and wetlands is also authorized by this NWP, if those mats are used to minimize impacts during regulated maintenance activities.

Many commenters supported all proposed modifications of NWP 3. Several commenters objected to the reissuance of this NWP, and some stated that it does not authorize a category of activities that is similar in nature. Two commenters opposed the reissuance of NWP 3, stating that it allows for piecemealing of maintenance activities and does not require evaluation of practicable alternatives. A few commenters said that maintenance activities should require individual permits.

This NWP only authorizes maintenance activities, a general category of activities that is similar in nature. General condition 15 requires each NWP activity to be a single and complete project, and states that the same NWP cannot be used more than once for the same single and complete project. Other than on-site avoidance and minimization measures, NWPs do not require the evaluation of practicable alternatives (see paragraph (a) of general condition 23, mitigation, and 40 CFR 230.7(b)(1)). Maintenance activities involving discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States usually have no more than minimal adverse environmental effects, individually and cumulatively, so authorization by NWP is appropriate. District engineers have the authority to exercise discretionary authority and require individual permits for any maintenance activities they determine will result in more than minimal adverse environmental effects.

Two commenters requested clarification regarding the use of the phrase "previously authorized" under paragraph (a), and whether it is necessary to supply the district engineer with documentation of the previous authorization. One commenter questioned whether a grandfathering provision is required for any currently serviceable structure or fill authorized by 33 CFR 330.3. Several commenters objected to the proposal to modify paragraph (a) of this NWP to authorize the removal of previously authorized structures or fills, and several commenters expressed their support for that proposed modification. Several commenters requested further clarification of the meaning of "minimum necessary" in paragraph (a), while one commenter said that there is no need to clarify this term. Two commenters asked for an explanation of the circumstances under which an activity would be considered a maintenance activity authorized by this NWP.

The term "previously authorized" means the structure or fill was authorized by an individual permit or a general permit, or the structure or fill was authorized under the provisions of 33 CFR 330.3. To qualify for NWP 3 authorization, it is not necessary for the project proponent to produce a copy of the prior authorization. In many cases it might not be possible to produce a copy of a written authorization because the discharge, structure, or work may have been authorized by a general permit that does not require reporting, or it was authorized by regulation without a reporting requirement. Once a structure or fill is authorized, it remains authorized unless the district engineer suspends or revokes the authorization (see 33 CFR 325.6). The district engineer has the discretion to determine what

constitutes the minimum necessary for the purposes of this NWP. In general terms, in the context of this NWP maintenance consists of repairing, rehabilitating, or replacing previously authorized structures or fills.

One commenter suggested adding a 200-foot limit to paragraph (a) of this NWP. Three commenters suggested adding "stabilization" after the phrase "repair, rehabilitation, or replacement" to clarify that stabilization activities are authorized by paragraph (a) of this NWP. One commenter recommended authorizing wetland dike maintenance under paragraph (a). One commenter said that there should be a limit on the size of structures or fills that can be removed under paragraph (a). Two commenters requested clarification regarding whether NWP 3 requires the removal of structures. Two commenters stated that in site-specific cases it may be environmentally preferable to abandon a structure or pipeline and keep it in place. A few commenters stated that maintenance activities often go beyond the intent of this NWP and, occasionally in emergency situations, are more extensive than necessary to respond to the emergency. They said those activities should require PCNs after the emergency response is completed if additional work is required.

Since this NWP authorizes maintenance activities and only allows minor deviations, we do not believe it would be appropriate to impose a quantitative limit on this NWP other than the 200-foot limit in paragraph (b). Stabilization activities can be authorized by NWP 13 or other NWPs. Wetland dikes that were previously authorized and are currently serviceable can be maintained under the authorization provided by this NWP. The intent of the proposed modification of this NWP with respect to authorizing the removal of structures or fills is to provide Department of the Army authorization when the landowner or other appropriate entity wants to remove a structure or fill from jurisdictional waters and wetlands, in case the prior authorization does not cover the removal of the structure or fill. This NWP does not require the removal of structures or fills. If it would be environmentally preferable to keep the structure or fill in place, then the structure or fill can remain in place unless the district engineer takes action under his or her authority to require the responsible party to remove the structure or fill. For example, under paragraph (c) of general condition 1, navigation, the district engineer can require a permittee to remove structures or works from navigable waters of the United States. If a district engineer determines that an activity, including an activity conducted to respond to an emergency, did not comply with the terms and conditions of NWP 3, and an excessive amount of work was done, he or she can take action to address the alleged non-compliance. One potential approach might be to require an individual permit for that activity.

For paragraph (b) of NWP 3, one commenter recommended removing the 200-foot limit. Two commenters suggested increasing that limit to 300 feet. One commenter said that any new riprap should be limited to being placed in the original project footprint. One commenter asked whether new or additional riprap to protect a structure or fill could be authorized by this NWP. Two commenters said the use of riprap should be discouraged, and

other means of controlling erosion should be used. A number of commenters said that the use of riprap in paragraph (b) should not require a PCN. One commenter said that in some cases, it is not possible to restore the waterway in the vicinity of the existing structure to the approximate dimensions that existed when the structure was built, because of changes to the stream channel that naturally occurred over time since the structure was originally constructed. One commenter stated support for the language requiring restoration of the waterway to those approximate dimensions.

We are retaining the 200-foot limit in paragraph (b) because we believe it is an appropriate limit, along with the PCN requirement, for ensuring that authorized activities result in no more than minimal adverse environmental effects. We have removed the last two sentences of this paragraph. The use of riprap or other erosion control measures such as bioengineering to protect the structure or fill from erosion may be authorized by other NWPs, such as NWP 13. The use of the word "approximate" in that sentence in paragraph (b) allows for the restoration of the waterway even though changes to the watershed and other alterations may have caused stream dimensions to change over time. Because all activities authorized by paragraph (b) require PCNs, district engineers will have the opportunity to consider the changes that have occurred to the stream over time, and determine whether the proposed activity is authorized by NWP 3 despite those changes.

Several commenters supported the addition of timber mats to the temporary activities authorized by this NWP. One commenter said that the use of timber mats in waters of the United States always requires Department of the Army authorization. One commenter requested clarification of the circumstances under which the use of timber mats in waters of the United States is a regulated activity. One commenter questioned whether the use of wetland mats requires a PCN. One commenter recommended limiting the use of temporary mats so that impacts do not exceed 300 linear feet of stream bed and/or 1/2-acre of waters of the United States. One commenter recommended adding the word "promptly" prior to "removed" so that the fourth sentence of paragraph (c) would read: "After conducting the maintenance activity, temporary fills must be promptly removed in their entirety and the affected areas returned to preconstruction elevations."

We have retained the use of timber mats in paragraph (c) of this NWP. District engineers will determine on a case-by-case basis whether using timber mats to conduct NWP activities requires Department of the Army authorization. For this NWP, only activities authorized by paragraph (b) require PCNs, unless an NWP general condition triggers a PCN requirement (e.g., paragraph (c) of general condition 18, endangered species or paragraph (c) of general condition 20, historic properties) or a regional condition. Since temporary mats authorized by paragraph (c) are temporary features, it is not necessary to impose quantitative limits on their use. We do not agree that the "promptly" should be added to the fourth sentence of paragraph (c) because there will be circumstances where temporary fills need to

remain in place for a longer time period. An example would be to allow the affected areas to stabilize before removing temporary fills.

A few commenters said that PCNs should be required for all activities authorized by this NWP. One commenter said that proposed removals of previously authorized structures or fills should require PCNs. Some commenters said that tribes should be notified of proposed NWP 3 activities because of potential impacts to tribal trust resources. Two commenters stated that PCNs should be required for any proposed activity under paragraph (a) that would result in more than a minor deviation from the structure's configuration or the filled area.

Because this NWP only authorizes maintenance activities, we do not believe that PCNs should be required for all activities. Division engineers have discretion to impose regional conditions on this NWP to require PCNs for some or all activities, including removal activities, if they believe additional PCNs are necessary to ensure that activities authorized in a region result in no more than minimal adverse environmental effects. For the 2017 NWPs, Corps districts have been consulting with tribes to identify regional conditions that protect tribal trust resources. Corps districts may also establish coordination procedures with tribes to ensure that NWP 3 activities do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands. Maintenance activities that result in more than minor deviations in the structure's configuration or filled area are not authorized under paragraph (a), unless it is a structure or fill that was destroyed or damaged by a storm, flood, fire, or other discrete event, and the structure or fill needs to be reconstructed. For repair, rehabilitation, or replacement activities conducted after storms or other discrete events, the structure or fill should be similar to what was damaged or destroyed, and constructed in the same general footprint as the original structure or fill.

One commenter said that a PCN should be required for any placement of new or additional riprap under paragraph (b). One commenter stated that the placement of riprap to protect an existing structure should not require a PCN. Several commenters recommended removing the PCN requirement for activities authorized by paragraph (b), because they believe that the removal of accumulated sediment results in only minimal adverse environmental effects. Three commenters suggested not requiring PCNs for removal of accumulated sediments within an existing structure, such as a culvert. One commenter asked whether the PCN requirement for activities authorized by paragraph (b) only applies to activities in section 10 waters.

All activities authorized by paragraph (b) of this NWP require PCNs. As discussed above, we have removed the last two sentences of this paragraph. The project proponent has the option of using NWP 13 or another NWP to authorize the placement of riprap to protect the existing structure, which in some circumstances does not require a PCN. The removal of accumulated sediment within an area extending 200 feet from a structure or fill has the potential to result in more than minimal adverse environmental effects, so we believe requiring

a PCN for those sediment removal activities is appropriate. We have modified paragraph (a) to clarify that it authorizes the removal of accumulated sediment and debris within, and in the immediate vicinity of, the structure or fill. Therefore, the removal of accumulated sediment and debris in those areas does not require a PCN unless a general condition or regional condition triggers a PCN requirement for those activities. The removal of accumulated sediment and debris outside of the immediate vicinity of the structure or fill, and up to 200 feet from that structure or fill, could be authorized by paragraph (b) and would therefore require a PCN. The PCN requirement for activities authorized under paragraph (b) of this NWP applies to activities that require section 10 and/or section 404 authorization.

One commenter expressed concern regarding impacts to endangered or threatened species caused by activities authorized by this NWP. One commenter recommended a cumulative impact analysis for NWP 3. One commenter said that compensatory mitigation should be required for all NWP 3 activities. Several commenters stated that this NWP should require use of best management practices to avoid sediment inputs to downstream waters. One commenter said that NWP 3 activities must comply with state or local floodplain management requirements.

Any proposed NWP 3 activity conducted by a non-federal permittee that might affect an ESA-listed species or designated critical habitat requires a PCN because of the requirements of general condition 18. Cumulative effects analyses under the National Environmental Policy Act and Clean Water Act section 404(b)(1) guidelines have been conducted for the 2017 NWP 3. Those cumulative effects analyses are presented in the national decision document for this NWP. We do not agree that compensatory mitigation should be required for all activities authorized by this NWP, because maintenance activities generally cause no more than minimal adverse environmental effects. For those NWP 3 activities that require PCNs, district engineers will determine whether compensatory mitigation or another form of mitigation is necessary to ensure the proposed activities will result in no more than minimal adverse environmental effects, in accordance with 33 CFR 330.1(e)(3). General condition 12, soil erosion and sediment controls, requires the use of appropriate soil erosion and sediment controls for NWP activities. General condition 10, fills in 100-year floodplains, requires fills in those floodplains to comply with applicable Federal Emergency Management Agency (FEMA)-approved state or local floodplain management requirements.

One commenter stated that maintenance of any structure should not create or maintain a fish passage barrier. Another commenter recommended adding terms to this NWP requiring authorized activities to improve aquatic life movements. One commenter recommended that this NWP authorize stream channelization to improve aquatic life movements. One commenter stated that maintenance of any structure should not create or maintain a channel restriction. One commenter stated that treated wood should not be used for maintenance activities to protect water quality.

General condition 2, aquatic life movements, requires NWP activities to be constructed so that they do not substantially disrupt the life cycle movements of indigenous aquatic species, unless the activity's primary purpose is to impound water. We can only condition the NWP to minimize adverse effects on aquatic life movements so that those adverse effects are no more than minimal, but actions the permittee takes to improve aquatic life movements in a waterbody may be considered as mitigation that would be considered in the district engineer's verification decision. While stream channelization may benefit some species, other species are likely to be adverse affected by those activities because they alter their habitat. General condition 9, management of water flows, requires that NWP activities maintain water flows to the maximum extent practicable, and that the capacity of open waters should be maintained. Treated wood may be considered a suitable material for maintenance activities, as long as the district engineer determines that its use complies with general condition 6, suitable material.

One commenter recommended adding terms to this NWP to provide specific requirements regarding slope stability. One commenter asked whether it is more appropriate to conduct pipeline maintenance under NWP 3 or NWP 12. One commenter said that NWP 3 should authorize up to 200 linear feet of stream realignment.

The appropriate slope for maintenance activities should be determined on a case-by-case basis, after considering site- and activity-specific factors. Either NWP 3 or NWP 12 may be used to authorize pipeline maintenance activities that require DA authorization because they involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States. Stream realignment is not a maintenance activity and may be authorized by another NWP, a regional general permit, or an individual permit.

This NWP is reissued with the modifications discussed above.

The current NWP does not have acreage, linear foot, or other numeric limits. Many of the activities authorized by this NWP do not require PCNs because the regulated activities are limited to maintaining and repairing existing structures and fills in place, and only minor deviations may be authorized when necessary to address changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards. For proposed activities where PCNs are required, district engineers provide case-specific review for each activity and ensure that this NWP authorizes only those activities that result in no more than minimal individual and cumulative adverse effects. Given an often limited project area and the applicant's compliance with various other regulations, verification of the NWP is typically simple.

After re-evaluating this NWP in light of EO 13783 and considering questions on the NWP 3 reissued in 2017, one modification is recommended. That modification would be to add text to paragraph (a) of this NWP to state that it authorizes minor amounts of riprap to protect the repaired structure or fill, as long as that riprap results in only a minor deviation in

the configuration of the fill or structure. The riprap would protect energy facilities and infrastructure from erosion.

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

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

<u>Comments on Proposed NWP 7, Response to Comments, and Action for the Final NWP 7</u>: In the June 1, 2016, proposed rule, the Corps did not propose any changes to this NWP. Several commenters said they support the reissuance of this NWP. One commenter recommended limiting bank stabilization for outfall structures to 25 feet along the bank. One commenter said that outfall structures should be installed in a manner that avoids permanent impacts to streams, and that velocity dissipation devices should be required to ensure that discharges from outfalls do not cause erosion. One commenter stated that outfall structures should not be located immediately adjacent to oyster or clam beds so that those clams and oysters can continue to be fit for human consumption. One commenter said that outfall structures should not be located in areas used by fish for foraging or spawning, or in areas inhabited by marine vegetation. Another commenter said that advance notice of proposed NWP 7 activities should be provided to tribes to avoid unresolved tribal treaty issues.

The stabilization of banks next to outfall structures may be authorized by NWP 13, and such activities would be subject to the terms and conditions of that NWP. A requirement to install velocity dissipation devices is more appropriately identified on a case-by- case basis by district engineers when they evaluate PCNs for activities authorized by this NWP. General condition 5, shellfish beds, protects areas of concentrated shellfish populations. Important fish spawning areas are protected through the requirements of general condition 3, spawning areas. Division and district engineers may modify, suspend, or revoke this NWP if there are regional or site-specific concerns about the effects of outfall structures on shellfish, spawning areas, or marine vegetation. For the 2017 NWPs, Corps districts have been consulting with tribes to identify regional conditions that protect tribal trust resources. Corps districts may also establish coordination procedures with tribes to ensure that NWP 7 activities do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands.

After re-evaluating this NWP in light of EO 13783 and public comments, no modifications are recommended. The current NWP does not have acreage, linear foot, or other numeric limits. In general, public comments received recommend imposing additional restrictions to protect the environment. The PCN is always required to provide case-specific review for each activity and ensure that this NWP authorizes only those activities that result in no more than minimal individual and cumulative adverse effects. Given an often limited project area and the applicant's compliance with various other regulations, verification of the NWP is typically simple. ***Accordingly, this review does not recommend any changes to NWP 7***.

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

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

Comments on Proposed NWP 8, Response to Comments, and Action for the Final NWP 8: the Corps did not propose any changes to this NWP. One commenter objected to the proposed reissuance of this NWP and said that individual permits should be required for these activities. Another commenter stated that these activities should require environmental impact statements and consultation with the National Marine Fisheries Service to address potential impacts to marine mammals.

For oil and gas structures on the outer continental shelf, and for the purposes of this NWP, the Corps' authority is limited to evaluating effects on navigation and national security. Because of their location on the outer continental shelf, these activities are unlikely to have more than minimal adverse effects on navigation and national security, but the PCN review process will ensure compliance with general permit requirements. A proposed oil and gas structure on the outer continental shelf that may result in ''take'' of marine mammals requires separate authorization under the Marine Mammal Protection Act. Requests for Marine Mammal Protection Act incidental harassment or take authorizations are obtained through a separate process administered by the National Oceans and Atmospheric Administration.

After re-evaluating this NWP in light of EO 13783, no modifications are recommended.

<u>NWP 12. Utility Line Activities.</u> Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.

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

Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

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

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

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

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

This NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines.

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

<u>Notification</u>: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if any of the following criteria are met: (1) the activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional

area (i.e., water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials. (See general condition 32.) (Authorities: Sections 10 and 404)

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

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

Note 3: Utility lines consisting of aerial electric power transmission lines crossing navigable waters of the United States (which are defined at 33 CFR part 329) must comply with the applicable minimum clearances specified in 33 CFR 322.5(i).

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

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

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

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

Note 8: For NWP 12 activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended

to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

Comments on Proposed NWP 12, Response to Comments, and Action for the Final NWP 12: In the June 1, 2016, the Corps proposed to make several changes to this NWP. The Corps proposed to clarify that this NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States for crossings of those waters associated with the construction, maintenance, repair, and removal of utility lines. In addition, The Corps proposed to modify the definition of ''utility line'' to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. The Corps also proposed to add a paragraph to this NWP to authorize, to the extent that DA authorization is required, discharges of dredged or fill material into waters subject to section 404 of the Clean Water Act and structures and work in waters subject to section 10 of the Rivers and Harbors Act of 1899, necessary to remediate inadvertent returns of drilling fluids that can occur during horizontal directional drilling operations to install utility lines under jurisdictional waters and wetlands.

Several commenters expressed their support for the proposed modifications to NWP 12. Some of these commenters agreed with the clarification that, for utility lines authorized by NWP 12, the Corps is only authorizing regulated activities to cross waters of the United States, including navigable waters. Several commenters said that utility lines crossing multiple waterbodies should require individual permits, instead of authorizing each separate and distant crossing by NWP. In contrast, several commenters said they support the use of NWP 12 to authorize separate and distant crossings of waters of the United States. One commenter suggested clarifying that ''crossing'' only refers to regulated activities, and not to activities such as horizontal directional drilling and aerial crossing of jurisdictional waters. Several commenters said this NWP does not authorize activities that are similar in nature. A couple of these commenters asserted that this NWP does not authorize activities that are similar in nature because pipelines can carry a variety of types of fluids, some of which are harmful and some of which are benign. Other commenters made the ''not similar in nature'' objection, stating that pipelines that carry fluids such as oil are different than pipelines that carry water or sewage, which are different than utility lines that carry electricity.

The Corps retained the long-standing practice articulated in the NWP regulations at 33 CFR 330.2(i), in which each separate and distant crossing of waters of the United States is authorized by NWP. The utility line activities authorized by NWP 12 are similar in nature because they involve linear pipes, cables, or wires to transport physical substances or

electromagnetic energy from a point of origin to a terminal point. For the purposes of this NWP, the term ''crossing'' refers to regulated activities. However, it should be noted that installing utility lines under a navigable water of the United States subject to section 10 of the Rivers and Harbors Act of 1899 via horizontal directional drilling, as well as aerial crossings of those navigable waters, require authorization under section 10 of the Rivers and Harbors Act of 1899. The substations, tower foundations, roads, and temporary fills that are also authorized by NWP 12 (when those activities require Department of the Army (DA) authorization) are integral to the fulfilling the purpose of utility lines, and thus fall within the ''categories of activities that are similar in nature'' requirement for general permits stated in section 404(e) of the Clean Water Act.

Many commenters objected to the reissuance of NWP 12, stating that it authorizes oil and gas pipelines that should be subject to the individual permit process instead. Many commenters said that these activities should be subject to a public review process. Many of these commenters cited the risk of oil spills as a reason why oil pipelines should be evaluated under the Corps' individual permit process. Many commenters based their concerns on their views that the Corps is the only federal agency that regulates oil pipelines.

The Corps does not regulate oil and gas pipelines, or other types of pipelines, per se. For utility lines, including oil and gas pipelines, the Corps' authority is limited to regulating discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States, under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899, respectively. The Corps does not have the authority to regulate the operation of oil and gas pipelines nor the authority to address spills or leaks from oil and gas pipelines. General condition 14, proper maintenance, requires that NWP activities, including NWP 12 activities, be properly maintained to ensure public safety. The proper maintenance required by general condition 14 also ensures compliance with the other NWP general conditions, many of which are designed to protect the environment, as well as any regional conditions imposed by the division engineer and activity-specific conditions imposed by the district engineer. In addition, the Corps does not have the legal authority to regulate the construction, maintenance, or repair of upland segments of pipelines or other types of utility lines. For example, for a recent oil pipeline (e.g., the Flanagan South pipeline), the segments of the oil pipeline that were subject to the Corps' jurisdiction (i.e., the crossings of waters of the United States, including navigable waters of the United States, that were authorized by the 2012 NWP 12) was only 2.3% of the total length of the pipeline; the remaining 97.7% of the oil pipeline was constructed in upland areas outside of the Corps' jurisdiction. Interstate natural gas pipelines are regulated by the Federal Energy Regulatory Commission. The Federal Energy Regulatory Commission also regulates some electric transmission projects.

There are other federal laws that address the operation of pipelines and spills and leaks of substances from pipelines. Those laws are administered by other federal agencies. Under the Natural Gas Pipeline Safety Act of 1968, the Department of Transportation (DOT) regulates

pipeline transportation of natural gas and other gases. The DOT also regulates the transportation and storage of liquefied natural gas. Under the Hazardous Liquid Pipeline Safety Act, the DOT regulates pipeline transportation of hazardous liquids including crude oil, petroleum products, anhydrous ammonia, and carbon dioxide. The DOT administers its pipeline regulations through the Office of Pipeline Safety (OPS), which is in its Pipelines and Hazardous Materials Safety Administration (PHMSA). Specific to oil pipelines, the PHMSA is responsible for reviewing oil spill response plans for onshore oil pipelines.

Oil spills are also addressed through the Oil Pollution Act of 1990, which is administered by the U.S. Environmental Protection Agency and the U.S. Coast Guard. Under the Oil Pollution Act of 1990, EPA is responsible for addressing oil spills occurring in inland waters and the U.S. Coast Guard is responsible for addressing oil spills in coastal waters and deepwater ports. The U.S. EPA has issued regulations governing its oil spill prevention program, and requires oil spill prevention, control, and countermeasures, and facility response plans (see 40 CFR part 300 and 40 CFR part 112). Oil spill prevention, control, and countermeasures are intended to ensure that oil facilities prevent discharges of oil into navigable waters or adjoining shorelines. Their facility response plan regulations require certain facilities to submit response plans to address worst case oil discharges or threats of a discharge. The U.S. Coast Guard has the authority to ensure the effective cleanup of oil spills in coastal waters and require actions that prevent further discharges of oil from the source of the oil spill. Activities regulated under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act that are determined by the U.S. EPA or U.S. Coast Guard to be necessary to respond to discharges or releases of oil or hazardous substances may be authorized by NWP 20.

Many commenters based their objections to the reissuance of NWP 12 on the inability for public involvement to occur during the Corps' NWP verification process for specific pipelines. Many commenters said the Corps' authorization process should be modified to prevent the segmentation of pipelines and that the Corps should fully evaluate the environmental impacts of individual fossil fuel pipelines, including the burning of those fossil fuels. Many commenters cited climate change as a reason why oil and gas pipelines should be evaluated under the individual permit process instead of the Corps using NWP to authorize crossings of waters of the United States.

The purpose of the NWPs, as well as regional general permits, is to provide a streamlined authorization process for activities that result in no more than minimal individual and cumulative adverse environmental effects. When section 404(e) of the Clean Water Act became law in 1977, lawmakers endorsed the general permit concept that was developed by the Corps in its 1975 and 1977 regulations (see 40 FR 31335 and 42 FR 37140, 37145 respectively). For the issuance or reissuance of NWPs and other general permits, the public involvement process occurs during the development of the general permit. If public notices were required to authorize specific activities after the NWP or other general permit was issued, it would not provide the streamlined process intended by Congress. Individual pipelines may be

able to operate independently to transport substances from a point of origin to a terminal point, even though they may be part of a larger network of pipelines. The Corps may authorize these independent pipelines, if all crossings of waters of the United States involving regulated activities qualify for NWP authorization.

The Corps does not have the legal authority to regulate the burning of fossil fuels that are transported by pipelines where the Corps authorized crossings of waters of the United States by NWP 12, other general permits, or individual permits. Therefore, in its environmental documentation the Corps is not required to fully evaluate the burning of fossil fuels, except to respond to specific comments submitted in response to a proposed rule (in the case of these NWPs) or comments submitted in response to a public notice for an individual permit application.

Activities authorized by NWP 12 are currently playing, and will continue to play, and important role in helping the nation achieve goals regarding the increased reliance on clean energy projects to meet the energy needs of its populace, and to help reduce emissions of greenhouse gases that contribute to climate change. Clean energy projects include the construction, operation, and maintenance of more efficient and cleaner fossil-fuel energy generation facilities, nuclear power plants, and renewable energy generation projects that use solar and wind energy. Natural gas and electricity transmission and distribution systems will also need to be constructed or upgraded to bring clean energy to consumers.

The utility line activities authorized by NWP 12 will continue to be needed by society, including the goods and services transported by those utility lines. In areas of increasing temperatures, there will be increased demand for air conditioning and the energy needed to run air conditioners. Some areas of the country will receive less precipitation, and their water needs may need to be fulfilled through the construction and operation of utility lines that carry water to those areas that need additional water.

One commenter said that for any oil pipeline that affects aboriginal, historic treaty or reservation lands of an Indian tribe, the terms of NWP 12 should require consultation with all affected tribes and that any permit decision protect the full range of tribal rights under federal law. Two commenters stated that all NWP 12 activities should require pre-construction notification to ensure that consultation occurs with tribes on any utility line that may affect protected tribal resources, tribal rights, or Indian lands. One of these commenters said that general condition 17 in effect delegates the Corps' tribal trust responsibility to project proponents, and that the vast majority of impacts to waters of the United States can occur without notification to the Corps.

Activities authorized by NWP 12 must comply with general condition 17, tribal rights, and general condition 20, historic properties. The Corps has modified general condition 17 to more effectively address the Corps' responsibilities regarding tribal rights (including treaty rights), protected tribal resources, and tribal lands. For the 2017 NWPs, district engineers have

been consulting with tribes to identify regional conditions that will facilitate compliance with general conditions 17 and 20. As a result of this consultation, district engineers can establish coordination procedures to identify utility line activities that require government-to-government consultation to protect tribal trust resources and tribal treaty rights. These consultations will be done in accordance with the Corps' tribal policy principles. In fulfilling its trust responsibilities to tribes, the Corps follows the Department of Defense American Indian and Alaska Native Policy. The Corps' tribal trust responsibilities apply to the activities regulated by the Corps, and do not extend to associated activities that the Corps does not have the authority to regulate, such as activities in upland areas outside of the Corps' legal control and responsibility.

The consultation between Corps districts and tribes that has been conducted for these NWPs can result in additional procedures or regional conditions to protect tribal trust resources. District engineers work to establish procedures with interested tribes to coordinate on specific NWP 12 activities to assist the Corps in executing its tribal trust responsibilities, or add mitigation requirements that the district engineer determines are necessary to ensure that the verified NWP activity results in no more than minimal individual and cumulative adverse environmental effects. As necessary, Division engineers impose regional conditions on this NWP, including requiring more activities to require pre-construction notification, to ensure that these activities do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands. When a Corps district receives a pre-construction notification that triggers a need to consult with one or more tribes, that consultation will be completed before the district engineer makes his or her decision on whether to issue the NWP verification. Regional conditions and coordination procedures can help ensure compliance with general condition 17. The Corps does not, and cannot, delegate its tribal trust responsibilities to permit applicants.

One commenter said that NWP 12 should prohibit construction in waters of the United States until all other federal and state permits are issued for pipelines. One commenter suggested adding language that allows temporary impacts for repair of a utility line parallel a bank, which is not a ''crossing.'' Several commenters stated that this NWP should not authorize activities in regions in Appalachia because it is not possible to mitigate impacts in those mountainous areas. Two commenters said this NWP should require the use of best management practices to control release of sediments during construction.

The NWPs do not remove the need to obtain other required federal, state, or local authorizations as required by law. The NWPs have a 45-day review period (with some exceptions), so district engineers cannot wait for all other federal, state, or local authorizations to be issued. Otherwise, the proposed NWP activity would be authorized after the 45-day period passed with no response from the Corps. The default NWP authorization would not have any activity-specific conditions, such as mitigation requirements, to ensure that the adverse environmental effects are no more than minimal. This NWP authorizes temporary fills to

construct a utility line. Concerns about the use of this NWP in Appalachia are more appropriately addressed by the appropriate division engineer, who has the authority to modify, suspend, or revoke the NWP in a specific region. General condition 12 requires the use of soil and erosion controls to ensure that sediments associated with an NWP activity are not released downstream.

Several commenters suggested changing the acreage limit from 1⁄2-acre to 1 acre. Some commenters said the 1⁄2- acre limit is too high, and some commenters stated that the 1⁄2-acre limit is appropriate. A number of commenters recommended imposing an acreage limit that would place a cap on losses of waters of the United States for the entire utility line. A few commenters recommended reducing the 1⁄2-acre limit to 1⁄4-acre. One commenter said the 1⁄2- acre limit should apply to the entire utility line, not to each separate and distant crossing. One commenter recommended establishing an acreage limit based on a county or state. Another commenter suggested applying the acreage limit to a waterbody. One commenter stated that this NWP should not authorize waivers of the 1⁄2-acre limit. Two commenters said that stream impacts should be limited to 300 linear feet, especially in headwater streams.

The Corps retained the 1⁄2-acre limit for this NWP because it is an appropriate limit for authorizing most utility line activities that have no more than minimal individual and cumulative adverse environmental effects. Division engineers can modify this NWP on a regional level to reduce the acreage limit if necessary to ensure that no more than minimal adverse environmental effects occur in that region. The acreage limit should not apply to the entire utility line because the separate and distant crossings of waters of the United States are usually at separate waterbodies scattered along the length of the utility line, and are often in different watersheds especially for utility lines that run through multiple counties, states, or Corps districts. For utility lines that cross the same waterbody (e.g., a river or stream) at separate and distant locations, the distance between those crossings will usually dissipate the direct and indirect adverse environmental effects so that the cumulative adverse environmental effects are no more than minimal. If the district engineer determines after reviewing the PCN that the cumulative adverse environmental effects are more than minimal, after considering a mitigation proposal provided by the project proponent, he or she will exercise discretionary authority and require an individual permit.

The 1⁄2-acre limit cannot be waived. The 1/2-acre for this NWP, and for all the other NWPs that have the 1/2-acre limit, is (and always has been since the 1/2-acre limit was adopted in 2000) a hard limit to ensure that those NWPs only authorize activities that have no more than minimal individual and cumulative adverse environmental effects. This includes those activities that receive default NWP authorizations in cases where district engineers do not respond to complete PCNs within 45 days. Only certain limits specified in the terms of specific NWPs can be waived, such as the 300 linear foot limit for losses of ephemeral and intermittent stream bed in NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. In cases where a waiver of the 300 linear foot limit is issued, the authorized loss of stream bed, plus any other losses of

jurisdictional waters and wetlands, cannot exceed 1/2-acre. The Corps did not think it was necessary to impose a 300 linear foot limit for the loss of stream bed was not imposed because most utility line crossings are constructed perpendicular, or nearly perpendicular, to the stream. In addition, most utility line crossings consist of temporary impacts. This NWP requires PCNs for proposed utility lines constructed parallel to, or along, a stream bed, and the district engineer will evaluate the adverse environmental effects and determine whether NWP authorization is appropriate.

Several commenters said this NWP does not authorize oil pipelines. One commenter said that the requirement that utility lines result in ''no change in pre-construction contours'' will not prevent changes in habitats or physical features in some streams, and utility lines may become exposed over time. One commenter objected to the requirement that there must be no change in pre-construction contours, because it is a new requirement and would require the permittee to complete a pre- and post- construction survey. One commenter said this NWP should not authorize mechanized land clearing in forested wetlands or scrub-shrub wetlands. Two commenters supported the addition of ''internet'' to the list of examples of utility lines. One commenter recommended removal of the reference to ''telegraph lines'' from the list of types of utility lines covered by this NWP.

This NWP authorizes crossings of waters of the United States that are part of utility lines used to transport any ''gaseous, liquid, liquescent, or slurry substance'' which includes oil. The Corps acknowledges that the construction and maintenance of utility lines in jurisdictional waters and wetlands will result in some changes to the structure of waters and wetlands and to the ecological functions and services provided by those waters and wetlands. There is often conversion of wetland types within utility line rights-of-way and those conversions often need to be permanently maintained while the utility line is operational. Periodic maintenance may be necessary to respond to erosion exposing utility lines that were buried when they were constructed. The requirement to ensure that there are no changes in pre- construction contours of waters of the United States does not mandate pre- and post-construction surveys. Compliance with this requirement can usually be accomplished by examining the nearby landscape to determine if there has been a change in pre-construction contours. The NWP requires PCNs for mechanized land clearing in the utility line right-of- way so that district engineers can evaluate those proposed activities and determine whether they qualify for NWP authorization and whether compensatory mitigation is necessary to ensure no more than minimal adverse environmental effects in accordance with general condition 23, mitigation. The Corps has retained the internet as a form of communication that may be transmitted by utility lines. There is no need to remove ''telegraph messages'' from the type of communications that may be conveyed by utility lines because there may be some use of telegraph messages by historic societies or other entities. Some of the existing utility lines that previously conveyed telegraph messages may now carry other forms of communication.

One commenter recommended modifying NWP 12 to authorize activities associated with wireless communication facilities, because these facilities could be considered substations. Two commenters said that NWP 12 should not authorize the construction or expansion of utility line substations because these facilities should not be located in waters of the United States. Several commenters said that utility line substations and access roads should not be limited to non-tidal waters of the United States to allow them to be constructed in all waters of the United States.

The substations authorized by this NWP must be associated with utility lines. With wireless telecommunication facilities, there are no utility lines connecting the various facilities because they transmit their information via electromagnetic waves traveling through the atmosphere. The construction of wireless communication facilities that involves discharges of dredged or fill material into waters of the United States may be authorized by NWP 39 or other NWPs. For some utility lines, it may not be practicable or feasible to locate a substation outside of waters of the United States. As long as the construction or expansion of the proposed utility line substation results in no more than minimal adverse environmental effects, it can be authorized by this NWP. The Corps believes that it is necessary to limit the construction of utility line substations and access roads to non-tidal wetlands (except for non-tidal wetlands adjacent to tidal waters) to ensure that NWP 12 only authorizes activities that result in no more than minimal adverse environmental effects. Conducting those activities in tidal waters and wetlands, and in non-tidal wetlands adjacent to tidal waters is more likely to result in more than minimal adverse environmental effects.

One commenter expressed opposition to moving the provisions authorizing access roads to NWPs 14 and 33. One commenter said that this NWP should not authorize access roads, because those roads can cause fragmentation of the landscape.

The Corps did not move the provisions authorizing the construction of utility line access roads to NWPs 14 and 33. The Corps has retained the access road provision in this NWP. The Corps only regulates those portions of access roads that require DA authorization because they involve regulated activities in jurisdictional waters and wetlands. The Corps does not regulate access roads constructed in upland areas that, in many areas of the country, are more likely to result in substantial habitat fragmentation. In those areas of the country where much of the landscape is comprised of wetlands, utility line access roads are more likely to exceed the 1/2-acre limit and thus require individual permits. District engineers will review PCNs with proposed access roads and determine whether the proposed activities will have more than minimal adverse environmental effects on wetland functions, including habitat connectivity.

In the June 1, 2016, proposed rule, The Corps added a paragraph to NWP 12 to authorize, to the extent that DA authorization is required, discharges of dredged or fill material into waters of the United States, and structures and work in navigable waters, necessary to remediate inadvertent returns of drilling fluids that can occur during horizontal directional drilling operations to install utility lines below jurisdictional waters and wetlands. An

inadvertent return occurs when drilling fluids are released through fractures in the bedrock and flow to the surface, and possibly into a river, stream, wetland, or other type of waterbody. For NWP 12 activities where there is the possibility of such inadvertent returns, district engineers may add conditions to the NWP 12 verification requiring activity-specific remediation plans to address these situations, should they occur during the installation or maintenance of the utility line.

The fluids used for directional drilling operations consist of a water- bentonite slurry and is not a material that can be considered ''fill material'' under 33 CFR 323.2(e). This water-bentonite mixture is not a toxic or hazardous substance, but it can adversely affect aquatic organisms if released into bodies of water. Because these drilling fluids are not fill material, inadvertent returns of these drilling fluids are not regulated under section 404 of the Clean Water Act. However, activities necessary to contain and clean up these drilling fluids may require DA authorization (e.g., temporary fills in waters of the United States, or fills to repair a fracture in a stream bed).

Several commenters expressed support for adding the paragraph on remediation of inadvertent returns of drilling fluids from directional drilling activities. A few commenters said that the term ''frac-out'' should not be used when referring to inadvertent returns of drilling fluids during horizontal directional drilling operations. A commenter recommended replacing the term ''sub-soil'' with ''subsurface.'' One commenter objected to the proposed addition, stating that these inadvertent returns of drilling fluids occur too frequently. One commenter asked for a definition of ''inadvertent return'' and said the NWP should explain that inadvertent returns of drilling fluids during horizontal directional drilling activities may require a Clean Water Act section 402 permit. One commenter requested clarification that activities which remediate inadvertent returns of drilling fluids minimize environmental impacts. One commenter agreed that inadvertent returns of drilling fluids that occur during horizontal directional drilling activities are not discharges of dredged or fill material into waters of the United States. One commenter said that for horizontal directional drilling activities, the NWP should require entry and exit 50 feet from the stream bank, and sufficient depths prevent inadvertent returns of drilling fluids. One commenter said that the NWP should require upland containment of drilling fluids. One commenter requested that this paragraph distinguish between horizontal directional drilling for the purposes of utility line installation or replacement, and directional drilling for oil and gas extraction.

Horizontal directional drilling for utility line installation and replacement is an important technique for avoiding and minimizing adverse effects to jurisdictional waters and wetlands during the construction of utility lines. Modifying NWP 12 to authorize remediation activities that involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States and are necessary to address these inadvertent returns to protect the aquatic environment is a prudent course of action. The Corps removed the term ''frac-out'' from the text of this NWP, and replaced the term ''mud'' with

‘‘fluid.’’ The Corps replaced the term ‘‘sub- soil’’ with ‘‘subsurface’’ because horizontal directional drilling activities usually occur well below the soil. District engineers may add conditions to NWP verifications to require activity- specific remediation plans to address potential inadvertent returns that might occur during the construction of the utility line.

If the horizontal directional drilling activities require DA authorization, the district engineer may add conditions to the NWP authorization to specify entry and exit points for the drilling equipment. If the drilling fluids return to the surface and are not considered to be discharges of dredged or fill material regulated under section 404 of the Clean Water Act, then the Corps cannot require those drilling fluids to be contained in an upland area. The text of this paragraph of NWP 12 specifically refers to horizontal directional drilling for utility line installation or replacement, but the Corps revised the text of this paragraph to specify that these activities are being ‘‘conducted for the purpose of installing or replacing utility lines.’’

Several commenters said that for utility lines involving horizontal directional drilling, the PCN should require drilling plans and site-specific spill detection and remediation measures. One commenter stated that mitigation should be required for the remediation of inadvertent returns of drilling fluids. Two commenters recommended adding a requirement that remediation of inadvertent returns of drilling fluids must be based on contingency plans submitted in advance of conducting horizontal directional drilling. One commenter said that PCNs should be required for these remediation activities and agency coordination should be conducted. Another commenter said that water quality certification agencies should be involved in the review and approval of these remediation plans.

If the horizontal directional drilling involves activities that require authorization under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act, the PCN should describe those activities and their environmental effects. The PCN should also describe mitigation measures that will be used to ensure compliance with the terms and conditions of the NWP. Remediating the inadvertent returns of drilling fluids and restoring, to the maximum extent practicable, the affected jurisdictional waters and wetlands is sufficient mitigation. District engineers can add conditions to the NWP authorization to require contingency plans for utility line activities that require DA authorization. It is not necessary to require PCNs for inadvertent returns of drilling fluids or to conduct agency coordination. Through this provision of NWP 12, the Corps encourages timely remediation of these inadvertent returns of drilling fluids to protect the aquatic environment. States can determine whether water quality certification is required for activities conducted to remediate inadvertent returns of drilling fluids. States can require water quality certification for any discharge into jurisdictional waters and wetlands, not just discharges of dredged or fill material.

Several commenters said they support the addition of temporary mats to minimize impacts of utility line activities. Two commenters requested clarification that not all uses of temporary mats in jurisdictional waters and wetlands results in a regulated activity. One commenter recommended adding language to this paragraph to include other measures that

distribute the weight of construction equipment to minimize soil disturbance. Another commenter stated that this paragraph should require best management practices, such as low pressure equipment, wide tires, and varying travel paths, to minimize the adverse environmental effects of NWP 12 activities. One commenter suggested inserting the word ''promptly'' between the words ''be removed'' to require the prompt removal of all temporary fills.

District engineers will determine on a case-by-case basis whether the use of timber mats in jurisdictional waters and wetlands requires DA authorization. Language in this paragraph allows for a variety of temporary structures, fills, and work necessary to construct, maintain, or repair a utility line, substation, foundation for overhead utility lines, or access road. It is not necessary to provide, for NWP 12 activities, a comprehensive list of techniques to minimize soil disturbance and minimize the impacts of construction equipment. The proposed addition of ''promptly'' was rejected because it may be more protective of the environment to keep temporary fills in place until post- construction restoration activities or permanent fills have had time to stabilize.

One commenter stated that the PCN thresholds for NWP 12 should not be changed. One commenter said that PCNs should be required for all NWP 12 activities. Several commenters suggested increasing the 1⁄10-acre PCN threshold (item 5 in the ''Notification'' paragraph) to 1⁄2-acre. One commenter asked the Corps to remove the PCN requirement for the maintenance of aerial crossings of section 10 waters that do not include installation of new structures. One commenter opposed replacing the current PCN thresholds with a single 1⁄10-acre PCN threshold. One commenter requested clarification of the PCN threshold for proposed NWP 12 activities that run parallel to a stream bed (item 4 in the ''Notification'' paragraph). One commenter said that PCNs should be required for utility line crossings of streams inhabited by species listed under the Endangered Species Act.

The Corps did not change the PCN thresholds for this NWP. PCNs should not be required for all activities authorized by this NWP because the current PCN thresholds have been effective in identifying proposed NWP 12 activities that should be reviewed by district engineers on a case-by-case basis to ensure that they result in only minimal individual and cumulative adverse environmental effects. In addition, paragraph (b)(4) of general condition 32 requires that NWP 12 PCNs (and PCNs for other NWPs) also include information on other crossings of waters of the United States for the linear project that will use NWP 12 authorizations but do not require PCNs. This requirement is also explained in Note 8 of NWP 12.

All NWP 12 activities that require authorization under section 10 of the Rivers and Harbors Act of 1899 require PCNs to ensure that these utility lines will have no more than minimal adverse effects on navigation. This includes the maintenance of aerial crossings of navigable waters. The current PCN thresholds should be maintained instead of simplifying the PCN thresholds to a single PCN threshold for the loss of greater than 1⁄10-acre of waters of the United States. Item 4 of the ''Notification'' paragraph requires pre-construction notification for

utility lines placed in jurisdictional waters and wetlands if the proposed utility line runs parallel to, or along, a stream bed. These activities require PCNs to allow district engineers to evaluate potential impacts to the stream. General condition 18, endangered species, requires PCNs for all NWP activities to be conducted by non- federal permittees that might affect listed species or critical habitat (see paragraph (c) of general condition 18).

Several commenters expressed agreement with adding the proposed Note 2, and some of those commenters requested clarification of the use of the term ''independent utility'' in the proposed note. Several commenters objected to the proposed Note 2, stating that only the crossings of waters of the United States that do not qualify for NWP authorization should be evaluated through the individual permit process, allowing the remaining crossings to be authorized by NWP 12. Several commenters said that the second sentence of Note 2 should be removed. Several commenters requested clarification that the phrase

''independent utility'' in 33 CFR 330.6(d) does not affect the current practice for linear projects found in 33 CFR 330.2(i) and in the NWP definition of ''single and complete linear project'' in which separate and distant crossings of waters of the United States can qualify for separate NWP authorization. Several commenters asked for thresholds for determining when utility line crossings are ''separate and distant.''

Note 2 is based on the NWP regulations that were published in the Federal Register on November 22, 1991 (56 FR 59110), and represent long- standing practices in the NWP program. Those regulations include the definition of ''single and complete project'' at 33 CFR 330.2(i) and the provision on combining NWPs with individual permits at 33 CFR 330.6(d). The Corps removed the phrase ''with independent utility'' from the second sentence of Note 2. The second sentence, with this modification was retained to remind users of NWP 12 of the requirements in the regulations at 33 CFR 330.6(d). This will help ensure that the project proponent submits the appropriate request for authorization, specifically an individual permit application or NWP PCN.

If one or more crossings of waters of the United States for a proposed utility line do not qualify for authorization by NWP, then the utility line would require an individual permit because of 33 CFR 330.6(d). An exception would be if a regional general permit is available to authorize the crossing or crossings that do not qualify for NWP authorization. In these circumstances, the project proponent also has the option of relocating or redesigning the crossings of waters of the United States that does not qualify for NWP authorization so that all of the utility line crossings could qualify for NWP authorization.

There is no conflict between 33 CFR 330.6(d) and 33 CFR 330.2(i). In addition, these regulations do not conflict with the NWP definition of ''single and complete linear project'' in Section F of these NWPs. It should be noted that both 33 CFR 330.2(i) and the NWP definition of ''single and complete linear project'' do not discuss the concept of ''independent utility.'' The Corps cannot establish national thresholds for determining when crossings of waters of the

United States are ‘‘separate and distant’’ because a variety of factors should be considered by district engineers when making those decisions, such as topography, geology, hydrology, soils, and the characteristics of wetlands, streams, and other aquatic resources. Corps districts may establish local guidelines for identifying ‘‘separate and distant’’ crossings.

One commenter said that Note 2 uses the phrase ‘‘utility lines with independent utility’’ and observes that the definition of ‘‘independent utility’’ in the ‘‘Definitions’’ section of the NWPs states that independent utility is a test for ‘‘a single and complete non- linear project.’’ This commenter said that this inconsistent wording causes confusion. One commenter stated that the difference between ‘‘stand-alone’’ activities and ‘‘segments’’ is unclear. One commenter recommended removing the second sentence of Note 2. One commenter requested a definition of ‘‘stand-alone linear project.’’

The Corps removed the phrase ‘‘with independent utility’’ from the second sentence of Note 2. District engineers will apply the concept of independent utility in 33 CFR 330.6(d) to determine when NWP authorizations can be combined with individual permit authorizations, or whether an individual permit is required for the regulated activities. Therefore, there is no need to further explain the concept of ‘‘stand- alone’’ activities or ‘‘stand-alone linear project.’’ Note 2 covers linear projects, not single and complete non-linear projects, so Note 2 should not be applied to non-linear projects. There are separate definitions of ‘‘single and complete linear project’’ and ‘‘single and complete non-linear project’’ in the Definitions section of these NWPs because these are different concepts for the NWP program.

Several commenters opposed Note 2, stating that it would allow utility line proponents to break up large utility lines into separate projects and prevent them from being evaluated under the individual permit process. One commenter requested clarification whether the permittee can identify to the district engineer the origin and terminal point for each utility line that has independent utility (i.e., each stand- alone utility line).

The purpose of Note 2 is to prevent the situations the commenters opposing the proposed note are concerned about, to ensure that utility lines with one or more crossings that do not qualify for NWP authorization are evaluated under the individual permit process. To assist district engineers in applying 33 CFR 330.6(d), in an individual permit application or a PCN, the project proponent can identify the point of origin and terminal point of the utility line that could function independently of a larger overall utility line project.

The objective of Note 2 is to improve consistency in implementation of the NWP program, especially the application of 33 CFR 330.6(d). Project proponents usually design their utility lines to reduce their impacts to waters of the United States to qualify for NWP authorization. That avoidance and minimization is a benefit of the NWP program. In addition, most of the crossings of waters of the United States for utility lines result in temporary impacts to those jurisdictional waters and wetlands. The use of the term ‘‘separate and distant’’ in Note

2 is the same as its use in 33 CFR 330.2(i) and the definition of ''single and complete linear project'' in the ''Definitions'' section of the NWPs (Section F).

A few commenters asserted that proposed Note 2 does not comply with NEPA or the National Historic Preservation Act (NHPA) because the Corps should view an entire oil pipeline as a single and complete project. These commenters objected to the Corps' practice of authorizing each separate and distant crossing by NWP.

The Advisory Council on Historic Preservation's regulations for implementing NHPA section 106 define the term ''undertaking'' as: ''a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.'' (See 36 CFR 800.16(y).) It should be noted that the Advisory Council's definition of ''undertaking'' refers not only to projects, but also to activities. Their definition of ''undertaking'' recognizes that federal agencies may not regulate or permit entire projects, and that a federal agency might only have the authority to authorize an activity or a number of activities that is a component or are components of a larger overall project.

For oil pipelines and other utility lines, the activities that are subject to the Corps' regulatory authorities and require DA authorization are crossings of jurisdictional waters and wetlands, as well as utility line substations, foundations for overhead utility lines, and access roads, that involve discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States. Segments of an oil pipeline or other utility line in upland areas outside of the Corps' jurisdiction, or attendant features constructed in upland areas, do not require DA authorization and therefore are not, for the purposes of the Corps' compliance with section 106 of the NHPA, ''undertakings.'' The Corps does not have direct or indirect jurisdiction over pipeline segments in upland areas. The Corps does not regulate oil pipelines, or other utility lines per se; the Corps only regulates those components of oil pipelines or other utility lines that involve activities regulated under its authorities (i.e., section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899).

The activities regulated by the Corps, as well as the Corps' analysis of direct and indirect effects caused by those regulated activities, are the same regardless of whether the Corps processes an individual permit application or uses NWPs or other general permits to authorize the regulated activities. Likewise, for the consideration of cumulative effects, the incremental contribution of regulated activities to cumulative effects is the same regardless of the type of DA authorization. That incremental contribution consists of the direct and indirect effects of the activities that require DA authorization.

One commenter supported the addition of Note 3. One commenter requested that this Note clarify that the term "navigable waters of the United States" refers to the waters defined at 33 CFR part 329. The Corps added a reference to 33 CFR part 329 to Note 3.

One commenter agreed with the proposed addition of Note 6. Several commenters said the word "that" should be added before the phrase "do not qualify." One commenter stated that the phrase "or another applicable 404(f) exemption" should be added to Note 6 because a project proponent may use other Clean Water Act section 404(f) exemptions, such as the exemptions for ditch maintenance and the construction of temporary sedimentation basins. One commenter requested confirmation that the Clean Water Act section 404(f) exemptions that are applicable to currently serviceable structures used for transportation have not been changed. Another commenter requested examples of activities that do not qualify for the Clean Water Act section 404(f) exemptions, such as mechanized land clearing outside previously authorized right-of-ways.

The Corps added the word "that" after "activities" to correct the error in the proposed Note 6. Note 6 does not preclude project proponents from utilizing other Clean Water Act section 404(f) exemptions that are applicable to activities that may be related to utility lines. Note 6 refers to the maintenance exemption because NWP 12 explicitly refers to maintenance activities, which may require Clean Water Act section 404 authorization if the maintenance activity does not qualify for the section 404(f) maintenance exemption. Note 6 does not affect the application of the maintenance exemption to fill structures used for transportation. It is beyond the scope of Note 6 to discuss activities related to utility lines that do not qualify for any of the Clean Water Act section 404(f) exemptions.

One commenter pointed out that Note 8 was not discussed in the preamble of the June 1, 2016, proposed rule. One commenter asked the Corps to explain why it proposed to add Note 8. Another commenter requested clarification of whether Note 8 would affect utility lines that have stormwater outfalls.

The lack of discussion of Note 8 in the preamble to the proposed rule was an error. As stated on page 35197 of the proposed rule, the Corps solicited comments on all of the NWPs, general conditions, definitions, and all NWP application procedures presented in the proposed rule. The purpose of Note 8 is to remind users of the NWPs that if a utility line includes crossings of waters of the United States that are authorized by NWP but do not require PCNs, and one or more crossings of waters of the United States requires pre-construction notification, then the PCN must include those non-PCN crossings, in accordance with the requirements of paragraph (b)(4) of general condition 32 . The requirements in Note 8 may apply to outfalls for utility lines and outfalls for stormwater management facilities, depending on the case-specific characteristics of the utility line, outfall, and stormwater management facility.

Several commenters said that Corps districts should be prohibited from suspending or revoking NWP 12 and using RGPs for utility lines that cross state or district boundaries. One commenter recommended that NWP 12 include prescriptive national standard best management practices (BMPs) and provide notifications to stakeholders when pipelines, cables, and utility lines are proposed to be constructed in marine transportation routes. These

notifications would also be provided to the U.S. Coast Guard and the National Marine Fisheries Service. A few commenters said that the mitigation process for NWP 12 is not in compliance with the National Environmental Policy Act (NEPA) because the public is not provided with an opportunity to comment on requests for NWP verifications. A few commenters also stated that reliance on a district engineer's compensatory mitigation requirement for an NWP 12 verification is inadequate to support a finding of no significant impact under an environmental assessment prepared to satisfy NEPA requirements.

For utility lines that cross Corps district boundaries, each Corps district may process the NWP 12 PCNs for crossings located in its district, or the Corps districts may designate a lead district to provide a single response to the NWP 12 PCNs. If a Corps district has had NWP 12 suspended or revoked by the division engineer to use a regional general permit or state programmatic general permit instead of NWP 12, it can use that regional or programmatic general permit to authorize utility line activities. It would be more appropriate to have district engineers determine which BMPs should be applied to the construction, maintenance, or repair of utility lines in their geographic areas of responsibility, as those BMPs may vary by region and utility sector. If the U.S. Coast Guard has a role in regulating utility lines in marine transportation routes, the U.S. Coast Guard can take its own actions under its authorities to ensure compliance with its requirements. The Corps continues to provide NWP verifications to the National Ocean Service for the charting of utility lines in navigable waters of the United States.

The decision document for this NWP includes an environmental assessment with a mitigated finding of no significant impact. Mitigation measures are discussed throughout the combined decision document, which includes the environmental assessment, public interest review, and 404(b)(1) Guidelines analysis. Other mitigation measures may be required by district engineers through conditions added to activity-specific NWP verifications. The mitigation measures discussed in the national decision documents include the NWP general conditions, which help ensure that NWP activities result in no more than minimal adverse environmental effects.

The draft decision document for NWP 12 was made available for public review and comment concurrent with the proposed rule that was published in the Federal Register on June 1, 2016. The decision document describes, in general terms, mitigation that helps ensure that NWP 12 activities result in no more than minimal adverse environmental effects. Mitigation requirements, including compensatory mitigation requirements, will be determined by district engineers for activity-specific NWP verifications. Compliance with NEPA is accomplished when the NWP is issued by Corps Headquarters, with its decision document. Individual NWP 12 verifications do not require NEPA documentation, nor do they require an opportunity for public comment. The public comment process occurs during the rulemaking procedures to issue or reissue an NWP. A public notice and comment process for NWP verifications would not be

consistent with the Congressional intent of section 404(e) of the Clean Water Act, which envisions a streamlined authorization process for activities that result in no more than minimal individual and cumulative adverse environmental effects.

One commenter said that utility lines constructed parallel to the stream gradient should have the minimum number of crossings, and those crossings should intersect the stream as close to 90 degrees to the stream centerline as possible. That commenter also stated that trench plugs should be no more than 200 feet apart, and plugs must be used on either side of the stream crossing. One commenter recommended adding a permit condition to prevent utility lines from creating new drainage paths away from a waterbody.

Paragraph (a) of general condition 23, mitigation, requires permittees to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable on the project site. For the purposes of NWP 12, this means that the project proponent should design the utility line to minimize the number of crossings of waters of the United States. The use of trench plugs will be determined on a case-by-case basis by district engineers when processing NWP 12 PCNs or voluntary requests for NWP verification. District engineers may also impose activity-specific conditions on NWP 12 authorizations to minimize draining of waters of the United States.

One commenter said that compensatory mitigation should be required for the permanent conversion of forested wetlands to scrub-shrub wetlands for utility line rights-of-way. Two commenters stated that this NWP should not authorize sidecasting of excavated material into waters of the United States because the sidecast material will be dispersed by currents or rainfall. One commenter requested clarification of a statement made in the preamble to the proposed rule that some excavation activities do not require Clean Water Act section 404 authorization. Two commenters said that if Corps districts consider separate and distant crossings of waters of the United States to qualify for separate NWP authorization, how are cumulative impacts considered in accordance with Section D, District Engineer's Decision?

District engineers have the discretion to require compensatory mitigation for the permanent conversion of forested wetlands to scrub-shrub wetlands, if that permanent conversion is conducted as a result of activities that require DA authorization (see paragraph (i) of general condition 23, mitigation). General condition 12, soil erosion and sediment controls, requires permittees to stabilize exposed soils and fills at the earliest practicable date, to minimize dispersion by currents, rainfall, or other erosive forces. Excavation activities require Clean Water Act section 404 authorization if they result in regulated discharges of dredged or fill material into waters of the United States (see the definitions at 33 CFR 323.2).

Paragraph 1 of Section D, District Engineer's Decision, requires district engineers to consider the cumulative effects of all crossings of waters of the United States for a single and complete linear project that is authorized by NWP, including those crossings that require DA authorization but do not otherwise require pre-construction notification. A complete PCN

requires the project proponent to identify, in addition to the NWP 12 activities that require PCNs, the NWP 12 activities that do not require PCNs (see paragraph (b)(4) of general condition 32 and Note 8). The information regarding the cumulative effects of all of the utility line activities authorized by NWP 12 will be considered by the district engineer in his or her decision-making process for an NWP 12 verification.

A number of commenters asserted that the issuance of NWP 12 requires an environmental impact statement. A few commenters stated that the cumulative effects analysis for NWP 12 in the draft decision document was insufficient. A few commenters said that the cumulative effects analysis for NWP 12 in the draft decision document was properly done. One commenter indicated that the Corps improperly deferred the requirement to do a NEPA cumulative effects analysis to the district engineer's NWP verification decision. One commenter opined that the Corps defers its NEPA review for later stages in the permitting process and that NWP 12 provides no guarantee that the Corps district will conduct a NEPA analysis for the NWP verification. One commenter said that Corps districts should prepare supplemental environmental impact statements for NWP 12 verifications. One commenter stated that the decision document should discuss NWP 12 activities and their effects on climate change. Many commenters remarked that the Corps should not issue permits for pipelines because the burning of fossil fuels contributes greenhouse gases that cause climate change.

For the issuance or reissuance of an NWP, including NWP 12, the Corps complies with NEPA when Corps Headquarters issues or reissues the NWP with its decision document. The decision document issued by Corps Headquarters includes an environmental assessment and a finding of no significant impact, which concludes the NEPA process. The finding of no significant impact is reached because of the terms and conditions of the NWP and the mitigation measures (e.g., general conditions and other mitigation measures) for NWP 12 activities that are discussed throughout the decision document. Therefore, an environmental impact statement is not required for the issuance or reissuance of NWP 12. When a district engineer issues an NWP 12 verification, he or she is confirming that the proposed NWP 12 activity complies with the terms and conditions of the NWP, including any regional and activity-specific conditions, and will result in no more than minimal individual and cumulative adverse environmental effects. If the district engineer requires activity-specific mitigation measures, he or she will require those mitigation measures through conditions added to the NWP authorization.

To issue an NWP verification the district engineer does not need to prepare a NEPA document because the requirements for NEPA were fulfilled when Corps Headquarters issued the national decision document for the NWP. Since NEPA compliance is achieved by Corps Headquarters through the preparation of a combined decision document that includes an environmental assessment and finding of no significant impact, Corps districts do not need to prepare supplemental environmental impact statements for NWP verifications. If a proposed NWP activity will result in more than minimal individual and cumulative adverse environmental effects after considering the mitigation proposal submitted by the prospective permittee, the district engineer will assert discretionary authority and require an individual permit if the

adverse environmental effects will be more than minimal. During the individual permit process, the district engineer will prepare the appropriate NEPA documentation.

The NEPA cumulative effects analysis in the NWP 12 decision document was prepared in accordance with the Council of Environmental Quality's definition of "cumulative impact" at 40 CFR 1508.7, and utilizes concepts presented in CEQ's 1997 and 2005 guidance on conducting cumulative impact analyses. The NEPA cumulative effects analysis examines cumulative effects on various resources of concern, including wetlands, rivers and streams, coastal areas, and endangered and threatened species. The Corps' NEPA cumulative effects analysis examines past, present, and reasonably foreseeable future actions that affect those resources of concern, including federal, non-federal, and private actions. Because the decision document is national in scope it is a general cumulative effects analysis.

The Corps also conducted a cumulative effects analysis in accordance with the 404(b)(1) Guidelines because this NWP authorizes discharges of dredged or fill material into waters of the United States. The Corps does not defer the NEPA cumulative effects analysis to the NWP verification stage of the authorization process. Corps Headquarters conducts the required NEPA analyses when it issues or reissues the NWP. The final national decision document includes a discussion of NWP 12 activities and climate change. Activities authorized by NWP will result in small incremental contributions to greenhouse gas emissions during construction periods, if the equipment used to construct the crossings of waters of the United States, utility line substations, footings for overhead utility lines, or access roads in waters of the United States consumes fossil fuels. The Corps does not have the authority to regulate the burning of fossil fuels that may be transported by utility lines. The Corps does not have the legal authority to regulate emissions of greenhouse gases during the operation and maintenance of the utility line activities, if those operations and maintenance activities do not involve activities that require DA authorization.

A number of commenters said the draft decision document for NWP 12 is inadequate, especially in its evaluation of the risks and impacts of oil spills, gas pipeline leaks, and inadvertent returns of drilling fluids from horizontal directional drilling activities. One commenter stated that with respect to the discussion of Subpart G (Evaluation and Testing) in the draft decision document, that voluntary compliance is rarely as effective as monitored compliance. Another commenter objected to the statement that "this NWP will encourage applicants to design their projects within the scope of the NWP" because the commenter believes that the NWP encourages massive cross-country pipeline projects. One commenter said the decision document must address impacts to forested wetlands caused by NWP 12 activities.

The decision document for NWP 12 treats oil spills and gas pipeline leaks as reasonably foreseeable future actions in the NEPA cumulative impact analysis section. The decision document also discusses the potential for inadvertent returns of drilling fluids to occur during horizontal directional drilling activities used to install or replace utility lines. As discussed above, the Corps does not regulate the operation of oil or gas pipelines, or leaks that might

occur. In addition, the Corps does not regulate inadvertent returns of drilling fluids that might occur as a result of subsurface fractures during horizontal directional drilling activities. Oil spills and gas leaks are addressed by other federal agencies under other federal laws.

As discussed in the proposed rule, inadvertent returns of drilling fluids from horizontal directional drilling are not discharges regulated under section 404 of the Clean Water Act, under the current definitions of "discharge of dredged material" and "discharge of fill material" at 33 CFR 323.2. The Corps added provisions to NWP 12 to authorize discharges of dredged or fill material into waters of the United States and/or structure or work in navigable waters of the United States to remediate inadvertent returns of drilling fluids if they occur, to minimize the adverse environmental effects of those inadvertent returns of drilling fluids.

For those NWP 12 activities that do not require PCNs, voluntary compliance is an appropriate means of compliance. District engineers will take appropriate action if they discover cases of non-compliance with the terms and conditions of NWP 12. For utility lines, this NWP only authorizes crossings of waters of the United States that involve activities regulated under the Corps' authorities. It does not authorize segments of utility lines constructed in uplands because those segments do not require DA authorization. It does not authorize the entire utility line unless the entire utility line is constructed in jurisdictional waters and wetlands and involves activities that require DA authorization. For the crossings of waters of the United States authorized by NWP 12, the terms and conditions of this NWP encourage the project proponent to minimize adverse effects to jurisdictional waters and wetlands to qualify for NWP authorization, instead of having to apply for an individual permit.

For utility lines that cross state and/or Corps district boundaries, district engineers will consider the cumulative impacts of those NWP 12 activities when determining whether to issue NWP 12 verifications. The national decision document for NWP 12 discusses, in general terms, the impacts that NWP 12 activities have on wetlands of all types, including forested wetlands. For some utility lines, forested wetlands may be permanently converted to scrub-shrub or emergent wetlands to construct a right-of-way.

A few commenters said this NWP should not authorize utility lines in drinking water source areas. One commenter stated that this NWP should not authorize pipelines under rivers or near the ocean because those pipelines could leak and threaten water supplies. Many commenters said that the Corps should consider the environmental effects of the entire pipeline, including potential impacts to water supplies, to not just the specific activities authorized by NWP 12 or other DA permits.

General condition 7, water supply intakes, prohibits NWP activities in proximity of public water supply intakes except under specific circumstances. General condition 14, proper maintenance, requires NWP activities to be maintained to ensure public safety. For NWP 12 activities, this includes maintaining the utility line so that it does not leak. The Corps does not regulate the operation and maintenance of pipelines, if those activities do not include activities that require DA authorization. As discussed above, there are other federal agencies that have

legal responsibility for addressing the operation of pipelines and responding to leaks or spills that may occur. Concerns regarding pipeline leaks or spills should be brought to the attention of those federal agencies.

One commenter expressed concern regarding the effects of dispersants on public health and the environment. One commenter said that in the draft decision document the projected amount of compensatory mitigation required for NWP 12 activities is far less than the projected authorized impacts, and that difference results in inadequate mitigation. One commenter said that the draft NWP 12 decision document fails to acknowledge that water quality standards will be violated in some cases.

The Corps does not have the legal authority to regulate the use of dispersants. Other federal or state agencies may have that responsibility. Many of the activities authorized by NWP 12 result in temporary impacts to jurisdictional waters and wetlands, and often district engineers do not require compensatory mitigation to offset those temporary impacts because those waters and wetlands continue to provide ecological functions and services. The estimated impacts in the draft decision document include both permanent and temporary impacts to jurisdictional waters and wetlands. For discharges into waters of the United States, general condition 25 requires certification that an NWP activity complies with applicable water quality standards unless a waiver of the Clean Water Act section 401 water quality certification requirement occurs. The district engineer has discretion to take action to ensure compliance with the water quality certification issued by the state, tribe, or U.S. EPA. The section 401 certifying authority also has the authority to enforce the terms and conditions of its water quality certification.

This NWP was reissued with the modifications discussed above. After re-evaluating this NWP in light of EO 13783 a potential modification to consider is simplifying the PCN requirements by reducing the 7 current PCN thresholds to 2 PCN thresholds. This would simplify and streamline the use of NWP 12. To meet the objective of EO 13873, the Corps suggests modifying NWP 12 to require PCNs only for those for utility line activities that: (1) require a section 10 permit, or (2) involve discharges that result in the loss of greater than 1/10-acre of waters of the United States.

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

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

Comments on Proposed NWP 17, Response to Comments, and Action for the Final NWP 17: One commenter objected to the proposed reissuance of this NWP, stating that these activities should require individual permits. One commenter recommended increasing the generating capacity limit in item (a) of the NWP to 10,000 kilowatts.

The hydropower projects authorized by this NWP are subject to either licensing requirements or licensing exemptions from the Federal Energy Regulatory Commission (FERC), and the FERC's oversight of those projects warrants use of this NWP to avoid duplicative federal review that would occur during the Corps' evaluation of a standard individual permit application. The current generating capacity limit of 5,000 kilowatts is appropriate to ensure that associated discharges of dredged or fill material into waters of the United States authorized by this NWP are relatively small and result in no more than minimal adverse environmental effects.

The Corps did not propose any changes to this NWP. After re-evaluating this NWP in light of EO 13783 the Corps recommends soliciting comments on increasing the generating capacity limit from 5,000 kW to 10,000 kW. The Hydropower Regulatory Efficiency Act of 2013 (Public Law 113-23) changed the definition of "small hydroelectric power project" by raising the generating capacity limit for such projects from 5,000 kW to 10,000 kW. The recommended change would make NWP 17 consistent with the current threshold for which the Federal Energy Regulatory Commission can issues a license or exemption for small hydroelectric power projects.

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

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

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

NWP activity cannot exceed 1/2-acre. This NWP does not authorize discharges into tidal waters or non-tidal wetlands adjacent to tidal waters; and

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

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

Comments on Proposed NWP 21, Response to Comments, and Action for the Final NWP 21: The Corps proposed to remove paragraph (a) that was in the 2012 NWP 21. Many commenters objected to the proposed reissuance of this NWP. Several commenters stated that these activities should require individual permits because they result in more than minimal individual and cumulative adverse environmental effects. One commenter said that paragraph (a) should be deleted from this NWP. Several commenters stated that the Corps should be able to evaluate and make decisions on NWP 21 PCNs prior to the issuance of the Surface Mining Control and Reclamation Act (SMCRA) permit, regardless of whether the Office of Surface Mining or the state agency has an integrated permit processing procedure.

The Corps removed paragraph (a) of the 2012 NWP 21 from this NWP. Surface coal mining activities that were authorized under paragraph (a) of the 2012 NWP 21, where the regulated activities in waters of the United States have not yet been completed will require individual permits if operators need more time to complete those regulated activities. Activities that were authorized under paragraph (a) of the 2012 NWP 21 may qualify for the one-year grandfather provision at 33 CFR 330.6(b) if the operator has commenced the authorized work or is under contract to do the authorized work before the 2012 NWP 21 expires on March 18, 2017.

All activities authorized by this NWP are subject to the 1/2-acre limit and all other terms and conditions of this NWP. The 1/2-acre and the 300 linear foot limits, as well as the PCN review process, will ensure that activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. Division engineers may modify, suspend, or revoke this NWP on a regional basis. Division engineers may also impose regional conditions to ensure that authorized activities result in no more than minimal adverse environmental effects.

Corps districts can review NWP 21 PCNs concurrent with the Office of Surface Mining's or the state's SMCRA review process. Since the Office of Surface Mining or the state has authority over the entire coal mining activity, and the Corps has jurisdiction only over activities that involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters, the project proponent cannot proceed with the surface

coal mining activity until he or she has secured his or her SMCRA authorization. Therefore, the Corps' completion of its review of the NWP 21 PCN prior to the SMCRA authorization decision would not benefit the project proponent. The Corps did not made any changes to that provision.

One commenter said that the 1/2-acre limit should be used for all NWP 21 activities. One commenter stated that district engineers should not be able to waive the 1/2-acre limit. Several commenters requested removal of the provision that allows district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream beds. Many commenters said that the 300 linear foot limit should be decreased. Most of these commenters stated that if the waiver provision is retained, there should be a maximum waiver limit of 500 linear feet and compensatory mitigation should be required for losses of greater than 300 linear feet of intermittent and ephemeral stream bed. Many commenters supported the provision that does not authorize discharges of dredged or fill material into waters of the United States to construct valley fills.

For this NWP rulemaking effort, both the 1/2-acre and 300 linear foot limits are necessary to ensure that the activities authorized by this NWP cause no more than minimal individual and cumulative adverse environmental effects. This decision is independent of prior rulemakings for NWP 21. The waiver provision for the loss of intermittent and ephemeral stream bed gives district engineers flexibility to authorize, using NWP 21, surface coal mining activities that have no more than minimal adverse environmental effects. Each waiver request requires a written determination by the district engineer, as well as coordination with the resource agencies. During agency coordination, the resource agencies can provide their views on whether the proposed activity will or will not result in no more than minimal individual and cumulative adverse environmental effects. The district engineer will fully consider all agency comments when making his or her decision whether to issue the written waiver and issue an NWP verification letter to the applicant.

One commenter suggested requiring agency coordination for all NWP 21 PCNs for proposed activities that would impact pitcher plant bog wetlands or bald cypress/tupelo swamps. One commenter recommended increasing the limits for NWP 21 and creating a self-verification process to streamline the verification process.

Division engineers can modify this NWP to add regional conditions to protect specific types of wetlands, such as pitcher plant bogs or bald cypress/tupelo wetlands. They can restrict or prohibit the use of this NWP in certain types of wetlands. A regional condition may also require agency coordination for certain NWP 21 activities. The project proponent can provide additional information in the PCN to assist the district engineer in his or her decision-making process. A self-verification process will not make the district engineer's verification process more streamlined. The PCN process is necessary for all activities authorized by this NWP because of the potential for more than minimal adverse environmental effects to occur. The

PCN process requires the district engineer to make an independent determination on whether the proposed activity will result in no more than minimal adverse environmental effects and whether NWP 21 authorization is appropriate.

This NWP is reissued as proposed. After re-evaluating this NWP in light of EO 13783, the Corps recommends removing the 300 linear foot limit for losses of stream bed. The Corps would rely on the 1/2-acre limit and the PCN review process to ensure that this NWP only authorizes activities that result in no more than minimal individual and cumulative adverse environmental effects. The Corps also suggests removing the provision that requires the permittee to obtain written authorization from the Corps prior to commencing the NWP activity, to make this NWP consistent with the other NWPs that have a 45-day PCN review period, and a default NWP authorization if the Corps district does not respond to a complete PCN within 45 days of receipt (see 33 CFR 330.1(e)(1)).

NWP 33. Temporary Construction, Access, and Dewatering. Temporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard. This NWP also authorizes temporary structures, work, and discharges, including cofferdams, necessary for construction activities not otherwise subject to the Corps or U.S. Coast Guard permit requirements. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. The use of dredged material may be allowed if the district engineer determines that it will not cause more than minimal adverse environmental effects. Following completion of construction, temporary fill must be entirely removed to an area that has no waters of the United States, dredged material must be returned to its original location, and the affected areas must be restored to pre-construction elevations. The affected areas must also be revegetated, as appropriate. This permit does not authorize the use of cofferdams to dewater wetlands or other aquatic areas to change their use. Structures left in place after construction is completed require a separate section 10 permit if located in navigable waters of the United States. (See 33 CFR part 322.)

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

Comments on Proposed NWP 33, Response to Comments, and Action for the Final NWP 33: The Corps proposed to modify this NWP to change the PCN threshold to require notification only for temporary construction, access, and dewatering activities in navigable waters of the United States (i.e., waters subject to Section 10 of the Rivers and Harbors Act of 1899). Several commenters supported the proposed change to this NWP and several commenters opposed the proposed change. The Corps changed the "Notification" requirement to only require PCNs for activities in waters subject to section 10 of the Rivers and Harbors Act of 1899.

One commenter stated that this NWP should clarify that impact thresholds only apply to permanent, not temporary, losses of waters of the United States. One commenter recommended defining "temporary." One commenter expressed support for reissuing this NWP, as long as it does not authorize permanent impacts. One commenter said that temporary fills should be authorized for a period of up to two years because temporary causeways and work pads are occasionally needed for projects that take multiple years to construct. One commenter recommended adding a 1/2-acre limit for losses of waters of the United States and a 300 linear foot limit for losses of stream bed.

This NWP only authorizes temporary impacts to jurisdictional waters and wetlands. Permanent impacts to jurisdictional waters and wetlands are not authorized by this NWP, and this NWP requires restoration of affected areas after completion of construction. Permanent impacts to jurisdictional waters and wetlands can be authorized by another NWP, a regional general permit, or an individual permit. Determining when activities regulated under the Corps' authorities result in temporary impacts to jurisdictional waters and wetlands versus permanent impacts to those waters and wetlands is at the discretion of the district engineer. Because this NWP only authorizes temporary impacts to jurisdictional waters and wetlands that must be restored upon completion of the work, it is not necessary to impose acreage or linear foot limits. For the NWPs, the acreage limits only apply to permanent adverse effects to waters of the United States (see the definition of "loss of waters of the United States" in Section F. The linear foot limits apply to losses of stream bed caused by filling or excavation.

One commenter said that NWP 33 should be revised to avoid conflicts with excavation activities that do not require Clean Water Act section 404 authorization, such as removal of accumulated sediment from a dry stream channel. In addition, this commenter stated that this NWP should not require the removed material be returned to its original location or that the excavated area be returned to pre-construction elevations. One commenter suggested requiring PCNs and coordination with federal and state natural resource agencies when proposed activities occur in non-tidal waters in which federally- and/or state-listed endangered and threatened mussels are known to occur.

This NWP only authorizes temporary construction, access, and dewatering activities that require DA authorization. If an excavation activity does not involve regulated discharges of

dredged or fill material into waters of the United States, then there is no conflict with the activities that require DA authorization and are covered by this NWP. This NWP requires waters of the United States that are temporarily filled as a result of regulated activities to be restored to pre-construction elevations. If a proposed activity might affect ESA-listed endangered or threatened species or designated critical habitat, such species are in the vicinity of the proposed activity, or if the proposed activity is in designated critical habitat, general condition 18 requires non-federal permittees to submit PCNs. The district engineer will review those PCNs and determine if ESA section 7 consultation is required because the proposed activity may affect listed species or designated critical habitat. If ESA section 7 consultation it is required, the district engineer will conduct formal or informal consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service, as appropriate. Effects to state-listed endangered or threatened species are more appropriately addressed through state regulatory and non-regulatory programs.

Several commenters said that this NWP should require PCNs for all activities involving discharges of dredged or fill material into special aquatic sites. Two commenters stated that not requiring PCNs for all activities authorized by this NWP provides no assurance that the adverse environmental effects will be no more than minimal. One commenter asserted that PCNs are necessary to ensure that pre-construction contours and hydrology are restored and that affected areas are revegetated without invasive species. One commenter said that PCNs should be required for activities in non-tidal waters that are important tribal resources, so that tribes will have the opportunity to review and comment on those activities. One commenter stated that the proposed change to require PCNs only for activities in section 10 waters would result in degradation of the affected waterbodies, and dewatering activities are problematic in areas with methane.

The Corps retained the proposed change to this NWP, which is to only require PCNs for activities in navigable waters subject to section 10 of the Rivers and Harbors Act of 1899. In waters subject only to section 404 of the Clean Water Act, PCNs will be required for any NWP 33 activity that triggers a PCN requirement under general condition 18, endangered species, and/or general condition 20, historic properties. For activities in designated critical resource waters and their adjacent wetlands, PCNs are required by general condition 22, designated critical resource waters. Division engineers can modify this NWP by adding regional conditions to require PCNs in waters subject only to Clean Water Act jurisdiction. The terms and conditions of this NWP, including regional conditions imposed by division engineers, will ensure that NWP 33 activities that do not require PCNs will result in no more than minimal adverse environmental effects, and that pre-construction contours and hydrology are restored after the temporary fills are removed. The terms of the NWP also require that affected areas are revegetated as appropriate. For the 2017 NWPs, Corps districts are consulting with tribes to identify regional conditions to protect tribal trust resources. Those regional conditions can require PCNs for those NWP 33 activities that have the potential to affect tribal trust resources,

and district engineers can coordinate those PCNs with interested tribes. The terms and conditions of this NWP, plus the requirements of water quality certifications issued by states, tribes, or the U.S. EPA, will ensure that NWP 33 activities will have only minimal adverse effects on water quality. Concerns regarding methane emissions are more appropriately addressed by agencies that have regulatory authority over such emissions.

This NWP was reissued as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended because the Corps modified this NWP in 2017 to reduce the number of activities that require pre-construction notification. Under the 2017 NWP 33, pre-construction notification requirements were removed for those temporary construction, access, and dewatering activities occurring in waters and wetlands that are only regulated under section 404 of the Clean Water Act. Pre-construction notification is still required for all NWP 33 activities in navigable waters regulated under section 10 of the Rivers and Harbors Act of 1899.

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

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

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

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

Comments on Proposed NWP 39, Response to Comments, and Action for the Final NWP 39: We proposed to modify this NWP to clarify that it authorizes discharges of dredged or fill material into waters of the United States to construct wastewater treatment facilities. We also proposed to modify the terms of this NWP to clarify that any loss of stream bed applies towards the 1/2-acre limit, and that 1/2-acre limit cannot be exceeded.

Several commenters objected to the proposed reissuance of this NWP, stating that commercial and institutional developments should be authorized by individual permits instead of NWPs because they result in more than minimal adverse environmental effects. Several commenters supported the proposed addition of wastewater treatment facilities to the list of examples of attendant features that may be authorized by this NWP. One commenter said that this NWP should not authorize oil and gas wells and their attendant infrastructure. This commenter also stated that NWP 39 should not authorize commercial and institutional developments in channel migration zones or floodplains critical to salmon populations.

The terms and conditions of this NWP, including the acreage and linear foot limits and the reviews of PCNs by district engineers, will ensure that the activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. All activities authorized by this NWP require PCNs. The district engineer will exercise discretionary authority and require an individual permit for any proposed NWP 39 activity that he or she determines will result in more than minimal adverse environmental effects, after considering the mitigation proposal provided by the applicant. We have added wastewater treatment facilities as an example of attendant features authorized by this NWP. The construction of oils and gas wells that involves discharges of dredged or fill material into waters of the United States can be authorized by this NWP as long as the proposed activity complies with the terms and conditions of this NWP and the district engineer determines the proposed activity will result in only minimal adverse environmental effects.

The construction of commercial and institutional developments in jurisdictional waters and wetlands within floodplains must comply with general condition 10, fills in 100-year floodplains. All activities authorized by this NWP require PCNs and the district engineer will review the PCN to determine if the proposed activity may affect any ESA-listed endangered or threatened species, or their designated critical habitat. If the district engineer determines the proposed activity may affect listed species or designated critical habitat and the prospective permittee is a non-federal permittee, the district engineer will conduct formal or informal ESA section 7 consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service. If the project proponent is a non-federal permittee, the activity is not

authorized by NWP until section 7 consultation is completed and the district engineer issues the NWP verification. Division engineers can add regional conditions to this NWP to restrict or prohibit its use in waters of the United States in channel migration zones. District engineers can add activity-specific conditions to NWP verifications to restrict its use in waters of the United States in channel migration zones.

One commenter recommended increasing the acreage limit to 1 acre, and the linear foot limit for losses of stream bed to 1,000 feet. Another commenter said that this NWP should have flexibility in authorizing losses of stream bed, and stated that there should not be a hard limit for losses of stream bed. One commenter said that there should only be limits for losses of ephemeral streams. One commenter suggested decreasing the acreage limit to 1/10-acre. One commenter stated that the limits in this NWP are too high and compensatory mitigation should be required for all impacts to wetlands and streams.

We are retaining the 1/2-acre and 300 linear foot limits for this NWP, as well as the ability for district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed upon making a written determination that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. All of the activities authorized by this NWP require PCNs, which provide case-by-case review to ensure that all authorized activities result in no more than minimal adverse environmental effects. To assist district engineers in making their written determinations for waiver requests, agency coordination is required for PCNs requesting waivers of the 300 linear foot limit (see paragraph (d) of general condition 32). The loss of stream bed is counted towards the 1/2-acre limit for this NWP, and that 1/2-acre limit cannot be exceeded under any circumstances. The limits for losses of stream bed apply to perennial, intermittent, and ephemeral streams. Reducing the acreage limit to 1/10-acre would result in commercial and institutional development activities that result in no more than minimal adverse environmental effects requiring individual permits. In accordance with 33 CFR 330.1(e)(3) and general condition 23, compensatory mitigation is only required when the district engineer determines that compensatory mitigation is necessary for a particular activity to ensure that that NWP activity results in only minimal individual and cumulative adverse environmental effects.

One commenter suggested changing the PCN threshold to losses of 1/2-acre of wetlands or open waters or losses of 300 linear feet of stream. The 1/2-acre PCN threshold would be used if the acreage limit for this NWP is increased to 1 acre. One commenter requested that the NWP clarify whether acreage limits apply cumulatively to the original construction and any subsequent expansion of the commercial or institutional development.

We believe that it is necessary to require PCNs for all NWP 39 activities to ensure they will cause only minimal individual and cumulative adverse environmental effects. The acreage limit applies to each single and complete project. See the definition of "single and complete non-linear project" which applies to most NWP 39 activities. There could be NWP 39 activities

that are linear projects, but they are likely to be rare. If the expansion of a commercial or institutional development requires DA authorization and the expansion does not have independent utility from the existing commercial or institutional development, then the acreage limit applies to the original, existing commercial or institutional development (if it was originally authorized by NWP 39) and the proposed expansion.

We have modified the second sentence of the second paragraph of this NWP by replacing the word "only" with the phrase "no more than" to make this sentence consistent with the corresponding sentences in NWPs 29 and 43.

This NWP is reissued with the modification discussed above.

After re-evaluating this NWP in light of EO 13783, the Corps recommends modifying this NWP to remove the 300 linear foot limit for losses of stream bed and the associated waiver provision for intermittent and ephemeral streams. This would simplify and streamline the NWP 39 authorization process. The Corps would rely on the 1/2-acre limit and the PCN review process to ensure that this NWP only authorizes activities that will result in no more than minimal individual and cumulative adverse environmental effects.

NWP 49. <u>Coal Remining Activities</u>. Discharges of dredged or fill material into non-tidal waters of the United States associated with the remining and reclamation of lands that were previously mined for coal. The activities must already be authorized, or they must currently be in process as part of an integrated permit processing procedure, by the Department of the Interior Office of Surface Mining Reclamation and Enforcement, or by states with approved programs under Title IV or Title V of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Areas previously mined include reclaimed mine sites, abandoned mine land areas, or lands under bond forfeiture contracts.

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

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

Comments on Proposed NWP 49, Response to Comments, and Action for the Final NWP 49: The Corps did not propose any changes to this NWP. One commenter said this NWP should not be reissued. A commenter suggested that aquatic resources within previously mined areas should not be considered to be subject to Clean Water Act jurisdiction. One commenter recommended encouraging NWP 49 activities by allowing the permittee to use the net increases in aquatic resource functions to produce compensatory mitigation credits for sale or transfer to other permittees. One commenter said that a watershed approach should be used to quantify ecological lift resulting from NWP 49 activities.

The purpose of this NWP is to provide general permit authorization for the remining of an unreclaimed coal mining site. Requiring that these activities result in net increases in aquatic resource functions will help restore unreclaimed areas that might otherwise not be restored. The restoration of unreclaimed coal mining areas is one of the most effective ways to reverse degraded water quality in a watershed. District engineers will determine on a case-by-case basis using applicable regulations and guidance whether aquatic resources on previously mined areas are waters of the United States and therefore subject to the Clean Water Act. A former coal mining site might be a suitable mitigation bank or in-lieu fee project if the sponsor obtains the required approvals from the Corps in accordance with the procedures in 33 CFR 332.8. Rapid ecological assessment tools, or other tools, can be used to determine whether a proposed NWP 49 activity will result in net increases in aquatic resource functions. Such tools may include watershed considerations in determining increases in specific ecological functions or overall ecological condition.

One commenter asked if the net increase in aquatic resource functions applies to the new mining activities or collectively to the new mining and the remining activities. Several commenters requested clarification of the requirement that the total area disturbed by new mining must not exceed 40 percent of the total acreage covered by both the remined area and the area needed to do the reclamation of the previously mined area. One commenter said that the 40 percent requirement should be removed from this NWP.

The overall coal remining activity, which consists of the remining and reclamation activities, plus the new mining activities, must result in the required net increases in aquatic resource functions. The text of the NWP states that the "total area disturbed by new mining must not exceed 40 percent of the total acreage covered by both the remined area and the additional area necessary to carry out the reclamation of the previously mined area." For examples illustrating the application of the 40 percent requirement, please see the preamble discussion for NWP 49 in the 2012 final NWPs, which were published in the February 21, 2012, issue of the Federal Register (77 FR 10233).

This NWP was reissued without change.

After re-evaluating this NWP in light of EO 13783 one modification is recommended. The Corps also suggests removing the provision that requires the permittee to obtain written authorization from the Corps prior to commencing the NWP activity, to make this NWP consistent with the other NWPs that have a 45-day PCN review period, and a default NWP authorization if the Corps district does not respond to a complete PCN within 45 days of receipt (see 33 CFR 330.1(e)(1)).

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

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

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

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

Comments on Proposed NWP 50, Response to Comments, and Action for the Final NWP 50: The Corps did not propose any changes to this NWP, other than to clarify that any loss of stream bed applies to the 1/2-acre limit. Several commenters objected to the reissuance of this NWP, stating that these activities should require individual permits because they result in more than minimal adverse environmental effects.

The 1/2-acre limit for this NWP, as well as the requirement that all activities require PCNs and written verifications from district engineers, will ensure that this NWP only authorizes activities that result in no more than minimal adverse environmental effects, individually and

cumulatively. If the district engineer reviews the PCN and determines that the proposed activity, after considering any mitigation proposal submitted by the applicant, will result in more than minimal adverse environmental effects, he or she will assert discretionary authority and require an individual permit for that activity.

This NWP was reissued as proposed.

After re-evaluating this NWP in light of EO 13783 two modifications are recommended. The Corps suggests removing the 300 linear foot limit for losses of stream bed. Compliance with the requirement that the NWP only authorize activities with no more than minimal individual and cumulative adverse environmental effects would be achieved through the 1/2-acre limit and the PCN review process. All activities authorized by this NWP require submittal of PCNs to the Corps. The Corps also suggests removing the provision that requires the permittee to obtain written authorization from the Corps prior to commencing the NWP activity, to make this NWP consistent with the other NWPs that have a 45-day PCN review period, and a default NWP authorization if the Corps district does not respond to a complete PCN within 45 days of receipt (see 33 CFR 330.1(e)(1)).

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

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

<u>Notification</u>: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the discharge results in the loss of greater than 1/10-acre of waters of the United States. (See general condition 32.) (<u>Authorities</u>: Sections 10 and 404)

<u>Note 1</u>: Utility lines constructed to transfer the energy from the land-based renewable energy generation facility to a distribution system, regional grid, or other facility are generally

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

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

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

Comments on Proposed NWP 51, Response to Comments, and Action for the Final NWP 51: The Corps proposed to split Note 1 of the 2012 NWP 51 into two notes. The Corps also sought comments on changing the PCN threshold in this NWP, which currently requires PCNs for all authorized activities.

One commenter said that these activities should require individual permits, instead of being authorized by an NWP. One commenter recommended adding terms to this NWP to authorize temporary structures, fills, and work that are necessary to construct, expand, or modify land-based renewable energy generation facilities. One commenter stated that this NWP should not authorize facilities in channel migration zones and floodplains where there will be direct and indirect impacts to special status species. Several commenters said that Note 1 should be modified to include linear transportation projects and their potential authorization by NWP 14. One commenter suggested splitting the revised Note 1 into two notes. Several commenters recommended the removal of Note 3.

The 1/2-acre limit, along with the PCN requirements and compliance with the NWP general conditions, will ensure that the activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. In response to a PCN, if the district engineer determines after considering the applicant's mitigation proposal that the proposed activity will cause more than minimal adverse environmental effects, he or she will exercise discretionary authority and require an individual permit for that activity. Temporary structures, fills, and work necessary to construct, expand, or modify these facilities may be authorized by NWP 33. Since the Corps has removed the PCN requirement for temporary construction, access, and dewatering activities in waters and wetlands subject only to Clean Water Act section 404, the use of NWP 33 with this NWP will not result in a PCN requirement

unless a PCN is required because of general condition 18, endangered species, general condition 20, historic properties, or another general condition.

Activities authorized by this NWP must comply with general condition 10, fills in 100-year floodplains. Proposed activities that might affect ESA-listed species or designated critical habitat or are in the vicinity of such species or critical habitat, or are located in designated critical habitat, require PCNs if the project proponent is a non-federal permittee (see paragraph (c) of general condition 18). Division engineers may impose regional conditions that require PCNs for impacts to other types of special status species. It is not appropriate to add NWP 14 activities to Note 1. The purpose of Note 1 is to address utility lines that transmit the energy generated by these land-based renewable energy generation facilities to other areas. There is no need to split Note 1 into separate notes because those two sentences cover the general concept of utility lines that transmit the energy to other places.

Several commenters stated that the acreage limit should be increased to one acre. One commenter asked why NWP 51 has a 1/2-acre limit when other NWPs have a 1/10-acre limit. One commenter said that NWP 51 should not authorize activities in known areas of special status species or critical habitat. A few commenters recommended adding waivers to NWP 51.

The Corps retained the 1/2-acre limit for this NWP because it has been effective in ensuring that activities authorized by this NWP result in no more than minimal individual and cumulative adverse environmental effects. In geographic areas where an acreage limit greater than 1/2-acre is appropriate for land-based renewable energy generation facilities that involve activities that require DA authorization and will result in only minimal adverse environmental effects, district engineers can issue regional general permits. Only two NWPs have a 1/10-acre limit and 12 NWPs have a 1/2-acre limit.

The category of activities authorized by this NWP, and the adverse environmental effects of those activities, more closely resemble the categories of activities authorized by the NWPs that have the 1/2-acre limit. Activities authorized by NWP 51 must comply with general condition 18, endangered species. Division engineers can add regional conditions to this NWP to increase protection of other categories of special status species or particular habitat types. The 1/2-acre limit for this NWP cannot be waived, but the 300 linear foot limit for losses of intermittent and ephemeral stream beds can be waived by a district engineer on a case-by-case basis after conducting agency coordination and making a written determination that the proposed will result in no more than minimal adverse environmental effects.

Several commenters said the PCN threshold should be increased to 1/2-acre. A few commenters recommended changing the PCN threshold to 1/10-acre. One commenter stated that the Corps should continue to require PCNs for all NWP 51 activities. One commenter suggested requiring PCNs for proposed losses of greater than 1/10-acre of waters of the United States or losses of greater than 500 linear feet of stream bed. Several commenters said that

agency coordination should be required for all NWP 51 PCNs. One commenter stated that the removal of the PCN requirement for NWP 51 will not ensure that those activities have no more than minimal adverse impacts, because those impacts would not be assessed or tracked. This commenter said that these types of projects have the potential to impact ESA-listed species.

The Corps changed the PCN threshold to require PCNs for losses of greater than 1/10-acre of waters of the United States. Land-based renewable energy projects provide an important public interest function by producing energy while contributing to energy industry reductions in greenhouse gas emissions. Changing the PCN threshold to 1/2-acre would result in no activities requiring PCNs because the Corps retained the 1/2-acre limit for this NWP and did not adopt the one acre limit suggested by several commenters. For non-federal permittees, all proposed activities that might affect ESA-listed species or designated critical habitat, are in the vicinity of listed species or critical habitat, or are in designated critical habitat require PCNs under general condition 18, endangered species. All proposed NWP 51 activities to be conducted by non-federal permittees that may have the potential to cause effects to historic properties require PCNs under general condition 20, historic properties. The Corps will continue to track NWP 51 activities that require PCNs and that are voluntarily reported to Corps districts. To assess cumulative impacts of these activities, the Corps will estimate the number of activities that are conducted but do not require PCNs.

This NWP was reissued with the modifications discussed above.

After re-evaluating this NWP in light of EO 13783 one modification is recommended. In 2017, the Corps modified this NWP to reduce the number of activities require pre-construction notification. Prior to the 2017 NWPs, this NWP require pre-construction notification for all activities. For the 2017 NWP 51, pre-construction notification is required for those activities that result in a loss of greater than 1/10-acre of waters of the United States. In addition, the Corps suggests removing the 300 linear foot limit for losses of stream bed. Compliance with the requirement that the NWP only authorize activities with no more than minimal individual and cumulative adverse environmental effects would be achieved through the 1/2-acre limit and the PCN review process.

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

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

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

The placement of a transmission line on the bed of a navigable water of the United States from the renewable energy generation unit(s) to a land-based collection and distribution facility is considered a structure under Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(b)), and the placement of the transmission line on the bed of a navigable water of the United States is not a loss of waters of the United States for the purposes of applying the 1/2-acre or 300 linear foot limits.

For each single and complete project, no more than 10 generation units (e.g., wind turbines, wave energy devices, or hydrokinetic devices) are authorized. For floating solar panels in navigable waters of the United States, each single and complete project cannot exceed 1/2-acre in water surface area covered by the floating solar panels.

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

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

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

<u>Note 1</u>: Utility lines constructed to transfer the energy from the land-based collection facility to a distribution system, regional grid, or other facility are generally considered to be

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

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

Note 3: If the pilot project generation units, including any transmission lines, are placed in navigable waters of the United States (i.e., section 10 waters) within the coastal United States, the Great Lakes, and United States territories, copies of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration, National Ocean Service, for charting the generation units and associated transmission line(s) to protect navigation.

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

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

Comments on Proposed NWP 52, Response to Comments, and Action for the Final NWP 52: The Corps proposed to add floating solar panels to the types of water-based renewable energy generation pilot projects authorized by this NWP because they are another technology for generating renewable energy in waterbodies. The Corps also requested comment on whether to continue limiting this NWP to pilot projects, or to modify the NWP to authorize permanent water-based renewable energy generation facilities.

One commenter said that these activities should require individual permits instead of being authorized by NWP. Several commenters opposed removing the limitation in NWP 52 to pilot projects. Several commenters supported removing the limitation to pilot projects. Several commenters asked whether wave-generated energy pilot projects are authorized by this NWP. Several commenters expressed support for adding pilot floating solar energy generation facilities. One commenter stated that activities that interfere with treaty fishing rights should be required to obtain individual permits.

The Corps retained the limitation to pilot projects, to allow project proponents to collect data and determine whether they want to apply for individual permit authorization for permanent water-based renewable energy generation facilities. The Corps added wave energy

devices to the list of types of water-based renewable energy generation pilot projects that can be authorized by this NWP. Activities authorized by this NWP must comply with general condition 17, tribal rights, and not cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. For the 2017 NWPs, Corps districts are consulting with tribes to identify regional conditions that protect reserved tribal rights and tribal trust resources. District engineers may also develop coordination procedures with tribes to help determine whether a proposed NWP activity might cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands.

One commenter stated that the NWP should require the collection of robust data to inform future decisions. Another commenter said that the NWP should make a clear distinction between navigable waters of the United States subject to the Rivers and Harbors Act of 1899 and jurisdictional waters that are only subject to the Clean Water Act. Several commenters objected to Note 4, which states that hydrokinetic renewable energy generation projects that require authorization by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920 do not require separate DA authorization under section 10 of the Rivers and Harbors Act of 1899.

The Corps' review is limited to evaluating the adverse environmental effects caused by the permitted activities, and that review does not require extensive amounts of data collection. The collection of data to assess the renewable energy generation capabilities of these pilot projects is for the benefit of the project proponent, to help him or her decide whether to apply for individual permits for more permanent facilities. Navigable waters of the United States are defined at 33 CFR part 329, and under section 10 of the Rivers and Harbors Act of 1899, DA permits are required for structures and work in those waters. The term "structure" is defined at 33 CFR 322.2(b) and includes any obstacle or obstruction, as well as power transmission lines. Renewable energy generation facilities placed in navigable waters are structures under that definition. Under section 404 of the Clean Water Act, the Corps regulates discharges of dredged or fill material into waters of the United States. If the water-based renewable energy generation facility does not involve discharges of dredged or fill material into waters of the United States, then it does not require section 404 authorization. If it is in navigable waters, then it requires section 10 authorization which may be provided by this NWP. Note 4 is based on current law, and it needs to remain in the NWP. In the paragraph preceding the "Notification" paragraph the Corps changed the last word of that paragraph from "issued" to "required" because NWP applicability only occurs if FERC authorization is not required for the activity.

Several commenters voiced their support for the 1/2-acre limit for floating solar generation units. One commenter said that floating solar panels should be limited to 50 square feet. Several commenters said that there should be no limits on the number of water-based renewable energy generation units. One commenter stated that this NWP should not authorize

activities in submerged aquatic vegetation, areas inhabited by shellfish, and shellfish spawning areas. One commenter remarked that NWP 52 activities should be prohibited in fish-bearing streams. This commenter also said that the NWP should only authorize activities in ephemeral streams. Several commenters recommended prohibiting all activities in special aquatic sites. One commenter said that the 300 linear foot limit for losses of stream bed is too high. A few commenters suggested allowing waivers to the limits of this NWP.

The Corps retained the 1/2-acre limit for floating solar panels. A 50 square foot floating solar panel would have little practical use in determining the feasibility of potential permanent facilities. The 10-unit limit is necessary to ensure that the activities authorized by this NWP will result in only minimal individual and cumulative adverse environmental effects, including adverse effects on navigation. General conditions 3 and 5 provide protection to spawning areas and shellfish beds, respectively, to ensure that NWP activities have no more than minimal adverse effects on those resources. Division engineers can impose regional conditions that restrict or prohibit these activities in areas with submerged aquatic vegetation, areas inhabited by shellfish, and shellfish spawning areas.

The renewable energy generation units authorized by this NWP require deeper waters and most fish will be able to avoid these units. Therefore, these units will have no more than minimal adverse effects on fish inhabiting those deep rivers. Since ephemeral streams only have flowing water during, and a short time after, precipitation events, they are not suitable for water-based renewable energy generation facilities. All activities authorized by this NWP require PCNs, which gives district engineers the opportunity to evaluate the effects these activities have on special aquatic sites. The loss of stream bed will be limited to losses caused by the construction of attendant features. While district engineers can waive the 300 linear foot limit for losses of stream bed if the affected streams are intermittent or ephemeral, they cannot waive the 1/2-acre limit. This NWP is consistent with the other NWPs that have 1/2-acre limits in that the 1/2-acre limit cannot be waived.

Several commenters recommended requiring agency coordination for all NWP 52 PCNs. One commenter said the PCN threshold should be increased to 1/10-acre. Another commenter suggested changing the PCN threshold from all activities to only those activities that result in losses greater than 1/10-acre, or losses of greater than 400 linear feet of stream bed. One commenter supported the current PCN requirements.

Agency coordination is only required for proposed NWP 52 activities that involve losses of greater than 300 linear feet of intermittent and ephemeral stream bed in cases where project proponents request waivers from district engineers. Because of the potential for more than minimal adverse effects on navigation to occur all activities authorized by this NWP should require PCNs.

The Corps made some additional changes to this NWP. Some of these other changes are intended to be consistent with other NWPs. The Corps modified the third paragraph of this NWP by adding a sentence to explain that the loss of stream bed plus any other losses of jurisdictional waters and wetlands caused by the NWP activity cannot exceed 1/2-acre and modified Note 3 to remove the phrase "pre-construction notification and" to be consistent with Note 1 of NWP 12. Corps districts will send a copy of the NWP verification to the National Ocean Service for charting. The facility and its associated utility lines do not need to be charted if the district engineer does not issue an NWP verification letter. If the district engineer exercises discretionary authority and requires an individual permit, the relevant information will be provided to the National Ocean Service if the individual permit is issued.

This NWP was reissued with the modifications discussed above.

After re-evaluating this NWP in light of EO 13783 one modification is recommended. The Corps suggests removing the 300 linear foot limit for losses of stream bed. Compliance with the requirement that the NWP only authorize activities with no more than minimal individual and cumulative adverse environmental effects would be achieved through the 1/2-acre limit and the PCN review process. This NWP is not frequently used because only 2 or 3 of these activities are expected to occur each year. Additional modifications of this NWP will not provide any additional regulatory efficiencies for water-based renewable energy generation projects.

Nationwide Permit General Conditions

The General Conditions are normally applicable to all permits; however, some may not apply to certain permits and may be deleted by the issuing officer. The list of 32 General Conditions below was developed by USACE headquarters, along with the 52 NWPs, in accordance with the Administrative Procedures Act (notice and comment rulemaking). To qualify for a NWP authorization, and be in compliance, prospective permittees must comply with the 32 General Conditions unless they are deleted by the District Engineer or staff because they do not apply to a particular proposed activity. The primary purposes of these conditions is to ensure that the "no more that minimal environmental effects" standard is met, or to ensure compliance with other laws, regulations, or policies, for example, the Endangered Species Act (GC 18), the National Historic Preservation Act (GCs 20 & 21), the Migratory Bird Treaty Act (GC 4), the Wild and Scenic Rivers Act (GC 16), and the Coastal Zone Management Act (GC 26). The General Conditions help prospective permittees design their activities and projects to meet the "no more than minimal environmental effects" requirement so that they can benefit (time and cost) from being able to use a Nationwide Permit instead of a Standard Individual Permit. The General Conditions add clarity, transparency, consistency, and predictability to the Nationwide Permit Program, enabling activities and projects to move forward.

In theory, all 32 of the General Conditions apply to the 12 Nationwide Permits associated with energy projects being evaluated in this report. Whether or not any of the 32 General Conditions actually applies in each and every case depends upon the location of the proposed activity, the context of the proposed activity (disturbed, undisturbed, built landscape, etc.), and/or the environmental (natural and cultural) resources, or Federal projects present.

Some of these general conditions are necessary to ensure that the NWPs comply with other applicable laws, such as the Endangered Species Act, the National Historic Preservation Act, the Wild and Scenic Rivers Act, Section 401 of the Clean Water Act, and the Coastal Zone Management Act. Compliance with these other laws often results in delays in applicants obtaining NWP authorization because the NWP activity cannot be conducted until compliance with all applicable laws is achieved.

1. Navigation
2. Aquatic Life Movements
3. Spawning Areas
4. Migratory Bird Breeding Areas
5. Shellfish Beds
6. Suitable Material
7. Water Supply Intakes
8. Adverse Effects from Impoundments
9. Management of Water Flows
10. Fills Within 100-Year Floodplains
11. Equipment
12. Soil Erosion and Sediment Controls
13. Removal of Temporary Fills
14. Proper Maintenance
15. Single and Complete Project
16. Wild and Scenic Rivers
17. Tribal Rights
18. Endangered Species
19. Migratory Bird and Bald and Golden Eagle Permits
20. Historic Properties
21. Discovery of Previously Unknown Remains and Artifacts
22. Designated Critical Resource Waters
23. Mitigation
24. Safety of Impoundment Structures
25. Water Quality
26. Coastal Zone Management
27. Regional and Case-by-Case Conditions
28. Use of Multiple Nationwide Permits
29. Transfer of Nationwide Permit Verifications
30. Compliance Certification
31. Activities Affecting Structures or Works Built by the United States

32. Pre-Construction Notification

GC 1. <u>Navigation</u>. (a) No activity may cause more than a minimal adverse effect on navigation.

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

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

Comments on Proposed GC 1, Response to Comments, and Action for the Final GC 1: The Corps did not propose any changes to this general condition. Two commenters asked for an explanation of what constitutes a more than minimal adverse effect to navigation. These commenters also asked if temporary obstructions could be mitigated with portage.

District engineers will determine on a case-by-case basis whether proposed impacts of NWP activities on navigation will be no more than minimal after considering site-specific circumstances. District engineers will also use their discretion to determine whether temporary obstructions to navigation that would block the transport of interstate of foreign commerce will have more than minimal adverse effects on navigation and would thus require individual permits. During the evaluation of the individual permit application, the district engineer could determine whether portage is an appropriate mitigation measure while the temporary obstruction is in place.

The general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

GC 2. <u>Aquatic Life Movements</u>. No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. If a bottomless culvert cannot be used, then the

crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

Comments on Proposed GC 2, Response to Comments, and Action for the Final GC 2: The Corps did not propose any changes to this general condition. Several commenters supported the proposed text of this general condition. Several commenters recommended changes to the general condition.

One commenter said that the general condition be revised to require avoidance and minimization of interference to all necessary life cycle movements of aquatic species indigenous to the waterbody. One commenter stated that this general condition should include additional requirements for proper culvert sizing to ensure unhindered fish passage and to reduce blow-outs that cause major impacts to river and stream channels. One commenter said that the stream bed should be returned to pre-construction contours unless the purpose of the NWP activity is to eliminate a fish barrier and restore the natural substrate of the stream and its contours. One commenter expressed concern that the minimal adverse environmental impacts required by this general condition are not being tracked or enforced, stating that NWP activities often disrupt necessary life cycle movements of aquatic life indigenous to the waterbody, including their migration.

Requiring avoidance and minimization of interference to all necessary life cycle movements of indigenous aquatic species in a waterbody is usually not practical or feasible. Road crossings and other fills in jurisdictional waters are likely to cause some interference to the necessary life cycle movements of indigenous aquatic species. At best, disruptions of movement should be reduced as much as is practicable. The purpose of this general condition is to ensure that the disruptions to the necessary life cycle movements of indigenous aquatic species are no more than minimal, unless the NWP activity's primary purpose is to impound water. Proper culvert sizing is more appropriately determined on a case-by-case basis, after considering site and watershed characteristics and climate, and the life cycle characteristics of the species indigenous to the waterbody. Large storm events will occasionally cause some authorized culverts to fail and become damaged or washed out, with adverse effects to downstream segments of the river or stream caused by those large flows.

The general condition requires the permittee to design the NWP activity so that it does not substantially disrupt the necessary life cycle movements of indigenous aquatic species, except under certain circumstances. It may not be practicable to return the stream bed to pre-construction contours because of site and engineering constraints, as well as costs. Those factors influence the practicability of road crossing options. The NWP activity should be constructed to allow expected high flows to continue unless its primary purpose is impound water or manage high flows (also see general condition 9). For some types of culverts, sediment transport should continue to maintain the natural stream substrate and general

channel morphology. Activities authorized by NWP can have no more than minimal adverse effects on necessary aquatic life movements, and if a district engineer determines that a permittee is not complying, with the requirements of this general condition, he or she will take appropriate action. One action may be to require requiring remediation to ensure that the activity complies with general condition 2 and other applicable NWP general conditions or suspending. Another action could be to revoke the NWP authorization and require an individual permit for the activity if it substantially disrupts the necessary life cycle movements of indigenous aquatic species or otherwise cannot be conducted so that it has no more than minimal adverse environmental effects.

One commenter said this general condition should be more specific in terms of protocols to be used to ensure that NWP activities have no more than minimal adverse environmental effects. One commenter stated that there is a growing body of scientific literature that shows that a large percentage of culverted stream crossings across the country are not properly designed to allow for the safe passage of fish and other aquatic organisms. This commenter said there should be changes to this general condition to encourage the use of best management practices in the design, construction, modification, and replacement of bridges or culverts that cross waterbodies. This commenter recommended changing this general condition to require the use of stream-simulation principles to maintain or restore the waterbody's natural course, condition, capacity, and flows necessary to sustain the movement of those aquatic species. This commenter also said that this general condition should also require the use of open-bottom bridges and culverts whenever possible, or if the waterbody cannot be spanned with an open-bottom bridge or culvert the bottom of the bridge or culvert should be covered with natural substrate. This commenter also stated that the minimum crossing width must be 1.2 times the width of the waterbody from ordinary high water mark to ordinary high water mark. This commenter also said that the general condition should require the gradient or slope of the crossing structure to match the stream profile, so that the velocity and depth of water in the structure matches that of the stream. One commenter stated that this general condition should require maintenance of the natural bank full capacity or cross-sectional area of the stream channel.

Given the wide variation in river and stream structure, functions, and dynamics across the country, as well as the various geomorphic and hydrologic settings in which NWP activities are conducted, it is not possible to add more specific requirements to this general condition. Compliance with this general condition is more appropriately determined by district engineers on a case-by-case basis after considering the specific regional and site characteristics (e.g., hydrology, geology, and climate), as well as the life cycle requirements of the aquatic species indigenous to the waterbody. This general condition requires culverted stream crossings to be properly designed and constructed to allow for the passage of fish and other aquatic organisms during migration and other life cycle events. Planning, design, construction, and maintenance practices are more appropriately determined for specific NWP activities. Attempting to impose

the same practices, including best management practices, across the entire country is not practical and will not be effective. For some rivers and streams, it is not practicable to use bottomless culverts. The Corps modified this general condition to state that if a bottomless culvert cannot be used, then the crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

Given the wide variation in river and stream crossings across the country, the variability in the valleys in which those rivers and streams are located, and the need to consider hydrology and climate, it would not be appropriate to specify in this general condition a numeric minimum crossing width. It may also not be practicable to require, in all cases, that the gradient in the slope within the crossing structure to match the gradient or slope of the river or stream in the vicinity of the crossing. The purpose of this general condition is to ensure that adverse effects to aquatic life movements are no more than minimal. There may be methods to achieving that objective other than maintaining natural bank full capacity or the cross-sectional area of the stream channel. When reviewing PCNs, district engineers will evaluate proposed NWP activities to ensure that they comply with the requirements of this general condition.

The general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

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

Comments on Proposed GC 3, Response to Comments, and Action for the Final GC 3: In the June 1, 2016, proposed rule, the Corps did not propose any changes to this general condition. One commenter said that NWP activities should not be allowed in spawning areas. One commenter suggested revising the general condition to prohibit activities that would inhibit access of migratory species to their spawning areas. One commenter noted that spawning areas could be adversely affected by activities outside of those spawning areas, and that those indirect effects could also have negative impacts on species.

It is not practical to completely avoid impacts to spawning areas. The purpose of this general condition is to require permittees to avoid, to the maximum extent practicable, conducting NWP activities in spawning areas during spawning seasons. This requirement helps minimize adverse effects to spawning activities of aquatic organisms. General condition 2, aquatic life movements, addresses the movement of aquatic organisms in the waterbody. This includes access of migratory species to spawning areas, such as upstream spawning areas used by anadromous salmon. The general condition already recognizes that activities distant from spawning areas can physically destroy important spawning areas because of sediment transport

to downstream areas and deposition of sediment in those spawning areas. Those indirect adverse effects are prohibited by this general condition.

This general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

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

Comments on Proposed GC 4, Response to Comments, and Action for the Final GC 4: The Corps did not propose any changes to this general condition and no comments were received. The general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

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

Comments on Proposed GC 5, Response to Comments, and Action for the Final GC 5: The Corps did not propose any changes to this general condition. A few commenters expressed support for the general condition as proposed. One commenter requested that the Corps define the term "concentrated shellfish bed" and clarify whether it refers to oyster and clam beds and not to streams inhabited by mussels. One commenter asked if this general condition only applies to marine waters. A commenter asked for clarification as to what constitutes a "concentrated shellfish population" and how that term relates to living shorelines that would be authorized by proposed new NWP B. This commenter inquired whether this general condition applies to waters that have large shellfish populations and whether it prohibits NWP activities on extant shellfish reefs.

The term "concentrated shellfish bed" refers to shellfish beds inhabited by shellfish species, such as oysters, clams, and mussels. This general condition is not limited to marine or estuarine waters, but could also apply to fresh waters that support concentrated beds of native shellfish. This interpretation is supported by the history of this general condition. Prior to the 2000 NWPs, this general condition was focused on shellfish production beds. In 2000, the Corps modified this general condition by changing the title from "Shellfish Production" to "Shellfish Beds" so that it would cover more than areas actively managed for shellfish production (see 65 FR 12868). It should also be noted that the general condition applies to NWP 27 which authorizes habitat restoration activities to benefit shellfish in both tidal and non-tidal waters including freshwater streams. There are regional variations in what constitutes a

shellfish concentration depending on the species and habitat types present. The identification of concentrated shellfish populations, for the purposes of determining compliance with this general condition, is more appropriately conducted by district engineers using local criteria and methods.

Areas that have concentrated shellfish populations are not suitable for the construction of living shorelines, because this general condition prohibits NWP activities in those areas, except for activities authorized by NWPs 4 or 48. District engineers will review PCNs for NWP 54 activities to determine if the proposed activity is precluded from NWP authorization by general condition 5 because it occurs in an area of concentrated shellfish populations. If it is precluded, the district engineer will inform the project proponent that an individual permit will be required for the construction of the proposed living shoreline. This general condition applies to areas within a waterbody that have concentrated shellfish populations. It does not apply to other areas of the waterbody that do not have concentrated shellfish populations. If there is an extant shellfish reef, this general condition prohibits NWP activities, except for activities authorized by NWPs 4 and 48.

This general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

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

Comments on Proposed GC 6, Response to Comments, and Action for the Final GC 6: The Corps did not propose any changes to this general condition. One commenter supported the proposed general condition. One commenter suggested adding tires and encapsulated flotation devices to the list of unsuitable materials in the parenthetical in the text of the general condition.

Whether tires or encapsulated flotation are unsuitable materials is at the district engineer's discretion. In addition, division engineers can add regional conditions to this NWP to provide regional examples of unsuitable materials that are prohibited by this general condition. This general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

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

Comments on Proposed GC 7, Response to Comments, and Action for the Final GC 7: The Corps did not propose any changes to this general condition. Three commenters requested clarification on what constitutes "proximity" to a water supply intake for the purposes of this

general condition. They also expressed concern over the review procedures used to determine compliance with this general condition. Two commenters said that all NWP activities should be prohibited within water source protection areas for public water systems. One commenter asserted that district engineers are not ensuring compliance with general condition 7, and suggested that this general condition should be modified to mirror the review and documentation requirements for general condition 18, endangered species, and general condition 20, historic properties.

The term "proximity" is to be applied using the commonly understood definition of that term ("very near, close" according to Merriam-Webster's Collegiate Dictionary, 10th edition). Therefore, the proposed NWP activity would have to be very near, or close to, the public water supply intake for general condition 7 to apply. For those NWP activities that require PCNs or are voluntarily reported to Corps districts, district engineers will review the PCNs to determine if general condition 7 applies. For those NWP activities that do not require PCNs and are not voluntarily reported to Corps districts, district engineers have the authority to determine whether those unreported NWP activities comply with all applicable general and regional conditions. If an activity does not comply with one or more applicable conditions, the district engineer will take appropriate action under 33 CFR part 326.

The Corps does not agree that all NWP activities should be prohibited in water source protection areas for public water systems. NWP activities can be conducted in those areas with little or no minimal adverse effects to water quality. In addition, all NWPs that authorize discharges into waters of the United States require Clean Water Act section 401 water quality certification. States can deny water quality certification for any NWP activity that might result in a discharge that is not in compliance with applicable water quality standards. General conditions 18 and 20 are based on federal laws impose specific requirements (e.g., ensure its actions are not likely to jeopardize the continued existence of any endangered species or threatened species) or trigger consultation requirements. There is no federal law that imposes a comparable requirement for federal actions that take place in proximity to a public water supply intake. Division engineers can add regional conditions to the NWPs to prohibit the use of one or more NWPs in areas used for public water supplies.

One commenter stated that PCNs should be required for all NWP 12 activities within a certain distance of public water supply intakes. This commenter also said that if PCNs are not required for those NWP 12 activities, then that NWP should be prohibited in the watershed of the public water supply intake. A commenter said that this general condition does not provide sufficient safeguards against pollution of drinking water supplies.

For those NWP 12 activities that require PCNs or are voluntarily reported to the Corps, district engineers will review those proposed activities to ensure that they comply with this general condition. Division engineers can restrict or prohibit the use of NWP 12 in water source protection areas for public water systems. District engineers can also take action if they

determine that a specific activity does not comply with this general condition and therefore does not qualify for NWP authorization.

This general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

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

Comments on Proposed GC 8, Response to Comments, and Action for the Final GC 8: The Corps did not propose any changes to this general condition. One commenter supported the proposed general condition. One commenter asked for a definition of the term "maximum extent practicable" as it applies to this general condition, or for examples of activities that satisfy that provision.

District engineers will use their discretion in determining whether specific impoundments authorized by NWP have minimized, to the maximum extent practicable, adverse effects to the aquatic system as a result of accelerated water flows or restricted water flows. The application of that term is dependent on case-specific circumstances and site conditions. This general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

GC 9. <u>Management of Water Flows</u>. To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization, storm water management activities, and temporary and permanent road crossings, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).

Comments on Proposed GC 9, Response to Comments, and Action for the Final GC 9: The Corps did not propose any changes to this general condition. A few commenter expressed support for the proposed general condition. One commenter stated that this general condition: helps ensure that proper floodplain functions are maintained, helps safeguard communities during natural disasters, and preserves connectivity among aquatic habitats. One commenter said that this general condition should recognize that structures or fills, such as a temporary causeway or work pad, placed into open waters will raise backwaters to some degree, and that rise in water level should be acceptable as long as it does not cause significant flooding or damage to property.

The proposed general condition provides an exception to the prohibition against restricting or impeding the passage of normal or high flows, in cases where the primary purpose of the NWP activity is to impound water or manage high flows. It is the permittee's responsibility to ensure that such impoundments do not cause flood damage or other types of property damage. Paragraph 4 of Section E, Further Information, states that the NWPs "do not authorize any injury to the property or rights of others."

One commenter stated that this general condition should be modified to ensure that the pre-construction course and condition of a waterbody is maintained during the construction of permanent and temporary crossings of the waterbody. This commenter said that this is especially important because road crossings of streams that do not account for various flow conditions may fail during severe storms and flooding events. This commenter recommended adding "and the construction, replacement, or rehabilitation of temporary and permanent crossings (e.g., bridges or culverts)" after "stormwater management activities".

The Corps modified the first sentence of this general condition by removing the word "and" before "stormwater" and adding the phrase "and temporary and permanent road crossings" after "stormwater management activities" to add road crossings to the examples of activities where the pre-construction course, condition, capacity, and location of open waters must be maintained to the maximum extent practicable.

This general condition was adopted with the modification discussed above.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

GC 10. <u>Fills Within 100-Year Floodplains</u>. The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

Comments on Proposed GC 10, Response to Comments, and Action for the Final GC 10: The Corps did not propose any changes to this general condition. One commenter said that this general condition is not a surrogate for E.O. 11988 (Floodplain Management) compliance. This commenter recommended modifying general condition 10 to require an evaluation of existing flood risk data to satisfy floodplain management requirements, and to ensure that NWP activities are outside of the floodway or have minimal hydraulic impacts and do not place critical facilities at high risk. Two commenters said that NWPs that authorize development activities should not be allowed to authorize activities in 100-year floodplains. One commenter stated that Federal Emergency Management Agency (FEMA)-approved floodplain management requirements in one area of the country also protect essential fish habitat.

The only fills in 100-year floodplains that are regulated by the Corps are discharges of dredged or fill material into jurisdictional waters and wetlands. The NWP program supports the objectives of E.O. 11988 by encouraging minimization of losses of waters of the United States to qualify for NWP authorization, including losses of waters of the United States in 100-year

floodplains. The NWPs also require avoidance and minimization of temporary and permanent impacts to waters of the United States to the maximum extent practicable on the project site (see paragraph (a) of general condition 23, mitigation). The Corps does not have the authority to regulate the filling of uplands within 100-year floodplains, including upland floodways. The primary responsibility for determining land use and zoning lies with state, local, and tribal governments (see 33 CFR 320.4(j)(2)), which includes land use within 100-year floodplains. Concerns about adverse effects on floodplains and floodways are more appropriately addressed by the state and local agencies that have the primary responsibility for floodplain management. General condition 10 reminds permittees that they must comply with applicable FEMA-approved state or local floodplain management requirements.

Development activities in jurisdictional waters and wetlands within 100-year floodplains can be authorized by NWPs 29, 39, and other NWPs as long as they have no more than minimal individual and cumulative adverse environmental effects. The Corps acknowledges that FEMA-approved floodplain management requirements can also protect other important resources, such as essential fish habitat.

This general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

GC 11. <u>Equipment</u>. Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance.

Comments on Proposed GC 11, Response to Comments, and Action for the Final GC 11: The Corps did not propose any changes to this general condition. Two commenters said they support the reissuance of this general condition as proposed. One commenter stated that this general condition should provide examples of other minimization measures that should be taken when equipment is used in streams, such as minimization of soil disturbance, proper installation of turbidity barriers, and the placement of oil booms downstream of equipment used in waters. This commenter also suggested that water quality sampling should be required to ensure water quality standards are met throughout the construction period. One commenter said that the use of heavy equipment in jurisdictional waters and wetlands has potential to leak or spill petroleum products into those waters and wetlands. This commenter recommended modifying this general condition to require equipment to be maintained in good working order to ensure that there will be no leaks of contaminants, and require spill kits for on-site emergency cleanups.

Actions taken to minimize the impacts of equipment on streams are more appropriately identified on a case-by-case basis, after considering the type of work to be done in the stream, the flow regime, the geomorphology of the stream, and other factors. Ensuring that activities authorized by NWPs meet applicable water quality standards is achieved through the water quality certification process. If an individual water quality certification is required for an NWP activity, the certification may include activity-specific conditions that require actions, such as

water quality sampling, to ensure the NWP activity complies with applicable water quality standards. The Corps recognizes that there is a potential for mechanical equipment to leak or spill petroleum products. Such discharges may also be addressed through the water quality certification process. Leaks and spills of fuel, hydraulic fluids, transmission fluids, and other fluids from equipment used to conduct NWP activities are not discharges of dredged or fill material that are regulated under section 404 of the Clean Water Act. Such spills or leaks may also require action under other federal, state, or local laws and regulations. The purpose of this general condition is to minimize adverse effects to jurisdictional waters and wetlands that are caused by equipment that disturbs soil. The Corps does not have the authority to regulate the maintenance of equipment, or to mandate the use of spill kits for on-site emergency cleanups. Project proponents should comply with all other applicable federal, state, and local laws and regulations, which may address the operation and maintenance of construction equipment and responding to spills and leaks from that equipment during construction activities.

This general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

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

Comments on Proposed GC 12, Response to Comments, and Action for the Final GC 12: To clarify the application of this general condition in tidal waters, the Corps proposed to modify the last sentence to encourage permittees to conduct work during low tides to reduce soil erosion and sediment transport during construction activities in waters subject to the ebb and flow of the tide.

Three commenters stated their support for the proposed modification of this general condition. One commenter objected to the proposed change, stating that it would be interpreted and applied by Corps districts as a requirement. One commenter said that this general condition should prohibit activities during low tides when migratory birds are using tidal flats. Two commenters stated that this general condition should be modified to require maintenance of downstream water quality, and to require NWP activities to be conducted during periods of low flow. Two commenters asked that the general condition define the term "stabilized" and include stabilization guidelines and a requirement for post-construction monitoring of stabilization activities.

The last sentence of this general condition clearly states that permittees are encouraged to conduct NWP activities in waters of the United States during periods of no-flow or low-flow

or during low tides. The general condition does not mandate that NWP activities be done during those no- or low-flow stages or during low tides. Nationwide permit activities can be conducted at other flow stages or tides and result in no more than minimal adverse environmental effects, so it is not necessary to require NWP activities to be conducted during no- or low-flow stages or during low tides.

General condition 4 requires that NWP activities avoid breeding areas for migratory birds to the maximum extent practicable. General condition 19 also addresses the applicability of the Migratory Bird Treaty Act to the NWP program, and states that the permittee is responsible for contacting the local office of the U.S. Fish and Wildlife Service to determine if an "incidental take" permit is necessary and available under the Migratory Bird Treaty Act.

The maintenance of downstream water quality will be addressed through the water quality certification issued by the state, tribe, or U.S. EPA. The appropriate stabilization measures will be determined on a case-by-case basis and are dependent on site conditions. The appropriate stabilization measures may also be dictated by state or local sediment and erosion control regulations. These state or local sediment and erosion control regulations may also require post-construction monitoring.

This general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

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

Comments on Proposed GC 13, Response to Comments, and Action for the Final GC 13: The Corps did not propose any changes to this general condition. One commenter said that temporary fills should be limited to no more than 180 days. A few commenters stated that temporary mats should not be considered to be fill material and should not be counted towards NWP acreage limits. One commenter said that temporary mats are not necessary for activities authorized by NWPs 3 and 12. One commenter stated that the sidecasting of material excavated from a ditch is not a discharge of dredged or fill material, and that the Corps lacks the authority to regulate excavation activities.

What constitutes a temporary fill is at the discretion of the district engineer. Defining a temporary fill as a fill that is in place for no more than 180 days may discourage the removal of temporary fills within a shorter period of time. For some NWP activities, temporary fills should be removed immediately after construction to minimize temporary losses of aquatic resource functions and services. For some other NWP activities, temporary fills may need to be in place for longer periods of time to allow the impacted area to recover and stabilize so that it can withstand normal flows after the temporary fills are removed.

Whether timber mats and other temporary mats constitute a discharge of dredged or fill material that requires Clean Water Act section 404 authorization is at the district engineer's discretion after applying the definitions at 33 CFR 323.2. Waters of the United States that are temporarily filled and then restored to pre-construction contours and elevations are not included in the measurement of "loss of waters of the United States" (see the definition of "loss of waters of the United States" in Section F, Definitions). Activities authorized by NWPs 3 and 12 often use temporary mats to minimize adverse effects to waters of the United States. The text of those NWPs explicitly state that use of temporary mats is authorized for those activities.

The sidecasting of excavated material during ditch maintenance may be exempt from Clean Water Act section 404 permit requirements (see 33 CFR 323.4(a)(3)). If the ditch maintenance activity does not qualify for the Clean Water Act section 404(f)(1)(C) exemption, the deposition of excavated material into jurisdictional waters and wetlands may be considered a discharge of dredged material (see 33 CFR 323.2(d)). District engineers will determine on a case-by-case basis whether excavation activities require DA authorization under section 404 of the Clean Water Act by applying the current regulations, including the current definition of "discharge of dredged material."

This general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

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

Comments on Proposed GC 14, Response to Comments, and Action for the Final GC 14: The Corps did not propose any changes to this general condition. One commenter stated support for this general condition. One commenter said this general condition should require precautions during maintenance activities to minimize impacts to jurisdictional waters and ensure that downstream water quality is maintained.

Maintenance activities conducted under the NWP authorization are required to comply with all applicable general and regional conditions, which will minimize adverse effects to jurisdictional waters and wetlands and protect water quality. Proper maintenance requires promptly repairing damaged or deteriorating structures and fills so that they do not cause additional adverse effects to jurisdictional waters and wetlands.

This general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

GC 15. <u>Single and Complete Project</u>. The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

Comments on Proposed GC 15, Response to Comments, and Action for the Final GC 15: The Corps did not propose any changes to this general condition. Two commenters said that this general condition should state that an NWP activity cannot be expanded or modified at a later date to enlarge the permitted activity. One commenter stated that for the purposes of cumulative impacts analysis, the "single and complete project" definition should not be tied to the impacts of the NWP activity, but to the effects caused by that activity.

If, for a single and complete non-linear project, the proposed expansion or modification of a previously authorized NWP activity does not have independent utility from the previously authorized NWP activity, and the loss of waters of the United States that would result from proposed expansion or modification plus the previously authorized loss of waters of United States falls under the limit(s) of applicable NWP(s), that expansion or modification can still be authorized by NWP. If the loss of waters of the United States that would result from proposed expansion or modification plus the previously authorized loss of waters of United States exceeds the limit(s) of applicable NWP(s), that expansion or modification would require an individual permit unless there is a regional general permit that can authorize the expansion or modification. If the proposed expansion or modification has independent utility from the previously authorized NWP activity, then the limit(s) would apply to the proposed expansion or modification. Consistent with the Council on Environmental Quality's NEPA regulations at 40 CFR 1508.8, the Corps considers "impacts" and "effects" to be synonymous. Therefore, the terms "cumulative impact analysis" and "cumulative effects analysis" are also considered to be synonymous.

One commenter said that this general condition should define "single and complete project" in the same manner as the definition of "single and complete non-linear project" in Section F of the NWPs. One commenter stated that the same definition of "independent utility" should be applied to both linear and non-linear projects, to avoid piecemealing. This commenter said that linear roadway crossings generally do not have independent utility, so the definition of linear transportation projects should conform with the definition of single and complete non-linear project. This commenter stated that this recommended change would result in a more accurate cumulative impact analysis. Another commenter said that linear and non-linear projects should not be treated differently for the purposes of applying the limits of the NWPs.

The definitions of "single and complete linear project" and "single and complete non-linear project" are addressed in the "Definitions" section of this preamble and the NWPs. This general condition addresses the general concept of "single and complete project" regardless of whether the proposed NWP activity is a single and complete linear project or single and

complete non-linear project. The concept of independent utility does not apply to individual crossings of waters of the United States for linear projects because each separate and distant crossing of waters of the United States is necessary to transport people, goods, or services from the point of origin to the terminal point. For both linear projects and non-linear projects, the cumulative impact analysis considers the use of the applicable NWP or NWPs within a geographic region, such as a watershed, ecoregion, state, or Corps district. The acreage limit for an NWP applies to the single and complete project; for linear projects each separate and distant crossing of waters of the United States is considered a single and complete project (see the definition of "single and complete linear project" and 33 CFR 330.2(i)).

Two commenters suggested changing this general condition to prohibit the use of the same NWP more than once for the same utility line project, rather than allowing the use of NWP 12 for each separate and distance crossing of waters of the United States along a linear project. One commenter stated that for activities that may be authorized using multiple NWPs because the activity components are single and complete, that only one PCN is required to apply for all applicable NWPs.

As stated above, for linear projects such as utility lines authorized by NWP 12, each separate and distant crossing of waters of the United States is considered a single and complete project. For activities that have components that can be authorized by different NWPs, only one PCN needs to be submitted. The PCN should identify which NWP the project proponent wants to use to authorize a particular component, and the PCN should identify which components of the larger overall project have independent utility.

This general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

GC 16. <u>Wild and Scenic Rivers</u>. (a) No NWP activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status.

(b) If a proposed NWP activity will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, the permittee must submit a pre-construction notification (see general condition 32). The district engineer will coordinate the PCN with the Federal agency with direct management responsibility for that river. The permittee shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has

determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

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

Comments on Proposed GC 16, Response to Comments, and Action for the Final GC 16: The Corps proposed to modify this general condition to require pre-construction notification for any NWP activity that will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status.

A few commenters expressed support for the proposed PCN requirement and a few commenters opposed the PCN requirement. One commenter said that NWPs should not be used to authorize activities within Wild and Scenic Rivers. One commenter recommended basing the PCN requirement on the potential to adversely affect the river and not only on the location of the proposed NWP activity. This commenter also suggested that NWP activities conducted by federal agencies do their own compliance with the Wild and Scenic Rivers Act, similar to the proposed changes to paragraph (b) in general condition 18, endangered species, and general condition 20, historic properties.

The Wild and Scenic Rivers Act does not prohibit activities in a Wild and Scenic River or a study river; it requires coordination with the federal agency with direct management responsibility for that river to ensure that the activity will not adversely affect the river's designation as a Wild and Scenic River or a study river. Therefore, NWPs are an appropriate mechanism for providing DA authorization for some activities in these rivers. The proposed modifications to this general condition were based on federal agency regulations and guidance for implementing the Wild and Scenic Rivers Act, and the text of section 7(a) of the Wild and Scenic Rivers Act. For the purposes of DA authorizations issued by the Corps section 7(a) of the Wild and Scenic Rivers Act limits the Corps' responsibilities to activities that might have a "direct and adverse effect on the values" for which the river was established. Therefore, the location of the proposed NWP activity is relevant to determining whether coordinating an NWP PCN with the federal agency with direct management responsibility for that river is required. Section 7(a) of the Wild and Scenic Rivers Act requires the federal agency authorizing the water resources project to do the coordination with the federal agency with direct management responsibility for that river.

One commenter stated that the term "component" is too broad and said that specific river segments should be identified. One commenter requested a list of current "study rivers" for purpose of submitting PCNs. One commenter said that PCNs should not be required for

NWP 3 activities within Wild and Scenic Rivers or study rivers. This commenter also stated that PCNs should not be required for agencies that have direct management responsibilities for Wild and Scenic Rivers or study rivers. One commenter requested clarification of the review process for these PCNs and suggested that the NWP activity should not be prohibited if the federal agency with direct management responsibility for that river does not issue a written determination that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

The text of the general condition includes the internet address for obtaining information on Wild and Scenic Rivers and study rivers, to assist prospective permittees in complying with this general condition. A study river list is available at https://www.rivers.gov/study.php . Activities authorized by NWP 3 must comply with this general condition. If federal agencies with direct management responsibilities over these rivers want to use the NWPs to satisfy the permit requirements of section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899, they must comply with this general condition and provide documentation that demonstrates that their activities will not adversely affect the Wild and Scenic River designation or study status. When a Corps district receives a PCN from a non-federal permittee for a proposed NWP activity that will occur in a component of the National Wild and Scenic River System or in a study river, the district engineer will follow the coordination procedures described in the regulations and guidance for implementing the Wild and Scenic River Act. Until the federal agency with direct management responsibility for that river issues its written determination, the project proponent cannot proceed under the NWP authorization.

This general condition was adopted with the modifications discussed above.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

17. Tribal Rights. No NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.

Comments on Proposed GC 17, Response to Comments, and Action for the Final GC 17: The Corps did not propose any changes to this general condition. One commenter supported the proposed general condition. Several commenters stated that the federal government's tribal trust responsibilities requires federal agencies to protect tribal rights, resources, and cultures and this general condition does not adequately fulfill those responsibilities. Several commenters stated that NWPs should not authorize activities that affect tribal rights and that individual permits should be required to ensure that tribal treaty rights are addressed in the Corps' review process. One commenter said that NWPs should not authorize any activity that implicates tribal treaty rights. Several commenters noted that some NWP activities can occur without pre-construction notification and said that tribes should be involved in the review of NWP PCNs.

As discussed below, the Corps modified this general condition to better fulfill the Corps' fiduciary responsibilities towards tribes. The revised general condition requires that NWP activities cannot cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. Proposed activities that require DA authorization that cannot comply with the revised general condition require individual permits, if there are no regional general permits available to authorize those activities. Division engineers can add regional conditions to one or more NWPs to require PCNs to provide district engineers the opportunity to review proposed activities to ensure that they do not cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. District engineers can also develop coordination procedures with tribes to review PCNs to get the tribes' input on whether the proposed activities will cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.

Several commenters stated that the NWPs do not examine cumulative or indirect impacts on treaty rights. They said that NWP activities in the aggregate can have serious consequences to treaty-reserved resources. One commenter mentioned that resolution #SPO-16-002 was adopted in June 2016 by the National Congress of American Indians. That resolution urged the Department of Defense to reaffirm its commitment to consult with Tribal Nations when its activities impact tribal interests. That resolution represents 562 individually recognized Indian Tribes across the United States, and expresses their concern that the Department of Defense's tribal consultation principles and policies are not being followed and therefore the Department of Defense is not fulfilling its federal trust obligations and not protecting tribal interests.

District engineers monitor the use of the NWPs in specific geographic regions, to ensure that the use of the NWPs does not result in more than minimal cumulative adverse environmental effects, which includes adverse effects to tribal rights (including treaty rights), protected tribal resources, and tribal lands. If a district engineer determines that more than minimal cumulative adverse effects are occurring, he or she should recommend regional conditions, or the suspension or revocation of the applicable NWPs, to the division engineer. The division engineer will follow the procedures at 33 CFR 330.5(c) to modify, suspend, or revoke those NWP(s) in the appropriate geographic area. The Corps uses the Department of Defense American Indian and Alaska Native Policy to guide its interactions with tribes. The Corps also had developed additional policies, which are available at: http://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/ .

One commenter said that this general condition should be invoked for NWPs 3, 13, and 48 because the activities authorized by these NWPs affect salmon or shellfish and the natural resources upon which they depend. One commenter requested establishment of a dispute resolution procedures for tribal consultation and clarification on how the NWP PCN will be handled when a tribe objects to the proposed activity.

This general condition applies to NWPs 3, 13, and 48, as well as all of the other NWPs. If a tribe has concerns with how a Corps district is implementing these NWPs, the tribe should raise those concerns to the district. Disagreements concerning interpretation of treaties may need to be resolved by other parties.

One commenter said that Corps divisions and districts should be provided support to promote tribal involvement and collaborative decision-making. One commenter stated that the proposed general condition is limited because it refers only to "reserved treaty rights." This commenter remarked that the general condition should also include other treaty rights that are explicit retained. This commenter said that "reserved treaty rights" are those rights that the tribe did not specifically relinquish in the treaty, in other words, the treaty is silent on them. This commenter also said that, according to the Department of Defense American Indian and Alaska Native Policy, the Corps' fiduciary duties to tribes also apply to tribal lands and protected tribal resources. This commenter recommended revising this general condition to be consistent with the Department of Defense policy cited above and to require PCNs for proposed activities that might affect protected tribal resources, tribal rights (including treaty rights), and tribal lands.

During the past three rulemakings for the NWPs (2007 and 2012 and this rulemaking for 2017), Corps Headquarters issued memoranda to its division and district offices that requested that Corps districts consult with tribes on the NWPs to develop regional conditions, coordination procedures, and other measures to ensure that the NWPs have no more than minimal adverse effects on tribal trust resources and tribal rights. For the 2017 NWPs, the memorandum was issued on March 10, 2016. The Corps has revised general condition 17 to read as follows: "No activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands." The Corps removed the phrase "or its operation" because the Corps may not have the legal authority to regulate the operation of the facility or structure after the authorized activity is completed.

The principles in the Department of Defense American Indian and Alaska Native Policy apply to Department of Defense actions, which includes actions undertaken by the Corps such as the issuance of NWPs and other types of DA permits to authorize activities it regulates. The Corps' responsibilities for protecting tribal rights (including treaty rights), protected tribal resources, and tribal lands applies only to the activities it has the authority to regulate. For the NWPs, those activities are discharges of dredged or fill material into waters of the United States that the Corps has the authority to regulate under section 404 of the Clean Water Act and structures and work in navigable waters of the United States that the Corps has the authority to regulate under section 10 of the Rivers and Harbors Act of 1899. The Corps does not have the legal authority to regulate or impose conditions on actions or activities outside of its jurisdiction, such as activities in upland areas or operation and maintenance activities that do not require DA authorization.

The terms "tribal rights," "protected tribal resources," and "tribal lands" are defined in the Department of Defense American Indian and Alaska Native Policy. Tribal rights are defined as: "Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies." Protected tribal resources are defined as: "Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources." Tribal lands are defined as: "Any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation." To make these definitions readily accessible to users of the NWPs, the Corps added these definitions to the "Definitions" section of the NWPs (Section F).

There are presently 567 federally-recognized tribes, including Alaska Native tribes, and 370 ratified treaties[2]. In addition, each tribe is a distinct and separate government, and consultations may vary among tribes. Consultation procedures with tribes will vary, because different tribes have different customs and organization. Also, consultation with tribes is the responsibility of the federal government, not prospective permittees. Given the number of federally-recognized tribes, the number of ratified treaties, the fact that each tribe is a distinct and separate government, and that different consultation approaches are necessary for different tribes, the Corps does not expect most prospective permittees to understand applicable treaties, what the protected tribal resources are, and other relevant factors to know when to submit PCNs for proposed NWP activities that might cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. A more effective approach for addressing tribal rights, protected tribal resources, and tribal lands is the regional conditioning process and the development of coordination procedures between Corps districts and tribes.

Prior to the publication of the June 1, 2016, proposed rule in the Federal Register, Corps districts initiated government-to-government consultations for the 2017 NWPs, to identify regional conditions to protect tribal rights, protected tribal resources, or tribal lands. These consultations may also result in the development of coordination procedures between Corps districts and tribes to review PCNs to ensure that those NWP activities do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands. Division engineers can add regional conditions to one or more NWPs to require PCNs for proposed activities in a geographic region that have the potential to cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands.

[2] http://www.bia.gov/FAQs/index.htm, accessed October 18, 2016

This general condition was adopted with the modifications discussed above.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

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

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

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

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

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

(f) If the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed NWP activity, the non-federal applicant should provide a copy of that ESA section 10(a)(1)(B) permit with the PCN required by paragraph (c) of this general condition. The district engineer will coordinate with the agency that issued the ESA section 10(a)(1)(B) permit to determine whether the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation conducted for the ESA section 10(a)(1)(B) permit. If that coordination results in concurrence from the agency that the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation for the ESA section 10(a)(1)(B) permit, the district engineer does not need to conduct a separate ESA section 7 consultation for the proposed NWP activity. The district engineer will notify the non-federal applicant within 45 days of receipt of a complete pre-construction notification whether the ESA section 10(a)(1)(B) permit covers the proposed NWP activity or whether additional ESA section 7 consultation is required.

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

Comments on Proposed GC 18, Response to Comments, and Action for the Final GC 18: The Corps proposed to modify paragraph (a) of this general condition to define the terms "direct effects" and "indirect effects." The Corps also proposed to modify paragraph (b) to clarify that federal agencies only need to submit documentation of compliance with section 7 of the Endangered Species Act (ESA) when the terms and conditions of the NWP, or regional conditions imposed by the division engineer, require the submission of a PCN. In addition, the Corps proposed to modify paragraph (d) to clarify that the district engineer may add activity-

specific conditions to an NWP authorization after conducting formal or informal ESA Section 7 consultation.

Many commenters stated their support for adding the definitions of direct effects and indirect effects to paragraph (a) of this general condition. One commenter asked how "direct effects" and "indirect effects" will be considered in this general condition. One commenter said that this general condition should be revised to eliminate the open-ended review process for the ESA. One commenter said that the Corps should only be required to address aquatic species under this general condition.

The definitions of "direct effects" and "indirect effects" were added to paragraph (a) of this general condition to ensure that both direct and indirect effects to listed species and designated critical habitat are considered when making "might affect" and "may affect" determinations. Endangered Species Act section 7 consultations are not open-ended processes, although they take time to complete. Formal ESA section 7 consultations end with the issuance of biological opinions. Informal ESA section 7 consultations end when the U.S. FWS and/or NMFS issue their written concurrences, or when they state that they do not concur with the district engineer's "may affect, not likely to adversely affect" determination for a proposed NWP activity. If the U.S. FWS and/or NMFS do not provide written concurrence with the district engineer's "may affect, not likely to adversely affect" determination, then formal ESA section 7 consultation is required unless the applicant modifies the proposed activity to allow the district engineer to make a "no effect" determination. If the district engineer makes a "no effect" determination for a proposed NWP activity, then ESA section 7 consultation is not required. Activities authorized by NWPs and other forms of DA authorization can affect terrestrial endangered and threatened species, and district engineers are required to conduct ESA section 7 consultations for NWP activities that may affect those terrestrial listed species.

Several commenters stated their support for the proposed changes to paragraph (b) regarding federal permittee requirements. One commenter objected to the proposed modification, stating that the Corps has an independent duty to ensure that NWP activities are in compliance with ESA section 7 for activities conducted by federal permittees. A few commenters requested clarification of the provision in paragraph (b) that states that the district engineer will verify that the appropriate documentation has been submitted, in terms of another federal agency's compliance with section 7 of the ESA. These commenters asked which actions will be verified, and what the appropriate documentation should be. Several commenters asked when state transportation agencies can be considered as federal permittees under 23 U.S.C. 139(c)(3). One commenter said that state departments of transportation with NEPA authority should be allowed to be treated as federal agencies with respect to NWP requirements, such as ESA compliance. One commenter asked whether the term "non-federal permittee" applies to state mining regulatory authorities acting under SMCRA.

The Corps retained the proposed changes in paragraph (b) of this general condition. The appropriate documentation to provide to district engineers to demonstrate a federal permittee's compliance with ESA section 7 can be a biological opinion issued by the U.S. FWS and/or NMFS, a written concurrence from the U.S. FWS and/or NMFS for an informal ESA section 7 consultation, or a written "no effect" determination made by the federal permittee. Unless a state agency is a department of transportation which the Federal Highway Administration has assigned its responsibilities pursuant to 23 U.S.C. 327, it remains the Corps' responsibility to make ESA section 7 effect determinations for activities authorized by the NWPs that will be conducted by non-federal permittees. The delegation of responsibilities to state departments of transportation through 23 U.S.C. 139(c)(3) only applies to NEPA responsibilities, not to ESA responsibilities. Responsible entities under the Department of Housing and Urban Development's Community Development Block Grant program can take responsibility for ESA section 7 compliance under the provisions of 24 CFR part 58. The project proponent that needs to obtain SMCRA authorization from the state mining regulatory authority is a non-federal permittee that must comply with paragraph (c) of this general condition.

A few commenters expressed support for the requirement for non-federal applicants to submit PCNs when listed species or their designated critical habitat "might be affected or is in the vicinity of the project." A couple of commenters said that the Corps cannot rely solely on information provided by non-federal applicants regarding potential effects to listed species, stating that it is insufficient for meeting the requirements of the ESA. Several commenters asked for clarification of the difference between "might affect" and "may affect." Several commenters said that the term "in the vicinity" should be clarified. One commenter requested definitions for "vicinity" and "affected." One commenter stated that by not defining "in the vicinity" there is potential for non-compliance with section 7 of the ESA. One commenter said that PCNs should only be required for proposed activities that could affect designated critical habitat. One commenting agency said that the proposed changes to this general condition will result in a requirement for that agency to submit a few hundred more PCNs each year. A few commenters stated that submittal of PCNs by non-federal applicants only when any listed species or designated critical habitat "might be affected" fails to include candidate species and is not in compliance with conferencing regulations under Section 7 of the ESA.

The purpose of the PCN requirements in paragraph (c) of general condition 18 is to establish a low reporting threshold to ensure that PCNs are submitted for any proposed NWP that has the potential to affect listed species or designated critical habitat. When the district engineer receives the PCN, he or she will evaluate the information in the PCN, plus other available information, to determine whether the proposed activity may affect listed species or designated critical habitat and thus require ESA section 7 consultation. This paragraph of the general condition is written so that prospective permittees do not decide whether ESA section 7 consultation is required. If the project proponent conducts an activity that affects listed species or designated critical habitat, but did not submit the PCN required by paragraph (c), the

activity is not authorized by NWP. That activity is an unauthorized activity and the Corps will take appropriate action to respond to the unauthorized activity.

As explained in the preamble to the June 1, 2016, proposed rule, the Corps established the "might affect" threshold in 33 CFR part 330.4(f)(2) and paragraph (c) of general condition 18 because it is more stringent than the "may affect" threshold for section 7 consultation in the U.S. FWS's and NMFS's ESA section 7 regulations at 50 CFR part 402. The word "might" is defined as having "less probability or possibility" than the word "may" (Merriam-Webster's Collegiate Dictionary, 10th edition). As discussed in the June 1, 2016, proposed rule, the Corps cannot explicitly define the term "in the vicinity" for the purposes of general condition 18 because the "vicinity" is dependent on a variety of factors, such as species distribution, ecology, life history, mobility, and, if applicable, migratory patterns, as well as habitat characteristics and species sensitivity to various environmental components and potential stressors. The vicinity is also dependent on the NWP activity and the types of direct and indirect effects that might be caused by that NWP activity. If a non-federal project proponent conducts an activity and does not comply with general condition 18 or any other applicable general condition, then the activity is not authorized by NWP. The district engineer will take appropriate action for the unauthorized activity.

Because of the requirements of ESA section 7 and the U.S. FWS's and NMFS's implementing regulations at 50 CFR part 402, the Corps cannot limit PCNs to NWP activities that might affect designated critical habitat. The Corps acknowledges that as more species are listed as endangered or threatened, and more critical habitat is designated, there will be increases in the number of PCNs submitted to Corps districts each year. For species proposed to be listed as endangered or threatened, or for proposed critical habitat, ESA section 7 conferences are not required except for proposed actions that are likely to jeopardize the continued existence of any proposed species or adversely modify or destroy proposed critical habitat. The district engineer has the discretion to confer with the U.S. FWS and/or NMFS if he or she determines that a proposed NWP activity is likely to jeopardize the continued existence of the proposed species or destroy or adversely modify the proposed critical habitat. Because the NWPs only authorize activities that result in no more than minimal adverse environmental effects, and the threshold for ESA section 7 conferences is high (i.e., likely to jeopardize proposed species or adversely modify or destroy proposed critical habitat), conferences will only be necessary in rare circumstances for proposed NWP activities and do not need to address conferences in this general condition. District engineers will conduct conferences for proposed NWP when necessary.

One commenter said that a PCN should only be required if there are potential impacts to listed species and/or designated critical habitat, and a PCN should not be required for the potential presence of a listed species. One commenter stated that a PCN should only be required when ESA section 7 consultation is required. One commenter stated that a PCN not

be required in Northern long-eared bat habitat when there is no effect to the species, specifically when no clearing is involved. This commenter said that based on the term "in the vicinity" in paragraph (c), non-federal applicants would be required to submit a PCN for every NWP activity within this species' broad range. One commenter said that the Corps should require PCNs for proposed NWP activities that would take place within 10 river miles of ESA-listed species. One commenter stated that non-federal applicants should be allowed to satisfy the PCN requirement by demonstrating that ESA section 7 consultation has already been satisfactorily completed.

Under paragraph (c) of general condition 18, and 33 CFR 330.4(f)(2), PCNs are required if any listed species or designated critical habitat might be affected by the proposed NWP activity or is in the vicinity of the proposed NWP activity, or if the proposed NWP activity is located in designated critical habitat. The district engineer reviews the PCN and determines whether ESA section 7 consultation is required, because under section 7(a)(2) of the ESA, federal agencies are responsible for ensuring that actions they authorize are not likely to jeopardize the continued existence of listed species, or destroy or adversely modify designated critical habitat. The prospective permittee does not decide whether ESA section 7 consultation is required for NWP activities; that is the Corps' responsibility. The prospective permittee's responsibility is to submit a PCN to the district engineer when there is a possibility that the proposed NWP activity might affect listed species or designated critical habitat. The Corps acknowledges that the requirements of general condition 18 will result in more PCNs for listed species that have large ranges, but those requirements are necessary to comply with ESA section 7(a)(2). A PCN threshold of 10 river miles within the location of ESA-listed species would not be an effective PCN threshold, especially for mobile listed species. As discussed below, the Corps added a new paragraph (f) to general condition 18 to allow ESA compliance through a valid ESA section 10(a)(1)(B) incidental take permit. If the applicant does not have a valid ESA section 10(a)(1)(B) incidental take permit, and the proposed NWP activity may affect listed species or designated critical habitat, then the Corps is required to conduct ESA section 7 consultation.

A few commenters recommended that an ESA section 7 consultation should be completed in 45 days or less after the date of receipt of a complete PCN. A few commenters stated that if the applicant cannot commence the NWP activity even if the 45-day review period has passed, unless the Corps makes a "no effect" determination or ESA section 7 consultation is completed, this general condition places a burden on applicant. One of these commenters suggested that the Corps either adhere to the 45-day review period for complete PCNs or revise this general condition to state that these ESA section 7 consultations will take no more than 90 days. One commenter stated that for linear projects, the Corps should not issue NWP verifications for any crossings of waters of the United States until ESA section 7 consultation is completed for those crossings that require section 7 consultation. This commenter also said the general condition should prohibit the prospective permittee from beginning construction of the linear project until after those consultations are completed.

If formal ESA section 7 consultation is required, there are timeframes that are mandated by section 7(b) of the ESA. The NWPs cannot change those timeframes. If informal ESA section 7 consultation is conducted, there are no timeframes for completion, but written concurrence from the U.S. FWS and/or NMFS is required before informal consultation is concluded. If the U.S. FWS or NMFS will not provide their written concurrence, or explicitly disagrees that the proposed activity "may affect, is not likely to adversely affect" listed species or critical habitat, then formal ESA section 7 consultation is necessary to fulfill the consultation requirements of ESA section 7(a)(2). As stated in paragraph (c) of general condition 18, if the district engineer determines that the proposed NWP activity may affect listed species or designated critical habitat, the activity is not authorized by NWP until the district engineer completes ESA section 7 consultation or determines that the proposed NWP will have "no effect" on listed species or designated critical habitat.

District engineers have discretion in timing the issuance of NWP verifications for NWP activities that require PCNs. Linear projects often have crossings that require PCNs and crossings that do not require PCNs. For those linear projects, the PCN must also identify the use of NWP(s), regional general permit(s), or individual permit(s) to authorize other separate and distant crossings that require DA authorization (see paragraph (b)(4) of general condition 32). If some or all of the other separate and distance crossings are authorized by NWP without a requirement to submit a PCN (and they do not trigger the PCN requirements in paragraph (c) of general conditions 18 or 20, or other general conditions), then those activities are authorized by NWP unless the district engineer exercises his or her authority at 33 CFR 330.5(d) to suspend or revoke those NWP authorizations. There are also likely to be substantial segments of linear projects that are sited in uplands over which the Corps has no control and responsibility. The entity constructing the linear project can begin construction in the uplands prior to receiving the NWP verification or other DA authorizations.

Several commenters said they support allowing district engineers to add species-specific conditions to NWP verifications. One commenter asked whether district engineers would add species-specific conditions to the NWP itself or to the NWP verification letters. One commenter stated that Corps districts should not be allowed to add activity-specific conditions to NWPs when there are regional conditions related to the protection of listed species.

District engineers have the authority to modify NWPs by adding conditions to the NWP authorization (see 33 CFR 330.5(d)). This includes conditions to protect listed species and designated critical habitat. The conditions are written in the NWP verification letter, but they apply to the NWP authorization. In their NWP verification letters, district engineers may reference regional conditions or add those regional conditions to the NWP authorization to ensure that the permittee is aware of those conditions and to make those conditions easier to enforce.

One commenter said that the Corps is required to seek concurrence from the U.S. FWS and/or NMFS for any "no effect" determination. One commenter voiced support for using regional programmatic consultations to comply with section 7 of the ESA. A few commenters suggested that the Corps develop an informational guidance document and website dedicated to region-specific listed species under the jurisdiction of U.S. FWS, similar to what was developed by the NMFS.

Federal agencies are not required to seek concurrence from the U.S. FWS or NMFS for their ESA section 7 "no effect" determinations (see page 3-12 of the 1998 Endangered Species Consultation Handbook issued by the U.S. FWS and NMFS). For the 2017 NWPs, the Corps will develop a general information guidance document to assist NWP users in complying with general condition 18. This document will be posted on the Corps Headquarters regulatory program web site at: http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/ .

One commenter recommended changing this general condition to require non-federal applicants to submit a list of endangered and threatened species and designated critical habitat locations for the subject county in which the proposed NWP activity will occur, especially for NWPs 3, 12, 13, 14, 21, 39, 44, and 48.

Paragraph (c) of this general condition requires a non-federal permittee to submit a PCN if any listed species or designated critical habitat might be affected or is in the vicinity of the proposed NWP activity, or if the proposed NWP activity is located in designated critical habitat. Other activities authorized by other NWPs might trigger the PCN requirement in paragraph (c), so the Corps did not modify this general condition to focus on the eight NWPs identified by the commenter.

One commenter said that the Corps should include the entire linear project in its action area instead of limiting the action area to the crossings of waters of the United States. This commenter asserted that the Corps' approach for ESA compliance for linear projects does not comply with the ESA. One commenter stated that compensatory mitigation should be required for unavoidable adverse impacts to federally-listed species when NWP activities use treated wood below the water line. One commenter said that the Corps must conduct an activity-specific NEPA analysis when it implements an incidental take statement as a condition of the Corps' NWP verification and that the Corps' implementation of the incidental take statement should cover the entire linear project, not just crossings of waters of the United States.

The U.S. FWS's and NMFS's ESA section 7 regulations at 50 CFR 402.02 define the term "action area" as "…all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." When the Corps initiates ESA section 7 consultation on proposed activity that it determines "may affect" listed species or designated critical habitat, it consults on the direct and indirect effects caused by the proposed NWP

activity. In paragraph (a) of this general condition, the Corps defined the terms "direct effects" and "indirect effects." Indirect effects can be some distance from the direct effects of the proposed NWP activity. The Corps' approach to conducting ESA section 7 consultations for linear projects complies with the ESA. Section 7(a)(2) consultations for linear projects may include the effects of interdependent and interrelated activities. Interrelated and interdependent activities are not federal actions, because they are not authorized, funded, or carried out by the Corps or other federal agency. Including interrelated and interdependent activities in a formal ESA Section 7 consultation and biological opinion does not grant the Corps any authority to regulate those activities and their effects on listed species and critical habitat. Therefore, the Corps does not have the legal authority to enforce conditions that the U.S. FWS and/or NMFS might impose on those interrelated and interdependent activities in an incidental take statement in a biological opinion. The FWS and NMFS would be responsible for enforcing those provisions of the incidental take statement that apply to the upland activities outside of the Corps' jurisdiction.

District engineers will determine on a case-by-case basis whether compensatory mitigation is required for unavoidable adverse impacts to federally-listed species. The Corps only adopts and incorporates those provisions of an incidental take statement that apply to the actions authorized by the Corps. If the incidental take statement in a biological opinion has provisions that apply to activities in upland areas outside of the Corps' action areas for linear projects, where the Corps does not have the authority to control those upland activities, the Corps will not incorporate those provisions in its NWP authorization. The U.S. FWS and NMFS can use their authorities to enforce provisions of the incidental take statement that apply to upland linear project segments that are outside of the Corps' control and responsibility. From the Corps' perspective, those upland linear project segments are not federal actions, and therefore the Corps is not responsible for preparing NEPA documents for those actions.

Several commenters recommended using Habitat Conservation Plans to streamline compliance with this general condition if the prospective permittee has been issued an ESA section 10 permit that also authorizes incidental take that may result from the proposed NWP activity. Several commenters said that PCNs should not be required for non-federal permittees when their "take" of listed species is authorized by ESA section 10 permits and is addressed through HCPs with incidental take statements. A few commenters said that a non-federal permittee should be able to proceed with the proposed NWP activity 15 days after providing the district engineer with the ESA section 10(a)(1)(B) incidental take permit and HCP. One commenter said the PCN requirement of this general condition should be satisfied through a programmatic notification submitted to the district engineer, if more than one activity to be authorized by NWP has been the subject of a prior ESA section 7 consultation.

The Corps added a new paragraph (f) to this general condition, to cover circumstances in which the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit

and approved Habitat Conservation Plan for a project or group of projects that includes the proposed NWP activity. A group of projects may be covered by an ESA section 10(a)(1)(B) and large-scale (e.g., county) Habitat Conservation Plan. Whenever the U.S. Fish and Wildlife Service or the National Marine Fisheries Service issues an ESA section 10(a)(1)(B) incidental take permit, they conduct an intra-Service consultation under ESA section 7(a)(2). The intra-Service ESA section 7(a)(2) consultation conducted for the ESA section 10(a)(1)(B) permit and Habitat Conservation Plan will include their opinion whether the proposed project or group of projects is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. Adding this paragraph to general condition 18 reduces duplication and also fulfills the Corps' obligations under ESA section 7(a)(2). The district engineer will coordinate with the FWS and/or NMFS as appropriate to determine whether the agency that issued the ESA section 10(a)(1)(B) incidental take permit considered the proposed NWP activity and the associated incidental take in its internal ESA section 7 consultation for that ESA section 10(a)(1)(B) permit.

The Corps cannot eliminate the PCN requirement for non-federal permittees that is established by 33 CFR 330.4(f)(2). The PCN requirement is necessary to allow the district engineer to determine, after coordinating with the agency that issued the ESA section 10(a)(1)(B) incidental take permit (i.e., the FWS and/or NMFS), whether the ESA section 10(a)(1)(B) incidental take permit and the internal ESA section 7 consultation for that incidental take permit covers the proposed NWP activity and its anticipated incidental take. The district engineer should respond to the complete PCN to notify the non-federal applicant whether the ESA section 10(a)(1)(B) permit covers the proposed NWP activity or whether additional ESA section 7(a)(2) consultation is necessary, to ensure from the Corps' perspective, that the proposed NWP activity is not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adversely modification of designated critical habitat. The Corps also cannot state in the revised general condition that the prospective permittee can proceed with the NWP activity within 15 days of providing the district engineer with a copy of the ESA section 10(a)(1)(B) incidental take permit and Habitat Conservation Plan, because district engineers have 45-days to review complete PCNs and there are other exceptions to the 45-day review period. For example, if the proposed NWP activity is determined by the district engineer to have the potential to cause effects to historic properties, consultation will be required to fulfill the requirements of section 106 of the National Historic Preservation Act. Activities authorized by NWPs 21, 49, and 50 require written verifications before proceeding with the authorized work. The Corps cannot replace the PCN requirement individual NWP activities with a programmatic notification, because each proposed NWP activity needs to be evaluated to determine if ESA section 7 consultation is required.

One commenter expressed concern that the requirements of this general condition result in ESA section 7 consultations occurring in the absence of a real potential for listed species conflicts. One commenter said that ESA section 7 consultations should only occur if the

site for the proposed activity has an occurrence of listed species or the site is located in designated critical habitat. One commenter stated that the requirements of general condition 18 should only apply to activities in jurisdictional areas that might affect endangered species.

For a non-federal permittee, this general condition requires a PCN if any listed species or designated critical habitat might be affected or is in the vicinity of the proposed NWP activity, or if the proposed NWP activity is located in designated critical habitat. The district engineer will review the PCN to determine if the proposed NWP activity may affect listed species or designated critical habitat and thus require ESA section 7 consultation. If the district engineer determines the proposed NWP activity will have no effect on listed species or designated critical habitat, he or she will issue the NWP verification letter if the proposed activity complies with all other applicable terms and conditions of the NWP and will result in no more than minimal adverse environmental effects. When making an effect determination for the purposes of ESA section 7, the district engineer considers the direct and indirect effects caused by the proposed NWP activity. An NWP activity conducted in jurisdictional waters and wetlands can have indirect effects on listed species or designated critical habitat outside of those jurisdictional waters and wetlands, and thus require the district engineer to conduct ESA section 7 consultation.

This general condition was adopted with the modifications discussed above.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

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

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

Several commenters stated their support for the proposed modification. Two commenters said that the proposed modification will increase burdens on applicants and create delays in the NWP verification process. This general condition does not require any action by district engineers and will not delay their reviews of PCNs and voluntary requests for NWP

verifications. Permittees are responsible for contacting the local office of the U.S. Fish and Wildlife Service to determine if they need to take action to reduce impacts to migratory birds or bald or golden eagles, or obtain incidental take permits under these two laws.

This general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

GC 20. <u>Historic Properties</u>. (a) In cases where the district engineer determines that the activity may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

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

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties might have the potential to be affected by the proposed NWP activity or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of, or potential for, the presence of historic properties can be sought from the State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted in the PCN and these identification efforts, the district engineer shall determine whether the proposed NWP activity has the potential to cause effects on the historic properties. Section 106 consultation is not required when the district engineer determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). Section 106

consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of section 106 of the NHPA: no historic properties affected, no adverse effect, or adverse effect. Where the non-Federal applicant has identified historic properties on which the activity might have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that NHPA section 106 consultation has been completed.

(d) For non-federal permittees, the district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. If NHPA section 106 consultation is required, the district engineer will notify the non-Federal applicant that he or she cannot begin the activity until section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that section 110k of the NHPA (54 U.S.C. 306113) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

Comments on Proposed GC 20, Response to Comments, and Action for the Final GC 20: Parallel with the proposed modifications of paragraph (b) of general condition 18, the Corps proposed to modify paragraph (b) of general condition 20 to state that federal permittees only need to submit documentation of their compliance with section 106 of the National Historic Preservation Act (NHPA) if the proposed NWP activity requires pre-construction notification because of other terms and conditions, including regional conditions imposed by division engineers.

One commenter asked how district engineers will determine if NWP activities will affect historic properties and who is expected to satisfy the requirements of section 106 of the NHPA. One commenter recommended revising paragraph (a) as follows: "In cases where the district engineer is notified, or determines based on scoping performed in accordance with 36 CFR 800.4(a), 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 district engineer finds that the requirements of Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations (36 CFR Part 800) have been satisfied."

District engineers will review PCNs and determine whether proposed NWP activities have the potential to affect historic properties. If the district engineer determines that the proposed NWP activity has no potential to cause effects on historic properties, section 106 consultation is not required. If the district engineer determines that the proposed NWP activity will result in either "no historic properties affected," "no adverse effects," or "adverse effects," he or she will conduct NHPA section 106 consultation with the appropriate consulting parties. The NWPs, via the requirements of general condition 20, provide general guidance on historic properties and compliance with NHPA section 106, but further details on the section 106 process are provided in other Corps regulations and guidance, and do not need to be included in the text of paragraph (a) of this general condition.

Several commenters supported the proposed change to paragraph (b) regarding federal permittees' compliance with section 106 of the NHPA. One commenter suggested modifying paragraph (b) to state that if the district engineer identifies deficiencies in the federal permittee's section 106 compliance, then he or she will consult further with the federal agency and other parties to resolve those deficiencies. Several commenters stated that paragraph (b) exempts non-lead federal agencies from fulfilling their section 106 responsibilities. One commenter said that paragraph (b) results in the Corps designating another agency as the NHPA section 106 compliance lead without the agreement of the other agency. One commenter requested further clarification to address situations where no other federal lead agency has the responsibility.

Federal permittees have an independent obligation to comply with section 106 of the NHPA. If an NWP activity that will be conducted by a federal permittee requires a PCN and the district engineer determines while reviewing the PCN that the federal permittee's section 106 compliance documentation is insufficient, then he or she will notify the federal permittee that additional section 106 consultation may be necessary. Paragraph (b) of this general condition is not equivalent to a lead federal agency concept. The purpose of paragraph (b) is to avoid duplicative consultation efforts, because federal agencies have their own obligation to comply with NHPA section 106. When a federal permittee is conducting an NWP activity, it is either conducting the same undertaking as the Corps (i.e., the permitted activity), or a larger undertaking that involves other activities that the Corps does not have the authority to

regulate. If there is no federal permittee, then paragraph (c) of this general condition would apply.

One commenter recommended revising the fourth sentence of paragraph (b) as follows: "If the appropriate documentation is not submitted, then additional consultation under section 106 may be necessary to fulfill the requirements of the NHPA and relevant regulations have been complied with." This commenter suggested adding the following sentence after the fourth sentence: "If the district engineer identifies deficiencies, then the district engineer will consult further with the federal agency and other parties to resolve them."

The last sentence of paragraph (b) makes it clear that if there are deficiencies in the federal permittee's documentation of section 106 compliance, it is the federal permittee's responsibility to address those deficiencies. The Corps is not required to conduct that additional consultation on behalf of the federal permittee.

One commenter said that paragraph (c) should be modified to make it clear who is responsible for making an effect determination for the purposes of section 106 of the NHPA. Several comments stated that by referencing "current procedures" in paragraph (c) of this general condition, the Corps suggests to prospective permittees that compliance with the Corps' current regulations and guidance fulfills its section 106 NHPA responsibilities. Several commenters recommended revising this general condition to require non-federal applicants to provide documentation in their PCNs from qualified professionals to state that standard procedures have been followed to identify historic properties. One commenter said that the third sentence in paragraph (c) should include "designated tribal representative" because not all federally recognized tribes have Tribal Historic Preservation Officers.

The Corps modified paragraph (c) by adding two sentences to make it clear that it is the district engineer's responsibility to make section 106 effects determinations: "Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of section 106 of the NHPA: no historic properties affected, no adverse effect, and adverse effect." The Corps retained the fourth sentence in paragraph (c) to refer to our its current procedures for addressing the requirements of section 106 of the NHPA, which are Appendix C to 33 CFR part 325, the April 25, 2005, interim guidance in which the Corps adapted the applicable provisions of 36 CFR part 800 to augment Appendix C, and the January 31, 2007, interim guidance in which the Corps provides further guidance on adapting the applicable provisions of 36 CFR part 800 to Appendix C.

Modifying paragraph (c) to require non-federal applicants to provide documentation from qualified professionals goes beyond the "good faith effort" required to identify historic properties for minor activities authorized by the NWPs. The magnitude and nature of the

undertaking and the degree of federal involvement are considerations for determining what is required to identify historic properties (see 36 CFR 800.4(b)(1)), and for many NWP activities these are both minimal. For activities that have the potential to cause effects to historic properties, applicants often hire consultants to assist in the section 106 process. The Corps modified the third sentence of paragraph (c) to include "designated tribal representative" as an option for assistance regarding information on the location of potential historic resources, consistent with 36 CFR 800.2(c)(2)(i)(B).

Several commenters stated that this general condition does not provide sufficient guidance to non-federal applicants to ensure compliance with section 106 because the information requirements for PCNs are vague and set a low threshold. These commenters expressed concern that district engineers will not have sufficient information from applicants or may not receive PCNs at all. Several commenters stated that this general condition and its PCN requirements unlawfully delegates to non-federal entities the Corps' responsibility to comply with section 106 of the NHPA.

The Corps did not delegate responsibilities to comply with Section 106, but as a permitting agency the Corps requires certain information from project proponents. This general condition requires prospective permittees to submit PCNs for proposed activities that might have the potential to cause effects to historic properties. In this general condition, the Corps changed the word "may" to "might" to be consistent with the language in paragraph (c) of general condition 18, endangered species, because it serves a similar purpose. As with paragraph (c) of general condition 18, paragraph (c) of general condition 20 places the responsibility of determining whether NHPA section 106 is necessary. The district engineer will evaluate the PCN, and if he or she determines that the proposed NWP activity has the potential to cause effects to historic properties, he or she will initiate section 106 consultation with the appropriate consulting parties. For the section 106 consultation, the district engineer will make one of three effect determinations: "no historic properties affected," "no adverse effect," and "adverse effect."

The Corps made changes to paragraphs (c) and (d) to more clearly articulate the district engineer's process for complying with NHPA section 106 for NWP activities undertaken by non-federal permittees. The Corps moved the second sentence from paragraph (d) to paragraph (c). The Corps also added two new sentences to paragraph (c). The first new sentence states that section 106 consultation is required when the district engineer determines the proposed activity has the potential to cause effects to historic properties. The second new sentence states that the district engineer will consult with consulting parties identified under 36 CFR 800.2(c) when he or she determines the proposed activity may result in "no historic properties affected," "no adverse effects" on historic properties, or "adverse effects" on historic properties. The Corps also made some edits to the last sentence of paragraph (c) to provide additional clarity.

At the beginning of the first sentence of paragraph (d), the Corps added the phrase "For non-federal permittees," to make it clear that paragraph (d) applies to non-federal permittees. In what is now the second sentence of paragraph (d), the Corps deleted the phrase "and will occur" because if section 106 consultation is required, the district engineer will do that section 106 consultation.

One commenter said that PCNs should be required for all NWP activities that involve ground disturbance. One commenter stated that this condition sets a lower threshold for requiring review than Appendix C to 33 CFR part 325 and should be revised. One commenter stated that general condition 20 and 32, and their reliance on compliance by permittees, often results in the Corps' failure to consult with federally recognized tribes in a government-to-government relationship.

Requiring PCNs for all NWP activities that involve ground disturbance would result in many additional PCNs for activities that have no potential to cause effects to historic properties. The intent of paragraph (c) is to require non-federal permittees to submit PCNs for any proposed NWP activity that might have the potential to cause effects to historic properties. The PCN requirement gives district engineers the opportunity to make effect determinations for the purposes of complying with section 106 of the NHPA. General condition 20 only addresses historic properties and the requirements of section 106 of the NHPA. As discussed above, general condition 20 does not delegate the Corps' section 106 responsibilities to permittees. In addition, the Corps made substantial changes to general condition 17, tribal rights, to address the Corps' fiduciary responsibilities towards tribes, which extend beyond historic properties. General condition 17 addresses tribal rights (including treaty rights), protected tribal resources, and tribal lands. District engineers will consult with tribes on NWP activities that have the potential to cause effects to historic properties of significance to those tribes.

Two commenters said they support paragraph (e) and its implementation of section 110(k) for intentional adverse effects. One commenter noted that the NHPA was recodified and the citation to section 110(k) should be corrected to 54 U.S.C. 306113. The Corps revised the first sentence of paragraph (e) to refer to 54 U.S.C. 306113.

Several commenters said that this general condition unlawfully limits the scope of the Corps' "permit area." One commenter stated that 33 CFR part 325, Appendix C is not approved by the Advisory Council on Historic Preservation (ACHP) as a program alternative, as required by 36 CFR 800.14. This commenter said that Appendix C is an internal Corps process that does not fulfill the requirements of section 106 of NHPA. One commenter recommended that the Corps continue working with the ACHP in order to bring its regulations into compliance with the NHPA. One commenter stated that Appendix C violates tribal consultation requirements, and more importantly, meaningful consultation with tribes.

General condition 20 does not use the term "permit area." When evaluating PCNs, district engineers will determine the appropriate scope of analysis for the purposes of NHPA section 106 using its current procedures for addressing the requirements of that statute. The ACHP's regulations at 36 CFR 800.14(a) states that an "agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the act." Both 36 CFR 800.14(a) and NHPA section 110(a)(2)(E) state that a federal agency's program alternative has to be "consistent" with the ACHP's regulations. Neither of those provisions state that those program alternative have to be "approved" by the ACHP. The Corps complies with section 106 of the NHPA through Appendix C and the interim guidance documents April 25, 2005, and January 31, 2007. The Corps continues to work with the ACHP on this matter. The 2005 and 2007 interim guidance documents were issued to make the regulatory program's NHPA section 106 procedures consistent with the ACHP's regulations. The Corps complies with tribal consultation requirements and its fiduciary responsibilities to tribes through the Department of Defense American Indian and Alaska Native Policy and the Corps' November 1, 2012, Tribal Consultation Policy.

Several commenters said that certain state departments of transportation have been assigned responsibilities by the Federal Highway Administration under the authority in 23 U.S.C. 327 to conduct compliance under section 7 of the Endangered Species Act. These commenters stated that this practice needs to be recognized in general condition 20 for historic properties, because these departments of transportation are considered "federal permittees" and their own procedures apply for compliance with section 106. Several commenters indicated that some Corps districts re-coordinate with State Historic Preservation Officers that were already contacted by state transportation agencies during their review process.

If a state agency is a department of transportation to which the Federal Highway Administration has assigned its responsibilities pursuant to 23 U.S.C. 327, then that state agency would be responsible for section 106 compliance under paragraph (b) of this general condition. No changes to the text of this general condition are necessary to recognize this assignment of authority. If a PCN is required, non-federal applicants, including state departments of transportation that have not been assigned authority under 23 U.S.C. 327 are asked to provide any documentation which may expedite the review process for NHPA section 106. For NWP activities conducted by non-federal permittees, it is the Corps' responsibility to comply with the requirements of section 106.

One commenter stated that reliance on general conditions 20 and 32, is not a substitute for activity-specific compliance with section 106 of the NHPA. This commenter said that the Corps should conduct a section 106 review out prior to reissuing the NWPs. One commenter said that the general condition should state that the Corps is not obligated to delay issuance of an NWP verification until after an official agreement is obtained from a state.

General condition 20 provides the means for activity-specific compliance with section 106 of the NHPA. General condition 32 describes the general PCN requirements for the NWPs. As discussed in another section of this final rule, the Corps determined that the issuance or reissuance of the NWPs by Corps Headquarters has no potential to cause effects to historic properties. The NWPs authorize activities over a five-year period, after they are issued and go into effect. When the Corps issues or reissues NWPs, there are no specific NWP activity sites identified; when the NWPs go into effect several weeks after they issued or reissued, they could potentially authorize activities in jurisdictional waters and wetlands anywhere in the United States. In other words, during the rulemaking process for the issuance or reissuance of the NWPs there are no specific historic properties on which to conduct NHPA section 106 consultation. General condition 20 requires completion of NHPA section 106 consultations, and when section 106 consultation is required, the Corps cannot issue an NWP verification letter until after the consultation has been completed.

Several commenters requested clarification of how PCN requirements will be defined to promote a consistent and streamlined approach and a clearer understanding of general condition 20. Several commenters stated that the PCN review timeframe should be limited to 45 days, or a maximum of 90 days when it is necessary to complete section 106 consultation. These commenters said that if the applicant has not gotten a response from the Corps within those timeframes, the applicant should be permitted to proceed with the NWP activity. One commenter said that the Corps should eliminate the open-ended review process for section 106 of the NHPA.

For those NWP activities that require NHPA section 106 consultation, the Corps acknowledges that it will take longer for district engineers to issue NWP verifications because the Corps has to provide sufficient time for consulting parties to provide comments on the Corps' "no historic properties affected," "no adverse effects," and "adverse effect" determinations. Compliance with section 106 of the NHPA is mandatory, not optional. General condition 20 states that if section 106 consultation is required, the project proponent cannot conduct the NWP activity until section 106 consultation is completed. The review process for section 106 of the NHPA is not open-ended; it concludes after the applicable procedures are followed and the district engineer can make his or her decision on the NWP PCN.

One commenter said that linear undertakings should not be segmented separately and reviewed as individual crossings. This commenter stated that, for linear projects, the Corps should include all areas where historic properties may be directly and indirectly affected by the undertaking, if any historic properties are present.

For linear projects, where the crossings of waters of the United States involve discharges of dredged or fill material into waters of the United States and/or structures or work in a navigable waters of the United States, the undertakings for the purposes of section 106 of the NHPA are the crossings that require DA authorization. The Corps does not have the authority

to regulate upland segments of linear projects, and therefore those upland segments are not undertakings for the purposes of section 106 of the NHPA. The ACHP's regulations at 36 CFR 800.16(y) define "undertaking" as: "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval." By including "activity" in its definition of "undertaking," the ACHP's definition recognizes that federal agencies may not issue permits or licenses for entire projects, and those federal agencies might only issue permits or licenses for specific components of entire projects.

For linear projects, from the Corps' perspective, the crossings of waters of the United States authorized by NWPs or other types of DA permits, are the undertakings. For those crossings that require DA authorization, district engineers consider the direct and indirect effects of those crossings on historic properties that are caused by the discharges of dredged or fill material into waters of the United States and/or structure or work in navigable waters of the United States. If the operation and maintenance of those linear projects do not involve activities that require DA authorization, then the Corps is not required to evaluate the effects of those operation and maintenance activities on historic properties. The Corps' scope of analysis for the purposes of section 106 of the NHPA is the same regardless of whether the activities regulated by the Corps are authorized by NWPs or other general permits, or by individual permits.

This general condition was adopted with the modifications discussed above.

After re-evaluating this NWP in light of EO 13783 no modifications to this general condition are recommended.

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

Comments on Proposed GC 21, Response to Comments, and Action for the Final GC 21: The Corps did not proposed any changes to this general condition. One commenter expressed support for general condition 21, but requested that this condition require the permittee to cease work in the area of the discovery of the previously unknown historic, cultural, or archeological remains and artifacts. This commenter noted that the wording of this general condition only allows for recovery activities or eligibility determinations, while failing to address

other types of measures that might be determined necessary to avoid, minimize, or mitigate adverse effects to historic properties. One commenter said that general condition 21 is not a substitute for compliance with section 106 of the NHPA in individual cases. This commenter asserted that in absence of a section 106 review process that is carried out prior to reissuance of the NWPs, the Corps fails to meet the requirements of 36 CFR part 800.

General condition 21 requires permittees to avoid, to the maximum extent practicable, construction activities that may affect the remains and artifacts until coordinated has been completed. This condition permits construction activities to continue outside of the discovery, while protecting the area of the discovery until coordination is complete. If these remains and artifacts are determined, after NHPA section 106 consultation, to be historic properties, other types of measures to avoid, minimize, or mitigate adverse effects to those historic properties may be implemented on a case-by-case basis. The district engineer can ask the project proponent to stop work, but the Corps does not have the authority to require the project proponent to stop work in the event of the discovery of previously unknown historic, cultural, or archeological remains and artifacts.

The purpose of this general condition is to address previously unknown remains and artifacts that are revealed during while the authorized NWP activity is being conducted. If the artifacts or remains were known at the time the district engineer reviewed the PCN or voluntary request for NWP verification, he or she would have made an eligibility determination, and if necessary, conducted NHPA section 106 consultation. Section 106 consultation was either not done because the remains or artifacts were unknown at the time the NWP PCN or voluntary request for NWP verification was being evaluated by the district engineer, or section 106 consultation was done for known historic properties included in, or eligible for inclusion in, the National Register of Historic Places. When the discovery of the previously unknown remains and artifacts are reported to the district engineer, he or she will initiate federal, tribal, and state coordination to determine whether the artifacts or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places. Section 106 consultation will be conducted when necessary for these discoveries. General condition 21 is not a substitute for section 106 consultation.

This general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

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

state natural heritage sites. The district engineer may also designate additional critical resource waters after notice and opportunity for public comment.

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

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and 54, notification is required in accordance with general condition 32, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

Comments on Proposed GC 22, Response to Comments, and Action for the Final GC 22: The Corps did not propose any changes to this general condition, except to add the new NWP 54 to paragraph (b).

This general condition is adopted with the modification discussed above.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

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

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

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

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

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

(e) Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, the restoration or maintenance/protection of riparian areas may be the only compensatory mitigation required. Restored riparian areas should consist of native species. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to restore or maintain/protect a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or maintaining/protecting a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of minimization or compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

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

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in no more than minimal adverse environmental effects. For the NWPs, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2) and (3)). However, if an appropriate number and type of mitigation bank or in-lieu credits are not available at the time the PCN is submitted to the district engineer, the district engineer may approve the use of permittee-responsible mitigation.

(2) The amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.1(e)(3)). (See also 33 CFR 332.3(f)).

(3) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, aquatic resource restoration should be the first compensatory mitigation option considered for permittee-responsible mitigation.

(4) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)).

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

(6) Compensatory mitigation requirements (e.g., resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan (see 33 CFR 332.4(c)(1)(ii)).

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

(h) Permittees may propose the use of mitigation banks, in-lieu fee programs, or permittee-responsible mitigation. When developing a compensatory mitigation proposal, the permittee must consider appropriate and practicable options consistent with the framework at 33 CFR 332.3(b). For activities resulting in the loss of marine or estuarine resources, permittee-responsible mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee-responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.

Comments on Proposed GC 23, Response to Comments, and Action for the Final GC 23: The Corps proposed to modify the opening paragraph of this general condition and paragraph (b) to clarify that mitigation can be required by district engineers to ensure that activities authorized by NWPs will result in no more than minimal individual and cumulative adverse environmental effects. Also, the Corps proposed to modify paragraph (d) to state that compensatory mitigation for stream losses should be provided through rehabilitation, enhancement, or preservation, to be consistent with 33 CFR 332.3(e)(3), which states that streams are difficult-to-replace resources. In paragraph (e), the Corps proposed to modify the first sentence to state that compensatory mitigation provided through riparian areas can be accomplished by restoration, enhancement, or maintenance of those areas. In addition, the Corps proposed to modify paragraph (f)(1) to state that if the district engineer determines compensatory mitigation is required for the proposed NWP activity, the preferred mechanism for providing compensatory mitigation is either mitigation bank credits or in-lieu credits. In the June 1, 2016, proposed rule the Corps also requested comment on ways to improve how compensatory mitigation conducted under the NWP program is implemented to offset direct, indirect, and cumulative effects.

Several commenters said that the Corps should only require compensatory mitigation for activities that require individual permits. Many commenters said that project proponents should not be allowed to use compensatory mitigation to reduce the impacts of their activities to qualify for NWP authorization. Several commenters expressed support for allowing applicants an option to prepare a mitigation plan to reduce adverse environmental effects to no more than minimal to qualify for NWP authorization. One commenter stated that district engineers should continue to be allowed flexibility in determining when compensatory mitigation is to be required for NWP activities, especially when many aquatic resources are already heavily degraded.

The Corps' regulations at 33 CFR 330.1(e)(3) state that district engineers can require mitigation to ensure that activities authorized by NWPs result in no more than individual and cumulative adverse environmental effects. Under the procedure in 33 CFR 330.1(e)(3), district engineers offer prospective permittees the opportunity to submit mitigation proposals to reduce the adverse environmental effects caused by NWP activities. The mitigation required under the authority of 33 CFR 330.1(e)(3) can be compensatory mitigation, but it can also be additional on-site avoidance and minimization of adverse impacts to jurisdictional waters and wetlands. District engineers have the discretion to determine when compensatory mitigation is

to be required for NWP activities, and consider the degree of functions being performed by the jurisdictional waters and wetlands that will be adversely affected by the NWP activities (see paragraph 2 of Section D, District Engineer's Decision).

One commenter stated that compensatory mitigation should only be required for impacts to jurisdictional waters. One commenter suggested that compensatory mitigation should not be required for restoration activities. One commenter said that the reference to the aquatic environment in general condition 23 should be retained.

It is implicit in general condition 23 that compensatory mitigation is only required for NWP activities that impact jurisdictional waters and wetlands. However, under general condition 32 a complete PCN requires a delineation of wetlands, other special aquatic sites, and other waters, and some of those wetlands, other special aquatic sites, and other waters might not be subject to Clean Water Act jurisdiction. Therefore, if compensatory mitigation is required for a proposed NWP activity, and there was no approved jurisdictional determination issued for the project site, there may be occasions where compensatory mitigation was required for impacts to waters and wetlands, where some of those waters and wetlands might not be subject to Clean Water Act jurisdiction. If a project proponent wants an approved jurisdictional determination for a parcel where he or she might be proposing an NWP activity, the project proponent should request and receive that approved jurisdictional determination prior to submitting a PCN for the proposed NWP activity.

In general, compensatory mitigation is not required for restoration activities. In NWP 27, which authorizes aquatic habitat restoration, enhancement, and establishment activities, there is a provision that states that compensatory mitigation is not required for activities authorized by that NWP because they result in net increases in aquatic resource functions and services. The Corps added a similar provision to new NWP 53, which authorizes the removal of low-head dams to restore rivers and streams and improve public safety. The NWP regulations, as well as section 404(e) of the Clean Water Act, refer to adverse environmental effects, so mitigation for NWP activities is intended to help ensure that activities authorized by NWPs cause no more than minimal adverse environmental effects.

One commenter stated that compensatory mitigation should be required for all unavoidable impacts to wetlands, special aquatic sites, and all stream types (ephemeral, intermittent and perennial). One commenter said that mitigation should only be completed on-site to better compensate for the loss at that location. A few commenters expressed their support for maintaining existing thresholds for compensatory mitigation requirements.

Compensatory mitigation is only required when necessary to ensure that activities authorized by NWPs result in no more than minimal individual and cumulative adverse environmental effects. Avoidance and minimization are other forms of mitigation that may also result in NWP activities causing no more than minimal adverse environmental effects. Under

the sequence articulated in 33 CFR 330.1(e)(3), the district engineer first evaluates the PCN and determines whether the proposed activity will cause no more than minimal adverse environmental effects. If the district engineer determines the proposed activity will result in more than minimal adverse environmental effects, he or she will offer the project proponent the opportunity to submit a mitigation proposal to reduce the adverse environmental effects so that they are no more than minimal, individually and cumulatively. If the district engineer determines the mitigation proposal will reduce the adverse environmental effects, so that the net adverse environmental effects are no more than minimal, he or she will add conditions to the NWP authorization to require the project proponent to implement the mitigation proposal. If the district engineer determines that the mitigation proposal will not reduce the adverse environmental effects so that they are no more than minimal, he or she will exercise discretionary authority and instruct the project proponent on how to apply for an individual permit. On-site compensatory mitigation is often not an ecologically effective means of providing compensatory mitigation for impacts to jurisdictional wetlands because hydrologic conditions on the project site are likely to have been altered as a result of the permitted activity (NRC 2001). In the 2008 mitigation rule (33 CFR part 332), there is a framework for evaluating compensatory mitigation options to reduce risk and uncertainty in compensatory mitigation decision-making (see 33 CFR 332.3(a) and (b)). In this general condition, the Corps did not make any changes to the compensatory mitigation thresholds for the NWPs.

One commenter said that the Corps should require all applicants to take all practicable steps to avoid and minimize adverse impacts. Paragraph (a) requires permittees to design their NWP activities to avoid and minimize adverse effects, including both temporary and permanent adverse effects, to the maximum extent practicable on the project site.

One commenter said that mitigation measures should be required for losses of streams and open waters, including mitigation measures to improve floodplain connectivity and to provide flood storage. Another commenter stated that mitigation should be required for impacts to native aquatic vegetation such as eelgrass and kelp. A few commenters said that preservation of high quality aquatic resources should be a priority option for mitigation.

District engineers have the authority to require mitigation for losses of streams and other open waters (see paragraphs (d) and (e) of this general condition). That mitigation may result in the restoration of floodplain connectivity and the provision of one or more floodplain functions. District engineers also have the discretion to require compensatory mitigation for impacts to vegetated estuarine and marine habitats that are caused by NWP activities. The Corps agrees that preservation can be used to provide compensatory mitigation, as long as the preservation proposal complies with 33 CFR 332.3(h).

Many commenters said that the 1/10-acre threshold for wetland mitigation should be retained. One commenter suggested increasing the threshold for requiring wetland compensatory mitigation to one acre. Many commenters said that wetland compensatory

mitigation should not be required if wetland fills are unavoidable. One commenter stated that district engineers should not be allowed to waive the wetland compensatory mitigation requirement.

The Corps retained the 1/10-acre threshold for requiring wetland compensatory mitigation for wetland losses, with the district engineer's discretion to waive that compensatory mitigation requirement or require wetlands compensatory mitigation for wetland losses of less than 1/10-acre. For many NWP activities, wetland losses authorized by NWP result in no more than minimal individual and cumulative adverse environmental effects without the need to require wetland compensatory mitigation. The NWPs authorize unavoidable impacts to wetlands, and wetland compensatory mitigation is sometimes necessary to ensure that NWP activities result in no more than minimal adverse environmental effects.

One commenter stated that stream mitigation should only be required if it is practicable. One commenter recommended requiring compensatory mitigation for all losses of stream beds. One commenter said that compensatory mitigation should not be allowed to reduce adverse impacts of losses of stream bed. One commenter suggested establishing a threshold of 500 linear feet for requiring stream compensatory mitigation. One commenter suggested that paragraph (d) should state that the district engineer may require stream mitigation, instead of stating that the district engineer "should" require stream mitigation. A few commenters stated that the Corps should not require compensatory mitigation to offset all losses of stream bed. Several commenters said that compensatory mitigation should not be required for losses of intermittent or ephemeral streams. One commenter said that stream creation or establishment should be acceptable compensatory mitigation. One commenter asked which types of projects can be done to mitigate for the loss of stream length.

Similar to wetland compensatory mitigation, compensatory mitigation for losses of stream bed is only required when district engineers determine such compensatory mitigation is necessary to ensure that activities authorized by NWPs result in no more than minimal individual and cumulative adverse environmental effects. Stream mitigation can reduce the adverse environmental effects of NWP activities so that they are no more than minimal. District engineers have the discretion to require compensatory mitigation for losses of perennial, intermittent, and ephemeral streams. In general, stream compensatory mitigation should be accomplished through rehabilitation, enhancement, and preservation because the Corps' regulations consider streams to be difficult-to-replace aquatic resources (see 33 CFR 332.3(e)(3)). The Corps added the phrase "if practicable" to the last sentence of paragraph (d) to state that stream rehabilitation, enhancement, or preservation activities should be practicable. Stream compensatory mitigation for NWP activities should not be provided through establishment/creation approaches because establishment/creation activities have not been demonstrated to effectively provide stream ecological functions.

Stream restoration and enhancement can be done using a variety of techniques, such as dam removal and modification, culvert replacement or modification, fish passage structures when connectivity cannot be restored or improved by dam removal or culvert replacement, levee removal or setbacks, reconnecting floodplains and other riparian habitats, road removal, road modifications, reducing sediment and pollution inputs to streams, replacing impervious surfaces with pervious surfaces, restoring adequate in-stream or base flows, restoring riparian areas, fencing streams and their riparian areas to exclude livestock, improving in-stream habitat, recreating meanders, and replacing hard bank stabilization structures with bioengineering bank stabilization measures (Roni et al. 2013). Stream restoration projects should focus on restoring ecological processes, through activities such as dam removal, watershed best management practices, improving the riparian zone, and reforestation, instead of focusing on the manipulation the structure of the stream channel (Palmer et al. 2014).

One commenter said that the Corps should require use of a science-based assessment tool that is capable of measuring lost stream functions caused by impacts and stream functions gained from through restoration and/or enhancement activities. One commenter stated that paragraph (d) would allow for continued, unchecked and unmitigated losses of open waters or streams that support salmon or shellfish.

The Corps agrees that science-based assessment tools should be used to assess losses of stream function or condition caused by NWP activities, and to assess increases in stream function or condition resulting from stream compensatory mitigation projects. Science-based stream assessment tools can also be used develop ecological performance standards for stream compensatory mitigation projects. However, the Corps recognizes that those tools are not available in many areas of the country. Activities authorized by NWPs will result in some losses of streams and other waters that support salmon or shellfish, and district engineers have the discretion to require compensatory mitigation to ensure that the adverse environmental effects resulting from those activities are no more than minimal.

One commenter stated that riparian mitigation requirements should be consistent with the jurisdiction where the mitigation is occurring. Another commenter said that the restoration of riparian areas should not be allowed as a compensatory mitigation option. One commenter stated that buffers should be wider than 25 feet.

Riparian mitigation requirements are determined by district engineers on a case-by-case basis. District engineers can develop local guidelines for riparian mitigation. The restoration of riparian areas is important for rivers, streams, and other open waters, because those riparian areas provide substantial contributions to the ecological functions and services performed by rivers, streams, and other open waters. Paragraph (e) of general condition 23 allows district engineers to require riparian areas a little wider than 25 feet if there are documented water quality or habitat concerns. There are limits to the widths of riparian areas required by district engineers, because compensatory mitigation requirements for NWPs and other DA

authorizations must be roughly proportional to the permitted impacts (see 33 CFR 320.4(r)(2) and 33 CFR 332.3(f)(1)). The Corps modified paragraph (e) to state that compensatory mitigation provided through riparian areas can be accomplished by maintenance/protection of those riparian areas. A well-developed, functional riparian does not need to be restored if it provides ecological functions in its present state.

Several commenters said that paragraph (f)(1) of general condition 23 should be modified to make it clear that the use of mitigation banks or in-lieu fee programs is not mandatory if they are impractical when compared to other mitigation alternatives. One commenter objected to the change in paragraph (f)(1) to establish a preference for the use of mitigation bank or in-lieu fee program credits to provide compensatory mitigation for NWP activities. One commenter said that the proposed modification of paragraph (f)(1) places mitigation banks and in-lieu fee programs on the same level, contrary to the 2008 mitigation rule. This commenter also said that permittees should be allowed to do permittee-responsible mitigation when it is justified. One commenter said that permittee-responsible mitigation remain a viable option, as it may be more ecologically and financially appropriate for some projects. One commenter said that the applicant should be allowed to propose any mitigation option he or she thinks is appropriate, instead of following the hierarchy in 33 CFR 332.3(b). One commenter expressed support for the mitigation hierarchy in 33 CFR 332.3(b). A few commenters object to the hierarchy of mitigation banks being the first consideration. One commenter said that the Corps should select the most environmentally preferable method for wetland mitigation, rather than using the hierarchy listed in the 2008 rule.

As stated in proposed paragraph (f)(1), the use of mitigation bank and in-lieu fee program credits to provide compensatory mitigation for NWP activities is preferred, not required. This preference is based on the hierarchical framework for considering compensatory mitigation options for NWPs and other DA permits that is provided in 33 CFR 332.3(b). That framework was developed to manage risk and uncertainty in aquatic resource compensatory mitigation projects. The proposed paragraph (f)(1) was also made in recognition of the higher risk and uncertainty associated with permittee-responsible mitigation, especially on-site permittee-responsible mitigation where changes to hydrology and other site characteristics caused by the permitted activity make it more difficult to achieve the intended objectives of a compensatory mitigation project (NRC 2001). As stated in the 2001 NRC report, third-party mitigation approaches such as mitigation banks and in-lieu fee programs have some advantages over permittee-responsible mitigation. Paragraph (f)(1) does not supersede the framework established in 33 CFR 332.3(b); it merely reflects Conclusion 5 in the 2001 NRC report. Paragraph (f)(1) does not preclude the use of permittee-responsible mitigation, if such compensatory mitigation is approved by the district engineer after contemplating the considerations discussed in 33 CFR 332.3(a) and (b).

One commenter stated that the proposed change to general condition 23 is unclear as to whether a mitigation plan is required or not. This commenter said that proposed paragraphs (f)(3) and (f)(5) conflict with each other. Another commenter stated that proposed paragraphs (f)(1) and (f)(2) conflict with each other. One commenter said that the public should be involved in the approval process for mitigation plans.

General condition 23 does not require submission of a mitigation plan unless the district engineer determines compensatory mitigation is required to ensure that the proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects. If the prospective permittee proposes to use mitigation bank or in-lieu fee program credits to provide compensatory mitigation for the proposed NWP activity the mitigation plan only needs to provide the baseline information and a description of the number of credits to be provided (see 33 CFR 332.4(c)(1)(ii)). General condition 32 does not require a mitigation plan for a complete PCN.

The Corps added a new paragraph (f)(2) to state that the amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects. Paragraphs (f)(4) and (f)(6) of general condition 23 (paragraphs (f)(3) and (f)(5) in the proposed rule) do not conflict with each other. They are consistent with 33 CFR 332.4(c)(2)(ii), which addresses the preparation and approval process for mitigation plans for general permit activities. Paragraph (f)(4) describes the requirements for mitigation plans for permittee-responsible mitigation required for NWP activities. Paragraph (f)(6) reflects the flexibility in 33 CFR 332.4(c)(2)(ii) in allowing elements of a compensatory mitigation project to be addressed through permit conditions instead of being addressed in the mitigation plan. The Corps modified paragraph (f)(3) (proposed paragraph (f)(2)) to apply this paragraph to permittee-responsible mitigation, because mitigation bank credits and in-lieu fee program credits may not be explicitly linked to restoration activities. In addition, the review and approval of mitigation banks and in-lieu fee programs, as well as credit releases from approved mitigation banks and approved in-lieu fee project sites, undergo a rigorous review by the Corps and the other agencies participating in the interagency review process associated with mitigation banks and in-lieu fee programs. There is no public review process for the review of mitigation plans. The district engineer will review the proposed mitigation plan and determine whether it is sufficient for ensuring the NWP activity will cause no more than minimal adverse environmental effects.

One commenter said that when a permittee is a public agency (e.g., a flood control district or county) and it is required to do permittee-responsible mitigation, when the district engineer requires site protection he or she should acknowledge that the public agency can fulfill this obligation with public ownership or in fee easement over the property. One commenter stated that when a public entity conducts mitigation on public property, the site

protection requirement be relaxed. One commenter said that, for a compensatory mitigation site, county ownership or a park designation should fulfill the site protection requirement.

The Corps' compensatory mitigation regulations address site protection at 33 CFR 332.7(a) and those regulations allow a range of site protection options, including alternatives to more commonly used site protection instruments such as conservation easements and deed restrictions/restrictive covenants. For a permittee-responsible mitigation project conducted by a public agency or by a state or local government agency, site protection can be provided by agency ownership of the mitigation site, as long as that agency commits to managing and protecting the mitigation site including the aquatic resources and other natural resources on the property. The public agency may also provide site protection by purchasing an easement for the property used for the permittee-responsible mitigation project as long as that easement protects the aquatic resources and other resources on the site over other uses of the land. Section 332.7(a) states that for government property, "long-term protection may be provided through federal facility management plans or integrated natural resources management plans." Other types of land management plans may also be acceptable approaches to protecting permittee-responsible mitigation sites on publicly-owned lands, and the district engineer should evaluate the public agency's proposed plan for protecting and managing the mitigation site, to determine if that proposed plan satisfies the requirements of 33 CFR 332.7(a). However, if the public agency or state or local government agency decides, in the future, that it has to or wants to use the mitigation site for other purposes, because of changes in statutes, regulations, or agency needs or missions, then the agency will be required to provide alternative compensatory mitigation (see 33 CFR 332.7(a)(4)). In addition, the party responsible for providing the compensatory mitigation must notify the district engineer 60 days prior to taking any action that would void or modify the site protection instrument or site management plan (see 33 CFR 332.7(a)(3)).

Several commenters requested a more thorough explanation of compensatory mitigation monitoring requirements for NWP activities. One commenter asked for guidance on the monitoring requirements for aquatic habitat rehabilitation, enhancement or restoration activities. This commenter stated that monitoring requirements should be commensurate with impacts.

Monitoring requirements for compensatory mitigation projects are determined by district engineers on a case-by-case basis. General requirements for monitoring are provided at 33 CFR 332.6. Monitoring is required to ensure that the compensatory mitigation project site is meeting its performance standards, and to determine if measures such as remediation or adaptive management are necessary to ensure that the compensatory mitigation project is accomplishing its objectives. Monitoring requirements will vary, depending on the specific characteristics of the compensatory mitigation project, such as the compensatory mitigation mechanism (e.g., restoration, enhancement, establishment, or preservation), the type of

aquatic resource being provided as compensatory mitigation (e.g., forested wetlands, perennial stream), and the ecosystem development characteristics of the compensatory mitigation project. Either the approved mitigation plan or permit conditions will specify the monitoring requirements for a particular compensatory mitigation project. Monitoring requirements are commensurate with the characteristics of the compensatory mitigation project, not the impacts authorized by NWP or other types of DA permits.

One commenter stated that mitigation should always be at a 2:1 ratio to ensure that more aquatic habitat is replaced. One commenter said that a national mitigation ratio be used for the NWPs.

The amount of compensatory mitigation to be provided for an NWP activity is determined by the district engineer. Factors used to determine the amount of compensatory required by the district engineer are provided at 33 CFR 332.3(f)(2). Those factors include: the method of compensatory mitigation (e.g., rehabilitation), the likelihood of ecological success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and its functions, and/or the distance between the affected aquatic resource and the compensation site. The rationale for the required amount of compensatory mitigation must be documented in the administrative record for NWP verification. A national mitigation ratio cannot be established for the entire country, because those decisions require case-by-case analysis by district engineers. The amount of compensatory mitigation necessary to offset impacts to jurisdictional waters or wetlands authorized by an NWP or other type of DA permit must be roughly proportional to the permitted impacts.

One commenter said that off-site mitigation should not be allowed and on-site avoidance and minimization should be required instead. A few commenters stated that mitigation banking is a way to avoid alternatives analysis procedures.

Off-site compensatory mitigation is an appropriate option for providing compensatory mitigation for NWP activities, as long as the off-site compensatory mitigation project is approved by the district engineer. Off-site compensatory mitigation includes off-site permittee-responsible mitigation, mitigation banks, and in-lieu fee programs. Paragraph (a) of general condition 23 requires on-site avoidance and minimization to the maximum extent practicable for both permanent and temporary adverse effects caused by NWP activities. Compensatory mitigation requirements, including the use of mitigation banks to provide any required compensatory mitigation, are determined after the prospective permittee has complied with the on-site avoidance and minimization requirements in paragraph (a) of this general condition. Alternatives analyses are not required for NWP activities.

Several commenters expressed support for not requiring compensatory mitigation for non-jurisdictional activities, such as tree clearing for overhead power lines that do not involve discharges of dredged or fill material into waters of the United States. One commenter requested examples of activities that are beyond the scope of the district engineer's authority or discretion to require compensatory mitigation.

The Corps retained the provisions in paragraph (i) as proposed. Because the purpose of mitigation, including compensatory mitigation, in the NWP program is to reduce the adverse environmental effects caused by an NWP activity to ensure that they are no more than minimal, individually and cumulatively, compensatory mitigation requirements established by the district engineer must relate to the direct and indirect effects caused by the NWP activity. That would be the discharges of dredged or fill material in waters of the United States and/or the structures of work in navigable waters of the United States.

Several commenters stated that compensatory mitigation for NWP activities is not effective in offsetting adverse impacts. One commenter stated that post-permit compensatory mitigation cannot be used to make the no more than minimal adverse environmental effects determination, because it is legally impermissible and because the Corps lacks sufficient evidence to conclude that mitigation will render the impacts caused by NWP activities to be no more than minimal. One commenter said that mitigation under the NWPs does not compensate for losses of functions and services, and instead results in adverse impacts. One commenter stated the Corps should establish and manage a database to understand the impact of the NWP program, including the effectiveness of mitigation actions.

The restoration, enhancement, preservation, and in some circumstances, the establishment of aquatic resources has been demonstrated to increase or maintain ecological functions and services, which offset losses of ecological functions and services caused by activities authorized by NWPs and other types of DA permits. For difficult-to-replace aquatic resources, such as streams, bogs, and springs, compensatory mitigation should be provided through in-kind rehabilitation, enhancement, or preservation (see 33 CFR 332.3(e)(3)) because these types of aquatic resources cannot be established by manipulating uplands. When a district engineer receives a permittee-responsible mitigation proposal from the applicant, he or she carefully evaluates that proposal to determine whether it will be ecologically successful and fulfill its objectives in providing certain aquatic resource functions and services. If the permittee-responsible mitigation project is approved, the district engineer requires monitoring to ensure that it is meeting its ecological performance standards and is developing into the target aquatic resource. If the permittee-responsible mitigation project is not meeting its ecological performance standards, the district engineer will work with the permittee to identify actions, including adaptive management, to make adjustments to the mitigation project so that it meets its objectives. If the permittee-responsible mitigation project fails, the permittee may be required to provide alternative compensatory mitigation.

If the required compensatory mitigation is to be provided through mitigation bank or in-lieu fee program credits, oversight by the district engineer, with input from federal and state resource agencies and other agencies, helps ensure that mitigation banks and in-lieu fee projects produce the required amount and type of restored, enhanced, established, and preserved aquatic resources and other natural resources. Mitigation banks and in-lieu fee projects are required to have credit release schedules, which are linked to ecological performance standards and other requirements, to ensure that the mitigation bank or in-lieu fee project is meeting its objectives in providing the desired aquatic resources and functions and services. Monitoring and adaptive management are also required for mitigation banks and in-lieu fee projects.

For the issuance or reissuance of the NWPs, the decision documents for those NWPs describe, in general terms, the mitigation measures taken for NWP activities to ensure they result in no more than minimal individual and cumulative adverse effects. That is a general discussion because of the wide variation of aquatic resource types across the country, the functions and services they provide, and the methods for restoring, enhancing, and in certain circumstances, establishing those aquatic resource. The decision documents also provide a general discussion of studies on aquatic resource restoration and enhancement that demonstrate that these activities can provide increases of aquatic resource functions. To fulfill the requirements of NEPA, the decision document includes an environmental assessment, with a mitigated finding of no significant impact. Mitigated findings of no significant impact are appropriate for fulfilling NEPA requirements (see the Council on Environmental Quality's January 14, 2011, guidance entitled "Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact").

The Corps tracks authorized impacts and permittee-responsible mitigation in its Regulatory program automated information, ORM. The Corps tracks credits produced by approved mitigation banks and in-lieu fee programs in the Regulatory In-Lieu Fee and Banking Information System (RIBITS), which is available at: https://ribits.usace.army.mil/ribits_apex/f?p=107:2:

One commenter stated that upland buffers should be accepted as compensatory mitigation for NWP activities. One commenter asked how district engineers assess indirect impacts to wetlands authorized by NWPs. One commenter asked when compensatory mitigation is to be required for temporary impacts. One commenter said that district engineers should not require any more stringent methods of compensatory mitigation than what is provided in the 2008 mitigation rule.

Upland buffers can be used to provide compensatory mitigation for NWPs (see 33 CFR 332.3(i)). District engineers can use rapid ecological assessment tools to assess indirect effects to wetland caused by activities authorized by NWPs. If rapid ecological assessment tools or other tools are not available or practical to use, then district engineers will use their judgment

in evaluating those indirect impacts. Compensatory mitigation is required for temporary impacts when the district engineer determines such compensatory mitigation is necessary to ensure the NWP activity results in no more than minimal adverse environmental effects. Paragraph (f) of this general condition states that compensatory mitigation projects must comply with the applicable provisions of 33 CFR part 332, so the compensatory mitigation requirements for the NWP program are the same as for other types of DA permits.

One commenter stated that compensatory mitigation requirements should be determined by district engineers, because they are familiar with the regional conditions and the mitigation needs of their geographic areas of responsibility. Several commenters stated that compensatory mitigation should be required after the 404(b)(1) Guidelines had been followed. One commenter said that the Corps should focus on a consistent nationwide criteria for when compensatory mitigation is required. One commenter said that compensatory mitigation is unnecessary and impractical for the vast majority of NWP activities. One commenter said that compensatory mitigation should be required for all losses of waters of the United States.

Compensatory mitigation requirements for NWP activities are determined by district engineers on a case-by-case basis. The Corps complied with the 404(b)(1) Guidelines when it issued or reissued the NWPs. For a specific activity authorized by an NWP, a separate 404(b)(1) Guidelines analysis is not required. There is a national standard for when compensatory mitigation required, and that standard is found in 33 CFR 330.1(e)(3), which was established in 1991 (see the November 22, 1991, issue of the Federal Register at 56 FR 59110). Approximately 90 percent of the activities authorized by NWP through written verifications issued by district engineers do not require compensatory mitigation (see Table 5 in U.S. Army Corps of Engineers and U.S. EPA (2015)). Compensatory mitigation is only required when necessary to ensure that NWP activities result in no more than minimal adverse environmental effects (see 33 CFR 330.1(e)(3)). If the district engineer reviews the PCN and determines that the NWP activity will cause no more than minimal adverse environmental effects and complies with all applicable terms and conditions, he or she will issue the NWP verification without requiring compensatory mitigation.

One commenter suggested that the entire project should be considered when determining compensatory mitigation requirements. A few commenters said there should not be a threshold for requiring compensatory mitigation, but compensatory mitigation should be required regardless of the impact amount. One commenter objected to increasing compensatory mitigation requirements for the NWPs. One commenter said that compensatory mitigation requirements should be based on impacts to functions, not on a limit threshold.

Compensatory mitigation must be “directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable” (33 CFR 320.4(r)(2)). The term “proposal” refers to the activity that requires DA authorization. The Corps does not have the authority to enforce permit conditions, including compensatory

mitigation requirements, for activities it does not regulate. For the NWP program, the threshold for requiring compensatory mitigation is in 33 CFR 330.1(e)(3), and under that regulation compensatory mitigation is only required when necessary to ensure the authorized activity will cause no more than minimal individual and cumulative adverse environmental effects. The June 1, 2016, proposed rule did not propose to increase compensatory mitigation requirements for the NWPs, but the Corps did seek comments on how to improve compensatory mitigation in the NWP program (see 81 FR 35211). Compensatory mitigation requirements are based on the functions lost as a result of the NWP activity. For wetland losses greater than 1/10-acre, district engineers have the discretion to not require compensatory mitigation, if those wetland losses will result in no more than minimal adverse environmental effects without compensatory mitigation. District engineers also have discretion to require compensatory mitigation for losses of less than 1/10-acre, such as when the wetlands lost as a result of the NWP activity are highly functional.

Several commenters said that if a district engineer issues a written waiver of a linear foot limit or other NWP limit, then compensatory mitigation should not be required for the waiver because the district engineer already determined that the authorized activity results in no more than minimal adverse environmental effects because of best management practices and other minimization techniques. Another commenter stated that mitigation should always be required for activities that are authorized by a waiver. One commenter said that compensatory mitigation should not be required to receive a waiver. One commenter stated that if compensatory mitigation is required for a district engineer's waiver of the 300 linear foot limit for losses of intermittent or ephemeral stream bed, compensatory mitigation should only be required for the linear feet of losses of stream bed that exceed the 300 linear foot limit.

For a district engineer to issue a waiver, it may be necessary to require compensatory mitigation so that the adverse environmental effects caused by the activity are no more than minimal, individually and cumulatively. The district engineer evaluates the waiver request, and if agency coordination is required for the waiver request, the agency comments to make the determination whether the adverse environmental effects will be no more than minimal. If the district engineer decides the adverse environmental effects will be more than minimal, he or she will offer the project proponent the opportunity to submit a mitigation plan to reduce the adverse environmental effects so that they are no more than minimal. If the district engineer determines the mitigation proposal will reduce the adverse environmental effects so that NWP authorization is appropriate, and add conditions to the NWP authorization to require the permittee to implement the mitigation proposal. If the district engineer decides the mitigation proposal will not sufficiently reduce the adverse environmental effects so that they are no more than minimal, he or she will exercise discretionary authority and require an individual permit. Therefore, whether a waiver request requires compensatory mitigation is at the discretion of the district engineer. The district engineer will decide how much compensatory mitigation is necessary to ensure that the NWP activity with the written waiver of the

applicable NWP limit will cause no more than minimal individual and cumulative adverse environmental effects.

Several commenters stated that when district engineers make compensatory mitigation decisions for NWP activities, they should take into consideration whether the affected waters are man-made or natural. One commenter said that mitigation should not be required for man-made storm water conveyance systems. This commenter stated that if wetlands develop in these features and mitigation is required, the permittee should not be required to prepare a mitigation plan that fulfills the requirements of 33 CFR 332.4(c). One commenter suggested that compensatory mitigation requirements should be reduced when the regulatory requirements of another agency cause a linear transportation project to impact aquatic resources.

District engineers can take into account the type of aquatic resource, and whether it is natural or man-made, when deciding if compensatory mitigation should be required. If the man-made stormwater conveyance systems are not waters of the United States under the current regulations and guidance for identifying waters of the United States, then mitigation should not be required for activities in those systems, especially if the Corps does not regulate those activities. The Corps determines, on a case-by-case basis, when compensatory mitigation is to be required for NWP activities in a linear transportation project, regardless of whether another agency's requirements precluded alternatives for that linear transportation project that would have avoided or minimized impacts to jurisdictional waters or wetlands.

This general condition was adopted with the modifications discussed above.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

GC 24. <u>Safety of Impoundment Structures</u>. To ensure that all impoundment structures are safely designed, the district engineer may require non-Federal applicants to demonstrate that the structures comply with established state dam safety criteria or have been designed by qualified persons. The district engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

Comments on Proposed GC 24, Response to Comments, and Action for the Final GC 24: The Corps did not propose any changes to this general condition and no comments were received. This general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

GC 25. <u>Water Quality</u>. Where States and authorized Tribes, or EPA where applicable, have not previously certified compliance of an NWP with CWA section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The district engineer or State or Tribe may require additional water quality management measures to

ensure that the authorized activity does not result in more than minimal degradation of water quality.

Comments on Proposed GC 25, Response to Comments, and Action for the Final GC 25: The Corps did not propose any changes to this general condition and no comments were received. This general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

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

Comments on Proposed GC 26, Response to Comments, and Action for the Final GC 26: The Corps did not propose any changes to this general condition and no comments were received. This general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

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

Comments on Proposed GC 27, Response to Comments, and Action for the Final GC 27: The Corps did not propose any changes to this general condition. The Corps did not receive any comments on it. This general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

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

Comments on Proposed GC 28, Response to Comments, and Action for the Final GC 28: The Corps did not propose any changes to this general condition. One commenter said that combining NWPs should be prohibited. One commenter suggested adding regional general permits to this general condition. Two commenters recommended prohibiting the use of multiple NWPs and other DA permits that authorize numerous encroachments in close

proximity to navigable waters. One of these commenters stated that regardless of whether project components are independent of one another, they are likely to cause cumulative impacts within the navigable waterway, and those impacts need to be evaluated together.

The purpose of this general condition is to ensure that acreage limits are not exceeded when two or more NWPs are combined to authorize a single and complete project. When an NWP is combined with a regional general permit to authorize a single and complete activity, it is the district engineer's determination whether the adverse environmental effects will be no more than minimal. Both NWPs and regional general permits must comply with the same standard established under section 404(e) of the Clean Water Act. When district engineers evaluate proposed NWP activities, they consider the cumulative effects of the use of those NWPs on a regional basis. They also consider the cumulative effects of activities authorized by their regional general permits, and may modify, suspend, or revoke their regional general permits when they determine those general permits are resulting in activities that have more than minimal cumulative adverse environmental effects. During the evaluation of applications for individual permits, district engineers conduct cumulative impact analyses to comply with NEPA requirements, if they are preparing environmental assessments or environmental impact statements. If the proposed activity requires an individual permit and involves discharges of dredged or fill material into waters of the United States, the district engineer will also conduct a cumulative effects analysis under the 404(b)(1) Guidelines.

This general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

GC 29. <u>Transfer of Nationwide Permit Verifications</u>. If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

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

_____

(Transferee)

_____

(Date)

Comments on Proposed GC 29, Response to Comments, and Action for the Final GC 29: The Corps did not propose any changes to this general condition and no comments were received. This general condition was adopted as proposed.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

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

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

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

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

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

Comments on Proposed GC 30, Response to Comments, and Action for the Final GC 30: The Corps proposed to modify this general condition to add a timeframe for submitting the completed certification document. The proposed modification states that the completed certification should be sent to the district engineer within 30 days of completing the authorized activity or the completion of the implementation of any required compensatory mitigation.

Several commenters said they supported the proposed modification, and some suggested an extension to the 30-day timeframe. Two commenters stated that the 30-day

timeframe is not long enough and should be extended to 90 days because permittees have internal reviews and need more time to carefully certify the compliance certification document. One of these commenters asked what is considered "implementation" of the compensatory mitigation project. One commenter said the proposed modification would provide important information to the Corps to ensure that the program is causing no more than minimal adverse environmental impacts. One commenter recommended assigning a timeframe to ensure the receipt of a compliance certification. One commenter agreed with the 30-day timeframe but expressed concerns regarding what would happen if the due date is missed.

Thirty days is sufficient time for permittees to submit their compliance certifications to district engineers. These certifications should be simple statements that do not require much work to prepare. If the proposed 30-day period would be increased to 90 days, it is likely that it would result in more permittees forgetting to submit their certifications. For the purposes of this general condition, implementation of the required compensatory mitigation refers to the completion of construction of the permittee-responsible mitigation project. If the permittee-responsible mitigation project is solely preservation of aquatic resources, then it would be the execution of the site protection mechanism and other required measures for the preservation compensatory mitigation. If mitigation bank or in-lieu fee program credits will be used to fulfill compensatory mitigation requirements, the implementation refers to securing those credits. If the permittee fails to submit the compliance certification on time, there would be non-compliance with this general condition. The district engineer may take appropriate action to address that non-compliance.

One commenter stated that this general condition should be modified to state that the completed certification should be submitted within 30 days of completing the authorized activity or completing the implementation of the required compensatory mitigation. One commenter said the 2012 general condition should be retained and require submission of the certification within 30 days of project completion. This commenter remarked that there is frequently a time lapse between completing the compensatory mitigation requirement and completing the NWP activity.

In general, the required compensatory mitigation should be implemented in advance of, or concurrent with, the authorized activity (see 33 CFR 332.3(m)). However, if the district engineer allows the required compensatory mitigation to be constructed or otherwise implemented after the authorized activity occurs, then the compliance certification would have to be sent to the district engineers within 30 days of completing the required compensatory mitigation. In 2012, general condition 30 did not have a timeframe for submitting the compliance certification. That is why the Corps proposed to add a timeframe so that the compliance certification process would no longer be open-ended with no due date. The Corps modified this general condition to add the phase "whichever occurs later" to the end of the last sentence, to make it clear that the compliance certification must be submitted within 30 days of whatever action occurs last. For example, if the permittee implements the required

compensatory mitigation before conducting the NWP activity, the compliance certification would be required to be submitted to the district engineer within 30 days of the NWP activity being constructed.

This general condition was adopted with the modification discussed above.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

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

Comments on Proposed GC 31, Response to Comments, and Action for the Final GC 31: The Corps proposed this new general condition to address activities that are required under Section 14 of the Rivers and Harbors Act of 1899 (33 U.S.C. 408) to secure permission from the Secretary of the Army for the alteration or occupation or use of structures or works built by the United States (i.e., U.S. Army Corps of Engineers federally authorized Civil Works projects). The authority to issue these section 408 permissions has been delegated to Corps Headquarters, Corps divisions, or Corps districts depending on the case-specific circumstances for a 408 permission request. Some of these activities also require authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899, and may be eligible for one or more NWPs.

Several commenters said they support the proposed new general condition and several commenters said they opposed the new general condition. One commenter asked how long a typical section 408 permission review takes and how it would affect the 45-day default authorization for the NWPs. One commenter requested clarification on when the 45-day clock starts for PCNs submitted under general condition 31. Several commenters stated that the general condition should be modified so that it only applies to major section 408 reviews, not to minor section 408 reviews. A few commenters said that a PCN should not be required for an activity that requires section 408 permission, if the NWP activity does not otherwise require a PCN.

The Corps does not have any statistics on how long section 408 reviews typically take. As stated in the text of this general condition, the proposed NWP activity is not authorized by NWP until the appropriate Corps office issues the 408 permission. In other words, if the proposed NWP activity requires section 408 permission the 45-day default authorization does not apply. If a PCN is required under general condition 31, the activities cannot be authorized

by NWP until the Corps issues the 408 permission, or determines that a 408 permission is not required. The Corps modified the last sentence of this general condition to change "Corps district office" to "Corps office" because some section 408 permissions are issued by Corps Headquarters. To ensure that NWP activities that will alter or temporarily or permanently occupy or use USACE projects obtain the required 408 permissions before the project proponent conducts those NWP activities, the general condition must apply to both major and minor section 408 reviews. The PCN requirement is necessary to give district engineers the opportunity to add conditions to the NWP authorization to protect the USACE project and to ensure that any needed internal coordination is done.

One commenter said that Engineer Circular 1165-2-216 should not be treated as a binding rule in the final NWPs. One commenter stated that guidance should be issued to Corps districts on ways to streamline 408 reviews so that they do not delay NWP verifications. One commenter asked whether section 408 and section 404 reviews could be concurrent with each other. One commenter said that section 408 and section 404 reviews should be independent of each other.

The NWP regulations already state that the "NWPs do not authorize interference with any existing or proposed Federal project" (see 33 CFR 330.4(b)(5)). Engineer Circular 1165-2-216 provides the procedures to ensure that activities, including NWP activities, do not interfere with USACE projects. It has been extended for one year while the Corps considers updates and revisions to the Engineer Circular. General condition 31 adds further assurance that activities authorized by the NWPs will not interfere with existing or proposed USACE projects. The 408 permission process must be completed before the NWP verification can be issued. The 408 permission process might require the project proponent to modify his or her proposed activity to avoid or reduce its impact on the USACE project. Where possible, the section 408 and the NWP PCN reviews are conducted concurrently. The section 408 and NWP PCN reviews are independent of each other and they often occur in different Corps offices.

One commenter requested a list of rivers where section 408 permissions are required. One commenter said that the Corps should establish a website with a list of federal projects so applicants can determine when section 408 permissions are required. Additional information on the section 408 permission process and the timing of the issuance of authorizations by Regulatory Program offices is provided in Engineer Circular 1165-2-216, which is available at: http://www.usace.army.mil/Missions/CivilWorks/Section408.aspx .

The project proponent should contact the appropriate Corps district office if he or she is uncertain whether the proposed activity might alter or temporarily or permanently occupy or use a USACE project.

This general condition was adopted with the modification discussed above.

After re-evaluating this NWP in light of EO 13783 no modifications are recommended.

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

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

(2) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or are in the vicinity of the activity, or to notify the Corps pursuant to general condition 20 that the activity might have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is "no effect" on listed species or "no potential to cause effects" on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)) has been completed. Also, work cannot begin under NWPs 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

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

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed activity;

(3) Identify the specific NWP or NWP(s) the prospective permittee wants to use to authorize the proposed activity;

(4) A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures. For single and complete linear projects, the PCN must include the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (e.g., a conceptual plan), but do not need to be detailed engineering plans);

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

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

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

(8) For non-Federal permittees, if the NWP activity might have the potential to cause effects to a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, the PCN must state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with section 106 of the National Historic Preservation Act;

(9) For an activity that will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, the PCN must identify the Wild and Scenic River or the "study river" (see general condition 16); and

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

(c) Form of Pre-Construction Notification: The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it is an NWP PCN and must include all of the applicable information required in paragraphs (b)(1) through (10) of this general condition. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals.

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

(2) Agency coordination is required for: (i) all NWP activities that require pre-construction notification and result in the loss of greater than 1/2-acre of waters of the United States; (ii) NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 activities that require pre-construction notification and will result in the loss of greater than 300 linear feet of stream

bed; (iii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iv) NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.

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

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

(5) Applicants are encouraged to provide the Corps with either electronic files or multiple copies of pre-construction notifications to expedite agency coordination.

Comments on Proposed GC 32, Response to Comments, and Action for the Final GC 32: The Corps proposed to modify paragraph (b) by adding a new paragraph (b)(3) to state that the PCN should identify the specific NWP(s) the project proponent wants to use to authorize the proposed activity. In addition, the Corps proposed to modify paragraph (b)(4) to require a description of mitigation measures the applicant intends to use to reduce adverse environmental effects caused by the proposed activity. For linear projects, the Corps proposed to change paragraph (b)(4) to make it clear that the PCN should identify all crossings of waters

of the United States that require DA authorization. The Corps also proposed to modify paragraph (b)(4) to require, for linear projects, that the PCN include the quantity of proposed losses of waters of the United States for each single and complete crossing of those waters. Please see the June 1, 2016, proposed rule for additional discussion on the proposed changes to this general condition.

Several commenters said they supported the proposed changes to general condition 32 and several commenters said they objected to those proposed changes. One commenter stated that the Corps should avoid changes to the PCN requirements that would result in delays. A few commenters stated that mitigation and single and complete project requirements should not be included in general condition 32. A couple of commenters stated that without detailed information provided in PCNs, district engineers will not be able to assess whether or not adverse impacts from proposed NWP activities are no more than minimal, and the public has no ability to assess the full extent of impacts resulting from the NWP program.

Other than new general condition 31, the Corps did not make any changes to the PCN requirements for the NWPs that would increase the time it takes for district engineers to make decisions on those PCNs. Some of the proposed changes, such as providing the opportunity for the project proponent to describe mitigation measures in the PCN that would help the district engineer reach a "no more than minimal adverse environmental effects" determination, will help reduce PCN processing times. The proposed changes to general condition 32 regarding linear projects are also intended to provide information that would facilitate the district engineer's review.

One commenter said that PCNs should be required for all NWP activities to provide the public with the opportunity to comment on those activities, to provide information on other proposed activities that may contribute to cumulative impacts. One commenter stated that PCNs should be required for all activities in Clean Water Act section 303(d) impaired waters, and each of those PCNs should include a statement explaining how the proposed activity avoids contributing to the existing water quality impairment. One commenter said that PCNs should be required for all proposed NWP activities located in 100-year floodplains.

Activities authorized by NWPs and other general permits do not require a public notice and comment process; the public notice and comment process occurs during the development of the NWP, regional general permit, or programmatic general permit. Requiring the solicitation of public comment on case-specific NWP activities would be contrary to the streamlined process envisioned by section 404(e) of the Clean Water Act. The Corps tracks the use of the NWPs, especially the NWP PCNs and the activities voluntarily reported to Corps district offices that do not require PCNs, to assess the NWP program's incremental contribution to cumulative environmental effects. Division engineers can add regional conditions to one or more NWPs for activities in Clean Water Act section 303(d) waters, for those NWPs that might

contribute further to the impairment of those waters. Fills in 100-year floodplains must comply with the requirements of general condition 10 and do not require additional PCNs.

A few commenters stated that the PCN process should not be used to ensure that NWP activities will result in no more than minimal adverse environmental effects. One commenter said that there no evidence that PCNs will ensure that project impacts are no more than minimal. Two commenters stated that PCNs are an essential mechanism for ensuring NWP activities result in only minimal impacts.

The PCN process has been used for many years to provide flexibility in the NWP program and to ensure that NWP activities have no more than minimal individual and cumulative adverse environmental effects. Nothing in the text of section 404(e) of the Clean Water Act indicates that the Corps cannot use a PCN process for general permits. The PCN process provides an opportunity for the district engineer to do a site- and activity-specific evaluation of a proposed NWP activity, and take into account the characteristics of the project site and proposed activity to determine whether the proposed NWP activity will cause no more than minimal individual and cumulative adverse environmental effects. The PCN process also gives the district engineer the opportunity to add activity-specific conditions to the NWP authorization to satisfy the "no more than minimal adverse environmental effects" requirement for the NWPs. If there was no PCN process available for the NWPs, then there would be no activity-specific conditions added to the NWP authorization, including no compensatory mitigation or other mitigation requirements. In addition, there would be no opportunity to comply with section 7 of the Endangered Species Act or section 106 of the National Historic Preservation Act.

One commenter asked whether the Corps would notify the applicant in circumstances when individual water quality certifications are required for NWP activities. One commenter stated that NWP activities that require PCNs and NWP activities that do not require PCNs are not "similar in nature" and should not be authorized by the same NWP.

If water quality certification has not been previously issued by the state, tribe, or U.S. EPA for the NWP, an individual water quality certification is required (see general condition 25). The district engineer may issue a provisional NWP verification, which explicitly states to the prospective permittee that the proposed activity is not authorized by NWP until he or she obtains an individual water quality certification or a waiver. An NWP authorizes a category of activities that is similar in nature, and whether a PCN is required or not does not alter that category. The PCN process is simply a process whereby district engineers review proposed activities that have the potential to result in more than minimal adverse environmental effects. In response to a PCN, the district engineer can conditions, including mitigation requirements, to ensure that authorized activities cause no more than minimal adverse environmental effects. The district engineer can also exercise discretionary authority and require an individual permit for the proposed activity.

A few commenters said that the final NWPs should provide clear direction to Corps districts to not use additional information requests to delay reviews. A few commenters stated that the Corps should adhere to a 45-day review period for all PCNs that are not subject to activity-specific conditions requiring additional procedures. One commenter stated that PCN review periods should be expedited for time-sensitive maintenance and inspection work for energy projects. Another commenter said that the Corps should allow emergency projects to proceed immediately and conduct after-the-fact review and approvals.

Paragraph (a) is written to provide direction to district engineers to make only one additional information request. Except for certain NWPs (i.e., NWPs 21, 49, and 50) and for the requirements of certain general conditions (e.g., general conditions 18, 20, and 31), activities that require PCNs are authorized after 45 days have passed after district engineers receive complete PCNs unless the district engineer exercises his or her authority to modify, suspend, or revoke the NWP authorization (see 33 CFR 330.1(e)(1)). District engineers can place priority on processing NWP PCNs for time-sensitive maintenance and inspection activities associated with energy projects. There are other regulatory program procedures for emergency situations and those procedures are found 33 CFR 325.2(e)(4).

One commenter said that Corps Headquarters should provide district offices with more guidance and direction on complying with the review timelines for NWP PCNs. A few commenters stated that Corps Headquarters should issue guidance to its districts to make it clear that requests for additional information are limited to one request, and limited to the information required by paragraph (b) of general condition 32. One commenter said that the final rule should state that district engineers are limited to a single information request. One commenter suggested adding a provision to general condition 32 to require PCN completeness determinations to be made within 15 days.

No additional guidance is necessary. General condition 32 and Section D, District Engineer's decision, clearly articulate the process for reviewing PCNs. Paragraph (a) of general condition 32 describes the process for requesting additional information for PCNs to make them complete. Additional information may be required from the applicant to conduct other procedures associated with the PCN process, such as information necessary to conduct ESA section 7 consultation or information needed for NHPA section 106 consultation. General condition 32 states that, as a general rule, the district engineer should make only one request for information to make the PCN complete. The Corps recognizes that there may be some situations where a piece of information needed to make the PCN complete was not identified, and the district engineer can request that information to proceed with the evaluation of the PCN. If that flexibility is not provided, the district engineer may be left with the option of suspending or revoking the NWP authorization because he or she was not allowed by the NWP rule to request that piece of additional information. Thirty days is necessary to make completeness determinations for PCNs.

One commenter said that applicants should not be allowed to proceed with NWP activities that require PCNs without receiving a written verification from the Corps. A few commenters said that the statement explaining that the 45-day PCN review period may be extended if general conditions 18, 20, and/or 31 apply to an NWP activity leaves the PCN review period open ended, and disagreed with that approach. One commenter stated that extending the PCN review period beyond 45 days does not follow the congressional mandate to provide a streamlined permitting process. This commenter stated that extensions to the PCN review period should require documentation and substantiation as to why an extension is necessary, and then only be granted for specific and predictable periods of time. This commenter suggested creating timelines for the consultations and coordination procedures that extend the PCN review period to ensure that they occur in a timely manner.

The NWP regulations at 33 CFR part 330 provide a 45-day default authorization for most NWP activities. There are exceptions for certain NWPs, such as NWPs 21, 49, and 50, and for certain general conditions. If ESA section 7 consultation and/or NHPA section 106 consultation is required for a proposed NWP activity, the project proponent cannot proceed with the NWP activity until after those consultations have been completed and the district engineer notifies the project proponent. Activities authorized by the Corps are required to comply with ESA section 7 and NHPA section 106, and those consultations will be completed as soon as practicable. Section 404(e) of the Clean Water Act does not provide any exemptions from complying with ESA section 7 and/or NHPA section 106. The Corps only conducts those consultations where it is required to do so, and the consultation documentation is included in the administrative record for those NWP PCNs. For ESA section 7 consultations, the consultation process does not end until the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service issues their biological opinion for a formal consultation or its written concurrence for a request for informal consultation. For NHPA section 7 consultations, the consultation process does not end until after the applicable steps in the consultation process identified in 36 CFR part 800 have been completed.

One commenter said that the 45-day review should include a pre-application meeting to determine if NWP authorization is appropriate for a proposed activity. One commenter suggested that to avoid delays in PCN reviews, Corps districts should assign one project manager to an individual company to review all of that company's permit applications, and that the project manager would be funded by that company. One commenter recommended applying the 2001 memorandum entitled "Fees in the Section 106 Process" to the PCN coordination process, if the Corps intends to maintain the current coordination timelines.

Pre-application meetings can provide information that will be helpful in processing the NWP PCN, when the PCN is submitted to the district engineer. However, pre-application meetings are optional. Under 33 U.S.C. 2352, the Corps may accept and expend funds contributed by a non-federal public entity or a public-utility company or natural gas company to

expedite the evaluation of applications for Department of the Army permits for that entity or company. Guidance on that process is provided in guidance issued by the Corps on August 14, 2015, that is entitled: "Implementation Guidance for Section 1006 of the Water Resources Reform and Development Act of 2014 and Guidance on the Use of Funding Agreements within the Regulatory Program." A copy of that guidance is available at: http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/WRDA_214_reg_guide_2015.pdf . As stated in the Advisory Council on Historic Preservation's June 6, 2001, memorandum, neither the National Historic Preservation Act nor the Advisory Council's regulations for implementing the act requires federal agencies to pay for any aspect of consultation, including consultation with tribes, for the purposes of the NHPA section 106 process.

One commenter said that the information requirements for PCNs make the NWPs more like individual permits in terms of the amount of information required. Several commenters recommended requiring more project-specific information requirements for PCNs. One commenter stated that PCNs should include a requirement for alternatives information. One commenter said that PCNs should include detailed mitigation plans. A couple of commenters stated that PCNs should include information about drinking water intakes in the vicinity of proposed NWP activities.

While the NWPs may require a moderate amount of information for a complete PCN, that information is necessary for the district engineer to make his or her determination whether a proposed NWP activity will result in no more than minimal adverse environmental effects. Providing this information to the district engineer early in the NWP authorization process means that little or no information should be needed later in the process, in contrast to individual permits in which a minor amount of information is required to issue public notices, and additional information is provided during the individual permit evaluation process to assist the district engineer in making his or her decision. Pre-construction notifications do not require alternatives analyses because specific activities authorized by general permits do not require alternatives analyses under the 404(b)(1) guidelines (see 40 CFR 230.7(b)(1)). In addition, NEPA documentation, including a NEPA alternatives analysis, is not required for a specific general permit activity because NEPA compliance was completed by Corps Headquarters when it issued the general permit. Detailed mitigation plans are not required for NWP PCNs because the district engineer first reviews the PCN to determine whether the proposed activity is authorized by NWP, or whether compensatory mitigation or other mitigation is necessary to ensure that the proposed activity will result in no more than minimal adverse environmental effects. If the district engineer decides that compensatory mitigation is needed for the proposed activity to qualify for NWP authorization, then he or she will tell the project proponent that a mitigation plan that satisfies the requirements of 33 CFR 332.4 is required. When district engineers review PCNs, they ensure that the proposed activities comply with all applicable general conditions, including general condition 7, water supply intakes. Because of that review process, it is not

necessary to require PCNs to identify water supply intakes in proximity of proposed NWP activities.

Three commenters expressed support for having the applicant identify which NWP they are applying for. One of these commenters said that this will allow for streamlining the permitting process, and avoid delays in processing. One commenter said that the district engineer should be required to verify the particular NWP identified in the PCN, instead of saying that the district engineer should verify the activity under that NWP. One commenter suggested that applicant's choice of NWP that most readily authorizes the activity should be added to paragraph (b)(3). One commenter asked whether or not the Corps would notify the applicant that the district engineer is evaluating the proposed activity under a different NWP than what the applicant identified in the PCN. One commenter said that paragraph (b)(3) should state that the district engineer can or should advise the permittee of another NWP that could allow the proposed activity to be authorized more efficiently.

The Corps retained the proposed paragraph (b)(3), to identify the specific NWP or NWPs that the project proponent wants to use. The district engineer is not required to verify the specific NWP(s) identified in the PCN if any of the specific NWP(s) are clearly not applicable. For example, if the prospective permittee request NWP 27 authorization for a bank stabilization activity then the district engineer can issue an NWP 13 verification if the proposed activity complies with the terms and conditions of NWP 13. An applicant will normally specify the NWP or NWPs that will most readily authorize his or her proposed activity, unless there is reason for requesting verification under another NWP or NWPs. If the district engineer decides after reviewing the PCN that the proposed activity does not qualify for the NWP identified by the project proponent, he or she does not have to notify the applicant that the PCN is being evaluated under another NWP. If the district engineer decides that the proposed activity does not qualify for authorization under any NWP, he or she will notify the applicant and provide instructions on how to apply for authorization under an individual permit or a regional general permit.

Two commenters stated that there is no benefit to having the applicant identify in their PCNs which NWP he or she is proposing to use. These commenters said that regardless of which NWP the applicant identifies, the Corps should authorize the activity under the NWP most appropriate to the project purpose. A couple of commenters said proposed paragraph (b)(3) is unclear whether the proposed activity will be verified under the NWP identified by the applicant because it has less stringent conditions, or whether it would be verified under the most appropriate NWP based on the purpose of the proposed activity and the most pertinent conditions. A few commenters said that the Corps should evaluate proposed activities under the most pertinent NWP(s), even if the applicant has specified a different NWP.

There is some degree of redundancy in the NWPs, where a proposed activity is eligible for authorization more than one NWP. At the end of the day, the standard is the same for all

NWPs: NWP activities must result in no more than minimal individual and cumulative adverse environmental effects. So if a proposed activity meets the terms of the requested NWP, and any applicable regional conditions, then the district engineer should issue the NWP verification under the NWP identified in the PCN. In the NWP regulations at 33 CFR 330.2(h), "terms" are defined as: "…the limitations and provisions included in the description of the NWP itself" (see 33 CFR 330.2(h). The NWP general conditions are the same for all of the NWPs. The category of activity authorized by the NWP is the relevant consideration, not the project purpose.

One commenter said that PCNs for proposed NWP activities in FEMA-mapped floodways should require a floodway analysis. Another commenter stated that PCNs for proposed NWP activities located within 100-year floodplains should include require information on floodplain values, hazards, and FEMA-approved maps, and any applicable FEMA-approved state or local floodplain management requirements. One commenter suggested that PCNs should require certification by individuals that meet the Secretary of the Interior's Professional Qualifications Standards to state whether the proposed activity has potential to cause effects to historic properties or whether consultation with tribes needs to be conducted.

It is not necessary for a PCN to include a floodway analysis if the proposed NWP activity is located in a FEMA-mapped floodway. That information can be requested and analyzed by the appropriate federal, tribal, state, or local floodplain management authority. District engineers will review PCNs to determine whether they will have more than minimal adverse effects to floodplain values, or cause more than minimal increases in flood hazards. Such information does not need to be provided in the PCN. In accordance with general condition 20, non-federal permittees are required to submit PCNs if the proposed NWP activity might have the potential to cause effects to historic properties. Because the requirement to comply with the consultation requirements of section 106 of the NHPA fall on the Corps for its undertakings, and to consult with tribes when necessary to fulfill its trust obligations to tribes, the PCN does not need to include the certification suggested by the commenter.

A few commenters objected to including proposed mitigation measures in PCNs. Three commenters said that requiring the PCN to include mitigation measures is unnecessary, burdensome, and duplicative. Two commenters requested removal of the proposed requirement, because this information is applicable to proposed activities reviewed under individual permit procedures, instead of NWP activities. One commenter requested flexibility in the amount of detail required for describing mitigation measures in the PCN. One commenter said paragraph (b)(4) should refer to on-site mitigation measures and define those measures as avoidance, minimization, repair, restoration, or reduction of impacts over time to avoid confusion with compensatory mitigation. Two commenters stated that for restoration projects that qualify for NWP authorization, compensatory mitigation should not be required.

The mitigation measures in paragraph (b)(4) may include describing avoidance and minimization of impacts to jurisdictional waters and wetlands on the project site. The

prospective permittee is not required to propose any mitigation measures in his or her PCN. The prospective permittee can choose not to propose any mitigation measures. A description of mitigation measures is optional, and the project proponent is encouraged to describe, in the PCN, mitigation measures that will assist the district engineer in reaching a decision, earlier in the process, that the proposed activity will result in no more than minimal adverse environmental effects. The level of detail for the proposed mitigation measures described in the PCN is up to the project proponent. Otherwise, the district engineer may review the PCN and determine that mitigation is necessary to ensure that the proposed activity will cause no more than minimal adverse environmental effects and notify the prospective permittee that a mitigation plan is required. That will add more time to the district engineer's review process. It is the prospective permittee's decision whether to suggest mitigation measures up front in the PCN or wait for the district engineer's request for a mitigation proposal.

The term "mitigation measures" in paragraph (b)(4) refer to all five forms of mitigation identified in paragraph (b) of general condition 23, mitigation. The prospective permittee also has the option of proposing to do compensatory mitigation, especially if he or she believes that the district engineer will require compensatory mitigation for the proposed NWP activity. As stated in NWPs 27 and 54, compensatory mitigation is not required for the restoration activities authorized by those NWPs.

A few commenters objected to a requirement to state the proposed quantity of losses of waters of the United States for each single and complete crossing of waters of the United States for linear projects. One commenter said that for linear projects that have multiple crossings of waterbodies, and only some of those crossings require PCNs, the applicant must discuss the impacts of all crossings, not just those that require PCNs. This commenter also stated that the applicant should not be allowed to construct crossings that do not require PCNs until the Corps district issues its verification for the crossings that require PCNs.

In paragraph (b)(4), the Corps changed the phrase "waters of the United States" to "wetlands, other special aquatic sites, and other waters" to be consistent with paragraph (b)(5) of this general condition. As discussed below, neither approved jurisdictional determinations or preliminary jurisdictional determinations are not required for NWP PCNs, and if the project proponent wants an approved or preliminary jurisdictional determination for the project site, he or she should request and receive that approved or preliminary jurisdictional determination prior to submitting an NWP PCN.

Two commenters said there is inconsistent language in the PCN requirements for linear projects. They said the paragraph (b)(4) first states that the PCN must include "the anticipated amount of loss of water of the United States expected to result from the NWP activity" and later states that for single and complete linear projects, the PCN "must include the quantity of proposed losses of waters of the United States for each single and complete crossing of waters

of the United States." In the third sentence of paragraph (b)(4), the Corps changed the word "proposed" to "anticipated" to be consistent with the first sentence of this paragraph.

One commenter stated that an approved jurisdictional determination should not be required for an NWP PCN, and that the final NWPs should clarify how approved and preliminary jurisdictional determinations relate to the NWP PCN process. One commenter said that the Corps' jurisdictional determination process under Regulatory Guidance Letter 08-02 should not require a jurisdictional determination to be performed prior to starting the NWP PCN review process. One commenter stated that the requirement for a full delineation of waters of the United States is a significant cause of delay and cost in light of the uncertainties regarding the 2015 final rule defining waters of the United States. This commenter also said that because delineations are only required to be included with a PCN when proposed impacts are 1/10-acre or greater, all of the wetland impacts cannot be evaluated. One commenter said the Corps should field verify every delineation it receives with a PCN. This commenter also stated that if the Corps cannot verify every delineation, the Corps should randomly select delineations to verify.

An approved or preliminary jurisdictional determination is not required for a complete PCN, or for the district engineer to issue an NWP verification. For a complete PCN, the prospective permittee must submit a delineation of wetlands, other special aquatic sites, and other waters on the project site. The project site is not necessarily the entire parcel of land; it may be a portion of that land if the proposed NWP activity is limited to that portion of the parcel. The delineation of wetlands, other special aquatic sites, and other waters on the project site is necessary for the Corps' evaluation of the NWP PCN and its determination on whether the proposed activity will result in no more than minimal adverse environmental effects. The need for the delineation is independent of whatever regulation defining "waters of the United States" is in place at the time the PCN is submitted. As stated above, neither an approved jurisdictional determination nor a preliminary jurisdictional determination is required to process the PCN, and requests for approved and preliminary jurisdictional determinations will be processed by Corps districts as separate actions. Since 1991, the NWPs have had a requirement for submission of a delineation of affected special aquatic sites, including wetlands (see 56 FR 59145). All NWP PCNs require a delineation of wetlands, other special aquatic sites, and other waters. There is not a 1/10-acre threshold for requiring a delineation with the PCN. District engineers have the option of verifying the accuracy of the delineation, or making the decision on the NWP verification without doing a verification of the delineation.

Paragraph (b)(5) only requires a delineation of wetlands, other special aquatic sites, and other waters to provide information to the district engineer to make his or her determination whether the proposed activity qualifies for NWP authorization. In the third sentence of this paragraph, the Corps replaced the phrase "waters of the United States" with "wetlands, other special aquatic sites, and other waters" to make it clear that the delineation submitted with the

PCN does not require a jurisdictional determination. The delineation only needs to identify wetlands, other special aquatic sites, and other waters on the site and their approximate boundaries, so that the district engineer can evaluate the proposed activity's impacts to those wetlands, other special aquatic sites, and other waters. For a complete PCN, that delineation does not have to be verified by the Corps district. If the district engineer finds errors in the delineation, he or she may make corrections to the delineation or require the applicant to make those corrections, but those corrections should not delay the decision on the NWP verification or the decision to exercise discretionary authority.

If the project proponent wants an approved jurisdictional determination to help him or her determine whether the proposed activity might qualify for NWP authorization, to identify jurisdictional waters and wetlands to provide in support of his or her PCN, or to avoid having to do compensatory mitigation for losses of wetlands, other special aquatic sites, or other waters that are not subject to Clean Water Act jurisdiction, the project proponent must submit a separate request for an approved jurisdictional determination. An NWP PCN and a request for an approved jurisdictional determination are separate actions, and if a project proponent submits a request for an approved jurisdictional determination with his or her NWP PCN, the district engineer will process those requests separately. General condition 32 does not require an approved jurisdictional determination for NWP PCNs; only a delineation of wetlands, other special aquatic sites, and other waters is required to make the PCN. With certain exceptions identified in the NWPs (e.g., NWPs 21, 49, and 50) and some general conditions (e.g., general conditions 18 and 20), the decision on an NWP PCN must be made within 45 days of receipt of a complete PCN. There is no required timeframe for responding to requests for approved jurisdictional determinations, although the Corps strives to respond to those requests within 60 days.

One commenter said that paragraph (b)(5) should be modified to state that National Wetland Inventory mapping is not appropriate for determining wetland boundaries, every wetland delineation submitted with a PCN must be based on an actual field investigation, and streams identified on a U.S. Geological Survey (USGS) map are not adequate documentation for a delineation. One commenter suggested adding text to paragraph (b)(5) to state that a USGS topographic quadrangle shall be sufficient to delineate intermittent and ephemeral streams on the project site, and that failure to list or map any stream bed that is not shown on a USGS topographic quadrangle as an intermittent or ephemeral stream shall not be a reason for the district engineer determining the delineation is not complete. This commenter asserted that if a stream is not mapped on a USGS topographic quadrangle map, it should not be considered jurisdictional under the Clean Water Act.

The Corps understands that various published maps, especially published maps generated by remote sensing, do not show all wetlands or accurately depict wetland boundaries, or show all streams. The remote sensing approaches used by the U.S. FWS for its

National Wetland Inventory maps result in errors of omission that exclude wetlands that are difficult to identify through photointerpretation (Tiner 1997). These errors of omission are due to wetland type and the size of target mapping units (Tiner 1997). Likewise, many small streams, especially headwater streams, are not mapped on 1:24,000 scale U.S. Geological Survey (USGS) topographic maps (Leopold 1994) or included in other inventories (Meyer and Wallace 2001), including the National Hydrography Dataset (Elmore et al. 2013). Many small streams and rivers are not identified through maps produced by aerial photography or satellite imagery because of inadequate image resolution or trees or other vegetation obscuring the visibility of those streams from above (Benstead and Leigh 2012). However, it is not necessary to explicitly state in the text of paragraph (b)(5) that National Wetland Inventory maps or USGS topographic maps may, or may not, be adequate for preparing the delineation of wetlands, other special aquatic sites, or other waters for the PCN. A stream may be a jurisdictional water of the United States even if it is not shown on a USGS topographic map.

One commenter suggested adding the term "natural" before "lakes and ponds" in paragraph (b)(5), stating that there is no need to delineate artificial waterbodies or any area that is wet due to irrigation, whether or not they are prior converted cropland. One commenter suggested adding text to this paragraph to state that a jurisdictional determination is not required to make a PCN complete, because a jurisdictional determination is not necessary for the Corps to issue an NWP verification.

Some artificial waterbodies may be waters of the United States. For example, a lake that was created by impounding a jurisdictional river would likely be subject to Clean Water Act jurisdiction. If an area is not a wetland, another type of special aquatic site, or other water, then it does not need to be included in the delineation for the PCN. If the project proponent is uncertain whether a particular artificial waterbody or area of irrigated land is subject to Clean Water Act jurisdiction, and wants a definitive determination from the Corps, then he or she can request an approved jurisdictional determination. Areas of prior converted cropland will be identified on a case-by-case basis. As explained above, the Corps modified paragraph (b)(5) to remove the term "waters of the United States" so that there is no implication that a jurisdictional determination is necessary before the Corps issues an NWP verification.

One commenter expressed support for requiring PCNs to include a mitigation statement. One commenter stated that the mitigation information for a PCN should state that mitigation includes on-site avoidance and minimization measures.

The Corps did not make any changes to paragraph (b)(6). The delineation required by paragraph (b)(5) will document the on-site avoidance and minimization measures on the project site.

One commenter stated that proposed paragraph (b)(8) does not address undiscovered historic properties. Undiscovered historic properties are addressed by general condition 21. If

the historic properties are unknown at the time the PCN is submitted, then the prospective permittee cannot be expected to include that information in the PCN. If the non-federal project proponent thinks there might be historic properties that could potentially be affected by the NWP activity, then he or she should submit a PCN and the district engineer will determine whether NHPA section 106 consultation is necessary. The Corps modified paragraph (b)(10) by changing "Corps district" to "Corps office" because a 408 permission might be issued by Corps Headquarters.

Several commenters encouraged the Corps to develop and use an online PCN application tool for electronic submission of PCNs and supporting documents. A few commenters recommended that the Corps develop an on-line PCN submittal tool and that the tool be made available to states agencies such as water quality certification agencies. One commenter stated that the Corps should continue to allow paper PCNs to be submitted to Corps districts.

At this time, the Corps is not developing a national on-line PCN application. Some Corps districts have developed local tools that allow electronic submission of NWP PCNs and supporting documentation. The Corps modified the last sentence of paragraph (c) as follows: "Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals." The general condition still allows for paper PCNs to be submitted to Corps districts.

A few commenters stated that agency coordination should be completed within 30 or 60 days. One commenter suggested increasing the agency coordination period to 30 days, and to require an individual permit for any proposed NWP activity that requires a waiver and any agency objects to the district engineer issuing that waiver. One commenter said that local government agencies should be included in the agency coordination procedures in paragraph (d). Another commenter recommended including tribes in agency coordination procedures.

The purpose of the agency coordination process in paragraph (d) is seek input from other federal and state agencies for certain proposed NWP activities to determine whether those activities will result in no more than minimal individual and cumulative adverse environmental effects. The current timeframe (up to 25 days) is sufficient for federal and state agencies to provide their views for the "no more than minimal adverse environmental effects" determination. The final decision whether a proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects lies solely with the district engineer. District engineers can include local government agencies in agency coordination for proposed NWP activities. As a result of the consultations Corps districts are conducting with tribes on the 2017 NWPs, Corps districts can include interested tribes in agency coordination on proposed NWP activities.

Two commenters stated that under paragraph (d)(3) of general condition 32, the Corps cannot unilaterally impose timelines on State Historic Preservation Officers (SHPOs) or Tribal Historic Preservation Offices (THPOs), because section 106 consultation is not limited to 15 days. A couple of commenters said that 10 calendar days for the SHPO or THPO to submit comments back to the Corps is not reasonable, and that timeframe is in compliance with 36 CFR part 800, which provides 30 days for SHPOs and THPOs to provide their comments. One commenter stated that the Corps does not have the authority to impose a 10-day review period on THPOs, and cannot assume that a tribe has no comments or objections based on a lack of response within that 10-day period. One commenter stated that paragraph (d)(3) should read, "State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative."

If NHPA section 106 consultation is required, that consultation will be conducted under the requirements in general condition 20, historic properties. For NHPA section 106 consultations conducted to comply with general condition 20, the Corps will comply with the timeframes in 36 CFR part 800, consistent with the Corps' 2005 and 2007 interim guidance. Because paragraph (d) is limited to minimal adverse environmental effects determinations, the Corps removed coordination with SHPOs and THPOs from this paragraph. As discussed above, district engineers can adopt and implement coordination procedures with tribes to seek their views on proposed NWP activities that require PCNs.

One commenter stated that agency coordination should be required for bank stabilization projects over 200 linear feet. One commenter stated that agency coordination should continue to be required for NWP 48 activities that require PCNs.

The Corps retained the agency coordination threshold of 500 linear feet for NWP 13 activities, because that is consistent with the applicable waiver provision in paragraph (b) of NWP 13. The Corps removed the agency coordination requirement for NWP 48 activities, as proposed in the June 1, 2016, proposed rule.

One commenter noted that paragraph (d) uses the term "activity" instead of "single and complete project" and said that the district engineer would be required to do agency coordination when verifying a linear project with an overall loss greater than 1/2-acre.

Each separate and distant crossing that qualifies for NWP authorization is considered to be a separate NWP authorization. Therefore, the aggregate total of losses of waters of the United States is not used to determine whether agency coordination is required under paragraph (d) of general condition 32. Since each single and complete project authorized by NWPs 12 or 14 has a 1/2-acre limit (or a 1/3-acre limit for losses of tidal waters authorized by NWP 14), then NWP 12 or 14 activities will not require agency coordination.

A few commenters expressed their support for the proposed PCN form. Several commenters said that the Corps should have included the proposed PCN form with the proposed rule to issue and reissue the NWPs, so that the public can provide comments on the proposed form. One commenter stated that the comment period for the proposed PCN form should be extended by 60 days following the availability of the proposed form.

The proposed PCN form is a separate action from this rulemaking to issue and reissue NWPs. In the June 1, 2016, the public was provided the opportunity to submit comments on the proposed PCN form and the Corps received several comments. The comment period for the proposed PCN form was 30 days while the comment period on the proposed NWPs was 60 days.

One commenter noted that some districts have joint application forms with state agencies, and this commenter said that these districts should find a way to integrate the information required for NWP PCNs on the NWP PCN form with their current joint application forms.

If the NWP PCN form is approved, districts that have joint application forms with state agencies can continue to provide applicants the option to use those joint application forms. Those joint application forms can also be modified to incorporate features of the approved NWP PCN form.

This general condition was adopted with the modifications discussed above.

After re-evaluating this NWP in light of EO 13783 two modifications is recommended: (1) revise paragraph (a)(2) to remove the provision requiring written verification from the Corps prior to proceeding with NWP 21, 49, and 50 activities (to be consistent with the proposed changes to NWPs 21, 49, and 50), and (2) to modify paragraph (d)(2) to remove NWPs 21, 39, 50, 51, and 52 from the agency coordination process for waivers of the 300 linear foot limit for losses of stream bed.

REVIEW OF THE CORPS' NATIONAL HISTORIC PRESERVATION ACT SECTION 106 REGULATIONS PURSUANT TO EXECUTIVE ORDER 13783

The Corps Regulatory Program uses Appendix C to 33 CFR part 325 to comply with the requirements of Section 106 of the National Historic Preservation Act (NHPA). After the Advisory Council on Historic Preservation revised its regulations for implementing section 106 in 2000 and 2004, the Corps issued interim guidance to make the Corps Regulatory Program's procedures for section 106 consistent with the Advisory Council's revised regulations. The Corps' interim guidance was issued on April 5, 2005, and January 31, 2007. Appendix C plus the

2005 and 2007 interim guidance constitute the Corps Regulatory Program's current procedures for fulfilling the requirements of section 106 of the NHPA. Many State Historic Preservation Offices (SHPOs), Tribal Historic Preservation Offices (THPOs), and Tribes have objected to the Corps' use of Appendix C and the interim guidance and have stated that the Corps should use the Advisory Council's regulations instead. The disagreement concerning the Corps' use of Appendix C and interim guidance instead of the Advisory Council's regulations has resulted in delays in processing permit applications because consulting parties insist on applying the Advisory Council's regulations instead of Appendix C and the interim guidance while commenting on the Corps' effects determinations under section 106 of the NHPA. This disagreement has affected the Corps' ability to process applications for individual permits and general permit verification requests in a timely manner.

For the NWPs, the Corps has determined that the NWP regulations at 33 CFR 330.4(g) and NWP general condition 20, historic properties, ensure that all activities authorized by NWPs comply with section 106 of the NHPA. General condition 20 requires non-federal permittees to submit PCNs for any activity that might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. The Corps then evaluates the PCN and makes an effect determination for the proposed NWP activity for the purposes of NHPA section 106. We established the "might have the potential to cause effects" threshold in paragraph (c) of general condition 20 to require PCNs for those activities so that the district engineer can evaluate the proposed NWP activity and determine whether it has no potential to cause effects to historic properties or whether it has potential to cause effects to historic properties and thus require section 106 consultation.

If the project proponent is required to submit a PCN and the proposed activity might have the potential to cause effects to historic properties, the activity is not authorized by NWP until either the Corps district makes a "no potential to cause effects" determination or completes NHPA section 106 consultation.

When evaluating a PCN, the Corps will either make a "no potential to cause effects" determination or a "no historic properties affected," "no adverse effect," or "adverse effect" determination. If the Corps makes a "no historic properties affected," "no adverse effect," or "adverse effect" determination, it will notify the non-federal applicant and the activity is not authorized by NWP until NHPA Section 106 consultation has been completed. If the non-federal project proponent does not comply with general condition 20, and does not submit the required PCN, then the activity is not authorized by NWP. In such situations, it is an unauthorized activity and the Corps district will determine an appropriate course of action to respond to the unauthorized activity.

The only activities that are immediately authorized by NWPs are "no potential to cause effect" activities under section 106 of the NHPA, its implementing regulations at 36 CFR part 800, and the Corps' "Revised Interim Guidance for Implementing Appendix C of 33 CFR part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800," dated April 25, 2005, and amended on January 31, 2007. Therefore, the issuance or reissuance of NWPs does not require NHPA section 106 consultation because no activities that might have the potential to cause effects to historic properties can be authorized by NWP without first completing activity-specific NHPA Section 106 consultations, as required by general condition 20. Programmatic agreements (see 36 CFR 800.14(b)) may also be used to satisfy the requirements of the NWPs in general condition 20 if a proposed NWP activity is covered by that programmatic agreement.

NHPA section 106 requires a federal agency that has authority to license or permit any undertaking, to take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register, prior to issuing a license or permit. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. Thus, in assessing application of NHPA section 106 to NWPs issued or reissued by the Corps, the proper focus is on the nature and extent of the specific activities "authorized" by the NWPs and the timing of that authorization.

The issuance or reissuance of the NWPs by the Chief of Engineers imposes express limitations on activities authorized by those NWPs. These limitations are imposed by the NWP terms and conditions, including the general conditions that apply to all NWPs regardless of whether pre-construction notification is required. With respect to historic properties, general condition 20 expressly prohibits any activity that "may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places," until the requirements of section 106 of the NHPA have been satisfied. General condition 20 also states that if an activity "might have the potential to cause effects" to any historic properties, a non-federal applicant must submit a PCN and "shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that consultation under Section 106 of the NHPA has been completed." Permit applicants that are Federal agencies should follow their own requirements for complying with section 106 of the NHPA (see 33 CFR 330.4(g)(1) and paragraph (b) of general condition 20), and if a PCN is required the district engineer will review the federal agency's NHPA section 106 compliance documentation and determine whether it is sufficient to address NHPA section 106 compliance for the NWP activity.

Thus, because no NWP can or does authorize an activity that may have the potential to cause effects to historic properties, and because any activity that may have the potential to cause effects to historic properties must undergo an activity-specific consultation before the district

engineer can verify that the activity is authorized by NWP, the issuance or reissuance of NWPs has "no effect" on historic properties. Accordingly, the action being "authorized" by the Corps (i.e., the issuance or re-issuance of the NWPs themselves) has no effect on historic properties.

To help ensure protection of historic properties, general condition 20 establishes a higher threshold than the threshold set forth in the Advisory Council's NHPA section 106 regulations for initiation of section 106 consultation. Specifically, while section 106 consultation must be initiated for any activity that "has the potential to cause effects to" historic properties, for non-federal permittees general condition 20 requires submission of a PCN to the Corps if "the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties." General condition 20 also prohibits the proponent from conducting the NWP activity "until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that consultation under Section 106 of the NHPA has been completed." (See paragraph (c) of general condition 20.) The PCN must "state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property." (See paragraph (b)(8) of general condition 32.)

During the process for developing regional conditions, Corps districts can coordinate or consult with State Historic Preservation Officers, Tribal Historic Preservation Officers, and tribes to identify regional conditions that can provide additional assurance of compliance with general condition 20 and 33 CFR 330.4(g)(2). Such regional conditions can add PCN requirements to one or more NWPs where historic properties occur. Corps districts will continue to consider through regional consultations, local initiatives, or other cooperative efforts and additional information and measures to ensure protection of historic properties, the requirements established by general condition 20 (which apply to all uses of all NWPs), and other provisions of the Corps regulations and guidance ensure full compliance with NHPA section 106.

Based on the fact that NWP issuance or reissuance has no potential to cause effects on historic properties and that any activity that "has the potential to cause effects" to historic properties will undergo activity-specific NHPA section 106 consultation, there is no requirement that the Corps undertake programmatic consultation for the NWP program. Regional programmatic agreements can be established by Corps districts and State Historic Preservation Officers and/or Tribal Historic Preservation Officers to comply with the requirements of section 106 of the NHPA.

RECOMMENDATION: Consistent with the direction and goals of both EO 13777 and EO 13783, it is recommended that an official statement be issued to declare that 33 CFR part 325, Appendix C, ***Procedures for the Protection of Historic Properties***, a longstanding regulation

promulgated by the U.S. Army Corps of Engineers for use specifically in its Regulatory Program for compliance with the National Historic Preservation Act, plus the interim guidance issued by the Corps in 2005 and 2007, constitute an acceptable "Federal Agency Program Alternative" under 36 CFR 800.14, and shall substitute for all of Subpart B of said regulation, and is fully consistent with the ACHP's regulations. Section 110(a)(2)(E) of the NHPA, as amended, states that an agency alternative has to be "*consistent with* regulations issued by the Council pursuant to section 211" of the NHPA (emphasis added). Section 110(a)(2)(E) of the NHPA does not require a federal agency to seek approval from the Council in order to adopt alternative procedures to use instead of the ACHP's regulations. Although by letter dated August 21, 1979, the Executive Director of the ACHP stated that they assisted with development of Appendix C and that Appendix C "provides for adequate consideration of historic and cultural resources in the issuance of Corps permits, in recent years some ACHP, SHPO, and THPO staff have incorrectly argued that the ACHP never approved Appendix C and that it is invalid. This mischaracterization has created significant confusion for the regulated community, historic preservation interests, and the public at large, resulting in significant and costly delays for activities proposed for authorization by a General Permit, including Nationwide Permits.

Over the year, the Corps has periodically evaluated 33 CFR part 325, Appendix C (Historic Properties), and has determined that this regulation, plus the 2005 and 2007 interim guidance, is used effectively and efficiently most of the time to process Department of the Army Permit applications. However, there are times when Federal, Tribal, and State agencies, stakeholders, interested parties, the public, and the regulated community face challenges due to different interpretations of how Appendix C is to be implemented --- typically, this occurs for infrastructure projects are being proposed and where the Corps has regulatory jurisdiction over a very small portion of an overall project. The Corps' regulatory authority and regulatory scope of analysis for implementation of its authorities under section 9 and 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, and section 103 of the Marine Protection Research and Sanctuaries Act, is focused on the aquatic environment, not uplands. The Corps' regulatory authority is strictly limited to structures and other activities in navigable waters, or the discharge of dredged or fill material into waters of the United States. Federal, Tribal, and State agencies, stakeholders, interested parties, the public, and the regulated community can be confused by the narrow limitations of the Corps authority, sometimes incorrectly believing that the Corps regulates, for example, extensive linear project areas such as complete road alignments, energy project alignments, ports, and non-federal navigation projects. This confusion leads to avoidable conflict, added costs, delays, and litigation for all parties involved.

An official statement made by the Administration that Appendix C plus the 2005 and 2007 interim guidance is an acceptable agency alternative under 36 CFR 800.14 would eliminate this confusion. It would also reduce timeframes for evaluating applications for Department of the Army authorization under both individual permits and general permits. Rulemaking to revise Appendix C is not necessary because the Corps' current procedures for complying with section

106 are consistent with the procedures issued by Advisory Council at 36 CFR part 800. It will provide a clear, consistent, predictable regulatory framework, thereby saving significant time and costs in support of the Trump Administration's infrastructure agenda, and the policy of seeking and implementing regulatory efficiencies.

Statements in the proposed and final rules could make it clear that Appendix C only applies to the Corps Regulatory Program, when evaluating Department of the Army permit applications and making permit decisions pursuant to Sections 9 and 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection Research and Sanctuaries Act. Additionally, 36 CFR 800.14(a) (1)-(3) shall not apply to Appendix C since the regulation has already been promulgated and has been in force since June 29, 1990 (55 FR 27000). For this federal agency program alternative and consistent with the ACHP's regulations at 36 CFR 800.16(y), "undertaking" means a project, activity, or program, or portion of a project, activity, or program requiring a Department of the Army permit pursuant to the Corps regulations at 33 CFR 320-334, and the assessment of effects from an "undertaking" shall be limited in scope and geography to a "permit area" proximate to structures and other activities requiring a Section 10 of the Rivers and Harbors Act of 1899 authorization, and/or the discharge of dredged or fill material requiring authorization under Section 404 of the Clean Water Act.

Appendices:

Appendix A - Final 2017 Nationwide Permits and General Conditions

Appendix B – Paperwork Reduction Act Compliance

Appendix C – Regulatory Impact Analysis for 2017 Nationwide Permits

Appendix D – Procedures for the Protection of Historic Properties (33 CFR part 325, Appendix C)

Appendix A – 2017 Nationwide Permits, General Conditions, District Engineer's Decision, Further Information, and Definitions

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

Nationwide Permits

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3. Maintenance

4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities

5. Scientific Measurement Devices

6. Survey Activities

7. Outfall Structures and Associated Intake Structures

8. Oil and Gas Structures on the Outer Continental Shelf

9. Structures in Fleeting and Anchorage Areas

10. Mooring Buoys

11. Temporary Recreational Structures

12. Utility Line Activities

13. Bank Stabilization

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16. Return Water From Upland Contained Disposal Areas

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31. Maintenance of Existing Flood Control Facilities

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50. Underground Coal Mining Activities

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B. Nationwide Permits

1. Aids to Navigation. The placement of aids to navigation and regulatory markers that are approved by and installed in accordance with the requirements of the U.S. Coast Guard (see 33 CFR, chapter I, subchapter C, part 66). (Authority: Section 10 of the Rivers and Harbors Act of 1899 (Section 10))

2. Structures in Artificial Canals. Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)). (Authority: Section 10)

3. Maintenance. (a) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized. This NWP also authorizes the removal of previously authorized structures or fills. Any stream channel modification is limited to the minimum necessary for the repair, rehabilitation, or replacement of the structure or fill; such modifications, including the removal of material from the stream channel, must be immediately adjacent to the project. This NWP also authorizes the removal of accumulated sediment and debris within, and in the immediate vicinity of, the structure or fill. This NWP also authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the district engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(b) This NWP also authorizes the removal of accumulated sediments and debris outside the immediate vicinity of existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.). The removal of sediment is limited to the minimum necessary to restore the waterway in the vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend farther than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an area that has no waters of the

United States unless otherwise specifically approved by the district engineer under separate authorization.

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

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

Notification: For activities authorized by paragraph (b) of this NWP, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 32). The pre-construction notification must include information regarding the original design capacities and configurations of the outfalls, intakes, small impoundments, and canals. (Authorities: Section 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act (Sections 10 and 404))

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

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

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

be removed to the maximum extent practicable and the site restored to pre-construction elevations. (Authorities: Sections 10 and 404)

6. Survey Activities. Survey activities, such as core sampling, seismic exploratory operations, plugging of seismic shot holes and other exploratory-type bore holes, exploratory trenching, soil surveys, sampling, sample plots or transects for wetland delineations, and historic resources surveys. For the purposes of this NWP, the term "exploratory trenching" means mechanical land clearing of the upper soil profile to expose bedrock or substrate, for the purpose of mapping or sampling the exposed material. The area in which the exploratory trench is dug must be restored to its pre-construction elevation upon completion of the work and must not drain a water of the United States. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. This NWP authorizes the construction of temporary pads, provided the discharge does not exceed 1/10-acre in waters of the U.S. Discharges and structures associated with the recovery of historic resources are not authorized by this NWP. Drilling and the discharge of excavated material from test wells for oil and gas exploration are not authorized by this NWP; the plugging of such wells is authorized. Fill placed for roads and other similar activities is not authorized by this NWP. The NWP does not authorize any permanent structures. The discharge of drilling mud and cuttings may require a permit under section 402 of the Clean Water Act. (Authorities: Sections 10 and 404)

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

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

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

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

9. Structures in Fleeting and Anchorage Areas. Structures, buoys, floats, and other devices placed within anchorage or fleeting areas to facilitate moorage of vessels where such areas have been established for that purpose. (Authority: Section 10)

10. Mooring Buoys. Non-commercial, single-boat, mooring buoys. (Authority: Section 10)

11. Temporary Recreational Structures. Temporary buoys, markers, small floating docks, and similar structures placed for recreational use during specific events such as water skiing competitions and boat races or seasonal use, provided that such structures are removed within 30 days after use has been discontinued. At Corps of Engineers reservoirs, the reservoir managers must approve each buoy or marker individually. (Authority: Section 10)

12. Utility Line Activities. Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.

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

Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

Utility line substations: This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with a power line or utility line in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and

complete project, does not result in the loss of greater than 1/2-acre of waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

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

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

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

This NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines.

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

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

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

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

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

Note 3: Utility lines consisting of aerial electric power transmission lines crossing navigable waters of the United States (which are defined at 33 CFR part 329) must comply with the applicable minimum clearances specified in 33 CFR 322.5(i).

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

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

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

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

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

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

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

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects (an exception is for bulkheads – the district engineer cannot issue a waiver for a bulkhead that is greater than 1,000 feet in length along the bank);

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

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

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

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

(g) Native plants appropriate for current site conditions, including salinity, must be used for bioengineering or vegetative bank stabilization;

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

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

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

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

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

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to construct the linear transportation project. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary

fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

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

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

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

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

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

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

16. Return Water From Upland Contained Disposal Areas. Return water from an upland contained dredged material disposal area. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d), even though

the disposal itself occurs in an area that has no waters of the United States and does not require a section 404 permit. This NWP satisfies the technical requirement for a section 404 permit for the return water where the quality of the return water is controlled by the state through the section 401 certification procedures. The dredging activity may require a section 404 permit (33 CFR 323.2(d)), and will require a section 10 permit if located in navigable waters of the United States. (Authority: Section 404)

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

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

18. Minor Discharges. Minor discharges of dredged or fill material into all waters of the United States, provided the activity meets all of the following criteria:

(a) The quantity of discharged material and the volume of area excavated do not exceed 25 cubic yards below the plane of the ordinary high water mark or the high tide line;

(b) The discharge will not cause the loss of more than 1/10-acre of waters of the United States; and

(c) The discharge is not placed for the purpose of a stream diversion.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) the discharge or the volume of area excavated exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line, or (2) the discharge is in a special aquatic site, including wetlands. (See general condition 32.) (Authorities: Sections 10 and 404)

19. Minor Dredging. Dredging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States (i.e., section 10 waters). This NWP does not authorize the dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist but may not be present in a given year), anadromous fish spawning areas, or wetlands, or the connection of canals or other artificial waterways to navigable waters of the United States (see 33 CFR 322.5(g)). All dredged material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. (Authorities: Sections 10 and 404)

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

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

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

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

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

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

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

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

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

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

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

(a) That agency or department has determined, pursuant to the Council on Environmental Quality's implementing regulations for the National Environmental Policy Act (40 CFR part 1500 et seq.), that the activity is categorically excluded from the requirement to prepare an environmental impact statement or environmental assessment analysis, because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment; and

(b) The Office of the Chief of Engineers (Attn: CECW-CO) has concurred with that agency's or department's determination that the activity is categorically excluded and approved the activity for authorization under NWP 23.

The Office of the Chief of Engineers may require additional conditions, including pre-construction notification, for authorization of an agency's categorical exclusions under this NWP.

Notification: Certain categorical exclusions approved for authorization under this NWP require the permittee to submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 32). The activities that require pre-construction notification are listed in the appropriate Regulatory Guidance Letters. (Authorities: Sections 10 and 404)

Note: The agency or department may submit an application for an activity believed to be categorically excluded to the Office of the Chief of Engineers (Attn: CECW-CO). Prior to approval for authorization under this NWP of any agency's activity, the Office of the Chief of Engineers will solicit public comment. As of the date of issuance of this NWP, agencies with approved

categorical exclusions are: the Bureau of Reclamation, Federal Highway Administration, and U.S. Coast Guard. Activities approved for authorization under this NWP as of the date of this notice are found in Corps Regulatory Guidance Letter 05-07, which is available at: http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl05-07.pdf . Any future approved categorical exclusions will be announced in Regulatory Guidance Letters and posted on this same web site.

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

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

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

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

26. [Reserved]

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

To be authorized by this NWP, the aquatic habitat restoration, enhancement, or establishment activity must be planned, designed, and implemented so that it results in aquatic habitat that resembles an ecological reference. An ecological reference may be based on the characteristics of an intact aquatic habitat or riparian area of the same type that exists in the region. An ecological reference may be based on a conceptual model developed from regional ecological knowledge of the target aquatic habitat type or riparian area.

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to: the removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms, as well as discharges of dredged or fill material to restore appropriate stream channel configurations after small water control structures, dikes, and berms, are removed; the installation of current deflectors; the enhancement, rehabilitation, or re-establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to enhance, rehabilitate, or re-establish stream meanders; the removal of stream barriers, such as undersized culverts, fords, and grade control structures; the backfilling of artificial channels; the removal of existing drainage structures, such as drain tiles, and the filling, blocking, or reshaping of drainage ditches to restore wetland hydrology; the installation of structures or fills necessary to restore or enhance wetland or stream hydrology; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; re-establishment of submerged aquatic vegetation in areas where those plant communities previously existed; re-establishment of tidal wetlands in tidal waters where those wetlands previously existed; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.

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

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

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

Reversion. For enhancement, restoration, and establishment activities conducted: (1) In accordance with the terms and conditions of a binding stream or wetland enhancement or restoration agreement, or a wetland establishment agreement, between the landowner and the U.S. Fish and Wildlife Service (FWS), the Natural Resources Conservation Service (NRCS), the Farm Service Agency (FSA), the National Marine Fisheries Service (NMFS), the National Ocean Service (NOS), U.S. Forest Service (USFS), or their designated state cooperating agencies; (2) as

voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or (3) on reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) or the applicable state agency, this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (i.e., prior to the restoration, enhancement, or establishment activities). The reversion must occur within five years after expiration of a limited term wetland restoration or establishment agreement or permit, and is authorized in these circumstances even if the discharge occurs after this NWP expires. The five-year reversion limit does not apply to agreements without time limits reached between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS, or an appropriate state cooperating agency. This NWP also authorizes discharges of dredged or fill material in waters of the United States for the reversion of wetlands that were restored, enhanced, or established on prior-converted cropland or on uplands, in accordance with a binding agreement between the landowner and NRCS, FSA, FWS, or their designated state cooperating agencies (even though the restoration, enhancement, or establishment activity did not require a section 404 permit). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit. Before conducting any reversion activity the permittee or the appropriate Federal or state agency must notify the district engineer and include the documentation of the prior condition. Once an area has reverted to its prior physical condition, it will be subject to whatever the Corps Regulatory requirements are applicable to that type of land at the time. The requirement that the activity results in a net increase in aquatic resource functions and services does not apply to reversion activities meeting the above conditions. Except for the activities described above, this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion.

Reporting. For those activities that do not require pre-construction notification, the permittee must submit to the district engineer a copy of: (1) The binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement, or a project description, including project plans and location map; (2) the NRCS or USDA Technical Service Provider documentation for the voluntary stream enhancement or restoration action or wetland restoration, enhancement, or establishment action; or (3) the SMCRA permit issued by OSMRE or the applicable state agency. The report must also include information on baseline ecological conditions on the project site, such as a delineation of wetlands, streams, and/or other aquatic habitats. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP.

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

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

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

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

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

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

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

29. Residential Developments. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development).

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

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

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

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

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

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

Maintenance Baseline: The maintenance baseline is a description of the physical characteristics (e.g., depth, width, length, location, configuration, or design flood capacity, etc.) of a flood control project within which maintenance activities are normally authorized by NWP 31, subject to any case-specific conditions required by the district engineer. The district engineer will approve the maintenance baseline based on the approved or constructed capacity of the flood

control facility, whichever is smaller, including any areas where there are no constructed channels but which are part of the facility. The prospective permittee will provide documentation of the physical characteristics of the flood control facility (which will normally consist of as-built or approved drawings) and documentation of the approved and constructed design capacities of the flood control facility. If no evidence of the constructed capacity exists, the approved capacity will be used. The documentation will also include best management practices to ensure that the adverse environmental impacts caused by the maintenance activities are no more than minimal, especially in maintenance areas where there are no constructed channels. (The Corps may request maintenance records in areas where there has not been recent maintenance.) Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5. Except in emergencies as described below, this NWP cannot be used until the district engineer approves the maintenance baseline and determines the need for mitigation and any regional or activity-specific conditions. Once determined, the maintenance baseline will remain valid for any subsequent reissuance of this NWP. This NWP does not authorize maintenance of a flood control facility that has been abandoned. A flood control facility will be considered abandoned if it has operated at a significantly reduced capacity without needed maintenance being accomplished in a timely manner. A flood control facility will not be considered abandoned if the prospective permittee is in the process of obtaining other authorizations or approvals required for maintenance activities and is experiencing delays in obtaining those authorizations or approvals.

Mitigation: The district engineer will determine any required mitigation one-time only for impacts associated with maintenance work at the same time that the maintenance baseline is approved. Such one-time mitigation will be required when necessary to ensure that adverse environmental effects are no more than minimal, both individually and cumulatively. Such mitigation will only be required once for any specific reach of a flood control project. However, if one-time mitigation is required for impacts associated with maintenance activities, the district engineer will not delay needed maintenance, provided the district engineer and the permittee establish a schedule for identification, approval, development, construction and completion of any such required mitigation. Once the one-time mitigation described above has been completed, or a determination made that mitigation is not required, no further mitigation will be required for maintenance activities within the maintenance baseline (see Note, below). In determining appropriate mitigation, the district engineer will give special consideration to natural water courses that have been included in the maintenance baseline and require mitigation and/or best management practices as appropriate.

Emergency Situations: In emergency situations, this NWP may be used to authorize maintenance activities in flood control facilities for which no maintenance baseline has been approved. Emergency situations are those which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if action is not taken before a maintenance baseline can be approved. In such situations, the

determination of mitigation requirements, if any, may be deferred until the emergency has been resolved. Once the emergency has ended, a maintenance baseline must be established expeditiously, and mitigation, including mitigation for maintenance conducted during the emergency, must be required as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer before any maintenance work is conducted (see general condition 32). The pre-construction notification may be for activity-specific maintenance or for maintenance of the entire flood control facility by submitting a five-year (or less) maintenance plan. The pre-construction notification must include a description of the maintenance baseline and the disposal site for dredged or excavated material. (Authorities: Sections 10 and 404)

Note: If the maintenance baseline was approved by the district engineer under a prior version of NWP 31, and the district engineer imposed the one-time compensatory mitigation requirement on maintenance for a specific reach of a flood control project authorized by that prior version of NWP 31, during the period this version of NWP 31 is in effect (March 19, 2017, to March 18, 2022) the district engineer will not require additional compensatory mitigation for maintenance activities authorized by this NWP in that specific reach of the flood control project.

32. Completed Enforcement Actions. Any structure, work, or discharge of dredged or fill material remaining in place or undertaken for mitigation, restoration, or environmental benefit in compliance with either:

(i) The terms of a final written Corps non-judicial settlement agreement resolving a violation of Section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899; or the terms of an EPA 309(a) order on consent resolving a violation of section 404 of the Clean Water Act, provided that:

(a) The activities authorized by this NWP cannot adversely affect more than 5 acres of non-tidal waters or 1 acre of tidal waters;

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

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

(ii) The terms of a final Federal court decision, consent decree, or settlement agreement resulting from an enforcement action brought by the United States under section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or

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

Compliance is a condition of the NWP itself; non-compliance of the terms and conditions of an NWP 32 authorization may result in an additional enforcement action (e.g., a Class I civil administrative penalty). Any authorization under this NWP is automatically revoked if the permittee does not comply with the terms of this NWP or the terms of the court decision, consent decree, or judicial/non-judicial settlement agreement. This NWP does not apply to any activities occurring after the date of the decision, decree, or agreement that are not for the purpose of mitigation, restoration, or environmental benefit. Before reaching any settlement agreement, the Corps will ensure compliance with the provisions of 33 CFR part 326 and 33 CFR 330.6(d)(2) and (e). (Authorities: Sections 10 and 404)

33. Temporary Construction, Access, and Dewatering. Temporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard. This NWP also authorizes temporary structures, work, and discharges, including cofferdams, necessary for construction activities not otherwise subject to the Corps or U.S. Coast Guard permit requirements. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. The use of dredged material may be allowed if the district engineer determines that it will not cause more than minimal adverse environmental effects. Following completion of construction, temporary fill must be entirely removed to an area that has no waters of the United States, dredged material must be returned to its original location, and the affected areas must be restored to pre-construction elevations. The affected areas must also be revegetated, as appropriate. This permit does not authorize the use of cofferdams to dewater wetlands or other aquatic areas to change their use. Structures left in place after construction is completed require a separate section 10 permit if located in navigable waters of the United States. (See 33 CFR part 322.)

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

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

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

35. Maintenance Dredging of Existing Basins. The removal of accumulated sediment for maintenance of existing marina basins, access channels to marinas or boat slips, and boat slips to previously authorized depths or controlling depths for ingress/egress, whichever is less. All dredged material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. Proper sediment controls must be used for the disposal site. (Authority: Section 10)

36. Boat Ramps. Activities required for the construction of boat ramps, provided the activity meets all of the following criteria:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Notification: Except in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 32). (Authorities: Sections 10 and 404)

38. Cleanup of Hazardous and Toxic Waste. Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority. Court ordered remedial action plans or related settlements are also authorized by

this NWP. This NWP does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste.

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

Note: Activities undertaken entirely on a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act.

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

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

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

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

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

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

This NWP also authorizes discharges of dredged or fill material into non-tidal waters of the United States to relocate existing serviceable drainage ditches constructed in non-tidal streams.

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

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

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

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

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

42. Recreational Facilities. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of recreational facilities. Examples of recreational facilities that may be authorized by this NWP include playing fields (e.g., football

fields, baseball fields), basketball courts, tennis courts, hiking trails, bike paths, golf courses, ski areas, horse paths, nature centers, and campgrounds (excluding recreational vehicle parks). This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables that are directly related to the recreational activity, but it does not authorize the construction of hotels, restaurants, racetracks, stadiums, arenas, or similar facilities.

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

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

43. Stormwater Management Facilities. Discharges of dredged or fill material into non-tidal waters of the United States for the construction of stormwater management facilities, including stormwater detention basins and retention basins and other stormwater management facilities; the construction of water control structures, outfall structures and emergency spillways; the construction of low impact development integrated management features such as bioretention facilities (e.g., rain gardens), vegetated filter strips, grassed swales, and infiltration trenches; and the construction of pollutant reduction green infrastructure features designed to reduce inputs of sediments, nutrients, and other pollutants into waters to meet reduction targets established under Total Daily Maximum Loads set under the Clean Water Act.

This NWP authorizes, to the extent that a section 404 permit is required, discharges of dredged or fill material into non-tidal waters of the United States for the maintenance of stormwater management facilities, low impact development integrated management features, and pollutant reduction green infrastructure features. The maintenance of stormwater management facilities, low impact development integrated management features, and pollutant reduction green infrastructure features that are not waters of the United States does not require a section 404 permit.

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

NWP does not authorize discharges of dredged or fill material for the construction of new stormwater management facilities in perennial streams.

Notification: For discharges into non-tidal waters of the United States for the construction of new stormwater management facilities or pollutant reduction green infrastructure features, or the expansion of existing stormwater management facilities or pollutant reduction green infrastructure features, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) Maintenance activities do not require pre-construction notification if they are limited to restoring the original design capacities of the stormwater management facility or pollutant reduction green infrastructure feature. (Authority: Section 404)

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

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

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

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

The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects.

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

This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

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

45. Repair of Uplands Damaged by Discrete Events. This NWP authorizes discharges of dredged or fill material, including dredging or excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by storms, floods, or other discrete events. This NWP authorizes bank stabilization to protect the restored uplands. The

restoration of the damaged areas, including any bank stabilization, must not exceed the contours, or ordinary high water mark, that existed before the damage occurred. The district engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this NWP. The work must commence, or be under contract to commence, within two years of the date of damage, unless this condition is waived in writing by the district engineer. This NWP cannot be used to reclaim lands lost to normal erosion processes over an extended period.

This NWP does not authorize beach restoration or nourishment.

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

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

Note: The uplands themselves that are lost as a result of a storm, flood, or other discrete event can be replaced without a section 404 permit, if the uplands are restored to the ordinary high water mark (in non-tidal waters) or high tide line (in tidal waters). (See also 33 CFR 328.5.) This NWP authorizes discharges of dredged or fill material into waters of the United States associated with the restoration of uplands.

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

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

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

47. [Reserved]

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

This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures into navigable waters of the United States. This NWP also authorizes discharges of dredged or fill material into waters of the United States necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked.

This NWP does not authorize:

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

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

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

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

Notification: The permittee must submit a pre-construction notification to the district engineer if: (1) the activity will include a species that has never been cultivated in the waterbody; or (2) the activity occurs in a project area that has not been used for commercial shellfish aquaculture activities during the past 100 years. If the operator will be conducting commercial shellfish aquaculture activities in multiple contiguous project areas, he or she can either submit one PCN for those contiguous project areas or submit a separate PCN for each project area. (See general condition 32.)

In addition to the information required by paragraph (b) of general condition 32, the pre-construction notification must also include the following information: (1) a map showing the boundaries of the project area(s), with latitude and longitude coordinates for each corner of each project area; (2) the name(s) of the species that will be cultivated during the period this NWP is in effect; (3) whether canopy predator nets will be used; (4) whether suspended

cultivation techniques will be used; and (5) general water depths in the project area(s) (a detailed survey is not required). No more than one pre-construction notification per project area or group of contiguous project areas should be submitted for the commercial shellfish operation during the effective period of this NWP. The pre-construction notification should describe all species and culture activities the operator expects to undertake in the project area or group of contiguous project areas during the effective period of this NWP. If an operator intends to undertake unanticipated changes to the commercial shellfish aquaculture operation during the effective period of this NWP, and those changes require Department of the Army authorization, the operator must contact the district engineer to request a modification of the NWP verification; a new pre-construction notification does not need to be submitted. (Authorities: Sections 10 and 404)

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

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

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

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

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

Notification: The permittee must submit a pre-construction notification and a document describing how the overall mining plan will result in a net increase in aquatic resource functions

to the district engineer and receive written authorization prior to commencing the activity. (See general condition 32.) (Authorities: Sections 10 and 404)

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

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

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

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

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

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the discharge results in the loss of greater than 1/10-acre of waters of the United States. (See general condition 32.) (Authorities: Sections 10 and 404)

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

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

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

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

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

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

The placement of a transmission line on the bed of a navigable water of the United States from the renewable energy generation unit(s) to a land-based collection and distribution facility is

considered a structure under Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(b)), and the placement of the transmission line on the bed of a navigable water of the United States is not a loss of waters of the United States for the purposes of applying the 1/2-acre or 300 linear foot limits.

For each single and complete project, no more than 10 generation units (e.g., wind turbines, wave energy devices, or hydrokinetic devices) are authorized. For floating solar panels in navigable waters of the United States, each single and complete project cannot exceed 1/2-acre in water surface area covered by the floating solar panels.

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

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

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

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

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

Note 3: If the pilot project generation units, including any transmission lines, are placed in navigable waters of the United States (i.e., section 10 waters) within the coastal United States, the Great Lakes, and United States territories, copies of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration, National Ocean Service, for charting the generation units and associated transmission line(s) to protect navigation.

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

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

53. Removal of Low-Head Dams. Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States associated with the removal of low-head dams.

For the purposes of this NWP, the term "low-head dam" is defined as a dam built across a stream to pass flows from upstream over all, or nearly all, of the width of the dam crest on a continual and uncontrolled basis. (During a drought, there might not be water flowing over the dam crest.) In general, a low-head dam does not have a separate spillway or spillway gates but it may have an uncontrolled spillway. The dam crest is the top of the dam from left abutment to right abutment, and if present, an uncontrolled spillway. A low-head dam provides little storage function.

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

Because the removal of the low-head dam will result in a net increase in ecological functions and services provided by the stream, as a general rule compensatory mitigation is not required for activities authorized by this NWP. However, the district engineer may determine for a particular low-head dam removal activity that compensatory mitigation is necessary to ensure the authorized activity results in no more than minimal adverse environmental effects.

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

Note: This NWP does not authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters to restore the stream in the vicinity of the low-head dam, including the former impoundment area. Nationwide permit 27 or other Department of the Army permits may authorize such activities. This NWP does not authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters to stabilize stream banks. Bank stabilization activities may be authorized by NWP 13 or other Department of the Army permits.

54. Living Shorelines. Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction and maintenance of living shorelines to stabilize banks and shores in coastal waters, which includes

the Great Lakes, along shores with small fetch and gentle slopes that are subject to low- to mid-energy waves. A living shoreline has a footprint that is made up mostly of native material. It incorporates vegetation or other living, natural "soft" elements alone or in combination with some type of harder shoreline structure (e.g., oyster or mussel reefs or rock sills) for added protection and stability. Living shorelines should maintain the natural continuity of the land-water interface, and retain or enhance shoreline ecological processes. Living shorelines must have a substantial biological component, either tidal or lacustrine fringe wetlands or oyster or mussel reef structures. The following conditions must be met:

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

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

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

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

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

(f) If sills, breakwaters, or other structures must be constructed to protect fringe wetlands for the living shoreline, those structures must be the minimum size necessary to protect those fringe wetlands;

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

(h) The living shoreline must be properly maintained, which may require periodic repair of sills, breakwaters, or reefs, or replacing sand fills after severe storms or erosion events. Vegetation may be replanted to maintain the living shoreline. This NWP authorizes those maintenance and repair activities, including any minor deviations necessary to address changing environmental conditions.

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

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

Note: In waters outside of coastal waters, nature-based bank stabilization techniques, such as bioengineering and vegetative stabilization, may be authorized by NWP 13.

C. Nationwide Permit General Conditions

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

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

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

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

2. Aquatic Life Movements. No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably

culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. If a bottomless culvert cannot be used, then the crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

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

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

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

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

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

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

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

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

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

12. Soil Erosion and Sediment Controls. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil

and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow, or during low tides.

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

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

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

16. Wild and Scenic Rivers. (a) No NWP activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status.

(b) If a proposed NWP activity will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, the permittee must submit a pre-construction notification (see general condition 32). The district engineer will coordinate the PCN with the Federal agency with direct management responsibility for that river. The permittee shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

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

17. Tribal Rights. No NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.

18. Endangered Species. (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act

(ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless ESA section 7 consultation addressing the effects of the proposed activity has been completed. Direct effects are the immediate effects on listed species and critical habitat caused by the NWP activity. Indirect effects are those effects on listed species and critical habitat that are caused by the NWP activity and are later in time, but still are reasonably certain to occur.

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

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

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

(e) Authorization of an activity by an NWP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the FWS or the NMFS, the Endangered Species Act prohibits any person subject to the jurisdiction

of the United States to take a listed species, where "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word “harm” in the definition of “take'' means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

(f) If the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed NWP activity, the non-federal applicant should provide a copy of that ESA section 10(a)(1)(B) permit with the PCN required by paragraph (c) of this general condition. The district engineer will coordinate with the agency that issued the ESA section 10(a)(1)(B) permit to determine whether the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation conducted for the ESA section 10(a)(1)(B) permit. If that coordination results in concurrence from the agency that the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation for the ESA section 10(a)(1)(B) permit, the district engineer does not need to conduct a separate ESA section 7 consultation for the proposed NWP activity. The district engineer will notify the non-federal applicant within 45 days of receipt of a complete pre-construction notification whether the ESA section 10(a)(1)(B) permit covers the proposed NWP activity or whether additional ESA section 7 consultation is required.

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

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

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

(b) Federal permittees should follow their own procedures for complying with the requirements of section 106 of the National Historic Preservation Act. If pre-construction notification is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those

requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation is not submitted, then additional consultation under section 106 may be necessary. The respective federal agency is responsible for fulfilling its obligation to comply with section 106.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties might have the potential to be affected by the proposed NWP activity or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of, or potential for, the presence of historic properties can be sought from the State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted in the PCN and these identification efforts, the district engineer shall determine whether the proposed NWP activity has the potential to cause effects on the historic properties. Section 106 consultation is not required when the district engineer determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of section 106 of the NHPA: no historic properties affected, no adverse effect, or adverse effect. Where the non-Federal applicant has identified historic properties on which the activity might have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that NHPA section 106 consultation has been completed.

(d) For non-federal permittees, the district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. If NHPA section 106 consultation is required, the district engineer will notify the non-Federal applicant that he or she cannot begin the activity until section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that section 110k of the NHPA (54 U.S.C. 306113) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

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

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

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

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and 54, notification is required in accordance with general condition 32, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

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

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

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

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

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

(e) Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, the restoration or maintenance/protection of riparian areas may be the only compensatory mitigation required. Restored riparian areas should consist of native species. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to restore or maintain/protect a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or maintaining/protecting a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of minimization or

compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

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

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in no more than minimal adverse environmental effects. For the NWPs, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2) and (3)). However, if an appropriate number and type of mitigation bank or in-lieu credits are not available at the time the PCN is submitted to the district engineer, the district engineer may approve the use of permittee-responsible mitigation.

(2) The amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.1(e)(3)). (See also 33 CFR 332.3(f)).

(3) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, aquatic resource restoration should be the first compensatory mitigation option considered for permittee-responsible mitigation.

(4) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)).

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

(6) Compensatory mitigation requirements (e.g., resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan (see 33 CFR 332.4(c)(1)(ii)).

(g) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of 1/2-acre, it cannot be used to authorize any NWP activity resulting in the loss of greater than 1/2-acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to

ensure that an NWP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the NWPs.

(h) Permittees may propose the use of mitigation banks, in-lieu fee programs, or permittee-responsible mitigation. When developing a compensatory mitigation proposal, the permittee must consider appropriate and practicable options consistent with the framework at 33 CFR 332.3(b). For activities resulting in the loss of marine or estuarine resources, permittee-responsible mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee-responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.

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

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

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

27. Regional and Case-By-Case Conditions. The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its

section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

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

29. Transfer of Nationwide Permit Verifications. If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

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

_____

(Transferee)

_____

(Date)

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

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

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

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

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

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

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

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

(2) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or are in the vicinity of the activity, or to notify the Corps pursuant to general condition 20 that the activity might have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is "no effect" on listed species or "no potential to

cause effects" on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)) has been completed. Also, work cannot begin under NWPs 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

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

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed activity;

(3) Identify the specific NWP or NWP(s) the prospective permittee wants to use to authorize the proposed activity;

(4) A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures. For single and complete linear projects, the PCN must include the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (e.g., a conceptual plan), but do not need to be detailed engineering plans);

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

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

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

(8) For non-Federal permittees, if the NWP activity might have the potential to cause effects to a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, the PCN must state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with section 106 of the National Historic Preservation Act;

(9) For an activity that will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, the PCN must identify the Wild and Scenic River or the "study river" (see general condition 16); and

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

(c) <u>Form of Pre-Construction Notification</u>: The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it

is an NWP PCN and must include all of the applicable information required in paragraphs (b)(1) through (10) of this general condition. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals.

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

(2) Agency coordination is required for: (i) all NWP activities that require pre-construction notification and result in the loss of greater than 1/2-acre of waters of the United States; (ii) NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 activities that require pre-construction notification and will result in the loss of greater than 300 linear feet of stream bed; (iii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iv) NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.

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

(4) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat

conservation recommendations, as required by section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

(5) Applicants are encouraged to provide the Corps with either electronic files or multiple copies of pre-construction notifications to expedite agency coordination.

D. District Engineer's Decision

1. In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If a project proponent requests authorization by a specific NWP, the district engineer should issue the NWP verification for that activity if it meets the terms and conditions of that NWP, unless he or she determines, after considering mitigation, that the proposed activity will result in more than minimal individual and cumulative adverse effects on the aquatic environment and other aspects of the public interest and exercises discretionary authority to require an individual permit for the proposed activity. For a linear project, this determination will include an evaluation of the individual crossings of waters of the United States to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings authorized by NWP. If an applicant requests a waiver of the 300 linear foot limit on impacts to streams or of an otherwise applicable limit, as provided for in NWPs 13, 21, 29, 36, 39, 40, 42, 43, 44, 50, 51, 52, or 54, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in only minimal individual and cumulative adverse environmental effects. For those NWPs that have a waivable 300 linear foot limit for losses of intermittent and ephemeral stream bed and a 1/2-acre limit (i.e., NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52), the loss of intermittent and ephemeral stream bed, plus any other losses of jurisdictional waters and wetlands, cannot exceed 1/2-acre.

2. When making minimal adverse environmental effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity. He or she will also consider the cumulative adverse environmental effects caused by activities authorized by NWP and whether those cumulative adverse environmental effects are no more than minimal. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (e.g., watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional or condition assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse environmental effects determination. The district engineer may

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

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

4. If the district engineer determines that the adverse environmental effects of the proposed activity are more than minimal, then the district engineer will notify the applicant either: (a) that the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) that the activity is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal; or (c) that the activity is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse environmental effects, the activity will be authorized within the 45-day PCN period (unless additional time is required to comply with general conditions 18, 20, and/or 31, or to evaluate PCNs for activities authorized by NWPs 21, 49, and 50), with activity-specific conditions that state the mitigation requirements. The authorization will include the necessary

conceptual or detailed mitigation plan or a requirement that the applicant submit a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal. When compensatory mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan or has determined that prior approval of a final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation.

E. Further Information

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

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

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

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

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

F. Definitions

Best management practices (BMPs): Policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural.

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

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

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

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

Ecological reference: A model used to plan and design an aquatic habitat and riparian area restoration, enhancement, or establishment activity under NWP 27. An ecological reference may be based on the structure, functions, and dynamics of an aquatic habitat type or a riparian area type that currently exists in the region where the proposed NWP 27 activity is located. Alternatively, an ecological reference may be based on a conceptual model for the aquatic habitat type or riparian area type to be restored, enhanced, or established as a result of the

proposed NWP 27 activity. An ecological reference takes into account the range of variation of the aquatic habitat type or riparian area type in the region.

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

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

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

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

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

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

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

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

Loss of waters of the United States: Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. The loss of stream bed includes the acres or linear feet of stream bed that are filled or excavated as a result of the regulated activity. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities that do not require Department of the Army authorization, such as activities eligible for exemptions under section 404(f) of the Clean Water Act, are not considered when calculating the loss of waters of the United States.

Navigable waters: Waters subject to section 10 of the Rivers and Harbors Act of 1899. These waters are defined at 33 CFR part 329.

Non-tidal wetland: A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (i.e., spring high tide line).

Open water: For purposes of the NWPs, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of flowing or standing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of “open waters” include rivers, streams, lakes, and ponds.

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

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

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

Pre-construction notification: A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

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

Protected tribal resources: Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources.

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

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

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

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

riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

Riparian areas: Riparian areas are lands next to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects riverine, lacustrine, estuarine, and marine waters with their adjacent wetlands, non-wetland waters, or uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 23.)

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

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

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

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

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

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

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

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

Structure: An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

Tidal wetland: A tidal wetland is a jurisdictional wetland that is inundated by tidal waters. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line.

Tribal lands: Any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

Tribal rights: Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: For purposes of the NWPs, a waterbody is a jurisdictional water of the United States. If a wetland is adjacent to a waterbody determined to be a water of the United States, that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of "waterbodies" include streams, rivers, lakes, ponds, and wetlands.

Appendix B – Paperwork Reduction Act Compliance (from preamble to 2017 NWPs)

The paperwork burden associated with the NWP relates exclusively to the preparation of the PCN. The Corps estimates that applicants will submit 31,448 PCNs per year. Paragraph (b) of general condition 32 identifies the information that should be submitted with a PCN, and some NWPs identify additional information to be included in the PCN. While different NWPs require different information be included in a PCN, the Corps estimates that a PCN takes, on average, 11 hours to complete. That results in an average, annual paperwork burden of 345,928 hours.

The NWPs would increase the total paperwork burden associated with this program but decrease the net burden on the public. This is due to the fact that there is new paperwork burden associated with the inclusion of two new NWP (both of which have PCN requirements). Since, however, this time would otherwise be spent on completing an individual permit application, which we estimate also takes, on average, 11 hours to complete, the net effect on the public is zero.

The only real change to the public's paperwork burden from this final rule is a decrease due primarily to a modification to the PCN requirements for NWPs 33 and 48, the modification to paragraph (b) of NWP 3, and, to a lesser extent, a minor increase associated with the minor changes we made to the content required for a complete PCN (see paragraph (b) of general condition 32).

Specifically, we anticipate a reduction in paperwork burden from the final rule to require PCNs only for NWP 33 activities in section 10 waters. There will also be a paperwork reduction because of the change to the PCN thresholds for NWP 48, by eliminating the requirement to submit a PCN for dredged harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation. We estimate that the changes to NWP 33 would result in 210 fewer PCNs, with an estimated reduction of paperwork burden of 2,310 hours. The changes to the PCN thresholds for NWP 48 are expected to result in a reduction of 50 PCNs per year in waters where there are no listed species or critical habitat that would otherwise trigger the requirement to submit PCNs because of general condition 18. We estimate that 50 fewer PCNs will be required for NWP 48 activities, with a reduction of paperwork burden of 550 hours. We estimate that 50 fewer PCNs will be required for NWP 3(b) activities because the placement of riprap to protect the structure or fill will be authorized by NWP 13 and will not likely require a PCN. Therefore, the estimated net change in paperwork burden for this rule is an increase of 792 hours per year. Prospective permittees who are required to submit a PCN for a particular NWP, or who are requesting verification that a particular activity qualifies for NWP authorization, may use the current standard Department of the Army permit application form.

The following table summarizes the projected changes in paperwork burden for two alternatives relative to the paperwork burden under the 2012 NWPs. The first alternative is to reissue 50 NWPs and issue two new NWPs. The second alternative would result if these NWPs are not issued and reissued and regulated entities would have to obtain standard individual permits to comply with the permit requirements of section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899. The 302 standard individual permits included in the row for the 2012 NWPs represent the standard individual permits that would be required for activities that would be authorized by the changes to NWPs 3, 43, 45, and 52 and the two new NWPs (NWPs 53 and 54). The estimated 15 activities that would require authorization by standard individual permit under the 2017 NWPs represent surface coal mining activities that were authorized by paragraph (a) of the 2012 NWP 21 that will not be completed before the 2012 NWP expires and would thus require standard individual permits to complete the surface coal mining activity. We estimate that imposing a cap of 1,000 linear feet on bulkheads in NWP 13 will result in 10 bulkheads requiring individual permits each year. The modification of NWP 13 to make it clear that it authorizes stream barbs will reduce the number of individual permits by an estimated 10 per year. Those two changes to NWP 13 will result in no net changes in number of the number of individual permits required for bank stabilization activities each year.

	Number of NWP PCNs per year	**Number of NWP activities not requiring PCNs per year**	**Number of SIPs per year**	**Estimated changes in NWP PCNs per year**	**Estimated changes in number of NWP activities not requiring PCNs per year**	**Estimated changes in number of SIPs per year**
2012 NWPs	31,555	31,415	302			
2017 NWPs	31,448	31,979	15	-82	+492	-292
SIPs required if NWPs not reissued	0	0	49,838			

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number.

Appendix C

Regulatory Impact Analysis

for the

2017 Nationwide Permits

Prepared by:
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Headquarters
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Operations and Regulatory Community of Practice
Washington, DC
December 21, 2016

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List of Acronyms

CWA	Clean Water Act
DA	Department of the Army
GC	General Condition
NWP	Nationwide Permit
ORM	OMBIL Regulatory Module
PCN	Pre-construction Notification
SIP	Standard Individual Permit

Executive Summary

The Corps is reissuing 50 existing nationwide permits (NWPs) and issuing two new NWPs. The NWPs authorize a variety of activities in jurisdictional waters and wetlands under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. Each year, the NWPs authorize over 60,000 activities that result in no more than minimal individual and cumulative adverse environmental effects. The NWPs can only be issued for a period of five years. The NWPs were last reissued on February 13, 2012, and those NWPs expire on March 18, 2017. If the NWPs are not reissued and project proponents wish to proceed with their project, they will have to obtain an individual permit from the Department of the Army to fulfill the permit requirements of Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899.

For this regulatory impact analysis (RIA), the Corps examined the direct and indirect costs of the regulated entities to comply with the NWPs. We also examined the administrative costs. The baseline for this analysis is a requirement for standard individual permits for all activities that were authorized by NWP, presuming there are no NWPs available to authorize those activities. Alternative 1 is the reissuance of the 2012 NWPs without any changes. and the estimated annual numbers of NWP authorizations (both reporting and non-reporting activities), as well as activities authorized by standard individual permits intended to be authorized by the 2017 NWPs (e.g., removal of low-head dams, living shorelines, and other activities authorized by changes to the NWPs). Using that baseline, the Corps analyzed two alternatives scenarios: Alternative 1 compares the 2012 NWPs to the baseline and Alternative 2 compares the 2017 NWPs to the baseline. For the baseline, we assumed that all activities that would have otherwise received an NWP authorization would proceed with an individual permit although we understand that some project proponents may choose to not proceed with their intended project.

Under the baseline, the Corps would receive and process 49,838 standard individual permit applications each year. Under Alternative 1, we estimate that there would be, on an annual basis, 292 activities that require standard individual permits because they are not authorized by any of the 2012 NWPs. Under Alternative 2, we estimate that the Corps would receive 15 standard individual permit applications per year for activities that no longer qualify for NWP authorization. The compliance costs of Alternatives 1 and 2 represent the cost savings achieved by the NWP program.

Under Alternative 1, the estimated annual direct compliance costs would be between $463,000,000 and $802,000,000 per year, $1,254 million to $3,565 million per year less than the baseline direct compliance costs. The estimated annual direct compliance costs for Alternative 2 would be between $452,000,000 and $775,000,000 per year. Under Alternative 2, the estimated annual direct compliance costs would decrease by between $1,265 million and $3,592 million per year. The compliance costs of Alternative 2 represent additional cost savings achieved by the 2017 NWP program.

The indirect costs are evaluated as opportunity cost using a surrogate of examining the differences in evaluation times for the two alternatives compared to the baseline. The opportunity costs of the baseline are substantially greater than the opportunity costs of Alternatives 1 and 2. Alternative 1 would result in slightly higher opportunity costs compared to Alternative 2.

In terms of administrative costs, under Alternative 1 we estimate that administrative costs would be approximately $88,500,000 less than the baseline administrative costs. For Alternative 2, the administrative costs would be approximately $89,200,000 less than the baseline administrative costs.

The NWPs provide benefits in terms of encouraging project proponents to minimize their proposed impacts to waters of the United States and design their projects within the scope of the NWPs, rather than applying for individual permits for activities that could result in greater adverse impacts to the aquatic environment. The NWPs also benefit the regulated public by providing convenience and time savings compared to standard individual permits. The minimization encouraged by terms and conditions of an NWP, as well as compensatory mitigation that may be required for specific activities authorized by an NWP, helps reduce adverse environmental effects to jurisdictional waters and wetlands, as well as resources protected under other laws, such as listed species and designated critical habitat and historic properties.

1.0 Regulatory Program Background

The Corps Regulatory Program administers three laws: Section 404 of the Clean Water Act, Section 9 and 10 of the Rivers and Harbors Act of 1899, and Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended. Under Section 404 of the Clean Water Act, a permit is required to discharge dredged or fill material into waters of the United States. Under Section 9 of the Rivers and Harbors Act of 1899, a permit is required to construct dams or dikes across navigable waters of the United States. The obstruction or alteration of a navigable water of the United States requires a permit under Section 10 of the Rivers and Harbors Act of 1899. Under Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, a permit is required to transport dredged material for disposal into ocean waters.

There are two categories of permits that the Corps may issue under its authorities: individual permits and general permits. Individual permits include standard individual permits and letters of permission. General permits include nationwide permits (NWPs), regional general permits, and programmatic general permits. These permit types are described in more detail below:

- ***Standard individual permits*** are Department of the Army (DA) permits that have been processed through the public interest review procedures, including public notice and receipt of comments, activity-specific National Environmental Policy Act documentation (e.g., an environmental assessment or environmental impact statement), and, if the proposed activity involves discharges of dredged or fill material into waters of the United States, an activity-specific 404(b)(1) Guidelines analysis to ensure that the discharge of dredged or fill material complies with the environmental criteria in those Guidelines.

- ***Letters of permission*** are also individual permits issued after an abbreviated public interest review procedure, and usually involve coordination with federal and state agencies prior to making a decision on the permit application.

- ***Nationwide permits*** are type of general permit issued by the Chief of Engineers to authorize categories of activities across the country that have no more than minimal individual and cumulative adverse environmental effects. Corps division engineers can modify, suspend, or revoke NWPs in a particular region, or for a specific category of activities or waters (see 33 CFR 330.5(c)). Corps district engineers can modify, suspend, or revoke activity-specific NWP authorizations (see 33 CFR 330.5(d)) in their districts.

- ***Regional general permits*** are a category of general permit issued by Corps division or district engineers to authorize categories of activities on a regional basis. As of February 2015, there were 224 regional general permits in effect.

- ***Programmatic general permits*** are a specific type of regional general permit intended to reduce duplication with a similar federal, state, or local agency program. As of February 2015, there were 19 programmatic general permits in effect.

The NWPs can be issued under two of the Corps' statutory authorities: Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. Under Section 404(e) of the Clean Water Act, general permits can be issued for a period of no more than five years. The 2012 NWPs expire on March 18, 2017, and cannot be extended.

The authority to issue NWPs was delegated to the Chief of Engineers by the Assistant Secretary of the Army (Civil Works). The current regulations for implementing the NWP Program were issued on November 22, 1991 (56 FR 59110). Those regulations also contain procedures where Corps divisions and district engineers can modify, suspend, or revoke NWPs.

Some general permits require the project proponent to submit a notification to the appropriate Corps district before beginning the authorized activity. Other activities authorized by general permits do not require prior notification to the Corps district, and the project proponent can proceed with the activity as long as he or she complies with all terms and conditions of the general permit and has obtained any required water quality certification (or waiver) and/or Coastal Zone Management Act consistency concurrence (or a presumption of concurrence). The Corps records all requests for general permit verifications in its database, the OMBIL Regulatory Module (version 2) (ORM2). In ORM2, the Corps tracks the general permit used, the authorized impacts, and any required compensatory mitigation. Many project proponents request written confirmation from the Corps that an activity is authorized by NWP or another type of general permit, even if pre-construction notification is not required by the terms and conditions of that NWP or other general permit. The Corps also tracks these voluntary notifications in ORM2.

Nationwide permits were first issued by the Corps in 1977 (42 FR 37122) to authorize categories of activities that have minimal adverse effects on the aquatic environment, and streamline the authorization process for those minor activities. After 1977, NWPs have been issued or reissued in 1982 (47 FR 31794), 1984 (49 FR 39478), 1986 (51 FR 41206), 1991 (56 FR 59110), 1995 (60 FR 38650), 1996 (61 FR 65874), 2000 (65 FR 12818), 2002 (67 FR 2020), 2007 (72 FR 11092), and 2012 (77 FR 10184).

For this RIA, we use mostly Regulatory Program data from FY 2015. For certain components of this analysis, we also use Regulatory Program data from 2010 to 2014. Primary sources of information from the cost analyses were the Institute for Water Resources' 2001 report on the 2000 issuance and modification of NWPs (IWR 2001) and Sunding and Zilberman's (2002) examination of the changes to the wetland permitting process in the 2000 NWPs.

Table 1.1 provides the number of individual permits and general permit verifications issued by Corps districts in FY 2015, by permit type. This table does not include all activities authorized by general permits because many authorized activities do not require notification to the Corps prior to conducting authorized activities. In Appendix 2 of this report, we estimate the numbers

of non-reporting NWP activities where project proponents did not request written verifications that their proposed activities qualified for NWP authorization.

Table 1.1 Numbers of written authorizations issued in FY 2015, by permit type

Permit Type	Number of written authorizations issued
Standard individual permit	1,694
Letter of permission	1,409
Nationwide permit	31,707
Regional general permit	16,311
Programmatic general permit	5,803
Total	**56,924**

Table 1.2 summarizes the mean amount of time it took Corps districts to evaluate standard individual permits, letters of permission, and general permit verification requests. The number of days of review is the number of days it takes the Corps to reach a permit decision after it receives a complete individual permit application, a complete NWP PCN (if one is necessary), or a complete general permit verification request. The requirements for a complete individual permit application are found at 33 CFR 325.1(d). The requirements for a complete NWP PCN are found in paragraph (b) of general condition 32, but Corps districts may require additional information through regional conditions approved by the division engineer. The requirements for a complete PCN for a regional general permit or programmatic general permit are described in the each regional or programmatic general permit, if that general permit authorizes activities that require pre-construction notification.

The total number of application days is calculated from the date the Corps receives a permit application, NWP PCN (if one is necessary), or general permit verification request, to the date the Corps makes its decision on the permit application, NWP PCN, or general permit verification request. The individual permit application, NWP PCN, or general permit verification request may not be complete when the Corps district receives it. If additional information is required to make the individual permit application, NWP PCN, or general permit verification request complete, the Corps district will request that information from the applicant or his or her consultant. The mean total application days signifies, from the applicant's perspective, the length of time it takes to receive an individual permit, NWP verification letter, or general permit verification letter from the Corps.

Table 1.2. Evaluation times during FY 2015, by permit type. The numbers in this table apply to requests for written authorizations from Corps districts. They do not include activities authorized by NWPs, regional general permits, and programmatic general permits that are not reported to Corps districts.

Permit Type	Mean evaluation days	Mean total application days
Standard individual permit	211	291
Letter of permission	110	140
Nationwide permit	41	86
Regional general permit	40	68
Programmatic general permit	24	24

The mean evaluation days and the mean total application days include the number of days required to conduct consultations required by Section 7 of the Endangered Species Act and Section 106 of the National Historic Preservation Act. Endangered Species Act Section 7 consultation is required for any activity requiring DA authorization that may affect listed species or designated critical habitat. National Historic Preservation Act Section 106 consultation is required for any activity requiring DA authorization that has the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places.

The information required to apply for a standard individual permit is somewhat different than the information necessary to obtain an NWP verification (whether or not a PCN is required). The information requirements for a complete standard individual permit application are provided in the Corps' regulations at 33 CFR part 325.1(d)(1)-(9). The information requirements for a complete NWP PCN are listed in paragraph (b) of general condition 32. Many of the information requirements are similar for standard individual permit applications and NWP PCNs, such as applicant and consultant contact information, project location information, description of the proposed activity, statement of project purpose, quantification of project impacts, description of mitigation measures, statement regarding whether any portion of the project has already been completed, list of other authorizations needed for the project, and signature of the applicant. An application for a standard individual permit also requires the addresses of adjoining property owners. An NWP PCN also requires information on Endangered Species Act listed species or designated critical habitat that might be affected by the proposed activity, and/or historic properties that have the potential to be affected by the proposed activity. We are changing the NWP PCN requirements to including, when applicable, information on any requests for 408 permissions for activities that may alter or occupy a Corps federally-authorized Civil Works project and any proposed NWP activities that may occur in rivers covered under the Wild and Scenic Rivers Act.

The convenience and time savings associated with the NWPs encourages users of the NWPs to minimize their proposed impacts to waters of the United States and design their projects within the scope of the NWPs rather than apply for individual permits for activities that could result in greater adverse impacts to the aquatic environment. The minimization encouraged by the issuance of an NWP, as well as compensatory mitigation that may be required for specific activities authorized by an NWP, helps reduce adverse environmental effects to jurisdictional waters and wetlands, as well as resources protected under other laws, such as listed species and designated critical habitat and historic properties.

2.0 Nationwide Permit Authorization Process

There are currently 50 NWPs. They were issued on February 13, 2012, and were published in the Federal Register on February 21, 2012 (see 77 FR 10184 – 10290). When Corps Headquarters issues or reissues an NWP, it prepares a decision document. There is a decision document for each NWP and each decision document includes an environmental assessment to fulfill the requirements of the National Environmental Policy Act and a public interest review. If the NWP authorizes discharges of dredged or fill material into waters of the United States, the decision document includes a Clean Water Act Section 404(b)(1) Guidelines analysis. For the issuance of a general permit that authorizes discharges of dredged or fill material into waters of the United States, the 404(b)(1) Guidelines require an evaluation of the potential individual and cumulative impacts of the category of activities to be authorized by that general permit (see 40 CFR part 230.7(b)).

When the NWPs are issued or reissued, division engineers prepare supplemental decision documents to provide regional analyses for the NWPs and ensure that those NWPs will only authorize activities with no more than minimal individual and cumulative adverse environmental effects within that region (usually a state or a Corps district's geographic area of responsibility). The supplemental decision document also addresses regional conditions imposed by division engineers to provide additional protection to jurisdictional waters and wetlands, and other resources as appropriate. Regional conditions may only further restrict the use of an NWP. Regional conditions cannot increase acreage limits or other types of limits for an NWP.

A project proponent who wants to use one or more NWP(s) to fulfill the requirements for DA authorization for discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States must comply with all applicable terms and conditions of the appropriate NWP(s), including any regional conditions imposed by the division engineer and any activity-specific conditions imposed by the district engineer. If the project proponent does not fully comply with the applicable terms and conditions of the NWP(s), it is an unauthorized activity and he or she may be subject to an enforcement action.

Some NWPs have general or regional conditions that require the project proponent to submit a PCN prior to commencing the activity authorized by an NWP. Other NWPs do not require pre-construction notification. For the 2017 NWPs, 23 NWPs require PCNs for all activities, 10 NWPs require PCNs for some activities, and 19 NWPs do not require PCNs unless a general condition such as general condition 18 for endangered species or general condition 20 for historic properties require PCNs for activities that might affect listed species, designated critical habitat, or historic properties. Regional conditions imposed by division engineers may also add PCN requirements to one or more NWPs. The requirements for a complete NWP PCN are listed in paragraph (b) of general condition 32.

For non-federal permittees, NWP general condition 18 requires non-federal project proponents to submit PCNs if any Endangered Species Act (ESA) 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. In such cases, the non-federal project proponent is not authorized to 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. There is a similar general condition (general condition 20) for historic properties under Section 106 of the National Historic Preservation Act (NHPA). General condition 20 requires non-federal project proponents to submit PCNs to Corps districts when proposed activities might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. The non-federal project proponent cannot begin the NWP activity until notified by the Corps district that the requirements of Section 106 of the NHPA have been fulfilled.

For those NWPs that do not require PCNs, the project proponent can proceed with the NWP activity as long as he or she complies with all applicable general and regional conditions, and has obtained any required water quality certification or waiver and/or Coastal Zone Management Act consistency concurrence or presumption of concurrence (see 33 CFR 330.4(c) and (d), as well as NWP general conditions 24 and 25). A water quality certification or waiver is required if the NWP activity results in a discharge into waters of the United States. A Coastal Zone Management Act consistency concurrence or presumption of concurrence is required for any NWP activity that would affect land or water use or natural resources of the state's coastal zone.

Many project proponents submit NWP verification requests to Corps districts even though the terms and conditions of the applicable NWP(s) do not require PCNs, because they are seeking written confirmation from the Corps that their proposed activities are authorized by NWPs (see 33 CFR 330.6(a)(1)). Such written confirmations from the Corps may also be required by state and local government agencies, as conditions of their own authorizations (e.g., local building permits) to conduct those activities in accordance with state laws and local ordinances.
After a Corps district receives an NWP PCN or a written request for an NWP verification, it is reviewed by Corps district staff. The Corps' staff will determine whether the proposed activity qualifies for NWP authorization, and whether there may be effects to ESA listed species or designated critical habitat, or historic properties subject to Section 106 of the NHPA. If the proposed activity may affect listed species or designated critical habitat, or has the potential to cause effects to historic properties, the Corps district will notify the project proponent that ESA Section 7 consultation and/or NHPA Section 106 is required, if the project proponent is a non-federal entity. After such notification by the Corps district, the non-federal permittee cannot begin the proposed NWP activity until he or she is notified by the Corps that the requirements of ESA Section 7 and/or NHPA Section 106 have been fulfilled. If the project proponent is a federal entity, the Corps will review that agency's documentation of ESA Section 7 compliance and/or NHPA Section 106 compliance and may accept that compliance for the purposes of the NWP authorization. If the Corps determines that the federal agency's ESA Section 7 and/or NHPA Section 106 compliance is not sufficient for the purposes of the NWP's compliance with ESA Section 7 or NHPA Section 106, the Corps may request that the federal agency conduct

additional ESA Section 7 consultation and/or NHPA Section 106 consultation for the proposed NWP activity.

When reviewing a PCN for the proposed NWP activity, or a voluntary request for an NWP verification, the district engineer will determine whether the proposed NWP activity will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. Section D of the 2017 NWPs discusses the decision-making process. Paragraph 2 of that section describes the criteria the Corps district considers when making a minimal effects determination for an NWP PCN or voluntary verification request. When the term "NWP activity" is used, it refers to the activities authorized by the NWP (i.e., discharges of dredged or fill material into waters of the United States regulated under Section 404 of the Clean Water Act and/or structures or work regulated under Section 10 of the Rivers and Harbors Act of 1899). The NWP activity does not include components of a larger overall project that are not regulated by the Corps under its statutory authorities. When making "no more than minimal adverse environmental effects" determinations, the district engineer will consider:

- The direct and indirect effects caused by the NWP activity.
- The environmental setting in the vicinity of the NWP activity.
- The type of resource that will be affected by the NWP activity.
- The functions provided by the aquatic resources that will be affected by the NWP activity.
- The degree or magnitude to which the aquatic resources perform those functions.
- The extent that aquatic resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss).
- The duration of the adverse effects (temporary or permanent).
- The importance of the aquatic resource functions to the region (e.g., watershed or ecoregion).
- Mitigation required by the district engineer.

If an appropriate functional or condition assessment method is available and practicable to use to evaluate the jurisdictional waters and wetlands that would impacted by the NWP activity, that assessment method may be used by the district engineer to assist in the minimal adverse effects determination.

The district engineer may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns. The permittee must comply with these conditions, as well as any applicable general conditions and regional conditions.

The district engineer will consider any proposed mitigation the applicant has included in the PCN or voluntary NWP verification request to determine whether the net adverse environmental effects caused by the proposed NWP activity are no more than minimal. In the NWP verification, the activity-specific permit conditions addressing compensatory mitigation

requirements must comply with the appropriate provisions at 33 CFR 332.3(k) and 33 CFR 325.4. The district engineer must approve the final mitigation plan before the permittee commences work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation.

If the district engineer determines that the net adverse effects of the NWP activity on the aquatic environment (after consideration of the compensatory mitigation proposal) are minimal, he or she will provide a timely written response to the applicant. The response will state that the activity can proceed under the terms and conditions of the NWP, including any activity-specific conditions added to the NWP authorization by the district engineer.

If the district engineer determines that the adverse environmental effects of the proposed NWP activity are more than minimal, then the district engineer will notify the applicant either:

- That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit;
- That the project is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level; or
- That the project is authorized under the NWP with specific modifications or conditions.

In a specific watershed, state, county, or other geographic area (e.g., a Corps district), Corps division or district engineers may determine that the cumulative adverse effects of activities authorized by specific 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 modify, suspend, or revoke NWPs on a regional or case-specific basis and require individual permits in watersheds or other geographic areas where the cumulative adverse effects are determined to be more than minimal, or add conditions to the NWP either on a regional or case-by-case basis to require mitigation measures to ensure that the cumulative adverse effects are minimal. When a division or district engineer determines, using local or regional information, that a watershed or other geographic area is subject to more than minimal cumulative adverse effects due to the use of a specific NWP, he or she will use the revocation and modification procedure at 33 CFR 330.5. In reaching the final decision, the division or district engineer will compile information on the cumulative adverse effects and supplement the regional analyses he or she conducted when the NWPs were issued or reissued.

3.0 Estimation of Permitting Changes

The 2017 NWPs were compared to the 2012 NWPs to estimate the permitting changes expected to occur if the 2017 NWPs are issued. For those activities that were not authorized by the 2012 NWPs, but may be authorized by the 2017 NWPs, we assumed that those activities were authorized by standard individual permits (SIPs) while the 2012 NWPs were in effect. We also evaluated whether there were activities that were authorized by the 2012 NWPs but would not be authorized by the 2017 NWPs. For the purpose of this RIA, we assumed that standard individual permits would be required in those cases. We also examined changes to the NWP PCN thresholds and general conditions, to determine whether there would be any changes to the numbers of NWP activities that require PCNs, and would therefore affect compliance costs and administrative costs. The estimated permitting changes for the 50 existing NWPs and the two new NWPs are described in more detail in Appendix 1.

Figure 3.1 illustrates the screening process that was used to estimate the permitting changes from the 2012 NWPs to the 2017 NWPs. Activities that do not qualify for the 2017 NWPs were assumed to be processed through the standard individual permit process instead of potential authorization by regional or programmatic general permits.

Figure 3.1 – Permitting changes for activities previously authorized by the 2012 NWPs

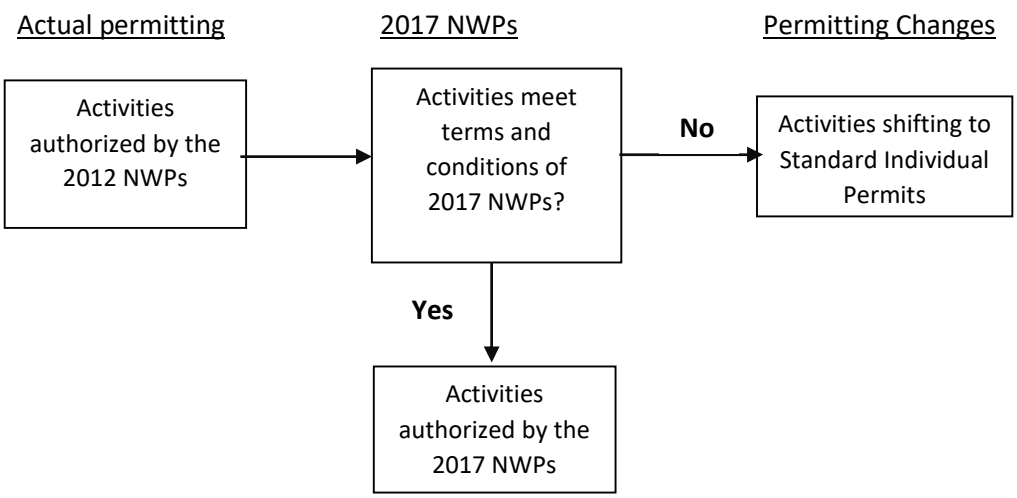


Figure 3.2 shows the screening process that was used to estimate the permitting changes for activities that required standard individual permits when the 2012 NWPs were in effect that would be authorized by the 2017 NWPs.

Figure 3.2 – Permitting changes for activities that were not authorized by the 2012 NWPs but could be authorized by the 2017 NWPs.

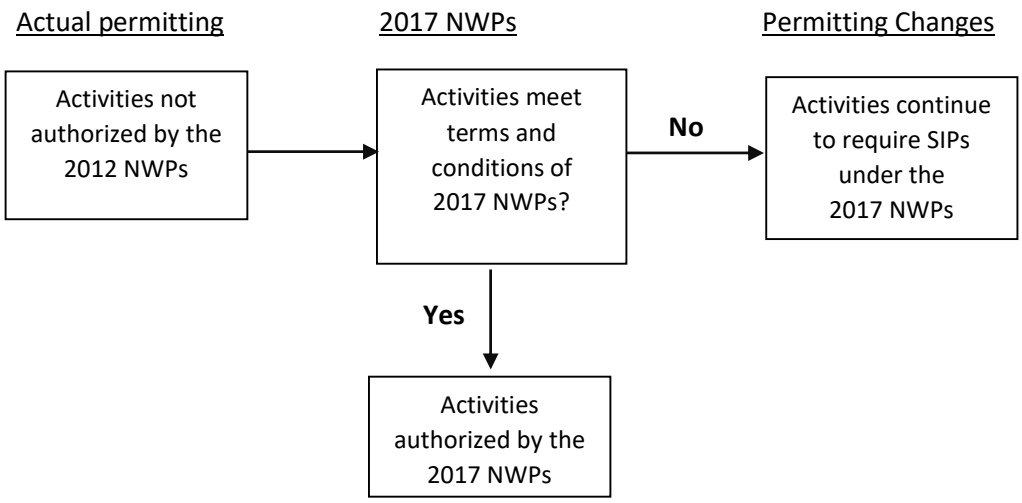


Figure 3.3 shows the screening process to determine whether activities authorized by the 2012 NWPs and required PCNs would continue to be authorized by the 2017 NWPs and either continue to require PCNs or may proceed without the requirement to submit PCNs. Figure 3.3 also includes screening for activities that required standard individual permits while the 2012 NWPs were in effect and might qualify for NWP authorization under the 2017 NWPs.

Figure 3.3 Changes in Pre-Construction Notification requirements under the 2017 NWPs

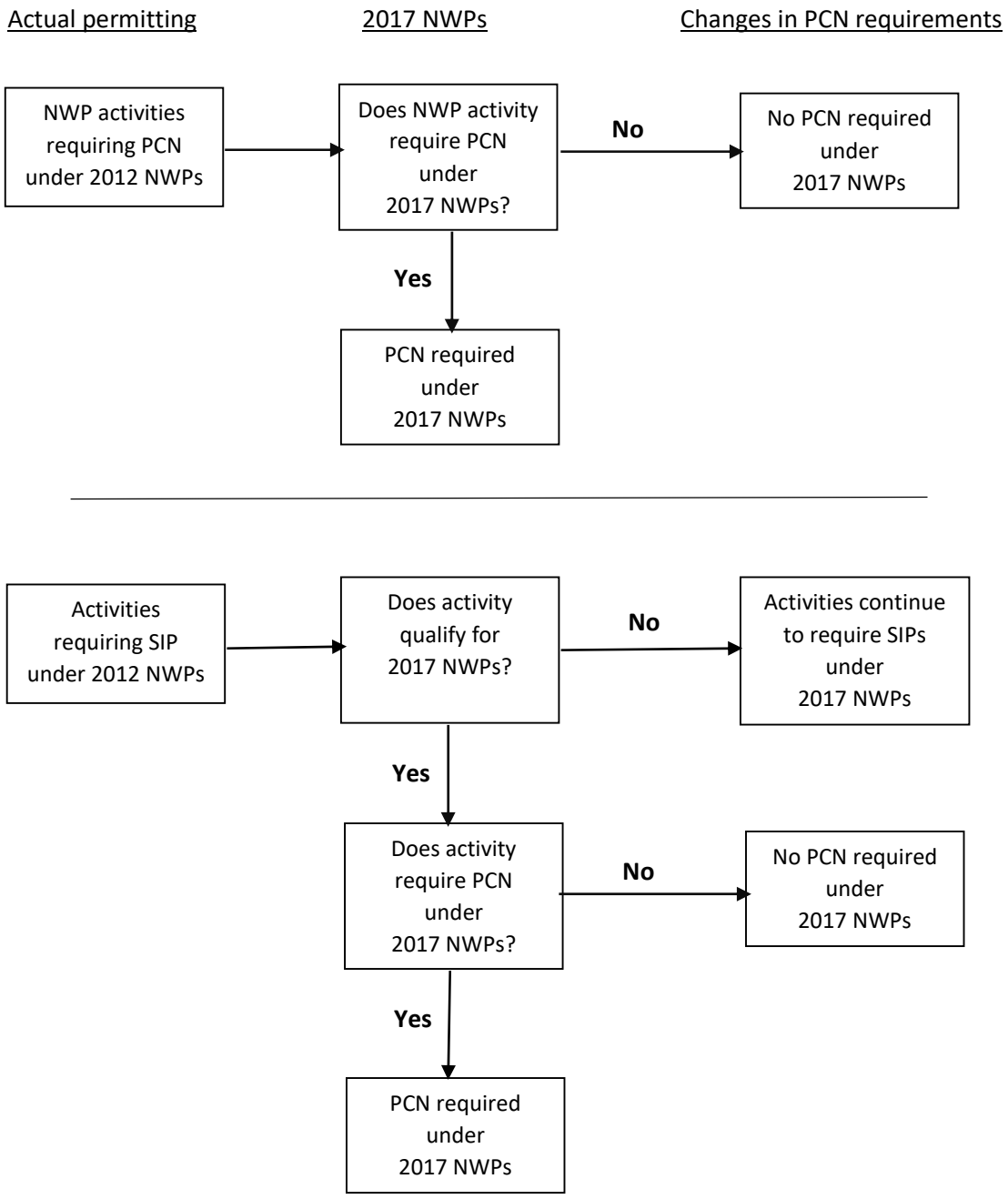


Table 3.1 provides a summary of the projected changes in NWP authorizations, NWP PCNs, and standard individual permits under the 2017 NWPs after the screenings identified in Figures 3.1, 3.2, and 3.2 were conducted. The inclusion of authorization to remove structures and fills under NWP 3 is anticipated to result in a slight increase in the use of that NWP because most DA permits include conditions requiring removal of authorized activities if they are no longer being used for their intended purposes. The modification of NWP 11 will result in additional NWP authorizations to cover barge fleeting activities that did not qualify for NWP 11 because the U.S. Coast Guard does not establish those areas. the maintenance of bank stabilization activities in NWP 13 will shift some NWP 3 authorizations to NWP 13. For bulkheads authorized by NWP 13, the 1,000 linear foot cap for waivers of the 500 linear foot limit will result in approximately 10 bulkheads per year requiring individual permits. The addition of stream barbs to NWP 13 is also expected to result in a slight increase in the use of that NWP, with fewer standard individual permits being required.

Table 3.1. Summary table of proposed changes. See Appendix A for more detail.

Nationwide permit	Estimated changes in annual number of NWP PCNs submitted	Estimated changes in annual number of NWP authorizations	Estimated changes in annual number of SIP authorizations
NWP 3 – Maintenance	-50	-325	-25
NWP 9 – Structures in fleeting and anchorage areas	0	+200	0
NWP 13 – Bank stabilization	-10	+350	0
NWP 21 – Surface coal mining activities	-5	-5	+5
NWP 33 – Temporary construction, access, and dewatering	-210	0	0
NWP 41 – Reshaping existing drainage ditches	-51	0	0
NWP 43 – Stormwater management activities	+20	+20	-20
NWP 45 – Repair of uplands damaged by discrete events	+25	+25	-25
NWP 48 – Commercial shellfish aquaculture activities	-50	0	0
NWP 51 – Land-based renewable energy generation facilities	-3	0	0
NWP 52 – Water-based renewable energy generation pilot projects	+2	+2	-2
NWP 53 – Removal of low-head dams	+25	+25	-25
NWP 54 – Living shorelines	+200	+200	-200
GC 16 – Wild and scenic rivers	+5	0	0
GC 31 – Activities affecting structures or works built by the United States	+20	0	0
Totals	**-82**	**-492**	**-292**

The modification of NWP 33 to remove the PCN requirement for temporary construction, access, and dewatering activities in Clean Water Act Section 404-only waters is expected to result in a decrease in the numbers of NWP 33 PCNs submitted each year. We are also removing the PCN requirement for NWP 41, which will also result in a decrease in the number of PCNs submitted each year. The modification of NWP 43 to authorize construction and maintenance of pollutant reduction green infrastructure features designed to reduce inputs of sediments, nutrients, and other pollutants into waters to meet reduction targets established under Total Daily Maximum Loads set under the Clean Water Act will result in an increase in NWP PCNs and NWP authorizations. Allowing district engineers to waive the 2-year deadline for requesting NWP 45 authorization to repair uplands damaged as a result of a storm or other discrete event is anticipated to shift a small number of activities from standard individual

permit authorization to NWP authorization each year, because large storms that would delay the ability to submit more timely PCNs are relatively rare. The removal of the PCN threshold for commercial shellfish aquaculture activities involving dredge harvesting, harrowing, and tilling in areas inhabited by submerged aquatic vegetation is expected to result in a relatively small decrease in PCNs submitted each year, because many NWP 48 activities in submerged aquatic vegetation will still require PCNs because they might affect Endangered Species Act listed species and designated critical habitat. The modification of the PCN threshold for NWP 51 will decrease the number of PCNs received each year. The changes to NWP 52 to include floating solar panels and wave energy devices is likely to result in a small shift in standard individual permit authorizations to NWP authorizations because these pilot projects will be relatively rare.

The two new NWPs are expected to decrease the numbers of standard individual permit applications processed by Corps districts each year for these activities because of the availability of these NWPs if they are issued. The revisions to clarify general condition 16 for NWP activities in Wild and Scenic Rivers or designated study rivers is anticipated to result in a small increase in PCNs each year. The new general condition 31, which addresses NWP activities that affect structures or works built by the United States will result in additional PCNs submitted to Corps districts each year.

4.0 Cost Estimates

Compliance costs are those costs incurred by regulated entities to comply with the permit requirements of Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. Compliance costs can be divided into two categories: (1) the direct costs to apply for a standard individual permit or request an NWP verification from the Corps, and (2) indirect (opportunity) costs. Direct costs reflect the out-of-pocket expenses necessary to complete permit applications (or prepare NWP PCNs or voluntary requests for NWP verifications) and comply with permit conditions, including any compensatory mitigation that might be required by the district engineer. For standard individual permits, compensatory mitigation may be required by the district engineer to offset significant resource losses (see 33 CFR 320.4(r)(2)). For activities authorized by NWPs, compensatory mitigation may be required by the district engineer to ensure the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.1(e)(3) and general condition 23).

The indirect costs of DA permitting represent other compliance costs that might not be reflected in out-of-pocket expenses. These include the costs associated with the length of time it takes to obtain standard individual permits or NWP verifications. They also include development profits that are not realized because the project proponent is required to redesign his or her project to minimize impacts to jurisdictional waters or wetlands or set aside land for compensatory mitigation.

Our assessment of compliance costs focuses primarily on the direct costs. While we recognize the importance of indirect costs, it is difficult to estimate those costs. Instead of attempting to quantify indirect costs, we provide a surrogate measure of indirect costs by examining the amount of time it takes to obtain either a standard individual permit or NWP verification under the alternatives examined in this RIA. Because of the challenges associated with quantitatively estimating those indirect costs, we do not attempt to analyze the indirect costs associated with the redesign of regulated activities to avoid and minimize impacts to jurisdictional waters and wetlands or loss in profits due to compensatory mitigation requirements.

The direct compliance costs were estimated by using two previous studies that examined the compliance costs associated with the NWP Program: the 2001 cost analysis for the 2000 NWPs conducted by the Institute for Water Resources (IWR 2001) and the Sunding-Zilberman (2002) study. The compliance costs estimated by these two studies were adjusted for inflation from 1999$ to 2015$ by using the Consumer Price Index (CPI-U).

We used the permitting change analysis discussed in Section 3.0 to calculate the changes in permitting that would result from two alternatives: (a) reissuing the 2012 NWPs with no changes and, (b) issuing the 2017 NWPs. The baseline was the use of standard individual permits to authorize activities that require Department of the Army authorization that were previously authorized by NWP. The reported NWP activities include activities that required PCNs and activities where the project proponent requested a written NWP verification from the Corps district even though he or she was not required to submit a PCN.

4.1 Compliance Costs

4.1.1 Direct Compliance Costs

Many of the NWPs require project proponents to notify the appropriate Corps district before conducting the NWP activity, to provide the district engineer with an opportunity to review the proposed NWP activity and determine whether it complies with all applicable terms and conditions, including regional conditions. In many cases where PCNs are not required, project proponents voluntarily seek confirmation from Corps districts that their proposed NWP activities qualify for NWP authorization (voluntary PCNs). For the NWPs, the direct compliance costs are the costs required to prepare a PCN (required or voluntary). Table 4.1 summarizes the components of an NWP PCN and a standard individual permit application and the estimated range of costs. Table 4.1 is adapted from the cost analysis on the 2000 NWPs prepared by the Institute for Water Resources (2001) and the total permit costs are adjusted for inflation to 2015$ using the CPI-U).

Table 4.1 Estimated direct compliance costs, by permit type (does not include costs to implement compensatory mitigation, if required by district engineer) (from IWR (2001)).

Application Component	NWP PCN	SIP application (impacts up to 3 acres)
Delineation and survey of special aquatic sites	Cost depends on project area and the total length of impact areas. (Assumed 20-30 acre project site in 2001 study.) Engineering survey of impact areas (if required) would impose added costs.	Cost depends on project site area and length of impact areas. (Assumed 20-30 acre project site in 2001 study.) Engineering survey of impact areas (if required) would impose added costs.
Project/Impact Drawings	Prepare detailed plan views and cross sections (Cost depends on number of separate impact areas).	Prepare detailed plan views and cross sections (Cost depends on number of separate impact areas).
Alternatives Analysis	Discussion of on-site alternatives, e.g. site layout designs and engineering opportunities to avoid and minimize impacts.	On- and off-site alternatives analysis. Cost can be much higher for controversial projects.
Mitigation Proposal	Mitigation statement or conceptual mitigation plan if the project proponent needs to do mitigation to ensure no more than minimal adverse environmental effects. May also propose use of mitigation bank credits or in-lieu fee program credits, if available.	Mitigation statement or conceptual mitigation plan if the project proponent needs to do mitigation to ensure no more than minimal adverse environmental effects. May also propose use of mitigation bank credits or in-lieu fee program credits, if available
Application Submission	Cost to complete application that includes all PCN requirements.	Cost to complete application that includes all requirements.
Total Permit Cost for a Typical Project	**$4,308 to $14,358**	**$17,230 to $34,460**

Table 4.2 summarizes the direct compliance costs for the baseline (SIPs required for activities that were authorized by the 2012 NWPs) and two alternatives. Alternative 1 is the reissuance of the 2012 NWPs. Alternative 2 is the issuance of the 2017 NWPs. The low estimated annual compliance costs are based on the high end of the range of direct compliance costs estimated by the IWR (2001) cost analysis. The high estimated annual compliance costs are based on the direct compliance costs estimated by Sunding and Zilberman (2002, page 74) for a median impact acreage. Sunding and Zilberman (2002) calculated direct compliance costs for standard individual permits and NWPs by using a formula that takes into account a base cost plus a cost per acre of waters of the United States impacted. To determine the median impact acreage, we

used ORM2 data for authorized impacts for standard individual permits and NWPs issued between 2010 to 2014. The median acreage of authorized impact for standard individual permits during that time period was 1.47 acres. The median acreage of authorized impact for NWP verifications issued during 2010 to 2014 was 0.028 acre. These median impact acreages are provided in the third column of Table 5.2 for the purpose of applying the formula developed by Sunding and Zilberman (2002) and calculating the higher end of the direct compliance cost range.

Table 4.2. Direct compliance costs for the baseline and the two alternatives.

Scenario	Number of reported activities per year	2010 – 2014 median acreage impact	Unit costs from Corps' 2001 NWP analysis (2015$)	Unit costs from 2002 SZ study (2015$)	Estimated annual compliance costs (2015$ millions) Low	Estimated annual compliance costs (2015$ millions) High
Baseline. Process standard individual permits instead of issuing the 2017 NWPs	49,838* (all PCNs and non-PCN activities require SIPs)	1.47	$34,460	$62,728 plus $16,939 per acre impacted	$1,717	$4,367
Alternative 1. Current (2012) NWPs plus activities requiring SIPs that would be covered under proposed 2017 NWPs	31,555 PCNs and voluntarily reported activities plus 292 SIPs				$463	$802
Alternative 2. Issue the 2017 NWPs	31,448 PCNs and voluntarily reported activities plus 5 surface coal mining activities and 10 bulkheads that will require SIPs	0.028	$14,358	$24,221 plus $13,332 per acre impacted	$452	$775

* Linear projects that were authorized by NWPs 12 and 14 were counted by Corps permit number. If a linear project is authorized by a standard individual permit, there is one Corps permit number in ORM2 for that linear project. Under the NWPs, each separate and distant crossing of waters of the United States for a linear project is authorized by an NWP 12 or 14, and all those NWP authorizations are recorded in ORM2 under a single Corps permit number for that linear project. In other words, for the purposes of Alternative 2, each linear project that was authorized by the 2012 NWPs (regardless of how many separate and distant crossings were authorized) is represented by a standard individual permit.

For the baseline, we used the median SIP authorized impact of 1.47 acres because not reissuing the 2012 NWPs or not issuing the 2017 NWPs would likely eliminate incentives for project proponents to redesign their projects to qualify for the streamlined NWP authorization. This is likely to occur for activities subject to the 1/2-acre limit in NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. In the absence of the NWPs, project proponents may design larger projects with

potentially greater impacts to jurisdictional waters and wetlands to offset opportunity costs associated with the standard individual permit process.

Under Alternative 1, the low estimated annual compliance costs would be reduced by $1,254 million per year compared to the baseline. The high estimated annual compliance costs would decrease by $3,564 million per year. Under Alternative 2, compared to the baseline the low end estimated annual compliance costs would decrease by $1,265 million per year, and the high end estimated annual compliance costs would decrease by $3,593 million per year.

4.1.2 Indirect Costs

The indirect costs of complying with the permit requirements of Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 largely represent opportunity costs that are not necessarily reflected in out-of-pocket expenses. Opportunity costs include permitting time costs and any development values missed because of the requirements in the Corps' regulations to avoid and minimize impacts to jurisdictional waters and wetlands to the maximum extent practicable, and take other mitigation actions, such as on-site compensatory mitigation. Project proponents that use the NWPs accept some opportunity costs when they design their projects to qualify for the terms and conditions of the NWPs. Compared to the IWR (2001) cost analysis, indirect costs of on-site compensatory mitigation are expect to be less for the 2017 NWPs because of the regulatory preference for off-site third party mitigation (i.e., mitigation banks and in-lieu fee programs) established in the Corps' 2008 mitigation regulation (see 33 CFR 332.3(b)). The IWR (2001) cost analysis examined on-site compensatory mitigation as an opportunity cost.

The 2017 NWPs are not expected to increase the indirect costs of permitting because more activities would be authorized by NWPs comparable to the 2012 NWPs. While we recognize the importance of incremental indirect costs, estimation of these costs is complicated by a variety of factors, such as regional differences in economic settings, land values, and aquatic resource abundance and distribution. Indirect costs may also be affected by the presence or absence of state and local government programs that regulate impacts to aquatic resources. Indirect costs may also be affected by other factors. The data and level of analysis needed to adequately assess indirect costs are beyond the time and resources available for this RIA.

As an alternative to a direct approach to estimating indirect costs, we examine whether the alternatives considered in this RIA would affect permitting times. The presumption is that longer permitting times will result in greater opportunity costs. In other words, the opportunity costs result from delays in project implementation caused by the time it takes to receive a standard individual permit or an NWP verification from the Corps.

Permitting times can be represented in two ways: (1) the time it takes the Corps to make a permit decision after it receives a complete standard individual permit application or NWP PCN (required or voluntary), or (2) the time it takes the Corps to make a permit decision after it receives a standard individual permit application or NWP PCN (required or voluntary) from the

project proponent. The latter approach better represents the project proponent's perspective of permitting time.

The evaluation days are the number of days between the date a complete standard individual permit application or NWP verification request is received by the Corps district and the date the standard individual permit decision is made or the date the NWP verification letter is issued. The information necessary for a complete standard individual permit application is described at 33 CFR 325.1(d). When the Corps district first receives a standard individual permit application or NWP PCN (required or voluntary), the Corps district staff reviews the application or NWP verification request and determines whether it contains the required information to be a complete application or NWP verification request. The information necessary for a complete NWP PCN is described in paragraph (b) of general condition 32. Application days are the number of days between the date of initial receipt of an SIP application or NWP PCN and the date the SIP or NWP verification letter is issued.

Once the Corps district receives the information necessary to make the application or verification request complete, it will begin its evaluation of the proposed activity. If it is an individual permit application, when a complete application is received the Corps district issues a public notice to solicit comment on the proposed activity that requires Department of the Army authorization. If it is an NWP PCN and the proposed NWP activity requires agency coordination (see paragraph (d) of general condition 32), the Corps district immediately sends copies of the PCN to the U.S. Fish and Wildlife Service, state natural resource or water quality agency, and EPA, and, if appropriate, the National Marine Fisheries Service. Those agencies have no more than 25 days to submit substantive, site-specific comments to the district engineer explaining why the agency believes the adverse environmental effects will be more than minimal.

Table 4.3 compares Alternatives 1 and 2 to the baseline, in terms of the total number of days each year it would take the Corps to make decisions on standard individual permit applications or NWP PCNs. Table 4.3 examines both evaluation days (days to decision on a complete standard individual permit application or required or voluntary NWP PCN) and application days (days to decision on a submitted standard individual permit application or required or voluntary NWP PCN). The comparison to the baseline for each alternative indicates a substantial decrease in opportunity costs, based on the assumption that the mean processing times would not change under either alternative. The comparisons in Table 4.3 are for illustrative purposes, to show the differences in opportunity costs between the two alternatives. The calculations presented in Table 4.3 do not take into account the probable increases in evaluation days or application days likely to result from backlogs of standard individual permit applications caused by the significant increase in those standard individual permit applications if the baseline were implemented instead of reissuing the 2012 NWPs or issuing the 2017 NWPs.

Table 4.3. Evaluation Days and Application Days for the Alternatives Compared to the Baseline (opportunity costs quantified in days). Total evaluation days and application days based on the mean processing times for NWP verification requests and standard individual permits for FY 2015 (from Table 1.2). This table only includes changes in the numbers of standard individual permits processed each year under the various scenarios (the baseline and two alternatives. This table does not include the 1,694 standard individual permits issued in FY 2015) for other activities.

Scenario	Number of NWPs PCNs per year	Number of SIPs per year	Total Evaluation Days per Year	Annual Difference from Baseline (Days)	Total Application Days per Year	Annual Difference from Baseline (Days)
Baseline: SIPs instead of NWPs	0	49,838	10,516,000		14,503,000	
Alternative 1 – 2012 NWPs	31,555	292	1,355,000	-9,161,000	2,799,000	-11,704,000
Alternative 2 – 2017 NWPs	31,448	15	1,293,000	-9,223,000	2,709,000	-11,794,000

Both Alternative 1 (i.e., the 2012 NWPs) and Alternative 2 (i.e., the 2017 NWPs) are expected to result in substantial decrease in both total evaluation days per year and total application days per year, with the largest decrease under Alternative 2. Therefore, opportunity costs will be slightly greater under Alternative 1 compared to Alternative 2. Alternative 2 would slightly decrease opportunity costs because of the lower amount of time required to reach permit decisions.

4.2 Administrative Costs

The Corps incurs administrative costs when it processes required or voluntary NWP PCNs or standard individual permit applications. Administrative costs vary by permit type, as well as the type of activity requiring Department of the Army authorization and the complexity of those activities. All other factors being equal, the 2017 NWPs would affect the Corps administrative costs by changing the total number of NWP PCNs and standard individual permits applications received, and the relative proportions of those NWP PCNs and standard individual permit applications.

To estimate the changes in Corps administrative costs for the two alternatives relative to the baseline, we used the administrative costs calculated in the Institute for Water Resource's cost analysis for the 2000 NWPs (IWR 2001) and adjusted those costs for inflation to 2015$ using the CPI-U. In the IWR (2001) cost analysis, the average administrative costs to the Corps were

estimated to be $1,492 per standard individual permit and $389 per NWP PCN (required or voluntary). Adjusted to account for inflation as 2015$, the Corps' administrative costs would be $2,142 per standard individual permit application and $559 per NWP PCN. These administrative costs do not include the costs associated with reviewing and approving a compensatory mitigation plan that fulfills the requirements in 33 CFR 332.4(c). During the period of 2010 to 2014, compensatory mitigation was required for approximately 11 percent of verified NWP activities and approximately 49 percent of activities authorized by standard individual permits (IWR 2015).

Table 4.4 provides estimates of the Corps' administrative costs for the baseline and the two alternatives examined in this RIA.

Table 4.4 Estimate of annual Corps administrative costs for implementing the 2012 NWPs and the two alternatives. This table only includes changes in the numbers of standard individual permits processed each year under the various scenarios (the baseline and two alternatives). This table does not include the 1,694 standard individual permits issued in FY 2015 for other activities.

Scenario	Number of NWP PCNs (required and voluntary) processed by the Corps each year	Number of standard individual permits processed by the Corps each year	Administrative costs incurred by the Corps each year (millions 2015$)	Difference from the baseline (millions 2015$)
Baseline: SIPs instead of NWPs	0	49,838	$106.8	
Alternative 1 – 2012 NWPs	31,555	292	$18.3	-$88.5
Alternative 2 – 2017 NWPs	31,448	15	$17.6	-$89.2

Compared to the baseline, Alternative 1 would reduce the administrative costs by approximately $88,500,000 per year. Under Alternative 2, the Corps' administrative costs would decrease by $89,200,000 per year relative to the baseline.

5.0 Benefit-Cost Analyses

5.1 Introduction

One of the benefits of the NWP Program is that the NWPs encourage project proponents that conduct activities that require Department of the Army (DA) authorization to avoid and minimize impacts to jurisdictional waters and wetlands to qualify for NWPs instead of applying for standard individual permits with potentially higher proposed impacts to jurisdictional waters and wetlands. Project proponents requiring DA authorization benefit from the NWP Program because it allows them to obtain the required authorizations in much less time than it takes to complete the standard individual permit process. In addition, as explained above, there are lower compliance costs associated with the NWPs than with standard individual permits.

Table 5.1 provides data from the most recent wetlands status and trends report published by the U.S. Fish and Wildlife Service.

Table 5.1. Estimated aquatic resource acreages in the conterminous United States in 2009 (Dahl 2011).

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

Leopold, Wolman, and Miller (1964) estimated that there are approximately 3,250,000 miles of river and stream channels in the United States. This estimate is based on an analysis of 1:24,000 scale topographic maps. Their estimate does not include many small streams. Many small streams, especially headwater streams, are not mapped on 1:24,000 scale U.S. Geological

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

The quantities of the Nation's aquatic resources presented by these studies are underestimates, because these national inventories do not include many small wetlands and streams. The U.S. Fish and Wildlife Service's status and trends study does not include Alaska, Hawaii, or the territories. The underestimate of national wetland acreage by the USFWS status and trends study and the National Wetland Inventory is primarily the result of the minimum size of wetlands detected through remote sensing techniques and the difficulty of identifying certain wetland types through those remote sensing techniques. The remote sensing approaches used by the U.S. Fish and Wildlife Service for its National Wetland Inventory maps and its status and trends reports result in errors of omission that exclude wetlands that are difficult to identify through photointerpretation (Tiner 1997a). These errors of omission are due to wetland type and the size of target mapping units (Tiner 1997a). Therefore, it is important to understand the limitations of the source data when describing the environmental baseline for wetlands using maps and studies produced by remote sensing, especially in terms of wetland quantity, and making inferences from those inventories.

Factors affecting the accuracy of wetland maps made by remote sensing include: the degree of difficulty in identifying a wetland, map scale, the quality and scale of the source information (e.g., aerial or satellite photos), the environmental conditions when the source information was obtained, the time of year source information was obtained, the mapping equipment, and the skills of the people producing the maps (Tiner 1999). The map scale usually affects the target mapping unit, which is the minimum wetland size that can be consistently mapped (Tiner 1997b). In general, wetland types that are difficult to identify through field investigations are likely to be underrepresented in maps made by remote sensing (Tiner 1999). Wetlands difficult

to identify through remote sensing include forested wetlands, small wetlands, narrow wetlands, mowed wetlands, farmed wetlands, wetlands with hydrology at the drier end of the wetland hydrology continuum, and significantly drained wetlands (Tiner 1999). In the most recent wetland status and trends report published by the U.S. Fish and Wildlife Service, the target minimum wetland mapping unit was 1 acre, although some easily identified wetlands as small as 0.1 acre were identified in that effort (Dahl 2011). The National Wetland Inventory identifies wetlands regardless of their jurisdictional status under the Clean Water Act (Tiner 1997b).

Another important consideration for determining whether the activities authorized by NWPs result in no more than minimal adverse environmental effects is the condition of the waters and wetlands that might be affected by NWP activities and activities authorized by other types of DA permits. A wide variety of activities affect the quantity and quality of aquatic resource, such as changes in land use and land cover, introductions of alien species, overexploitation of species, pollution, eutrophication due to excess nutrients, resource extraction, water withdrawals, climate change, and various natural disturbances (MEA 2005). The USFWS status and trends study does not assess the condition or quality of wetlands and deepwater habitats (Dahl 2011). Information on water quality in waters and wetlands, as well as the causes of water quality impairment, is collected by the U.S. EPA under sections 305(b) and 303(d) of the Clean Water Act. Table 5.2 provides U.S. EPA's most recent national summary of water quality in the Nation's waters and wetlands (EPA 2015).

Table 5.2. National summary of water quality data (U.S. EPA 2015).

Category of water	Total waters	Total waters assessed	Percent of waters assessed	Good waters	Threatened waters	Impaired waters
Rivers and streams	3,533,205 miles	1,046,621 miles	29.6	476,765 miles	7,657 miles	562,198 miles
Lakes, reservoirs and ponds	41,666,049 acres	17,904,395 acres	43.0	5,658,789 acres	145,572 acres	12,100,034 acres
Bays and estuaries	87,791 square miles	33,402 square miles	38.0	7,291 square miles	0 square miles	26,111 square miles
Coastal shoreline	58,618 miles	8,162 miles	13.9	900 miles	0 miles	7,262 miles
Ocean and near coastal waters	54,120 square miles	1,674 square miles	3.1	616 square miles	0 square miles	1,058 square miles
Wetlands	107,700,000 acres	1,112,438 acres	1.0	573,947 acres	0 acres	538,492 acres
Great Lakes shoreline	5,202 miles	4,431 miles	85.2	78 miles	0 miles	4,353 miles
Great Lakes open waters	60,546 square miles	53,332 square miles	88.1	62 square miles	0 square miles	53,270 square miles

According to the latest U.S. EPA national summary (U.S. EPA 2015), 54% of assessed rivers and streams, 68% of assessed lakes, reservoirs, and ponds, 78% of assessed bays and estuaries, 89% of assessed coastal shoreline, 63% of assessed ocean and near coastal waters, and 48% of assessed wetlands are impaired.

Activities authorized by the 2017 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 National Wetland Inventory maps for a particular region. Appendix 2 contains estimates of the projected annual impacts to jurisdictional waters and wetlands expected to occur under the 2017 NWPs. The estimated annual impacts that would be authorized by all 52 NWPs is approximately 20,300 acres per year. If NWPs 27 and 48 are excluded, the estimated annual impacts to waters and wetlands is approximately 5,500 acres per year. NWP 27 authorizes aquatic resources restoration, enhancement, and establishment activities and those activities must result in net gains in aquatic resource functions and services. The commercial shellfish aquaculture activities authorized by NWP 48 do not result in losses of jurisdictional waters and wetlands and the areas affected by these aquaculture activities continue to provide important ecological functions and services because they are production ecosystems.

The impacts provided in Appendix 2 include both permanent and temporary impacts and permanent impacts do not necessarily result in a loss of jurisdictional waters and wetlands

because many activities authorized by NWPs do not convert waters and wetlands to uplands or built structures. Therefore, actual losses of waters and wetlands resulting from the activities authorized by the 2017 NWPs will be smaller than the estimates provided above. When considering these estimated annual impacts in the context of the baseline quantity of the Nation's aquatic resources, it is important to remember that the inventories cited above do not include all of those aquatic resources because many headwater streams and many wetlands of various sizes and types are not included in these inventories because of mapping limitations. Another important consideration is that the impacts to jurisdictional waters and wetlands authorized by NWPs are scattered across the country (which is 2,264,000,000 acres in size) as small, discrete impacts throughout the country. Cumulative impacts are more effectively considered at smaller geographic scales, such as watersheds, ecoregions, counties, states, or Corps districts.

The NWPs provide an important benefit by encouraging project proponents to minimize impacts to jurisdictional waters and wetlands to qualify for NWP authorization so that they can receive the required DA authorization. As shown in Table 1.2, the mean time to receive a permit decision from the Corps after submitting an NWP PCN or an individual permit application is 86 days and 291 days, respectively.

To demonstrate the benefits in aquatic resource protection provided through the minimization done to qualify for NWP authorization, we examine the median authorized impact for activities authorized by the NWPs with 1/2-acre limits (i.e., NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52), versus the median authorized impact for activities authorized by standard individual permits. We did not include NWP 14 because it has a 1/2-acre limit for losses of non-tidal waters and a 1/3-acre limit for losses of tidal waters. We did not include the NWPs without acreage limits because those NWPs are either self-limiting by the nature of the authorized activity (e.g., single non-commercial mooring buoy authorized by NWP 10) or they authorized activities with net environmental benefits (e.g., NWP 27 activities that restore wetlands and streams). As stated in section 4.1, during the period of 2010 to 2014 the median authorized fill impact for standard individual permits was 1.47 acre. During that same time period, the median authorized fill impact for NWPs 21(b), 29, 39, 40, 42, 43, 44, 50, 51, and 52 was 0.09 acre. NWP 21, which authorizes discharges of dredged of fill material into waters of the United States associated with surface coal mining activities was limited in this analysis to NWP 21(b) activities authorized under the 2012 NWPs because NWP 21(b) has a 1/2-acre limit. Surface coal mining activities previously authorized under the 2007 NWP 21 could be reauthorized under the 2012 NWP 21(a) without an acreage limit as long as there was no increase in impacts to waters of the United States. There were only approximately 7 NWP 21(b) activities authorized each year, and we expect that trend to continue with the 2017 NWP 21. We acknowledge that this approach overestimates the impacts to jurisdictional waters and wetlands that might occur if the NWPs are not reissued and project proponents would have to obtain Department of the Army authorization through the standard individual permit process, which has no acreage limits. But it is difficult to predict what permit applicants might propose in terms of impacts to jurisdictional waters and wetlands if the NWPs are not available to provide incentives for regulated entities to avoid and minimize impacts to jurisdictional waters and wetlands to obtain

NWP authorization. Potential compensatory mitigation requirements can also drive additional avoidance and minimization because project proponents often seek ways to reduce overall project costs, and compensatory mitigation requirements impose additional costs on project proponents.

If the NWPs are not reissued, we expect that many project proponents would apply for standard individual permits with higher proposed impacts to jurisdictional waters and wetlands. They are likely to do this because they will have lost the time savings associated with NWP authorizations, and they may propose larger projects to minimize their opportunity costs. If NWPs 21(b), 29, 39, 40, 42, 43, 44, 50, 51, and 52 are not reissued, and if project proponents conducting these types of activities are required to apply for standard individual permits, we estimate that the impacts to jurisdictional waters and wetlands would potentially be 2,831 acres per year (1,926 activities per year times 1.47 acres). This estimate does not take into account activity-specific avoidance and minimization that would be required by the district engineers when he or she evaluates the standard individual permit application. It is not possible to take activity-specific factors into account when doing a national-scale analysis. If the 2017 NWPs are reissued, the activities authorized by NWPs 21 (the 2012 NWP 21(b) is proposed to become the 2017 NWP 21), 29, 39, 40, 42, 43, 44, 50, 51, and 52 would be estimated to impact 173 acres of jurisdictional waters and wetlands each year (1,926 activities per year times the median impact acreage of 0.09 acre for those NWPs).

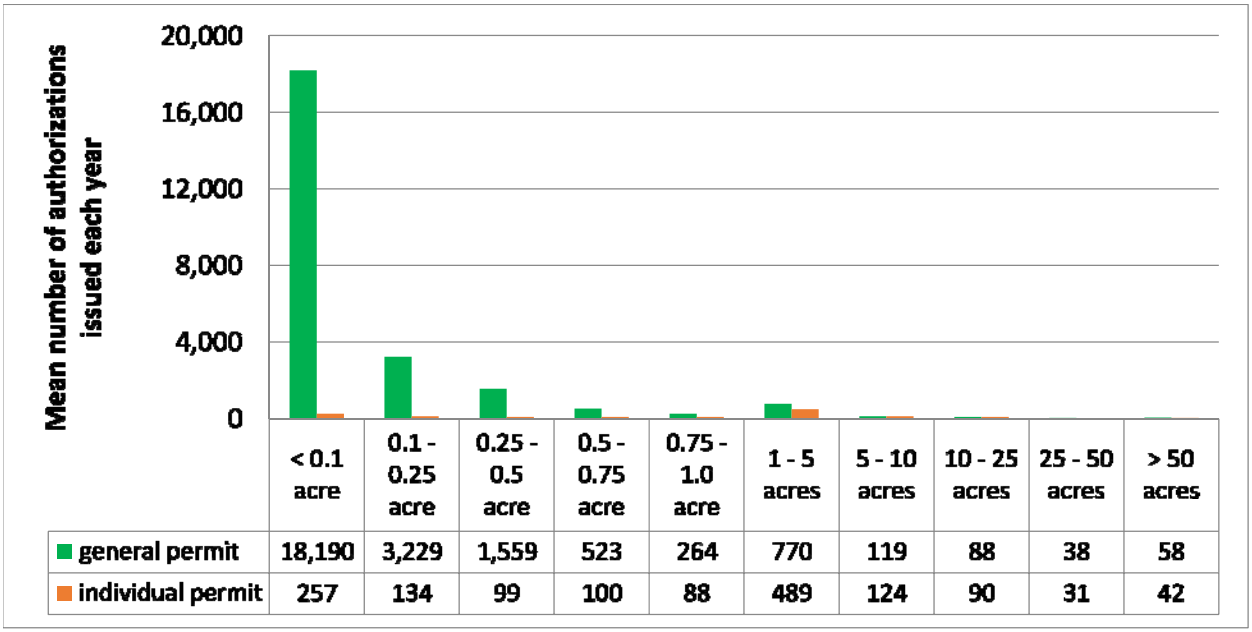
Not reissuing NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 would likely result in greater annual acreages of authorized impacts to jurisdictional waters and wetlands because standard individual permits have no acreages limits. The acreage of authorized impacts for standard individual permits is the result of project-specific analyses that are required for standard individual permits, including the avoidance, minimization, and compensatory mitigation requirements driven by 33 CFR part 320.4(r) and the 404(b)(1) Guidelines. If the district engineer determines compensatory mitigation is required for the standard individual permit, the permittee must also comply with the applicable requirements in 33 CFR part 332. Given the uncertainty in potential authorized impact acreages resulting from the issuance of standard individual permits if the NWPs are not reissued, it is not possible to estimate what mean annual increase in acreage impacts to jurisdictional waters and wetlands would result if the NWPs are no longer available. These calculations demonstrate some of the benefits the NWPs provide in terms of protecting the functions and services provided by the Nation's wetlands, streams, and other types of aquatic ecosystems while allowing certain types of economic development that provides other important services to our nation's citizens.

This analysis focuses on avoidance and minimization because compensatory mitigation is only considered after all appropriate and practicable avoidance and minimization to jurisdictional waters and wetlands has been achieved. Paragraph (a) of general condition 23 requires project proponents to avoid and minimize impacts (both permanent and temporary) to jurisdictional waters and wetlands to the maximum extent practicable at the project site. For the NWPs, compensatory mitigation is only required for a specific NWP activity when it is determined by the district engineer to be necessary to comply with the "no more than minimal adverse

environmental effects" requirement (see 33 CFR 330.1(e)(3)). The majority of activities verified by district engineers as qualifying for NWP authorization do not require compensatory mitigation because the district engineer determined when reviewing the PCN that those activities result in no more than minimal individual and cumulative adverse environmental effects after considering the factors in paragraph 2 of section D, District Engineer's Decision.

Figure 5.1 provides additional evidence that permit applicants design their projects to minimize the impacts of regulated activities in jurisdictional waters and wetlands to qualify for general permit authorization. The acreage of authorized impacts includes both permanent and temporary impacts. The vast majority of authorized impacts are less than 1/10-acre, below the 1/10-acre threshold in paragraph (c) of general condition 23 for requiring compensatory mitigation for wetland losses. The larger impacts authorized by NWP shown in Figure 5.1 are due to the use of NWPs that have no acreage limits, especially NWPs 27, 38, and 48. Nationwide permit 27 authorizes aquatic resource restoration, establishment, and enhancement activities. Nationwide permit 38 authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States for the cleanup of hazardous and toxic waste. Nationwide permit 48 authorizes activities regulated under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899 associated with commercial shellfish aquaculture activities. Activities authorized by NWPs 27 result in environmental improvements by providing net increases in aquatic resource functions and services. Activities authorized by NWP 38 improve the environment by removing or remediating hazardous and toxic substances. Nationwide permit 48 activities increase local shellfish populations in coastal waters, which provide a variety of ecosystem functions and services. In coastal waters inhabited by eelgrass and other types of submerged aquatic vegetation, there is some competition for space by shellfish and seagrasses, but those organisms generally co-exist in robust populations (Dumbauld and McCoy 2015).

Figure 5.1 Authorized impacts to jurisdictional waters and wetlands, in acreage range categories (2010 to 2014).



	< 0.1 acre	0.1 - 0.25 acre	0.25 - 0.5 acre	0.5 - 0.75 acre	0.75 - 1.0 acre	1 - 5 acres	5 - 10 acres	10 - 25 acres	25 - 50 acres	> 50 acres
general permit	18,190	3,229	1,559	523	264	770	119	88	38	58
individual permit	257	134	99	100	88	489	124	90	31	42

In the remainder of this section, we provide a qualitative benefit-cost analysis. We use a qualitative approach because of the substantial challenges of doing a quantitative benefit-cost analysis for the aquatic resources potentially affected by activities authorized by the new and modified NWPs. While the removal of low-head dams authorized by the NWP 53 will result in some increases in riverine and riparian functions and services, the projected increase is difficult to estimate because the functions and services provided by rivers and streams are strongly influenced by the condition of their watersheds (e.g., Allan 2004) and full ecological recovery is generally not expected after low-head dam removal (Doyle et al. 2005) because of changes to the watershed that occurred after the low-head dam was constructed. The activities authorized by NWP 54 for the construction and maintenance of living shorelines are expected to provide some ecological functions and services, living shorelines do not provide functions and services at the same level as natural fringe wetlands, vegetated shallows, and other intertidal and subtidal habitats (NRC 2007).

We are providing a brief qualitative benefit-cost analysis for the two new NWPs. If issued, these NWPs will authorize activities that were usually authorized by standard individual permits. Some Corps districts may have regional general permits that authorize these activities.

5.2 New NWP 53 – Removal of Low-Head Dams

5.2.1 Baseline

There are approximately 1,000,000 (Allan and Castillo 2007) to 2,000,000 (Graf 1993) small dams in the United States, an undetermined percentage of which are low-head dams (Tschantz and Wright 2011). Most rivers in the continental United States are altered by dams of various sizes, and the characteristics of those dams vary widely in terms of their size, purpose, and how they operate (Allan and Castillo 2007). Most low-head dams were constructed across rivers to increase the water level to provide water for towns and cities, and industries (Tschantz and Wright 2011). Many of those low-head dams were built in the 19th century, and have deteriorated or been abandoned (Tschantz and Wright 2011, Tschantz 2014). Most small dams are likely to be in need of repair or have been abandoned (Poff and Hart 2002). As of 1995, the average age of dams in the United States was 40 years, and many need to be repaired for public safety reasons (Shuman 1995).

Dams can be classified in a functional perspective as storage dams or run-of-the-river dams (Poff and Hart 2002). Storage dams have large hydraulic heads and storage volumes, long hydraulic residence times, and strong controls over water releases from the dam (Poff and Hart 2002). Run-of-the-river dams have small hydraulic heads and storage volumes, short residence times, and there is little or no control of the rate at which water is released from these dams (Poff and Hart 2002). Low-head dams are a category of run-of-the river dams and they have small storage capacities (Tschantz and Wright 2011, Csiki and Rhoads 2014).

Dams adversely affect river and stream functions by altering riverine hydrologic, sediment transport, and nutrient cycling processes, changing the structure and dynamics of riverine and riparian habitats, changing water temperatures, and posing barriers to movements of organisms and nutrients (Poff and Hart 2002, Allan and Castillo 2007). Dams also affect the flooding regimes of rivers and streams, and alter the ecological processes that occur in floodplains, adversely affecting species that relying on that periodic flooding (Allan and Castillo 2007). Removing dam structures can reverse their impacts to a large degree and allow the affected river or stream to recover its structure and function (Bednarek 2001).

Low-head dams have little effect on peak water flows or downstream sediment transport, but they still block fish migrations (Poff and Hart 2002, Allan and Castillo 2007). Low-head dams act as barriers to movements of some, but not all, species of fish and aquatic invertebrates, especially upstream macroinvertebrates (Stanley et al. 2002). Low-head dams do not store much sediment because sediment continues to be transported past the dam structure during high flows (Fencl et al. 2015, Csiki and Rhoads 2014).

Dam removal should be viewed in its trade-offs, with some beneficial outcomes and some detrimental outcomes (Stanley and Doyle 2003, Doyle et al 2005). As of 2014, approximately 1,100 dams have been removed (East et al. 2015, Lovett 2014). Most of the dams that have

been removed to date are small dams (Lovett 2014, Stanley and Doyle 2003), although a few larger dams have been removed (e.g., East et al. 2015).

5.2.2 Benefits

The removal of low-head dams provides a number of benefits, especially the restoration of riverine functions and services, including more natural river flows, increased connectivity of the river and stream network, and the re-establishment of migratory habitats and routes for aquatic organisms. The removal of low-head dams also helps improve public safety, for the users of small craft such as canoes and kayaks, and for local residents that might be adversely affected when an old or deteriorated dam structure fails. Many dams are removed because it is more costly to repair those dams to make them compliant with current safety and environmental requirements (Lovett 2014). Low-head dams are also removed because those dams pose dangers to swimmers, kayakers, canoeists, rafters, and other users of these waterways (Tschantz and Wright 2011).

Low-head dams do not substantially alter the passage of peak flows over the dam structure or store fine sediments to which contaminants adhere (Poff and Hart 2002). During high flows, sediment from upstream of the dam structure are transported over the low-head dam, which prevents the impoundment from filling with sediment (Fencl et al. 2015, Csiki and Rhoads 2014). We are limiting this NWP to the removal of dams that have small sediment storage capacities so that sediment releases resulting from dam removal will be minor and there will only be minimal adverse effects downstream of the dam removal. Because only small amounts of sediment will be released, and low-head dams do not store finer sediment that can have contaminants adsorbed to them, downstream contaminant transport will generally not be an issue associated with the removal of these low-head dams.

Rate of recovery after dam removal is dependent on dam size, river size, channel shape, sediment volume, and grain size (O'Connor et al. 2015). After dam removal, the process of stream recovery includes bed aggradation and degradation, bar development, and floodplain development (Bushaw-Newton et al. 2002). Different riverine ecosystem attributes recover at different rates after dam removal, with macroinvertebrate populations recovering the fastest, and the reestablishment of riparian forests taking the longest time because trees take years to grow from seedlings to mature trees (Doyle et al. 2005). Migratory fish have been observed to rapidly use the increased river connectivity that is regained after the dam structure is removed (O'Connor et al. 2015, Lovett 2014). In general, after dam removal sediment is redistributed throughout the downstream segments within months (O'Connor et al. 2015). Water quality generally improves after dam removal, by restoring nutrient cycling and reducing the potential for eutrophication to occur (Born et al. 1998).

When examining the removal of a low-head dam in Wisconsin, Stanley et al. (2002) found that the river recovered rapidly after the removal of the dam structure. They observed that most of the geomorphic changes occurred in the river segment in the former impoundment, and that

within one year macroinvertebrate communities in the area that was impounded became similar to the macroinvertebrate communities found in downstream reference reaches. Stanley et al. (2002) attributed the rapid recovery of the river to the small amount of time it took channel development in the former impoundment area to occur and the small amount of sediment stored in the low-head dam.

The removal of low-head dams benefits public safety because those dams create safety hazards. Low-head dams are hazardous because they create hydraulic pumps with dangerous currents that can trap boaters and swimmers on the downstream side of the dam, causing them to drown (Tschantz and Wright 2011, Tschantz 2014). Since the 1960s, there have been hundreds of deaths caused by low-head dams (Tschantz 2014).

The removal of low-head dams provide benefits to people who favor ecosystem restoration activities, such as members of environmental groups and natural resource agencies (Born et al. 1998). The removal of these dams may also be preferred by communities and dam owners because they no longer have to pay the costs of dam repair and maintenance (Born et al. 1998). There are trade-offs associated with low-head dam removal, with gains in recreation and aesthetics values for those people who prefer free-flowing rivers versus losses in recreation and aesthetics values for those people who prefer man-made impoundments (Born et al. 1998).

5.2.3 Costs

There are some costs associated with dam removal, including low-head dam removal. There are also trade-offs in the types and amounts of ecosystem functions and services as dams are removed and the lentic habitats associated with impoundments are replaced with the lotic habitats associated with flowing rivers and streams. Other costs include the amount of time it takes the river or stream to recover after the dam structure is removed and the adverse environmental effects that occur as a result of the removal of the dam structure. Fringe wetlands that may have developed around the impoundment may be converted to non-wetland riparian areas after the dam structure is removed.

The removal of low-head dams imposes costs to citizens that use impoundments for sportfishing, where the impoundments provide habitat for fish species that prefer to live in lakes and ponds (Born et al. 1998). After the low-head dam is removed they would have to find other places to fish. The removal of those dams also impose costs on property owners who live next to those impoundments, if they prefer the aesthetics and recreational opportunities associated with these impoundments (Born et al. 1998), setting aside from the dangers created by low-head dam that are described by Tschantz and Wright (2011) and Tschantz (2014). On the other hand, people who own land next to the impoundment may gain additional riparian lands after the dam structure is removed (Born et al. 1998), and they might be able to use that land for agriculture or other purposes.

There are short-term adverse effects that result from the removal of low-head dams, but over the long term the functions and structure of rivers and streams will recover and improve (Stanley et al. 2002). Riverine functions and structure will perform at higher levels, but they are unlikely to recover to the extent that existed prior to the construction of the low-head dam because of changes to the watershed that occurred while the low-head dam was in place (Doyle et al. 2005). The ecological responses to dam removal are highly dependent on site-specific circumstances, and the trade-offs associated with a particular dam removal also vary by local site conditions (Stanley and Doyle 2003). Examples of important influences to consider are the size and configuration of the dam, geology, sediment characteristics, and the species inhabiting the affected waterbodies (Stanley and Doyle 2003). There are a number of variables that should be considered in dam removal activities, including the physical characteristics of the dam to be removed, as well as local sediment and contaminant loads, geomorphology, and hydrodynamics (Bushaw-Newton et al. 2002). Concerns about the contamination of sediments stored in the dam impoundment and their potential release during low-head dam removal activities can be addressed through the Clean Water Act section 401 water quality certification process or through sediment testing requirements imposed by the district engineer if he or she believes there is a potential sediment contamination problem.

For small dams, there is not much stored sediment and after the dam structure is removed that sediment usually moves downstream quickly (Stanley and Doyle 2003, Gregory et al. 2002). Low-head dams store little sediment because during high river or stream flows, sediment from the impounded area is transported over the dam structure, preventing the impoundment from filling with sediment (Fencl et al. 2015, Poff and Hart 2002, Csiki and Rhoads 2014).

Removal of large dams usually takes longer to recover than removal of small dams (O'Connor et al. 2015). Most river and stream geomorphic adjustments to dam removal occur within 1 to 5 years, and that rate of recovery is similar to the rate of geomorphic recovery after occurs after landslides, floods, or channelization occur in rivers (Doyle et al. 2005). The rate of ecological recovery is linked to the rate of geomorphic recovery (Doyle et al. 2005).

Not removing low-head dams and leaving them in place can pose more costs to society because riverine functions and services will continue to be impaired by those dams and the costs of repairing or replacing the dam structure to conform with current requirements and standards can be very high (Stanley and Doyle 2003). The costs of repairing or replacing the dam structure can be three times the costs of removing the dam (Born et al. 1998). When considering the costs necessary to repair or replace a dam to meet current safety standards and prevent dam failure and protect local residents and their property, removal of the dam is often the most cost-effective response to a potentially failing dam (Stanley and Doyle 2003).

5.3 New NWP 54 – Living Shorelines

5.3.1 Baseline

Twenty-nine percent of the population of the United States lives in coastal counties (U.S. Census Bureau 2010). As coastal populations increase and as sea level rises, there will be increased demand to take measures to control shore erosion, which will result in the construction of man-made features that will replace natural habitats with artificial habitats (Chapman and Underwood 2011), such as seawalls, bulkheads, revetments, and living shorelines. There are four broad approaches to addressing shore erosion in coastal areas: managing land use (primarily the responsibility of state and local governments) to prevent or minimize development near the shore, vegetative stabilization, shoreline hardening, and trapping or adding sand (NRC 2007). Landowners with waterfront property often want to protect their properties from erosion and those erosion protection measures and those activities usually require DA authorization. The Corps generally receives permit applications for erosion protection measures after the coastal areas have been developed and the property owner identifies an erosion problem (NRC 2007). In other words, the desire to implement erosion protection measures is a reactive response that occurs after the coastal area is developed. The need for bank stabilization is an indirect consequence of land use planning and zoning decisions made by local and state governments, and requests for Department of the Army permits for bank stabilization activities usually come after residential, commercial, and other types of development activities occur (NRC 2007). The Corps' regulations acknowledge that waterfront property owners have the right to protect their properties from erosion (see 33 CFR 320.4(g)(2)).

In low to medium wave energy environments, living shorelines have been promoted in the past couple of years as an alternative to more traditional shore protection measures such as bulkheads, revetments, and seawalls (e.g., NOAA and USACE 2015; Popkin 2015). Living shorelines are a category of hybrid infrastructure (a combination of natural and built or gray infrastructure) that could be a cost-effective and ecologically and economically beneficial alternative to traditional engineered shore protection measures (Sutton-Grier et al. 2015). However, some people have cautioned that living shorelines need to be carefully designed to minimize the replacement of intertidal and subtidal habitats with fills and stone structures, and to designed to continue to allow animals to utilize shoreline habitats (e.g., Pilkey et al. 2012). Bilkovic and Mitchell (2013) stated that a living shoreline constructed as marsh-sill combination can be viewed as providing net ecological benefits only if the marsh and sill are used to control erosion instead of a bulkhead or revetment, the fills to construct the marsh and sill are minimized as much as possible to reduce the loss of existing subtidal habitat, and the sill is likely to be colonized by aquatic organisms.

Living shorelines typically include fills planted with wetland grasses or shrubs and hard structures (e.g., sills, breakwaters) to protect the constructed fringe wetland (Gittman et al. 2016). Some living shorelines include reef structures that support oysters and other aquatic organisms (Popkin 2015, NOAA 2015). The construction and maintenance of living shorelines usually currently requires standard individual permits from the Corps because there are no NWPs that authorize these activities. Living shorelines do not usually qualify for NWP 13 authorization because they usually involve substantial amounts of fill in jurisdictional waters. NWP 27 is generally not used to authorize living shorelines because they involve the

construction of stone structures not naturally occurring in coastal areas (e.g., sills, breakwaters) and are not aquatic resource restoration activities (Pilkey et al. 2012). Numerous authors have suggested that use of living shorelines to protect property from erosion would facilitated if the Corps were to issue an NWP to authorize those activities so that the time and resources required for landowners to obtain DA authorization for the construction and maintenance of living shorelines would be comparable to the time and resources required for authorization of revetments, bulkheads, and other types of bank stabilization activities authorized by NWP 13 (NRC 2007).

5.3.2 Benefits

Living shorelines can be a cost-effective erosion control approach (Popkin 2015). One of the challenges to more widespread use of living shorelines for erosion protection is the length of the permitting process, because currently most living shoreline activities require standard individual permits, if they require authorization from the Corps (NOAA and USACE 2015, Popkin 2015). This new NWP would establish similar permitting processes for living shorelines (including similar amounts of time for review and approval by the Corps districts) compared to use of NWP 13 for revetments, bulkheads, vegetative stabilization, and other bank stabilization approaches. However, it should be noted that in urban areas, there might not be sufficient space to do living shorelines, and bulkheads might be the only option in those areas (NOAA and USACE 2015).

Living shorelines can have less adverse impact on intertidal habitats compared to the impacts of seawalls and bulkheads (NRC 2007). Hybrid infrastructure, such as living shorelines, can provide more ecological benefits (services) than built infrastructure, but not the same amount of ecological benefits as natural infrastructure (e.g., coastal marshes) (Sutton-Grier et al. 2015). Bulkheads and seawalls reflect wave energy and cause scouring of near-shore habitats, and cause erosion of the intertidal zone and greater water depths near the bulkhead or seawall (NRC 2007). The Corps' regulations (33 CFR 320.4(r)(1)) and the 404(b)(1) Guidelines (40 CFR part 230) require project proponents to avoid and minimize losses of jurisdictional waters and wetlands. In other words, those regulations require project proponents to minimize encroachments into areas held in trust for the public (e.g., navigable waters and submerged lands). These minimization requirements can be viewed as favoring bulkheads and revetments because those erosion protection measures usually have smaller footprints in the public trust resources (NRC 2007).

All forms of erosion control, including living shorelines, cause reductions in ecosystem services compared to natural shorelines (NRC 2007). Ecosystem services provided by living shorelines include food production, nutrient removal, sediment storage, and water quality improvement (NOAA 2015), as well as recreation, natural hazard regulation, and erosion regulation (Millennium Ecosystem Assessment 2005). However, many of those ecosystem services, especially biogeochemical cycling associated with nutrient removal and water quality improvement, may take years to develop in constructed marshes (Craft et al. 2003). Over time,

living shorelines provide habitat for algae, barnacles, and oysters, and foraging areas for fish (NRC 2007, Gittman et al. 2016). Gittman et al. (2016) observed greater fish and crustacean abundance near sills that have been in place for 3 years or more, compared to bulkheads. Gittman et al. (2016) concluded that marshes with stone sills provide better near-shore habitat than vinyl bulkheads, and have habitat features analogous to reefs. Gittman et al. (2016) only examined living shoreline use by fish and crustaceans. They did not look at other ecosystem services and acknowledged that additional studies are needed to assess the provision of other ecosystem services by living shorelines.

5.3.3 Costs

There are trade-offs with living shorelines because they replace intertidal and subtidal substrate that is used by many animals with stone and fills, and may also convert areas inhabited by sea grasses to other habitat types (Popkin 2015, NRC 2007). These trade-offs can be reduced if the encroachment of living shorelines is minimized to provide a lower level of protection (NRC 2007). Living shorelines have some adverse effects on species diversity in coastal ecosystems (Sutton-Grier et al. 2015). At the present time, there is uncertainty whether living shorelines and their associated fills and fill structures, as well as their alterations of intertidal and subtidal habitats, are ecologically neutral or beneficial (Bilkovic and Mitchell 2013).

Living shorelines can also encroach into areas used for navigation and cause some interference with navigation (Popkin 2015). It make take a few years for living shorelines to become established and begin providing shore erosion protection, whereas bulkheads and revetments start controlling erosion when construction is completed (Popkin 2015). Another potential cost is the uncertainty on the performance of living shorelines in providing intended outcomes (e.g., shore erosion control, the provision of ecological services) because there is little data on their effectiveness (Sutton-Grier et al. 2015), especially over a long period of time.

Living shorelines and other forms of erosion control require periodic maintenance (NOAA and USACE 2015). Bulkheads require periodic repairs, but generally last 20 years (NRC 2007). Rock revetments that are well designed and constructed generally last up to 50 years (NRC 2007), and some maintenance is required when storms move rock. It is more difficult to calculate the longevity of living shorelines (Popkin 2015). Maintenance for living shorelines is similar to landscape maintenance, especially after storm events (NOAA and USACE 2015). Maintenance activities required for living shorelines include replanting marsh vegetation, trimming tree branches to provide sunlight to marsh plants, removing debris, and repairing rock structures (e.g., sills, low-profile sand containment structures, breakwaters) (NOAA 2015). Living shorelines using vegetation and sand fills require maintenance to replace sand and marsh plants that are removed or displaced by storms; nearby banks may also need to be re-graded if they are damaged by those storm events (NRC 2007). Some proponents of living shorelines recommend monitoring of completed projects (NOAA 2015), which if required by permitting agencies, would impose additional costs to landowners.

Some landowners may prefer bulkheads and seawalls if they believe those structures provide more effective protection against erosion (Popkin 2015). Living shorelines will not be effective in all shorelines, and will require maintenance to replace marsh grasses or repair sills that are damaged during storm events (Popkin 2015). Another trade-off relates to land ownership: filling of submerged lands owned by the state to construct a living shoreline benefits the landowner, but the state may lose the submerged lands that are filled or at least some of the ecosystem functions and services provided by those submerged lands (NRC 2007). In urban coastal areas, there may not be sufficient space available to use hybrid infrastructure (Sutton-Grier et al. 2015), such as living shorelines to control erosion.

Another cost associated with living shorelines is the cost of educating landowners and consultants on the benefits of living shorelines, because many landowners and the consultants and contractors they hire are more familiar with bulkheads and revetments, and those consultants and contractors will generally advocate using the shore protection approach they are most familiar with (NRC 2007). Landowners, consultants, and contractors may prefer bulkheads, which are expected to last 20 years, depending on the materials used, or stone revetments, which can last 50 years, depending on the quality of construction (NRC 2007).

The estimated costs of constructing and maintaining different type of shore protection measures vary widely. In Tables 5.3.1, 5.3.2, and 5.3.3, we provide summaries of studies that examined the typical costs of shore protection projects per linear foot of shore protected.

Table 5.3.1 summarizes the costs of different erosion control measures in different areas of the United States. The areas examined include Maryland, Delaware, Florida, and the northern Gulf of Mexico. The shore protection approaches covered in Table 5.3.1 include vegetative stabilization, fringe marsh with sills, off-shore breakwaters, and stone revetments.

Table 5.3.1. Cost estimates for various erosion protection approaches (CCRM 2014)

Erosion Control Technique	Cost range ($ per linear foot)
Vegetative stabilization (fill + plantings)	$45 to $225
Fringe marsh plus sill	$100 to $700
Offshore breakwaters	$125 to $1,000
Stone revetment	$115 to $1,500

Table 5.3.2 summarizes the costs of erosion protection approaches in the northern Gulf of Mexico. It includes vegetative plantings, stone revetments, off-shore breakwaters, and bulkheads. The breakwaters and bulkheads can be constructed with different materials, which affects their costs and durability.

Table 5.3.2 Cost estimates for shore protection products in the northern Gulf of Mexico (Mississippi-Alabama Sea Grant Consortium (undated).

Erosion Control Technique	Cost range ($ per linear foot)
Marsh or dune grass plantings	1.30 to 4.50
Rock revetments	120 to 180
Offshore breakwaters	
Wave attenuation devices	180 to 250
Rock breakwaters	125 to 200
Wooden sills	65 to 100
Bulkheads	
Vinyl	125 to 200
Vinyl with toe protection	210 to 285
Wooden	115 to 180
Wooden with toe protection	200 to 265

Table 5.3.3 was derived from the general cost estimates provided in the SAGE publication entitled "Natural and Structural Measures for Shoreline Stabilization" published by NOAA and the U.S. Army Corps of Engineers (2015). This table includes estimated annual operations and maintenance costs. The costs estimates provided in this publication are much higher than the cost estimates in Tables 5.3.1 and 5.3.2.

Table 5.3.3 Cost estimates for various erosion protection approaches (NOAA and USACE 2015)

Erosion Control Technique	Initial construction costs ($ per linear foot)	Annual operations and maintenance costs ($ per linear foot)
Vegetation	Up to $1,000	Up to $100
Vegetation edging	$1,001 to $2,000	$101 to $500
Sills	$1,001 to $2,000	$101 to $500
Revetment	$5,001 to $10,000	$101 to $500
Bulkhead	$2,001 to $5,000	$101 to $500
Seawall	$5,001 to $10,000	Over $500

6.0 References

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Appendix 1 – Changes to 2012 nationwide permits, impacts of new nationwide permits, and shifts between nationwide permit and standard individual permit

The following acronyms used in this table: NWP – nationwide permit; PCN – pre-construction notification; SIP – standard individual permit. ORM2 is the database maintained and used by the Corps to track various regulatory actions, including individual permits, NWP PCNs, regional general permits, and consultations conducted under Section 7 of the Endangered Species Act and Section 106 of the National Historic Preservation Act. ORM2 is also used to track the proposed impacts to jurisdictional waters and wetlands, the authorized impacts to jurisdictional waters and wetlands, and the amount and type of compensatory mitigation required to offset authorized losses of jurisdictional waters and wetlands.

Nationwide Permit	Changes	Estimated Annual Reported Use of 2012 NWPs (from ORM2)	Estimated Average Annual Non-Reported Activities	Estimated Changes in Number of NWP PCNs	Estimated Changes in Annual Number of NWP Authorizations	Estimated Changes in Annual Number of SIP Authorizations	Rationale
NWP 1 – Aids to navigation	None	52	200	0	0	0	No changes.
NWP 2 – Structures in artificial canals	None	129	200	0	0	0	No changes.
NWP 3 – Maintenance	State that NWP also authorizes removal of previously authorized structures or fills. Clarify that NWP also authorizes use of timber mats during maintenance activity. Clarify that paragraph (a) authorizes the removal of accumulated sediments and debris within, and in the immediate vicinity of, the structure or fill. Remove two sentences of paragraph (b) authorizing placement of new or additional riprap, which can be authorized by NWP 13 or other NWPs.	4,275	1,000	-50	-325	-25	Department of the Army permits usually have a condition requiring removal of structure or fill if it will be no longer used. Change covers activities where that permit condition was not included. Use of temporary mats is best management practice commonly used as a fill. Maintenance is often authorized by conditions of original permit. Change to NWP 13 to authorize maintenance activities estimated to result in 300 NWP 3 authorizations per year shifting to 300 NWP 13 authorizations per year. The removal of last two sentences from paragraph (b) estimated to result in 50 NWP 3 authorizations shifting to 50 NWP 13 authorizations per year.
NWP 4 – Fish and wildlife harvesting, enhancement, and attraction devices and activities	None	41	20,000	0	0	0	No changes.

Nationwide Permit	Changes	Estimated Annual Reported Use of 2012 NWPs (from ORM2)	Estimated Average Annual Non-Reported Activities	Estimated Changes in Number of NWP PCNs	Estimated Changes in Annual Number of NWP Authorizations	Estimated Changes in Annual Number of SIP Authorizations	Rationale
NWP 5 – Scientific measuring devices	None	89	100	0	0	0	No changes.
NWP 6 – Survey activities	None	162	100	0	0	0	No changes.
NWP 7 – Outfall structures and associated intake structures	None	312	0	0	0	0	No changes.
NWP 8 – Oil and gas structures on the outer continental shelf	None	8	0	0	0	0	No changes.
NWP 9 – Structures in fleeting and anchorage areas	Remove reference to U.S. Coast Guard because they do not establish fleeting areas.	14	100	0	+200	0	Remove reference to U.S. Coast Guard because they do not designate fleeting areas. Some barge fleeting activities may not have had Department of the Army authorization and this change would provide that authorization.
NWP 10 – Mooring buoys	None	92	5,000	0	0	0	No changes.
NWP 11 – Temporary recreational structures	None	64	250	0	0	0	No changes.

Nationwide Permit	Changes	Estimated Annual Reported Use of 2012 NWPs (from ORM2)	Estimated Average Annual Non-Reported Activities	Estimated Changes in Number of NWP PCNs	Estimated Changes in Annual Number of NWP Authorizations	Estimated Changes in Annual Number of SIP Authorizations	Rationale
NWP 12 – Utility line activities	Clarify that for utility lines, this NWP authorizes crossings of waters of the United States; the Corps does not regulate the construction, maintenance, or repair of utility lines per se. Add "internet" to list of examples of what might be carried by utility lines. Modify NWP to authorize activities necessary to remediate inadvertent returns of drilling fluids during horizontal directional drilling activities to install utility lines across waters of the United States. Clarify that NWP also authorizes use of temporary mats during construction activities. Add note reminding users of definition of "single and complete linear project" and 33 CFR 330.6(d). Add note referring to requirements of 33 CFR 322.5(i) for aerial transmission lines over navigable waters. Add note clarifying that NWP authorizes maintenance activities not covered by CWA Section 404(f) exemption for maintenance. Add note reminding users of requirements of paragraph (b) of general condition 32, to include in the PCN any crossings of waters of the United States authorized by NWP that do not require PCNs.	11,447	2,500	0	0	0	Clarifying that NWP authorizes utility line crossings instead of entire utility lines is needed because litigants often assert that the Corps is regulating the construction and operation of utility lines. Many districts included permit conditions for remediation plans in case inadvertent returns of drilling fluids occur during directional drilling activities; proposed change would add clarity that the NWP authorizes CWA Section 404 and RHA Section 10 activities necessary to carry out the remediation. Use of temporary mats is best management practice commonly used as a fill. The modification of the definition of "utility line" to include lines that communicate through the internet is not expected to result in any changes to the numbers of activities authorized by NWP 12 per year, because the 2012 NWP 12 defined utility lines as being able to transmit various types of messages and communications, which could be interpreted as also including internet communications. The new notes added to NWP 12 serve as reminders to users of the NWPs, and do not impose new requirements.

Nationwide Permit	Changes	Estimated Annual Reported Use of 2012 NWPs (from ORM2)	Estimated Average Annual Non-Reported Activities	Estimated Changes in Number of NWP PCNs	Estimated Changes in Annual Number of NWP Authorizations	Estimated Changes in Annual Number of SIP Authorizations	Rationale
NWP 13 – Bank stabilization	Clarify that the NWP authorizes a variety of bank stabilization techniques, including vegetative stabilization, bioengineering, sills, bulkheads, revetments, rip rap, and stream barbs. State that the volume of fill discharged is to be measured along the bank, and is not limited to being placed along the bank. Add a provision requiring that the bank stabilization activity be properly maintained, and that the NWP authorizes regulated activities required for maintenance and repair. Instead of prohibiting the use of invasive species for bioengineering and vegetative stabilization, require the use of native species. Add 1,000 linear foot cap on waivers for the construction of bulkheads (1,000 linear foot cap does not apply to other bank stabilization approaches, such as bioengineering, vegetative stabilization, rip rap, revetments, gabion baskets, and stream barbs).	2,723	500	-10	+350	0	Identifying stream barbs as a bank stabilization technique authorized by NWP 13 estimated to shift 10 SIPs to 10 NWP authorizations each year. Provision authorizing maintenance activities estimated to result in 300 NWP 3 authorizations per year shifting to 300 NWP 13 authorizations per year. The 2012 NWP 13 included a paragraph stating that for vegetative stabilization or bioengineering, invasive species shall not be used. The preamble to the 2012 NWP 13 explained the concept of bioengineering (see 77 FR 10198 – 10199), so the changes to NWP 13 will not result in any change in the use of this NWP for bioengineering and vegetative bank stabilization. No change in NWP 13 use is expected to result from requiring use of native species. The modification is a more positive way of stating that invasive species should not be used. The removal of the two sentences of NWP 3(b) concerning the placement of additional riprap estimated to result in 50 NWP 3 authorizations shifting to 50 NWP 13 authorizations each year. The 1,000 linear foot cap on bulkheads estimated to result in 10 NWP 13 authorizations shifting to 10 SIP authorizations each year. Therefore the net annual change in SIP authorizations is expected to be zero.

Nationwide Permit	Changes	Estimated Annual Reported Use of 2012 NWPs (from ORM2)	Estimated Average Annual Non-Reported Activities	Estimated Changes in Number of NWP PCNs	Estimated Changes in Annual Number of NWP Authorizations	Estimated Changes in Annual Number of SIP Authorizations	Rationale
NWP 14 – Linear transportation projects	Clarify that NWP also authorizes use of temporary mats during construction activities. Add note reminding users of definition of "single and complete linear project" and 33 CFR 330.6(d). Add note reminding users of requirements of paragraph (b) of general condition 32, to include in the PCN any crossings of waters of the United States authorized by NWP that do not require PCNs.	5,759	200	0	0	0	Use of temporary mats is best management practice commonly used as a fill. Note reiterates existing regulation and the definition from the 2012 NWP, which are not changed by this proposed rule.
NWP 15 – U.S. Coast Guard approved bridges	None	19	10	0	0	0	No changes.
NWP 16 – Return water from upland contained disposal areas	None	89	50	0	0	0	No changes.
NWP 17 – Hydropower projects	None	4	0	0	0	0	No changes.
NWP 18 – Minor discharges	None	750	200	0	0	0	No changes.
NWP 19 – Minor dredging	Add provision requiring dredged material to be deposited and retained in an area with no waters of the United States unless specifically approved by the Corps through a separate authorization.	150	150	0	0	0	Any placement of dredged material into waters of the United States requires a CWA Section 404 permit, so it is only a clarification, not a change in permitting practice. The 2012 NWP 19 did not authorize discharging the dredged material into waters of the United States, so there was an implicit requirement that a separate DA authorization was required.
NWP 20 – Response operations for oil or hazardous substances	Change "and" to "or" in permit title.	11	50	0	0	0	Minor change in title unlikely to affect the use of this NWP.

Nationwide Permit	Changes	Estimated Annual Reported Use of 2012 NWPs (from ORM2)	Estimated Average Annual Non-Reported Activities	Estimated Changes in Number of NWP PCNs	Estimated Changes in Annual Number of NWP Authorizations	Estimated Changes in Annual Number of SIP Authorizations	Rationale
NWP 21 – Surface coal mining activities	Remove paragraph (a) of the 2012 NWP 21. Clarify that the loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.	12	0	-5	-5	+5	Increase in number of SIPs due to activities authorized by 2012 NWP 21(a) that could not complete the work under that NWP, and will require SIPs under the 2017 NWP 21. NWP 21 was reissued in 2012 with the understanding that paragraph (a) of that NWP would only be in effect for the 2012 NWP 21 (see 77 FR 10209 – 10210). Clarification of how the 300 linear foot limit relates to the 1/2-acre limit will not change the number of activities authorized by this NWP.
NWP 22 – Removal of vessels	Change Note 2 to state that the emphasis on general condition 20 is because of the possibility that shipwrecks might be historic properties.	29	25	0	0	0	No change in application of general condition 20 with this NWP, because PCNs are required for all activities that might have the potential to cause effects to historic properties, so that the Corps can determine whether National Historic Preservation Act Section 106 consultation is required.
NWP 23 – Approved categorical exclusions	Change "environmental documentation" to "environmental impact statement or environmental assessment analysis".	352	300	0	0	0	Clarifying change in terminology to be more consistent with the Council on Environmental Quality's National Environmental Policy Act regulations.
NWP 24 – Indian tribe or state approved section 404 programs	None.	3	10	0	0	0	No changes.
NWP 25 – Structural discharges	None.	31	30	0	0	0	No changes.

Nationwide Permit	Changes	Estimated Annual Reported Use of 2012 NWPs (from ORM2)	Estimated Average Annual Non-Reported Activities	Estimated Changes in Number of NWP PCNs	Estimated Changes in Annual Number of NWP Authorizations	Estimated Changes in Annual Number of SIP Authorizations	Rationale
NWP 27 – Aquatic habitat restoration, establishment, and enhancement activities	Require the use of ecological references to ensure that the aquatic habitat restoration, enhancement, and establishment activities result in habitats comparable to natural habitats. Add to list of examples the removal of stream barriers.	1,346	0	0	0	0	Clarification regarding the use of ecological references is made to reduce use of NWP 27 for activities that are not aquatic habitat restoration, enhancement, or establishment activities. Adding removal of stream barriers to list of examples is only a clarification and will not change the number of NWP 27 activities per year.
NWP 28 – Modifications of existing marinas	None.	37	40	0	0	0	No changes.
NWP 29 – Residential developments	Clarify that the loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.	686	0	0	0	0	Clarification of how the 300 linear foot limit relates to the 1/2-acre limit will not change the number of activities authorized by this NWP.
NWP 30 – Moist soil management for wildlife	None.	2	25	0	0	0	No changes.
NWP 31 – Maintenance of existing flood control facilities	Add provision stating that a flood control facility will not be considered abandoned if the prospective permittee is in the process of obtaining the other authorizations or approvals required for maintenance activities and is experiencing delays in obtaining those authorizations or approvals. Add Note stating that the one-time mitigation requirement is for the total time period the NWP has been used to authorize maintenance activities, not every five years.	44	0	0	0	0	Change is only a clarification and is not expected to result in changes in the number of authorized activities. Clarifying the mitigation requirements is not expected to result in changes in the number of authorized activities, only the frequency of when compensatory mitigation is required for these activities.

Nationwide Permit	Changes	Estimated Annual Reported Use of 2012 NWPs (from ORM2)	Estimated Average Annual Non-Reported Activities	Estimated Changes in Number of NWP PCNs	Estimated Changes in Annual Number of NWP Authorizations	Estimated Changes in Annual Number of SIP Authorizations	Rationale
NWP 32 – Completed enforcement actions	Clarify that the 5 acre and 1 acre limits apply to adverse effects. Clarify that if the permittee does not comply with the terms and conditions of the NWP 32 authorization, he or she may be subject to an additional enforcement action.	59	25	0	0	0	These changes are only clarifications and will not alter the number of authorized activities. Any additional enforcement action would occur after the initial NWP 32 verification is issued.
NWP 33 – Temporary construction, access, and dewatering	Remove requirement for PCNs for activities in CWA Section 404-only waters.	419	0	-210	0	0	Change only affects requirement to submit a PCN; all other terms remain the same.
NWP 34 – Cranberry production activities	None.	0	0	0	0	0	No changes.
NWP 35 – Maintenance dredging of existing basins	State that all dredged material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization.	217	50	0	0	0	The 2012 NWP 35 did not authorize discharging the dredged material into waters of the United States, so there was an implicit requirement that a separate DA authorization was required. That separate authorization would have to be provided through another NWP, a regional general permit, or an individual permit.
NWP 36 – Boat ramps	None.	280	100	0	0	0	No changes.
NWP 37 – Emergency watershed protection and rehabilitation	None.	102	0	0	0	0	No changes.
NWP 38 – Cleanup of hazardous and toxic waste	None.	80	0	0	0	0	No changes.
NWP 39 – Commercial and institutional developments	Add wastewater treatment facilities to the list of examples of attendant features authorized by this NWP. Clarify that the loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.	641	0	0	0	0	Clarification will not change the number of authorized activities because the list of attendant features in the 2012 NWP 39 stated that it was not limited to those examples. Clarification of how the 300 linear foot limit relates to the 1/2-acre limit will not change the number of activities authorized by this NWP.

Nationwide Permit	Changes	Estimated Annual Reported Use of 2012 NWPs (from ORM2)	Estimated Average Annual Non-Reported Activities	Estimated Changes in Number of NWP PCNs	Estimated Changes in Annual Number of NWP Authorizations	Estimated Changes in Annual Number of SIP Authorizations	Rationale
NWP 40 – Agricultural activities	Clarify that the loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.	69	0	0	0	0	Clarification of how the 300 linear foot limit relates to the 1/2-acre limit will not change the number of activities authorized by this NWP.
NWP 41 – Reshaping existing drainage ditches	Remove the PCN requirements.	51	50	-51	0	0	Removal of the PCN requirements will not change number of activities authorized by this NWP.
NWP 42 – Recreational facilities	Clarify that the loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.	199	0	0	0	0	Clarification of how the 300 linear foot limit relates to the 1/2-acre limit will not change the number of activities authorized by this NWP.
NWP 43 – Stormwater management facilities	Remove citation to regulation that states that stormwater management facilities are not waters of the United States. Clarify that the loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre. Add authorization for discharges of dredged or fill material into non-tidal waters of the United States to construct and maintain pollutant reduction green infrastructure features designed to reduce inputs of sediments, nutrients, and other pollutants into waters to meet reduction targets established under Total Daily Maximum Loads set under the Clean Water Act.	177	100	+20	+20	-20	Removing regulation citation will not affect the exclusion of stormwater management facilities from the definition of waters of the United States. Adding authorization for the construction and maintenance of pollutant reduction green infrastructure features to meet reduction targets established under Total Daily Maximum Loads estimated to shift 20 SIPs to NWPs. Clarification of how the 300 linear foot limit relates to the 1/2-acre limit will not change the number of activities authorized by this NWP.
NWP 44 – Mining activities	Clarification of calculation of the 1/2-acre limit, and how the 300 linear foot limit for losses of stream bed fits with the 1/2-acre limit.	34	0	0	0	0	Clarification of how the 300 linear foot limit relates to the 1/2-acre limit will not change the number of activities authorized by this NWP.

Nationwide Permit	Changes	Estimated Annual Reported Use of 2012 NWPs (from ORM2)	Estimated Average Annual Non-Reported Activities	Estimated Changes in Number of NWP PCNs	Estimated Changes in Annual Number of NWP Authorizations	Estimated Changes in Annual Number of SIP Authorizations	Rationale
NWP 45 – Repair of uplands damaged by discrete events	Allow district engineers to waive the 12-month limit for submitting a PCN if the permittee can demonstrate funding, contract, or other similar delays after a major storm, flood, or other discrete event.	101	0	+25	+25	-25	Authority to grant exceptions to the two year notification period allows greater flexibility to authorize these activities by NWP
NWP 46 – Discharges in ditches	None	43	0	0	0	0	No changes.
NWP 48 – Commercial shellfish aquaculture activities	Define "new commercial shellfish aquaculture operation" as an operation in a project area where commercial shellfish aquaculture activities have not been conducted during the past 100 years. Project area can also be identified by other legally binding agreements that establish enforceable property interests. Clarify that only one PCN needs to be submitted during 5-year period NWP is in effect. Remove PCN requirement for dredge harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation. Clarify that for operations occurring in contiguous project areas, operator can submit one PCN for those contiguous project areas.	327	50	-50	0	0	Removal of PCN requirement for dredged harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation likely to result in a small change in the average annual number of PCNs submitted each year because of the PCN requirement in GC 18 for activities that might affect ESA listed species or critical habitat.
NWP 49 – Coal remining activities	None	12	0	0	0	0	No proposed changes.
NWP 50 – Underground coal mining activities	Clarify that the loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.	6	0	0	0	0	Clarification of how the 300 linear foot limit relates to the 1/2-acre limit will not change the number of activities authorized by this NWP.

Nationwide Permit	Changes	Estimated Annual Reported Use of 2012 NWPs (from ORM2)	Estimated Average Annual Non-Reported Activities	Estimated Changes in Number of NWP PCNs	Estimated Changes in Annual Number of NWP Authorizations	Estimated Changes in Annual Number of SIP Authorizations	Rationale
NWP 51 – Land-based renewable energy generation facilities	Change PCN threshold to losses of greater than 1/10-acre of waters of the United States, instead of requiring PCNs for all activities. Clarify that the loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.	5	0	-3	0	0	There will be a small decrease in PCNs, and there may be more use of this NWP instead of using NWPs 12 and 14 for utility lines and road crossings in these facilities. The change makes the PCN threshold for NWP 51 similar to NWPs 12 and 14 (i.e., losses greater than 1/10-acre). Clarification of how the 300 linear foot limit relates to the 1/2-acre limit will not change the number of activities authorized by this NWP. Change PCN threshold to losses of greater than 1/10-acre.
NWP 52 – Water-based renewable energy generation pilot projects	Remove the limitation to pilot projects and the requirement to obtain separate Department of the Army authorization if the project proponent wants the project permanently authorized. Clarify that hydrokinetic renewable energy generation projects that require authorization by the Federal Energy Regulatory Commission under the Federal Power Act of 1920 do not require separate authorization from the Corps under Section 10 of the Rivers and Harbors Act of 1899. Clarify that the loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre. Add floating solar panels and wave energy generation units in Rivers and Harbors Act of 1899 Section 10 waters.	1	0	+2	+2	-2	Small number of units authorized by this NWP not expected to result in substantial increases in authorized activities. Clarification that hydrokinetic generation projects in navigable waters authorized by the Federal Energy Regulatory Commission do not require separate Department of the Army authorization not expected to result in changes in the annual number of NWP 52 activities. Clarification of how the 300 linear foot limit relates to the 1/2-acre limit will not change the number of activities authorized by this NWP. Floating solar panels and wave energy generation units are relatively new, so it is expected that there will be few requests for NWP authorization.

Nationwide Permit	Changes	Estimated Annual Reported Use of 2012 NWPs (from ORM2)	Estimated Average Annual Non-Reported Activities	Estimated Changes in Number of NWP PCNs	Estimated Changes in Annual Number of NWP Authorizations	Estimated Changes in Annual Number of SIP Authorizations	Rationale
NWP 53 – Removal of low-head dams	New NWP	No prior NWP authorization	0	+25	+25	-25	Activities previously required standard individual permits, if regional general permits were not available.
NWP 54 – Living shorelines	New NWP	No prior NWP authorization	0	+200	+200	-200	Activities previously required standard individual permits, if regional general permits were not available.
GC 1 – Navigation	None.	n/a	n/a	0	0	0	No changes.
GC 2 – Aquatic live movements	None.	n/a	n/a	0	0	0	No changes.
GC 3 – Spawning areas	None.	n/a	n/a	0	0	0	No changes.
GC 4 – Migratory bird breeding areas	None.	n/a	n/a	0	0	0	No changes.
GC 5 – Shellfish beds	None.	n/a	n/a	0	0	0	No changes.
GC 6 – Suitable material	None.	n/a	n/a	0	0	0	No changes.
GC 7 – Water supply intakes	None.	n/a	n/a	0	0	0	No changes.
GC 8 – Adverse effects from impoundments	None.	n/a	n/a	0	0	0	No changes.
GC 9 – Management of water flows	Add temporary and permanent road crossings to list of examples of activities that need to continue to maintain water flows.	n/a	n/a	0	0	0	Adding another example will not change the number of activities authorized by NWP.
GC 10 – Fills within 100-year floodplains	None.	n/a	n/a	0	0	0	No changes.
GC 11 – Equipment	None.	n/a	n/a	0	0	0	No changes.
GC 12 – Soil erosion and sediment control	None.	n/a	n/a	0	0	0	No changes.
GC 13 – Removal of temporary fills	None.	n/a	n/a	0	0	0	No changes.
GC 14 – Proper maintenance	None.	n/a	n/a	0	0	0	No changes.
GC 15 – Single and complete project	None.	n/a	n/a	0	0	0	No changes.

Nationwide Permit	Changes	Estimated Annual Reported Use of 2012 NWPs (from ORM2)	Estimated Average Annual Non-Reported Activities	Estimated Changes in Number of NWP PCNs	Estimated Changes in Annual Number of NWP Authorizations	Estimated Changes in Annual Number of SIP Authorizations	Rationale
GC 16 – Wild and scenic rivers	Add PCN requirement for proposed NWP activities in Wild and Scenic Rivers or "study rivers" covered under the Wild and Scenic River Act.	n/a	n/a	5	0	0	Current general condition was unclear as to the Corps' responsibility to coordinate with the appropriate Federal agency with direct management responsibility for covered rivers, to obtain the required written determinations.
GC 17 – Tribal rights	Clarify the tribal rights subject to this general condition, consistent with the 1998 Department of Defense American Indian and Alaska Native Policy. Those tribal rights include including treaty rights), protected tribal resources, and tribal lands.	n/a	n/a	0	0	0	Make the general condition consistent with the Corps' responsibilities articulated in the Department of Defense American Indian and Alaska Native Policy issued on October 20, 1998.

Nationwide Permit	Changes	Estimated Annual Reported Use of 2012 NWPs (from ORM2)	Estimated Average Annual Non-Reported Activities	Estimated Changes in Number of NWP PCNs	Estimated Changes in Annual Number of NWP Authorizations	Estimated Changes in Annual Number of SIP Authorizations	Rationale
GC 18 – Endangered species	Add definitions of "direct effect" and "indirect effects." Revise paragraph (b) to state that the district engineer will verify that the appropriate ESA Section 7 consultation document has been submitted and that if additional section 7 consultation is required, then the Federal permittee is responsible for conducting that additional consultation. Add paragraph stating that if non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed NWP activity, the non-federal applicant can provide a copy of that ESA section 10(a)(1)(B) permit with the PCN required by paragraph (c) of this general condition. The district engineer will determine whether ESA section 7 compliance is accomplished through the ESA section 10(a)(1)(B) incidental take permit after coordinating with the FWS and/or NMFS.	n/a	n/a	0	0	0	No provision in the NWPs or the NWP regulations states that federal permittees must submit PCNs to comply with GC 18. They only have to submit their section 7 compliance documentation if other terms and conditions (including regional conditions) require submittal of a PCN. The district engineer will coordinate with the FWS and/or NMFS to determine whether the intraservice section 7 consultation for the ESA section 10(a)(1)(B) incidental take permit covers the NWP activity. The change is only a clarification to address numerous questions that were asked during implementation of the 2012 NWPs. The new paragraph will not change the number of PCNs required because the district engineer has to review the ESA section 10(a)(1)(B) incidental take permit and coordinate with the FWS and/or NMFS to determine if the activity complies with ESA section 7. The new paragraph reduces duplication because an intra-Service section 7(a)(2) consultation was conducted to issue the ESA section 10(a)(1)(B) incidental take permit, and ensure that the activity or activities are not likely to jeopardize the continued existence of listed species or adversely modify or destroy critical habitat.

Nationwide Permit	Changes	Estimated Annual Reported Use of 2012 NWPs (from ORM2)	Estimated Average Annual Non-Reported Activities	Estimated Changes in Number of NWP PCNs	Estimated Changes in Annual Number of NWP Authorizations	Estimated Changes in Annual Number of SIP Authorizations	Rationale
GC 19 – Migratory bird and bald and golden eagle permits	State that the permittee is responsible for complying with the Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act.	n/a	n/a	0	0	0	The permittee should contact the U.S. Fish and Wildlife Service regarding their obligations under these Acts. The U.S. Fish and Wildlife Service can use its enforcement authorities where unauthorized take of eagle or migratory birds occurs.
GC 20 – Historic properties	Revise paragraph (b) to state that the district engineer will verify that the appropriate NHPA Section 106 consultation document has been submitted and that if additional section 106 consultation is required, then the Federal permittee is responsible for conducting that additional consultation. Change "may have the potential" to "might have the potential" to ensure PCNs are submitted when proposed NWP activity might have the potential to cause effects to historic properties. Add clarification on effects determinations for the purposes of section 106. Add "designated tribal representative" to list of entities from which information on potential historic properties can be obtained.	n/a	n/a	0	0	0	No provision in the NWPs or the NWP regulations states that federal permittees must submit PCNs to comply with GC 20. They only have to submit their section 7 compliance documentation if other terms and conditions (including regional conditions) require submittal of a PCN. The change is only a clarification to address numerous questions that were asked during implementation of the 2012 NWPs. The other changes clarify the section 106 compliance requirements and are not expected to change the number of PCNs submitted.
GC 21 – Discovery of previously unknown remains and artifacts	None.	n/a	n/a	0	0	0	No changes.
GC 22 – Designated critical resource waters	Add NWP 54 to the list of NWPs that require PCNs so that district engineers can evaluate effects to designated critical resource waters.	n/a	n/a	0	0	0	All NWP 54 activities will require PCNs.

Nationwide Permit	Changes	Estimated Annual Reported Use of 2012 NWPs (from ORM2)	Estimated Average Annual Non-Reported Activities	Estimated Changes in Number of NWP PCNs	Estimated Changes in Annual Number of NWP Authorizations	Estimated Changes in Annual Number of SIP Authorizations	Rationale
GC 23 – Mitigation	State that mitigation bank and in-lieu fee program credits are the preferred means of fulfilling compensatory mitigation requirements imposed by district engineers. Add a paragraph stating that the amount of compensatory mitigation required by the district engineer must be sufficient to ensure the authorized activity results in no more than minimal individual and cumulative adverse environmental effects.	n/a	n/a	0	0	0	District engineers retain the discretion to require compensatory mitigation through mitigation bank credits, in-lieu fee program credits, and permittee-responsible mitigation. Mitigation bank credits and in-lieu fee program credits are more effective and efficient for the small impacts authorized by the NWPs. New paragraph (f)(2) states existing practice, as described in 33 CFR 332.3(f).
GC 24 – Safety of impoundment structures	None.	n/a	n/a	0	0	0	No changes.
GC 25 – Water quality	None.	n/a	n/a	0	0	0	No changes.
GC 26 – Coastal zone management	None.	n/a	n/a	0	0	0	No changes.
GC 27 – Regional and case-specific conditions	None.	n/a	n/a	0	0	0	No changes.
GC 28 – Use of multiple nationwide permits	None.	n/a	n/a	0	0	0	No changes.
GC 29 – Transfer of nationwide permit verifications	None.	n/a	n/a	0	0	0	No changes.
GC 30 – Compliance certification	Add provision stating that the completed certification document must be submitted to the district engineer within 30 days of completion of the authorized activity or the implementation of any required compensatory mitigation, whichever occurs later.	n/a	n/a	0	0	0	Requirement does not affect the numbers of activities authorized by NWP because this compliance certification requirement only applies to NWP activities.

Nationwide Permit	Changes	Estimated Annual Reported Use of 2012 NWPs (from ORM2)	Estimated Average Annual Non-Reported Activities	Estimated Changes in Number of NWP PCNs	Estimated Changes in Annual Number of NWP Authorizations	Estimated Changes in Annual Number of SIP Authorizations	Rationale
GC 31 – Activities affecting structures or works built by the United States	New general condition.	n/a	n/a	+20	0	0	Item 5 of "Further information" section of the 2012 NWPs stated that the NWPs do not authorize activities that interfere with any existing or proposed Federal project, so activities could not be authorized by NWP until the Corps issues a Section 408 permission. The new general condition will not change the number of activities authorized by NWP.
GC 32 – Pre-construction notification	Require PCN to identify the specific NWP(s) the project proponent wants to use. Require PCN to describe proposed mitigation measures to ensure no more than minimal adverse environmental effects. For single and complete linear projects, require the PCN to state the quantity of proposed losses of waters of the United States at each single and complete crossing of waters of the United States. If the proposed activity will occur in a Wild and Scenic River or a designated study river, the PCN must identify the river. If the proposed NWP activity also requires section 408 permission from the Corps, the PCN must include a statement confirming that the project proponent has applied for that section 408 permission. Require agency coordination for proposed NWP B activities seeking a waiver of one or more of its limits.	n/a	n/a	0	0	0	Changes will not alter the number of activities authorized by NWPs, but will provide better information that should reduce the processing times for PCNs.
Totals				-82	+492	-292	

Appendix 2 – Comparison of estimated annual mean use of the 2012 nationwide permits and projected mean annual use of 2017 nationwide permits.

Using data on NWP use from March 19, 2012, to March 12, 2015, the Corps estimated the mean annual use of the 2017 NWPs, with estimates of the impacted acreage (including both permanent and temporary impacts) and acreage of required compensatory mitigation. Impacted acreages include both permanent and temporary impacts in waters of the United States, including navigable waters. The Corps points out that not all permanent impacts (e.g., conversions of one wetland type to another wetland type) result in permanent losses of jurisdictional wetlands and waters.

NWP Number	2012 NWPs			Projected Changes in Mean Annual Use for 2017 NWPs	2017 NWPs		
	Estimated Mean Annual Activities Authorized	Estimated Mean Annual Acreage Impacted	Mean Annual Acreage of Comp. Mitigation		Projected Mean Annual Activities Authorized	Projected Mean Annual Acreage Impacted	Projected Mean Annual Acreage of Comp. Mitigation
1	252	0.533	0	0	252	0.533	0
2	329	3.827	0.04	0	329	3.827	0.040
3	5,275	563.179	48.765	-325	4,925	564.356	45.761
4	20,041	202.959	0.184	0	20,041	202.959	0.184
5	189	4.691	0.003	0	189	4.691	0.003
6	262	31.124	0.003	0	262	31.124	0.003
7	312	17.146	1.655	0	312	17.146	1.655
8	8	571.403	0	0	8	571.403	0
9	114	3.833	0	+200	314	10.558	0
10	5,092	5.327	0.013	0	5,092	5.327	0.013
11	314	3.227	0	0	314	3.227	0
12	13,947	1,773.714	296.208	0	13,947	1,773.714	296.208
13	3,223	73.158	20.889	+350	3,573	85.443	23.157
14	5,959	359.919	266.161	0	5,959	359.919	266.161
15	29	4.918	5.3	0	29	4.918	5.300
16	139	10.09	0.269	0	139	10.090	0.269
17	4	2.847	2.617	0	4	2.847	2.617
18	950	31.235	29.178	0	950	31.235	29.178
19	300	3.121	0.13	0	300	3.121	0.130
20	61	11.311	0.367	0	61	11.311	0.367
21	12	29.842	39.431	-5	7	1.263	1.644
22	54	5.464	0	0	54	5.464	0
23	652	255.962	242.608	0	652	255.962	242.608
24	13	0.755	0	0	13	0.755	0
25	61	2.068	0.498	0	61	2.068	0.498
26	-	-	-	-	-	-	-
27	1346	3,490.525	297.275	0	1,346	3,490.525	297.275

NWP Number	2012 NWPs			Projected Changes in Mean Annual Use for 2017 NWPs	2017 NWPs		
	Estimated Mean Annual Activities Authorized	Estimated Mean Annual Acreage Impacted	Mean Annual Acreage of Comp. Mitigation		Projected Mean Annual Activities Authorized	Projected Mean Annual Acreage Impacted	Projected Mean Annual Acreage of Comp. Mitigation
28	77	7.850	0.073	0	77	7.850	0.073
29	686	93.886	454.392	0	686	93.886	454.392
30	27	187.254	0	0	27	187.254	0
31	44	99.169	1.525	0	44	99.169	1.525
32	84	92.226	120.475	0	84	92.226	120.475
33	419	109.945	14.89	0	419	109.945	14.89
34	0	0	0	0	0	0	0
35	267	350.659	0.167	0	267	350.659	0.167
36	380	7.585	3.973	0	380	7.585	3.973
37	102	29.601	24.513	0	102	29.601	24.513
38	80	144.257	26.384	0	80	144.257	26.384
39	641	111.310	375.397	0	641	111.310	375.397
40	69	11.572	7.197	0	69	11.572	7.197
41	101	26.955	1.12	0	101	39.519	1.12
42	199	23.984	21.92	0	199	23.984	21.92
43	277	78.947	26.931	+20	297	93.003	28.875
44	34	4.237	35.664	0	34	4.237	35.664
45	101	16.171	0.347	+25	126	20.174	0.347
46	43	12.468	2.816	0	43	12.468	2.816
47	-	-	-	-	-	-	-
48	377	11,366.689	0.037	0	377	11,366.689	0.037
49	12	54.520	38.022	0	12	54.520	38.022
50	6	0.689	0.688	0	6	0.689	0.688
51	5	2.746	1.98	0	5	2.746	1.98
52	1	0.413	0	+2	3	1.239	0
53	N/A	N/A	N/A	+25	25	0.886	0
54	N/A	N/A	N/A	+200	200	27.548	0
Total	**62,970**	**20,295.311**	**2,410.105**	**+492**	**63,437**	**20,346.800**	**2,373.526**
Totals excluding NWPs 27 and 48*	**61,247**	**5,438.097**	**2,112.793**	**+492**	**61,714**	**5,489.588**	**2,076.214**

* Aquatic resource restoration activities authorized by NWP 27 must result in net increases in aquatic resource functions and services, and the commercial shellfish aquaculture activities authorized by NWP 48 cannot not result in losses of jurisdictional waters or waters. The activities authorized by NWP 48 usually have positive or neutral effects on aquatic resource functions and services because they increase the numbers of filter feeding molluscs in waterbodies, which helps improve water quality.

Appendix D – Procedures for the Protection of Historic Properties (33 CFR part 325, Appendix C)

Procedures for the Protection of Historic Properties

1. Definitions

2. General Policy

3. Initial Review

4. Public Notice

5. Investigations

6. Eligibility Determinations

7. Assessing Effects

8. Consultation

9. ACHP Review and Comment

10. District Engineer Decision

11. Historic Properties Discovered During Construction

12. Regional General Permits

13. Nationwide General Permits

14. Emergency Procedures

15. Criteria of Effect and Adverse Effect

1. Definitions

a. Designated historic property is a historic property listed in the National Register of Historic Places (National Register) or which has been determined eligible for listing in the National Register pursuant to 36 CFR part 63. A historic property that, in both the opinion of the SHPO and the district engineer, appears to meet the criteria for inclusion in the National Register will be treated as a "designated historic property."

b. Historic property is a property which has historical importance to any person or group. This term includes the types of districts, sites, buildings, structures or objects eligible for inclusion, but not necessarily listed, on the National Register.

c. Certified local government is a local government certified in accordance with section 101(c)(1) of the NHPA (See 36 CFR part 61).

d. The term “criteria for inclusion in the National Register” refers to the criteria published by the Department of Interior at 36 CFR 60.4.

e. An “effect” on a “designated historic property” occurs when the undertaking may alter the characteristics of the property that qualified the property for inclusion in the National Register. Consideration of effects on “designated historic properties” includes indirect effects of the undertaking. The criteria for effect and adverse effect are described in Paragraph 15 of this appendix.

f. The term “undertaking” as used in this appendix means the work, structure or discharge that requires a Department of the Army permit pursuant to the Corps regulations at 33 CFR 320–334.

g. Permit area.

(1) The term “permit area” as used in this appendix means those areas comprising the waters of the United States that will be directly affected by the proposed work or structures and uplands directly affected as a result of authorizing the work or structures. The following three tests must all be satisfied for an activity undertaken outside the waters of the United States to be included within the “permit area”:

(i) Such activity would not occur but for the authorization of the work or structures within the waters of the United States;

(ii) Such activity must be integrally related to the work or structures to be authorized within waters of the United States. Or, conversely, the work or structures to be authorized must be essential to the completeness of the overall project or program; and

(iii) Such activity must be directly associated (first order impact) with the work or structures to be authorized.

(2) For example, consider an application for a permit to construct a pier and dredge an access channel so that an industry may be established and operated on an upland area.

(i) Assume that the industry requires the access channel and the pier and that without such channel and pier the project would not be feasible. Clearly then, the industrial site, even though upland, would be within the “permit area.” It would not be established “but for” the access channel and pier; it also is integrally related to the work and structure to be authorized; and finally it is directly associated with the work and structure to be authorized. Similarly, all three tests are satisfied for the dredged material disposal site and it too is in the “permit area” even if located on uplands.

(ii) Consider further that the industry, if established, would cause local agencies to extend water and sewer lines to service the area of the industrial site. Assume that the extension would not itself involve the waters of the United States and is not solely the result of

the industrial facility. The extensions would not be within the “permit area” because they would not be directly associated with the work or structure to be authorized.

(iii) Now consider that the industry, if established, would require increased housing for its employees, but that a private developer would develop the housing. Again, even if the housing would not be developed but for the authorized work and structure, the housing would not be within the permit area because it would not be directly associated with or integrally related to the work or structure to be authorized.

(3) Consider a different example. This time an industry will be established that requires no access to the navigable waters for its operation. The plans for the facility, however, call for a recreational pier with an access channel. The pier and channel will be used for the company-owned yacht and employee recreation. In the example, the industrial site is not included within the permit area. Only areas of dredging, dredged material disposal, and pier construction would be within the permit area.

(4) Lastly, consider a linear crossing of the waters of the United States; for example, by a transmission line, pipeline, or highway.

(i) Such projects almost always can be undertaken without Corps authorization, if they are designed to avoid affecting the waters of the United States. Corps authorization is sought because it is less expensive or more convenient for the applicant to do so than to avoid affecting the waters of the United States. Thus the “but for” test is not met by the entire project right-of-way. The “same undertaking” and “integral relationship” tests are met, but this is not sufficient to make the whole right-of-way part of the permit area. Typically, however, some portion of the right-of-way, approaching the crossing, would not occur in its given configuration “but for” the authorized activity. This portion of the right-of-way, whose location is determined by the location of the crossing, meets all three tests and hence is part of the permit area.

(ii) Accordingly, in the case of the linear crossing, the permit area shall extend in either direction from the crossing to that point at which alternative alignments leading to reasonable alternative locations for the crossing can be considered and evaluated. Such a point may often coincide with the physical feature of the waterbody to be crossed, for example, a bluff, the limit of the flood plain, a vegetational change, etc., or with a jurisdictional feature associated with the waterbody, for example, a zoning change, easement limit, etc., although such features should not be controlling in selecting the limits of the permit area.

2. General Policy

This appendix establishes the procedures to be followed by the U.S. Army Corps of Engineers (Corps) to fulfill the requirements set forth in the National Historic Preservation Act (NHPA), other applicable historic preservation laws, and Presidential directives as they relate to the regulatory program of the Corps of Engineers (33 CFR parts 320–334).

a. The district engineer will take into account the effects, if any, of proposed undertakings on historic properties both within and beyond the waters of the U.S. Pursuant to section 110(f) of the NHPA, the district engineer, where the undertaking that is the subject of a permit action may directly and adversely affect any National Historic Landmark, shall, to the maximum extent possible, condition any issued permit as may be necessary to minimize harm to such landmark.

b. In addition to the requirements of the NHPA, all historic properties are subject to consideration under the National Environmental Policy Act, (33 CFR part 325, appendix B), and the Corps' public interest review requirements contained in 33 CFR 320.4. Therefore, historic properties will be included as a factor in the district engineer's decision on a permit application.

c. In processing a permit application, the district engineer will generally accept for Federal or Federally assisted projects the Federal agency's or Federal lead agency's compliance with the requirements of the NHPA.

d. If a permit application requires the preparation of an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act, the draft EIS will contain the information required by paragraph 9.a. below. Furthermore, the SHPO and the ACHP will be given the opportunity to participate in the scoping process and to comment on the Draft and Final EIS.

e. During pre-application consultations with a prospective applicant the district engineer will encourage the consideration of historic properties at the earliest practical time in the planning process.

f. This appendix is organized to follow the Corps standard permit process and to indicate how historic property considerations are to be addressed during the processing and evaluating of permit applications. The procedures of this Appendix are not intended to diminish the full consideration of historic properties in the Corps regulatory program. Rather, this appendix is intended to provide for the maximum consideration of historic properties within the time and jurisdictional constraints of the Corps regulatory program. The Corps will make every effort to provide information on historic properties and the effects of proposed undertakings on them to the public by the public notice within the time constraints required by the Clean Water Act. Within the time constraints of applicable laws, executive orders, and regulations, the Corps will provide the maximum coordination and comment opportunities to interested parties especially the SHPO and ACHP. The Corps will discuss with and encourage the applicant to avoid or minimize effects on historic properties. In reaching its decisions on permits, the Corps will adhere to the goals of the NHPA and other applicable laws dealing with historic properties.

3. Initial Review

a. Upon receipt of a completed permit application, the district engineer will consult district files and records, the latest published version(s) of the National Register, lists of

properties determined eligible, and other appropriate sources of information to determine if there are any designated historic properties which may be affected by the proposed undertaking. The district engineer will also consult with other appropriate sources of information for knowledge of undesignated historic properties which may be affected by the proposed undertaking. The district engineer will establish procedures (e.g., telephone calls) to obtain supplemental information from the SHPO and other appropriate sources. Such procedures shall be accomplished within the time limits specified in this appendix and 33 CFR part 325.

b. In certain instances, the nature, scope, and magnitude of the work, and/or structures to be permitted may be such that there is little likelihood that a historic property exists or may be affected. Where the district engineer determines that such a situation exists, he will include a statement to this effect in the public notice. Three such situations are:

(1) Areas that have been extensively modified by previous work. In such areas, historic properties that may have at one time existed within the permit area may be presumed to have been lost unless specific information indicates the presence of such a property (e.g., a shipwreck).

(2) Areas which have been created in modern times. Some recently created areas, such as dredged material disposal islands, have had no human habitation. In such cases, it may be presumed that there is no potential for the existence of historic properties unless specific information indicates the presence of such a property.

(3) Certain types of work or structures that are of such limited nature and scope that there is little likelihood of impinging upon a historic property even if such properties were to be present within the affected area.

c. If, when using the pre-application procedures of 33 CFR 325.1(b), the district engineer believes that a designated historic property may be affected, he will inform the prospective applicant for consideration during project planning of the potential applicability of the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44716). The district engineer will also inform the prospective applicant that the Corps will consider any effects on historic properties in accordance with this appendix.

d. At the earliest practical time the district engineer will discuss with the applicant measures or alternatives to avoid or minimize effects on historic properties.

4. Public Notice.

a. Except as specified in subparagraph 4.c., the district engineer's current knowledge of the presence or absence of historic properties and the effects of the undertaking upon these properties will be included in the public notice. The public notice will be sent to the SHPO, the regional office of the National Park Service (NPS), certified local governments (see paragraph (1.c.) and Indian tribes, and interested citizens. If there are designated historic properties which

reasonably may be affected by the undertaking or if there are undesignated historic properties within the affected area which the district engineer reasonably expects to be affected by the undertaking and which he believes meet the criteria for inclusion in the National Register, the public notice will also be sent to the ACHP.

b. During permit evaluation for newly designated historic properties or undesignated historic properties which reasonably may be affected by the undertaking and which have been newly identified through the public interest review process, the district engineer will immediately inform the applicant, the SHPO, the appropriate certified local government and the ACHP of the district engineer's current knowledge of the effects of the undertaking upon these properties. Commencing from the date of the district engineer's letter, these entities will be given 30 days to submit their comments.

c. Locational and sensitive information related to archeological sites is excluded from the Freedom of Information Act (Section 304 of the NHPA and Section 9 of ARPA). If the district engineer or the Secretary of the Interior determine that the disclosure of information to the public relating to the location or character of sensitive historic resources may create a substantial risk of harm, theft, or destruction to such resources or to the area or place where such resources are located, then the district engineer will not include such information in the public notice nor otherwise make it available to the public. Therefore, the district engineer will furnish such information to the ACHP and the SHPO by separate notice.

5. Investigations

a. When initial review, addition submissions by the applicant, or response to the public notice indicates the existence of a potentially eligible property, the district engineer shall examine the pertinent evidence to determine the need for further investigation. The evidence must set forth specific reasons for the need to further investigate within the permit area and may consist of:

(1) Specific information concerning properties which may be eligible for inclusion in the National Register and which are known to exist in the vicinity of the project; and

(2) Specific information concerning known sensitive areas which are likely to yield resources eligible for inclusion in the National Register, particularly where such sensitive area determinations are based upon data collected from other, similar areas within the general vicinity.

b. Where the scope and type of work proposed by the applicant or the evidence presented leads the district engineer to conclude that the chance of disturbance by the undertaking to any potentially eligible historic property is too remote to justify further investigation, he shall so advise the reporting party and the SHPO.

c. If the district engineer's review indicates that an investigation for the presence of potentially eligible historic properties on the upland locations of the permit area (see paragraph

1.g.) is justified, the district engineer will conduct or cause to be conducted such an investigation. Additionally, if the notification indicates that a potentially eligible historic property may exist within waters of the U.S., the district engineer will conduct or cause to be conducted an investigation to determine whether this property may be eligible for inclusion in the National Register. Comments or information of a general nature will not be considered as sufficient evidence to warrant an investigation.

d. In addition to any investigations conducted in accordance with paragraph 6.a. above, the district engineeer may conduct or cause to be conducted additional investigations which the district engineer determines are essential to reach the public interest decision . As part of any site visit, Corps personnel will examine the permit area for the presence of potentially eligible historic properties. The Corps will notify the SHPO, if any evidence is found which indicates the presence of potentially eligible historic properties.

e. As determined by the district engineer, investigations may consist of any of the following: further consultations with the SHPO, the State Archeologist, local governments, Indian tribes, local historical and archeological societies, university archeologists, and others with knowledge and expertise in the identification of historical, archeological, cultural and scientific resources; field examinations; and archeological testing. In most cases, the district engineer will require, in accordance with 33 CFR 325.1(e), that the applicant conduct the investigation at his expense and usually by third party contract.

f. The Corps of Engineers' responsibilities to seek eligibility determinations for potentially eligible historic properties is limited to resources located within waters of the U.S. that are directly affected by the undertaking. The Corps responsibilities to identify potentially eligible historic properties is limited to resources located within the permit area that are directly affected by related upland activities. The Corps is not responsible for identifying or assessing potentially eligible historic properties outside the permit area, but will consider the effects of undertakings on any known historic properties that may occur outside the permit area.

6. Eligibility determinations

a. For a historic property within waters of the U.S. that will be directly affected by the undertaking the district engineer will, for the purposes of this Appendix and compliance with the NHPA:

(1) Treat the historic property as a “designated historic property,” if both the SHPO and the district engineer agree that it is eligible for inclusion in the National Register; or

(2) Treat the historic property as not eligible, if both the SHPO and the district engineer agree that it is not eligible for inclusion in the National Register; or

(3) Request a determination of eligibility from the Keeper of the National Register in accordance with applicable National Park Service regulations and notify the applicant, if the

SHPO and the district engineer disagree or the ACHP or the Secretary of the Interior so request. If the Keeper of the National Register determines that the resources are not eligible for listing in the National Register or fails to respond within 45 days of receipt of the request, the district engineer may proceed to conclude his action on the permit application.

b. For a historic property outside of waters of the U.S. that will be directly affected by the undertaking the district engineer will, for the purposes of this appendix and compliance with the NHPA:

(1) Treat the historic property as a “designated historic property,” if both the SHPO and the district engineer agree that it is eligible for inclusion in the National Register; or

(2) Treat the historic property as not eligible, if both the SHPO and the district engineer agree that it is not eligible for inclusion in the National Register; or

(3) Treat the historic property as not eligible unless the Keeper of the National Register determines it is eligible for or lists it on the National Register. (See paragraph 6.c. below.)

c. If the district engineer and the SHPO do not agree pursuant to paragraph 6.b.(1) and the SHPO notifies the district engineer that it is nominating a potentially eligible historic property for the National Register that may be affected by the undertaking, the district engineer will wait a reasonable period of time for that determination to be made before concluding his action on the permit. Such a reasonable period of time would normally be 30 days for the SHPO to nominate the historic property plus 45 days for the Keeper of the National Register to make such determination. The district engineer will encourage the applicant to cooperate with the SHPO in obtaining the information necessary to nominate the historic property.

7. Assessing Effects

a. Applying the Criteria of Effect and Adverse Effect. During the public notice comment period or within 30 days after the determination or discovery of a designated history property the district engineer will coordinate with the SHPO and determine if there is an effect and if so, assess the effect. (See Paragraph 15.)

b. No Effect. If the SHPO concurs with the district engineer's determination of no effect or fails to respond within 15 days of the district engineer's notice to the SHPO of a no effect determination, then the district engineer may proceed with the final decision.

c. No Adverse Effect. If the district engineer, based on his coordination with the SHPO (see paragraph 7.a.), determines that an effect is not adverse, the district engineer will notify the ACHP and request the comments of the ACHP. The district engineer's notice will include a description of both the project and the designated historic property; both the district engineer's and the SHPO's views, as well as any views of affected local governments, Indian tribes, Federal agencies, and the public, on the no adverse effect determination; and a description of the

efforts to identify historic properties and solicit the views of those above. The district engineer may conclude the permit decision if the ACHP does not object to the district engineer's determination or if the district engineer accepts any conditions requested by the ACHP for a no adverse effect determination, or the ACHP fails to respond within 30 days of the district engineer's notice to the ACHP. If the ACHP objects or the district engineer does not accept the conditions proposed by the ACHP, then the effect shall be considered as adverse.

d. Adverse Effect. If an adverse effect on designated historic properties is found, the district engineer will notify the ACHP and coordinate with the SHPO to seek ways to avoid or reduce effects on designated historic properties. Either the district engineer or the SHPO may request the ACHP to participate. At its discretion, the ACHP may participate without such a request. The district engineer, the SHPO or the ACHP may state that further coordination will not be productive. The district engineer shall then request the ACHP's comments in accordance with paragraph 9.

8. Consultation

At any time during permit processing, the district engineer may consult with the involved parties to discuss and consider possible alternatives or measures to avoid or minimize the adverse effects of a proposed activity. The district engineer will terminate any consultation immediately upon determining that further consultation is not productive and will immediately notify the consulting parties. If the consultation results in a mutual agreement among the SHPO, ACHP, applicant and the district engineer regarding the treatment of designated historic properties, then the district engineer may formalize that agreement either through permit conditioning or by signing a Memorandum of Agreement (MOA) with these parties. Such MOA will constitute the comments of the ACHP and the SHPO, and the district engineer may proceed with the permit decision. Consultation shall not continue beyond the comment period provided in paragraph 9.b.

9. ACHP Review and Comment

a. If: (i) The district engineer determines that coordination with the SHPO is unproductive; or (ii) the ACHP, within the appropriate comment period, requests additional information in order to provide its comments; or (iii) the ACHP objects to any agreed resolution of impacts on designated historic properties; the district engineer, normally within 30 days, shall provide the ACHP with:

(1) A project description, including, as appropriate, photographs, maps, drawings, and specifications (such as, dimensions of structures, fills, or excavations; types of materials and quantity of material);

(2) A listing and description of the designated historic properties that will be affected, including the reports from any surveys or investigations;

(3) A description of the anticipated adverse effects of the undertaking on the designated historic properties and of the proposed mitigation measures and alternatives considered, if any; and

(4) The views of any commenting parties regarding designated historic properties.

In developing this information, the district engineer may coordinate with the applicant, the SHPO, and any appropriate Indian tribe or certified local government.

Copies of the above information also should be forwarded to the applicant, the SHPO, and any appropriate Indian tribe or certified local government. The district engineer will not delay his decision but will consider any comments these parties may wish to provide.

b. The district engineer will provide the ACHP 60 days from the date of the district engineer's letter forwarding the information in paragraph 9.a., to provide its comments. If the ACHP does not comment by the end of this comment period, the district engineer will complete processing of the permit application. When the permit decision is otherwise delayed as provided in 33 CFR 325.2(d) (3) & (4), the district engineer will provide additional time for the ACHP to comment consistent with, but not extending beyond that delay.

10. District Engineer Decision

a. In making the public interest decision on a permit application, in accordance with 33 CFR 320.4, the district engineer shall weigh all factors, including the effects of the undertaking on historic properties and any comments of the ACHP and the SHPO, and any views of other interested parties. The district engineer will add permit conditions to avoid or reduce effects on historic properties which he determines are necessary in accordance with 33 CFR 325.4. In reaching his determination, the district engineer will consider the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44716).

b. If the district engineer concludes that permitting the activity would result in the irrevocable loss of important scientific, prehistoric, historical, or archeological data, the district engineer, in accordance with the Archeological and Historic Preservation Act of 1974, will advise the Secretary of the Interior (by notifying the National Park Service (NPS)) of the extent to which the data may be lost if the undertaking is permitted, any plans to mitigate such loss that will be implemented, and the permit conditions that will be included to ensure that any required mitigation occurs.

11. Historic Properties Discovered During Construction

After the permit has been issued, if the district engineer finds or is notified that the permit area contains a previously unknown potentially eligible historic property which he reasonably expects will be affected by the undertaking, he shall immediately inform the Department of the Interior Departmental Consulting Archeologist and the regional office of the NPS of the current knowledge of the potentially eligible historic property and the expected

effects, if any, of the undertaking on that property. The district engineer will seek voluntary avoidance of construction activities that could affect the historic property pending a recommendation from the National Park Service pursuant to the Archeological and Historic Preservation Act of 1974. Based on the circumstances of the discovery, equity to all parties, and considerations of the public interest, the district engineer may modify, suspend or revoke a permit in accordance with 33 CFR 325.7.

12. Regional General Permits

Potential impacts on historic properties will be considered in development and evaluation of general permits. However, many of the specific procedures contained in this appendix are not normally applicable to general permits. In developing general permits, the district engineer will seek the views of the SHPO and, the ACHP and other organizations and/or individuals with expertise or interest in historic properties. Where designated historic properties are reasonably likely to be affected, general permits shall be conditioned to protect such properties or to limit the applicability of the permit coverage.

13. Nationwide General Permit

a. The criteria at paragraph 15 of this Appendix will be used for determining compliance with the nationwide permit condition at 33 CFR 330.5(b)(9) regarding the effect on designated historic properties. When making this determination the district engineer may consult with the SHPO, the ACHP or other interested parties.

b. If the district engineer is notified of a potentially eligible historic property in accordance with nationwide permit regulations and conditions, he will immediately notify the SHPO. If the district engineer believes that the potentially eligible historic property meets the criteria for inclusion in the National Register and that it may be affected by the proposed undertaking then he may suspend authorization of the nationwide permit until he provides the ACHP and the SHPO the opportunity to comment in accordance with the provisions of this Appendix. Once these provisions have been satisfied, the district engineer may notify the general permittee that the activity is authorized including any special activity specific conditions identified or that an individual permit is required.

14. Emergency Procedures

The procedures for processing permits in emergency situations are described at 33 CFR 325.2(e)(4). In an emergency situation the district engineer will make every reasonable effort to receive comments from the SHPO and the ACHP, when the proposed undertaking can reasonably be expected to affect a potentially eligible or designated historic property and will comply with the provisions of this Appendix to the extent time and the emergency situation allows.

15. Criteria of Effect and Adverse Effect

(a) An undertaking has an effect on a designated historic property when the undertaking may alter characteristics of the property that qualified the property for inclusion in the National Register. For the purpose of determining effect, alteration to features of a property's location, setting, or use may be relevant, and depending on a property's important characteristics, should be considered.

(b) An undertaking is considered to have an adverse effect when the effect on a designated historic property may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Adverse effects on designated historic properties include, but are not limited to:

(1) Physical destruction, damage, or alteration of all or part of the property;

(2) Isolation of the property from or alteration of the character of the property's setting when that character contributes to the property's qualification for the National Register;

(3) Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting;

(4) Neglect of a property resulting in its deterioration or destruction; and

(5) Transfer, lease, or sale of the property.

(c) Effects of an undertaking that would otherwise be found to be adverse may be considered as being not adverse for the purpose of this appendix:

(1) When the designated historic property is of value only for its potential contribution to archeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research, and such research is conducted in accordance with applicable professional standards and guidelines;

(2) When the undertaking is limited to the rehabilitation of buildings and structures and is conducted in a manner that preserves the historical and architectural value of affected designated historic properties through conformance with the Secretary's “Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings”, or

(3) When the undertaking is limited to the transfer, lease, or sale of a designated historic property, and adequate restrictions or conditions are included to ensure preservation of the property's important historic features.

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