

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Chapter II

[Docket Number: COE–2025–0002]

RIN 0710–AB56

Reissuance and Modification of Nationwide Permits

AGENCY: Corps of Engineers, Army, DoD.

ACTION: Final action.

SUMMARY: Nationwide Permits (NWP) authorize activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 that have no more than minimal individual and cumulative adverse environmental effects. The NWP help protect the aquatic environment and the public interest by providing incentives to reduce impacts to jurisdictional waters. In this final action, the U.S. Army Corps of Engineers (Corps) is reissuing 56 existing nationwide permits (NWP), general conditions, and definitions, with some modifications. The Corps is also issuing one new NWP.

DATES: The 57 NWP, the general conditions, and the associated definitions will go into effect on March 15, 2026. The NWP will expire on March 15, 2031.

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

FOR FURTHER INFORMATION CONTACT: Ms. Katherine McCafferty at 513–310–4196 or access the U.S. Army Corps of Engineers Regulatory Home Page at <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/>.

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List of Acronyms

CWA Clean Water Act
DA Department of the Army
EFH Essential Fish Habitat
ESA Endangered Species Act
FWS U.S. Fish and Wildlife Service
FY Fiscal Year
GC General Condition
NEPA National Environmental Policy Act
NHPA National Historic Preservation Act
NMFS National Marine Fisheries Service
NWP Nationwide Permit
PCN Pre-Construction Notification
RHA Rivers and Harbors Act of 1899
USCG U.S. Coast Guard

List of Nationwide Permits and General Conditions Issued in This Final Action

Nationwide Permits (NWP)

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I. Background

A. General

The U.S. Army Corps of Engineers (Corps) may issue nationwide permits (NWP) to authorize activities under Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act of 1899 (RHA) that will result in no more than minimal individual and cumulative adverse environmental effects. Under Section 404 of the CWA (33 U.S.C. 1344), Department of the Army (DA) authorization is required for discharges of dredged or fill material into waters of the United States. Under Section 10 of the RHA (33 U.S.C. 403), DA authorization is required for construction of any structure in, over, or under any navigable water of the United States; the excavating from or depositing of material in navigable waters of the United States; or the accomplishment of any other work affecting the course, location, condition, or capacity of navigable waters of the United States.

NWPs 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. Since 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), 2012 (77 FR 10184), 2017 (82 FR

1860), and 2021 (86 FR 2744 and 86 FR 73522).

Section 404(e) of the CWA provides the statutory authority for the Secretary of the Army, after notice and opportunity for public hearing, to issue general permits on a nationwide basis for any category of activities involving discharges of dredged or fill material into waters of the United States for a period of no more than five years after the date of issuance (33 U.S.C. 1344 (e)). The Secretary's authority to issue individual permits and general permits has been delegated to the Chief of Engineers and his or her designated representatives. NWPs are a type of general permit issued by the Chief of Engineers and are designed to regulate activities in federally jurisdictional waters and wetlands that have no more than minimal adverse environmental effects (see 33 CFR 330.1(b)). The categories of activities authorized by NWPs must be similar in nature, cause only minimal adverse environmental effects when performed separately, and have only minimal cumulative adverse effect on the environment (33 U.S.C. 1344(e)(1)). The Corps has discretionary authority to modify or revoke the NWPs before they expire. NWPs and other general permits can also be issued to authorize activities pursuant to Section 10 of the RHA (see 33 CFR 322.2(f) and 330.1(g)). The NWP program is designed to provide timely authorizations for the regulated public while protecting the Nation's aquatic resources.

Section 10 of the RHA authorizes the Corps to issue general permits and after-the-fact permits for structures and work in navigable waters of the United States. Section 10 (33 U.S.C. 403) prohibits any obstructions to the navigable capacity of any waters of the United States "unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." Section 10 does not mandate that the Corps specify what form those authorizations should take and does not limit authorization to permits, either individual permits or general permits. By using the word "authorized," a term that is broad in scope, Section 10 gives the Corps the authority to use different types of permits to approve structures and work in navigable waters of the United States. Since 1975, the Corps has issued general permits under Section 10 of the RHA (see 40 FR 31335). The Corps has issued NWPs under the authority of Section 10 of the RHA since 1977 (see 42 FR 37140).

The NWPs provide incentives for project proponents to design activities that require DA authorization under

Section 404 of the CWA and/or Section 10 of the RHA to avoid and minimize impacts to the aquatic environment in order to qualify for NWP authorization, because in most cases those project proponents can obtain NWP verifications from Corps districts in less time than it takes to receive standard individual permits. For some NWPs, project proponents can proceed with the authorized activities without reporting those activities to Corps district offices as long as the project proponent complies with all applicable terms and conditions of those NWPs. Other NWPs require project proponents to submit pre-construction notifications (PCNs) to Corps districts prior to proceeding with the authorized activities to give district engineers the opportunity to determine whether the project proponents' proposed activities are authorized by an NWP. The former set of NWPs are called non-reporting NWPs and the latter set of NWPs are called reporting NWPs.

Activities not authorized by NWPs, or by regional general permits or programmatic general permits issued by district engineers, require individual permits from the Corps. Individual permits are DA authorizations in the form of standard individual permits or letters of permission, which require an activity-specific public interest review and the preparation of appropriate environmental documentation in support of a permit decision for a specific activity. In Fiscal Year (FY) 2024, the average processing time for an NWP PCN that was required or voluntarily submitted, was 55 days and the average processing time for a standard individual permit was 253 days. The reduced processing time for NWPs creates a substantial incentive for project proponents to reduce the impacts of their regulated activities on the aquatic environment to a no more than minimal level. This incentive to minimize impacts directly benefits the aquatic resources that CWA and RHA protect.

Section 404(e)(1) of the CWA states that general permits may be issued on a state, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material into waters of the United States if the activities in such a category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment. The phrase "minimal adverse environmental effects when performed separately" refers to the direct and indirect adverse environmental effects caused by the specific activity authorized by an NWP.

The phrase “minimal cumulative adverse effect on the environment” refers to the collective direct and indirect adverse environmental effects caused by all the activities authorized by a particular NWP during the time period when the NWP is in effect (a period of no more than 5 years) in a specific geographic region.

Some NWP activities include PCN requirements. When a PCN is submitted, Corps districts evaluate proposed NWP activities on a case-by-case basis to ensure that they will cause no more than minimal adverse environmental effects, individually and cumulatively. In most cases an applicant can begin their regulated activity if the district does not respond within 45 days of receiving a complete PCN. The exceptions to that general rule are when: general condition 18 (Endangered Species) or general condition 20 (Historic Properties) require a non-federal permittee to submit a PCN; activities subject to General Conditions 16 (Wild and Scenic Rivers) and 31 (Activities Affecting Structures of Works Built by the United States); activities proposed for authorization under NWP 49 (Coal Remining Activities); or if the proposed activity requires a written waiver to exceed specified limits of an NWP. When any of these exceptions apply, the applicant must wait until they are notified in writing that the activity may proceed under the NWP. District engineers also have authority under 33 CFR 330.5(d) to modify, suspend, or revoke the NWP authorization on a case-specific basis.

There are 39 Corps district offices and eight Corps division offices. The district offices administer the NWP program on a day-to-day basis by reviewing PCNs for proposed NWP activities. The division offices oversee district offices and are managed by division engineers. Division engineers have the authority to modify, suspend, or revoke NWP authorizations on a regional basis to take into account regional differences among aquatic resources and ensure that the NWP activities authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects in a region (see 33 CFR 330.5(c)).

When a Corps district receives a PCN, the district engineer reviews the PCN and determines whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects, consistent with the criteria in paragraph 2 of Section D, “District Engineer’s Decision.” At this point, the district engineer may add conditions to the NWP authorization to ensure that the

verified NWP activity results in no more than minimal individual and cumulative adverse environmental effects consistent with processes and requirements set out in 33 CFR 330.5(d).

For some NWP activities, when submitting a PCN an applicant may request a waiver of a particular limit specified in the NWP’s terms and conditions. If the applicant requests a waiver of an NWP limit and the district engineer determines, after conducting any coordination with the resource agencies required under paragraph (d) of NWP general condition 32, that the proposed NWP activity will result in no more than minimal adverse environmental effects, the district engineer may grant such a waiver. Following the conclusion of the district engineer’s review of the PCN, the district engineer prepares a document explaining the decision on whether to issue a waiver for the proposed NWP activity. This document discusses the district engineer’s findings as to whether a proposed NWP activity qualifies for NWP authorization, including compliance with all applicable terms and conditions, and the rationale for any waivers granted, and activity-specific conditions needed to ensure that the NWP activity will have only minimal individual and cumulative adverse environmental effects and will not be contrary to the public interest (see 33 CFR 330.6(a)(3)(i)). Waivers are only permissible when they are explicitly provided for by a specific NWP’s terms and conditions.

The case-by-case review of PCNs often results in district engineers adding activity-specific conditions to NWP authorizations to ensure that the adverse environmental effects are no more than minimal. These can include permit conditions such as time-of-year restrictions and use of best management practices (BMPs) or compensatory mitigation requirements to offset authorized losses of jurisdictional waters and wetlands so that the net adverse environmental effects are no more than minimal. Any compensatory mitigation required for NWP activities must comply with the Corps’ compensatory mitigation regulations at 33 CFR part 332. Review of a PCN may also result in the district engineer asserting discretionary authority to require an individual permit from the Corps for the proposed activity, if he or she determines, based on the information provided in the PCN and other available information, that adverse environmental effects will be more than minimal, or otherwise determines that “sufficient concerns for the environment or any other factor of the

public interest so requires” consistent with 33 CFR 330.4(e)(2).

During their reviews of PCNs, district engineers use their discretion to determine the appropriate regional scale for evaluating cumulative effects for the purposes of 33 CFR 330.5(d)(1), 33 U.S.C. 1344(e)(1), 33 CFR 322.2(f)(1), and/or 33 CFR 323.2(h)(1). The appropriate regional scale for evaluating cumulative effects may be a waterbody, watershed, seascape, county, state, a Corps district, or other geographic area. The appropriate regional scale is dependent, in part, on what types of NWP activities are occurring, where they are occurring, and what types of adverse environmental effects they might be causing. For example, for NWP activities that authorize structures and/or work in navigable waters of the United States under Section 10 of the RHA, the appropriate geographic region for assessing cumulative effects may be a specific navigable waterbody (e.g., a lake), or in the case of activities in ocean or estuarine waters, a seascape. For NWP activities that authorize discharges of dredged or fill material into non-tidal wetlands and streams, the appropriate geographic region for assessing cumulative effects may be a watershed, county, state, or Corps district. The direct individual adverse environmental effects caused by activities authorized by NWP activities are evaluated within the project footprint, and the indirect individual adverse environmental effects caused by activities authorized by NWP activities are evaluated within the geographic area to which those indirect effects may extend.

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

environmental protections and incentives to project proponents.

After the NWP's are issued or reissued, division engineers will issue supplemental documents to determine whether regional conditions are necessary to ensure that use of the NWP's on a regional basis (*e.g.*, within a Corps district or state) will authorize only those activities with no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.5(c)(1)). The supplemental documents are prepared by Corps districts but must be approved and formally issued by the appropriate division engineer, because the NWP regulations at 33 CFR 330.5(c) state that the division engineer has the authority to modify, suspend, or revoke NWP authorizations for any specific geographic area within her or his division. For some Corps districts, their geographic area of responsibility covers an entire state. For other states, there is more than one Corps district responsible for implementing the Corps Regulatory Program, including the NWP program. In those states, there is a lead Corps district responsible for preparing the supplemental documents for all of the NWP's.

When districts prepare supplemental documents for division approval of regional conditions, or imposing no regional conditions, they assess cumulative effects by estimating the number of times a particular NWP might be used in the region (*e.g.*, Corps district or state) covered by the supplemental document, along with estimates of impact acreages and acreages of compensatory mitigation required. If the NWP is not suspended or revoked in a state or a Corps district, the supplemental document includes a certification that the use of the NWP in that district, with any applicable regional conditions, will result in no more than minimal cumulative adverse environmental effects. See 33 CFR 330.5(c)(1).

After the NWP's are issued or reissued and go into effect, district engineers will monitor the use of these NWP's on a regional basis (*e.g.*, within a watershed, county, state, Corps district or other appropriate geographic area), to ensure that the use of a particular NWP is not resulting in more than minimal cumulative adverse environmental effects (see 33 CFR 330.5(d)(1)). The Corps staff that evaluate NWP PCNs that are required by the text of the NWP or by NWP general conditions or regional conditions imposed by division engineers, or voluntarily submitted to the Corps district by project proponents to receive written NWP verifications,

often work in a particular geographic area and have an understanding of the activities that have been authorized by NWP's, regional general permits, and individual permits over time, as well as the current environmental setting for that geographic area. If Corps district staff believe that the use of an NWP in that geographic region is approaching a threshold above which the cumulative adverse environmental effects for that category of activities may be more than minimal, the district engineer may either make a recommendation to the division engineer to modify, suspend, or revoke the NWP authorization in that geographic region in accordance with the procedures in 33 CFR 330.5(c). Alternatively, under the procedures at 33 CFR 330.5(d), the district engineer may also modify, suspend, or revoke NWP authorizations on a case-by-case basis to ensure that the NWP does not authorize activities in that region that result in more than minimal cumulative adverse environmental effects.

For the NWP's, the assessment of cumulative effects occurs at three levels: national, regional, and the verification stage. Each national NWP decision document includes a national-scale cumulative effects analysis to evaluate whether the issuance or reissuance of the NWP would result in more than minimal cumulative adverse environmental effects. For all NWP's, an evaluation of the probable effects, including cumulative effects, of the proposed activity and its intended use on the public interest is required (see 33 CFR 320.4(a)(1)). For NWP's that authorize discharges of dredged or fill material into waters of the United States, an analysis of cumulative effects conducted in accordance with 40 CFR 230.7(b)(3) is also required.

Cumulative effects are the result of the accumulation of direct and indirect effects caused by multiple activities that persist over time in a particular geographic area (MacDonald 2000), such as a watershed or ecoregion (Gosselink and Lee 1989). For the NWP's, the analysis of cumulative effects would be the accumulation of impacts caused by activities authorized by an NWP during the period it is in effect (*i.e.*, no more than five years) in a watershed, ecoregion, or other appropriate geographic area, and how those accumulated impacts might affect the current environmental setting or environmental baseline within that geographic area. The current environmental setting includes the present effects of other federal, non-federal, and private actions, including those that do not require DA authorization, as well as the effects of

other federal, non-federal, and private actions that are occurring at the same time as the activities authorized by the NWP.

In the context of an NWP issued or reissued by Corps Headquarters, the "incremental effects of the action" would be the direct and indirect effects on the environment caused by activities authorized by the NWP during the period it is in effect. The incremental effects caused by NWP activities are to be added to the effects caused by other past, present, and reasonably foreseeable actions regardless of what agency (federal or non-federal) or person authorizes or undertakes those other past, present, and reasonably foreseeable actions. Oceans, estuaries, lakes, rivers, streams, wetlands, and other aquatic ecosystems are affected by a wide variety of federal, non-federal, and private actions in addition to activities authorized by the Corps under its permitting authorities, including activities authorized by NWP's in the past and activities authorized by other types of DA permits, such as regional general permits, standard individual permits, and letters of permission. Therefore, when evaluating cumulative effects of activities authorized by NWP's, context is important, and the severity of those impacts have to be evaluated against the environmental baseline to determine whether the cumulative adverse environmental effects caused by the issuance or reissuance of an NWP are likely to be no more than minimal, or more than minimal.

For an NWP, the cumulative effects are the collective incremental environmental effects of the activities that are authorized by an NWP, including the number of times that NWP is used to authorize activities in a specific geographic area during the five-year period that NWP is in effect, as well as the estimates of impact acres and acreages of compensatory mitigation required. For the issuance or reissuance of an NWP by Corps Headquarters, the geographic scale of the cumulative effects analysis is the entire United States, including its territories. The cumulative effects likely to be caused by activities authorized by an NWP are evaluated against the environmental baseline, which has been shaped by human activities and natural disturbances and other events over time, including activities authorized by prior versions of that NWP, as well as other federal, non-federal, and private actions that directly or indirectly affect the aquatic environment and contribute to the overall cumulative effects that have influenced the structure and function of that aquatic environment over time.

In the supplemental documentation, the division engineer analyzes the cumulative effects in a region, which could be defined as a state or a Corps district. Under 33 CFR 330.5(d)(1), when a district engineer considers cumulative effects when reviewing a PCN for a proposed NWP activity, she or he will use a geographic and temporal scale that is larger than the geographic and temporal scales that were used to evaluate the direct and indirect adverse environmental effects caused by the proposed NWP-specific activity. The geographic scope of the district engineer's consideration of cumulative effects would be the seascape, watershed, or other appropriate geographic region in which the proposed NWP activity is located. The district engineer would also consider other activities that were authorized by that NWP in that geographic area during the period of time that NWP is in effect, as well as the other federal, non-federal, and private actions that shaped the environmental baseline within that geographic region, to determine whether the incremental contribution of activities authorized by that NWP in that geographic region during the time it would be in effect would not be, or would be, more than minimal. The environmental baseline includes activities conducted in the past under authorizations provided by prior issuances of that NWP, activities authorized by other forms of DA authorization, as well as other federal, non-federal, and private actions not regulated by the Corps that directly or indirectly caused changes to, or losses of, waters and wetlands subject to the Corps' jurisdiction under its permitting authorities. In addition, the environmental baseline includes the ecological functions and services the waters and wetlands within that watershed, seascape, or other geographic area provide, as well as the degree to which those waters and wetlands provide those ecological functions and services.

When a district engineer reviews a PCN and determines that the proposed activity qualifies for NWP authorization, he or she will issue a written NWP verification to the permittee (see 33 CFR 330.6(a)(3)). If an NWP verification includes multiple authorizations using a single NWP (e.g., linear projects with crossings of separate and distant waters of the United States authorized by NWPs 12, 14, 57, and 58) or non-linear projects authorized with two or more different NWPs (e.g., an NWP 28 for reconfiguring an existing marina plus an NWP 19 for minor dredging within that

marina), the district engineer will evaluate the cumulative effects of the applicable NWP authorizations within the appropriate geographic area. As discussed above, examples of geographic areas that may be used for cumulative effects analyses for specific NWPs may be a waterbody, watershed, county, state, Corps district, or other geographic area, such as a seascape in ocean or estuarine waters.

Corps Headquarters conducted the required cumulative effects analyses in the national decision documents for the issuance or reissuance of each of the NWPs. Therefore, district engineers do not need to replicate the Headquarters national cumulative effects analyses for NWP verifications for a specific activity authorized by one or more NWPs. For an NWP verification, the district engineer only needs to include a brief statement in the administrative record documenting the NWP PCN review stating her or his determination whether the proposed NWP activity, plus any required mitigation, will result in no more than minimal individual and cumulative adverse environmental effects for the purposes of 33 CFR 330.5(d)(1), as well as 33 U.S.C. 1344(e)(1), 33 CFR 322.2(f)(1), and/or 33 CFR 323.2(h)(1). If the district engineer determines, after considering mitigation, that a proposed NWP activity will result in more than minimal cumulative adverse environmental effects, he or she will exercise discretionary authority and require an individual permit for the proposed activity.

An activity that requires DA authorization may include discharges that would occur within more than one state or within more than one Corps district or division. When the Corps receives an NWP PCN or individual permit application for such activities, a lead Corps district will be designated, and that district will serve as a single point of contact for each permit applicant.

B. Overview of Proposed Rule

On June 18, 2025, the Corps published in the **Federal Register** (90 FR 26100) a proposed regulation to reissue 56 of 57 existing NWPs with some modifications and associated general conditions and definitions, and to create one new NWP (2025 Proposal). The Corps provided a 30-day comment period, which closed on July 18, 2025. Among other things, the Corps proposed the following: (1) to reissue 56 of 57 existing permits (some with proposed modifications); (2) to issue one new NWP to authorize activities that improve the passage of fish and other aquatic organisms; (3) not to reissue

NWP 56 (finfish mariculture activities); and (4) to modify some general conditions and definitions. The Corps requested comment on these and all other aspects of the proposal.

C. Overview of This Final Action

This final action reissues 56 of the 57 existing NWPs, with some changes, and issues one new NWP (NWP A for activities to improve passage of fish and other aquatic organisms). This action does not reissue NWP 56 (finfish mariculture activities). This action also reissues the general conditions and definitions, with some changes.

This final action reissues 56 of 57 existing NWPs that were issued or reissued in 2021 and 2022 (collectively the 2021 NWPs). This final action reissues 15 of the 16 NWPs (i.e., NWPs 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52, 55, 57, and 58) that were issued or reissued in the final rule that was published in the **Federal Register** on January 13, 2021, and went into effect on March 15, 2021 (86 FR 2744) with some changes. This action reissues the 41 NWPs (i.e., NWPs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 45, 46, 49, 53, 54, and 59) that were issued or reissued in the final rule published in the **Federal Register** on December 27, 2021, and went into effect on February 25, 2022 (86 FR 73522) with some changes. This action also reissues the NWP general conditions and definitions that were published in the January 13, 2021, final rule with some changes.

These 57 NWPs, the general conditions, and the associated definitions will go into effect on March 15, 2026. The expiration date for the NWPs issued or reissued in this final action is March 15, 2031.

D. Status of Existing Permits

When the Corps reissues existing NWPs, the reissued NWPs replace the prior versions of those NWPs so that there are not two sets of NWPs in effect at the same time. The expiration date of the 57 NWPs that went into effect on March 15, 2021, and February 25, 2022, is March 14, 2026. This expiration date was expressly provided for in the rulemakings establishing these NWPs (see 86 FR 2744 and 86 FR 73522). An activity completed under the authorization provided by a 2021 NWP continues to be authorized by that NWP (see 33 CFR part 330.6(b)). Activities authorized by the 2021 NWPs that have commenced or are under contract to commence by March 14, 2026, will have one year (i.e., until March 14, 2027) to complete those activities (see 33 CFR

330.6(b)). Activities previously authorized by the 2021 NWP that have not commenced or are not under contract to commence by March 14, 2026, or that will not be completed by March 14, 2027, will require reauthorization under the 2026 NWP, provided those activities still comply with the terms and conditions, and qualify for authorization under the 2026 NWP. If those activities no longer qualify for NWP authorization because they do not meet the terms and conditions of the 2026 NWP (including any regional conditions imposed by division engineers), the project proponent will need to obtain an individual permit, or seek authorization under a regional general permit, if such a general permit is available in the applicable Corps district and can be used to authorize the proposed activity.

One commenter recommended changing the grandfather period for the activities authorized under the 2021 NWP to between two and five years to allow for additional time to complete activities which receive verifications from the district engineer in the final year of an NWP authorization. The one-year grandfathering period in 33 CFR 330.6(b) was established in the November 22, 1991, final rule amending 33 CFR part 330 (see 56 FR 59110). Experience since this one-year grandfathering period was established has shown that it has been adequate to allow project proponents to complete the activities which were authorized by the NWP or to plan to seek new authorization under a newly issued NWP or individual permit. Therefore, the Corps declines to extend the grandfather period.

E. Nationwide Permit Verifications

Certain NWP require the permittee to submit a PCN prior to commencing the proposed NWP activity. The requirement to submit a PCN is identified in the NWP text when it applies, as well as certain general conditions (e.g., general conditions 18 and 20, Endangered Species and Historic Properties, respectively).

In the PCN, the project proponent must specify which NWP or NWPs the project proponent wants to use to provide the required DA authorization under Section 404 of the CWA and/or Section 10 of the RHA. The district engineer should verify the activity under the NWP(s) requested by the project proponent, as long as the proposed activity complies with all applicable terms and conditions, including any applicable regional conditions imposed by the division engineer. All NWP have the same

general requirement: that the authorized activities may only cause no more than minimal individual and cumulative adverse environmental effects. Therefore, if the proposed activity complies with the terms and all applicable conditions of the NWP the applicant wants to use, then the district engineer should issue the NWP verification unless the district engineer exercises discretionary authority to modify the NWP through the addition of conditions, or to require an individual permit. If the proposed activity does not meet the terms and conditions of the NWP identified in the applicant's PCN, and that activity meets the terms and conditions of another NWP identified by the district engineer, the district engineer will process the PCN under the NWP identified by the district engineer. If the district engineer exercises discretionary authority, the district engineer should explain the reasons for determining that the proposed activity raises sufficient concern for the environment or otherwise may be contrary to the public interest.

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

In response to a PCN or a voluntary NWP verification request, the district engineer reviews the information submitted by the prospective permittee. If the district engineer determines that the activity complies with the terms and conditions of the NWP, the district engineer will notify the permittee. Activity-specific conditions, such as compensatory mitigation requirements, may be added to an NWP authorization to ensure that the activity to be authorized under the NWP will result in no more than minimal individual and cumulative adverse environmental effects and will not be contrary to the public interest. The activity-specific conditions are incorporated into the NWP verification letter (i.e., the written confirmation from the district engineer that the proposed activity is authorized by an NWP), along with the NWP text

and the NWP general conditions. In general, NWP verification letters will expire on the date the NWP expires (see 33 CFR 330.6(a)(3)(ii)), although district engineers have the authority to issue NWP verification letters that will expire before the NWP expires, if it is in the public interest to do so.

If the district engineer reviews the PCN or voluntary NWP verification request and determines that the proposed activity does not comply with the terms and conditions of an NWP, the district engineer will notify the project proponent and provide instructions for applying for authorization under a regional general permit or an individual permit. District engineers will respond to NWP verification requests, submitted voluntarily or as required through PCNs, within 45 days of receiving a complete PCN. Except for activities conducted by non-federal permittees that require PCNs under paragraph (c) of general conditions 18 (Endangered Species) and 20 (Historic Properties), activities subject to General Conditions 16 (Wild and Scenic Rivers) and 31 (Activities Affecting Structures of Works Built by the United States), and activities proposed for authorization under NWP 49 (Coal Remining Activities), if the Corps district does not respond to the PCN within 45 days of a receipt of a complete PCN, the project proponent may assume that the project is authorized, consistent with the information provided in the PCN. For NWP 49, and activities conducted by non-federal permittees that require PCNs under paragraph (c) of general conditions 18 (Endangered Species) and 20 (Historic Properties), activities subject to General Conditions 16 (Wild and Scenic Rivers) and 31 (Activities Affecting Structures of Works Built by the United States), the project proponent cannot begin work before receiving a written NWP verification. If the project proponent requested a waiver of a limit in an NWP, the waiver is not granted unless 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 issues an NWP verification.

F. Severability

The purpose of this section is to clarify the Corps' intent with respect to the severability of the NWP in this action. Each NWP in this action operates independently and is an individual agency action. If any particular NWP of this action is determined by judicial review or operation of law to be invalid, that partial invalidation will not render the

remainder of the NWP in this action invalid. Likewise, if the application of any NWP to a specific activity in a particular location is determined to be invalid, the Corps intends that the NWP remain applicable to all other eligible activities.

II. Discussion of Public Comments

A. Overview

In response to the 2025 Proposal, the Corps received comments from more than 450 states, tribes, organizations, and individuals. Many commenters co-signed joint letters commenting on the 2025 Proposal. The Corps received around two hundred individual comment letters. One commenter attached more than 750 documents to their comments. The attached documents were comments originally submitted in response to the Department of the Army's March 2022 **Federal Register** notice (87 FR 17281) and were specific to NWP 12. The individual comment letters, including the attached comments that were re-submitted from the 2022 docket, are posted on *regulations.gov* docket (COE-2025-0002) for this rulemaking action. The Corps reviewed and considered all comments received in response to the 2025 Proposal.

B. Responses to General Comments

Many commenters expressed general support for the reissuance of the NWPs and many commenters expressed opposition to the NWP program or to the use of NWPs to authorize certain activities or activities in certain locations. Many commenters encouraged the Corps to finalize the rule to reissue the NWPs before the existing NWPs expire on March 14, 2026. Several commenters stated that the NWPs should be revoked. Many commenters stated that the NWPs streamline the permit process. One commenter stated that the NWPs strike a balance between environmental protection of the aquatic environment and reasonable economic development. One commenter stated that the Corps should ensure that the issuance of this final action does not add unnecessary costs to, or unnecessarily delay, the permitting process.

One commenter stated that the NWP program allows the Corps to focus its limited resources on reviewing permit applications that would result in more than minimal environmental impacts. Many commenters requested that the Corps increase permitting efficiencies in the NWP program, through this rulemaking, future rulemakings, and other administrative actions. Many

commenters suggested that the Corps undertake a second rulemaking before the NWPs in this final action expire. Many commenters suggested changes to the NWPs that should be considered in future rulemakings. One commenter stated that the NWPs do not cover routine activities, which causes Corps Districts to use resources to develop Regional General Permits.

The NWP program provides a mechanism to efficiently authorize activities that have no more than minimal adverse environmental effects on the environment. The NWP program is an important part of the Regulatory program because it allows the Corps to focus its finite resources on evaluating applications for Department of the Army (DA) authorization which cause more than minimal adverse environmental effects. The NWP program furthers the regulatory approach of the Corps Regulatory program that is articulated in 33 CFR 320.1(a)(3), to avoid unnecessary regulatory controls, and in 33 CFR 320.1(a)(1), to balance favorable impacts against detrimental impacts, reflecting the national concerns for both the protection and utilization of important resources. In accordance with 33 CFR 330.5(b)(1) anyone may, at any time, suggest changes to the NWPs to the Chief of Engineers. From time to time, but at least every 5 years, the Chief of Engineers will evaluate new NWPs and revocations or modifications to existing NWPs.

Many commenters stated that the proposed NWPs do not comply with the CWA, the National Environmental Policy Act (NEPA), the Endangered Species Act, and the National Historic Preservation Act. Many commenters stated that the NWPs achieve the goals in various Executive Orders, including Executive Order 14154 "Unleashing Energy Dominance", issued on January 20, 2025. Many commenters stated that the NWPs do not comply with the Administrative Procedure Act, stating that the Corps did not allow adequate time to comment or adequately explain its decision. One commenter stated that all technical documents, internal documents, regional manuals, document templates, and other interpretive materials used by the Corps must comply with the Administrative Procedures Act.

The decision to reissue, modify, or issue the NWPs is made in compliance with the CWA, NEPA, the Endangered Species Act, the National Historic Preservation Act, and other federal laws. Comments and responses to comments on compliance with the CWA, NEPA, ESA, and NHPA are discussed in more detail in Section III of this final action.

The Administrative Procedure Act governs the process by which federal agencies issue regulations and publish notices in the **Federal Register**. This rulemaking has been conducted in accordance with the Administrative Procedure Act and Executive Order 12866. The manner in which unidentified technical documents and other unidentified documents used by the Corps are developed and approved is beyond the scope of this rulemaking.

Many commenters stated that the NWPs provide clear guidance. One commenter requested that the NWPs include precise procedures for how to apply the NWP program in each circumstance. This final action incorporates modifications to the NWPs to provide additional clarity to potential permittees. The application of the terms of each NWP, in combination with the general conditions and other information in this final action, as well as any regional conditions, address how an NWP will be applied to a proposed specific activity.

Many commenters and several tribes stated that the proposed rule did not allow for adequate time to meaningfully participate in the rulemaking process and requested extensions to the deadline to comment on the proposed rule. Some commenters stated that this rulemaking is procedurally deficient. One commenter objected to extending the comment period. Several commenters recognized that the Corps had limited time to complete the current rulemaking and recommended that the future rulemaking for the NWPs allow for a longer comment period.

For the 2025 proposed rule, the Corps provided a 30-day comment period. The 2025 Proposal to reissue, issue, or modify the NWPs described modest changes to the 2021 NWPs. Of the 57 existing NWPs, changes were proposed to 13 NWPs and one new NWP was proposed. There were no changes proposed to 43 NWPs. The Corps believes that a 30-day review period allowed for adequate time to provide substantive comments on the proposed rule. The Corps sent response letters to entities that made timely requests for extensions of the comment period for the 2025 Proposal. The process and timing of any future rulemaking for the NWPs are beyond the scope of this rulemaking.

One commenter requested a public hearing on the 2025 Proposal and stated that the Corps should offer to hold meetings with the public and tribes to receive input on the 2025 Proposal. The Corps declined to hold a public hearing or public meetings on the proposed NWPs because it determined that a

public hearing or public meeting was unlikely to provide additional information that would inform the Corps' decision whether to reissue, issue, or modify these NWP. Under the Corps' regulations at 33 CFR 327.4(b), requests for public hearing under this paragraph shall be granted, unless the Corps determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by holding a public hearing. The Corps received around two hundred comments on the proposed rule, and it is unlikely that any statements provided during a public hearing would raise issues that are different than the issues or concerns discussed in the written comments received in response to the 2025 Proposal.

One commenter stated that the NWPs are useful for development with minimal impacts to waterways. Many commenters stated that the NWPs result in more than minimal adverse environmental impacts. Many commenters stated that the Corps should achieve "no net loss" of wetlands. Many commenters stated that the NWPs promote avoidance and minimization of environmental impacts. Many commenters opposed the NWPs because they do not require avoidance and minimization of impacts.

Section 404(e) of the CWA recognizes that activities authorized by general permits, including NWPs, will result in adverse environmental impacts, but limits those adverse impacts so that they can only be no more than minimal. The Corps has adopted terms and conditions for the NWPs to be sufficiently protective of the aquatic environment while allowing activities that result in no more than minimal adverse environmental effects to be conducted. There is no federal statute or regulation that requires "no net loss" of aquatic resources. The "no overall net loss" goal for wetlands articulated in the 1990 U.S. EPA-Army Memorandum of Agreement for mitigation for CWA Section 404 permits states that the Section 404 permit program will contribute to that national goal. The 1990 Memorandum of Agreement only applies to standard individual permits, not to general permits.

The NWPs authorize impacts with less paperwork and a shorter processing time for project proponents than standard individual permits. These differences in burden can incentivize project proponents to voluntarily reduce the adverse effects of their planned activities that would otherwise require an individual permit under Section 404 of the CWA and/or Section 10 of the RHA, in order to qualify for NWP

authorization. This reduction in adverse effects can therefore reduce a project's impact on the Nation's aquatic resources. General condition 23 (Mitigation) requires permittees to design and construct their projects 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.

Many commenters suggested removing or raising the $\frac{1}{2}$ -acre impact limit of loss of waters for the NWPs. Many commenters recommended raising the $\frac{1}{2}$ -acre impact limit to three acres.

We are retaining the acreage limits for those NWPs that have specified acreage limits. Comments suggesting changes to the acreage limits of a specific NWP are summarized in the section of the preamble that discusses the comments received on that NWP. The acreage limits, along with the current PCN thresholds, other terms of the NWPs, in combination with the general conditions satisfy the requirements of Section 404(e) of the CWA and ensure that the NWPs authorize no more than minimal adverse environmental impacts both individually and cumulatively. In addition, division engineers have the authority to modify NWPs on a regional basis to reduce acreage limits through regional conditions and district engineers, upon review of a PCN, can modify an NWP verification to ensure that a case-specific activity will have no more than minimal adverse environmental effects.

In areas of the United States where higher acreage limits (e.g., one or two acres) would be appropriate for general permit authorizations, district engineers have the authority to issue regional general permits. A number of NWPs are self-limiting, in that the category of activities authorized by that NWP acts as a limit (e.g., NWP 10, which authorizes a single, non-commercial mooring buoy). For those self-limiting NWPs, acreage and linear foot limits are not necessary to control the adverse environmental effects of those activities. In NWPs which have impact limits or PCN thresholds, the acre impact limits, in conjunction with the PCN thresholds, and the $\frac{1}{10}$ -acre loss of wetlands and $\frac{3}{100}$ -acre loss of stream bed compensatory mitigation thresholds are sufficient to protect waters of the United States to ensure the NWPs cause no more than minimal adverse environmental effects.

Many commenters stated that the Corps should reinstate the 300 linear foot impact limit for losses of stream bed in NWPs 21 (Surface Coal Mining

Activities), 29 (Residential Developments), 39 (Commercial and Institutional Facilities), 40 (Agricultural Activities), 42 (Recreational Facilities), 43 (Stormwater Management Facilities), 44 (Mining Activities), 50 (Underground Coal Mining Activities), 51 (Land-Based Renewable Energy Generation), and 52 (Water-Based Renewable Energy Generation Pilot Projects). Many commenters stated that removal of the 300 linear foot limit from NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51 and 52 allows unlimited impacts to streams. One commenter recommended adding a linear foot impact limit of 500 feet.

The 300 linear foot impact limit was removed from 10 NWPs and the $\frac{3}{100}$ -acre threshold for stream compensatory mitigation for NWP activities was established in the 2021 NWPs as explained in the final rule to issue the 2021 NWPs (86 FR 2761–2768) and remains the Corps' position. The Corps will rely on other, existing protective mechanisms within the NWPs to ensure that the activities authorized by these NWPs will result in no more than minimal individual and cumulative adverse environmental effects. Those mechanisms include the $\frac{1}{2}$ -acre impact limit, the PCN requirements for these NWPs, and the ability of division and district engineers to further condition or restrict the applicability of an NWP in situations where they have concerns for the aquatic environment under the CWA Section 404(b)(1) Guidelines or for any factor of the public interest (see 33 CFR 330.1(d)).

Many commenters requested that all NWPs require PCNs for all activities. Many commenters stated that no PCN requirement should be changed. A few commenters stated that thresholds for PCN requirements should be lowered. Many commenters stated that the PCN requirements should be reduced. One commenter stated that the acreage threshold for triggering PCNs for certain NWPs is arbitrarily determined. One commenter stated that PCNs create unnecessary work and delay. Many commenters stated that the Corps should not exempt federal agencies from requirements to submit PCNs. Many commenters stated that by not requiring PCNs for every NWP activity, the Corps is failing to meet its statutory and regulatory obligations.

In this final action, we have retained the PCN thresholds that were in the 2025 Proposal. PCNs are an important mechanism to ensure that the NWPs only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects. Pre-construction notifications allow district engineers to evaluate the

activity- and site-specific circumstances of proposed NWP activities to decide whether those activities are eligible for NWP authorization or require individual permits. In addition, PCNs provide district engineers with the opportunity to impose activity-specific conditions on the NWPs, including mitigation requirements, to ensure that the regulated activity will cause no more than minimal adverse environmental effects.

We agree that federal agencies that use the NWPs to authorize their activities must submit a PCN when required by the terms of the NWP and certain general conditions. General conditions 18 (Endangered Species) and 20 (Historic Properties) require federal agencies to follow their own implementing procedures for complying with the ESA and NHPA. Federal agencies do not have to submit a PCN to satisfy general conditions 18 or 20 if no PCN is required by the terms of the NWP which authorizes the proposed regulated activity or by any other general condition. Section 404(e) of the CWA does not mandate that the Corps track all NWP activities. Since the inception of the NWP program in 1977, many of the NWPs have not required PCNs, thus the changes that are being finalized are not a departure from the Corps' practice or procedures. The Corps will continue to use reliable data and resources to analyze the effects of the NWP Program.

One commenter stated that the PCN thresholds should be set to $\frac{1}{10}$ -acre or 300 linear feet. One commenter stated there is no ecological support for differing thresholds between $\frac{1}{10}$ th and $\frac{1}{2}$ acres for cumulative impacts.

For NWPs that have an acreage PCN threshold, the Corps has set that threshold at $\frac{1}{10}$ -acre. The $\frac{1}{10}$ -acre threshold is a sufficiently protective limit to allow district engineers review PCNs and provide opportunity to impose activity-specific conditions on the NWPs, including mitigation requirements, to ensure that the regulated activity will cause no more than minimal adverse environmental effects. The areal limit is also a more consistently understood measurement of impact compared to the length limit. The $\frac{1}{2}$ -acre limit to loss of waters of the United States, where NWPs have such a limit, in combination to the PCN requirements and other terms and condition of the NWP are sufficient to ensure that the NWPs will cause no more than minimal adverse environmental effects, individually and cumulatively.

Many commenters requested clarification on how to submit a PCN for

a linear project that spans more than one Corps district. Prospective permittees of linear projects that cross the boundaries of a Corps district or division may submit a PCN to one of the districts where regulated activities in waters of the United States are proposed. When the Corps receives an NWP PCN for activities that cross the boundary of a Corps district or division, a lead Corps district will be designated and serve as a single point of contact for each permit applicant.

Several commenters stated that all NWPs should require PCNs so the Corps can coordinate or consult with tribes on proposed NWP activities. Many commenters stated that activities should not be authorized by an NWP when they interfere with tribal rights. Several commenters stated that regional conditions should be modified to ensure that the NWPs do not authorize impacts to any lands or waters ceded in treaties, impacts to treaty rights, or any sacred/cultural site/landscape.

Consistent with general condition 17 (Tribal Rights), no activities are authorized by NWP where they impair reserved tribal rights. Corps districts consulted with tribes during the process for reissuing the NWPs and those consultation efforts may have resulted in regional conditions or coordination procedures with tribes to help ensure compliance with general condition 17. District engineers can develop regional conditions and develop protocols regarding tribal notification that build upon the existing Department of Defense, Army, and Corps' tribal consultation policies. In geographic areas where there are regional concerns about impacts to a particular waterbody or a sensitive aquatic resource, division engineers have the discretionary authority to suspend, modify, or revoke this NWP in a region or location. During review of a PCN, the district engineer will assess the proposal for compliance with general condition 17.

One commenter stated that the Corps should audit a sample of NWPs each year and publish the result of the audit in a report. One commenter recommended treating commercial and non-commercial project proponents differently, such as conditioning permits to protect certain landowners from harsh enforcement actions. Several commenters stated that the Corps should refuse to authorize activities after-the-fact if a PCN was not submitted.

If a permittee receives a verification letter, they must certify their compliance with the NWP, including any conditions to the NWP in accordance with general condition 30

(Compliance Certification). Corps districts conduct compliance inspections on a proportion of permit actions authorized each year, including activities authorized by NWPs. If a project proponent fails to comply with the terms and conditions of an NWP, then the activity is not authorized by that NWP and the district engineer may pursue compliance of an unauthorized action pursuant to 33 CFR 326. The district engineer has discretion how to resolve unauthorized actions, including whether to require restoration, accept an application for an after-the-fact authorization, or other remedies.

One commenter requested definition of the term "verification." As described in Section I.E. of this action, when a project proponent submits a PCN and the district engineer agrees that the proposed activity is authorized by an NWP, the district engineer sends a verification letter to the project proponent verifying that the proposed activity is authorized by an NWP. The district engineer is not issuing a permit, rather they are verifying that the proposed activity complies with the terms and conditions of an issued NWP. The NWP PCN and verification are a streamlined process, intended to be completed by the project proponent and district engineer with a minimal amount of paperwork.

Some commenters recommended that the Corps revise the CWA, various Corps regulations in 33 CFR parts 320 through 332, regional general permits, and the regulations for implementing Section 401 of the Water Act.

The Corps does not have authority to amend the statutory provisions of the CWA. The implementing regulations for Section 401 of the CWA are under the authority of the EPA and are beyond the scope of the Corps' authority to modify. Rulemaking for sections of Corps regulations beyond the reissuance of these NWPs are outside the scope of this rulemaking. Several commenters provided comments on concerns over specific impacts or permit actions in various regions or objections to regional general permits, which are beyond the scope of this review and will be addressed by the districts that issued them.

Many commenters stated these NWPs support the national priorities for energy infrastructure development. One commenter stated that Executive Order 14156 (Declaring a National Energy Emergency) has reduced statutory protections of natural resources. Many commenters support the timely reissuance of the NWPs to avoid disruption to energy infrastructure projects.

Use of emergency procedures does not obviate legal requirements to comply with all applicable laws and regulations. Consequently, compliance with other laws such as the NEPA, Endangered Species Act, the National Historic Preservation Act, and others are still required. The NWPs can provide a streamline process to more quickly issue DA authorization for activities which meet the terms and NWP conditions.

Many commenters stated that the NWPs do not consider climate change or environmental justice concerns. During the process to reissue or modify the NWPs, the Corps considers the adverse environmental effects of the reissuance of these NWPs in accordance Section 404(e) of the CWA, Section 10 of the RHA, and in compliance with applicable environmental laws, regulation, guidance and policy, as limited by the scope of our authority. Executive Order 14148—Initial Rescissions of Harmful Executive Orders and Actions (January 20, 2025) revoked several prior executive orders which addressed climate change and environmental justice concerns. Revoked orders included Executive Order 13990—Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis (January 20, 2021); Executive Order 14008—Tackling the Climate Crisis at Home and Abroad (January 27, 2021); Executive Order 13985—Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (January 20, 2021); and Executive Order 14096—Revitalizing Our Nation’s Commitment to Environmental Justice for All (April 21, 2023).

Executive Order 14154—Unleashing American Energy (January 20, 2025) provided further policy guidance on the consideration of climate change in agency regulatory analyses. On May 5, 2025, the Office of Management and Budget distributed further guidance to agencies (as required by E.O. 14154) which restricted consideration of greenhouse gas emissions in agency regulatory and permitting decision-making. In Executive Order 14151—Ending Radical and Wasteful Government DEI Programs and Preferencing (20 January 2025), the President of the United States directed the termination of environmental justice initiatives. On May 8, 2025, the Acting Assistant Secretary of the Army (Civil Works) rescinded the Corps’ Environmental Justice strategic plan. The level of analysis and consideration of climate change and environmental justice concerns in the national decision documents and this final action comply

with these Executive Orders and directives.

C. Responses to Comments on Regional Conditions of Nationwide Permits

Under Section 404(e) of the CWA, NWPs can only be issued for those activities that result in no more than minimal individual and cumulative adverse environmental effects. Corps regulations impose the same standard for general permits that authorize activities under Section 10 of the RHA (33 U.S.C. 403) (33 CFR 330.1(b), (g)). The NWP terms and general conditions to the NWPs may not account for regional differences; therefore, regional conditions imposed by division engineers are an important mechanism for addressing those regional differences and ensuring compliance with statutory requirements. Effective regional conditions help protect local aquatic ecosystems and other resources and the functions and services they provide. They also help ensure that the NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse effects on the aquatic environment and are not contrary to the public interest.

There are two types of regional conditions: (1) Corps regional conditions and (2) water quality certification/CZMA consistency concurrence regional conditions. Corps regional conditions are added to the NWPs by division engineers in accordance with the procedures at 33 CFR 330.5(c). Water quality certification and Coastal Zone Management Act consistency concurrence regional conditions are also added to the NWPs if an appropriate authority grants a water quality certification or CZMA consistency concurrence with conditions for the issuance, reissuance, or modification of the NWPs prior to the effective date of the issued, reissued, or modified NWPs.

Examples of Corps regional conditions include:

- Restricting the types of waters of the United States where the NWPs may be used (*e.g.*, fens, bogs, bottomland hardwood forests, etc.) or prohibiting the use of some or all of the NWPs in those types of waters or in specific watersheds.
- Restricting or prohibiting the use of NWPs in an area covered by a Special Area Management Plan, where regional general permits are issued to authorize activities that have no more than minimal individual and cumulative adverse environmental effects and are consistent with that plan.
- Revoking certain NWPs in a watershed or other type of geographic

area (*e.g.*, a state or county) to require other forms of DA authorization (*e.g.*, individual permits) for those activities.

- Adding PCN requirements to NWPs in certain watersheds or other types of geographic areas, or in certain types of waters of the United States, to require notification for all activities or impose lower PCN thresholds.

- Reducing NWP acreage limits for activities in certain types of waters of the United States (*e.g.*, streams) or specific waterbodies, or in specific watersheds or other types of geographic regions.

- Restricting activities authorized by NWPs to certain times of the year in a particular waterbody, to minimize the adverse effects of those activities on fish or shellfish spawning, wildlife nesting, or other ecologically cyclical events.

- Conditions necessary to facilitate compliance with the “Endangered Species” general condition, to enhance protection of listed species or designated critical habitat under the Endangered Species Act.

- Conditions necessary to facilitate compliance with the “Tribal Rights” general condition, to enhance protection of tribal trust resources, including natural and cultural resources and tribal lands.

- Conditions necessary for ensuring compliance with the “Historic Properties” general condition, to enhance protection of historic properties.

- Conditions necessary to ensure that activities authorized by NWP will have no more than minimal individual and cumulative adverse effects on Essential Fish Habitat.

Regional conditions are modifications of the NWPs that are made by division engineers. Regional conditions can only add conditions to, or further restrict the applicability of, an NWP (see 33 CFR 330.1(d)). Corps regional conditions approved by division engineers cannot remove any of the terms and conditions of the NWPs, including general conditions. Corps regional conditions cannot increase PCN thresholds or remove notification requirements, but they can lower PCN thresholds to require PCNs for more activities authorized by a specific NWP. In summary, Corps regional conditions can only be more restrictive than the NWP terms and conditions established by Corps Headquarters when it issues or reissues an NWP.

Corps regional conditions may be added to NWPs by division engineers after a public notice and comment process and coordination with appropriate federal, state, and local agencies, as well as tribes. After Corps

Headquarters published, in the **Federal Register**, the proposed rule to issue, reissue, or modify NWP, district engineers issued local public notices to announce the availability of the proposed rule for review and comment and to solicit public comment on proposed regional conditions and/or proposed suspensions or revocations of NWP authorizations for specific geographic areas, classes of activities, or classes of waters (see 33 CFR 330.5(b)(2)(ii)). These local public notices usually have a 45-day comment period. The local public notices also solicited suggestions from the public and interested agencies on additional regional conditions that they believe are necessary to ensure that the NWPs authorize only those activities that have no more than minimal adverse environmental effects.

Comments on proposed regional conditions were evaluated by the Corps district that issued the public notice. Corps districts also consulted or coordinated with tribes to identify and propose regional conditions to ensure compliance with general condition 17 (Tribal Rights) and fulfill the Corps' tribal trust responsibilities. The process for adding Corps regional conditions to the NWPs is described at 33 CFR 330.5(c). The regulations for the regional conditioning process were promulgated in 1991, with the proposed rule published in the **Federal Register** on April 10, 1991 (56 FR 14598) and the final rule published in the **Federal Register** on November 22, 1991 (56 FR 59110).

In response to the districts' local public notice, interested parties suggested additional Corps regional conditions or changes to Corps regional conditions. Interested parties also suggested suspension or revocation of NWPs in certain geographic areas, such as specific watersheds or waterbodies. Such comments should include data to support the need for the suggested modifications, suspensions, or revocations of NWPs.

After the public comment period ended for the districts' local public notices, each Corps district evaluated the comments received in response to their local public notice and began preparing, as required by 33 CFR 330.5(c)(1)(iii), supplemental documents for each NWP. Each supplemental document evaluates the NWP on a regional basis (e.g., by Corps district geographic area of responsibility or by state) and discusses whether regional conditions are needed for that NWP to ensure that authorized activities result in no more than minimal individual and cumulative adverse

environmental effects. Each supplemental document will also include a statement by the division engineer that will certify that the NWP, with approved regional conditions, will authorize only those activities that will have no more than minimal individual and cumulative adverse environmental effects.

The supplemental documents may cover a Corps district, especially in cases where the geographic area of responsibility for the Corps district covers an entire state. The supplemental documents may also cover portions of multiple Corps districts in cases where more than one Corps district has a geographic area of responsibility in a single state. The supplemental documents include an evaluation of public and agency comments on proposed and suggested regional conditions, with responses to those comments, to show that the views of potentially affected parties were fully considered (33 CFR 330.5(c)(1)(ii)). Each supplemental document also explains how substantive comments submitted in response to the local public notice were considered. After the supplemental documents for the NWPs are drafted by the district, they are sent to the division engineer for review along with the district's recommendations for regional conditions. The division engineer may approve the supplemental documents and the district's recommended regional conditions. Alternatively, the division engineer may also request changes to one or more supplemental documents, including changes to the regional conditions recommended by the district in those supplemental documents.

After the division engineer approves regional conditions for the NWPs by signing the supplemental documents, the district issues a public notice announcing the final Corps regional conditions and when those regional conditions go into effect (see 33 CFR 330.5(c)(1)(v)). The district's public notice will be posted on its website. Copies of the district's public notice are also sent to interested parties that are on the district's public notice mailing list via email or the U.S. mail. The public notice will also describe, if appropriate, a grandfathering period as specified by 33 CFR 330.6(b) for those project proponents who have already commenced work under the NWP or are under contract to commence work under the NWP (see 33 CFR 330.5(c)(1)(iv)). Copies of all Corps regional conditions approved by the division engineers for the NWPs are forwarded to Corps Headquarters (see 33 CFR 330.5(c)(3)).

The purpose of regional conditions is to tailor the NWPs to account for regional differences in aquatic resource types, the functions they provide, and their value to the region so that the NWPs in a particular geographic area authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects. Requiring consistency among regional conditions at a national level would be contrary to the purpose of regional conditions and would reduce the utility of the NWPs. In other words, the ability to add restrictions to one or more NWPs at a regional level to ensure that those activities result in no more than minimal individual and cumulative adverse environmental effects, allows the national terms and conditions to be less restrictive in other areas of the country where additional restrictions may not be necessary or relevant to the aquatic ecosystem.

The ability to tailor the NWP program in specific areas of the country allows the NWPs to authorize more activities than would be possible if the need for greater restrictions in one part of the country had to be applied to the nation as a whole. Corps regional conditions should be written clearly and provide only the additional restrictions that are necessary to ensure that NWP activities in the applicable geographic region result only in minimal individual and cumulative adverse environmental effects, consistent with the requirements of Section 404(e) of the CWA.

Under 33 CFR 330.5(c), the authority to approve Corps regional conditions is assigned to division engineers. A division engineer can take steps to provide consistency in Corps regional conditions for the districts within her or his division. However, it should also be noted that the eight Corps divisions encompass large geographic regions and there can be substantial differences in aquatic resource types, functions, services, and values within a Corps division. For example, the Corps' Northwestern Division extends from the northwest coast to the Midwest, with oceanic and estuarine waters along the coasts of Oregon and Washington, to inland wetlands and rivers in Missouri and Nebraska. As another example, the Mississippi Valley Division extends from Louisiana, with its extensive coastal wetlands and bottomland hardwood forests to Minnesota, which has many lakes, bogs, marshes, and swamps.

In addition, there are usually also substantial differences in other resources that are subject to regional conditions that may be developed to

assist in the Corps' compliance with other applicable federal laws, such as Section 7 of the Endangered Species Act, the Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act, Section 106 of the National Historic Preservation Act, and the Wild and Scenic Rivers Act. The presence and ranges of endangered and threatened species, and the locations of designated critical habitat often vary substantially within a Corps division. Most coastal Corps districts have essential fish habitat in their geographic areas of responsibility, whereas inland districts do not.

Regional conditions may also be developed to address tribal treaty rights and trust resources, which likely vary from tribe to tribe. Therefore, because of these factors, consistency in regional conditions necessary to ensure that NWP only authorize activities that have no more than minimal adverse environmental effects cannot be practicably achieved at a national or division level without reducing the availability of NWPs in other areas of the country.

Consistent with the Corps' approach to providing more transparency in the process for proposing and adding regional conditions to the NWPs that was adopted for the 2021 NWPs, the Corps posted copies of the district public notices soliciting input for proposed and suggested regional conditions in the *www.regulations.gov* docket for this rulemaking action (docket number COE-2025-0002), under "Supporting and Related Material." In addition, after publication of this final action to reissue the NWPs, the Corps will post copies of all district public notices announcing the final regional conditions in the *www.regulations.gov* docket for this rulemaking action, so that copies of all these district public notices are available in a single location. This docket is intended to provide a central location for interested parties to obtain information on proposed and finalized Corps regional conditions, as well as the WQC/CZMA regional conditions added through the water quality certification process and Coastal Zone Management Act consistency concurrence process for the issuance and reissuance process for the NWPs.

If, after the NWPs go into effect, division or district engineers receive new information that calls for new or modified Corps regional conditions to ensure that authorized activities cause no more than minimal individual and cumulative adverse environmental effects, Corps division and district

engineers may work together to propose and approve new or modified regional conditions after following the procedures in 33 CFR 330.5(c). Adding new Corps regional conditions, or modifying existing Corps regional conditions, after the final action issuing or reissuing the NWPs go into effect includes a public notice and comment process and amending supplemental documents for those Corps regional conditions. Information on regional conditions for the NWPs, and on the suspension or revocation of one or more NWPs in a particular area, can be obtained from the appropriate district engineer.

A few commenters recommended eliminating regional conditions or objected to applying regional conditions the NWPs. Many commenters stated the Corps should make PCN requirements and interpretations among the Corps districts standardized. A few commenters expressed support for applying regional conditions to ensure the NWPs result in no more than minimal adverse environmental effects in a region. One commenter stated that regional conditions are the most effective way to ensure compliance with an NWP. One commenter stated that the Corps should publish the justifications for each regional condition. One commenter stated that the Corps Headquarters should review and approve regional conditions.

The NWPs establish terms and conditions for authorization of regulated activities for the nation. Regional conditions provide flexibility to consider the variety of waters of the United States, quality of the aquatic resources, or regional concerns for specific types of impacts to waters of the United States while continuing to ensure that the NWPs will cause no more than minimal adverse environmental effects. Supplemental documentation is publicly available, and division engineers may make supplemental documents available on their websites, at their discretion. After this action is finalized, district engineers will issue public notices to notify the public of the final regional conditions to the NWPs.

Water Quality Certification and Coastal Zone Management Authorization Regional Reviews

The processes for states, approved tribes, and EPA to issue water quality certifications (WQCs) for the issuance of the NWPs, and for states to issue general CZMA consistency concurrences for the NWPs are separate from the Corps' process in 33 CFR 330.5(c) for division engineers adding Corps regional

conditions to the NWPs. The WQC process is governed by EPA's regulations at 40 CFR part 121, and by the regulations and policies of certifying authorities, such as states, tribes approved by EPA to administer their own water quality certification programs, or EPA regions. EPA regions act as the certifying authorities where no state or tribe has authority to issue certification (33 U.S.C. 1341(a)(1)). Currently, EPA acts as the certifying authority in two scenarios: (1) on behalf of tribes without "treatment in a similar manner as a state" (TAS) for CWA Section 401 and (2) on lands of exclusive federal jurisdiction in relevant respects.

The CZMA consistency process is governed by regulations issued by the Department of Commerce at 15 CFR part 930. Individuals who are interested in providing comments specific to WQCs and CZMA consistency determinations for the issuance or reissuance of the NWPs should submit their comments directly to the appropriate state, authorized tribe, or EPA regional office. Because these processes are separate from the Corps' regional conditioning process, the public notices issued by states, authorized tribes, and EPA regions during the WQC and CZMA consistency determination processes will not be included in the docket for this rulemaking action.

The Corps' regulations for establishing WQC regional conditions for the NWPs are provided at 33 CFR 330.4(c)(2). If, prior to the issuance or reissuance of NWPs, a state, authorized tribe, or EPA region issues a CWA Section 401 water quality certification with conditions, the division engineer will make those water quality certification conditions regional conditions for the applicable NWPs, unless she or he determines those conditions do not comply with 33 CFR 325.4 (see 33 CFR 330.4(c)(2)).

If the division engineer determines those water quality certification conditions do not comply with 33 CFR 325.4, then the conditioned water quality certification will be considered denied, and the project proponent will need to request an activity-specific water quality certification for the proposed activity which may result in any discharge from a point source into waters of the United States from the certifying authority. That certification request must satisfy the requirements of 40 CFR 121.5. The certifying authority may grant, grant with conditions, or deny water quality certification for an individual license or permit, for any activity which may result in any discharge into waters of the United

States (see 40 CFR 121.7), including an activity-specific discharge into waters of the United States that may be authorized by an NWP.

A similar process applies to a CZMA consistency concurrence issued by a state for the issuance of an NWP (see 33 CFR 330.4(d)(2)). If the division engineer determines those CZMA concurrence conditions do not comply with 33 CFR 325.4, then the conditioned CZMA consistency certification will be considered an objection (see 15 CFR 930.4(b)), and the project proponent will need to request an activity-specific CZMA consistency concurrence from the state under subpart D of 15 CFR part 930.

After division engineers finalize Corps regional conditions and determined whether conditions in WQCs and CZMA consistency concurrences for the issuance or reissuance of the NWPs are WQC/CZMA regional conditions for the NWPs, Corps districts will issue public notices announcing the final Corps and WQC/CZMA regional conditions, and the status of WQCs and CZMA consistency concurrences for the final NWPs. Corps Headquarters will post copies of these district public notices in the *regulations.gov* docket (docket number COE-2025-0002), under “Supporting and Related Material.”

D. Responses to Comments on Nature-Based Solutions and the NWP Program

In the 2025 Proposal, the Corps proposed to add a definition for “nature-based solutions” to the NWPs, in Section F, Definitions. Nature-based solutions can be incorporated into regulated activities authorized by NWP 13 (bank stabilization activities), NWP 27 (aquatic ecosystem restoration, enhancement, and establishment activities), NWP 31 (maintenance of existing flood control facilities), NWP 41 (reshaping existing drainage and irrigation ditches), NWP 43 (stormwater management facilities), NWP 54 (living shorelines), NWP 55 (seaweed mariculture activities), NWP 59 (water reclamation and reuse facilities), and NWP A (Activities to Improve Passage of Fish and Other Aquatic Organisms). The Corps also proposed modifications to some NWPs (e.g., NWPs 13 and 43) to enhance the ability of those NWPs to authorize regulated activities associated with nature-based solutions.

Many commenters expressed support for the addition of this definition. One commenter recommended that the Corps consider including the phrases “best management practices” and “stormwater control measures” in the definition of “nature-based solutions”

or instead of “nature-based solutions.” One commenter objected to the inclusion of “regenerative stormwater conveyances” and “natural channel design” as acceptable practices of “nature-based solutions.” One commenter recommended using more commonly known terms such as “green infrastructure” or “low-impact development” instead of “nature-based solutions.”

“Best management practices,” “stormwater management,” “green infrastructure,” and “low-impact development” are subcategories of nature-based solutions. The terms “best management practices,” “stormwater management,” and “stormwater management facilities” are already defined in Section F (Definitions) of this action. Nature-based solutions can include “regenerative stormwater conveyances,” which can result in benefits to an ecosystem, however these types of activities may not result in a project that meets an ecological reference and therefore may not be authorized by NWP 27 (Aquatic Ecosystem Restoration, Enhancement, and Establishment). Nature-based solutions include a wider range of actions, protection, management, restoration of ecosystems resulting in a broader range of benefits. Nature-based solutions can vary in the degree to which they involve natural or restored ecosystems and engineered components. We have not included “natural channel design” as an example of a nature-based solution.

One commenter recommended revising this definition to be consistent with the definition of “nature-based solutions” used by other Corps and federal agency programs. Many commenters recommended deleting overly broad language from the definition relating to societal challenges, suggesting that they could lead to challenges in interpretation and are aspirational. One commenter suggested adding “that ensure no net loss of ecological function” to the end of the definition.

The Corps declines to adopt a different definition of nature-based solutions than was proposed, and will include the language in the new definition referring to societal challenges. Societal challenges can be environmental and include water security and disaster-risk reduction. District engineers have the discretion to determine whether a proposed activity may be authorized by an NWP. Definitions for nature-based solutions generally have the elements of conservation, restoration, or management of natural systems for the

benefit of people and environments. We have adopted the definition of nature-based solutions from Cohen-Shacham and others (2016). The Corps declines to require that nature-based solutions ensure no net loss of ecological function as inclusion of that requirement would discourage the use of nature-based solutions. Nature-based solutions provide benefits to the ecosystem but may not result in no net loss of ecological function.

One commenter suggested incorporating a list of examples of nature-based solutions in the definition. One commenter stated that the term “nature-based solutions” is used differently in NWPs 13 and 43. One commenter suggested expanding the list of nature-based solutions examples to include vegetative stabilization and bioengineering. One commenter recommended removing thin-layer placement of sediment as an example of nature-based solutions out of concern that use of such an example would create a perceived narrowing of the types of sediment placement activities that may be authorized by NWP 27.

In this action, the Corps has proposed a new definition of “nature-based solutions.” Nature-based solutions can vary in the degree to which they involve natural or restored ecosystems and engineered components. Nature-based solutions may result in avoidance or minimization of adverse effects of authorized activities. They may also cause adverse effects to waters of the United States while providing other benefits to the aquatic ecosystem.

Some nature-based solutions will not qualify for authorization under certain NWPs which authorize nature-based solutions because the proposed activity does not meet the terms and conditions of that NWP. For instance, a proposed activity that is a nature-based solution may not be authorized by NWP 27 (aquatic ecosystem restoration, enhancement, and establishment activities) because it involves engineered features that do not resemble ecological references. Examples of nature-based solutions are listed in the terms of NWP 13 (bank stabilization activities) and NWP 43 (stormwater management facilities). The list of examples in each of these NWPs will be necessarily different because of the difference in the purpose of the regulated activities authorized by each of those NWPs.

Nature-based solutions associated with bank stabilization activities can include use of seawalls and bulkheads that are constructed with materials that have textured surfaces (e.g., crevices, depressions, pits, grooves, gaps) that

provide structural complexity and microhabitats that habitat-forming sessile organisms such as barnacles, branching coralline algae, bivalves, algae, and corals can attach to, grow on, and further enhance habitat structure (Strain et al. 2017) for other aquatic organisms. Fish may feed on the aquatic organisms attached to these seawalls and bulkheads, and aquatic organisms can be attracted to the structural habitat on these seawalls and bulkheads. Seawalls and bulkheads constructed with textured surfaces and other features to increase habitat complexity and are colonized by benthic organisms, such as seaweeds and sessile animals, and may attract and support populations of juvenile fish, including salmon species (Morris et al. 2018). Habitat complexity at seawalls and bulkheads that supports more diverse aquatic organism assemblages can also be enhanced at seawalls by incorporating water retaining features such as rock or tidal pools (O'Shaughnessy et al. 2020), "flower pots" (Morris et al. 2018), and benches (Toft et al. 2013), or large or small ledges (Strain et al. 2017).

Nature based solutions associated with bank stabilization may also include rocks placed in subtidal and intertidal areas next to seawalls and bulkheads, or in clusters next to seawalls and bulkheads, to provide habitat for aquatic organisms (Suedel et al. 2022). Rock piles next to seawalls and bulkheads can be constructed from rocks of different sizes or rocks of similar size, and gaps between these rocks can provide habitat and refuge areas for aquatic organisms. Another nature-based solution that may increase habitat and biodiversity next to seawalls, bulkheads, and revetments involves the placement of bags of molluscs or the placement of small reef structures to provide habitat for molluscs and other sessile aquatic organisms next to a seawall, bulkhead, or revetment (Suedel et al. 2022).

Other nature-based solutions associated with bank stabilization include revetments designed and constructed to increase structural complexity that can provide habitat for benthic and motile aquatic organisms. Rocks of different sizes can be used to construct revetments and provide cracks and holes of different sizes that can be used as habitat by aquatic organisms and plants (Suedel et al. 2022). Another nature-based solution that can add structural complexity in marine waters, is the placement of pieces of large wood in front seawalls, bulkheads, and revetments.

In waterbodies with soft substrates such as sand, the large wood pieces can attract benthic and pelagic organisms and enhance local biodiversity (Dickson et al. 2023). Installing large pieces of wood into marine and estuarine waters seaward of seawalls, bulkheads, and revetments can provide habitat for a variety of aquatic organisms, increase the number of trophic connections among aquatic species, and contribute to local nutrient cycling, and may help lessen changes in of biodiversity that may occur as a result of the construction of a seawall, bulkhead, or revetment (Witte et al. 2024, Dickson et al. 2023). Nature-based solutions which may be authorized by NWP 13 and may also be authorized by NWP 54 (living shorelines), include vegetative stabilization, bioengineering, or other types of soft bank stabilization.

Examples of nature-based solutions can be incorporated into regulated activities that may be authorized by NWP 27 (aquatic ecosystem restoration, enhancement, and establishment activities) include thin-layer placement of dredged material to sustain wetlands and other aquatic habitats; placement of spoil material to elevate a degraded riverbed and restore geomorphic processes; alignments of river channels within the existing floodway to enhance riverine function and connectivity; and reservoir sediment management activities to maintain continuity of sediment transport through the river network to sustain downstream aquatic habitats (e.g., downstream geomorphology) and terrestrial habitats (non-wetland riparian areas and floodplains) (see 86 FR 73544–73548). Thin layer placement of dredged material is one of a number of nature-based solutions that may involve the discharge of sediments into waters of the United States for the purpose of restoring wetlands, streams and other waters. Placement of sediments for the purpose of restoration, enhancement, or establishment, may occur in a variety of depths or configurations and may be authorized by NWP 27 provided the activity results in net increases in aquatic ecosystem functions and services and resembles an ecological reference.

Other examples of nature-based solutions that might be associated with activities authorized by NWP 27 include restoration of fringe wetlands in estuaries and lakes to reduce bank erosion; restoration of oyster reefs, coral reefs, and other types of subtidal or intertidal habitats to provide habitat, support biodiversity, and provide a variety of co-benefits (e.g., reduced shoreline or bank erosion); the re-

establishment, rehabilitation, establishment, or enhancement of riparian areas and wetlands to trap or transform sediments and pollutants carried by surface run-off or shallow subsurface flows before that water reaches rivers, streams, lakes, estuaries, ocean waters; and the use of dredged material to reestablish, rehabilitate, enhance, or establish wetlands or other aquatic habitats. Another nature-based solution includes process-based restoration of river corridors (i.e., river and stream channels and their associated floodplains, riparian areas, and wetlands) to increase the functions and services provided by river corridors and provide increased resilience to drought and wildfires.

NWP 43 (Stormwater Management Facilities) may authorize regulated activities which incorporate nature-based solutions for the construction and maintenance of stormwater management and pollution abatement facilities if they involve discharges of dredged or fill material into non-tidal waters of the United States, such as stream biofilters, bioretention ponds or swales, rain gardens, vegetated filter strips, vegetated swales (bioswales), constructed wetlands, infiltration trenches, and regenerative stormwater conveyances. Other regulated activities that incorporate nature-based solutions that are conducted to meet pollutant discharge targets established under the CWA may also be authorized by NWP 43 as long as they comply with the applicable terms and conditions of this NWP.

Proposed new NWP A (Activities to Improve Passage of Fish and Other Organisms) may authorize regulated activities that incorporate nature-based solutions such as nature-like fishways, which use ecological engineering principles to provide nature-based solutions to improve the ability of fish and other aquatic organisms to pass around obstacles to access other aquatic habitats.

Other NWPs, such as NWP 31 (maintenance of existing flood control facilities), NWP 41 (reshaping existing drainage and irrigation ditches), NWP 55 (seaweed mariculture activities), and NWP 59 (water reclamation and reuse facilities) may also authorize regulated activities that incorporate nature-based solutions, including some of the examples listed in this section. Examples of regulated activities associated with nature-based solutions that may be authorized by these NWPs include bioretention ponds, biofilters, placement of bags of molluscs, and constructed wetlands.

One commenter suggested including a clear definition of soft bank stabilization. One commenter recommended adding a definition of bioengineering. Many commenters recommended that the Corps add language to each NWP to require prioritization of the use of nature-based solutions wherever possible.

Soft bank stabilization includes bioengineering and vegetative stabilization. Bioengineering is a longstanding concept in the discipline of soil and bank stabilization. We decline to add a definition of “soft bank stabilization” or “bioengineering” to the NWPs to maintain the flexibility to apply those definitions as the science around each concept evolves. We will rely on the new definition of nature-based solutions as an overarching term that encompasses both soft-bank stabilization and bioengineering activities. Prospective permittees are encouraged to incorporate nature-based solutions into regulated activities. The incorporation of nature-based solutions into an NWP-specific activity may not be possible or appropriate in all situations, depending on the purpose of the activity, site specific characteristics and other factors.

In this action, the Corps has modified the NWPs which may provide the most opportunity to incorporate nature-based solutions into the activity which requires DA authorization to provide examples of nature-based solutions. The Corps has also added the definition of “nature-based solutions” to Section F (Definitions) as a guide to prospective permittees and districts in the incorporation of nature-based solutions into NWP-specific activities.

E. Response to Comments on Notes in the NWPs for Utilities and Mariculture Activities

In the 2025 Proposal, the Corps proposed to modify the NWPs that authorize activities associated with utilities and the activities associated with mariculture. The Corps proposed to add or modify two Notes in each NWP to add language to clarify the intent of each Note, to identify information that should be provided to National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS) or U.S. Coast Guard (USCG), and to provide contact information for both NOS and USCG.

The Corps proposed to modify an existing note in NWP 12 (Oil or Natural Gas Pipeline Activities), NWP 52 (Water-Based Renewable Energy Generation Pilot Projects), NWP 57 (Electric Utility Line and Telecommunications Activities), and

NWP 58 (Utility Line Activities for Water and Other Substances) to encourage project proponents to contact NOS and to add a note to advise the permittee to contact USCG. The Corps proposed to modify an existing Note in NWP 48 (Commercial Shellfish Mariculture Activities) and NWP 55 (Seaweed Mariculture Activities) to advise the permittee to contact the USCG and to add a note that encourages project proponents to contact NOS. The Corps also requested comments on adding both Notes to NWP 4 (Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities) and NWP 27 (Aquatic Habitat Restoration, Enhancement, and Establishment Activities).

Many commenters supported or stated they did not object to the modified or added Notes. One commenter noted that the responsibility to provide information to the USCG and NOS was being moved from the Corps to the permittee. One commenter recommended that the Corps research a technology-based solution to provide the requested information to the NOS and USCG. A few commenters recommended that the Notes include a more detailed list of information that should be provided or should not be provided to USCG or NOS. One commenter requested clarification if district engineers must wait for a response from USCG before reviewing a PCN. One commenter stated that notification to NOS should only be required if a structure would obstruct navigation. Several commenters recommended adding language to the Notes to state that the information should be submitted to NOS within 1-year of completion. Several commenters recommended that the Notes be clarified to state that proponents of activities which do not require a PCN should also contact USCG. One commenter stated that the information provided to NOS for activities authorized under NWPs 12, 48, 52, 55, 57, and 58 should be provided to affected tribes upon request.

The purpose of these Notes is to encourage the permittee to contact USCG and NOS regarding the location and marking of proposed structures in navigable waters of the United States to avoid conflicts with navigation. Prospective permittees are encouraged to contact the USCG and NOS for activities in navigable waters of the United States subject to authorization by NWPs 12, 48, 52, 55, 57, and 58 regardless of whether the NWP requires submittal of a PCN to the district engineer. Prospective permittees are not required to wait for a response from USCG before submitting a PCN. District

engineers should not delay review of a PCN if the prospective permittee has not engaged with or received a response from USCG.

The Notes cannot detail all of the information that the USCG or NOS might prefer or request to receive from a permittee. Prospective permittees should coordinate with USCG and NOS regarding information necessary to inform the reviews or actions that are the responsibility of USCG or NOS. Tribes may, at any time, request such information from the district engineer that the district engineer has in his or her possession.

One commenter expressed objections to adding the Notes to NWP 4 and NWP 27. One commenter stated that it is impractical to notify NOS of structures or devices that are temporary in nature.

NWP 4 authorizes temporary structures and small fish attraction devices, but does not authorize artificial reefs or other large permanent structures in navigable water of the U.S. NWP 27 authorizes activities to restore aquatic ecosystems, and does not authorize the installation of engineered structures in waters of the United States. NWP 27 can be used to authorize the removal of culverts and other obstructions from waters, but it cannot be used to add or replace existing structures with new structures. After consideration of these comments, the Corps has determined that it is not necessary to add either Note to NWP 4 or NWP 27.

After reviewing the comments received in response to the proposed rule, the Corps has decided to adopt the Notes as proposed.

F. Responses to Comments on Specific Nationwide Permits

NWP 1. Aids to Navigation. The Corps did not propose any changes to this NWP. No comments were received on the proposed reissuance of this NWP. This NWP is reissued as proposed.

NWP 2. Structures in Artificial Canals. The Corps did not propose any changes to this NWP. Several commenters stated that all NWP 2 should require a PCN because the activities authorized by this NWP have the potential to cause harmful sedimentation by impacting the flow of water.

This NWP only authorizes the construction of structures in navigable waters of the United States. Discharges of dredge or fill material requiring authorization under Section 404 of the CWA are not authorized by this NWP. Permittees are required to comply with the general conditions to the NWP and regional conditions, including conditions included in any issued water

quality certifications. If an activity constructed in an artificial canal affects navigation, movement of aquatic species, or creates an impoundment (where the purpose of the activity is not to impound waters) or has improperly installed and maintained erosion and sedimentation controls, contrary to general conditions, the activity is not compliant with the NWP and is not authorized by this NWP. If a structure is not authorized, the district engineer will address the potential unauthorized activity in accordance with 33 CFR 326. This NWP is reissued as proposed.

NWP 3. Maintenance. The Corps did not propose any changes to this NWP. Many commenters supported the reissuance of this NWP. Many commenters stated that this NWP authorizes activities that are not similar in nature. Many commenters stated that this NWP should not be modified to add any additional PCN requirements or acreage limits. Many commenters stated that this NWP should have an acreage limit for “loss of waters of the United States.” One commenter stated that NWP 3 should always require a PCN because currently serviceable structures may be historic properties. One commenter suggested that the Notification paragraph for NWP 3 be modified to require documentation on how alternatives were considered. One commenter suggested that NWP 3 prohibit the emergency use of NWP 3 when the permittee has no documentation of monitoring, maintenance, or inspection activities.

The activities authorized by NWP 3 are similar in nature because they authorize the discharge of dredged or fill material in waters of the United States and work on structures, in navigable waters of the United States that are limited to the repair, rehabilitation, and replacement of currently serviceable structures or fills, or structures or fills damaged or destroyed by storms, floods (including tidal floods), fires, or other discrete events. This NWP authorizes regulated activities for the repair, rehabilitation, or replacement of existing, currently serviceable structures or fills, and only authorizes minor deviations to the structure’s configuration or filled area. The Corps declines to require PCNs for activities authorized by paragraph (a) because the current qualitative and quantitative limits in the text of this NWP are sufficient to ensure that the NWP authorizes only those activities that result in no more than minimal individual and cumulative adverse effects. Paragraph (a) of this NWP authorizes only minor deviations to previously authorized structures or fills.

If a non-federal permittee proposes an activity that might have the potential to effect a historic property or a property eligible for listing on the National Register of Historic Places, general condition 20 requires the prospective permittee to submit a PCN and the non-federal permittee is not authorized to begin construction until they receive written authorization from the district engineer. If the non-federal project proponent does not comply with 33 CFR 330.4(g)(2) and general condition 20, and does not submit the required PCN, then the activity is not authorized by an NWP. In such situations, it is an unauthorized activity, and the district engineer will determine an appropriate course of action under the regulations at 33 CFR part 326 if and when the Corps learns about that unauthorized activity. Because this NWP is limited to regulated activities associated with the repair, rehabilitation, and replacement of existing, currently serviceable structures or fills, there are usually no practicable off-site alternatives for repairing, rehabilitating, or replacing these structures or fills.

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 at the project site. Permittees are required to maintain structures or fills authorized by an NWP in accordance with general condition 14 (Proper Maintenance). The prompt need for repair could result from changes to a fill or structure that happen gradually, or as a result of an abrupt change, as from a natural disaster. Corps’ regulations at 33 CFR 325.2(e)(4) govern the use of emergency procedures to authorize activities in emergency situations. The Corps does not require documentation from the permittee to justify the need for an emergency repair, or any other project purpose; therefore, the Corps declines to require documentation from the permittee justifying the need for the emergency repair.

Several commenters requested that the Corps define the term “minor deviations.” One commenter stated that this NWP should indicate what should be considered maintenance and what should be considered a new project. One commenter stated that NWP 3 should prohibit any increases in the size of the structure. Many commenters stated that this NWP authorizes large infrastructure repairs without Corps review.

This NWP authorizes regulated activities associated with the repair, rehabilitation, or replacement of existing infrastructure while allowing

minor deviations to the structure or fill due to changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards. What constitutes a “minor deviation” varies and is dependent on the degree to which changes in the structure’s configuration or filled area would occur as a result of the repair, rehabilitation, or replacement activity relative to the size and shape of the existing structure or fill. Minor deviations may also be necessary because of changes in materials, construction techniques, the requirements of other regulatory agencies, or current construction codes or safety standards.

The NWP requires the structure or fill not be put to uses that differ from the uses originally contemplated when the structure or fill was originally constructed. Repair, rehabilitation, or replacement activities that exceed the “minor deviations” provision of this NWP may be authorized by individual permits, regional general permits, or another NWP. Discharges of dredged or fill material associated with maintenance activities which do not modify the character, scope, or size of the original fill design may be exempted from regulation under Section 404(f) of the CWA.

Many commenters stated that this NWP should be modified to authorize maintenance activities on currently serviceable structures or fill that did not require a permit at the time it was constructed. Many commenters requested that the NWP be modified to authorize new or additional riprap to protect the repaired structure or fill, provided that riprap is the minimum necessary to achieve protection. One commenter objected to the use of NWP to authorize new or additional rip rap.

For the reasons explained in the 2021 final rule (86 FR 73528), the Corps declines to modify the NWP to authorize maintenance activities for structures that did not require a permit at the time it was constructed and also declines to reissue this NWP with modifications that would authorize the placement of new or additional riprap to protect the existing structure or fill.

One commenter stated that the term “previously authorized structure” is applied inconsistently across the Districts and requested that the phrase be defined. Many commenters stated that work to repair structures or fill that are damaged by storms, floods, fire or other discrete events is inconsistent with the definition of “currently serviceable.”

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 a PCN, 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 term “currently serviceable” is defined in Section F of the NWPs (Definitions). This NWP 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. The term currently serviceable is not included in the list of actions authorized after destruction or damage by storms, floods, fire or other discrete events. 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, he or she can take action to address the alleged non-compliance.

One commenter recommended that paragraph (b) be modified to limit the removal of sediments to 25 cubic yards or within 25 feet of the structure. One commenter stated that activities authorized under paragraph (c) should require a PCN to ensure the activities are truly temporary. One commenter requested that a new Note be added to require that vegetation that is removed must be replaced.

Paragraph (b) 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.) for a distance of no more than 200 feet in any direction from the structure. All activities authorized by paragraph (b) of this NWP require submittal of a PCN to the district engineer. District engineers will review these proposed activities to determine whether removal of accumulated sediments up to 200 feet from the structure will result in no more than minimal individual and cumulative adverse environmental effects.

Paragraph (c) of NWP 3 does not authorize permanent discharges of

dredged or fill material into waters of the United States. Permittees must comply with the requirements of paragraph (c) as well as general conditions 11 (Equipment) and 13 (Removal of Temporary Structures of Fills) and remove temporary fills in order for an activity to be authorized by NWP 3. The Corps believes that the limitation in paragraph (c) and the general conditions are adequate to ensure that impacts from temporary fills will cause no more than minimal adverse environmental effects. Paragraph (c) as well as general conditions 11 and 13 require areas to be restored to pre-construction elevations and revegetated, as appropriate. The Corps declines to add a new Note to this NWP.

Many commenters stated that this NWP authorizes activities that cause significant adverse environmental impacts. One commenter stated that the decision document for this NWP fails to consider impacts as a result of emergency reconstruction activities as a result of natural disasters.

The final decision document for this NWP provides an assessment of activities that may be authorized by this NWP during the five-year period it is anticipated to be in effect, as well as an evaluation of potential environmental impacts that is commensurate with the anticipated degree and severity of those environmental impacts. The decision document has been prepared in compliance with the requirements of the NEPA, the Corps’ public interest review regulations, and the CWA Section 404(b)(1) Guidelines. As discussed in this final action and the final decision document, the Corps has determined that the NWP 3 will cause no more than minimal adverse environmental effects, both individually and cumulatively. The activities that are authorized by this NWP are considered in this final action and in the decision document, including all activities that may be authorized by paragraph (a) of the NWP. This NWP is reissued as proposed.

NWP 4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities. The Corps sought comment on adding two notes to this NWP to protect navigation. These Notes identify information that should be provided to NOS or USCG and provide contact information for both NOS and USCG. Comments received on the proposed addition of the two Notes are summarized in Section II.E of this final action, and in that section the Corps provided responses to those comments. As discussed in Section II.E, the Corps declines to add the Notes to this NWP. This NWP is reissued as proposed.

NWP 5. Scientific Measurement Devices. The Corps did not propose any changes to this NWP. One commenter supported reissuance of NWP 5. One commenter stated that a PCN should be required for weirs and flumes. One commenter suggested modifying the NWP 5 to prohibit the placement of any device which cannot be removed in its entirety. Many commenters stated that weirs or flumes authorized by NWP 5 should be designed to maintain unimpeded fish passage. One commenter recommended modifying NWP 5 to protect treaty-reserved resources.

No PCN is required for activities authorized by this NWP. Adverse effects from the structures or fills authorized by this NWP should generally be temporary. NWP 5 requires devices and structures or fills associated with that device be removed to the maximum extent practicable. There may be situations where the removal of the device or some part of a device or structures or fills associated with that device would cause more adverse environmental effects to aquatic resources than leaving it in place. For instance, it may be preferable to cut off an anchor piling at the mud line rather than disturb the substrate in order to retrieve the entirety of the structure.

The language in NWP 5 is consistent with the language in general condition 5 (Removal of Temporary Structures and Fills). General condition 2 (Aquatic Life Movement) prohibits substantial disruption of necessary life cycle movements of aquatic life indigenous to the waterbody. Weirs and flumes may have some adverse impact to the movement of aquatic species while they are in place. If the regulated activity might affect, or is in the vicinity of a species listed (or proposed for listing) or designated critical habitat (or habitat proposed for such designation) under the ESA, general condition 18 (Endangered Species) requires non-federal permittees to submit a PCN and states the permittee cannot begin work until the district engineer has provided notification that the proposed activity will have “no effect” on listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), or until ESA Section 7 consultation or conference has been completed.

If a PCN is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with the ESA. District engineers can develop regional conditions and develop protocols regarding tribal notification that build

upon the existing Department of Defense, Army, and Corps' tribal consultation policies. The terms of this NWP, as well as the NWP general conditions will ensure that the authorized activities will cause no more than minimal adverse environmental effects. The Corps declines to require PCNs for weirs and flumes.

This NWP is reissued as proposed.

NWP 6. Survey Activities. The Corps did not propose any changes to this NWP. Many commenters recommended that the 1/10-acre limit be raised to 1/2-acre. One commenter recommended modifying this NWP to require a PCN for exploratory trenching because trenching has the potential to affect historic properties.

NWP 6 authorizes discharges of dredged or fill material that do not exceed 1/10-acre into waters of the United States for the purpose of constructing temporary pads. Temporary pads must be removed in accordance with general condition 5 (Removal of Temporary Structures and Fills). The Corps believes that the limits in this NWP are appropriate to ensure impacts from these activities cause no more than minimal adverse environmental effects. If a non-federal permittee proposes an activity that might have the potential to effect a historic property or a property eligible for listing on the National Register of Historic Places, general condition 20 (historic properties) requires the prospective permittee to submit a PCN and the permittee may not begin the activity until they receive written authorization from the district engineer. If the non-federal project proponent does not comply with 33 CFR 330.4(g)(2) and general condition 20, and does not submit the required PCN, then the activity is not authorized by an NWP.

This NWP is reissued as proposed.

NWP 7. Outfall Structures and Associated Intake Structures. The Corps did not propose any changes to this NWP. Many commenters stated that NWP authorization should not be available to project proponents who have violated National Pollutant Discharge Elimination System (NPDES) regulations or who are seeking to modify a structure due to improper design or installation of the outfall or intake structures.

This NWP authorizes work and structures, and discharges of dredged or fill material for the purpose of constructing or modifying outfall structures and associated intake structures where the effluent from the outfall is authorized or otherwise in compliance with the NPDES Program

(Section 402 of the CWA). It is the responsibility of EPA, or authorized states or tribes, pursuant to Section 402 of the CWA to enforce NPDES regulations that are applicable to the effluent of outfall structures. Discharges of dredged or fill material, or work or structures, which are not in compliance with the terms and conditions of an NWP are not authorized by that NWP. District engineers may address an unauthorized action that requires authorization by Section 404 of the CWA or Section 10 of the RHA pursuant to 33 CFR 326.

This NWP is reissued as proposed.

NWP 8. Oil and Gas Structures on the Outer Continental Shelf. The Corps did not propose any changes to this NWP. No comments were received on the proposed reissuance of this NWP. This NWP is reissued as proposed.

NWP 9. Structures in Fleeting and Anchorage Areas. The Corps did not propose any changes to this NWP. Many commenters stated that NWP 9 should require a mooring buoy and anchoring structure maintenance agreement and that midline floats on mooring/anchor lines should be mandatory.

We do not agree that a maintenance agreement and a midline float is required for every mooring buoy and anchoring structure. The design of these structures, as well as the characteristics of the fleeting and anchorage areas, will vary across the nation. Regional concerns about the mooring buoys authorized by this NWP are more appropriately addressed by division and district engineers, who have the authority to modify, suspend, or revoke NWP authorizations on a regional or activity-specific basis. If a division engineer imposed a regional condition on this NWP, in order to qualify for NWP authorization, the permittee must comply with that regional condition as well as any requirements in the text of the NWP and applicable NWP general conditions.

This NWP is reissued as proposed.

NWP 10. Mooring Buoys. The Corps did not propose any changes to this NWP. Many commenters stated that activities should not be authorized by NWP 10 when they interfere with tribal rights. Many commenters stated that NWP 10 should require a mooring buoy and anchoring structure maintenance agreement and that midline floats on mooring/anchor lines should be mandatory. One commenter stated that NWP 10 should be revised to limit mooring buoys where the applicant already has an existing mooring structure, or on the basis of whether the applicant has access to adjoining property.

We do not agree that a maintenance agreement and a midline float is required for every mooring buoy and anchoring structure. The design of these structures, as well as the characteristics of the fleeting and anchorage areas, will vary across the nation. Regional concerns about the mooring buoys authorized by this NWP are more appropriately addressed by division and district engineers, who have the authority to modify, suspend, or revoke NWP authorizations on a regional or activity-specific basis.

In order to qualify for NWP authorization, the permittee must comply with regional conditions, activity-specific conditions, as well as any requirements in the text of the NWP and applicable NWP general conditions. We also decline to limit the use of this NWP on the basis of the applicant's access to other mooring structures or on the basis of property ownership. As stated in Section E. (Further Information), NWPs do not grant any property rights or exclusive privileges. The Corps has no authority over zoning or land use rights.

This NWP is reissued as proposed.

NWP 11. Temporary Recreational Structures. The Corps did not propose any changes to this NWP. One commenter stated that temporary structures should be removed in less than 30 days if requested by an affected tribe.

Activities authorized by this NWP must comply with general condition 17 (tribal rights). Corps districts consulted with tribes during the process for reissuing this NWP and those consultation efforts may have resulted in regional conditions or coordination procedures with tribes to help ensure compliance with general condition 17. Shorter time periods for removal may be imposed through regional conditions, or if the district engineer receives a PCN, he or she may add activity-specific conditions.

This NWP is reissued as proposed.

NWP 12. Oil or Natural Gas Pipeline Activities. The Corps proposed to modify Note 1 and to add a Note (designated as Note 7) in this NWP. Language was added to each Note to clarify the intent of each Note. Note 1 was modified to identify information that should be provided to NOS and to provide contact information for NOS. New Note 7 identifies information that should be provided to USCG and to provide contact information for USCG. The Corps provides a summary of the comments received on revised Note 1 and new Note 7 and responses to comments in Section II.D of this final action.

Many commenters expressed support for NWP 12. Many commenters expressed support for the NWP as written. Many commenters objected to the reissuance of this NWP. One commenter stated that this NWP should be available for authorization of jurisdictional activities associated with carbon dioxide pipelines.

Nationwide permit 12 authorizes discharges of dredged or fill material or work or structures associated with oil or natural gas pipeline activities. Nationwide permit 12 defines oil or natural gas pipelines as “any pipe or pipeline for the transportation of any form of oil or natural gas, including products derived from oil or natural gas, such as gasoline, jet fuel, diesel fuel, heating oil, petrochemical feedstocks, waxes, lubricating oils, and asphalt.” Nationwide permit 58 (Utility Line Activities for Water and Other Substances) may be used to authorize regulated activities associated with the construction, maintenance, repair, and removal of utility lines for water and other substances, including but not limited to hydrogen, methanated hydrogen, or carbon dioxide. There is some overlap in the NWPs. The district engineer will review PCNs that he or she receives and determine if the case-specific activity can be authorized by the NWP requested by the prospective permittee. If the case-specific activity does not comply with the terms and conditions of the NWP, the district engineer will notify the project proponent within 30 days of the date the PCN was submitted to the district engineer that the project proponent must apply for a different NWP, a regional general permit, or an individual permit.

A few commenters stated that natural gas pipelines are subject to industry standards and oversight by the Federal Energy Regulatory Commission (FERC), resulting in temporary impacts to jurisdictional waters which are mitigated where possible. A few commenters stated that reissuance of this NWP is important for improving pipeline safety and reliability. One commenter supported reissuing this NWP before the other NWPs. Some commenters expressed opposition to specific pipeline projects. The Corps acknowledges these comments.

A few commenters stated that the NWP does not protect waters of the United States. Many commenters stated that this NWP allows more than minimal adverse environmental impacts, individually and cumulatively. Many commenters stated that the Corps should ensure that this NWP authorizes no more than minimal individual and

cumulative effects. Several commenters stated that the Corps should collect more detailed information on NWP 12 verifications to better inform the decision whether to reissue the NWP. Many commenters oppose additional modifications to this NWP and further cumulative effects analysis for this NWP. Many commenters stated that this NWP violates CWA and NEPA. A few commenters stated that the Corps should prepare an EIS for each pipeline project.

Section 404(e) of the CWA provides the Corps with the authority to issue NWPs to authorize categories of activities involving discharges of dredged or fill material into waters of the United States to streamline the authorization process for these activities, as long as they result in no more than minimal individual and cumulative adverse environmental effects. The terms and conditions of the NWPs, such as acreage limits and the mitigation measures in some of the NWP general conditions, are imposed to ensure that the NWPs authorize only those activities that result in no more than minimal adverse effects on the aquatic environment and other public interest review factors.

The Corps Headquarters has prepared a national decision document to address the environmental effects of the reissuance of this NWP in accordance with NEPA and CWA. The national decision document evaluates cumulative impacts in accordance with the CWA Section 404(b)(1) Guidelines at 40 CFR 230.7 for the issuance of general permits. The national decision document includes estimates of the number of times the NWP is anticipated to be used during the five-year period it will be in effect, the authorized impacts to jurisdictional waters and wetlands, and the compensatory mitigation required to offset losses of jurisdictional waters and wetlands. Those impacts, and the compensatory mitigation, are evaluated against the current environmental setting (*i.e.*, the affected environment).

The national decision document includes an environmental assessment (EA) with a finding of no significant impact, satisfying the requirements of NEPA. Neither the CWA nor NEPA mandate that the Corps prepare an environmental impact statement to analyze the impacts of the reauthorization of this NWP. Since the Corps fulfills the requirements of NEPA when it issues its national decision document for the reissuance of that NWP, specific activities authorized by this NWP do not require additional NEPA analysis. As documented in this

action and in the national decision documents, the issuance of this NWP complies with the requirements of the CWA.

In addition to the assessment of cumulative effects at the national level, division engineers will consider cumulative effects in the supplemental documentation for a region, which is typically defined as a state or Corps district. District engineers will consider cumulative effects during their review of a PCN for a case-specific activity. In furtherance of the district engineer’s review of cumulative effects, paragraph (b)(4)(ii) of NWP general condition 32 requires PCNs for proposed NWP activities for linear projects to include and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require a PCN.

When a district engineer issues a verification letter in response to a PCN or a voluntary request for an NWP verification, the district engineer prepares a brief document that explains the decision on whether to issue a verification letter for the proposed NWP activity or exercise discretionary authority to require an individual permit for that proposed activity. The district engineer’s document explains whether the proposed NWP activity, after considering permit conditions such as mitigation requirements, will result in no more than minimal individual and cumulative adverse environmental effects. If the district engineer reviews a PCN and determines that the impacts of the jurisdictional activity are more than minimal, the district engineer will exercise discretionary authority to require an individual permit for that proposed activity.

One commenter supported the determination that reissuance of the NWP will have “no effect” on listed species or critical habitat. Many commenters stated that programmatic ESA consultation should be required for reissuance of this NWP. Many commenters stated that this NWP violates the ESA. One commenter stated that this NWP should prohibit jurisdictional activities that are in the vicinity of listed species or designated critical habitat.

The Corps’ compliance with ESA for the reissuance of the NWPs is discussed in Section III.C. of this action. General condition 18 (Endangered Species) addresses compliance with Section 7 of the ESA for each NWP-specific activity. If the regulated activity might affect, or

is in the vicinity of a species listed (or proposed for listing) or designated critical habitat (or habitat proposed for such designation) under the ESA, general condition 18 (Endangered Species) requires non-federal permittees to submit a PCN and states the permittee cannot begin work until the district engineer has provided notification that the proposed activity will have “no effect” on listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), or until ESA Section 7 consultation or conference has been completed. If a PCN is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with the ESA.

Several commenters stated that this NWP violates Section 106 of the NHPA. One commenter stated that this NWP should require tribal consultation under Section 106 of the NHPA. One commenter expressed concern over impacts to newly discovered cultural resources.

The Corps’ compliance with Section 106 of the NHPA for the reissuance of the NWPs is discussed in Section III.D. of this action. General condition 20 (Historic Properties) addresses compliance with section 106 of the NHPA. Under paragraph (c) of general condition 20, non-federal permittees must submit a PCN to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties even if a PCN is not otherwise required. Non-federal permittees may not proceed with their activity unless the district engineer has reviewed the PCN and determined that the activity has “no potential to effect” historic properties or the district engineer has completed consultation under Section 106 of NHPA.

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, including tribes. If a PCN is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with the NHPA. Permittees must also comply with general condition 21 (Discovery of Previously

Unknown Remains and Artifacts) and immediately notify the district engineer of discoveries of previously unknown historic, cultural, or archeological remains and artifacts. The permittee must avoid activities that may affect the remains and artifacts to the extent possible until required coordination is completed.

Some commenters stated that the Corps is not complying with Executive Order 13175. Many commenters stated that this NWP violates tribal sovereignty and does not provide opportunity for tribal input. One commenter stated that this NWP should require free prior and informed consent from tribes. One commenter stated that this NWP violates the RESPECT Act and sovereign land rights. One commenter stated that man camps associated with pipeline construction projects are linked to criminal activity.

Consultation with tribes on the reissuance of the NWPs is discussed in Section V of this final action (Administrative Requirements), in the section for E.O. 13175 (Consultation and Coordination with Indian Tribal Governments). Tribal treaty rights are addressed through NWP general condition 17 (Tribal Rights) for all NWPs, including NWP 12. General condition 17 states that no activity authorized by an NWP may impair reserved tribal rights. During the process for issuing these NWPs, Corps districts have been consulting or coordinating with tribes to identify regional conditions or coordination procedures to ensure that activities authorized by NWP 12 and other NWPs do not have substantial adverse effects on tribal rights and, as appropriate, treaty reserved resources.

Division engineers can modify the NWPs at a regional level to address tribal concerns within the limits of Corps’ authorities. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is a nonbinding document that encourages good faith consultation with indigenous peoples to “obtain their free, prior, and informed consent” before implementing measures that could affect them. The Corps follows Executive Order 13175 and existing Department of Defense, Army, and Corps’ tribal consultation policies to meaningfully consult with tribes and consider the concerns of tribes, but not necessarily receive the agreement of tribes, before making permit decisions. The RESPECT Act (Pub. L. 117–317) does not create obligations that are relevant to this rulemaking. Concerns regarding criminal activities are more appropriately addressed by local, state,

tribal, and federal law enforcement officials.

One commenter stated that this NWP is contrary to Executive Orders 13990 (Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis) and 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations). One commenter stated that this NWP is consistent with the direction in Executive Order 14156 (Declaring a National Energy Emergency).

Executive Order 13990 was rescinded by Executive Order 14148 (Initial Rescissions of Harmful Executive Orders and Actions) and Executive Order 12898 was rescinded by Executive Order 14173 (Ending Illegal Discrimination and Restoring Merit-Based Opportunity). Executive Order 14156 declared a national energy emergency and directed federal agencies to facilitate the identification, leasing, siting, production, transportation, refining, and generation of domestic energy resources through existing permitting vehicles. This NWP helps fulfill the policies of Executive Order 14156 by maintaining the streamlined process that has been in existence since 1977, to authorize categories of activities associated with the construction and maintenance of oil or natural gas pipelines that have no more than minimal individual and cumulative adverse environmental effects.

Some commenters supported the retention of the ½-acre impact limit or opposed changes to this limit. One commenter said the ½-acre impact limit should be applied to the entire length of a pipeline. One commenter stated that ½-acre impact limit should include temporary impacts. Many commenters expressed support for additional impact limits on this NWP. Many commenters suggested raising the impact limits on this NWP. One commenter recommended that this NWP authorize up to 1,000 linear feet of stream impacts. One commenter suggested capping the number of crossings that could be authorized by this NWP. Some commenters suggested limiting the activities that may be authorized by this NWP on the basis the dimensions of the pipeline or amount of impacts to riparian buffers. One commenter stated that this NWP should require authorization of activities in water of the United States and other non-jurisdictional waters.

This NWP authorizes discharges of dredged or fill material into waters of the United States and work and

structures in navigable waters of the United States associated with the construction, maintenance of repair, and removal of oil and natural gas pipelines and associated facilities. The NWP prohibits loss of waters that exceed 1/2-acre of waters of the United States for each single and complete project. The "loss of waters of the United States" refers to permanent adverse effects to waters of the United States as a result of filling, flooding, excavation, or drainage because of the activities subject to the Corps' authority, and does not include temporary impacts.

The Corps believes that the 1/2-acre limit authorized by this NWP, as limited by the constraints in the text of the NWP (e.g., requirements to restore temporary impacts to preconstruction elevations) and in the NWP general conditions, is appropriate to ensure that each single and complete project will cause no more than minimal adverse environmental effects. The Corps has no authority to regulate impacts to non-jurisdictional aquatic resources and cannot require permits for activities outside waters of the United States.

One commenter stated that temporary and cumulative impacts should be considered when evaluating activities authorized by this NWP. One commenter recommended raising the timeframe for temporary discharges from three months to five months. One commenter recommended allowing the district engineer to waive the requirement to restore areas to preconstruction contours.

The national decision document for this NWP considers both temporary impacts and cumulative effects in the analysis. Some activities authorized by NWP 12 (e.g., the construction of substations and permanent access roads) result in permanent fills while other authorized activities generally result in temporary impacts. The terms of the NWP, as well as general conditions 11 (Equipment) and 13 (Removal of Temporary Structures and Fills) require that temporary fills be removed upon completion of the activity. The permittee must restore the affected area to pre-construction elevations and revegetate the area as appropriate. When the district engineer reviews a PCN, in accordance with Section D, District Engineer's Decision, he or she will consider the duration of the adverse effects (temporary or permanent) as well as the cumulative effects of the specific activity.

Paragraph (b)(4) of NWP general condition 32 requires project proponents to include in PCNs any other NWP(s), regional general permit(s), or individual permit(s) used

or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require DA authorization but do not require a PCN. This information is used by district engineers to determine whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. When the district engineer receives a PCN, he or she will consider the direct and indirect effects of the regulated activity in accordance with Section D (District Engineer's Decision) and determine if the activity will cause no more than minimal adverse environmental effects, both individually and cumulatively.

This NWP states that material from trench excavation can be temporarily sidecast into waters of the United States for no more than three months and this time period may be extended by the district engineer to not more than 180 days (6 months) where appropriate. The Corps retains the three-month limit and the district engineer's discretion to allow temporary fills to remain in place for six months. Waters of the United States which are filled, flooded, excavated, or drained, and are not restored to preconstruction contours and elevations after construction, are included in the measurement of loss of waters of the United States, and are considered permanent adverse effects.

Many commenters opposed further limits on the thresholds for requiring a PCN. A few commenters stated that no PCN should be required by this NWP. Many commenters stated that this NWP should require a PCN for all activities. Many commenters supported lowering the thresholds for requiring a PCN. A few commenters suggested adding other thresholds for requiring the submittal of a PCN. One commenter recommended retaining the 0.10-acre threshold for requiring the submittal of a PCN. A few commenters opposed the 250-mile threshold for requiring a submittal of a PCN. One commenter suggested raising the 250-mile PCN threshold.

Nationwide permit 12 requires a PCN for any discharge of dredged or fill material into waters of the United States that results in a loss of greater than 1/10-acre of waters of the United States. A PCN is also required for any proposed work or structure which requires authorization under Section 10 of the RHA, and for any regulated activity associated with an overall project that is greater than 250 miles in length when the project purpose is to install new pipeline for the majority of the distance of the overall project length. If a proposed NWP 12 activity does not

trigger any of the three PCN thresholds in the text of the NWP, or a PCN threshold in the text of one of the NWP general conditions (e.g., general condition 18 (Endangered species) and general condition 20 (Historic Properties)), then a PCN is not required for the proposed activity unless a division engineer has imposed a regional condition to require PCNs in a particular geographic region.

Division engineers can add regional conditions to add PCN thresholds, if he or she determines the PCN threshold is necessary to ensure that the NWP authorizes only those activities that have no more than minimal adverse environmental effects. The Corps has found that a length of 250 miles is both a good indicator of potential cumulative effects of an oil or natural gas pipeline while minimizing the potential for inconsistent implementation of the PCN requirement across districts. The Corps is retaining the PCN thresholds associated with NWP 12 activities that result in losses of waters of the United States or have potential effects on navigation. The PCN thresholds, in combination with the other terms of the NWP and the general conditions ensure that the NWP causes no more than minimal adverse environmental effects.

Many commenters stated that the Corps should require a PCN for mechanized land clearing of forested wetlands. Many commenters supported the removal of the PCN threshold for mechanized land clearing in the 2021 final rule to reissue the NWPs.

Mechanized land clearing in waters of the United States may result in a discharge of dredged material which requires DA authorization under Section 404 of the CWA. To be regulated under Section 404 of the CWA, a discharge of dredged material involves any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States that is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation (see 33 CFR 323.2(d)(1)(iii)). For the reasons stated in the 2021 final rule (86 FR 2773–2775), the Corps maintains the position that no PCN for mechanized land clearing should be added to this NWP.

A few commenters stated that the NWP should require avoidance and minimization to the maximum extent possible. Many commenters opposed the addition of uniform national BMPs or standards to this NWP.

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. Best management practices are more appropriately addressed as regional conditions added to the NWP by division engineers or activity-specific conditions added to NWP authorizations by district engineers. The Corps is not adding any national BMPs to NWP 12.

Many commenters suggested that acreage impact limits and PCN thresholds be consistent between NWP 12 and 14. The acreage limits for NWP 12 and 14 have some similarities, with a 1/2-acre limit for losses of non-tidal waters of the United States. The 1/2-acre limit for NWP 12 also applies to tidal waters, while NWP 14 has a 1/3-acre limit for losses of tidal waters. NWP 12 and NWP 14 both require a PCN for activities causing the loss of greater than 1/10-acre of waters of the United States. NWP 12 also requires a PCN for activities requiring a Section 10 permit and when a proposed oil or natural gas pipeline activity is associated with an overall project that is greater than 250 miles in length and the project purpose is to install new pipeline along the majority of the distance of the overall project length. In addition to the 1/10-acre PCN threshold, the NWP 14 requires a PCN for discharges of fill material into special aquatic sites. Nationwide permits 12 and 14 have somewhat different impact limits and PCN thresholds because of differences between oil or natural gas pipeline activities and linear transportation projects. With the exception of discharges of dredged or fill material associated with substations, pipeline foundations, or access roads, many impacts authorized by the NWP 12 are temporary and require restoration back to preconstruction elevations (*i.e.*, discharges of dredged or fill material associated with the installation of the oil or natural gas pipeline). Nationwide permit 14 for linear transportation projects authorizes discharges of dredged or fill material associated with linear transportation projects (*e.g.*, roads, railroads, airport runways, and trails), which are more likely to result in discharges of dredged or fill material that are not temporary.

Many commenters recommended restricting the ability of the division or district engineer to modify, suspend, and revoke NWP authorizations. Many commenters opposed restricting the ability of the division or district engineer to modify, suspend, and revoke NWP authorizations. In accordance with 33 CFR 330.5, division and engineers have the discretion to modify, suspend, or revoke NWP authorizations. The

Corps is retaining the division and district engineer's discretion to modify, suspend, and revoke NWP.

Several commenters stated that permittees fail to comply with the requirement to remove temporary access roads and recommended increased compliance and enforcement by the Corps. A few commenters stated that this NWP should include language about the repercussions of unauthorized activities in this NWP.

If the permittee fails to comply with the terms and conditions of an NWP, including NWP general conditions then the activity is not authorized by that NWP and the district engineer may pursue compliance of an unauthorized action pursuant to 33 CFR 326. The district engineer has discretion how to resolve unauthorized actions, including whether to require restoration, accept an application for an after-the-fact authorization, or other remedies. The Note in Section C (NWP General Conditions) advises prospective permittees of their obligations regarding compliance with NWP terms and conditions.

Several commenters stated that the Corps should require additional information in PCNs for NWP 12. One commenter stated that prospective permittees should not be allowed to proceed with construction 45 days after submittal of a PCN.

The Corps has determined that the contents of a complete PCN as stated in paragraph (b) of general condition 32 are sufficient for the district engineer to make his or her decision. Some general conditions, such as general condition 18 (endangered species) or general condition 20 (historic properties) require a non-federal permittee to wait for written approval before commencing construction. Activities that qualify for the default authorization that occurs 45-days after the district engineer receives a complete PCN must comply with all conditions of the NWP, including the general conditions and any applicable regional conditions imposed by the division engineer.

One commenter supported separating this NWP into one or more general permits. One commenter objected to separating this NWP into one or more general permits. One commenter recommended that use of this NWP be prohibited for activities in sensitive areas. One commenter stated that use of this NWP should be prohibited for large pipeline projects. Many commenters stated that this NWP should not automatically prohibit authorization of activities associated with oil and gas pipelines.

Section 404(e) of the CWA does not specify how broad or narrow categories of activities authorized by NWP and other general permits must be. The Corps has substantial discretion to identify categories of activities that are appropriate for NWP and other general permits. For instance, in the 2021 final rule to reissue the NWP (86 FR 2744), the Corps modified NWP 12 and created two new NWP (NWP 57. Electric Utility Line and Telecommunications Activities and NWP 58 Utility Line Activities for Water and Other Substances) to authorize activities associated with types of utility projects that were formerly authorized by NWP 12. The Corps declines to further narrow the activities authorized by NWP 12.

Division engineers may develop regional conditions for an NWP if he or she determines it necessary to ensure that activities in a region will cause no more than minimal adverse environmental effects to sensitive areas. This NWP requires project proponents to submit a PCN for regulated activities associated with pipelines greater than 250-miles in length, when the purpose is to install new pipeline over the majority of the overall length. The PCN must include the locations and proposed impacts of all crossings of waters of the United States that require DA authorization. The district engineer will review the PCN and determine if the proposed NWP activity will, after considering permit conditions such as mitigation requirements, result in no more than minimal individual and cumulative adverse environmental effects. If one crossing of waters of the United States associated with the installation of a new oil or natural gas pipeline requires an individual permit, then 33 CFR 330.6(d) applies and the district engineer will determine which activities require individual permits and which activities can be authorized by an NWP. Section 330.6(d) of the Corps' NWP regulations, as well as Note 2 of NWP 12, remain in effect. Section 330.6(d) and Note 2 maintain the Corps' long-standing process regarding the use of NWP and individual permits to authorize linear projects such as oil or natural gas pipelines.

Many commenters requested more consistency across districts regarding whether this NWP authorizes regulated activities associated with the abandonment of pipelines. District engineers have discretion to determine on a case-by-case basis how to address pipeline abandonment activities. If a permittee proposes to abandon a pipeline which lies over, under, or in a navigable water of the United States, the district engineer will review the PCN to

determine if the proposed action will impact navigation.

Many commenters requested a clarification of the scope of “emergency activities” authorized by this NWP. The activities that are authorized by NWP 12 are defined in the terms of this NWP. Nationwide permit 12 can be used to authorize regulated activities associated with emergency installation, replacement or repair of utility lines. The availability of this NWP to authorize such activities may facilitate the implementation of these emergency activities by reducing delays in securing authorization. Which activities constitute an “emergency” is determined by regulation and policy.

Many commenters requested that “normal maintenance” be exempted under Section 404(f). Discharges of dredged or fill material for maintenance activities may be exempted from regulation under the CWA by Section 404(f), in accordance with 33 CFR 323.4(a)(2). If not exempted by Section 404(f) of the CWA, such discharges may be authorized by a variety of NWPs, such as NWP 3 (Maintenance), NWP 33 (Temporary Construction, Access, and Dewatering), or NWP 45 (Repair of Uplands Damaged by Discrete Events). The 1989 Memorandum of Agreement Between the Department of the Army and the U.S. EPA Concerning the Determination of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the Clean Water Act, states that the U.S. EPA has the authority to establish policies on which activities are eligible for the CWA Section 404(f) exemptions. There are no work or structures in navigable waters of the United States that are exempted from regulation under Section 10 of the RHA.

Many commenters stated that the definition of “single and complete linear project” causes cumulative effects to aquatic resources. Many commenters objected to the determination that each waterbody crossing is a single and complete project. One commenter requested that the Corps define “separate and distant.” One commenter disagreed that the Corps fails to consider cumulative impacts from all crossings.

The authorization of separate and distant crossings of waters of the United States as single and complete projects for the purposes of NWP authorization is a long-standing practice consistent with the Corps’ regulations at 33 CFR 330.2(i). Under paragraph (b)(4) of general condition 32, PCNs for linear projects are required to include those crossings of waters of the United States that require NWP PCNs as well as those

crossings that will utilize the NWPs and do not require PCNs. The Corps declines to define the phrase “separate and distant” because what constitutes separate and distant crossings can vary across the country because of differences in the distribution of waters and wetlands in the landscape, local hydrologic conditions, local geologic conditions, and other factors. What constitutes separate and distant crossings is more appropriately determined by district engineers on a case-by-case basis. When reviewing a PCN, the district engineer will consider the cumulative effects of all crossings of waters of the United States and apply the 10 criteria listed in paragraph 2 of Section D, District Engineer’s Decision.

One commenter stated that vague conditions such as “to the maximum extent possible” and “where practicable” should be eliminated from the NWP. One commenter recommended that the phrase “near as possible” be revised to “maximum extent practicable.” The use of the terms such as “to the maximum extent practicable” and “where practicable” afford the district engineer the discretion to consider the benefits and detriments of activities, temporary activities in light of differences in the local hydrologic conditions, and other factors while ensuring that the activity will have no more than minimal adverse environmental effects. This NWP requires access roads to be constructed as near as possible to pre-construction contours and elevations. The additional avoidance and minimization required by the more restrictive “near as possible” is necessary and still allows flexibility to deviate from preconstruction contours.

Many commenters oppose providing notice and an opportunity for potentially impacted communities to comment on each NWP-specific activity. Many commenters stated that the NWP does not provide opportunity for public input on each activity. Many commenters stated that this NWP does not ensure that impacts to disadvantaged and environmental justice communities are considered.

The public was provided an opportunity to comment on the Corps’ proposal to issue, reissue, or modify NWP 12 when Corps Headquarters published its proposed rule in the **Federal Register** (90 FR 26100) to start the public comment period. However, after an NWP is issued, there is no public comment process for specific NWP activities. If, for a proposed oil or natural gas pipeline activity, the district engineer exercises discretionary authority and requires an individual

permit for that activity, the public will have an opportunity to provide comments in response to the public notice issued by the Corps district. During the process to reissue or modify the NWPs, the Corps considers the adverse environmental effects of the reissuance of these NWPs in accordance Section 404(e) of the CWA, Section 10 of the RHA, and in compliance with applicable environmental laws, regulation, guidance and policy, as limited by the scope of our authority. The level of analysis and consideration of environmental justice concerns in the national decision documents and this final action comply with current Executive Orders and agency directives, including Executive Order 14151. The NWPs are not expected to have any discriminatory effect or disproportionate negative impact on any community or group.

One commenter opposed this NWP, stating it undermines local environmental requirements. One commenter stated that states and local authorities should review projects with activities that may be authorized by this NWP. One commenter stated that a PCN should be required for activities proposed where residential areas are within 500 feet of the pipeline right-of-way. One commenter stated that the Corps has no authority to make siting decisions for pipelines. One commenter expressed concerns over risks of horizontal directional drilling.

As stated in item 2 of Section E (Further Information), the NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law. State and local governments are the entities that have primary responsibility for regulating land use and pipeline siting. The Corps does not have jurisdiction to regulate or enforce inadvertent returns, leaks, or spills that may occur during horizontal directional drilling to install or replace oil or natural gas pipelines. The eighth paragraph of this NWP authorizes, to the extent that DA authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through subsoil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing oil or natural gas pipelines. The purpose of this paragraph is to provide authorization for regulated activities that are necessary to remediate inadvertent returns of drilling fluids to reduce adverse environmental effects that might be caused by releases of

drilling fluids to the surrounding environment.

One commenter stated that this NWP should be available to all parties rather than just to the oil and gas industry. One commenter expressed concern that this NWP exposes the NWP Program to judicial scrutiny. This NWP places no restriction on who may apply for authorization for discharges of dredged or fill material into waters of the United States or work and structures in navigable waters of the United States for activities associated with oil or natural gas pipelines. While potential litigation risk is a consideration when contemplating changes to an NWP, the Corps also considers other factors such as administrative efficiency, reduction of regulatory burdens, and other approaches for maintaining environmental protections.

Many commenters expressed concern over the impacts of activities authorized by this NWP on water supply and water quality. Many commenters expressed opposition to oil and gas pipelines because of concern over fossil fuels or supporting renewable energy resources. Many commenters stated that authorizing fossil fuel projects is contrary to the public interest. Many commenters expressed concerns over ruptures, spills and leaks from oil and gas pipelines. Several commenters stated that the Corps does not analyze the harms and threats posed on the environment through operation and maintenance of pipelines.

The national decision document for this NWP considers the effects of regulated discharges of dredged or fill material, or work or structures, on water supply and conservation as part of the public interest review. Discharges of dredged or fill material into waters of the United States require water quality certification from the appropriate certifying authority unless a waiver of the water quality certification requirement occurs. For those certifying authorities that choose to require individual water quality certifications for activities authorized by this NWP, they can place conditions on the certification to ensure the activity complies with state water quality standards. General condition 25 (water quality) requires permittees to comply with any granted water quality certifications. As stated in item 2 of Section E (Further Information), the NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law. State and local governments are the entities that have primary responsibility for regulating water use.

Congress did not grant the Corps' statutory authority to regulate the extraction of oil or natural gas, the operation of any oil or natural gas pipeline, the product transported by the pipeline, or the emissions that result from combustion of oil or natural gas or from the industrial processes that derive other products from oil or natural gas. The Corps' authority is limited to the discharges of dredged or fill material into waters of the United States and work or structure in navigable waters of the United States. The extent of the NEPA analysis for this NWP addresses the environmental effects of reissuing NWP 12 for a period of five years. NEPA does not require that the Corps evaluate upstream and downstream impacts, including potential impacts on the planet's climate which are associated with the extraction or consumption of oil or natural gas or products derived from oil or natural gas.

In the national decision document for the issuance of this NWP, the Corps discusses leaks or spills that may occur during the construction and/or operation of oil or natural gas pipelines. Congress has not granted the Corps statutory authority to take actions to prevent or control potential leaks or spills that may occur during the construction or operation of oil or natural gas pipelines. Since the Corps does not regulate the release of oil, natural gas, or products derived from oil or natural gas, the Corps is not required to perform a detailed analysis of the effects of those possible future leaks or spills because those leaks or spills are not an effect of the Corps' proposed action. Although some regulated activities authorized by various NWPs may be associated with energy production, distribution, and use, the Corps does not have the authority to regulate or control the which type of energy production is proposed by a project proponent.

Many commenters recommended that compensatory mitigation should be required for all losses of stream banks and any loss of waters. One commenter stated that states rely on the Corps to require compensatory mitigation for impacts to streams in their state.

General condition 23 requires compensatory mitigation for all wetland losses greater than 1/10-acre and for all stream losses greater than 3/100-acre that require PCNs, unless the district engineer determines that some other form of mitigation would be more environmentally appropriate. The Corps establishes PCN thresholds to ensure compliance with federal law and to ensure that activities authorized by an NWP will cause no more than minimal

adverse environmental effects. States and other local authorities may enact laws and regulations to place further protections on streams and other natural resources. The NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.

This NWP is reissued as proposed. *NWP 13. Bank Stabilization.* The Corps proposed to modify NWP 13 by adding a paragraph to clarify that this NWP can be used to authorize regulated activities that incorporate nature-based solutions associated with bank stabilization activities, including those in conjunction with hard bank stabilization activities such as seawalls, bulkheads, and revetments. The Corps also proposed to modify this NWP by adding a new Note to encourage project proponents to use soft bank stabilization approaches and/or nature-based solutions where appropriate to reduce the potential individual and cumulative adverse environmental effects that may be caused by bank stabilization activities. The proposed new Note also provides examples of the numerous factors that likely need to be considered when planning and designing a proposed bank stabilization activity, including hard or soft approaches to bank stabilization.

Many commenters recommended that the Corps not reissue this NWP. Many commenters stated that this NWP causes more than minimal adverse environmental effects. Many commenters stated that the Corps failed to support the finding that this NWP will cause no more than minimal individual and cumulative adverse environmental effects. Many commenters objected to the reliance on compensatory mitigation to reduce the cumulative impacts of NWP 13 to a minimal level. Many commenters stated that NWP 13 authorizes activities with significant adverse impacts and therefore violates NEPA and the CWA. Many commenters expressed concern that the Corps failed to analyze "secondary effects" on aquatic ecosystems. Many commenters stated that Corps should conduct proper endangered species consultation for the reissuance of NWP 13.

The process to reissue this NWP complied with Section 404(e) of the CWA (including the Section 404(b)(1) Guidelines), NEPA, and ESA. The terms and conditions for this NWP are appropriate for limiting bank stabilization activities so that they have no more than minimal individual and cumulative adverse environmental effects, while allowing landowners and other entities to protect their property

and safety. In the national decision document for the reissuance of this NWP, the Corps prepared an EA using reliable data and resources to inform a finding of no significant impact to comply with NEPA requirements. Therefore, the reissuance of this NWP does not require the preparation of an environmental impact statement. In the national decision document, we have completed a 404(b)(1) Guidelines analysis, including an analysis of direct and secondary effects, and determined that the reissuance of this NWP complies with the Guidelines. The Corps' compliance with ESA for the reissuance of the NWPs is discussed in Section III.C. of this action.

Many commenters stated that this NWP authorizes activities that are not similar in nature. One commenter stated that the Corps should require mitigation for projects that result in more than minimal losses of riverine functions for hard bank stabilization. Many commenters expressed concern that the Corps failed to meaningfully consider climate change and sea level rise.

This NWP authorizes discharges of dredged or fill material into waters of the United States or work and structures in navigable waters of the United States associated with bank stabilization activities necessary for erosion control or prevention. This NWP authorizes categories of activities that are similar in nature. The similar in nature requirement does not mean that activities authorized by an NWP must be identical to each other. The phrase "categories of activities that are similar in nature", is best read to confer broad discretion on the Secretary to facilitate the practical implementation of this general permit program. General condition 23 requires compensatory mitigation for all wetland losses greater than 1/10-acre and for all stream losses greater than 3/100-acre that require PCNs, unless the district engineer determines that some other form of mitigation would be more environmentally appropriate. The activities authorized by NWP 13 are a tool for landowners and communities to adapt to sea level rise and increases in the frequency of severe storm events.

Many commenters suggested reducing the impact limits for this NWP. Many commenters recommended adding an acreage impact to this NWP. Many stated that all armoring projects should be evaluated through the individual permit process. Many commenters stated that the public should be given the opportunity to comment on all shoreline armoring projects regardless of size.

This NWP does not have an acreage limit; regulated activities authorized by this NWP are subject to nine criteria, including a 500-linear foot length limit along the bank and one-cubic yard per running foot, unless waived by the district engineer. The limits in this NWP are sufficient to ensure that the NWP authorizes only those activities that have minimal adverse effects on the aquatic environment. Division engineers may regionally condition this NWP to impose lower impact limits to account for local environmental conditions and the ecological functions and services provided by waters of the United States in those areas.

In response to a PCN the district engineer can add special conditions to the NWP authorization to ensure minimal adverse effects, or exercise discretionary authority and require another type of permit, such as an individual permit, for the activity. If the district engineer exercises discretionary authority and requires an individual permit for a bank stabilization activity, the public will have an opportunity to provide comments in response to the public notice issued by the Corps district. The public was provided an opportunity to comment on the Corps' proposal to issue, reissue, or modify an NWP when Corps Headquarters published its proposed rule in the **Federal Register** (90 FR 26100) to start the public comment period. However, after an NWP is issued, there is no public comment process for specific NWP activities.

Many commenters stated that PCNs should be required for all NWP 13 projects. Many commenters objected to any new PCN thresholds. Several commenters recommended reducing the 500-linear foot limit. One commenter suggested raising the 500-linear foot limit. One commenter stated that the one cubic yard per running foot limit is too restrictive. One commenter requested clarification if the 500 linear foot limit is measured along the centerline or along each bank.

The Corps establishes PCN thresholds to ensure compliance with federal laws and to ensure that activities authorized by an NWP will cause no more than minimal adverse environmental effects. This NWP requires the prospective permittee submit a PCN when a proposed activity (1) involves discharges of dredged or fill material into special aquatic sites; or (2) is in excess of 500 feet in length; or (3) will involve the discharge of dredged or fill material 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.

The linear foot limit in this NWP applies to the length of the regulated activity as measured along each bank where the bank stabilization would occur, not the length of the stream segment as measured along the centerline. If the prospective permittee intends bank stabilization along 300 linear feet of the right stream bank and additional bank stabilization along 300 linear feet of the left stream bank of the same stream segment, a PCN is required because the total length of the activity will exceed 500 linear feet. If a proposed activity does not trigger any of the three PCN thresholds in the text of the NWP, or a PCN threshold in the text of one of the NWP general conditions (*e.g.*, general condition 18, endangered species and general condition 20, historic properties), then a PCN is not required for the proposed activity unless a division engineer has imposed a regional condition to require PCNs in a particular geographic region. Upon receipt of a PCN, the district engineer will determine if the regulated activity will cause no more than minimal adverse environmental effects. The Corps is retaining the PCN thresholds in this NWP.

Many commenters recommended removing the district engineers' ability to waive the limits in this NWP. Many commenters stated that the Corps is not adequately considering the benefits versus the adverse effects when deciding whether to waive limits. Many commenters suggested removing the 1,000 linear foot limit on waivers for bulkheads to allow for case-by-case approvals.

Paragraph (b) limits the activity authorized by this NWP to 500 linear feet unless waived and limits any bulkhead to no more than 1,000 linear feet. Paragraph (c) limits the activity to an average of one cubic yard per running foot along the length of the treated bank unless waived. Paragraph (d) prohibits discharges of dredged or fill material into special aquatic sites unless waived. The criterion in paragraphs (b), (c), and (d) of this NWP can be waived upon written determination by the district engineer that the discharge of dredged or fill material will result in no more than minimal adverse environmental effects. All requests for waivers under NWP 13 will be coordinated with the appropriate resource agencies, in accordance with paragraph (d) of general condition 32, to assist with the district engineer's evaluation. The district engineer will review the PCN and determine if the proposed NWP activity will, after

considering any comments from resource agencies, any waived criterion, and permit conditions such as mitigation requirements, result in no more than minimal individual and cumulative adverse environmental effects.

We are retaining the waiver provisions for NWP 13. Waivers are an important tool for providing flexibility in the NWP program, and for authorizing activities that have only minimal adverse environmental effects. Waivers also allow the Corps to focus its limited resources on proposed activities that require DA authorization and may have more than minimal impacts on the aquatic environment. The national decision documents list the estimated annual usage of this NWP, the amount of authorized impacts and the amount of required compensatory mitigation. This level of information is sufficient to determine that this NWP is being reissued compliant with Section 404(e) of the CWA.

Many commenters suggested an addition to paragraph (e) to prohibit the impediment of groundwater and hyporheic exchange, for example, through the filling of wetlands. One commenter recommended adding “and that material from failed protection will be removed from stream (and if reused, can only be used as backfill as it does not meet 100 yr flood requirements)” to the end of paragraph (e). Many commenters suggested that subsection (i) should state that maintenance of any bank stabilization must be required for the lifetime of the activity. One commenter requested that the NWP include a condition that requires the project be designed to ensure the bank stabilization is sustainable. One commenter suggested clarifying that the authorized maintenance under the NWP includes the removal of failing structures.

Discharges of dredged or fill material into wetlands and other waters of the United States may directly or indirectly impact movement of ground water and hyporheic exchange. The loss of functions resulting from the regulated activity are considered in the evaluation of the impacts, at the national level, at the regional level, and at the district level. The district engineer will determine, through review of the PCN, if impacts to wetlands and other special aquatic sites resulting from the specific activity will cause no more than minimal adverse environmental effects. Paragraph (i) and general condition 14 (Proper Maintenance) require a permittee maintain and repair any activity authorized by this NWP. Paragraph (i) does not require a

landowner or other entity to maintain a bank stabilization activity in perpetuity. There are also a variety of other factors that affect the functional lifespan of a bank stabilization activity.

If failure of an authorized activity occurs, the district engineer may pursue compliance of an unauthorized action pursuant to 33 CFR 326. The Corps declines to modify paragraph (e) to prescribe a specific method for resolving noncompliance with an NWP, preserving flexibility in such situations. As described in 33 CFR 326, the district engineer has the discretion to make decisions on resolving unauthorized actions based on the specific site characteristics, type of resource impacted, and whether removal of eroded material would cause greater impacts then allowing it to remain in place. Consistent with paragraph (i) and general condition 14 (Proper Maintenance) a permittee may remove existing fill or structures in order to maintain and repair any activity authorized by this NWP. Removal of authorized fills and structures may be also authorized by NWP 3 (Maintenance), by regional general permit, or by individual permit.

Many commenters suggested adding language that requires that fill material must be free from contaminants. Many commenters recommended adding language that requires the applicant to ensure the preservation of fish when dewatering aquatic resources.

Activities authorized by this NWP must comply with general condition 6 (Suitable Material) which prohibits the discharge of material that contains pollutants in toxic amounts. The permittee is also responsible for complying with all general conditions to the NWP. General condition 2 (Aquatic Life Movements) requires that temporary crossings be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. If the regulated activity might affect, or is in the vicinity of a species listed (or proposed for listing) or designated critical habitat (or habitat proposed for such designation) under the ESA, general condition 18 (Endangered Species) requires non-federal permittees to submit a PCN and states the permittee cannot begin work until the district engineer has provided notification that the proposed activity will have “no effect” on listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), or until ESA Section 7 consultation or conference has been completed. If a PCN is required for the proposed NWP

activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with the ESA. The permittee is required to comply with any mitigation measures identified during Section 7 ESA consultation, or species proposed for listed) or critical habitat (or habitat proposed for such designation).

Many commenters supported the proposed addition of language about nature-based solutions. Many commenters opposed the addition of the nature-based solutions definition and some expressed concern that nature-based solutions are not always the most beneficial to the environment or feasible. Many commenters recommended requiring the use of nature-based solutions. Many commenters suggested requiring nature-based solutions be considered before allowing another form of bank stabilization. One commenter recommended that the district engineer ensure a seamless transition occurs between soft bank transitions to hard bank structures and transitions to unmodified bank.

This NWP encourages project proponents to incorporate nature-based solutions into the design of the activities authorized by this NWP. The Corps acknowledges that there are circumstances when nature-based solutions will not be practicable for a site for a variety of reasons. Inclusion of nature-based solutions into the design of a project is not required by this NWP. Note 2 reinforces the Corps’ acknowledgement that the landowner has the general right to protect his or her property from erosion. The project proponent will determine what bank stabilization options are feasible. In addition, district engineers can only provide general information to landowners regarding bank stabilization options. District engineers cannot design a landowner’s bank stabilization activity.

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. General condition 23 requires compensatory mitigation for all wetland losses greater than 1/10-acre and for all stream losses greater than 3/100-acre for all activities authorized under this NWP, unless the district engineer determines that some other form of mitigation would be more environmentally appropriate. The district engineer will determine if a proposed activity would cause more than minimal adverse impacts to the environment in light of the terms of the

NWP, all the general conditions, and the criteria in Section D. District Engineer's Decision.

A few commenters expressed concern that proposed examples of nature-based solutions are actually bank hardening approaches that contradict nature-based solutions. One commenter recommended clarifying if "bags of molluscs" refers to living organisms, is limited to the use of native species, the quantity of mollusks used, or if this relates to oyster shell bags used in living shorelines. One commenter suggests aligning the definition of nature-based solutions with the examples provided in NWP 43 (Stormwater Management Facilities) to ensure consistency for transportation and stormwater management projects that incorporate nature-based solutions. One commenter suggested adding the word "also" to the first sentence of the eleventh paragraph, so it reads "This NWP also authorizes discharges . . ." to clarify that the permit doesn't only authorize discharges incorporating nature-based solution.

Depending on the characteristics of a site, soft bank stabilization may not be appropriate. Nature-based solutions can include natural and engineered components. Elements of nature-based solutions can be incorporated into hard bank stabilization, such as use of construction materials for seawalls and bulkheads that have textured surfaces, or the placement of rock clusters next to a seawall or bulkhead. We have modified NWP to add "vegetative stabilization" and "bioengineering" to the list of examples of nature-based solutions for bank stabilization activities. We have also added a sentence to the eleventh paragraph to reinforce that nature-based solutions should be appropriate for the physical and biological characteristics of the site.

Nature-based solutions may also include the placement of bags of molluscs to create habitat. Molluscs are found in both freshwater and saltwater and include mussels and oysters. The phrase "bags of molluscs" refers to living organisms, but nature-based solutions can also include the placement of bags of mollusc shells. If the molluscs are living, the bags of molluscs should consist of species that are native to the waterway where they will be placed to avoid the introduction of invasive species in a waterway. The examples of nature-based solutions in NWP 13 and in NWP 43 (Stormwater Management Facilities) are necessarily different because the examples listed in any NWP are related to the purpose of the proposed discharge of dredged or fill material or work and structures. The

Corps is retaining the list of examples in this NWP. The Corps agrees to modify the first sentence of the eleventh paragraph to make clear that this NWP authorizes activities associated with bank stabilization and also authorizes activities associated with incorporating nature-based solutions into new and existing bank stabilization.

Many commenters supported the addition of Note 2 to this NWP. Many commenters opposed the addition of Note 2. Several commenters expressed concern that Note 2 would only apply to activities that require submittal of a PCN. One commenter requested a modification to Note 2 to state what hard armoring is permitted along shorelines and to specify what private property structures are eligible for protection and what level of bank stabilization is required. A few commenters expressed concerns that Note 2 recommends nature-based solutions and does not prohibit hard stabilization. Several commenters stated that the Note should be modified to recognize local agencies authority to determine approaches for projects. Several commenters recommended adding additional factors to consider when determining the type of bank stabilization, such as local climate, soil properties, water fluctuations, bank slope and wake action. One commenter stated that the private property owner's right to protect their property is limited by concerns of adverse impacts to property of others, public health and safety, adverse environmental impacts, and the public interest.

This NWP encourages the incorporation of nature-based solutions into existing and new bank stabilization projects where those methods are likely to be successful. Note 2 applies to all activities authorized by this NWP. The Corps recognizes that there may be locations where the incorporation of soft bank stabilization or other nature-based solutions may not be practicable. The responsibility for land use planning and zoning, including land use in coastal zones, generally falls on state and local governments. If a state regulates shore erosion control activities, the state's regulations or permit decisions will influence or dictate the shore erosion approach proposed by the landowner. There will be a variety of factors to consider when identifying, planning, and designing an appropriate and effective bank stabilization activity for a particular site. Some of the factors to consider are listed in Note 2, but there may be other factors to consider based on the location of a site.

The Corps acknowledges that the property owner's right to protect their

property is balanced by considerations including whether the protective structure may cause damage to the property of others, adversely affect public health, or otherwise be contrary to the public interest. It is up to the landowner to decide how he or she wants to protect his or her property from erosion. Upon review of the PCN, if the district engineer determines that the proposed activity does not qualify for the NWP, he or she will advise the applicant whether the activity qualifies for another NWP or regional general permit authorization or requires an individual permit.

Many commenters suggested that the NWP explicitly state the preference for the use of NWP 54 for shoreline stabilization projects instead of NWP 13. Several commenters requested that the Corps properly enforce the removal of permitted temporary fills.

The Corps declines to establish a preference for one approach to bank stabilization over other approaches. Paragraph (b) of general condition 32 (Pre-Construction Notification) states the PCN must include the specific NWP(s) that the prospective permittee wants to use to authorize the proposed activity. Corps districts will enforce NWP 13 activities in the same manner as they enforce all individual permits and general permit authorizations, which is through the procedures described in the Corps' regulations at 33 CFR part 326 and relevant guidance and policy documents. Under its procedures at 33 CFR part 326, the Corps can take actions to address situations where permittees do not comply with the terms and conditions of this NWP, including the removal of temporary discharges of dredged or fill material into waters of the United States.

This NWP is reissued with the modifications discussed above.

NWP 14. Linear Transportation Projects. The Corps did not propose any changes to this NWP. Many commenters expressed support for the reissuance of this NWP. Many commenters oppose the reissuance of this NWP. One commenter stated that this NWP authorizes more than minimal impacts. Many commenters stated that this NWP causes significant cumulative impacts to water quality, salmon, and shellfish. Several commenters stated that a public comment period should be required for this NWP. Many commenters support the use of temporary mats under NWP 14.

This NWP authorizes activities that have no more than minimal individual and cumulative adverse environmental effects. For this NWP, the assessment of cumulative effects occurs at three levels:

National, regional, and the verification stage. The national NWP decision document includes a national scale cumulative effects analysis. Corps Headquarters prepared a national decision document for the reissuance of this NWP and made a finding of no significant impact. Each supplemental document has a cumulative effects analysis conducted for a region, which is typically defined as a state or Corps district.

When a district engineer issues a verification letter in response to a PCN or a voluntary request for an NWP verification, the district engineer prepares a brief document that explains whether the proposed NWP activity, after considering permit conditions such as mitigation requirements, will result in no more than minimal individual and cumulative adverse environmental effects. The public was provided an opportunity to comment on the Corps' proposal to issue, reissue, or modify an NWP when Corps Headquarters published its proposed rule in the **Federal Register** (90 FR 26100) to start the public comment period. However, after an NWP is issued, there is no public comment process for specific NWP activities.

Many commenters requested that NWP 12 and NWP 14 have consistent acreage limits. Many commenters oppose the $\frac{1}{3}$ -acre impact limit in tidal waters and $\frac{1}{2}$ -acre impact limit in non-tidal waters. One commenter stated that the impact limits should not be changed.

The acreage limits for NWPs 12 and 14 have some similarities, with a $\frac{1}{2}$ -acre limit for losses of non-tidal waters of the United States. The $\frac{1}{2}$ -acre limit for NWP 12 also applies to tidal waters, while NWP 14 has a $\frac{1}{3}$ -acre limit for losses of tidal waters. Nationwide permits 12 and 14 have somewhat different impact thresholds because of differences between oil or natural gas pipeline activities and linear transportation projects. With the exception of discharges of dredged or fill material associated with substations, pipeline foundations, or access roads, many impacts authorized by the NWP 12 are temporary and require restoration back to preconstruction elevations (*i.e.*, discharges of dredged or fill material associated with the installation of the oil or natural gas pipeline). Nationwide permit 14 for linear transportation projects authorizes discharges of dredged or fill material associated with linear transportation projects (*e.g.*, roads, railroads, airport runways, and trails), which are more likely to result in discharges of dredged or fill material that are not temporary. The Corps is

retaining the impact limits for this NWP.

Many commenters requested that NWP 12 and NWP 14 have consistent PCN thresholds. Several commenters supported the $\frac{1}{10}$ -acre threshold for submittal of a PCN. A few commenters stated this NWP should have no PCN threshold for low quality wetlands. One commenter stated that isolated waters should not be considered special aquatic sites. One commenter stated that a PCN should be required for all activities authorized by this NWP because historic resources are being affected.

NWP 12 and NWP 14 both require a PCN for activities causing the loss of greater than $\frac{1}{10}$ -acre of waters of the United States. NWP 12 also requires a PCN for activities requiring a Section 10 permit and when a proposed oil or natural gas pipeline activity is associated with an overall project that is greater than 250 miles in length and the project purpose is to install new pipeline along the majority of the distance of the overall project length. In addition to the $\frac{1}{10}$ -acre threshold, NWP 14 requires a PCN for discharges of fill material into special aquatic sites. Wetlands are special aquatic sites as defined by regulation in 33 CFR 330.2(j).

The Corps only has the authority to issue permits for regulated activities in waters of the United States. Not all wetlands and waters are waters of the United States. A jurisdictional determination is not required in order to submit a PCN. If the project proponent did not obtain an approved jurisdictional determination for the project site prior to submitting the PCN, for the purposes of evaluating the PCN, the district engineer will presume the wetlands, streams, and other waters on the project site are subject to CWA jurisdiction. If a PCN is required, the district engineer will review the PCN and consider the quality of the aquatic resources that would be impacted by the regulated activity when making the district engineer's decision (Section D).

If a non-federal permittee proposes an activity that might have the potential to effect a historic property or a property eligible for listing on the National Register of Historic Places, in accordance with general condition 20 (historic properties), the prospective permittee must submit a PCN and may not begin construction until they receive written authorization from the district engineer. Federal agencies must follow their own regulations for complying with Section 106 of the NHPA. During the review of the PCN, the district engineer will assess the proposal for compliance with general condition 17

(Tribal Rights). The Corps declines to modify the PCN thresholds for this NWP. The PCN requirements, in addition to the other terms of this NWP and the NWP general conditions ensure that the activities authorized by this NWP cause no more than minimal adverse environmental effects.

Many commenters oppose the definition of "single and complete linear project," stating that it is used to avoid review of projects through the individual permit process. The practice for providing NWP authorization for single and complete linear projects, where each separate and distant crossing of waters of the United States may qualify for its own NWP authorization, is consistent with the Corps' NWP regulations at 33 CFR 330.2(i), and dates back to November 22, 1991. District engineers will review PCNs to determine whether proposed crossings of waters of the United States are to be considered together or as separate and distant on a case-by-case basis, after evaluating site and regional characteristics. If one crossing of waters of the United States associated with the construction of a linear transportation project requires an individual permit, then 33 CFR 330.6(d) applies and the district engineer will determine which activities require individual permits and which activities can be authorized by an NWP. Section 330.6(d) of the Corps' NWP regulations, as well as Note 1 of NWP 14, remain in effect. Section 330.6(d) and Note 1 maintain the Corps' long-standing process regarding the use of NWPs and individual permits to authorize linear projects.

One commenter stated that replacement of existing fills should not count toward the $\frac{3}{100}$ -acre threshold. One commenter stated that this NWP should authorize nature-based solutions. One commenter recommended adding a note to NWP 14 to encourage the use of nature-based solutions.

Discharges of dredged or fill material for maintenance activities may be exempt from regulation under the CWA by Section 404(f) in accordance with 33 CFR 323.4(a)(2). If not exempted by Section 404(f) of the CWA, such discharges may be authorized by a variety of NWPs, such as NWP 3 (Maintenance) or NWP 14 (Linear Transportation Projects), NWP 33 (Temporary Construction, Access, and Dewatering), or NWP 45 (Repair of Uplands Damaged by Discrete Events). General condition 23 requires compensatory mitigation for all wetland losses greater than $\frac{1}{10}$ -acre and for all stream losses greater than $\frac{3}{100}$ -acre for all activities which require a PCN,

unless the district engineer determines that some other form of mitigation would be more environmentally appropriate.

This NWP authorizes discharges of dredged or fill material into waters of the United States and work and structures in navigable waters of the United States for activities associated with the construction, expansion, modification, or improvement of linear transportation projects. Prospective permittees may incorporate nature-based solutions into activities which requires DA authorization, where appropriate. Culvert replacements may be authorized by NWP 3 (Maintenance), NWP 14 (Linear Transportation Projects), or NWP A (Activities to Improve Passage of Fish and Other Aquatic Organisms) when the case-specific activity complies with the terms and conditions of the NWP. However, the incorporation of nature-based solutions may not be possible based on-site conditions, design requirements, and other factors. We decline to add a note to NWP 14 because the opportunity to incorporate nature-based solutions into linear transportation projects may be limited.

This NWP is reissued as proposed.

NWP 15. U.S. Coast Guard Approved Bridges. The Corps proposed to modify this NWP to refer to the General Bridge Act of 1946 as one of the statutory authorities that may be used by the U.S. Coast Guard to authorize a bridge over navigable waters of the United States. No comments were received on the proposed reissuance of this NWP. This NWP is reissued as proposed.

NWP 16. Return Water From Upland Contained Disposal Areas. The Corps did not propose any changes to this NWP. One commenter suggested changes to NWP 16 to authorize discharges of return water from a barge.

The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d). NWP 16 authorizes the return water from an upland contained disposal area provided the activity meets the terms and conditions of this NWP. This NWP only authorizes the return water. NWP 16 does not authorize the actual dredging activity, dredge material transport, or the discharge of dredged or fill material into waters of the United States, beyond the return water activity described above. The text of NWP 16 states dredging activities may require Section 404 authorization (33 CFR 323.2(d)) and will require Section 10 authorization if located in navigable waters of the United States. This NWP does not authorize the discharge of return water

from a vessel. We decline to modify the terms of this NWP.

One commenter suggested revising the NWP to require that activities authorized by NWP 16 require a separate individual Section 401 water quality certification. One commenter suggested NWP 16 not be reissued, stating it could authorize the placement of contaminated dredged material, causing detrimental water quality impacts and violating the CWA. One commenter stated that a PCN should be required for activities authorized under NWP 16 and that testing of the dredged material should be required.

The authority to make decisions regarding water quality under Section 401 of the CWA, including whether a project proponent must obtain an individual water quality certification, lies with state, tribe or EPA Region with the authority to grant, waive or deny water quality certifications. The permittee is responsible for complying with the terms and conditions to the NWP and any applicable regional conditions, including conditions of a granted general or individual 401 WQC. Activities authorized by this NWP must also comply with general condition 6 (Suitable Material) which prohibits the discharge of material that contains pollutants in toxic amounts. If the permittee fails to comply with a general condition, then the activity is not authorized by that NWP and the district engineer may pursue compliance of an unauthorized action pursuant to 33 CFR 326. We do not agree that a PCN should be required for this NWP. If the project proponent intends to discharge dredged material into waters of the United States beyond the return water activity, he or she must obtain a separate DA authorization, and a separate water quality certification.

This NWP is reissued as proposed.

NWP 17. Hydropower Projects. The Corps did not propose any changes to this NWP. Many commenters stated that the activities authorized under this NWP are not similar in nature and objected to the lack of impact limitations. Many commenters requested that the Corps decrease the total allowable generating capacity for NWP 17 activities from 10,000 kw to 5,000 kw. Many commenters requested confirmation that NWP 17 cannot be used for new dam construction.

This NWP authorizes categories of activities that are similar in nature, that is discharges of dredged or fill material regulated by the Corps that are associated with the construction of hydropower facilities within existing infrastructure which is under the authority of the FERC. For the reasons

articulated in the 2021 NWP (86 FR 73522) NWP 17 was modified to authorize activities associated with hydropower projects with a generating capacity of less than 10,000 kilowatts. This NWP does not authorize the construction of new dams for hydropower projects. This NWP authorizes discharges of dredged or fill material to install hydropower generation into existing reservoirs or structures.

Many commenters requested that the Corps withdraw the NWP 17 because it authorizes significant adverse impacts that violate the CWA. Many commenters suggested the inclusion of additional protective measures in the NWP, such as limiting impact size, requiring fish passage technology, bypasses, size restrictions, sediment flushing, fish-protective turbine spacing, and technologies to prevent water quality violations.

This NWP requires a PCN for all authorized activities. District engineers will review each PCN to determine if the proposed discharge of dredged or fill material into waters of the United States will result in no more than minimal individual and cumulative adverse environmental effects and may include activity-specific conditions in the NWP authorization. Decisions on the appropriate protective measures necessary to ensure the activity causes no more than minimal adverse effects to the environment will vary based on site conditions, type of facility, the proposed action and species and habitats that are present. If the district engineer determines a proposed discharge of dredged or fill material into waters of the United States will result in more than minimal adverse environmental effects after considering mitigation proposed by the applicant, he or she will exercise discretionary authority and require an individual permit for the proposed activity.

Many commenters oppose the authorization of activities under NWP 17 in watersheds containing unlicensed or non-compliant hydropower projects with known environmental and cultural impacts. Many commenters requested that the Corps prohibit use of NWP 17 for hydropower projects in a specific waterbody. Many commenters suggested requiring formal government-to-government consultation and written concurrence from affected tribes for all NWP 17 activities.

Division engineers may regionally condition this NWP to account for local environmental conditions and the ecological functions and services provided by waters of the United States. In geographic areas where there are

regional concerns about impacts to a particular waterbody or a sensitive aquatic resource, division engineers have the discretionary authority to suspend, modify, or revoke this NWP in a region or location. During the review of the PCN, the district engineer will assess the proposal for compliance with general condition 17 (Tribal Rights).

This NWP is reissued as proposed.

NWP 18. Minor Discharges. The Corps did not propose any changes to this NWP. Many commenters supported reissuance of this NWP with no changes. Many commenters suggested adding language to paragraph (a) of this NWP specifying that dredged or fill material cannot be discarded in areas above the plane of the ordinary high-water mark or high tide line in a manner that would result in future discharge into the waterbody via runoff. Many commenters recommended increasing the acreage impact threshold in this NWP to ½-acre. One commenter requested that the volume limit be raised to 50 cubic yards. One commenter stated that wetlands are not all special aquatic sites and requested the Corps change the PCN threshold of this NWP to only require a PCN when wetlands of a certain quality would be impacted by the activity.

This NWP authorizes discharges of dredged or fill material into waters of the United States provided the activity meets certain criteria. Disposal of dredged material in uplands is not subject to Corps' authority with the exception of return water, which may be authorized by NWP 16 (Return Water from Upland Disposal Sites). If discharges of dredged or fill material into waters of the United States located above the ordinary high water mark or high tide line are authorized by an NWP, the permittee must comply with general condition 12 (Soil Erosion and Sediment Controls) to stabilize exposed soils and fills. The permittee must also protect water quality through compliance with any conditions to water quality certifications.

The Corps believes that the 25 cubic yard limit for discharges and excavation activities and the ½-acre limit for losses of waters of the United States ensure that this NWP authorizes only those activities that have minimal individual and cumulative adverse effects on the aquatic environment. Special aquatic sites are defined by regulation in 33 CFR 330.2(j) and include all areas that meet the definition of a wetland. The Corps declines to change the PCN threshold to exclude certain wetlands.

One commenter recommended that the language in paragraph (a) of the

NWP be modified to remove the phrase "and the volume of material excavated" because the Corps does not typically regulate excavation or removal of material. One commenter stated that wetlands do not have an ordinary high water mark or high tide line and recommended that paragraph (a) be revised to limit the quantity of discharges in waters of the United States rather than below the plane of the ordinary high water mark or the high tide line.

When measuring the quantity of the discharge of dredged or fill material, the Corps will include the volume of any excavated area (*i.e.*, the volume of the substrate excavated) which is below the plane of the ordinary high water mark (OHWM) or high tide line (HTL). Excavation activities may result in discharges of dredged or fill material into waters of the United States that require Section 404 permits (see 33 CFR 323.2(d)). Therefore, it is not appropriate to remove references to excavation from this NWP. Unless exempted under Section 404(f) of the CWA, excavation activities in waters of the United States that result in more than incidental fallback require Section 404 authorization. Minor discharges authorized under NWP 18 often involve excavation activities that result in more than incidental fallback and would therefore constitute a discharge that is regulated under Section 404. The volume limitation is applied in waters of the United States below the high tide line or ordinary high water mark. The acreage limitation is applied in all waters of the United States. Wetlands may occur both waterward and below, or landward and above, the ordinary high water mark or the high tide line. For these reasons, the Corps declines to revise paragraph (a).

This NWP is reissued as proposed.

NWP 19. Minor Dredging. The Corps did not propose any changes to this NWP. One commenter expressed support for reissuance of the NWP as written. One commenter requested that the volume limit of this NWP be raised to 50 cubic yards. One commenter suggested requiring a PCN for all activities authorized by this NWP. Another commenter suggested requiring a PCN for activities in special aquatic sites.

The Corps believes that the 25 cubic yard limit in this NWP ensures that this NWP authorizes those activities that have minimal individual and cumulative adverse effects on the aquatic environment. Where the 25 cubic yard limit would be exceeded, the dredging activity may be authorized under regional general permits or

individual permits. Division engineers can also add regional conditions to this NWP to require PCNs for some or all NWP 19 activities to provide district engineers the opportunity to evaluate these minor dredging activities on a case-by-case basis.

One commenter stated that the NWP should include language that requires dredging to be conducted in a manner that avoids destabilizing the bed and banks of waterbodies. One commenter recommended expanding the list of areas where dredging is not authorized to include areas such as habitats for anadromous species, as well as in tidal marshes, eelgrass beds, mapped pocket estuaries, and tribal shellfish harvesting areas. One commenter requested a cumulative impact assessment for areas where repeated dredging has substantially reduced habitat availability.

General condition 12 (Soil Erosion and Sediment Controls) requires a permittee to stabilize any work below the ordinary high water mark or high tide line at the earliest practicable date. Division engineers may develop regional conditions for an NWP if he or she determines it necessary to ensure that activities in a region will cause no more than minimal adverse environmental effects to sensitive areas. If the regulated activity might affect, or is in the vicinity of a species listed (or proposed for listing) or designated critical habitat (or habitat proposed for such designation) under the ESA, general condition 18 (Endangered Species) requires non-federal permittees to submit a PCN and states the permittee cannot begin work until the district engineer has provided notification that the proposed activity will have "no effect" on listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), or until ESA Section 7 consultation or conference has been completed. If a PCN is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with the ESA.

For the NWPs, the assessment of cumulative effects occurs at three levels: National, regional, and the verification stage. Each national NWP decision document includes a national scale cumulative effects analysis under the Corps' public interest review. Each supplemental document has a cumulative effects analysis for a region, which is usually a state or Corps district. When a district engineer issues a verification letter in response to a PCN or a voluntary request for an NWP

verification, the district engineer prepares a brief document that explains whether the proposed NWP activity, after considering permit conditions such as mitigation requirements, will result in no more than minimal individual and cumulative adverse environmental effects.

This NWP is reissued as proposed.

NWP 20. Response Operations for Oil or Hazardous Substances. The Corps did not propose any changes to this NWP. No comments were received on the proposed reissuance of this NWP. This NWP is reissued as proposed.

NWP 21. Surface Coal Mining Activities. The Corps did not propose any changes to this NWP. Several commenters stated that this NWP should not be reissued. Several commenters stated that the 1/2-acre impact limit is overly permissive. Several commenters stated that surface coal mining activities should only be authorized by individual permits.

The discharge of dredged or fill material associated with surface coal mining and reclamation operations that are authorized by this NWP cannot result in the loss of greater than 1/2-acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. All activities authorized by this NWP require PCNs. If the district engineer determines a proposed NWP 21 activity will result in more than minimal adverse environmental effects after considering mitigation proposed by the permit applicant, he or she will exercise discretionary authority and require an individual permit for the proposed activity. The 1/2-acre limit, the PCN requirements, and the ability of division and district engineers to modify, suspend, or revoke this NWP on a regional or activity-specific basis ensures that the activities authorized by this NWP result in no more than minimal adverse environmental effects.

Several commenters stated that this NWP authorizes activities that have significant direct and cumulative effects, including effects to threatened and endangered species, waterways, water quality, animals, flood risks, and the human environment. Several commenters stated that the reissuance of the NWP should be evaluated in an environmental impact statement and programmatic ESA consultation.

As discussed in Section III.A. of this final action, the Corps Headquarters has prepared a national decision document and with a finding of no significant impact, therefore the requirements of NEPA have been met and no environmental impact statement is required. The terms and conditions of this NWP, such as acreage limits and the

mitigation measures in some of the NWP general conditions, are imposed to ensure that the NWPs authorize only those activities that result in no more than minimal adverse effects on the aquatic environment and other public interest review factors. District engineers will review the PCN and consider the effects of the regulated activity on waters of the United States. Permittees must comply with general conditions 10 (Fills Within 100-Year Floodplains) and 25 (Water Quality) and any conditions of a granted water quality certification. As discussed in Section III.C. of this final action, the Corps has determined that the issuance of this final action will have “no effect” on listed species (or species proposed for listed) or critical habitat (or habitat proposed for such designation), therefore no programmatic consultation on the issuance of these NWP is required.

Several commenters stated that the prohibition on “valley fills” allows other activities to be authorized under this NWP that have similar impacts on downstream waters. Several commenters stated that the scale of the cumulative impacts assessment for the activities authorized by NWP 21 should be limited to those areas where coal is mined, rather than nationwide. Several commenters stated that this NWP should never be used to authorize activities in the Appalachian Region.

The term “valley fills” is defined in the terms of NWP 21, and discharges of dredged or fill material that meet that definition are not authorized by this NWP. Other discharges of dredged or fill material into waters of the United States for activities associated with mining operations may be authorized by this NWP provided the regulated activity causes no more than minimal adverse effects to the aquatic environment. For the NWPs, the assessment of cumulative effects under the Corps’ public interest review occurs at three levels: National, regional, and the verification stage. Each national NWP decision document includes a national scale cumulative effects analysis under the Corps’ public interest review. The cumulative effects analysis at the national scale considers past, present, and reasonably foreseeable impacts to the nations waters which are impacts by human activities. Each supplemental document has a cumulative effects analysis for a region, which is typically defined as a state or Corps district. When a district engineer issues a verification in response to a PCN or a voluntary request for an NWP verification, the district engineer prepares a brief decision document that documents the district

engineer’s decision that the proposed NWP activity, after considering permit conditions such as mitigation requirements, will result in no more than minimal individual and cumulative adverse environmental effects.

If the Corps district staff believe that the use of an NWP in that geographic region may be approaching a threshold above which the cumulative adverse environmental effects for that category of activities may be more than minimal, the district engineer may either make a recommendation to the division engineer to modify, suspend, or revoke the NWP authorization in that geographic region in accordance with the procedures in 33 CFR 330.5(c). Alternatively, under the procedures at 33 CFR 330.5(d), the district engineer may also modify, suspend, or revoke NWP authorizations on a case-by-case basis to ensure that the NWP does not authorize activities that result in more than minimal cumulative adverse environmental effects.

This NWP is reissued as proposed.

NWP 22. Removal of Vessels. The Corps did not propose any changes to this NWP. No comments were received on the proposed reissuance of this NWP. This NWP is reissued as proposed.

NWP 23. Approved Categorical Exclusions. The Corps proposed to modify paragraph (a) of this NWP to add references to NEPA to replace the references from the Council on Environmental Quality NEPA regulations that were removed from the Code of Federal Regulations on April 11, 2025 (90 FR 10610). The Corps proposed to modify paragraph (a) to reference Sections 106, 109, and 111(1) of the NEPA statute. The Corps also sought comment on whether a Regulatory Guidance Letter is the best way to document the categorical exclusions that are approved under this NWP or if another document, such as a **Federal Register** notice, would provide better notice to the public.

One commenter supported the updates to the text of the NWP. Many commenters requested that the Corps use the **Federal Register** to notify the public of categorical exclusions that are approved for use under this NWP. One commenter requested that the Corps use a Regulatory Guidance Letter to notify the public of categorical exclusions that are approved under this NWP. Several commenters recommended notifying the public of any revisions to the list of categorical exclusions in both the **Federal Register** and in a Regulatory Guidance Letter. One commenter recommended that the Corps provide a list of categorical exclusions approved

by the Federal Highways Administration or a summary of activities that have historically qualified for this NWP.

After consideration of the comments, the Corps will notify the public of future changes to the list of categorical exclusions applicable to this NWP in a **Federal Register** notice. We have modified the text of the Note to indicate that future changes to approve categorical exclusions applicable to this NWP will be announced in the **Federal Register**. Until it is rescinded or replaced, Regulatory Guidance Letter 05–07 contains the list of activities approved for authorization under this NWP as of the date of this action. Regulatory Guidance Letter 05–07 and any future **Federal Register** notices of changes to categorical exclusions applicable to NWP 23 can be found on the Corps' website (*usace.army.mil*). Regulatory Guidance Letter 05–07 lists the categorical exclusions requested by the Federal Highways Administration, Bureau of Reclamation, and USCG and approved for authorization under this NWP.

Many commenters stated that the activities authorized by this NWP are not all similar in nature. One commenter stated that a PCN should be required for all activities proposed for authorization under this NWP.

We believe that the “categories of activities that are similar in nature” requirement in CWA Section 404(e) is to be interpreted broadly, for practical implementation of this general permit program. This NWP only authorizes discharges of dredged or fill material into waters of the United States and work and structures in navigable waters of the United States when: (1) another federal agency has determined, pursuant to Section 106, 109, and 111(1) of NEPA, that the activity is categorically excluded from the requirement to prepare an environmental impact statement or environmental assessment analysis; and (2) the Chief of Engineers has concurred with that agency's or department's determination and has approved that activity for authorization under this NWP.

To be categorically excluded from NEPA, an agency must determine that a category of activities normally does not individually or cumulatively have significant effect on the human environment. After the other agency makes that determination, the Chief of Engineers also evaluates that category of activities to determine if he or she concurs that the agencies' categorical exclusions have no more than minimal adverse effects on the aquatic environment. A PCN is required for

certain activities approved for authorization under this NWP. If the district engineer determines a proposed discharge of dredged or fill material into waters of the United States will result in more than minimal adverse environmental effects, he or she will exercise discretionary authority to add case-specific conditions to the NWP or to require an individual permit for the proposed activity.

One commenter requested that the Corps consider whether certain categories of routine transportation activities, such as minor road maintenance or rehabilitation, could be addressed through standardized verification procedures. One commenter stated that the NWP should include a Note to advise the permittee that an action that qualifies for a categorical exclusion under NEPA may not be categorically excluded from a state environmental policy regulation.

The NWP provides a streamlined process for authorizing activities that cause no more than minimal adverse environmental effects. Discharges of dredged or fill material for maintenance activities may be exempted from regulation under the CWA by Section 404(f). If not exempted by Section 404(f) of the CWA, such discharges may be authorized by a variety of NWPs, such as NWP 3 (Maintenance) or NWP 14 (Linear Transportation Projects), NWP 33 (Temporary Construction, Access, and Dewatering), NWP 45 (Repair of Uplands Damaged by Discrete Events). Maintenance activities in navigable waters of the United States may also be authorized by a variety of NWPs, such as NWP 3 (Maintenance) or NWP 14 (Linear Transportation Projects), NWP 33 (Temporary Construction, Access, and Dewatering), NWP 45 (Repair of Uplands Damaged by Discrete Events).

Environmental policy regulations and requirements are different for each state. If there are state requirements which inform the Division Engineer's decision on the addition of regional conditions to the NWPs or the district engineer's case-specific review of an activity that may be authorized by the NWP, the division engineer or the district engineer may use his or her discretionary authority to modify the NWP. It is not necessary to add a Note advising permittees that their activity may be subject to review under state laws and regulations because the NWP does not purport to exempt a proposed activity from compliance with applicable state laws or regulations.

This NWP is reissued with the modifications discussed above.

NWP 24. Indian Tribe or State Administered Section 404 Programs.

The Corps proposed to modify this NWP to remove Florida from the list of states that have been approved by EPA to administer their own CWA Section 404 permit program under the authority of 33 U.S.C. 1344(g)–(l). EPA's approval of Florida's assumption of the CWA Section 404 permit program was vacated by the District Court for the District of Columbia in 2024. One commenter expressed support for the change to the NWP.

This NWP is reissued as proposed.

NWP 25. Structural Discharges. The Corps did not propose any changes to this NWP. No comments were received on the proposed reissuance of this NWP. This NWP is reissued as proposed.

NWP 27. Aquatic Ecosystem Restoration, Enhancement, and Establishment Activities. The Corps proposed to change the title of this NWP to refer to “aquatic ecosystems” instead of “aquatic habitats” because activities authorized by this NWP should, over time, produce net increases in a variety of aquatic ecosystem functions and services. The Corps also proposed to modify the paragraph that requires NWP 27 activities to resemble ecological references and include ecological references that are cultural ecosystems and ecological references based on indigenous and local ecological knowledge. In addition, the Corps proposed to remove the list of examples of activities authorized by this NWP and modify the list of categories of activities that are not authorized by this NWP.

The Corps also proposed to require the submission of Reports for all NWP 27 activities and remove the “Notification” paragraphs from this NWP. However, PCNs will still be required when PCN thresholds in the NWP general conditions (e.g., general condition 18, endangered species) or regional conditions added by division engineers are triggered. Lastly, the Corps proposed to add a new Note (Note 2) to this NWP to state that if an NWP 27 activity requires PCN because of an NWP general condition or a regional condition imposed by a division engineer, the baseline information required by paragraph (3) of the Reporting requirement substitutes for the delineation of waters, wetlands, and other special aquatic sites required by paragraph (b)(5) of general condition 32.

A few commenters opposed the reissuance of this NWP. Many commenters supported the proposed changes to this NWP. A few commenters requested a size limit be placed on all projects that can be authorized by NWP 27. One commenter stated that no activities should be authorized under this NWP without a public hearing or

public notice. Many commenters supported the statement that activities authorized by this NWP do not require compensatory mitigation. A few commenters opposed the language clarifying compensatory mitigation shall not be required by NWP 27.

This NWP requires aquatic ecosystem restoration, enhancement, and establishment activities that result in net increases in aquatic resource functions and services and resemble ecological references. This NWP does not have any acreage or other quantitative limits because the overall effect of the regulated activity results in a benefit to the aquatic environment. Aquatic habitat restoration, enhancement, and establishment activities can occur in large or small areas. When the district engineer reviews the reports required for activities proposed for authorization by this NWP, he or she will assess whether the activities will satisfy the terms and conditions of this NWP. If a specific activity does not, then the district engineer will notify the project proponent that he or she must apply for a different NWP, for a regional general permit, or for an individual permit.

This NWP requires that activities in waters of the United States associated with restoration, enhancement, and establishment result in net increases in aquatic ecosystem functions and services, which will generally result in an increase in acreage of aquatic habitats. However, there may be some activities authorized by this NWP that result in a decrease in acreage of aquatic resources in order to affect a net increase in aquatic ecosystem functions and services. Such decreases in acreage of aquatic resources are acceptable because it is the ecosystem functions, and the services that people derive from those functions, which are important to society. The public was provided an opportunity to comment on the Corps' proposal to issue, reissue, or modify NWP 27 when Corps Headquarters published its proposed rule in the **Federal Register** (90 FR 26100) to start the public comment period. However, after an NWP is issued, there is no public comment process for specific NWP activities. The Corps is retaining language that states no compensatory mitigation is required for activities authorized by this NWP.

One commenter recommended defining voluntary restoration to differentiate it from activities associated with compensatory mitigation. One commenter suggested that the Corps establish a new NWP that approves mitigation banking instruments or in-lieu fee program instruments. One

commenter supported the use of an ecological reference standard. One commenter opposed allowing project proponents to decide how to establish the goals of the restoration, enhancement or establishment activities. A few commenters recommended requiring applicants to document and justify their selection of the ecological reference(s). One commenter recommended that the report include a discussion of the ecological reference condition(s) relied upon by the project proponent to inform the district engineers' review.

The Corps does not find it necessary to define what constitutes a voluntary restoration activity. This NWP authorizes activities associated with voluntary restoration and with restoration by third party mitigation providers. Both types of restoration activities are subject to the same requirements of this NWP. In a process separate from this NWP, third-party mitigation providers are also subject to any approved mitigation banking instrument or in-lieu fee program instrument (33 CFR 332). Third-party mitigation providers of mitigation banks or in-lieu fee programs which require approval by the Corps will include information on the goals and objectives of the compensatory mitigation, as well as performance standards, in their mitigation banking instrument or in-lieu fee program instrument. Nationwide permits authorize discharges of dredged or fill material into waters of the United States or work and structures in navigable waters of the United States under the authorities of Section 404(e) of the CWA and the implementing regulations at 33 CFR 330. Under the Corps' regulations at 33 CFR 332, the approval of a compensatory mitigation banking instrument or an in-lieu fee program instrument is a separate process and does not authorize the discharge or dredged or fill material or work or structures associated with the restoration, enhancement, or establishment activities.

For voluntary aquatic ecosystem restoration, enhancement, and establishment activities, project proponents can decide on the objectives and whether, and how, they establish goals and ecological performance criteria. To allow the district engineer to assess whether there will be a net increase in aquatic resource functions and services and that the proposed activity will resemble an ecological reference, we have added a provision to the reporting requirement that requires the prospective permittee identify the objectives of the proposed aquatic ecosystem restoration and enhancement

and establishment activity. Item (5) of the "Report" section of NWP 27 has been revised to require that the project proponent state the objectives of the proposed aquatic ecosystem restoration enhancement and establishment activity proposed for authorization under NWP 27 and to make clear that the report should describe the methods by which those objectives will be met.

A few commenters recommended allowing some engineered elements in restoration projects while maintaining ecological reference standards, arguing that excluding all artificial components would eliminate most restoration opportunities in developed areas. One commenter supported allowing habitat manipulation that simulates a naturally occurring feature, such as a beaver dam. One commenter recommended developing a separate NWP to authorize low-tech process-based restoration, such as beaver dam analogues (BDAs) and post assisted log structures (PALS) (Wheaton et al. 2019). One commenter suggested adding a reference to the Corps' definition of "restoration." One commenter stated that restoration should always provide net increases in biological functions.

Nationwide permit 27 does not authorize the construction, maintenance, or expansion of artificial, engineered features that require management because those activities would not resemble ecological references. Examples of such artificial, engineered features that would not resemble ecological references include culverts, bridges, water pumps, and gated water control structures. The removal of such structures, and restoration of the water of the United States may be authorized by NWP 27, if such activity meets the terms and condition of the NWP. Construction, maintenance, or expansion of engineered features that are analogous to natural landscape features, features that occur in nature, may be authorized under NWP 27. Constructed levees or berms that simulate natural landforms which form as a result of a river's natural flooding and sediment deposition processes, constructed or anchored log jams that mimic the movement of large woody debris or beaver dams in a riverine system, and rock grade controls that mimic a rock slide or bedrock sill may be authorized by NWP 27 if they resemble an ecological reference. The proposed modifications to this NWP remove the restriction on conversions of streams and natural wetlands to better allow process-based restoration, including BDAs and PALS.

It is unnecessary to include a reference to the definition of “restoration” in this NWP. The Corps will continue to rely on the definition of “restoration” in Section F. (Definitions), consistent with the definition of “restoration” found in 33 CFR 332.2. Regulated activities proposed for authorization under this NWP must result in net increases in aquatic resource functions and services, and such activities may result in a net increase in biological function, either as a direct or indirect result of the restoration activity.

One commenter requested that the text of this NWP make clear that natural elements that do not currently occur in the project area may still meet the definition of ecological reference standard provided they contribute to overall ecological function and result in a net improvement. Many commenters argued that restoration projects do not universally result in ecological improvements and requested enhanced monitoring requirements. One commenter recommended including a definition of “aquatic ecosystem functions and services” in the NWP.

The Corps agrees that, for activities authorized by this NWP, natural elements that are not currently in the project area may be part of an NWP-specific restoration, enhancement, or establishment activity if they resemble an ecological reference that currently exists or did exist in the region and result in net increases in aquatic ecosystem functions and services. For instance, the restoration of a farmed wetland may include the addition of native wetland vegetation that is not currently in the farmed wetland but that can be found in wetlands currently in the region. The terms of this NWP and the definition of “Ecological Reference” in Section F (Definitions) provide sufficient information about the limits or acceptable elements of an ecological reference.

Monitoring is not required by this NWP. In accordance with 33 CFR 332, third-party mitigation providers must monitor compensatory mitigation banks or in-lieu fee programs sites as established in the mitigation banking instrument or in-lieu fee program instrument. Project proponents of voluntary restoration projects may voluntarily monitor the activity in order to report to federal or state agencies, or entities which may have funded the activity. Permittees who receive an NWP verification letter, either as a result of a PCN submitted in compliance with a general condition or a PCN submitted voluntarily, must certify to the district engineer that the authorized

activity has been completed in compliance with the NWP authorization in accordance with general condition 30 (Compliance Certification). If a permittee fails to comply with the terms and conditions of this NWP, the district engineer will address the potential unauthorized activity in accordance with 33 CFR 326. The Corps will rely on the definitions of “functions” and “services” in 33 CFR 332.2 and declines to add a definition of “aquatic ecosystem functions and services” to this NWP.

Many commenters supported removing the list of examples of authorized activities. A few commenters opposed complete removal of the examples list, recommending that the list be included, but adding language to make clear that the list does not limit the activities authorized by this NWP. Some commenters requested that this NWP authorize the removal of fords and in-stream grade control structures. One commenter stated that the Corps should no longer approve restoration that includes Natural Channel Design, Legacy Sediment Removal, connecting to an “Engineered Floodplain”, or Regenerative Stormwater Conveyance Step Pools. Several commenters requested recognition that some projects may provide both restoration and flood management benefits.

The Corps is removing the list of examples of authorized activities as proposed. The removal of low fords is an activity that would likely result in net increases in aquatic ecosystem functions and services and could be authorized by this NWP if the activity results in an aquatic ecosystem that resembles an ecological reference. The removal of in-stream grade control structures, such as irrigation structures, may be more appropriately authorized by NWP 33 (Temporary Construction, Access, and Dewatering).

Certain types of manipulation of the physical or chemical characteristics of a site may restore aquatic resources or downstream waters; however, they must result in an aquatic ecosystem that resembles an ecological reference in order for the regulated activity to be authorized by this NWP. A stream restoration activity that also helps reduce sediment, nutrient, and pollutant inputs to downstream waters and helps meet established Total Maximum Daily Loads (TMDLs) can be authorized by this NWP, provided the restored stream will resemble an ecological reference for that stream type in the region. Activities associated with the restoration, enhancement, and establishment of aquatic ecosystems may have multiple goals or benefits, but those activities

authorized by this NWP must result in a net increase in aquatic ecosystem functions and services so that the aquatic ecosystem resembles an ecological reference.

Many commenters supported the removal of the prohibition on conversion. One commenter stated that the terms of an NWP may not be explicit enough to ensure that conversion is allowed. One commenter recommended retaining language stating that wetland plant communities that occur when wetland hydrology is more fully restored is not a prohibited habitat conversion. Several commenters stated that the conversion of open waters areas to wetlands may result in a benefit to the ecosystem and should not be categorized as “conversion.” One commenter supported allowing the relocation of non-tidal waters in authorized projects. Some commenters expressed concern about eliminating the prohibition on conversion, arguing that some conversions result in net functional losses. One commenter recommended only allowing conversions when the project would result in a net increase to the aquatic resource.

The Corps proposed to modify the list of categories of activities not authorized by this NWP to remove the prohibition on conversions of a stream or natural wetlands to another aquatic habitat type or uplands. This NWP retains the prohibition on the conversion of tidal wetlands to open water impoundments and other aquatic uses. The full suite of aquatic ecosystem functions and services must be considered when determining whether the net gains in aquatic resource functions and services required by this NWP will occur. When conducting these evaluations to determine NWP 27 eligibility, there should not be a focus on a specific aquatic resource function, or the ecological service(s) produced from that aquatic resource function. To assist district engineers in making these determinations, prospective permittees considering such activities should provide supporting information in their NWP 27 Reports or PCNs to demonstrate net increases in aquatic resource functions and services.

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. Changes in plant communities resulting from restoring wetland hydrology are still acceptable under this NWP provided the resulting aquatic habitat type resembles an ecological reference. Restoring wetland

hydrology has a high likelihood of changing the plant community, and such changes are usually an objective of those wetland restoration activities. Discharges of dredged or fill material into waters of the United States and work or structures in navigable waters of the United States for the purpose of restoring, enhancing, or establishing aquatic ecosystems must result in a net increase in aquatic ecosystem functions and services in order to be authorized by this NWP. The Corps is modifying the statement that this NWP does not authorize conversions of tidal wetlands to open water impoundments or other aquatic uses, to clarify that such conversions may be authorized if the conversion is solely for the purpose of enhancing the functions of tidal wetlands. The objective of the restoration, enhancement, or establishment activities authorized by this NWP is to provide a net increase in aquatic resource functions and services and this modification allows the district engineer the flexibility to authorize activities that will result in a wider variety of tidal habitats, including other types of special aquatic sites.

Many commenters supported excluding dam removal from NWP 27. Many commenters stated that NWP 27 should authorize dam removal. Many commenters argued that dam removal has a number of ecological benefits, and that removal of smaller dams should be authorized by this NWP. Some of the commenters stated that this NWP should authorize removal of small dams as defined by dam height or acre-feet of storage in the impoundment. Some of these commenters recommended that dam removal could be authorized by NWP 27 after submittal of a PCN.

The Corps is retaining the language stating that this NWP does not authorize discharges of dredged or fill material into waters of the United States and work or structures in navigable waters of the United States associated with any type of dam removal. The removal of small water control structures, dikes, and berms, to the extent DA authorization is needed, and associated restoration of the stream channel associated with the removal of the water control structure may still be authorized by NWP 27 so long as those activities result in net increases in aquatic ecosystem functions and services and resemble an ecological reference. Activities associated with low head dam removal may be authorized by NWP 53 (Removal of Low-Head Dams) and regulated activities associated with the removal of other types of dams may be authorized by regional general permit or an individual permit.

One commenter supported the addition of Bureau of Land Management to the list of federal agencies who can authorize or fund restoration projects. A few commenters recommended revising item (5) of Reporting by moving “and if applicable” from the end of item (5) to the beginning of item (6), to make clear that the prospective permittee must only include the documents listed in item (6) in the Report if they apply to the proposed NWP-specific activity.

The Corps is retaining the language adding the Bureau of Land Management to the list of federal agencies who can authorize or fund projects. The Corps is revising items (5) and (6) under Reporting as suggested to make clear that the prospective permittee must only include the documents in item (6) if the prospective permittee is proposing the activity in accordance with an agreement, documentation, or permit from the listed agencies.

Many commenters supported the removal of a requirement to submit a PCN and replacement with a Report requirement. Many commenters objected to the removal of the requirement to submit a PCN, stating that a PCN should be required for all activities or for all activities in certain regions. One commenter supported the requirement to submit a PCN when required by general condition. Many commenters stated that an individual permit should be required for larger projects. A few commenters recommended that no report be required for small projects.

All activities authorized by this NWP require some form of advance notification to district engineer before commencing authorized activities, to ensure compliance with the NWP. If the district engineers determines that a proposed activity does not qualify for NWP 27 authorization because it is not an aquatic ecosystem restoration, enhancement, or establishment activity or it is not likely to result in net gains in aquatic resource functions and services; or it does not resemble an ecological reference, then the district engineer will notify the project proponent that he or she must apply for a different NWP, a regional general permit, or an individual permit. If a PCN is required by a general condition (e.g., general condition 18 (Endangered Species) or general condition 20 (Historic Properties)), the district engineer will review the PCN for compliance with the terms and general conditions and Section D (District Engineer’s Decision). If a PCN is required by a general condition, the project proponent cannot proceed with the activity until he or she receives

written notification from the district engineer. The Corps does not agree that an individual permit should be required for regulated activities associated with the restoration, enhancement, or establishment of aquatic ecosystems because the activity will cause no more than minimal adverse effects to the environment by providing a net benefit to the aquatic ecosystem. Likewise, the Corps does not agree that a PCN should be required for all activities authorized by this NWP. The district engineer’s review of a report will be sufficient to determine if the case-specific activity will comply with the terms of this NWP. Division engineers may develop regional conditions to require a PCN for this NWP if he or she determines it is necessary to ensure that activities in a region will cause no more than minimal adverse environmental effects out of concern for sensitive areas or tribal rights.

Several commenters requested clarification about procedures following report timeframes and when the project proponent has authorization to proceed. One commenter stated that the district engineer must show through scientific literature how they supported their determination of the adequacy of the restoration. One commenter supported the requirement to submit the report 30-days before commencing activities in waters of the United States. Several commenters stated that the report should be submitted to the district engineer 60-days before commencing activities. A few commenters expressed concern about conflicts between this NWP and state regulatory requirements, such as water quality certification timeframes.

Prospective permittees must submit advance notification to the district engineer. The advance notification takes the form of either: (1) a Report, or (2) a PCN. Prospective permittees must submit a Report for all activities authorized by this NWP unless a general condition requires submittal of a PCN (e.g., general condition 18 (Endangered species)). When no PCN is required, the project proponent must submit a Report to the district engineer at least 30-days before commencing activities in waters of the United States authorized by this NWP. The district engineer will review the Report to assess whether the case-specific activities will satisfy the terms and conditions of this NWP. The project proponent may proceed with their case-specific activity if 30 days have passed from submittal of the report to the district engineer and the project proponent has not received written notice from the district engineer that the proposed activity does not qualify for

authorization under NWP 27. If the district engineer reviews the Report and determines a PCN is required in order to comply with a general condition, the district engineer must notify the project proponent within 30-days of submittal of the Report. If a specific activity does not comply with the terms and conditions of this NWP, then the district engineer will notify the project proponent within 30 days of the date the Report was submitted to the district engineer indicating that the project proponent must apply for a different NWP, a regional general permit, or an individual permit. The district engineer's documentation of their determination that the case-specific activity is authorized by the NWP 27 does not require detailed analysis of the adequacy of the proposed restoration. The district engineer's review of a Report must only establish that the proposed activity meets the terms and conditions of this NWP. When the district engineer reviews a PCN, he or she will document the district engineer's decision in accordance with Section D (District Engineer's Decision). The Corps believes that 30-days is sufficient time for the district engineer to determine if a case-specific activity will comply with the terms and conditions of this NWP or to notify the project proponent that they must apply for some other type of DA authorization.

General condition 25 (Water Quality) requires a permittee to comply with any conditions of a granted water quality certification. If a certifying authority has not previously granted certification or waived certification, the prospective permittee must obtain an individual water quality certification or waiver in order for an activity to be authorized by this NWP. Nationwide permits do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.

Many commenters supported the addition of Note 2 and the removal of the requirement to submit a wetland delineation to the district engineer, if a PCN is required for activities authorized under this NWP. Many commenters objected to the removal of the requirement to provide a wetland delineation to the district engineer.

This NWP does not have any quantitative limits, such as acreage limits, which necessitate identifying the precise location of jurisdictional boundaries, such as wetland boundaries, ordinary high water marks, high tide lines, or mean high water marks. A jurisdictional determination is not required in order to receive an NWP verification or conduct activities authorized by an NWP or other permit

type. This NWP requires authorized activities to result in net increases in aquatic resource functions and services, which will generally add acreage to the nation's aquatic habitat base. The information required by the Reporting section of this NWP, including baseline information is sufficient for the district engineer to determine if an activity complies with the terms of this NWP and general conditions, including any regional conditions.

A few commenters expressed disagreement with the data and analysis in the national decision document for the NWP 27. The national decision document for this NWP was prepared using estimates of past and future use of an NWP based on information available at the time of document preparation and our best understanding of the state of the science of restoration, enhancement, and establishment activities.

This NWP is reissued with the modifications discussed above.

NWP 28. Modifications of Existing Marinas. The Corps did not propose any changes to this NWP. One commenter stated a PCN should be required for all activities authorized by this NWP. One commenter requested that tribes be notified of actions proposed for authorization by this NWP that would be located in usual and accustomed fishing grounds. One commenter stated that this NWP should require that activities avoid eelgrass, macroalgae, and shellfish habitat. One commenter stated that a review of cumulative impacts should be completed for areas with multiple existing overwater structures. One commenter recommended that the incremental expansion of marina infrastructure be monitored for cumulative impacts to nearshore habitat and access to treaty-protected fisheries.

This NWP authorizes the work and structures in navigable waters of the United States associated with the reconfiguration of existing docking facilities within an authorized marina area. Expansions or additions of any kind are not authorized by this NWP. Permittees must comply with general condition 23 (Mitigation) and design the activity to avoid and minimize impacts to the maximum extent practicable at the site. Division engineers can add regional conditions to this NWP to require PCNs for some or all NWP 28 activities to provide district engineers the opportunity to review these activities on a case-by-case basis and determine whether the activity would cause more than minimal adverse effects on a sensitive aquatic resource or tribal rights.

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

If a permittee conducts work or constructs structures that are not authorized by an issued permit, it is an unauthorized activity, and the Corps district will determine an appropriate course of action under its regulations at 33 CFR part 326. Under Section 10 of the RHA, the removal of any unauthorized structures from navigable waters of the United States "may" be enforced and proper proceedings "may" be instituted under the direction of the Attorney General of the United States.

This NWP is reissued as proposed.

NWP 29. Residential Developments. The Corps did not propose any changes to this NWP. Many commenters stated that this NWP does not authorize activities that are similar in nature and/or have similar effects on the environment. Commenters stated that developments ranging from single-family homes to large multi-unit developments as well as "attendant features" are dissimilar activities. Many commenters stated the NWP contributes significantly to the loss of wetlands in the United States. One commenter recommended modifying NWP 29 to apply separate standards for larger housing developments and for small individual landowners or separate the NWP 29 into two separate NWPs. One commenter stated that this NWP should be withdrawn. Many commenters stated that the term "subdivision" should be defined in the NWP.

We believe that the "categories of activities that are similar in nature" requirement in CWA Section 404(e) is to be interpreted broadly, for practical implementation of this general permit program. This NWP authorizes categories of activities that are similar in nature, that is discharges of dredged or fill material regulated by the Corps that are associated with the construction of

residential development. The requirements of this NWP are appropriate for both regulated activities associated with the construction of single-family homes and multi-unit developments. Residential developments that are part of a larger mixed-use development may be authorized by NWP 29 in combination with other NWPs if consistent with general condition 28 (Use of Multiple Nationwide Permits). This NWP includes a subdivision provision, which states that for residential subdivisions, the aggregate total loss of waters of the United States authorized by this NWP cannot exceed 1/2-acre, including any loss of waters of the United States associated with the development of individual subdivision lots. Defining the term "subdivision" is unnecessary as there is little confusion surrounding the term.

One commenter recommended changing "aggregate total" to "cumulative total." One commenter requested that the NWP be modified to clarify that discharges of dredged or fill material into waters of the United States and work and structures into navigable waters of the United States can be authorized by this NWP for activities associated with attendant features may be authorized by this NWP only if they are part of the original development or subdivision. One commenter requested that this NWP be modified to clarify that this NWP does not authorize swimming pools constructed in aquatic resources.

The Corps declines to revise the NWP to replace the term "aggregate" with the term "cumulative" to avoid confusion with the regulatory requirements in the Corps regulations 33 CFR 320.4, which frequently use "cumulative." This NWP may authorize attendant features associated with residential developments provided they meet the requirements of general condition 15 (single and complete project), and the application of the definition of "single and complete nonlinear project." The 1/2-acre limit, the requirement that all activities authorized by this NWP require PCNs, the general conditions that apply to these activities including mitigation requirements in those general conditions, and the district engineers' review of PCNs ensure that the activities authorized by this NWP will result in no more than minimal individual and cumulative adverse effects.

Many commenters stated that the Corps should maintain and not decrease the current 1/2-acre impact limit on the NWP. Many commenters stated that the impact limit should be decreased to less than 1/2 acre. Many commenters stated that this NWP should be revised to

require the use of low-impact construction methods or require the use of nature-based solutions. Many commenters stated that this NWP should not authorize activities within certain locations, including critical habitat. Many commenters recommended requiring climate resiliency screening (sea level rise vulnerability, floodplain modeling) as part of the district engineer's review of the PCN.

The 1/2-acre limit, plus the requirement that all activities require PCNs and thus get case-by-case review by district engineers, are sufficient to ensure that the NWP authorizes those activities with no more than minimal adverse environmental effects. District engineers will consider the direct, indirect, and cumulative effects of the proposed activity in accordance with paragraph (2) in the District Engineers Decision (Section D.). Division engineers can modify, suspend, or revoke this NWP in geographic areas to ensure that the authorized activities do not cause more than minimal individual and cumulative adverse environmental impacts to sensitive areas.

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 regardless of the construction type or method. This action adds a definition of nature-based solutions to assist in the district engineer's review of the PCN. Prospective permittees are encouraged but not required to incorporate nature-based solutions into their project design. The Corps will not require the use of nature based-solutions because there may be locations where the incorporation of nature-based solutions may not be practicable. Activities authorized by this NWP must comply with general condition 10 (fills within 100-year floodplains). Although the CWA and the RHA do not require the district engineer to screen proposed activities for climate resilience, the use of nature-based solutions may contribute to climate resiliency efforts.

Activities authorized by this NWP must also comply with general condition 18 (Endangered Species). If the regulated activity might affect, or is in the vicinity of a species listed (or proposed for listing) or designated critical habitat (or habitat proposed for such designation) under the ESA, general condition 18 (Endangered Species) states the non-federal permittee cannot begin work until the district engineer has provided notification that the proposed activity will have "no effect" on listed species (or species

proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), or until ESA Section 7 consultation or conference has been completed. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with the ESA.

Many commenters objected to the removal of the 300 linear foot limit from the NWP, stating that it violates the CWA. A few commenters supported the removal of the 300 linear foot limit. One commenter stated that the NWP should be modified to prohibit the district engineer from waiving impact limits.

The 300 linear foot impact limit was removed from this NWP in the 2021 NWPs as explained in the final rule to issue the 2021 NWPs (86 FR 2761-2768) and remains the Corps' position. The Corps will rely on other, existing protective mechanisms within the NWP to ensure that the authorized activities will result in no more than minimal individual and cumulative adverse environmental effects. Those mechanisms include the 1/2-acre impact limit, the PCN requirements for these NWPs, and the ability of division and district engineers to further condition or restrict the applicability of an NWP in situations where they have concerns for the aquatic environment under the CWA Section 404(b)(1) Guidelines or for any factor of the public interest (see 33 CFR 330.1(d)). The ability for district engineers to waive impact limits was not proposed for inclusion in this NWP. The district engineer's discretion to waive the 300-linear foot impact limit was removed for the reasons explained in the 2021 NWPs, which remains the Corps position. When a district engineer issues a verification letter in response to a PCN or a voluntary request for an NWP verification, the district engineer prepares a brief document that explains the decision on whether to issue a verification letter for the proposed NWP activity or exercise discretionary authority to require an individual permit for that proposed activity.

One commenter suggested that the NWP require compensatory mitigation for any impacts over 1/10-acre. One commenter stated that the authority to waive the mitigation requirements should be banned or restricted to a higher level of review. Many commenters stated that reliance on compensatory mitigation to reduce cumulative impacts of NWP 29 does not satisfy CWA requirements. Many commenters stated that compensatory mitigation is not effective at offsetting impacts authorized by this NWP. Many commenters stated that the draft

decision document and NWP 29 itself lacks specific methods for mitigating the effects of residential construction.

General condition 23 requires compensatory mitigation for all wetland losses greater than $\frac{1}{10}$ -acre and for all stream losses greater than $\frac{3}{100}$ -acre when a PCN is required, unless the district engineer determines that some other form of mitigation would be more environmentally appropriate. District engineers have the discretion to delegate the authority to review PCNs. The district engineer, or delegated authority will make activity-specific determinations whether the compensatory mitigation is sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects. The use of compensatory mitigation and other forms of mitigation to ensure that activities authorized by an NWP result in no more than minimal individual and cumulative adverse environmental effects is codified in the Corps' NWP regulations at 33 CFR 330.1(e)(3). Section 404(e) of the CWA does not prescribe how the Corps is to ensure that the categories of activities authorized by general permits such as the NWPs will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effect on the environment. Therefore, the Corps has discretion on how to comply with the requirement in the statute.

Compensatory mitigation projects required for activities authorized by the NWPs must comply with the Corps' regulations at 33 CFR part 332, which require monitoring and other actions to ensure that the required compensatory mitigation offsets the permitted wetland or stream losses. The geographic area or watershed where mitigation credits are available to offset adverse impacts to wetlands and streams is determined through the review of the compensatory mitigation proposal in compliance with 33 CFR 332. District engineers will review the PCN to determine if the compensatory mitigation proposed by the prospective permittee is suitable to offset the adverse impacts to aquatic resources, considering the location of the impacts relative to the compensatory mitigation, watershed characteristics, and type of compensatory mitigation. If the district engineer determines that the compensatory mitigation is not suitable, he or she may advise the prospective permittee to revise their mitigation plan or review the proposed activity through the individual permit process.

One commenter expressed concern that the expected amount of

compensatory mitigation required by this NWP decreased from the 2021 Rule according to the draft decision document for this NWP. The decision document for this NWP estimates the amount of compensatory mitigation that will be required annually and over the five-years the NWPs in this final action could be in effect. The acres of compensatory mitigation that may be required to offset regulated activities authorized by the NWP in this final action are based on reliable data and resources. These estimates in the national decision documents are updated each time the Corps prepares national decision documents to support the reissuance of an NWP. Estimates of required compensatory mitigation acreage may change from decision document to decision document as a result of a variety of factors, which may include increased reliance on compensatory mitigation banks and in-lieu fee programs, or increased avoidance and minimization sufficient for the district engineer to determine that a case-specific authorized activity results in no more than minimal individual and cumulative adverse environmental effects.

This NWP is reissued as proposed.

NWP 30. Moist Soil Management for Wildlife. The Corps did not propose any changes to this NWP. No comments were received on the proposed reissuance of this NWP. This NWP is reissued as proposed.

NWP 31. Maintenance of Existing Flood Control Facilities. The Corps did not propose any changes to this NWP. One commenter expressed support for this NWP. Many commenters recommended adding aerial and linear impact limitations to this NWP. Many commenters urged the Corps not to reissue this NWP, stating that it causes significant impacts in violation of 404(e) of the CWA.

This NWP authorizes the discharge of dredged or fill material into waters of the United States or work or structures in navigable waters of the United States for the purpose of maintaining existing flood control facilities. While this NWP does not have a quantitative limit, maintenance activities that require DA authorization are limited to the maintenance baseline that is approved by the district engineer for each existing flood control facility. The NWP does not authorize new construction or expansion of an existing flood control facility. Flood control facilities contain aquatic resources which are adapted to a regime of periodic disturbance and will re-colonize an area after recurring maintenance. Based on the recovery of these resources after maintenance

activities, the Corps believes that no quantitative limit is required to ensure that the activities authorized by this NWP will not cause more than minimal adverse environmental effects.

Significant impacts are unlikely to occur as a result of these recurring maintenance activities because of the ecological recovery that occurs between each maintenance activity. That ecological recovery, the recovery of biotic and abiotic components, is likely the reason why recurring maintenance is needed, because the ecological recovery within an existing flood control facility, such as the re-growth of vegetation and the accumulation of sediment, may be diminishing the capacity of the flood control facility to perform its intended flood control functions.

Many commenters stated that the activities authorized by this NWP should be restricted to those that are similar in nature. We believe that the "categories of activities that are similar in nature" requirement in CWA Section 404(e) is to be interpreted broadly, for practical implementation of this general permit program. This NWP authorizes categories of activities that are similar in nature, that is discharges of dredged or fill material regulated by the Corps that are associated with activities related to the maintenance of existing flood control facilities within the established maintenance baseline.

Many commenters recommended that vegetation removal from levees be addressed by a regional approach. Maintenance of an existing flood control facility may require the removal of vegetation, regardless of whether a DA authorization is required for maintenance activities back to the maintenance baseline. This NWP does not impose any specific requirements regarding vegetation on levees, and it does not prescribe any specific management approach to levee vegetation. Division engineers may develop regional conditions to an NWP if he or she determines it necessary to ensure that activities in a region will cause no more than minimal adverse environmental effects. The district engineer will review the PCN and determine if the proposed NWP activity will, after considering permit conditions such as mitigation requirements, result in no more than minimal individual and cumulative adverse environmental effects.

Many commenters recommended that compensatory mitigation be required each time an activity is authorized by this NWP. One commenter urged the Corps to require compensatory mitigation for lost habitat values and,

impacts to anadromous fish and special status species each time the NWP is utilized.

This NWP authorizes only maintenance activities for existing flood control facilities that were previously authorized, or did not require DA authorization at the time they were originally constructed. Mitigation, including compensatory mitigation, may have been required for the original construction of the flood control facility. Mitigation may also be required for the first-time approval of the maintenance activity up to the maintenance baseline by the district engineer. Subsequent recurring maintenance activities to return the existing flood control facility to the maintenance baseline should not require mitigation because those maintenance activities generally have temporary impacts.

If the regulated activity might affect, or is in the vicinity of a species listed (or proposed for listing) or designated critical habitat (or habitat proposed for such designation) under the ESA, general condition 18 (Endangered Species) states the non-federal permittee cannot begin work until the district engineer has provided notification that the proposed activity will have “no effect” on listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), or until ESA Section 7 consultation or conference has been completed. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with the ESA.

One commenter expressed concern that the national decision document for this NWP stated that there would be a five-fold increase in the use of this NWP under this final action. No changes have been made to the terms or conditions of this NWP. The estimated impact acreages in the national decision document for this NWP includes both permanent and temporary impacts to waters of the United States. The national decision document for this NWP was prepared using estimates of past and future use of an NWP based on information available at the time of document preparation.

This NWP is reissued as proposed.

NWP 32. Completed Enforcement Actions. The Corps did not propose any changes to this NWP. One commenter stated that the Corps should coordinate with affected tribes prior to administering an enforcement action to ensure that tribal treaty resources are protected. District engineers undertake tribal consultations regarding resolution of unauthorized actions (33 CFR part

326) consistent with the existing Department of Defense, Army, and Corps’ tribal consultation policies. Activities that are authorized by this NWP must comply with general condition 17 (Tribal Rights).

This NWP is reissued as proposed.

NWP 33. Temporary Construction, Access, and Dewatering. The Corps did not propose any changes to this NWP. Many commenters supported the reissuance of the NWP with no changes. One commenter stated that the NWP should require the permittee to ensure that fish are preserved from areas that are temporarily dewatered. One commenter stated that this NWP should require that any fill brought in from outside the project area for constructing temporary structures be verified to be free from contaminants.

General condition 2 (Aquatic Life Movements) requires that temporary crossings be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. If the regulated activity might affect, or is in the vicinity of a species listed (or proposed for listing) or designated critical habitat (or habitat proposed for such designation) under the ESA, general condition 18 (Endangered Species) requires non-federal permittees to submit a PCN and states the permittee cannot begin work until the district engineer has provided notification that the proposed activity will have “no effect” on listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), or until ESA Section 7 consultation or conference has been completed. If a PCN is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with the ESA. The permittee is required to comply with any mitigation measures identified during Section 7 ESA consultation. General condition 6 (Suitable Material) requires that all material used for construction be free from toxic pollutants in toxic amounts. The Corps declines to require the permittee use a specific method for verifying that the material is compliant with general condition 6.

One commenter objected to the inclusion of language stating that structures can be left in place after construction if authorized by a separate Section 10 permit, stating that all structures should be removed or should require authorization under both a Section 10 and a CWA Section 404 permit. One commenter stated that this

NWP should exempt waterfilled barriers used to create coffer dams/water diversions from requiring a permit under either Section 10 of the RHA or Section 404 of the CWA.

This NWP prohibits any temporary fills from remaining in place and requires that they be removed in their entirety after completion of construction. Permanent structures or fills may be authorized through a separate DA authorization, such as an individual permit, other NWP, or a regional general permit. Structures in navigable waters of the United States require authorization under Section 10 of the RHA and discharges of dredged or fill material into waters of the United States, including navigable waters of the United States, require authorization under Section 404 of the CWA. Many structures do not result in an activity which requires authorization under Section 404. For instance, many pilings are structures that do not result in activity that requires authorization under Section 404 of the CWA (33 CFR 323.3(c)(2)). There may be situations when it would cause more environmental damage to remove a structure in its entirety than it would to leave the structure in place. The Corps declines to specifically exempt waterfilled barriers from requiring authorization under this NWP. District engineers will determine what activities require authorization under DA authorities.

This NWP is reissued as proposed.

NWP 34. Cranberry Production Activities. The Corps did not propose any changes to this NWP. No comments were received on the proposed reissuance of this NWP. This NWP is reissued as proposed.

NWP 35. Maintenance Dredging of Existing Basins. The Corps did not propose any changes to this NWP. Many commenters recommended that the NWP require dredging projects include sediment contamination testing and adherence to EPA/State cleanup standards. One commenter stated this NWP should include authorization under Section 404 of the CWA. One commenter stated that this NWP should require a PCN so that the district engineer can review the dredge disposal areas associated with the proposed activity for potential effects to historic properties. Many commenters stated that this NWP be modified to require a PCN.

This NWP authorizes dredging in navigable waters of the United States to previously authorized depths or controlling depths for ingress/egress, whichever is less. Discharges of dredged or fill material are not authorized by this

NWP. During dredging activities, sediments may be resuspended in the water column and may carry chemical substances that have adverse effects to water quality. Those adverse effects are likely to be temporary because the suspended sediments are likely to settle back onto the bottom. Under Section 401 of the CWA, certifying authorities may determine that a dredging activity may result in a discharge into waters of the United States and require the project proponent to obtain an individual water quality certification or waiver unless the certifying authority has issued water quality certification for the issuance of a general permit that authorizes the dredging activity. The permittee must comply with general condition 25 (Water Quality). Water quality certifications for activities authorized by this NWP will help ensure that any discharges that may be caused by those dredging activities comply with applicable water quality requirements.

Since it was first issued in 1991 (56 FR 59144), this NWP has been issued only under the authority of Section 10 of the RHA. This NWP has never been issued or reissued under the authority of Section 404 of the CWA. If the project proponent intends to dispose of dredged material into waters of the United States a separate DA authorization, such as another NWP, an individual permit, or a regional general permit is required.

If the dredge activity in navigable waters of the United States might have the potential to affect a historic property or a property eligible for listing on the National Register of Historic Places, in accordance with general condition 20 (historic properties), the prospective permittee must submit a PCN and may not begin construction until he or she receives written authorization from the district engineer. Federal permittees will comply with general condition 20 by following their agency procedures for implementing Section 106 of NHPA.

Division engineers can add regional conditions to this NWP to require PCNs for activities to provide district engineers the opportunity to review these activities on a case-by-case basis and determine if impacts to sensitive areas would cause no more than minimal adverse environmental effects. The activities authorized by this NWP are limited to existing marina basins, access channels to marinas or boat slips, and boat slips. The terms and conditions of this NWP ensure that activities authorized by this NWP cause no more than minimal adverse environmental effects. The Corps declines to require a PCN for this NWP.

This NWP is reissued as proposed.

NWP 36. Boat Ramps. The Corps did not propose any changes to this NWP. One commenter recommended that the NWP 36 be modified to increase the fill limit to 100 cubic yards and the maximum width to 30 feet. One commenter stated that the NWP should not allow the district engineer to issue waivers. One commenter requested that the prohibition on discharging material into special aquatic sites be removed from the NWP. One commenter requested this NWP be modified to require a PCN for all authorized activities out of concern for the potential to affect historic properties.

This NWP authorizes discharges of dredged or fill material into waters of the United States and work and structures in navigable water of the United States for the construction of boat ramps in waters of the United States. The terms of the NWP restrict the volume of discharged material to 50 cubic yards and the width of the boat ramp to 20 feet unless waived by the district engineer. Project sites, aquatic resources, and habitats vary across the nation; therefore, this NWP affords the district engineers the discretion to restrict or waive the width and volume limits so long as the activity would cause no more than minimal adverse environmental effects. Paragraph (e) of this NWP prohibits the placement of material into special aquatic sites, which include wetlands and riffles and pools. The Corps believes that the limits of this NWP are appropriate to ensure the NWP activity will result in no more than minimal adverse environmental effects.

If the regulated activity in waters of the United States might have the potential to affect a historic property or a property eligible for listing on the National Register of Historic Places, in accordance with general condition 20 (historic properties), the prospective permittee must submit a PCN and may not begin construction until he or she receives written authorization from the district engineer. Federal permittees will comply with general condition 20 by following their agency procedures for implementing Section 106 of NHPA.

This NWP is reissued as proposed.

NWP 37. Emergency Watershed Protection and Rehabilitation. The Corps did not propose any changes to this NWP. A few of commenters requested the NWP be modified to add "local or state government entity or political subdivision" as a category of emergency watershed protection and rehabilitation work authorized by this NWP. This NWP authorizes work done or authorized by certain federal agencies under their implementing regulations or

policies. Federal agencies have known regulations and policies which include requirements to meet environmental standards that the Corps can review to determine that activities authorized by this NWP would cause no more than minimal adverse environmental effects. Local or state governments, or other political subdivisions will have a variety of standards and requirements which may not provide similar environmental controls. The Corps declines to revise this NWP.

This NWP is reissued as proposed.

NWP 38. Cleanup of Hazardous and Toxic Waste. The Corps did not propose any changes to this NWP. No comments were received on the proposed reissuance of this NWP. This NWP is reissued as proposed.

NWP 39. Commercial and Institutional Developments. The Corps did not propose any changes to this NWP. One commenter stated that the activities authorized by this NWP are not similar in nature. One commenter stated that this NWP should not be reissued. One commenter stated that commercial and industrial developments should require an individual permit. One commenter requested the NWP be modified to raise the 1/2-acre impact limit to one-acre. Many commenters stated that the Corps should maintain or not decrease the current 1/2-acre impact limit. One commenter requested that the NWP be modified to limit stream bed impacts to 300 linear feet. One commenter stated that the requirement to submit a PCN for this NWP should be removed. One commenter requested the NWP be modified to include a threshold below which no PCN would be required.

Practical implementation of the Corps' general permit program warrants a broad interpretation of the "categories of activities that are similar in nature" requirement in CWA Section 404(e). This NWP authorizes categories of activities that are similar in nature, that is discharges of dredged or fill material regulated by the Corps that are associated with the construction of commercial and institutional developments. The activities authorized by this NWP must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. The 1/2-acre limit, the requirement that all activities authorized by this NWP require PCNs, the general conditions that apply to these activities, including mitigation requirements in those general conditions, and the district engineers' review of PCNs ensures that the activities authorized by this NWP will result in no more than minimal individual and cumulative adverse

effects. The 300 linear foot impact limit was removed from this NWP in the 2021 NWPs as explained in the final rule to issue the 2021 NWPs (86 FR 2761–2768) and remains the Corps' position.

A few commenters recommended revising this NWP to include data centers, and artificial intelligence and machine learning facilities as examples of commercial developments. One commenter stated that this NWP should list pharmaceutical storage and pharmaceutical manufacturing facilities as an example of commercial developments.

The Corps agrees that data centers, artificial intelligence and machine learning facilities, pharmaceutical storage facilities, and pharmaceutical manufacturing facilities are types of commercial developments. In response to these comments, this NWP has been modified to include "data centers (to include for example, artificial intelligence and machine learning facilities)," "pharmaceutical manufacturing facilities," and the broader term "storage facilities" in the list of examples of commercial developments. The list of examples of commercial and institutional developments in this NWP is not intended to be all-encompassing. This NWP authorizes attendant features to commercial and institutional developments, including utility lines, and roads. There are a number of NWPs that also could authorize discharges of dredged or fill material associated with the construction of facilities associated with commercial and institutional developments, such as NWP 12 (Oil and natural gas pipelines), NWP 14 (Linear Transportation Projects), NWP 18 (Minor Discharges), NWP 51 (Land-based Renewable Energy Generation Facilities), NWP 57 (Electric Utility Line and Telecommunication Activities), or NWP 58 (Utility Line Activities for Water and Other Substances). The use of multiple NWPs to authorize a single and complete project must comply with general condition 28 (Use of Multiple Nationwide Permits).

Prospective permittees who submit a PCN in accordance with paragraph (b) of general condition 32 (Pre-Construction Notification) will identify the specific NWP or NWPs that they propose to use. The district engineer will review the PCN and determine if the case specific activity qualifies for the NWP identified in the PCN. 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. 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.

One commenter stated that phased commercial developments may cause cumulative effects that may not be appropriate for authorization under an NWP. A few commenters stated that commercial developments in floodplains, special aquatic sites, or areas important to salmon should not be authorized by this NWP. One commenter stated that this NWP should require compensatory mitigation for any impacts greater than $\frac{1}{10}$ -acre.

The requirements of general condition 15 (Single and Complete Project), and the application of the definition of "single and complete nonlinear project" will limit the environmental impacts of any phased commercial developments. The $\frac{1}{2}$ -acre limit of NWP 39, plus the requirement that all activities require PCNs and thus get case-by-case review by district engineers, are sufficient to ensure that the NWP authorizes those activities that will cause no more than minimal adverse environmental effects, individually and cumulatively. District engineers will consider the direct, indirect, and cumulative effects of the proposed activity in accordance with paragraph (2) in the District Engineers Decision (Section D.). Division engineers can modify, suspend, or revoke this NWP in a region or geographic to ensure that this NWP does not authorize activities that result in more than minimal cumulative adverse environmental effects.

Activities authorized by this NWP must comply with general condition 10 (Fills Within 100-year Floodplains) and with general condition 18 (Endangered Species). If the regulated activity might affect, or is in the vicinity of a species listed (or proposed for listing) or designated critical habitat (or habitat proposed for such designation) under the ESA, general condition 18 (Endangered Species) states the non-federal permittee cannot begin work until the district engineer has provided notification that the proposed activity will have "no effect" on listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), or until ESA Section 7 consultation or

conference has been completed. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with the ESA. If the district engineer reviews the PCN and determines that the proposed activity may adversely affect essential fish habitat, he or she will initiate essential fish habitat consultation with the NMFS. General condition 23 requires compensatory mitigation for all wetland losses greater than $\frac{1}{10}$ -acre and for all stream losses greater than $\frac{3}{100}$ -acre, unless the district engineer determines that some other form of mitigation would be more environmentally appropriate.

This NWP is reissued with the modifications discussed above.

NWP 40. Agricultural Activities. The Corps did not propose any changes to this NWP. Many commenters stated that the Corps should maintain and not decrease the current $\frac{1}{2}$ -acre impact limit on the NWP. One commenter expressed concern over the size of impacts authorized by this NWP. One commenter recommended modifying this NWP to authorize work and structures in navigable waters of the United States under Section 10 of the RHA. One commenter requested language be included to explicitly state that conservation practices that are designed or constructed to meet USDA–NRCS specification be considered agricultural activities.

The Corps has made no change to the $\frac{1}{2}$ -acre impact limit in this NWP. This NWP authorizes discharges of dredged or fill material into waters of the United States for agricultural activities. The Corps declines to modify this NWP to authorize activities in navigable waters of the United States, such activities may be authorized by another NWP, a regional general permit, or an individual permit. The NWP provides a list of examples of activities that are considered agricultural activities, but the list is not all-inclusive. This NWP requires that prospective permittees submit a PCN. Upon receipt of the PCN, district engineers will determine if a proposed activity is an agricultural activity. If the district engineer determines that a discharge of dredged or fill material into waters of the United States associated with a conservation practice does not meet the terms and conditions of this NWP, the project proponent can apply for different NWP, for a regional general permit, or for an individual permit.

Many commenters opposed connecting agricultural drainage ditches to fish bearing streams in Washington State, expressing concern about water

quality. One commenter recommended prohibiting use of this NWP in any agricultural, drainage, or irrigation ditches that are used by fish.

Division engineers may develop regional conditions for an NWP if he or she determines it necessary to ensure that activities in a region will cause no more than minimal adverse environmental effects to sensitive areas. Permittees must comply with general condition 25 (Water Quality) and any granted water quality certification. The potential effects of a regulated activity on fish bearing streams in Washington State would be better addressed at the regional level. The district engineer may add conditions to a case-specific NWP which incorporate measures to avoid and minimize impacts to listed species (or species proposed for listing) and critical habitat (or critical habitat proposed for designation). District engineers may also add conditions to NWP authorizations to address EFH Conservation Recommendations made by NMFS during activity-specific EFH consultations. General conditions 2 (Aquatic Life Movements) and 3 (Spawning Areas) require the permittee to maintain low flows and to avoid impacts to spawning areas during spawning seasons, to the maximum extent practicable.

This NWP is reissued as proposed.

NWP 41. Reshaping Existing Drainage and Irrigation Ditches. The Corps did not propose any changes to this NWP. A few commenters recommended that this NWP be modified to require a PCN for all activities. One commenter stated that this NWP should be modified to limit the length and frequency of the activities authorized by this NWP. One commenter requested that projects in a region on the eastern seaboard require an individual permit. One commenter recommended adding a statement requiring “as-builts” be provided to verify original capacity and dimensions. One commenter stated that activities authorized by this NWP may impact historic properties. One commenter recommended modifying the NWP to prohibit authorization of this NWP in any agricultural, drainage, or irrigation ditches that are used by fish at any time of the year. This NWP authorizes discharges of dredged or fill material in non-tidal waters of the United States to reshape drainage or irrigation ditches. The Corps does not believe that length or frequency limits are necessary to ensure that this NWP causes no more than minimal adverse environmental effects, individually or cumulatively. In geographic areas where there are regional concerns about impacts to a sensitive aquatic resource, division

engineers have the discretionary authority to require a PCN for proposed NWP-activities in a region or location. Permittees who receive a verification letter certify compliance with the NWP terms and general conditions, in accordance with general condition 30 (Compliance Certification).

If a non-federal permittee proposes an activity that might have the potential to affect a historic property or a property eligible for listing on the National Register of Historic Places, in accordance with general condition 20 (historic properties), the prospective permittee must submit a PCN and may not begin construction until they receive written authorization from the district engineer. The district engineer may add conditions to a case-specific NWP which incorporate measures to avoid and minimize impacts to listed species (or species proposed for listing) and critical habitat (or critical habitat proposed for designation). District engineers may also add conditions to NWP authorizations to address EFH Conservation Recommendations made by NMFS during activity-specific EFH consultations. General conditions 2 (Aquatic Life Movements) and 3 (Spawning Areas) require the permittee to maintain low flows and to avoid impacts to spawning areas during spawning seasons, to the maximum extent practicable. If the district engineer receives a PCN, he or she may add conditions to a case-specific NWP verification to ensure that the activity would cause no more than minimal adverse environmental effects.

This NWP is reissued as proposed.

NWP 42. Recreational Facilities. The Corps did not propose any changes to this NWP. One commenter expressed opposition to the reissuance of this NWP and stated that the activities under this NWP result in more than minimal impacts. One commenter stated that impacts to 1/2-acre of non-tidal waters or over 1,000 feet of stream channel are not minimal. Many commenters stated the Corps should maintain and not decrease the current 1/2-acre impact limit on this NWP.

This NWP requires a PCN for all activities. District engineers will review the PCN and to determine if the proposed discharge of dredged or fill material into waters of the United States will result in no more than minimal individual and cumulative adverse environmental effects and may include activity-specific conditions in the NWP authorization. Activities authorized by this NWP must not cause the loss of more than 1/2-acre of non-tidal waters of the United States. Losses of streams will count toward the 1/2-acre limit. The

terms and conditions of this NWP, including the 1/2-acre limit and the requirement that all activities require PCNs, will ensure that the activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects.

One commenter stated that use of this NWP should be prohibited in areas important to listed species or essential fish habitat. One commenter stated that the NWP should require compensatory mitigation for any impacts over 1/10 acre.

If the regulated activity might affect, or is in the vicinity of a species listed (or proposed for listing) or designated critical habitat (or habitat proposed for such designation) under the ESA, general condition 18 (Endangered Species) states non-federal permittees cannot begin work until the district engineer has provided notification that the proposed activity will have “no effect” on listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), or until ESA Section 7 consultation or conference has been completed. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with the ESA.

District engineers may also add conditions to NWP authorizations to address EFH Conservation Recommendations made by NMFS during activity-specific EFH consultations or to ensure that the activity would cause no more than minimal adverse environmental effects. General conditions 2 (Aquatic Life Movements) and 3 (Spawning Areas) require the permittee to maintain low flows and to avoid impacts to spawning areas during spawning seasons, to the maximum extent practicable. General condition 23 requires compensatory mitigation for all wetland losses greater than 1/10-acre and for all stream losses greater than 3/100-acre that require PCNs, unless the district engineer determines that some other form of mitigation would be more environmentally appropriate.

This NWP is reissued as proposed.

NWP 43. Stormwater Management Facilities. The Corps proposed to modify this NWP to reference the broader term of “nature-based solutions” instead of the narrower terms of “green infrastructure” and “low-impact development integrated management features.” The nature-based solutions associated with regulated activities authorized by this NWP include features that can be constructed and maintained to manage

stormwater and reduce inputs of pollutants, including sediments and nutrients, to downstream waters. To provide additional clarity to potential permittees, the Corps also proposed to add more examples to the text of this NWP of nature-based solutions for stormwater management and reducing pollution loads to waters and wetlands. Other nature-based solutions and other features that are conducted to meet pollutant reduction targets established under TMDLs set under the CWA may also be authorized by this NWP provided they comply with the applicable terms and conditions of this NWP.

Many commenters recommended retaining the 1/2-acre impact threshold in this NWP. Many commenters recommended clarifying that the 1/2-acre impact threshold does not apply to temporary or long-term impacts to waters. A few commenters stated that changes to other aquatic resource types should be considered loss of waters and considered in the determination of minimal adverse impacts. Many commenters recommended ensuring the cumulative effects of repeated maintenance dredging and vegetation removal are evaluated. One commenter recommended adding language explicitly authorizing routine maintenance activities to ensure continued function.

The activities authorized by this NWP must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. The "loss of waters of the United States" refers to permanent adverse effects to waters of the United States as a result of filling, flooding, excavation, or drainage because of the activities subject to Corps' authority, and does not include temporary impacts. The definition of "loss of waters of the United States" is in Section F of this action (Definitions). This NWP does not authorize any activities in non-tidal wetlands adjacent to tidal waters or in tidal waters.

This NWP does not authorize discharges of dredged or fill material for the construction of new stormwater management facilities in perennial streams. When a PCN is required, the district engineer will determine if a proposed activity would cause more than minimal individual and cumulative adverse effects to the environment in light of all the general conditions and the criteria in Section D, District Engineer's Decision. The district engineer will consider the direct, indirect, and cumulative effects of the action on waters of the United States. The Corps' CWA authority over aquatic resources is limited to waters of the

United States. The second paragraph of this NWP states that "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" is authorized by this NWP.

Several commenters expressed support for the proposed language that nature-based solutions can be authorized under this NWP. One commenter stated that this NWP should authorize nature-based solutions.

To the extent that nature-based solutions require DA authorization and are associated with stormwater management facilities, regulated activities associated with nature-based solutions may be authorized by NWP 43. The district engineer will review the PCN and make a case-specific determination whether such structures, are authorized by this NWP.

Many commenters stated that stormwater management facilities should be prohibited in a variety of areas, including wetlands and critical habitat. One commenter opposed use of this NWP in natural streams or areas used by fish. One commenter opposed converting natural resources into stormwater management facilities. One commenter stated that facilities located in a floodplain should require an individual permit. Many commenters recommended tribal coordination within salmon-bearing watersheds or usual and accustomed fishing areas.

It is not always possible or desirable to site stormwater management facilities in upland areas, and locating them in jurisdictional wetlands or other waters of the United States may be the only practicable option for effectively managing stormwater. This NWP authorizes the construction of these facilities in non-tidal jurisdictional wetlands and waters, as long as those activities result in no more than minimal individual and cumulative adverse environmental effects. This NWP does not authorize discharges of dredged or fill material into perennial streams for the construction of new stormwater management facilities.

Except for certain maintenance activities, all activities authorized by this NWP require submittal of a PCN. For those activities that require PCNs, the district engineer will evaluate potential impacts to fish and determine if the proposed activity may affect listed species (or species proposed for listing) or critical habitat (or habitat proposed for such designation) and complete any required ESA Section 7 consultation. Activities authorized by this NWP must comply with general condition 10 (Fills

in 100-Year Floodplains). If, during the review of a PCN, the district engineer determines the proposed activity may adversely affect EFH, she or he will initiate EFH consultation with the NMFS. Division engineers may add regional conditions to this NWP to protect other sensitive areas. The district engineer will review all PCNs for compliance with general condition 17 (Tribal Rights).

One commenter stated that the activities authorized by this NWP should not be considered restoration. One commenter stated that compensatory mitigation should not be required for activities authorized by this NWP because stormwater management facilities improve and protect aquatic resources. One commenter recommended the Corps retain discretionary authority to require mitigation.

Stormwater management facilities are an important tool for fulfilling the objective of the CWA, by protecting and restoring the physical, chemical, and biological integrity of our Nation's waters. Some activities authorized by this NWP will not meet the definition of "restoration," but they may still provide benefits to the aquatic ecosystem. General condition 23 requires compensatory mitigation for all wetland losses greater than 1/10-acre and for all stream losses greater than 3/100-acre that require PCNs, unless the district engineer determines that some other form of mitigation would be more environmentally appropriate.

One commenter expressed support for the current PCN threshold. Many commenters stated that the district engineer should consider low impact development alternatives and changing rainfall intensity or flood risk. Many commenters stated that the prospective permittee should have to submit a long-term maintenance plan as part of the PCN.

General condition 23 requires the prospective permittee to design the activity to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable at the project site. The use of nature-based approaches may contribute to avoidance and minimization and could address changing climate factors. This NWP does not require the inclusion of nature-based solutions in the design of a stormwater management facility. Activities authorized by this NWP that are associated with the maintenance of stormwater facilities do not require a PCN if they are limited to restoring the original design capacities of the stormwater management facility. The Corps has determined that these

activities will cause no more than minimal adverse environmental effects if completed in compliance with the terms of this NWP and all applicable general conditions.

One commenter stated that NWP 43 should authorize a broader category of activities which improve water quality rather than specifying that the NWP authorizes activities that are conducted to meet TMDLs set under the CWA. One commenter stated that the Corps should recognize that prospective permittees must comply with requirements of states, municipalities, and tribes. One commenter stated that the final decision on what is most appropriate to meet public safety needs should be made by the local agency responsible for stormwater management. One commenter stated that monitoring may be required for certain activities where there are limits on allowable degradation, performance standards, or potential violations of water quality standards.

This NWP authorizes discharges of dredged or fill material into non-tidal waters of the United States for the construction of stormwater management facilities, maintenance of such stormwater facilities and nature-based solutions for managing stormwater and reducing inputs of sediments, nutrients, and other pollutants into waters. This NWP authorizes regulated activities which include, but are not limited to, activities which are conducted to meet TMDLs. The Corps agrees that states and municipalities may require, under their authorities, the construction and implementation of facilities to meet water quality criteria, designated uses, and compliance with post-construction stormwater requirements. If the construction and maintenance of those facilities involves discharges of dredged or fill material into waters of the United States, this NWP can be used to authorize those activities. If a certifying authority grants a water quality certification with conditions, those conditions become regional conditions to the NWP. Section E of this action (Further Information) states the NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law. Project proponents are responsible for complying with other licenses or permits.

This NWP is reissued as proposed.

NWP 44. Mining Activities. The Corps did not propose any changes to this NWP. Many commenters stated that the Corps should maintain and not decrease the current 1/2-acre impact limit on this NWP. One commenter stated that 1/2-acre of impacts to a small stream is not

minimal. One commenter recommended using a sliding acreage cap for impacts based on project size. One commenter stated that the 1/2-acre impact limit should be expanded to at least 3 acres. One commenter recommended a new NWP permit only for aggregates with a higher acreage impact limit.

The terms and conditions of this NWP, including the 1/2-acre limit and the requirement that all activities require PCNs, will ensure that the activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. District engineers will review these PCNs, and can add conditions to the NWP authorization, including mitigation requirements, to ensure that the authorized activity will cause no more than minimal adverse environmental effects. If a proposed activity will result in more than minimal adverse environmental effects, after considering the mitigation proposal provided by the prospective permittee, the district engineer will exercise discretionary authority and require an individual permit.

Division engineers may also add regional conditions to this NWP to change the PCN threshold or restrict activities in sensitive waters or locations. This NWP authorizes aggregate mining activities, and the Corps does not believe a separate NWP for those activities is warranted. Activities that are not authorized by this NWP may be authorized by a regional general permit or individual permit.

One commenter stated that mining activities, especially within a fish bearing stream, should not be covered under an NWP. One commenter objected to the use of this NWP when activities occur in streams, floodplains, or are adjacent to non-tidal waters occupied by anadromous salmon.

All activities authorized by this NWP require a PCN. District engineers will review PCNs for case specific activities and determine whether they may affect ESA-listed species (or species proposed for listing) or designated critical habitat (or habitat proposed for such designation). If the district engineer determines a proposed NWP activity may affect listed species (or species proposed for listing) or designated critical habitat (or habitat proposed for designation), he or she will conduct ESA Section 7 consultation with the U.S. Fish and Wildlife Service's (FWS) or National Marine Fisheries Service's (NMFS) as appropriate. If, during the review of a PCN, the district engineer determines the proposed activity may adversely affect EFH, she or he will initiate EFH consultation with the

NMFS. Division engineers may add regional conditions to this NWP to protect other special status species.

This NWP is reissued as proposed.

NWP 45. Repair of Uplands Damaged by Discrete Events. The Corps did not propose any changes to this NWP. One commenter stated that any repairs should not include structures waterward of the new ordinary high water mark unless there is an immediate threat to a primary structure or associated infrastructure. One commenter suggested this NWP be modified to authorize beach restoration, up to 25 cubic yards, conducted by a local government or hydropower owner with a FERC license.

This NWP only authorizes restoration of the damaged upland areas up to the contours or ordinary high water mark that existed prior to the occurrence of the damage. We do not agree that the restoration should be limited to the post-damage ordinary high water mark. The purpose of this NWP is to authorize regulated activities to repair uplands that have been damaged by a discrete event. It may not be practicable to limit fills to the new ordinary high water mark where the ordinary high water mark was changed by a discrete event.

Use of this NWP to authorize beach nourishment has been prohibited since 2012 (77 FR 10227) and we continue to maintain this position. The FERC license is not sufficient to replace the review by the district engineer to ensure that the activity would cause no more than minimal adverse environmental effects. The Corps declines to modify this NWP to authorize beach nourishment. Beach nourishment or restoration activities may be authorized by individual permits or regional general permits.

One commenter stated the requirement to submit the PCN within one year from the date of damage is too short due to engineering and regulatory processes that need to be followed. This commenter recommended the timeframe be extended to two years.

The Corps agrees that 12 months may be too short a timeframe to submit a PCN for activities authorized by this NWP. The Corps is modifying this NWP to require submittal of a PCN within 18-months and retaining the district engineer's discretion to waive the 18-month deadline if the prospective permittee can demonstrate funding, contract, or similar delays. Such delays can occur after major storm events if the entities responsible for making decisions regarding disbursement of funds or issuing contracts are short staffed or receive more requests than can be handled in a timely manner. The

Corps is retaining the requirement that the activity be under contract to commence or commence construction within two years of the date of the damage, and retaining the district engineer's discretion to waive the two-year timeframe.

This NWP is reissued with the modifications discussed above.

NWP 46. Discharges in Ditches. The Corps did not propose any changes to this NWP. One commenter expressed concern with the scale of impacts authorized by this NWP. A few commenters objected to the use of this NWP to authorize activities in ditches occupied by fish.

The Corps is retaining the one-acre limit that was established for this NWP when it was first issued in 2007. The one-acre limit has been effective in ensuring that discharges of dredged or fill material into the non-tidal ditches that satisfy four criteria in the first paragraph of this NWP result in no more than minimal individual and cumulative adverse environmental effects. Division engineers can add regional conditions to this NWP to impose an acreage limit that is less than one-acre, to ensure that activities authorized in the region will have no more than minimal individual and cumulative adverse environmental effects. During the review of PCNs for proposed NWP 46 activities, district engineers can require compensatory mitigation to offset losses of waters of the United States, in accordance with general condition 23 (Mitigation).

This NWP requires prospective permittees to submit a PCN. When the district engineer reviews the PCN, he or she will consider potential impacts to salmon and other fish species. General condition 2 (Aquatic Life Movements), prohibits activities which could disrupt the necessary life cycle movements of aquatic species and general condition 3 (Spawning Areas) prohibits the destruction of important spawning areas. If deemed appropriate, this NWP can be regionally conditioned by division engineers to limit or restrict the use of this NWP in waters accessible to anadromous salmonid species. The text of this NWP states that it does not authorize discharges into streams, or streams that have been relocated into uplands.

One commenter requested clarification if activities in ditches that receive groundwater inputs are excluded from this NWP. One commenter requested that this NWP be modified to allow activities in ditches that receive water from sources other than waters of the United States.

This NWP authorizes discharges of dredged or fill material into ditches that are waters of the United States so long as the ditches (1) are 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, and (3) divert water to an area determined to be a water of the United States prior to the construction of the ditch. Although criterion (2) requires that the ditch must receive water from a water of the United States that existed prior to the construction of the upland ditch, the terms of the NWP do not require that the ditch only receive water from a water of the United States prior to the construction of the ditch. The ditch may also receive water from other sources, such as precipitation or groundwater. 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. To the extent that ditches are determined to be waters of the United States, this permit provides authorization for discharges of dredged or fill material into them provided all terms and conditions of this NWP are met.

This NWP is reissued as proposed.

NWP 48. Commercial Shellfish Mariculture Activities. Federal court decisions in *The Coalition to Protect Puget Sound v. U.S. Army Corps of Engineers* (U.S. District Court, Western District Court of Washington at Seattle and U.S. Court of Appeals for the Ninth Circuit) vacated the 2017 NWP 48 in waters within Washington State. As a result, project proponents in Washington state have since sought authorization for regulated activities, work, or structures under a standard individual permit or letter of permission. Due to the low volume of PCNs received under the 2021 NWPs for activities proposed within waters in Washington State, the Corps proposed to modify NWP 48 to exclude its use in waters within Washington State. The Corps proposed to modify Note 1 and to add a Note (designated as Note 4) in this NWP. Language was added to each Note to clarify the intent of each Note. Note 1 was modified to identify information that should be provided to USCG and to provide contact information for USCG. New Note 4 identifies information that should be provided to NOS and provides contact information for NOS. The Corps provides a summary of the comments received on revised Note 1 and new Note 4 and responses to comments in Section II.D of this final action.

One commenter recommended that a PCN be required for all activities authorized by this NWP. One commenter opposed NWP 48 and recommended all covered activities require an individual permit. One commenter suggested prohibiting the use of this NWP and requiring an individual permit in high-value subsistence and cultural zones. One commenter recommended that the NWP be withdrawn until it can be demonstrated that the impacts of shellfish mariculture on the aquatic environment are minimal in nature. One commenter supported the revocation of NWP 48 in Washington State but disagreed with the use of Letters of Permission for authorizing mariculture operations in the state.

The terms and conditions of this NWP, including its PCN requirement, will ensure that commercial shellfish mariculture activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. If the regulated activity might affect, or is in the vicinity of a species listed (or proposed for listing) or designated critical habitat (or habitat proposed for such designation) under the ESA, general condition 18 (Endangered Species) requires non-federal permittees to submit a PCN and states the permittee cannot begin work until the district engineer has provided notification that the proposed activity will have "no effect" on listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), or until ESA Section 7 consultation or conference has been completed.

Division engineers may impose regional conditions to require PCNs or revoke this NWP for proposed activities that might affect treaty rights, submerged aquatic vegetation, or other concerns. Regional conditions can help ensure compliance with general condition 17, (Tribal rights) so that no NWP 48 activity will cause more than minimal adverse effects on reserved tribal rights (including treaty rights), protected tribal resources, or tribal lands.

When reviewing a PCN, if the district engineer determines that the proposed activity, after considering mitigation proposed by the prospective permittee, will result in more than minimal individual and cumulative adverse environmental effects, he or she will exercise discretionary authority and require an individual permit for that activity. The district engineer has the discretion to determine what type of individual permit may be appropriate

for authorizing the proposed activity, a Letter of Permission or a standard individual permit.

One commenter expressed concerns that the NWP could cause more than minimal adverse impacts to submerged aquatic vegetation. One commenter expressed concern that no compensatory mitigation will be required to offset the impacts from the authorized activities. One commenter stated that commercial shellfish mariculture activities improve habitat, increase species richness, and increase species diversity of aquatic resources. One commenter disagreed with the Corps' claim that the placement of oyster shells is a permanent discharge of dredged or fill material and can bury submerged aquatic vegetation. One commenter expressed concern that this NWP has no acreage impact limitation.

Prospective permittees must submit a PCN for commercial mariculture operations that impact more than 1/2-acre of submerged aquatic vegetation. This PCN threshold is sufficient for the purposes of ensuring that a project will have no more than minimal individual or cumulative adverse environmental effect. Division engineers may restrict or prohibit use of this NWP in geographic regions or specific waterbodies where more than minimal individual or cumulative adverse environmental effects may occur. District engineers will review the PCN and determine if the case-specific activity will cause more than minimal adverse effects on the environment. Placement of oyster shells in waters of the United States, either temporarily or permanently, can impact submerged aquatic vegetation. The length of time it takes for submerged aquatic vegetation to reestablish in an area can vary by species and habitat. District engineers will review PCNs to determine what activities result in a loss of waters of the United States and if the effects of the discharge are more than minimal.

One commenter requested clarification if the commercial shellfish operator would need to reapply every five years for continued authorization of the regulated activities. The commenter stated that requiring prospective permittees to reapply every NWP cycle is excessive and puts an extreme burden on districts where mariculture is prevalent.

General permits, including NWPs, must be reissued at least every five years. Commercial shellfish mariculture activities typically involve on-going discharges of dredged or fill material into waters of the United States and structures and work in navigable waters of the United States throughout the five-

year period a general permit is in effect. When that general permit expires, the on-going activities must be reauthorized in order for the regulated activities to continue to be authorized by general permit, assuming the general permit is reissued by the appropriate permitting authority (*i.e.*, Corps Headquarters for an NWP, a district engineer for a regional general permit or a programmatic general permit). Commercial shellfish mariculture operators can choose to utilize NWP 48 or other general permits to provide DA authorization for their activities, or they can apply for standard individual permits or letters of permission for those activities and if they would like to request that Corps districts issue standard individual permits or Letters of Permission for those activities that would be in effect for periods longer than five years.

One commenter requested that the NWP define which activities require authorization under Section 404 of the CWA and which activities require authorization under Section 10 of the RHA. Structures or work in navigable waters of the United States require authorization under Section 10 of the RHA and discharges of dredged or fill material into waters of the United States require authorization under Section 404 of the CWA. The majority of the activities associated with commercial shellfish mariculture require authorization under Section 10 of the RHA. Some activities associated with seeding, cultivating and harvesting activities will require authorization under Section 404 of the CWA. District engineers will determine what specific activities are subject to each of these laws.

One commenter asserted that mechanical harvest, harrowing and shell dispersal do not constitute a discharge of dredged or fill material and insisted that those activities should be covered under the normal farming exemption.

Discharges of dredged or fill material require DA authorization under Section 404 of the CWA unless exempted by Section 404(f) of the CWA. In accordance with the 1989 Memorandum of Agreement Between the Department of the Army and the U.S. EPA Concerning the Determination of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the CWA, the U.S. EPA has the authority to establish policies on which activities are eligible for the CWA Section 404(f) exemptions. There are no work or structures in navigable waters of the United States that are exempted from regulation under Section 10 of the RHA.

This NWP is reissued as proposed.

NWP 49. Coal Remining Activities. The Corps did not propose any changes to this NWP. One commenter stated mining activities should not be covered under an NWP. All activities authorized by this NWP must result in net increases in aquatic resource functions. Regulated activities associated with remining activities reduce acid mine drainage and sedimentation, which help manage cumulative effects on a watershed basis. The reduction in acid mine drainage and/or sedimentation in downstream segments of stream channels has resulted in functional improvements in many watersheds.

This NWP is reissued as proposed. *NWP 50. Underground Coal Mining Activities.* The Corps did not propose any changes to this NWP. Many commenters opposed reissuance of this NWP and stated that the activities authorized under the NWP have significant and harmful impacts on the environment. One commenter stated mining activities should require an individual permit. Many commenters opposed the use of this NWP in the Appalachian Regions due to impacts from previous mining.

The Corps Headquarters has prepared a national decision document to address the environmental effects of the reissuance of this NWP in accordance with NEPA and the CWA. The national decision document evaluates cumulative impacts in accordance with the CWA Section 404(b)(1) Guidelines at 40 CFR 230.7 for the issuance of general permits. In the national decision document for this NWP, the Corps Headquarters has made a finding of no significant impact.

In addition to the national analysis, the division engineer will prepare supplemental documentation and can exercise discretionary authority and modify the NWP by imposing regional conditions to ensure that activities authorized by this NWP in a region cause no more than minimal adverse environmental effects. The prospective permittee must submit a PCN to the district engineer for all activities proposed for authorization by this NWP. When the district engineer reviews the PCN, he or she will consider the direct and indirect effects of the NWP-specific activity in accordance with Section D (District Engineer's Decision) and determine if the activity will cause no more than minimal adverse environmental effects, both 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.

Many commenters stated that the Corps should maintain the current 1/2-acre impact limit on this NWP. Many commenters stated that the 1/2-acre impact limit should only apply to permanent impacts to waters. Many commenters opposed the 1/2-acre impact limit. Many commenters opposed the provision that allows the permittee to proceed 45-days after submittal of the PCN to the district engineer.

This NWP prohibits the loss of greater than 1/2-acre of non-tidal waters of the United States. The 1/2-acre limit for this NWP, as well as the requirement that all activities require PCNs, will ensure that this NWP authorizes activities that result in no more than minimal adverse environmental effects, individually and cumulatively. The “loss of waters of the United States” refers to permanent adverse effects to waters of the United States as a result of filling, flooding, excavation, or drainage because of the activities subject to Corps’ authority, and does not include temporary impacts. The district engineer will review the PCN and consider the impacts of the regulated activities, including the duration of the adverse effects (temporary or permanent) in accordance with Section D (District Engineer’s Decision). Activities that qualify for the default authorization that occurs 45-days after the district engineer receives a complete PCN must comply with all terms and conditions of the NWP, including the general conditions and any applicable regional conditions imposed by the division engineer.

Many commenters expressed concern that this NWP would significantly increase sediment loads into waters of the United States. Many commenters stated that the activities authorized by this NWP would harm endangered species.

Permittees must comply with the general conditions of this NWP, including general condition 25 (Water Quality) and general condition 12 (Soil Erosion and Sediment Controls), which require the permittee to comply with any conditions to granted water quality certifications and to implement appropriate soil erosion and sediment controls. Paragraph (c) of general condition 25 acknowledges that the district engineer or certifying authority may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

If the regulated activity might affect, or is in the vicinity of a species listed (or proposed for listing) or designated critical habitat (or habitat proposed for such designation) under the ESA, general condition 18 (Endangered Species) states the permittee cannot begin work until the district engineer has provided notification that the proposed activity will have “no effect” on listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), or until ESA Section 7 consultation or conference has been completed. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with the ESA. No activity is authorized by an NWP if it is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation.

This NWP is reissued as proposed. *NWP 51. Land-Based Renewable Energy Generation Facilities.* The Corps did not propose any changes to this NWP. One commenter expressed support for this NWP. One commenter expressed concern with the scale of impacts authorized by this NWP. A few commenters stated these activities should not be covered under an NWP. Many commenters stated that the Corps should maintain the current 1/2-acre impact limit on this NWP. Many commenters stated that the 1/2-acre impact limit should only apply to permanent impacts to waters. One commenter stated that a PCN should be required for all activities authorized by this NWP citing concerns for impacts to historic properties.

This NWP authorizes discharges of dredged or fill material into waters of the United States for the construction, expansion, or modification of land-based renewable energy facilities. The authorized discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. The “loss of waters of the United States” refers to permanent adverse effects to waters of the United States as a result of filling, flooding, excavation, or drainage because of the activities subject to Corps’ authority, and does not include temporary impacts (Section F. Definitions). 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. PCN is required if the discharge results in the loss of greater than 1/10-acre of waters of the

United States. The district engineer will review the PCN and he or she will consider the impacts of the discharges of dredged or fill material into waters of the United States, including the duration of the adverse effects (temporary or permanent) in accordance with Section D (District Engineer’s Decision).

If a non-federal permittee proposes an activity that might have the potential to affect a historic property or a property eligible for listing on the National Register of Historic Places, in accordance with general condition 20 (historic properties), the prospective permittee must submit a PCN and may not begin construction until they receive written authorization from the district engineer. Federal agencies must follow their own procedures for complying with Section 106 of the NHPA.

One commenter requested that the NWP be expanded to provide authorization for battery storage projects. There is overlap in some activities authorized by certain NWPs and battery storage projects, such as battery energy storage systems, may be authorized by this NWP, as well as by NWP 39 (Commercial and Institutional Developments) or NWP 57 (Electric Utility Line and Telecommunications Activities) provided they comply with the terms and conditions of the NWP.

One commenter suggested the NWP be modified to restrict its use in critical habitat, recovery units or areas known to be of importance to migratory birds, bald eagles, and golden eagles. One commenter stated that this NWP causes more than minimal impacts to areas important to fish. One commenter stated that compensatory mitigation should be required for impacts that cannot be avoided.

In accordance with general condition 19 (Migratory Birds and Bald and Golden Eagles), project proponents are responsible for complying with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. If the regulated activity might affect, or is in the vicinity of a species listed (or proposed for listing) or designated critical habitat (or habitat proposed for such designation) under the ESA, general condition 18 (Endangered Species) requires non-federal permittees to submit a PCN and states the permittee cannot begin work until the district engineer has provided notification that the proposed activity will have “no effect” on listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), or until ESA Section 7 consultation or conference has been completed. If a

PCN is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with the ESA. Activities authorized by this NWP must comply with general condition 10 (Fills Within 100-year Floodplains). Division engineers can regionally condition this NWP to restrict or prohibit its use in waters of the United States, where the discharges of dredged or fill material are likely to result in more than minimal adverse effects on the aquatic environment. During the review of PCNs for case-specific activities, district engineers can require compensatory mitigation to offset the permitted losses of waters of the United States, in accordance with general condition 23 (Mitigation).

This NWP is reissued as proposed.

NWP 52. Water-Based Renewable Energy Generation Pilot Projects. The Corps proposed to modify Note 3 and to add a Note (designated as Note 6) in this NWP. Language was added to each Note to clarify the intent of each Note. Note 3 was modified to identify information that should be provided to NOS and to provide contact information for NOS. New Note 6 identifies information that should be provided to USCG and to provide contact information for USCG. The Corps provides a summary of the comments received on revised Note 3 and new Note 6 and responses to comments in Section II.D of this final action.

One commenter supported NWP 52 and the proposed changes. One commenter objected to the reissuance of this NWP and stated that all covered activities should require an individual permit. Many commenters stated that the Corps should maintain the current 1/2-acre impact limit on this NWP. Many commenters stated that the 1/2-acre impact limit should only apply to permanent impacts to waters. Many commenters stated that the number of units allowed by this NWP should be reduced from 10 to 3. One commenter stated that authorizing these activities in streams, wetlands or other critical areas would result in more than minimal adverse environmental impact. Several commenters expressed concern with shading or light reduction caused by solar panels. Many commenters stated that activities authorized by this NWP impact treaty rights and tribal treaty fishing rights.

The terms and conditions of this NWP, including the 1/2-acre limit, and the ten-unit limit will ensure that this NWP authorizes only those activities with minimal adverse effects on the aquatic environment. All activities

authorized by this NWP require a PCN, which provides district engineers an opportunity to review each proposed activity and determine whether the adverse effects on the aquatic environment will be minimal. District engineers may add activity-specific conditions to the NWP authorization which require actions to mitigate adverse environmental effects. The Corps is retaining the 1/2-acre limit and the requirement that all authorized activities require PCNs. The "loss of waters of the United States" refers to permanent adverse effects to waters of the United States as a result of filling, flooding, excavation, or drainage because of the activities subject to Corps' authority, and does not include temporary impacts.

This NWP is also subject to general condition 22 (Designated Critical Resource Waters), which prohibits using this NWP to authorize discharges of dredged or fill material into critical resource waters and wetlands adjacent to such waters. Critical resource waters include marine sanctuaries and marine monuments managed by the National Oceanic and Atmospheric Administration, and National Estuarine Research Reserves, and waters designated by the district engineer after notice and opportunity for comment. Division engineers may also impose regional conditions to restrict or prohibit the use of this NWP in specific categories of waters or in certain geographic areas. Division engineers will review the PCN and make a project-specific determination that the adverse effects on navigation, the aquatic environment, and other public interest review factors would be minimal, individually and cumulatively. During review of a PCN, district engineers may exercise discretionary authority and require an individual permit if the proposed activity will result in more than minimal adverse effects on the aquatic environment. Division engineers can add regional conditions to this NWP to help ensure compliance with general condition 17 (Tribal Rights).

Many commenters objected to the Corps relinquishing its authority to the FERC for activities proposed under this NWP. Note 4 states that hydrokinetic renewable energy generation projects that require authorization by the FERC under the Federal Power Act of 1920 do not require separate authorization from the Corps under Section 10 of the RHA. Note 4 is based on current law and must remain in the NWP. If the water-based renewable energy generation activity results in discharges of dredged or fill material into waters of the United States, then Section 404 authorization is

required for the proposed activity. In situations when FERC authorizes a structure in a navigable water of the United States, this NWP can authorize the discharge of dredged or fill material if the proposed activity complies with the NWP terms and all general conditions.

One commenter stated that pilot projects should be temporary. Many commenters stated that permanent installation of hydrokinetic units should require an individual permit because they are based on new technologies.

This NWP does not authorize activities associated with permanent installation of water-based renewable energy generation pilot projects. The construction of permanent water-based renewable energy generation facilities would require separate authorization under a regional general permit or individual permit.

This NWP is reissued as proposed.

NWP 53. Removal of Low-Head Dams. The Corps did not propose any changes to this NWP. One commenter supported reissuance of this NWP. A few commenters suggested that this NWP be expanded to authorize the removal of other dams using criteria based on size or storage volume.

This NWP, defines "low-head dam" as a "dam or weir built across a stream to pass flows from upstream over all, or nearly all, of the width of the dam crest and does not have a separate spillway or spillway gates, but it may have an uncontrolled spillway." The definition further states that low-head dams in all cases, provide little or no storage function. The Corps declines to modify this NWP to expand the activities covered by this NWP based on a dam height or storage capacity, as those criteria could result in a greater range of potential impacts to aquatic resources. The definition of "low head dam" in this NWP limits the use of this NWP to dams that have the key features presented in the definition. The definition of "low head dam," in addition to the PCN requirement, ensures that activities authorized by this NWP cause no more than minimal adverse environmental effects.

If the proposed dam removal activity does not qualify for authorization under this NWP or NWP 27, then an individual permit will be required unless the Corps district has issued a regional general permit that could be used to authorize the proposed activity. District engineers can also issue regional general permits to authorize the removal of other types of dams, such as run-of-the-river dams. The removal of fords or in-stream grade-control structures might also be authorized by NWP 27 as a long

as the activity results in a net increase in aquatic ecosystem functions and services and complies with the other terms and conditions of the NWP.

One commenter recommended revising this NWP to allow placement of demolition debris from the low head dam below the ordinary high water mark within 200 linear feet of the structure. One commenter recommended that the Corps create a single permit to authorize dam removal, restoration, and bank stabilization activities.

This NWP requires that the material of the removed low-head dam structure be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. The terms and conditions of the NWP ensure that the authorized activities cause no more than minimal adverse effects to the environment. We decline to modify this NWP to expand the list of activities authorized by this NWP. Bank stabilization activities may be authorized by NWP 13 (Bank Stabilization), restoration of the stream in the vicinity of the dam may be authorized by NWP 27 (Aquatic Ecosystem Restoration, Enhancement, and Establishment) or other DA permits, such as a regional general permit. Activities authorized by one or more NWPs must comply with all general conditions, including general permit 28 (Use of Multiple Nationwide Permits). The district engineer will review the PCN and determine if the proposed activity can be authorized by one or more NWPs. If a prospective permittee cannot comply with the terms of the NWP and the general conditions, the district engineer may advise the project proponent to apply for a regional general permit or individual permit.

This NWP is reissued as proposed.

NWP 54. Living Shorelines. The Corps proposed to modify the first paragraph of this NWP to state that a portion of a living shoreline can consist of an unvegetated cobble or sand beach, which can be considered a pocket beach.

Many commenters supported reissuance of this NWP, noting that it streamlined the permitting process for bank stabilization projects which provide ecological enhancement. One commenter supported the retention of the PCN requirement and the language in the NWP. One commenter objected to the reissuance of this NWP and stated that all covered activities should require an individual permit. One commenter stated that these activities could result in more than minimal adverse environmental impacts. One commenter

stated that the applicant must demonstrate that the proposed activity will not impact waters of the United States.

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 associated with the construction and maintenance of living shorelines. The permittee must comply with the terms and general conditions of this NWP, including general conditions which require avoidance and minimization of effects to spawning areas. A PCN is required for all NWP 54 activities. The district engineer will review the PCN and, if the proposed activity will result in more than minimal individual and cumulative adverse environmental effects after considering mitigation proposed by the applicant, the district engineer will exercise discretionary authority and require an individual permit.

One commenter expressed concern that permittees will not be required to avoid or minimize impacts to waters of the United States. One commenter stated that the applicant should demonstrate why the proposed activity is necessary. One commenter stated that the applicant must provide assurances that the structure will not become a hazard. One commenter stated that the NWP should prohibit the introduction of non-native or invasive species.

Paragraph (a) of general condition 23 (Mitigation) and paragraphs (e) and (f) of this NWP require structures and fills in jurisdictional waters and wetlands, including navigable waters, to be minimized to the maximum extent practicable on the project site. It is up to the landowner to decide how he or she wants to protect his or her property from erosion. This NWP authorizes the construction or maintenance of living shorelines in order to offer landowners an alternative general permit authorization to the various types of bank stabilization activities authorized by NWP 13 (Bank Stabilization). Paragraph (h) of this NWP requires that the permittee maintain the living shoreline, including making repairs after discrete events. Paragraph (d) of this NWP requires that the permittee use native plants.

One commenter stated that the activities authorized by this NWP should not be used as compensatory mitigation. One commenter stated that the permittee should be required to comply with water quality standards.

When the prospective permittee submits a PCN and compensatory mitigation is required by general condition 23 (Mitigation), the district

engineer will review the proposed compensatory mitigation and determine if it is sufficient to offset the adverse environmental effects of a regulated activity. Consistent with general condition 25 (water quality) the permittee must comply with any conditions of a granted water quality certification for any activity that may result in a discharge from a point source into waters of the United States.

One commenter suggested that this NWP be modified to limit the use of cobble and gravel fill materials by adding "where appropriate and consistent with the characteristics of the natural shoreline." Many commenters stated that the NWP should avoid improper use of larger rocks in living shorelines. A few commenters suggested modifying this NWP to authorize small-scale beach nourishment.

The terms of this NWP, in combination with the general conditions, appropriately limit the types of structures or fill materials that are authorized by this NWP. Cobble, sand, and rock sills may all be part of a living shoreline as long as the footprint is made up of mostly native material and incorporates vegetation or other living, natural "soft" elements, and the activity meets the other requirements of this NWP. We have not included beach nourishment in this NWP because these projects do not have a living component such as fringe wetland vegetation, or oysters or mussels, and are not considered living shorelines. When using the term "beach nourishment," we are referring to larger scale beach fill projects, which usually occur on open coasts. There may be a portion of the living shoreline that consists of unvegetated sandy substrate (e.g., a micro-beach or pocket-beach within or next to the fringe wetland). In addition, we recognize that some movement of sand fill may be necessary to maintain the living shoreline. The district engineer will review the required PCN to determine if a specific activity may be authorized by this NWP, another NWP, a regional general permit, or if the activity will require an individual permit.

One commenter suggested modifying this NWP to allow fills and structures to be placed more than 30 feet from the mean low water line or the ordinary high water mark or to allow activities more than 500 feet in length without a waiver from the district engineer. One commenter objected to allowing the district engineer the discretion to waive the 30-foot or 500-foot limits.

The Corps is retaining the 30-foot and 500 linear foot limits and retaining the district engineer's discretion to waive

these limits on a case-by-case basis, after reviewing the PCN and coordinating that PCN with the resource agencies. For a waiver to occur, the district engineer must issue a written determination with a finding that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects.

A few commenters stated that use of this NWP should be limited in the State of Washington. One commenter stated that this NWP has the potential to result in impacts to tribal treaty natural resources and fishing activities.

Division engineers may also impose regional conditions to restrict or prohibit the use of this NWP in specific categories of waters or in certain geographic areas. Division engineers can add regional conditions to this NWP to help ensure compliance with general condition 17 (Tribal Rights). District engineers may also include project-specific conditions with any NWP verification to ensure the activity results in no more than minimal adverse environmental effects.

One commenter suggested that language allowing temporary structures during construction, similar to language found in NWP 13 (Bank Stabilization), be added to NWP 54. We agree with the suggested change and have added language after paragraph (h) of this NWP to authorize temporary structures, fills, and work, including the use of temporary mats, necessary to construct the living shoreline.

This NWP is reissued with the modifications discussed above.

NWP 55. Seaweed Mariculture Activities. The Corps proposed to modify Note 1 and to add a Note (designated as Note 4) in this NWP. Language was added to each Note to clarify the intent of each Note. Note 1 was modified to identify information that should be provided to USCG and to provide contact information for USCG. New Note 4 identifies information that should be provided to NOS and provides contact information for NOS. The Corps provides a summary of the comments received on revised Note 1 and new Note 4 and responses to comments in Section II.D of this final action.

Many commenters urged the Corps to revoke NWP 55 due to concerns that the activities covered could cause more than minimal impacts. A few commenters suggested prohibiting the use of this NWP and requiring an individual permit. One commenter stated that the use of this NWP should be prohibited in areas important to tribes.

The work and structures in navigable waters of the United States authorized by this NWP are associated with seaweed mariculture, which is expected to have a relatively small, if not beneficial, impact on marine ecosystems. This NWP includes terms and conditions, including the requirement to submit a PCN for all proposed NWP 55 activities, to ensure the NWP authorizes only those regulated activities associated with seaweed mariculture that result in no more than minimal individual and cumulative adverse environmental effects. In response to a PCN, district engineers will apply the criteria listed in paragraph 2 of Section D, District Engineer's Decision to determine whether the proposed activity can be authorized by NWP 55, with or without additional permit conditions, or exercise their discretionary authority to require an individual permit. Division engineers may modify, suspend, or revoke this NWP on a regional basis in accordance with the procedures at 33 CFR 330.5(c).

Division engineers may impose regional conditions to require PCNs or revoke this NWP for proposed activities that might affect treaty rights, submerged aquatic vegetation, or other concerns. Regional conditions can help ensure compliance with general condition 17, (Tribal rights) so that no NWP 55 activity will cause more than minimal adverse effects on reserved tribal rights (including treaty rights), protected tribal resources, or tribal lands.

This NWP is reissued as proposed.

NWP 56. Finfish Mariculture Activities. The Corps proposed to not reissue this NWP. Under this final action, NWP 56 will expire on March 14, 2026. Section I.D. of this action (and 33 CFR 330.6(b)) provides information about the time within which permittees must complete activities authorized by this NWP. After this expiration date, project proponents who want to construct structures in navigable waters of the United States for finfish mariculture activities will need to obtain individual permits (*i.e.*, standard individual permits or letters of permission) for those activities unless the Corps district has issued a regional general permit or a programmatic general permit to authorize regulated structures associated with finfish mariculture. Many commenters supported the Corps' decision not to reissue this NWP. This NWP is not reissued.

NWP 57. Electric Utility Line and Telecommunications Activities. The Corps proposed to modify Note 1 and to

add a Note (designated as Note 8) in this NWP. Language was added to each Note to clarify the intent of each Note. Note 1 was modified to identify information that should be provided to NOS and to provide contact information for NOS. New Note 8 identifies information that should be provided to USCG and to provide contact information for USCG. The Corps provides a summary of the comments received on revised Note 1 and new Note 8 and responses to comments in Section II.D of this final action.

Many commenters support the reissuance of this NWP as proposed. One commenter stated that NWP 57 will have no more than minimal adverse effects on the environment. One commenter recognizes that impacts that are not discharges of dredged or fill material are outside of the Corps' regulatory authority under Section 404 of CWA. One commenter opposes the reissuance of NWP 57, stating that it will result in more than minimal impacts. Several commenters stated that a PCN should be required when a project includes mechanized land clearing. One commenter stated that activities authorized by NWP 57 should be required to avoid marine aquatic vegetation areas.

The 1/2-acre impact limit, PCN requirements and other requirements of this NWP, and general conditions, are sufficient to ensure that the activities authorized by this NWP cause no more than minimal adverse environmental effects. Utility line installations must not cause changes to pre-construction contours in waters of the United States. Changes to pre-construction contours constitute a loss of waters of the United States. A PCN is required for the loss of greater than 1/10-acre of waters of the United States. If a PCN is required, district engineers can add conditions to the NWP authorization, including mitigation requirements, to ensure that the authorized activity will cause no more than minimal adverse environmental effects.

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. General condition 23 requires compensatory mitigation for all wetland losses greater than 1/10-acre and for all stream losses greater than 3/100-acre for all activities authorized under this NWP, unless the district engineer determines that some other form of mitigation would be more environmentally appropriate. The district engineer may, consistent with paragraph (i) of general condition 23, require compensatory mitigation for

conversions of wetlands in utility rights-of-way to offset adverse environmental effects of such conversions.

If after reviewing a PCN, the district engineer determines the proposed activity will result in more than minimal adverse environmental effects, after considering the mitigation proposal provided by the prospective permittee, he or she will exercise his or her discretionary authority and require an individual permit. Division engineers may also add regional conditions to this NWP to change the PCN threshold or restrict activities in sensitive waters or locations. The Corps declines to add a PCN threshold for mechanized land clearing to this NWP.

One commenter suggested that the requirements for access roads be consistent between NWPs 57 and 14. One commenter recommended that the phrase "near as possible" be revised to "maximum extent practicable."

This NWP requires access roads to be constructed as near as possible to pre-construction contours and elevations. The additional avoidance and minimization required by the more restrictive "near as possible" is necessary and still allows flexibility to deviate from preconstruction contours. The Corps declines to modify this NWP to allow access roads in tidal waters or wetlands adjacent to tidal waters. Temporary access roads in tidal waters may be authorized by NWP 33 (Temporary Construction, Access, and Dewatering).

Many commenters oppose Note 2 in NWP 57, stating that reliance on the definition of "single and complete linear project" is unlawful. The practice for providing NWP authorization for single and complete linear projects, where each separate and distant crossing of waters of the United States may qualify for its own NWP authorization, is consistent with the Corps' NWP regulations at 33 CFR 330.2(i), which were published in the November 22, 1991, issue of the **Federal Register**. This NWP has been issued in compliance with Section 404(e) of the CWA (including the Section 404(b)(1) Guidelines). District engineers will review PCNs to determine whether proposed crossings of waters of the United States are to be considered together or as separate and distant on a case-by-case basis, after evaluating site and regional characteristics. If one crossing of waters of the United States associated with the construction of a linear transportation project requires an individual permit, then 33 CFR 330.6(d) applies, and the district engineer will determine which activities require individual permits and which activities

can be authorized by an NWP. Section 330.6(d) of the Corps' NWP regulations, as well as Note 2 of NWP 57, remain in effect. Section 330.6(d) and Note 2 maintain the Corps' long-standing process regarding the use of NWPs and individual permits to authorize linear projects.

One commenter requested that this NWP be expanded to provide authorization for battery storage projects. Battery storage projects, such as battery energy storage systems, may be authorized by this NWP, as well as by NWP 39 (Commercial and Institutional Developments) or NWP 51 (Land-Based Renewable Energy Generation Facilities) provided they comply with the terms and conditions of the NWP. There is overlap in activities authorized by certain NWPs.

This NWP is reissued as proposed.

NWP 58. Utility Line Activities for Water and Other Substances. The Corps proposed to modify Note 1 and to add a Note (designated as Note 7) in this NWP. Language was added to each Note to clarify the intent of each Note. Note 1 was modified to identify information that should be provided to NOS and to provide contact information for NOS. New Note 7 identifies information that should be provided to USCG and to provide contact information for USCG. The Corps provides a summary of the comments received on revised Note 1 and new Note 7 and responses to comments in Section II.D of this final action.

Many commenters expressed general support for NWP 58. Many oppose the reissuance of this NWP and stated that this NWP would authorize more than minimal adverse environmental impacts. A few commenters stated that a district engineer's decision that activities from the same pipeline have no more than minimal cumulative effects should be in writing and made publicly available. Many commenters assert that NWP 58 fails to comply with NEPA and is therefore unlawful.

This NWP has been issued in compliance with Section 404(e) of the CWA (including the Section 404(b)(1) Guidelines). The terms and conditions of this NWP are appropriate for limiting authorized activities associated with utility lines activities for water and other substances so that they have a no more than minimal individual and cumulative adverse effect on the aquatic environment. Certain activities require pre-construction notification to the district engineer. District engineers will review PCNs for proposed NWP 58 activities, and may add permit conditions, including mitigation requirements, to the NWP authorization

to help ensure that the authorized activities cause no more than minimal adverse environmental effects. District engineers can also exercise discretionary authority and require an individual permit if the proposed activity may result in more than minimal adverse environmental effects. Following the conclusion of the district engineer's review of a PCN, he or she prepares an official, publicly-available decision document. This document discusses the district engineer's findings as to whether a proposed NWP activity qualifies for NWP authorization, including compliance with all applicable terms and conditions, and activity-specific conditions needed to ensure that the activity being authorized by the NWP will have no more than minimal individual and cumulative adverse environmental effects. As explained in Section III.A. of this final action, the reissuance of the NWP complies with NEPA.

One commenter requested that this NWP be modified to specifically list CO₂ pipelines as example of a substance that could be transported by utility lines installed under this NWP. One commenter suggested creating a separate NWP for CO₂ pipelines with limits on the size of such projects.

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 construction, maintenance, repair, and removal of utility lines for water and other substances, excluding oil, natural gas, products derived from oil or natural gas, and electricity. Carbon dioxide is not derived from oil or natural gas but is emitted when oil or natural gas are burned. NWP 58 defines "utility lines" as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose that is not oil, natural gas, or petrochemicals. Carbon dioxide is transported as a liquid. The Corps agrees that this NWP may authorize regulated activities associated with the construction, maintenance, repair, or removal of pipelines for pipelines that convey carbon dioxide, hydrogen or methanated hydrogen, industrial products that are not petrochemicals, wastewater, brine, irrigation water, sewage or stormwater. The Corps declines to create a separate NWP specifically for carbon dioxide pipeline activities because regulated activities associated with carbon dioxide pipelines are authorized by this NWP.

Many commenters expressed concern over the use of this NWP to authorize activities associated with pipelines that transport carbon dioxide or hydrogen.

One commenter stated that the decision document of NWP 58 fails to include analysis of carbon dioxide pipelines and is therefore in violation of the CWA and NEPA. Many commenters stated that carbon dioxide pipelines should require an individual permit.

The Corps does not have jurisdiction over the construction or siting of any pipeline, the products transported by any pipeline, nor over inadvertent returns, leaks, or spills that may occur during the installation or operation of pipelines. The siting of pipelines falls under the authority of the FERC or state agencies. Pipeline safety, including carbon dioxide or hydrogen pipelines, falls under the authority of the Pipeline and Hazardous Materials Safety Administration. The Corps has authority over discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States.

As discussed in Section III. A. and B. of this final action, this NWP was issued in compliance with NEPA and the CWA. Through the national decision document, the Corps has determined that this NWP will cause no more than minimal adverse environmental effects. The division engineer can exercise discretionary authority and modify the NWP by imposing regional conditions, that will help ensure that the NWP authorizes only those activities with minimal individual and cumulative adverse effects on the aquatic environment. District engineers can exercise discretionary authority and require an individual permit if he or she determines the proposed activity will result in more than minimal adverse environmental effects.

One commenter recommended revising the last sentence of the seventh paragraph of this NWP to be consistent with Note 4 and similar text in NWP 12 (Oil or Natural Gas Pipelines). The Corps agrees with this suggestion and has added the word “may” after “discharge of dredged or fill material” to acknowledge that some structures over navigable waters of the United States will not require authorization under Section 10 of the RHA. Pipelines over navigable waters of the United States are bridges and may require a permit from the USCG.

Many commenters opposed Note 2 in NWP 58, stating that reliance on the definition of “single and complete linear project” is unlawful. One commenter stated that specific direction should be provided to the district engineer on the use of discretionary authority to ensure that the NWP is not used to approve large-scale projects.

The practice for providing NWP authorization for single and complete linear projects, where each separate and distant crossing of waters of the United States may qualify for its own NWP authorization, is consistent with the Corps’ NWP regulations at 33 CFR 330.2(i), which were published in the November 22, 1991, issue of the **Federal Register**. This NWP has been issued in compliance with Section 404(e) of the CWA (including the Section 404(b)(1) Guidelines). District engineers will review PCNs to determine whether proposed crossings of waters of the United States are to be considered together or as separate and distant on a case-by-case basis, after evaluating site and regional characteristics. If one crossing of waters of the United States associated with the construction of a linear transportation project requires an individual permit, then 33 CFR 330.6(d) applies, and the district engineer will determine which activities require individual permits and which activities can be authorized by an NWP. Section 330.6(d) of the Corps’ NWP regulations, as well as Note 2 of NWP 57, remain in effect. Section 330.6(d) and Note 2 maintain the Corps’ long-standing process regarding the use of NWPs and individual permits to authorize linear projects.

Several commenters recommended modifying the NWP to require a PCN for proposed mechanized land clearing. One commenter suggested that activities authorized by this NWP must avoid marine aquatic vegetation areas. One commenter stated that the Corps should exercise more oversight of projects authorized by this NWP rather than relying on information from the prospective permittee.

Mechanized land clearing in waters of the United States may result in a discharge of dredged material which requires DA authorization under Section 404 of the CWA. To be regulated under Section 404 of the CWA, a discharge of dredged material involves any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States that is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation (see 33 CFR 323.2(d)(1)(iii)). The ½-acre impact limit, PCN requirements and other requirements of this NWP, and general conditions, are sufficient to ensure that the activities authorized by this NWP cause no more than minimal adverse environmental effects.

Utility line installations must not cause changes to pre-construction contours in waters of the United States.

Changes to pre-construction contours constitute a loss of waters of the United States. A PCN is required for the loss of greater than ¼-acre of waters of the United States. If a PCN is required, district engineers can add conditions to the NWP authorization, including mitigation requirements, to ensure that the authorized activity will cause no more than minimal adverse environmental effects. 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. General condition 23 requires compensatory mitigation for all wetland losses greater than ¼-acre and for all stream losses greater than ¾-acre for all activities authorized under this NWP, unless the district engineer determines that some other form of mitigation would be more environmentally appropriate.

The district engineer may, consistent with paragraph (i) of general condition 23, require compensatory mitigation for conversions of wetlands in utility rights-of-way to offset adverse environmental effects of such conversions. If after reviewing a PCN, the district engineer determines the proposed activity will result in more than minimal adverse environmental effects, after considering the mitigation proposal provided by the prospective permittee, he or she will exercise his or her discretionary authority and require an individual permit. Division engineers may also add regional conditions to this NWP to change the PCN threshold or restrict activities in sensitive waters or locations. The Corps declines to add a PCN threshold for mechanized land clearing to this NWP.

The district engineer will rely on information provided by the prospective permittee and other reliable data and resources when making a decision whether the NWP-specific activity will result in no more than minimal adverse environmental effects. Permittees who receive an NWP verification letter, either as a result of a PCN submitted in compliance with a general condition or a PCN submitted voluntarily, must certify to the district engineer that the authorized activity has been completed in compliance with the NWP authorization in accordance with general condition 30 (Compliance Certification). If a permittee fails to comply with the terms and conditions of this NWP, the district engineer will evaluate the potential unauthorized activity in accordance with 33 CFR 326.

One commenter suggested that the requirements for access roads be consistent between NWPs 58 and 14.

One commenter recommended that the phrase “near as possible” be revised to “maximum extent practicable.”

This NWP requires access roads to be constructed as near as possible to pre-construction contours and elevations. The additional avoidance and minimization required by the more restrictive “near as possible” is necessary and still allows flexibility to deviate from preconstruction contours. The Corps declines to modify this NWP to allow access roads in tidal waters or wetlands adjacent to tidal waters. Temporary access roads in tidal waters may be authorized by NWP 33 (Temporary Construction, Access, and Dewatering).

This NWP is reissued with the modifications discussed above.

NWP 59. Water Reclamation and Reuse Facilities. The Corps did not propose any changes to this NWP. Several commenters expressed general support for NWP 59. A few commenters oppose the 1/2-acre limitation for NWP 59, citing that the acreage limitation severely limits the practical use of this NWP. One commenter requested clarification if reuse water pipelines such as those used for extractive industries (natural gas hydraulic fracturing) would fall under NWP 58 or NWP 59.

The 1/2-acre limit in NWP 59 is consistent with other NWPs and is necessary to ensure that regulated activities cause no more than minimal adverse environmental effects. This NWP authorizes discharges of dredged or fill material into waters of the United States to construct, expand, or maintain water reclamation and reuse facilities as attendant features of other activities authorized by NWP, such as NWP 29 (residential developments), NWP 39 (commercial and institutional developments), NWP 40 (agricultural activities), and NWP 42 (recreational facilities). There may be overlap with NWP 58 for some activities authorized by this NWP. There are a number of activities that may be authorized by more than one NWP, and such redundancy is not problematic because the statutory requirement for all NWPs and other general permits is the same: those general permits can only authorize activities that have no more than minimal individual and cumulative adverse environmental effects. If the district engineer, after review of the PCN, determines that an activity cannot be authorized by NWP 59, he or she will advise the applicant whether the activity qualifies for another NWP or regional general permit, or if an individual permit is required.

This NWP is reissued as proposed.

NWP A. Activities To Improve Passage of Fish and Other Aquatic Organisms. The Corps proposed this new NWP to authorize structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for activities that restore or enhance the passage of fish and other aquatic organisms through river and stream networks as well as other types of waters.

Many commenters expressed support for the addition of this NWP. Several commenters stated that this NWP authorizes activities that are similar in nature. One commenter supported the statements in the 2025 Proposal stating that prospective permittees have the flexibility to use engineered components or nature-based solutions. One commenter opposed this NWP. One commenter recommended that this NWP authorize replacement of low-head irrigation dams with permanent structures such as weirs and vanes as well as replacing culverts in favor of low water crossings. A few commenters recommended that this NWP authorize the removal of in-stream structures such as dams, weirs, fords or other grade control structures.

Many commenters recommended limiting the activities authorized by this NWP to those associated with nature-like fishways, culvert and low-head dam removal and related restoration, and fish screens, stating that all other activities should require an individual permit. One commenter stated that placement of gravel for enhancing spawning habitat should be authorized by this NWP. One commenter supported the prohibition to use this NWP to authorize dam removal. One commenter stated that bridges should be mentioned in every instance where culverts are mentioned. One commenter requested clarification that this NWP authorizes installation and modification of culverts that are incidental to the fish passage elements of a project.

This new NWP can be used to authorize discharges of dredged or fill material in waters of the United States and work and structures in navigable waters of the United States associated with the construction, maintenance, modification, removal, or expansion of structures, devices, or fills that increase the ability of fish and other aquatic organisms to pass through, or around, infrastructure and other built features. The structures, devices, or fills may be engineered and may include nature-based solutions. This NWP is written to authorize regulated activities associated with a variety of options for improving the passage of fish and other organisms

and is not limited to nature-like fishways, fish screens and culvert removal.

This new NWP does not authorize the removal of dams of any size. Regulated activities associated with the removal of low head dams may be authorized by NWP 53 (Removal of Low-Head Dams). Regulated activities associated with the removal of any other type of dam will require evaluation through the individual permit process. There are some diversion structures that are not dams and regulated activities associated with the removal of these structures, including weirs and vanes, may be covered by this new NWP, if such removal improves passage of fish and other organisms.

Regulated activities associated with the removal of existing in-stream structures, such as weirs, fords, and other grade control structures, are authorized by this NWP when they restore or enhance the ability of fish and other aquatic organisms to move through the aquatic ecosystem. This NWP also authorizes regulated activities associated with the removal or replacement of existing culverts along with other structures, including but not limited to culverted fishways, low-water crossings, or bridges. Unless otherwise exempt, discharges of dredged or fill material associated with the construction of bridges in waters of the United States, including navigable waters of the United States, require authorization under Section 404 of the CWA. Bridges that cross navigable waters of the United States require a separate authorization from the U.S. Coast Guard under Section 9 of the RHA.

We have modified the text of the NWP to change the examples of activities that may be authorized by this NWP to replace “culverts” with “structures.” This modification clarifies there is flexibility in the types of structures that may be replaced, or which may replace existing culverts in order to enhance the movement of fish or aquatic organisms.

This new NWP authorizes the construction, maintenance, modification, or expansion of culverts and other structures if they are associated with the improvement of passage of fish and other aquatic organisms. Such activities include, but are not limited to, replacement of culverts that are perched or undersized or the construction or installation of additional culverts near existing culverts (e.g. installing an additional culvert next to an existing single culvert in a stream channel to reduce water velocities through the existing culvert sufficient to allow fish to swim

upstream). We have added language to clarify that this NWP does not authorize the construction or installation of new culverts where there are not existing culverts. In other words, the construction or installation of new culverts where no culvert is present at the waterbody crossing or no culvert is in, or adjacent to, the waterbody crossing is not authorized by this NWP. In situations where there is no existing culverted crossing or if there is an existing in-stream grade control structure which lacks a culvert, this NWP does not authorize the discharge of dredged or fill material or construction or installation of a new culvert. Installation of new culverts where a culvert does not exist may be authorized by other NWPs, such as NWP 14 if the activity is associated with a linear transportation project, and such culverts may include measures to improve passage of fish and other organisms.

One commenter requested additional clarification on types of fish passages that may qualify for authorization under this NWP. Many commenters recommended additional examples of activities that could be authorized by this NWP, including the removal of culverts for the purpose of daylighting streams, the addition of behavioral guidance and deterrence features that leverage attraction or avoidance behavioral responses of fish; the creation of seasonal floodways; the installation of fish lifts, fish by-pass pipes, and/or fish screens on water supply intakes; and/or or the addition of gravel to spawning habitat. Several commenters requested that examples of activities authorized by this NWP that fall under the category of "other ecological process" be added.

We have modified the text of the proposed NWP to expand the list of examples of activities and types of structures or devices that may be authorized by this NWP. We have added text to clarify that fishways may be conventional/technical, to make clear that either term is appropriate for use to describe fishways that may be authorized by this NWP. We have modified the text to clarify that this NWP may be used to authorize modification of existing structures or fills, in addition to the construction, maintenance, expansion or removal of existing structures or fills to enhance passage of fish and other aquatic organisms. We have added some additional examples to the list in the NWP, namely devices to minimize entrainment and entrapment of fish and other aquatic organisms, such as fish screens; and fish lifts and fish by-pass

pipes. We have also added devices to guide fish and other aquatic organisms through passage features as an example of a structure that could be authorized by this NWP.

The list of examples in the NWP is not exhaustive. We agree that removing culverts, daylighting culverts, or creating seasonal floodways are activities that may be authorized by this NWP if they restore or enhance the passage of fish and other aquatic organisms and comply with the other terms of this NWP and the NWP general conditions. The enhancement of spawning habitat would not be authorized by this new NWP unless such activity restores or enhances the ability of fish and other aquatic organisms to move through the aquatic ecosystem. The placement of gravel for enhancing fish spawning habitat may be authorized by NWP 18 (Minor Discharges) or NWP 27 (Aquatic Ecosystem Restoration, Enhancement, and Establishment).

Many commenters expressed support of the one-acre impact limit in this NWP. Many commenters opposed the one-acre impact limit. One commenter suggested changing the impact limit of this NWP from one-acre of loss of waters to 1/5-acre of conversion of waters of the United States to uplands. One commenter recommended that all activities authorized by this NWP be considered temporary impacts.

The Corps is retaining the one acre loss of waters of the United States limit in this NWP. The "loss of waters of the United States" refers to permanent adverse effects to waters of the United States as a result of filling, flooding, excavation, or drainage because of the activities subject to Corps' authority, and does not include temporary impacts. For activities that are intended to improve the passage of fish and other aquatic organisms through river or stream networks or other components of the aquatic environment, permanent fills in rivers and streams or other aquatic habitats may occur through the placement of boulders, cobbles, large wood and other materials to construct a nature-like fishway or the construction of a conventional fishway, or the replacement of a culvert. The construction of bypass channels around dams or weirs could involve filling or excavating wetlands or river or stream channels. Activities that are planned, designed, and constructed to improve the ability of fish and other aquatic organisms to pass through or around barriers are unlikely to result in the conversion of aquatic habitats to dry land. However, the placement of rocks, wood, or other fill material into a stream

segment would result in a permanent discharge of fill material into to waters of the United States and would be considered a "loss of waters of the United States."

One commenter requested clarification if this NWP authorizes activities in wetlands adjacent to waters of the United States. One commenter requested that language be added to the new NWP to inform the prospective permittee that some activities may be exempt from requiring DA authorization under Section 404(f) of the CWA.

Activities in jurisdictional wetlands adjacent to other waters of the United States may be authorized by this NWP provided the regulated activity increases or enhances the passage of fish and other aquatic organisms. Discharges of dredged or fill material associated with maintenance activities are exempted from regulation under Section 404(f) of the CWA, unless they modify the character, scope, or size of the original fill design. The RHA contains no language which exempts work or structures in navigable waters of the United States from regulation. The Corps declines to add text to this NWP to inform the prospective permittee that some activities may be exempt from regulation under Section 404 of the CWA because the activities authorized by this NWP are likely to modify the character of the original structure or fill.

Many commenters expressed support for the 1/10th acre threshold limit for submittal of a PCN. Many commenters stated that a PCN should be required for all activities. One commenter recommended raising the PCN threshold to one-acre. One commenter expressed concern that certain activities, such as culvert replacement, modification of in-stream structures, and construction or expansion of fish bypass channels, could result in more than minimal damage to the aquatic ecosystem. Many commenters expressed concern that cumulative impacts would not be adequately evaluated under this NWP.

This new NWP requires a PCN for activities resulting in the loss of greater than 1/10-acre of waters of the United States. This PCN threshold is implemented so that, in combination with the other terms and NWP general conditions, this NWP will result in no more than minimal adverse environmental impact, both individually and cumulatively. Through the national decision document, the Corps has determined that this NWP will cause no more than minimal adverse environmental effects. The division engineer can exercise discretionary authority and modify the NWP by imposing regional conditions to

help ensure that the NWP authorizes only those activities with minimal individual and cumulative adverse effects on the aquatic environment. The district engineer will review the PCN and determine if compensatory mitigation or other special conditions are necessary to ensure that the NWP-specific activity will result in no more than minimal adverse environmental impact.

Several commenters recommended requiring activities to meet specified design criteria. Several commenters recommended that this NWP should require that any authorized activity will improve the movement of wood, water, and sediment, in addition to fish.

There are numerous techniques to design features that improve passage of fish and aquatic organisms. Some of those techniques were discussed in the resources that were referenced in the 2025 Proposal. Activities which enhance the passage of fish and other aquatic organisms will vary by site, by species, and by waterbody. The Corps declines to set specific design criteria to allow for flexibility in the type of activity that is selected by the project proponent and to avoid prohibiting the application of new and emerging technologies. District engineers can generally discuss potential options to improve passage of fish and aquatic resources with project proponents. District engineers do not design or approve the design used to improve passage of fish and aquatic resources for activities which require NWP authorization. It is the prospective applicant's responsibility to ensure that the project is designed by someone with appropriate expertise in the design of such features. The district engineer's review will be limited to whether the proposed project meets the terms and conditions of the NWP and the criteria in Section D. (District Engineer's Decision). This NWP authorizes regulated activities associated with activities that restore or enhance the ability of fish and other aquatic organisms to move through aquatic ecosystems. There may be other benefits to such actions, such as the movement of wood, water, and sediment, that also benefit the aquatic ecosystem although they are not the focus of the activities authorized by this NWP.

Several commenters stated that the terms of this NWP do not ensure that a proposed activity will improve fish passage. Several commenters stated that this NWP should require monitoring and an adaptive management framework to ensure the projects are meeting ecological goals. One commenter stated

that the NWP should require monitoring to demonstrate net ecosystem benefits.

This NWP only authorizes activities that improve or enhance the passage of fish and other organisms. Permittees must submit a PCN for activities that would cause greater than 1/10-acre of loss of waters of the United States. Permittees who receive a verification letter from the Corps are required to certify their compliance with the NWP in accordance with general condition 30 (Compliance Certification). If a permittee fails to comply with the terms and conditions of this NWP, the district engineer will address the potential unauthorized activity in accordance with 33 CFR 326. This new NWP does not require that the regulated activities result in net ecosystem benefits. Losses of waters may occur as a result of activities to improve the passage of fish and other organisms.

Several commenters expressed concern that the NWP would allow the movement of invasive or non-native species. One commenter suggested a regional or activity specific permit condition to prevent the spread of invasive species.

Enhancing the passage of native fish and aquatic organisms may also allow the movement of invasive species or non-native species. Project proponents should consider the benefits and detriments of enabling invasive species to access waterways where they do not currently exist. Fishways can be designed to reduce the ability of large-bodied predatory fish or non-native species to move through the fishway, such as designing the fishway to have shallow water depths that larger individuals cannot pass through (Tamario et al. 2018). Under the discretionary authority provision at 33 CFR 330.1(d) and other provisions of the NWP regulations at 33 CFR part 330, division and district engineers can further condition or restrict the applicability of an NWP for cases where they have concerns for the aquatic environment.

Many commenters stated that this NWP does not comply with the ESA, stating that consultation is required for beneficial effects to listed species. One commenter recommended that the Corps identify activities authorized by this NWP that may require consultation under Section 7 of ESA. One commenter stated that authorizing improvements to fish passage could impact salmonids.

All permittees must comply with general condition 18 (Endangered Species). If the regulated activity might affect, or is in the vicinity of a species listed (or proposed for listing) or designated critical habitat (or habitat

proposed for such designation) under the ESA, general condition 18 (Endangered Species) requires non-federal permittees to submit a PCN and states the permittee cannot begin work until the district engineer has provided notification that the proposed activity will have "no effect" on listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), or until ESA Section 7 consultation or conference has been completed. If a PCN is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with the ESA. The Corps acknowledges that consultation is required by Section 7 regardless of whether the effect is beneficial or detrimental (see paragraph (c) of general condition 18). Federal permittees must comply with their own implementing regulations for ESA.

If salmonids are listed under the ESA, the district engineer will review the PCN and determine if the NWP-specific activity will have "no effect" on the listed species or critical habitat or complete any appropriate consultation under Section 7 of the ESA. If essential fish habitat has been designated for the salmonid species, district engineers will complete consultation in accordance with the Magnuson-Stevens Fishery Conservation and Management Act at 50 CFR 600.920. Corps districts will conduct consultations in accordance with the EFH consultation regulations. District engineers may add conditions to NWP authorizations in order to ensure the effects of the activity on listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) are no more than minimal. Conditions may also be added to address EFH Conservation Recommendations made by NMFS during activity-specific EFH consultations.

Several commenters stated that the Corps should issue a public notice for each NWP-specific activity. One commenter stated that regional conditions should be added to the permit to address water quality concerns.

The public was provided an opportunity to comment on the Corps' proposal to issue, reissue, or modify an NWP when Corps Headquarters published its proposed rule in the **Federal Register** (90 FR 26100) to start the public comment period. However, after an NWP is issued, there is no public comment process for specific NWP activities. Consistent with general condition 25 (water quality) the

permittee must comply with any conditions of a granted water quality certification for any activity that may result in a discharge from a point source into waters of the United States. Division engineers may develop regional conditions for an NWP if he or she determines it necessary to ensure that activities in a region will cause no more than minimal adverse environmental effects to sensitive areas, which may include areas with water quality concerns.

One commenter stated that NWP should be modified to clarify that compensatory mitigation is not required for activities authorized by this NWP. One commenter stated that compensatory mitigation may be required for this NWP.

Compensatory mitigation may be required for losses of waters authorized by this NWP. General condition 23 (Mitigation) requires compensatory mitigation for all wetland losses greater than 1/10-acre and for all stream losses greater than 3/100-acre for all activities authorized under this NWP, unless the district engineer determines that some other form of mitigation would be more environmentally appropriate. The district engineer will consider the benefits of the NWP-specific activity in determining the need for compensatory mitigation to offset the impacts to waters which would result from the regulated activities authorized by this NWP. The district engineer will review the PCN and determine if the NWP-specific activity will, after considering permit conditions such as mitigation requirements, result in no more than minimal individual and cumulative adverse environmental effects.

The Corps is issuing this NWP with the modifications discussed above. Proposed new NWP A is issued as NWP 60.

G. Responses to Comments on the Nationwide Permits General Conditions

Many commenters supported the reissuance of the general conditions from the 2021 NWPs. Several commenters supported the reissuance of all general conditions without additional unnecessary and burdensome requirements. One commenter stated that there are too many general conditions and requested that the overall number of general conditions be reduced to streamline the NWPs. One commenter stated that additional best management practices or industry standards should be added to regional conditions instead of general conditions. One commenter requested that the general conditions be amended to recognize Tribal designations that

correspond to any referenced state or federal designations.

Many commenters stated that the Corps violated the Administrative Procedure Act and CWA by relying on the general conditions to make a determination that the NWPs would have no more than minimal adverse environmental effects. Many commenters stated that the general conditions are insufficient to ensure that adverse impacts to waters of the United States have been minimized and avoided.

The NWP program is an administrative mechanism that allows the Corps to authorize activities with only minimal adverse environmental impacts in a timely manner. The NWP program incentivizes project proponents to design their activities to avoid and minimize adverse impacts to jurisdictional waters and wetlands to qualify for the streamlined NWP authorization. The final permits issued today, including the general conditions, maintain a proper balance between efficiently authorizing activities with minimal individual and cumulative adverse environmental effects and protecting the aquatic environment. If a project proponent does not comply with the general conditions, then the activity is not authorized by an NWP. In such situations, it is an unauthorized activity, and the district engineer will determine the appropriate course of action. District engineers will use available tools and information, such as databases and websites managed by state and local governments and non-governmental organizations, and information made available by tribal governments that may be helpful in determining whether an activity complies with the general conditions to the NWPs and applicable environmental laws.

Discussion of Proposed Modifications to Nationwide Permit General Conditions

GC 1. Navigation. The Corps did not propose any changes to this general condition. One commenter recommended that lighted buoys be avoided and stated that smaller markings would be acceptable. One commenter stated that GC 1 should be modified to state that permittees must agree that they will be required to remove structures or work that impairs reserved treaty rights.

The requirements for safety lights and signals are prescribed by the U.S. Coast Guard through their regulations at 33 CFR part 67 and are not under the authority of the Corps. Consistent with GC 17 (Treaty Rights) no activity or its operation may impair reserved tribal rights, including, but not limited to,

reserved water rights and treaty fishing and hunting rights. If the district engineer determines that work or structure authorized by an NWP impairs reserved treaty rights, the district engineer will determine whether to modify, suspend, or revoke the NWP verification in accordance with 33 CFR 330.5(d).

The general condition is adopted as proposed.

GC 2. Aquatic Life Movements. The Corps did not propose any changes to this general condition. Many commenters stated that the wording of the general condition lacks enforceable or explanatory language. One commenter stated that applicants should be required to submit an engineered design where endangered species are likely to be found.

It is not practicable to avoid all impacts to indigenous aquatic species. Regulated activities are likely to cause some interference to life cycle movements during construction. The intent of this general condition is to ensure that the impacts are no more than minimal, unless the purpose is to impound water. The characteristics of aquatic habitat types and the life cycle movements of indigenous aquatic species vary across the nation therefore, it is not possible to add more specific requirements to this general condition. District engineers will determine compliance with this general condition, on a case-by-case basis, considering any regional conditions, specific characteristics of the indigenous aquatic species, and aquatic habitats in the project area. The district engineer will determine if a proposed activity would cause more than minimal adverse impacts to the environment considering all the general conditions and the criteria in Section D. District Engineer's Decision. Permittees must also comply with general condition 18 (Endangered Species). The district engineer may add conditions to an NWP verification to avoid and minimize impacts to listed species (species proposed for listing) or critical habitat (or habitat proposed for such designation). The Corps declines to require engineered designs for activities authorized by an NWP.

The general condition is adopted as proposed.

GC 3. Spawning Areas. The Corps did not propose any changes to this general condition. Many commenters recommended strengthening and clarifying the language in the general condition. Many commenters assert that the general condition is not adequate to protect spawning areas. One commenter stated that the general condition should be modified to prohibit activities in

spawning areas used for spawning by endangered species.

The district engineer will determine compliance with this general condition on a case-by-case basis, in light of the timing of the activity relative to the spawning season and the characteristics of the spawning areas. It is not practicable or feasible to avoid all impacts to spawning areas. The use of the terms such as “to the maximum extent practicable” affords the district engineer the discretion to consider the benefits and detriments of activities that may require DA authorization, such as restoration activities authorized by NWP 27 (Aquatic Ecosystem Restoration, Enhancement, and Establishment Activities) or emergency actions authorized by NWP 37 (Emergency Watershed Protection and Rehabilitation), while ensuring that the activity will have no more than minimal adverse environmental impacts. In accordance with the general conditions, including general conditions 17 (treaty rights) and 18 (endangered species) and any regional conditions, the district engineer will determine if a proposed activity would cause more than minimal adverse impacts to the environment in light of all general conditions and the criteria in Section D. District Engineer’s Decision.

The general condition is adopted as proposed.

GC 4. Migratory Bird Breeding Areas. The Corps did not propose any changes to this general condition. Many commenters recommend strengthening and clarifying the language in this general condition. Many commenters assert that this general condition is not adequate to protect breeding areas for migratory birds. One commenter stated that the general condition should be modified to prohibit activities in breeding areas during breeding season.

This general condition establishes a national requirement to avoid impacts to migratory bird breeding areas to the maximum extent practicable. It is not feasible or practicable to completely avoid impacts to migratory bird breeding areas. The use of the terms such as “to the maximum extent practicable” afford the district engineer the discretion to consider the benefits and detriments of activities that may require DA authorization, such as restoration activities authorized by NWP 27 (Aquatic Ecosystem Restoration, Enhancement, and Establishment Activities) or emergency actions authorized by NWP 37 (Emergency Watershed Protection and Rehabilitation), while ensuring that the activity will have no more than minimal adverse environmental impacts.

The general condition is adopted as proposed.

GC 5. Shellfish Beds. The Corps did not propose any changes to this general condition. One commenter stated that the general condition should be modified to clarify that habitat restoration in shellfish beds as allowed by the general condition is “oyster” habitat restoration and not general habitat restoration. One commenter recommended that language be added to the general condition to prohibit any activity in areas harvested by tribes with reserved treaty rights.

This general condition applies to oysters, clams, or other native shellfish in any waterbody that contains concentrated shellfish populations. Habitat restoration authorized by NWP 27 (Aquatic Ecosystem Restoration, Enhancement, and Establishment Activities) may result in improved habitat quality and increases in shellfish populations. Activities that do not comply with all general conditions, including regional conditions are not authorized by an NWP. In accordance with general condition 17 (treaty rights) no activity is authorized by an NWP if it impairs a reserved treaty right.

The general condition is adopted as proposed.

GC 6. Suitable Material. The Corps did not propose any changes to this general condition. Many commenters stated that the general condition has no ability to regulate chemicals released during spills, leaks, or frac-outs. One commenter stated that suitable material should be defined as construction materials free of all pollutants that could leach or be discharged into waters of the United States.

The Corps agrees that general condition 6 does not convey authority over spills or leaks of chemicals, or releases of drilling muds used in directional drilling activities because these activities do not constitute a discharge of dredged or fill material that require DA authorization. Leaks or spills of chemicals, or releases of drilling mud, are not authorized by any DA permit. Leaks or spills of chemicals, or releases of drilling muds used in directional drilling activities which occur during an activity that requires DA authorization may be subject to Section 401 of the CWA or Section 402 of the CWA which are administered by state agencies, tribes, or EPA. Consistent with general condition 25 (water quality) the permittee must comply with any conditions of a granted water quality certification for any activity that may result in a discharge from a point source into waters of the United States. The Corps also does not have authority

over leaks or spills of chemicals occurring during the operation of facilities constructed on fills or structures that required DA authorization. Such spills or leaks are more appropriately addressed through federal, state, or local laws that are administered by other federal agencies, or state or local government agencies.

No commenter provided specific standards or criteria to define environmentally suitable construction materials. In the absence of a specific standard or criteria to develop a definition, the general condition prohibits the use of materials that contain toxic pollutants in toxic amounts, such as heavy metals, pesticides, and polycyclic aromatic hydrocarbons, in accordance with Section 307 of the CWA. Pollutants that could affect water quality of waters of the United States are regulated by states, tribes, or EPA through Section 401 of the CWA, whereby certifying authorities determine if the proposed discharge complies with applicable water quality standards.

The general condition is adopted as proposed.

GC 7. Water Supply Intakes. The Corps did not propose any changes to this general condition. Many commenters questioned the effectiveness of this general condition, citing the lack of a definition of “proximity”, the perceived difficulty in accessing information on the location of water supply intakes, and the lack of a PCN requirement for some NWPs. These commenters requested that the general condition be modified to prohibit the use of NWPs in source waters protection areas or waters designated for use as drinking water supplies.

The term “proximity” should be applied using the commonly understood definition of the 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. We do not agree that all NWP activities should be prohibited in source water protection areas for public water systems. NWP activities can be conducted in those areas with little or no more than minimal adverse effects to water quality. In addition, all NWPs that authorize discharges into waters of the United States require 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 requirements.

For those NWP activities that require PCNs or when PCNs 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, the permittee is responsible for complying with all applicable terms and conditions of the NWP, including general condition 7. 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. Under the discretionary authority provision at 33 CFR 330.1(d) and other provisions of the NWP regulations at 33 CFR part 330, division and district engineers can further condition or restrict the applicability of an NWP for cases where they have concerns regarding impacts to water supply intakes.

The general condition is adopted as proposed.

GC 8. Adverse Effects From Impoundments. The Corps did not propose any changes to this general condition. Many commenters stated that this condition does not limit adverse impacts to a minimal level because of the inclusion of the phrase “to the maximum extent practicable.”

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 the term “maximum extent practicable” is dependent on case-specific circumstances and site conditions.

The general condition is adopted as proposed.

GC 9. Management of Water Flows. The Corps proposed to add “tidal flows” to the text of this general condition to clarify that expected high flows, and normal or high flows, include the flow of water caused by tides. One commenter stated that the general condition should be issued as proposed with no additional changes. Many commenters stated that the general condition does not limit adverse impacts to a minimal level because of the inclusion of the term “to the maximum extent practicable.” One commenter stated that no alteration of the course, current, or cross section of a waterbody should be allowed without engineered drawings, that have been

approved by the district engineer or other another qualified engineer. One commenter stated that normal and high flows must be quantified.

District engineers will use their discretion in determining whether a case-specific-activity authorized by NWP meets the requirements of this general condition. The application of the term “maximum extent practicable” is dependent on case-specific circumstances and site conditions. General condition 32 requires that a complete PCN include sketches that are sufficiently detailed to help the district engineer understand the proposed activity. The district engineer reviews the PCN based on the criteria in Section F. District Engineer’s Decision to determine whether a case-specific activity would have no more than minimal adverse effects on the environment. The district engineer’s review makes no determination whether the case-specific activity meets current engineering standards and assumes that the permittee will comply with other relevant laws, authorizations and requirements. The Corps does not agree that engineered drawings should be required to show compliance with this general condition. It would be impracticable to define normal and high flows since it would depend on the environmental setting of the NWP activity.

The general condition is adopted as proposed.

GC 10. Fills Within 100-Year Floodplains. The Corps did not propose any changes to this general condition. Many commenters stated that floodplains provide important functions and services. Many commenters stated that compliance with FEMA-approved floodplain management requirements is insufficient to ensure no more than minimal adverse environmental effects. Many commenters stated that the Corps cannot rely on compliance with the general condition to ensure that authorized activities will not cause more than minimal effects on flood storage and conveyance. Many commenters stated that the general condition should prohibit the use of NWPs in floodplains. One commenter stated that the general condition should restrict the use of NWPs to authorize above-grade construction in the 100-year floodplain.

The Corps agrees that floodplains provide important ecological functions and services. The NWP program supports the objectives of E.O. 11988 (Floodplain Management) 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 Corps does not have the authority to regulate activities in the 100-year floodplain except for discharges of dredged or fill material into waters of the United States that may be located in those floodplains. Many areas within 100-year floodplains are not subject to CWA jurisdiction, because a large proportion of the area within 100-year floodplains consists of uplands.

The primary responsibility for land use matters, including development in 100-year floodplains, lies with state, local, and tribal governments (see 33 CFR 320.4(j)(2)). For those NWP activities that do not require PCNs and are not voluntarily reported to Corps districts, the permittee is responsible for complying with all applicable terms and conditions of the NWP, including general condition 10. 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. Under the discretionary authority provision at 33 CFR 330.1(d) and other provisions of the NWP regulations at 33 CFR part 330, division and district engineers can further condition or restrict the applicability of an NWP for cases where they have concerns for the aquatic environment.

One commenter stated that the general condition should require engineered drawings approved by the district engineer or other qualified engineer to prove that the activity would have no adverse impacts to 100-year floodplains. One commenter stated that the Corps may not be able to rely on floodplain management requirements to ensure public safety.

General condition 32 requires that a complete PCN include sketches that are sufficiently detailed to help the district engineer understand the proposed activity. The district engineer reviews the PCN based on the criteria in Section D (District Engineer’s Decision) to determine whether a case-specific activity would have no more than minimal adverse effects on the environment. The district engineer’s review makes no determination whether the case-specific activity meets current engineering standards and presumes that the permittee will comply with other relevant laws, authorizations and requirements. The Corps does not agree that engineered drawings should be required to show compliance with this general condition. The district engineer reviews a PCN based on the criteria in

Section D (District Engineer's Decision) to determine whether a case-specific activity would have no more than minimal adverse effects on the environment. The district engineer's review makes no determination whether the case-specific activity meets current engineering standards and assumes that the permittee will comply with other relevant laws, authorizations and requirements. General condition 10 requires the permittee comply with applicable FEMA-approved state or local floodplain management requirements. This general condition is consistent with item 2 of Section E, Further Information, which states that the NWP's do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.

State and local governments are the entities that have primary responsibility for regulating land uses within floodplains and other areas. Concerns about adverse effects to public safety with respect to floodplains and floodways are more appropriately addressed by the state and local agencies that have the primary responsibility for floodplain management.

The general condition is adopted as proposed.

GC 11. Equipment. The Corps proposed to modify this general condition by adding two new sentences to specify that areas affected by the use of mats must be restored. Several commenters support the proposed changes. A few commenters oppose the proposed changes to the general condition. A few commenters stated that the language "significant soil compaction" is ambiguous. One commenter stated that the language should only require restorative measures to prevent substantial impairment of hydrologic and soil functions. One commenter recommended that the text of the general condition allow the restoration requirements to be waived if the district engineer determines that the area would recover naturally. One commenter stated that this issue would be better addressed through regional conditions.

The purpose of the modification to the general condition is to require that the permittee restore any areas affected by mats to pre-construction elevations and, if appropriate, to revegetate the affected area. The modified condition also encourages the permittee to implement techniques to reverse the adverse effects of soil compaction that may occur as a result of the use of mats. Compacted soils may result in depressional areas that hold surface

water and inhibit the recovery of hydrologic and soil functions, as well as the reestablishment of the plant community.

The general condition is adopted as proposed.

GC 12. Soil Erosion and Sediment Controls. The Corps did not propose any changes to this general condition. Many commenters stated that the general condition allows permittees to determine how to apply the general condition. One commenter recommends clarifying that work should not occur during low tides when and where migratory waterbirds are utilizing tidal flats. One commenter recommended requiring that erosion and sediment controls be designed to federal or state design criteria and approved by state or federal personnel. One commenter recommended that the general condition require a time limit for permanent and temporary stabilization activities. Many commenters assert that the phrase "at the earliest practicable date" allows exposed soils to erode until it is practicable to stabilize them. One commenter recommended defining low flow conditions.

In order for an activity to be authorized by an NWP, permittees are required to comply with all general conditions to the NWP's. 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 appropriate stabilization measures may be dictated by state or local sediment and erosion control regulations. Specific soil erosion and sediment control requirements vary among state and local governments and other entities. Appropriate stabilization measures will vary by site location and activity type.

The Corps agrees that exposed soils are likely to erode until they are permanently stabilized. The purpose of soil erosion and sediment controls that are required to be used and maintained during construction is to limit and contain sediment in the construction area until the area can be permanently stabilized. It would not be practicable to require a time limit for permanent and temporary stabilization activities because many of these requirements may be included in state and local sediment and erosion requirements. In addition, the timeframe for installing

temporary and permanent stabilization measures will vary on a case-by-case basis and may depend on weather conditions. The last sentence of this general condition 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. We decline to define what constitutes a low-flow condition at a national level. District engineers will use their discretion to determine what constitutes a low-flow condition depending on the site-specific conditions.

The general condition is adopted as proposed.

GC 13. Removal of Temporary Structures and Fills. The Corps did not propose any changes to this general condition. One commenter recommended modifying the general condition to require the removal of all temporary structures in their entirety rather than "to the maximum extent practicable." There are circumstances when it might not be feasible to completely remove the structure after its use has been discontinued or circumstances where attempting to remove a temporary structure in its entirety has the potential to cause more substantial adverse environmental effects than leaving a portion of the structure in place. For example, it might not be feasible to remove an entire piling from navigable waters after it is no longer needed, but the project proponent could remove that portion of the piling that extends above the bottom of the waterbody so that it no longer is an obstruction to navigation.

The general condition is adopted as proposed.

GC 14. Proper Maintenance. The Corps did not propose any changes to this general condition. One commenter recommended revising the language of the general condition to prohibit the use of an NWP for emergency purposes when a structure or fill has not been maintained or inspected. Maintenance of structures or fills is a requirement of this general condition. If a project proponent does not comply with the terms and conditions of an NWP, then the case-specific activity is not authorized by the NWP. This general condition establishes no requirement for monitoring or inspection of an authorized structure or fill. If a project proponent conducts activities in waters of the United States without DA authorization, the district engineer will address the potential unauthorized activity in accordance with 33 CFR 326. Emergency projects that are not covered by NWP's or regional general permits may be addressed under the Corps'

emergency permitting procedures at 33 CFR 325.2(e)(4).

The general condition is adopted as proposed.

GC 15. Single and Complete Project. The Corps did not propose any changes to this general condition. The Corps did not receive any comments on this general condition. The general condition is adopted as proposed.

GC 16. Wild and Scenic Rivers. The Corps did not propose any changes to this general condition. One commenter recommended revising this general condition to allow federal permittees to satisfy the requirements of the general condition and provide documentation of such compliance, if a PCN is required by the NWP or another general condition. One commenter recommended that the general condition clarify how a non-federal permittee can comply with this general condition when a federal agency other than the Corps is leading the environmental review.

The language in this general condition is 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. 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. Until the federal agency with direct management responsibility for that river issues its written determination to the district engineer, the project proponent cannot proceed under the NWP authorization.

The general condition is adopted as proposed.

GC 17. Tribal Rights. The Corps did not propose any changes to this general condition. Many commenters recommended that this general condition require PCNs for all NWPs within areas of concern to tribes. Many commenters stated that tribes should be notified and provided opportunities to comment on activities which would impact tribal trust lands or natural and cultural resources important to tribes. One commenter stated that the Corps should require concurrence from potentially affected Tribes. One commenter stated that tribes should determine if general condition 17 is applicable to an activity, instead of the Corps. Once commenter recommended revising the general condition to clarify that it applies to both on- and off-reservation reserved rights. One commenter stated that the text of the general condition diminishes the protections of tribal rights.

The text of this general condition serves as a guide to users when undertaking tribal consultations regarding the application of an NWP to a particular activity, and when developing protocols regarding tribal notification that build upon the existing Department of Defense, Army, and Corps' tribal consultation policies. The CWA Section 404(e) requirement that no activity authorized by an NWP may cause more than minimal adverse effects remains applicable in the context of potential effects to tribal rights, resources, or lands. Division engineers may modify, suspend, or revoke this NWP on a regional basis in accordance with the procedures at 33 CFR 330.5(c). Division engineers may impose regional conditions to require PCNs for proposed activities that might affect treaty rights. The Corps follows Executive Order 13175 and existing Department of Defense, Army, and Corps' tribal consultation policies to meaningfully consult with tribes and consider the concerns of tribes, but not necessarily receive the agreement of tribes, before making permit decisions. District engineers can coordinate with tribes to help make these decisions, including whether a proposed NWP activity complies with general condition 17. District engineers have the final decision-making authority as to whether a proposed NWP activity that requires DA authorization qualifies for NWP authorization. This general condition applies to activities authorized by NWPs both on- and off-reservation reserved tribal rights.

The general condition is adopted as proposed.

GC 18. Endangered Species. The Corps proposed to modify the last sentence of the first paragraph of this general condition by removing language referring to 50 CFR 402.17. In a final rule published in the **Federal Register** on April 5, 2024 (89 FR 24268), the U.S. Fish and Wildlife Service and National Marine Fisheries Service removed Section 402.17 from their Endangered Species Act (ESA) Section 7 interagency consultation regulations at 50 CFR part 402.

A few commenters objected to the proposed changes. A few commenters supported the proposed changes. A few commenters requested that the Corps consider additional changes in future rulemakings to improve the efficient processing of permits.

Under 33 CFR 330.5(b), anyone may, at any time, suggest that Corps Headquarters consider new NWPs or conditions for issuance, or changes to existing NWPs. Corps Headquarters has the authority to periodically review the

NWPs and their conditions and initiate the process for proposing to modify, reissue, or revoke the NWPs (see 33 CFR 330.5(b) and 330.6(b)). The Corps will continue to exercise this authority to evaluate opportunities for more efficient processing of permits and likewise will evaluate future suggestions as part of subsequent rulemakings, including suggestions for timely completion of consultation or conferences sufficient to comply with Section 7 of the ESA.

Many commenters stated that reliance on general condition 18 unlawfully delegates the Corps' ESA responsibilities to permittees. A few commenters stated that when project proponents who do not submit a PCN when required to do so by general condition 18, cause harm to listed species and violate the ESA. One commenter stated that the general condition places the responsibility for identification of the potential presence of listed species or critical habitat on the non-federal permittee.

The Corps complies with Section 7 of the ESA through 33 CFR 330.4(f) and NWP general condition 18. The regulation and general condition 18 require a non-federal permittee to submit a PCN for any activity that might affect listed species or designated critical habitat (or species proposed for listing or habitat proposed for designation). The Corps established the "might affect" threshold in 33 CFR 330.4(f)(2) and in paragraph (c) of general condition 18 because it is more stringent than the "may affect" threshold for Section 7 consultation in the Services regulations at 50 CFR part 402. The "might" threshold is below the threshold that triggers the requirement for ESA Section 7 consultation for the proposed federal action.

When a PCN is submitted, the Corps evaluates the PCN and makes an effect determination for the proposed NWP activity for the purposes of ESA Section 7. If the non-federal project proponent does not comply with 33 CFR 330.4(f)(2) and general condition 18, and does not submit the required PCN when a listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation, then the activity is not authorized by an NWP. In such situations, it is an unauthorized activity, and the Corps district will determine an appropriate course of action under its regulations at 33 CFR part 326 to respond to the unauthorized activity, if and when the Corps learns about that unauthorized

activity. In accordance with general condition 32, a non-federal project proponent is responsible for providing all the information required for a complete PCN, including the names of those endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed activity. The district engineer will verify that the appropriate documentation has been submitted.

A few commenters stated that general condition 18 should not include species proposed for listing or critical habitat proposed for such designation. One commenter recommended that the general condition be modified so that a PCN is only required when an activity may affect and is likely to adversely affect listed species or critical habitat.

Section 7(a)(4) of the ESA requires agencies to confer with the Services on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under Section 4 of the ESA or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. The NWP regulations at 33 CFR 330.4(f)(2) impose a PCN requirement for proposed NWP activities by non-federal permittees where listed species (or species proposed for listing) or critical habitat might be affected or are in the vicinity of the proposed NWP activity. Because the Corps is statutorily mandated to consider species and critical habitat proposed for listing, we decline to remove the proposed species and habitat from the PCN requirement.

Similarly, the Corps also declines to modify the general condition to require a PCN only when an activity may affect and is likely to adversely affect a listed species or critical habitat. This is because the Corps must make the “may affect” determination and cannot delegate that decision to a permit applicant. Similarly, a prospective permittee cannot determine if an activity that “may affect” listed species or critical habitat is “not likely to adversely affect” those resources. The Corps is the decision-maker in these circumstances. The Corps will seek any required concurrence from the FWS or NMFS.

Many commenters recommended that the general condition be modified to state that no PCN is required when programmatic consultation has been completed by the district engineer and regional conditions have been developed to mitigate impacts. Several commenters stated that the Corps

should complete ESA consultation within 45-days. Many commenters stated that project proponents should be allowed to proceed with their activity 45-days after submitting a PCN. One commenter stated that the Corps and FWS should publish standard avoidance and minimization measures and that project proponents who include these measures into their PCN should be allowed to proceed after 45-days unless the Corps has notified them that the PCN is incomplete.

Corps districts may complete regional programmatic consultation for specific species and develop local procedures to more efficiently complete Section 7 consultation. Similarly, division engineers may approve regional general conditions which incorporate measures to ensure that impacts to listed species (or species proposed for listing) and critical habitat (or critical habitat proposed for designation) are no more than minimal. However, even when a regional programmatic consultation or protective regional conditions apply, the PCN serves to ensure that the Corps can validate that the proposed activity will comply with ESA. This responsibility to validate compliance with ESA cannot be waived if the Corps does not act within a specific timeframe. However, the Corps’ review should be completed expeditiously if the Corps determines a regional programmatic consultation or protective regional conditions apply. The outcome of regional programmatic consultation may require that the district engineer modify the NWP for a case-specific activity by adding special conditions to the NWP (33 CFR 330.5).

If the district engineer is required to consult with the Services, the Services may take longer than 45 days to complete the consultation process. The Services’ regulations at 50 CFR 402.13 state that the Services’ will provide written concurrence or non-concurrence with a federal agency’s determination of “may effect, not likely to adversely affect” within 60-days, and will extend the 60-day timeframe upon mutual consent of the Service, the federal agency and the applicant. In accordance with 50 CFR 402.14, formal consultation concludes within 90 days and the Service should provide the biological opinion within 45-days of the conclusion of formal consultation, unless the timeframe is extended. The biological opinion itself does not authorize the project proponent to take species or adversely affect designated critical habitat.

To ensure compliance with ESA, the Corps cannot finalize the agency action to issue the NWP verification until the Section 7 consultation, or a conference

is completed for activities that “may affect” listed species (or species proposed for listing) and critical habitat (or critical habitat proposed for designation). Given compliance with the ESA cannot be waived, the prospective permittee cannot proceed with the regulated activity without receiving written verification. The requirement for this written verification is described in both general condition 18 paragraph (c) and paragraph (a)(2) of general condition 32. Proposals for programmatic consideration of common and widespread species listed under ESA should be directed to USFWS or NMFS.

One commenter stated that the general condition should be modified to mandate consultation under the ESA in sensitive areas. Many commenters requested that the general condition be modified to define “in the vicinity.” Many commenters recommended that the phrase “or is in the vicinity of the activity” be deleted from the general condition. One commenter stated that the general condition should be modified to state that permittees may rely on the USFWS Information Planning and Consultation (IPaC) tool to determine if a species is “in the vicinity” of a water crossing. One commenter stated that the general condition should include the entire text of the definition of the “effects of the action.” One commenter stated that consultation should include information about the distance that a project must be located from an endangered species in order to avoid jeopardizing that species.

No activity is authorized by an NWP which “may affect” listed species or designated critical habitat until ESA Section 7 consultation has been completed. The ESA requires a federal agency to consult with the Services when a regulated activity “may affect” a listed species (or species proposed for listing) or critical habitat (or critical habitat proposed for designation). This obligation to consult under Section 7 applies regardless of the location of the NWP-specific activity. In determining whether a case-specific activity “may affect” a listed species (or species proposed for listing) or critical habitat (or critical habitat proposed for designation), the district engineer will consider the “effects of the action” (50 CFR 402.02). The “effects of the action” may include consequences occurring outside the immediate area involved in the action.

The term “in the vicinity” for the purposes of paragraph (c) of this general condition cannot be defined at a national level. What constitutes “in the vicinity” can vary substantially by

species, environmental setting, the medium in which the species lives (*e.g.*, water, air, or in the ground), and other factors. The vicinity is also dependent on the NWP activity and the types of effects that might be caused by that NWP activity. The Corps also declines to remove the term “in the vicinity” from the general condition. The Services’ regulations at 50 CFR 402.02 include the definition of the “effects of the action.” In the interest of brevity and to limit any future need to change the language of the general condition should the Services decide to modify the definition, the Corps declines to include the definition in general condition 18.

When reviewing a PCN, the district engineer makes an independent determination of whether the proposed activity “may affect” listed species or designated critical habitat and thus requires ESA Section 7 consultation. The district engineer relies in part on information in the PCN, but he or she will also utilize other information, including local knowledge of the area, and the species and the habitats in which the listed species occurs. Information on listed species under the management of FWS is available to the public through the IPaC system,¹ an on-line project planning tool developed and maintained by the FWS. The FWS’s IPaC tool is just one tool that might provide useful information to prospective permittees about species that might be in the vicinity of proposed activity. Information on species under the management of NMFS may be found on their website.² There may be other tools, such as databases and websites managed by state and local governments and non-governmental organizations that may be helpful in determining whether a proposed NWP activity might affect listed species (or species proposed for listing) or critical habitat (or critical habitat proposed for designation), or if listed species (or species proposed for listing) or critical habitat (or critical habitat proposed for designation) are in the vicinity of a proposed activity.

Through ESA Section 7 consultation, with the FWS and/or the NMFS as appropriate, the district engineers will ensure that case-specific NWP activities will not jeopardize any threatened and endangered species or adversely modify designated critical habitat. District engineers may add conditions to an NWP that authorizes an activity to avoid, minimize, or offset the effects of the action.

One commenter requested clarification if the second sentence of paragraph (a) of general condition 18 should include the text “or species proposed for listing.” A few commenters stated that the level of information available on species proposed for listing causes uncertainty in the analysis of impacts. A few commenters expressed concern that projects may be delayed if a species is listed midway through a construction activity.

The second sentence of paragraph (a) refers specifically to the requirements to complete consultation under Section 7 of the ESA for listed species or critical habitat which an activity “may affect.” Federal agencies confer with the Services to ensure an activity will not jeopardize a species proposed for listing or adversely modify proposed critical habitat. The Corps has retained the text of paragraph (a) to specify that no activity is authorized by an NWP unless the Corps has complete ESA Section 7 consultation for proposed species and proposed critical habitat. The Corps must comply with Section 7 of the ESA. Permittees and district engineers will use best available data and resources to inform the determination of effects and any mitigation measures. Information on species proposed for listing may be found on the Services’ proposed species’ web pages. For species administered by the FWS, additional information can also be found in IPaC and in the species status reports in the FWS’s Environmental Online System. Prospective permittees are encouraged to use this publicly available information and/or contact the Services to obtain information on listed species (or species proposed for listing) or critical habitat (or critical habitat proposed for designation) in the vicinity of a proposed project.

If the Service lists a species or designates critical habitat, the Service may adopt the conference findings of a case-specific activity if no new significant information is developed for the species or critical habitat and if there are no significant changes to the activity (50 CFR 402.10). Re-initiation of consultation may be required under Section 7 of the ESA if an activity which requires DA authorization has not been completed. In such cases, the division engineer and/or district engineer will consider available information on the species and/or habit and the discretionary options described in 33 CFR 330.5.

One commenter stated that general condition 18 should only require federal agencies to submit a PCN if they have not completed Section 7 consultation

under the ESA. One commenter requested clarification if a federal permittee or federally-funded project is required to submit a PCN for an activity that requires consultation under Section 7 of ESA if no PCN is required by the terms and other conditions of the NWP. One commenter stated that the general condition should be revised to state that proponents of a linear project can proceed at crossings and areas outside Corps’ jurisdiction where the project proponent has determined that a PCN is not required. One commenter stated that the Corps should designate a non-federal representative conduct Section 7 consultation.

In accordance with general condition 18, federal agencies must follow their own procedures for complying with Section 7 of the ESA. Paragraph (b) of general condition 18 does not contain a requirement for federal agencies to submit a PCN. 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. If a federal agency is required to submit a PCN, consistent with general condition 32, a complete PCN will include documentation demonstrating the federal agency’s compliance with the Endangered Species Act. Corps districts will generally not consult under Section 7 on behalf of another federal agency unless the district engineer has determined that the federal agency has not provided appropriate documentation of compliance with Section 7 of the ESA or the district engineer has agreed to be the lead federal agency for compliance with Section 7 of the ESA (50 CFR 402.07).

The non-federal permittee is responsible for complying with paragraph (c) of general condition 18 and submitting a PCN to the district engineer when a proposed NWP activity triggers one of the PCN thresholds in that paragraph. Generally speaking, a non-federal permittee is a permittee that is not a federal agency. There may be limited circumstances where a non-federal agency might be considered as having ESA Section 7 obligations similar to those of a federal agency. For example, the Federal Highway Administration may assign a state Department of Transportation the responsibility for complying with non-NEPA environmental statutes such as the ESA. When a non-federal permittee is required to submit a PCN by general condition 18, the activity that requires DA authorization is not authorized by

¹ <https://ipac.ecosphere.fws.gov/>.

² <http://www.nmfs.noaa.gov/>.

an NWP until the Corps has provided notification that the proposed activity will have “no effect” on listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), or until ESA Section 7 consultation or conference has been completed. Prospective permittees, including proponents of linear projects must comply with general condition 18. District engineers have the discretion to designate a non-federal representative to conduct informal consultation or prepare a biological assessment in accordance with 50 CFR 402.08.

The general condition is adopted with the modifications discussed above.

GC 19. Migratory Birds and Bald and Golden Eagles. The Corps did not propose any changes to this general condition. One commenter stated that the general condition 19 should be revised to use the text from the 2017 NWPs. One commenter stated that the prospective permittee should be required to prove that they have contacted FWS and the specific measures that they will implement to reduce adverse impacts so those measures can be reviewed by the Corps.

General condition 19 was revised in the 2021 NWPs to clarify that the permittee, with the assistance of the FWS, is the entity responsible for determining what measures, if any, are necessary or appropriate to reduce adverse effects to migratory birds or eagles. This condition also clarifies that the permittee, with FWS assistance, is also responsible for determining what “take” permits, if any, might be required under the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act. Compliance with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act is the responsibility of the permittee.

The general condition is adopted as proposed.

GC 20. Historic Properties. The Corps did not propose any changes to this general condition. A few commenters stated that general condition 20 should require a PCN for most activities authorized by NWPs. A few commenters stated that the requirements of this general condition can result in extended review times and onerous paperwork. Several commenters requested clarification on the terms “might have the potential to cause” and “potentially eligible” stating that districts apply these requirements inconsistently when determining if a PCN is required.

The only activities that are immediately authorized by NWPs without the requirement for a PCN under general condition 20 are activities

with “no potential to cause effect” to historic properties. For compliance with Section 106 of the NHPA the Corps complies with the implementing regulations at Appendix C to 33 CFR part 325, 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. Paragraph (b) of general condition 20 requires non-federal permittees to submit a PCN to the district engineer if the NWP activity might have the potential to cause effects on 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 permittee must not begin the activity until notified by the district engineer either that the activity has no potential to cause effects on historic properties or that NHPA Section 106 consultation has been completed. The terms “might have the potential to cause effects” and “potentially eligible” are thresholds that are intended to provide the district engineer with an opportunity for further review to determine whether a historic property is present.

One commenter stated that the general condition should be modified to define the distance from a jurisdictional feature where a non-federal permittee should consider whether an activity might cause effects to a historic property, such as 300 feet. One commenter suggested changing “historic properties” to “historic resources.”

An area within which an NWP activity “might have the potential to cause effects” for the purposes of paragraph (c) of this general condition cannot be defined at a national level. What constitutes a “potential effect” to a historic property from an NWP activity can vary substantially by the type of NWP activity and the type of historic property, if a historic property is present. The distance between an NWP activity and a historic property where the NWP activity might have the potential to cause effects will depend on the types of effects that might be caused by that NWP activity (e.g., physical destruction or alteration of a historic property in the project area, or visual or noise effects to historic properties outside of the project area), landscape setting, and other factors. The Corps will continue to use the term “historic properties” consistent with the language in Section 106 of the NHPA and the definition in Section F. Definitions.

District engineers will review PCNs and determine whether proposed NWP activities have the potential to affect historic properties. Section 106 consultation remains the responsibility of the Corps. The requirements of general condition 20 ensure that Section 106 consultation occurs for NWP activities that have potential to cause effects to historic properties.

A few commenters stated that general condition 20 relies on applicants to make a determination if an activity has the potential to affect historic properties, delegating the responsibility to comply with Section 106 of NHPA on the permittee instead of the Corps. A few commenters recommended that the general condition make clear that the district engineer cannot request additional information about cultural resources in the project area if permittee has determined that the “might have the potential” threshold has not been met. A few commenters stated that the “might have the potential” threshold is higher than the threshold set forth in the ACHP regulations.

The Corps complies with Section 106 of the NHPA through the NWP regulations at 33 CFR 330.4(g) and NWP general condition 20. Those regulations prohibit authorization of an activity by an NWP that may have the potential to cause effects to historic properties unless the requirements of Section 106 have been satisfied. General condition 20 is applicable to every activity which may be authorized by an NWP as permittees are required to comply with all general conditions to the NWPs. District engineers will review PCNs and may request additional information to inform their determination if an activity may have the potential to cause effects on properties listed, or eligible for listing, in the National Register of Historic Places. Paragraph (c) of general condition 20, requires a non-federal permittee to submit a PCN for any activity that might have the potential to cause effects on 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 “might” threshold is below the threshold that triggers the requirement for Section 106 consultation for the proposed federal action. The purpose of the “might have the potential to cause effects” threshold is to require submittal of PCNs for proposed NWP activities that might have a possibility of causing effects to historic properties, so that the district engineer can determine whether Section 106 consultation is required for a proposed NWP activity.

The district engineer is responsible for evaluating the PCN and making an effect determination for the proposed NWP activity for the purposes of Section 106 of the NHPA. 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. If the non-federal project proponent does not comply with 33 CFR 330.4(g)(2) and general condition 20, and does not submit the required PCN, then the activity is not authorized by an NWP. In such situations, it is an unauthorized activity and the Corps district will determine an appropriate course of action under its regulations at 33 CFR part 326, if and when the Corps learns about that unauthorized activity.

One commenter stated that tribes should determine if general condition 20 is applicable to an activity, instead of the Corps. One commenter requested that the general condition define the roles and responsibilities of the permittee and the Corps in consulting with tribes on efforts to identify of historic properties. One commenter requested that the general condition be modified to stipulate that tribes should be consulted before identification efforts are conducted and to require that cultural resource surveys be completed after the submittal of a PCN. One commenter stated that tribes are the expert on traditional cultural properties/landscapes and requested 30 days to review PCNs.

The division engineer has the authority to determine if an NWP-specific activity meets the terms and conditions of an NWP. When a district engineer reviews a PCN and determines that consultation under Section 106 of the NHPA is required, the district engineer will consult with consulting parties identified under 36 CFR 800.2(c). Consulting parties include the Indian tribes and the prospective permittee. The district engineer will complete Section 106 consultation in accordance with implementing regulations at 36 CFR part 800, 33 CFR 325 Appendix C, 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. The Corps declines to modify

this general condition to specify the roles of the consulting parties or to prohibit actions that the permittee may take before submittal of the PCN and beginning of the federal action. Division engineers may modify this NWP on a regional basis in accordance with the procedures at 33 CFR 330.5(c) to impose regional conditions to require PCNs for proposed activities that might affect historic properties, including traditional cultural properties that are or are eligible to be listed on the National Register of Historic Places. District engineers will determine whether an activity may have the potential to cause effects on properties listed, or eligible for listing, in the National Register of Historic Places using available information, including information may be shared by tribes.

A few commenters recommended that no changes be allowed to scopes of work for historic properties investigations once reviews are complete. A few commenters recommended that district offices inform prospective permittees of the scope of any required historic properties investigations before a PCN is submitted. A few commenters supported the language in the general condition that clarifies that identification efforts will be commensurate with potential impacts. One commenter stated that it is unclear if general condition 20 requires the Corps to consult with consulting parties when making a determination of effects or after the determination of effect is made. One commenter stated that general condition 20 should be revised to clarify that the Corps follows 36 CFR 800 when Section 106 consultation is required.

The NHPA does not require non-federal prospective permittees to consult with a State Historic Preservation Officer or a Tribal Historic Preservation Officer, or with tribes. Prospective permittees are encouraged to engage with Corps districts in pre-application consultations at the earliest practical time in the planning process so that the district engineer may discuss measures to comply with general condition 20 and 33 CFR 330.4(g). When reviewing PCNs, district engineers will comply with the current procedures for addressing the requirements of Section 106 of the National Historic Preservation Act, including implementing regulations at 36 CFR part 800, 33 CFR 325 Appendix C, 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.

The district engineer, in consultation with consulting parties, is responsible for ensuring compliance with Section 106 of the NHPA and will require the project proponent to provide the information necessary to inform the determination of eligibility and determination of effects. 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.

One commenter requested clarification if a federal permittee or federally-funded project that fulfilled the requirements of Section 106 of the NHPA must submit a PCN if no PCN is required by the terms or other conditions of the NWP. A few commenters stated that non-federal permittees should not have to submit a PCN if the district engineer has completed regional consultation and developed regional conditions to mitigate impacts to historic properties. A few commenters recommended that the Corps adhere to the 45-day review time or as an alternative change paragraph (c) of this general condition so that the district engineer’s review of the PCN does not exceed 90 days.

In accordance with general condition 20, federal agencies must follow their own procedures for complying with Section 106 of the NHPA. Paragraph (b) of general condition 20 does not contain a requirement for federal agencies to submit a PCN. Federal agencies only need to submit documentation of compliance with Section 106 of the NHPA when the terms and conditions of the NWP, or regional conditions imposed by the division engineer, require the submission of a PCN. Corps districts may develop a program alternative and develop local procedures to more efficiently satisfy the requirements of Section 106 of the NHPA. Paragraph (d) of general condition 20 states that for non-federal permittees, the district engineer will notify the prospective permittee within 45 days of receipt of a complete PCN whether NHPA Section 106 consultation is required. District engineers must consult with the SHPO, tribes and other consulting parties to satisfy Section 106 of the NHPA. There are no mandatory timelines for the completion of the Section 106 process. The Section 106 consultation process may take longer than 45 days. The NWP verification cannot be issued and the project applicant cannot proceed with the

proposed activities under Corps' jurisdiction until the Section 106 consultation process has been completed.

A few commenters suggested adding language to paragraph (c) of the general condition to require that the person who would make the determination that non-federal permittees must submit a PCN for the purposes of complying with general condition 20 would need to satisfy the Secretary of the Interior's Standards for Professional Qualifications in Archaeology and Historic Preservation.

It is not appropriate to add text to this general condition to stipulate the qualifications of people determining if a PCN is required for the purposes of compliance with general condition 20. Non-federal permittees are responsible for determining if an activity "might have the potential to cause effects to historic properties." Determinations whether an activity has the potential to cause effects to historic properties may be made by a variety of agency officials, including Corps district staff. The Corps is ultimately responsible for determining compliance with the requirements of Section 106 of the National Historic Preservation Act.

The general condition is adopted as proposed.

GC 21. Discovery of Previously Unknown Remains and Artifacts. The Corps did not propose any changes to this general condition. A few commenters supported reissuing this general condition with no substantive changes. Many commenters stated that the general condition does not limit impacts to a no more than minimal level because of the inclusion of the text "to the maximum extent practicable." One commenter recommended editing the first sentence of the general condition to improve readability.

The application of the term "maximum extent practicable" is dependent on case-specific circumstances and site conditions, and gives the district engineer the discretion to determine what is necessary to comply with the general condition for each circumstance in which inadvertent discoveries occur. We recognize that in some circumstances it may not be possible to avoid further construction activities that might affect the remains and artifacts, because those construction activities may have to be completed for safety or minimizing erosion and sedimentation. The language of the general condition is sufficiently clear in its current form, and we decline to make any changes to this general condition.

The general condition is adopted as proposed.

GC 22. Designated Critical Resource Waters. The Corps did not propose any changes to this general condition. Many commenters expressed concern that the general condition did not provide protection against indirect or secondary impacts from upstream NWP activities on the critical resource waters. One commenter requested that this general condition be modified to prohibit the use of NWP 12 in critical resource waters.

Activities authorized by an NWP which occur upstream from critical resource waters must comply with the general conditions to the NWPs and any regional conditions. Through compliance with general conditions and regional conditions, activities subject to an NWP would cause no more than minimal individual and cumulative adverse environmental effects. The district engineer will review PCNs for activities consistent with Section E (District Engineer's Decision) and will consider the direct and indirect effects of the activity. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity. The district engineer may add site specific conditions to address specific environmental concerns. Paragraph (a) of this general condition prohibits the use of NWP 12 to authorize discharges of dredged or fill material into waters of the United States located within or directly affecting critical resource waters and wetlands adjacent to such waters.

The general condition is adopted as proposed.

GC 23. Mitigation. The Corps did not propose any changes to this general condition. Many commenters stated that this general condition should be strengthened to require that prospective permittees take all practicable steps to avoid and minimize adverse impacts. One commenter stated that mitigation is no substitute for avoidance of impacts. Many commenters stated that the first sentence of paragraph (a) of the general condition should be revised to require avoidance and minimization of adverse effects to any wetland and waterbody rather than waters of the United States. One commenter stated that the NWPs cause no more than minimal individual and cumulative environmental impacts, therefore general condition 23 should be eliminated. One commenter stated that requiring the district engineer to consider the need for compensatory mitigation places an unnecessary burden on the district and results in delays and unnecessary costs.

Mitigation includes avoidance, minimization, and compensatory

mitigation. Paragraph (a) of general condition 23 requires the NWP activity to 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). The Corps does not have authority to require mitigation to address impacts that occur as a result of activities in areas that are not regulated under the CWA or RHA. The purpose of compensatory mitigation is to offset unavoidable adverse impacts to jurisdictional waters and the compensatory mitigation should be considered after all appropriate and practicable avoidance and minimization has been achieved.

The NWPs only authorize activities that have no more than minimal adverse environmental effects both individually and cumulatively. An activity is not authorized under an NWP unless the activity complies with both the terms and all applicable conditions to ensure that an activity will have no more than minimal adverse environmental effects. 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 review period, unless the 45-day timeframe does not apply due to requirements of a general condition (*e.g.*, general condition 18 (Endangered Species) or general condition 20 (Historic Properties)), with activity-specific conditions that specify the mitigation requirements. Work cannot proceed in waters of the United States until the district engineer has approved a specific compensatory mitigation plan or has determined that a mitigation plan is not practicable or necessary to ensure timely completion of the require compensatory mitigation.

One commenter stated mitigation should not be used to justify that an activity would have less than minimal impacts. Many commenters stated that compensatory mitigation should be required at a ratio of greater than one-to-one. Many commenters stated that the existing thresholds for compensatory mitigation in paragraphs (c) and (d) of the general condition should be retained. Many commenters stated that the acreage thresholds for requiring compensatory mitigation in the NWPs should be increased. One commenter stated that the Corps should require compensatory mitigation for any amount of acreage of wetlands and streams when a PCN is required while retaining the district engineer's discretion to make a case-specific

determination if compensatory mitigation is appropriate.

The use of compensatory mitigation and other forms of mitigation to ensure that activities authorized by an NWP result in no more than minimal individual and cumulative adverse environmental effects is codified in the Corps' NWP regulations at 33 CFR 330.1(e)(3). Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. The terms and conditions of the NWPs, such as acreage limits and the mitigation, are considered by the district engineer to determine if an activity would result in no more than minimal adverse effects on the aquatic environment. Since the NWPs authorize activities across the country, paragraphs (c) and (d) of this general condition establish a national threshold for stream compensatory mitigation, but there is flexibility in the general condition to allow district engineers to make activity-specific determinations on whether compensatory mitigation should be required for activities that result in the loss of waters of the United States.

When an NWP requires a PCN, district engineers may require compensatory mitigation for activities which do not exceed the acreage thresholds in general condition 23 when he or she determines compensatory mitigation is necessary to ensure that the adverse environmental effects are no more than minimal. District engineers also have the discretion to determine, on a case-by-case basis 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. Division engineers can add regional conditions to the NWPs to establish a lower threshold for requiring compensatory mitigation. For all DA permits, including the NWPs, compensatory mitigation requirements are determined on a case-by-case basis.

Many commenters stated that the practice of giving the district engineer discretion to make a case-specific determination if compensatory mitigation is required follows longstanding agency practice to prevent no more than minimal adverse environmental effects. One commenter recommended retaining language in the general condition which gives the district engineer the discretion to determine whether compensatory mitigation is required. Several commenters stated that the district engineer should not have discretion to determine the type of mitigation or to waive the requirement to provide

compensatory mitigation. One commenter stated that giving the district engineer the discretion to waive compensatory mitigation fails to prevent direct, indirect, and cumulative effects. Many commenters stated that the district engineer should not have the discretion to accept riparian area mitigation in lieu of wetland compensatory mitigation for losses of wetlands.

A few commenters stated that compensatory mitigation for stream bed losses should not be required when a PCN is required by an NWP condition that is not related to aquatic resource impacts, such as when a PCN is required by general condition 20 (historic properties). A few commenters stated that the general condition should list circumstances when compensatory mitigation for stream bed losses may be waived, including when the activity would not change the ecological function of the stream bed. A few commenters stated that compensatory mitigation should not be required if the activity incorporates the U.S. Fish and Wildlife Service's best management practices, or when the prospective permittee will incorporate conservation measures required to satisfy Section 7 consultation for aquatic habitats subject to the ESA.

General condition 23 (Mitigation) requires compensatory mitigation for all wetland losses greater than $\frac{1}{10}$ -acre and for all stream losses greater than $\frac{3}{100}$ -acre for all activities authorized under this NWP, unless the district engineer determines that some other form of mitigation would be more environmentally appropriate. District engineers impose compensatory mitigation requirements on specific activities authorized by NWPs to ensure that those activities result in no more than minimal individual and cumulative adverse environmental effects, including direct and indirect effects. This discretion is appropriate because the district engineer can evaluate the case-specific circumstances of an activity to consider factors such as the quality and ecological function of the waters being lost, the benefits of the regulated activity to the aquatic ecosystem, and similar considerations. Just as some circumstances may warrant a greater mitigation ratio than that specified as the minimum, other circumstances may justify less mitigation.

The district engineers' discretion to determine mitigation requirements on a case-by-case basis also provides the necessary flexibility to adjust to the on-the-ground realities that may not make specific types of mitigation possible or

beneficial in all cases. In some cases, a different type of mitigation (*e.g.*, wetland instead of riparian) may be the only practical option or may provide a greater environmental benefit. When a district engineer exercises his or her discretion to deviate from the recommended mitigation, it may be necessary to require mitigation at a higher ratio to ensure the environmental effects are no more than minimal.

The flexibility in general condition 23 allows district engineers to consider the impacts of the case-specific activity, and other site-specific activities required by other agencies, such as mine reclamation, when determining whether to require compensatory mitigation for NWP activities. District engineers evaluate stream compensatory mitigation proposals and should be provided the flexibility to consider a variety of potential stream restoration or rehabilitation approaches.

Many commenters objected to the requirement in paragraph (d) that losses of stream bed that exceed $\frac{3}{100}$ -acre will require compensatory mitigation. One commenter stated that paragraph (d) is inconsistent with Executive Orders 14219, "Ensuring Lawful Governance and Implementation of the President's 'Department of Government Efficiency' Deregulatory Agenda," and E.O. 14192, "Unleashing Prosperity through Deregulation." A few commenters supported the retention of the $\frac{3}{100}$ -acre stream bed loss threshold. One commenter stated that the $\frac{3}{100}$ -acre threshold did not create a new requirement but converted the threshold from a linear measurement to an area measurement.

Many commenters stated that the $\frac{3}{100}$ -acre threshold should be removed, and the district engineer should have the discretion to determine whether to require compensatory mitigation for stream bed losses. Many commenters requested that the Corps change the threshold for compensatory mitigation for stream bed losses from $\frac{3}{100}$ -acre to 300 linear feet. One commenter stated that mitigation should be required based on both aerial and linear impacts thresholds. Several commenters stated that the threshold for requiring compensatory mitigation for impacts to streams should be raised to $\frac{1}{10}$ -acre. A few commenters expressed concern that the $\frac{3}{100}$ -acre threshold would allow greater impacts to stream beds. One commenter requested that the $\frac{3}{100}$ -acre threshold to require compensatory mitigation should only apply to perennial streams impacted by permanent fill.

Paragraph (d) of general condition 23 requires compensatory mitigation at a

minimum one-for-one ratio for all losses of stream bed that exceed $\frac{3}{100}$ -acre and require a PCN. The rationale for establishing the $\frac{3}{100}$ -acre threshold for stream compensatory mitigation for NWP activities was explained in the final rule to issue the 2021 NWPs (86 FR 2744). The rationale remains valid and justifies the retention of the $\frac{3}{100}$ -acre threshold. This threshold is intended to be conservative based on the complexities of riverine systems, the substantial variation in riverine systems across the country, and the subjectivity inherent in the threshold for the NWPs (*i.e.*, no more than minimal individual and cumulative adverse environmental effects). Paragraph (d) applies to any loss of stream bed which exceeds $\frac{3}{100}$ -acre, when the stream bed is part of a water of the United States and is permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. District engineers retain the discretion to determine on a case-by-case basis whether to require compensatory mitigation for losses of stream bed authorized by NWPs.

Many commenters recommended that paragraph (e) of the general condition retain language on the width of riparian buffers. A few commenters stated that paragraph (e) should require riparian buffers wider than 25 to 50 feet.

The Corps' compensatory mitigation regulations at 33 CFR 332.3(i) allow district engineers to require the restoration, establishment, enhancement, and preservation, as well as the maintenance, of riparian areas and/or buffers around aquatic resources where necessary to ensure the long-term viability of those resources. The recommended riparian area width of 25 to 50 feet was established in the NWP program in 2000 (65 FR 12833) because riparian areas of that width can provide important aquatic habitat functions and water quality benefits. The rationale remains valid and continues to support this recommended riparian width. The general condition gives the district engineer the discretion to require wider riparian buffers to address concerns for water quality or habitat loss at a specific location.

Many commenters stated that districts vary in the types of compensatory mitigation required to offset wetlands impacts and encouraged the Corps to focus on improving consistency among districts regarding the application of mitigation requirements. Many commenters recommended that the Corps adhere to the 2008 Mitigation rule (33 CFR 332) and revise the NWP program when a new mitigation rule is finalized. Many commenters stated that

the district engineer should have the flexibility to consider how to apply the mitigation hierarchy described in 33 CFR 332.3(b). One commenter stated that a qualified engineer should submit mitigation plans and those plans should be approved by the district engineer.

Compensatory mitigation can be provided through the restoration, enhancement, establishment, and protection of aquatic resources to offset losses of those functions caused by activities authorized by the NWPs and other types of DA permits. The district engineer reviews compensatory mitigation plans for compliance with the compensatory mitigation regulations at 33 CFR 332. District engineers will review case-specific activities, including proposed compensatory mitigation, in compliance with the applicable environmental regulations in place at that time and will consider any changes to 33 CFR 332 or other regulations that may occur in the future. As stated in paragraph (f)(1) of GC 23, 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). The district engineer's acceptance of mitigation only validates that the mitigation complies with the requirements of 33 CFR 332 and GC 23. It is the responsibility of the permittee to ensure that the work complies with other applicable laws, authorizations and requirements, including any applicable engineering standards. As such, it's not necessary to require that mitigation plans be submitted by a qualified engineer.

One commenter stated that many districts have regional conditions that address the loss of functions of forested wetlands and recommended revising paragraph (i) of the general condition to require compensatory mitigation for the permanent conversion of forested wetlands in all cases.

Consistent with paragraph (i) of this general condition, if a proposed NWP activity involves mechanized land clearing in a forested wetland, and it requires a PCN, the district engineer can require compensatory mitigation to ensure the proposed activity results in no more than minimal individual and cumulative adverse environmental effects. The district engineer also has discretion to require compensatory mitigation on a case-by-case basis for the conversion of forested wetlands to ensure the activity results in no more than minimal adverse environmental

effects both individually and cumulatively.

The general condition is adopted as proposed.

GC 24. Safety of Impoundment Structures. The Corps did not propose any changes to this general condition. One commenter stated that a qualified dam safety engineer should submit the plans for impoundment structures and the plans should be approved by a qualified engineer. The general condition states that the district engineer may require non-federal permittees to demonstrate that impoundment structures have been designed by qualified permits. The general condition also states that the district engineer may require documentation that the design has been reviewed by a similarly qualified person.

The general condition is adopted as proposed.

GC 25. Water Quality. The Corps proposed to modify the text of this general condition to clarify that the proposed activity which may result in any discharge from a point source would have to be into a water of the United States in order to trigger the requirement for water quality certification. This proposed change would make the text of this general condition consistent with EPA's current water quality certification regulations at 40 CFR part 121, which defines "license or permit" as consistent with See 40 CFR 121.1(f).

One commenter supported the change to the general condition. One commenter opposed the revision, stating that the change is unnecessary because the language in 40 CFR 121.2 clearly states the threshold requirement for a 401 water quality certification. Several commenters suggested changing the language in the general condition from "may" to "will." One commenter stated that the general condition should mandate water quality reviews. One commenter stated that district engineers are inconsistently applying the standard for when a water quality certification may be required. Several commenters stated that the proposed revised language in the general condition is not consistent with the language in the current regulation. The commenters recommend revising "discharge from a point source" to "any discharge." One commenter stated that the general condition should reinforce that water quality certification is required only when an activity would result in a discharge from a point source into waters of the United States. One commenter requested that text be added to the general condition to state that

where a permittee has already received a FERC license and an associated water quality certification, the permittee is not required to obtain a duplicate water quality certification to satisfy general condition 25.

The current regulations at 40 CFR 121.2 state that a certification is required for any federal permit that “authorizes any activity which may result in any discharge from a point source into waters of the United States.” The revised language in the general condition is consistent with the current regulation. Discharges of dredged or fill material into waters of the United States are not authorized by an NWP until the certifying authority has granted or waived water quality certification. The certifying authority makes the determination if an activity which requires DA authorization would result in a discharge that requires a water quality certification or waiver, and reviews certification requests in accordance with 40 CFR 121. The Corps is responsible for complying with the requirements of Section 401 of the CWA even if there is another federal agency making a decision on a federal license or permit which also requires review under Section 401 of the CWA.

If a certifying authority has not previously certified compliance of an NWP with CWA Section 401, the permittee must obtain an individual water quality certification or waiver for a proposed activity which may result in a discharge from a point source into waters of the United States. In accordance with 33 CFR 330.4(c)(3), if a state denies a water quality certification for an activity that otherwise meets that NWP, a district engineer may provisionally notify the prospective permittee that the district engineer has completed his or her review, but the activity is not authorized pending the completion of the processes required by 40 CFR 121.

The general condition is adopted as proposed.

GC 26. Coastal Zone Management. The Corps did not propose any changes to this general condition. The Corps did not receive any comments on this general condition. The general condition is adopted as proposed.

GC 27. Regional and Case-by-Case Conditions. The Corps did not propose any changes to this general condition. The Corps did not receive any comments on this general condition. The general condition is adopted as proposed.

GC 28. Use of Multiple Nationwide Permits. The Corps proposed modifications to this GC to clarify the

standards that must be met to comply with this general condition.

Several commenters expressed support for the proposed changes to the general condition. Several commenters stated that the general condition should limit the total acreage limit to the lowest specified acreage limit. Several commenters recommended that the general condition limit the number of NWPs that can be used to authorize an activity to two to minimize cumulative impacts. Several commenters asked that the general condition clarify how temporary and cumulative effects are considered in the thresholds of this general condition. One commenter stated that there should be a waiver to this general condition when restoration activities are proposed which would be authorized under NWP 27.

The purpose of the revision to this general condition is to clarify the longstanding requirement to limit the total acreage impacts to the highest total acreage limit of each NWP being used for a single and complete project. The text in paragraph (a) will limit the use of NWPs with no acreage limits, including NWP 27. The general condition limits the acreage loss of waters of the United States to the highest specified acreage limit, and it does not allow the acreage limit of an NWP with a specified lower acreage limit to be exceeded. The general condition applies acreage impact limits to losses of waters of the United States. The definition of loss of waters of the United States is restricted to activities that cause permanent adverse effects to waters of the United States and does not include temporary or cumulative impacts. When the district engineer receives a PCN, his or her review will consider the direct, indirect, and cumulative effects of the single and complete project, in accordance with paragraph 2 of Section D (District Engineer’s Decision).

The general condition is adopted as proposed.

GC 29. Transfer of Nationwide Permit Verifications. The Corps did not propose any changes to this general condition. One commenter stated that this general condition only addresses the transfer of an NWP verification is situations where the property ownership is transferred between landowners, and recommended that it be expanded to allow the transfer of a permit verification when responsibility over the project is transferred even if the activities authorized by the NWP occur on lands not owned by the permittee, such as government owned lands.

The language in the general condition was taken from Appendix A of 33 CFR

325, which is the standard form for Department of the Army permits. This language is found at general condition 4 of Appendix A of 33 CFR 325. We believe that the language in this general condition should be consistent with our standard permit language. Permittees with questions about the transfer of an NWP verifications should contact the district engineer in the district where the activity is located.

The general condition is adopted as proposed.

GC 30. Compliance Certification. The Corps proposed to modify the second sentence of this general condition to refer to the “successful completion” of any required permittee-responsible mitigation instead of the “success” of any required permittee-responsible mitigation. One commenter supported the proposed change.

The general condition is adopted as proposed.

GC 31. Activities Affecting Structures or Works Built by the United States. The Corps did not propose any changes to this general condition. One commenter expressed support for the reissuance of this general condition. One commenter stated that the Corps should clarify how the NWPs in this action would affect the timelines of Section 408 reviews of federal projects.

A PCN is required for proposed NWP activities that also require Section 408 permissions so that the appropriate coordination can occur between district staff involved in the NWP evaluation and Section 408 permission processes. The Corps acknowledges that it may take longer for NWP verification to be issued by the district engineer when a 408 permission is required, because the NWP verification cannot be issued before the Section 408 permission process is completed.

The general condition is adopted as proposed.

GC 32. Pre-Construction Notification. The Corps proposed to modify paragraph (a)(2) of this general condition, to make it consistent with paragraph (c) of general condition 18 (Endangered Species). In paragraph (b)(5) of this general condition, the Corps proposed to simplify the first sentence to state that the PCN must include a delineation of waters, wetlands, and other special aquatic sites on the project site. The Corps proposed to remove references to “other waters” such as lakes and ponds and perennial and intermittent streams because those features would be covered by the term “waters.” The Corps also proposed to modify paragraph (b)(5) of this general condition by adding a new sentence at the end of this paragraph which points

permittees using NWP 27 (Aquatic Ecosystem Restoration, Enhancement, and Establishment Activities) to proposed new Note 2 in NWP 27.

Many commenters stated that PCNs should be required for all activities authorized by NWPs. Several commenters stated that both federal and non-federal permittees should be required to submit PCNs for every activity authorized by an NWP. One commenter stated that the project proponent should determine if a PCN is required for each single and complete crossing. One commenter stated that the Corps should clarify when a PCN is required for activities that impact protected resources. Many commenters said that no additional information requirements should be added to the PCN process that would further complicate or burden the process.

The Corps establishes PCN thresholds for those NWP activities that have the potential to cause more than minimal adverse environmental effects, to provide the opportunity for district engineer to conduct an activity-specific review and to exercise discretionary authority and require individual permits for activities that will have more than minimal adverse environmental effects. 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. Certain general conditions (*e.g.*, general conditions 18 (endangered species) and 20 (historic properties)) require submittal of a PCN when an activity that requires DA authorization may impact protected resources. Division engineers may also modify NWPs to require a PCN to address regional concerns for protected resources. We are retaining the language in general conditions 18 and 20 which direct federal agencies to follow their own procedures for complying with Section 7 of the ESA and Section 106 of the NHPA. The Corps has not added any information requirements beyond the clarifying language that was proposed in the 2025 Proposal.

One commenter opposed allowing permittees to proceed if the district engineer does not respond to a PCN within 45 days. One commenter stated that the NWPs are issued based on the finding that they would cause no more than minimal individual and cumulative impacts, therefore it is redundant to require submittal of a PCN

based on thresholds that are lower than the limits to the loss of waters authorized by an NWP. Several commenters stated that allowing permittees to proceed with their activity after 45 days without Corps review does not comply with Section 404(e). One commenter stated that requiring the district engineer to review a PCN causes unnecessary work, delay and cost. One commenter stated that permittees should be allowed to submit reports documenting the completion of an activity rather than a requiring submittal of PCN to allow for the district engineers' review.

Activities that qualify for the default authorization that occurs 45-days after the district engineer receives a complete PCN must comply with all conditions of the NWP, including the general conditions and any applicable regional conditions imposed by the division engineer. The permittee is responsible for reading the NWPs and all of the general conditions and regional conditions to determine whether he or she is required to submit a PCN before proceeding with an authorized activity. The PCN process provides flexibility in the NWP program and ensures that NWP activities have no more than minimal individual and cumulative adverse environmental effects and comply with the Section 404(e) of the CWA. 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. There are exceptions to the 45-day review period, such as when district engineers have to complete ESA Section 7 consultation, NHPA Section 106 consultations, or for other specified purposes to satisfy federal law.

One commenter stated that the general condition should state that work can proceed in water crossings outside Corps' jurisdiction where a project proponent has determined that a PCN is not required. One commenter stated that the prospective permittees for activities associated with linear projects should not be required to report activities for which no PCN is required. Several commenters stated that the Corps does not have the resources to ensure activities comply with the NWPs if it does not have the resources to respond to PCNs within 45 days.

The Corps has no authority over activities in waters outside Corps' jurisdiction. In the absence of a jurisdictional determination, when reviewing a PCN, the district engineer will assume that all waters in the project area are jurisdictional. If a project

proponent has determined that no PCN is required, the proponent must comply with the NWP and general conditions to the NWPs if order for the activity to be authorized by an NWP. Paragraph (b)(i) states that prospective permittees submitting a PCN for linear projects must include information on other separate and distant crossings that require DA authorization but do not require a PCN. The requirement to submit information on the non-PCN activities does not change those activities into ones which are subject to a PCN. The district engineer will review the PCN and information about activities which do not require a PCN to determine if the regulated activity will have no more than minimal individual and cumulative adverse effects to the environment. The Corps declines to remove the requirement to provide information about linear crossings for which no PCN is required. District engineers have the discretion to manage district workloads.

One commenter stated that it is not clear how the Corps determines when the 45-day time period has started. Many commenters stated that the Corps should determine if a PCN is complete within 15 days.

The 45-day time period begins upon the district engineer's receipt of a complete PCN. If the prospective permittee does not receive a request for additional information within 30-days of the date of receipt, the permittee can begin the activity 45 days from the district engineer's receipt of the PCN. There are exceptions to the 45-day timeframe, such as for activities conducted by non-federal permittees that require PCNs under paragraph (c) of general conditions 18 and 20 (Endangered Species and Historic Properties, respectively), activities that require PCNs under general conditions 16 and 31, activities proposed for authorization under NWP 49 (Coal Remining Activities), and when the proposed activity requires a written waiver to exceed specified limits of an NWP, or if the district engineer takes action under 33 CFR 330.5(d) to modify, suspend, or revoke the NWP authorization. We believe that 30 days is necessary to make completeness determinations for PCNs.

Many commenters stated that the permittee should not be allowed to proceed with their activity until the district engineer has provided written notification that the activity qualifies for an NWP. Many commenters stated that prospective permittees should receive expedited permit processing if the Corps fails to meet the 45-day timeline in general condition 32. One commenter

stated that the 45-day timeline does not allow for adequate time for tribal review. Many commenters recommended that district engineers adhere to the general rule to request additional information only one time and limit requests to information that is reasonable and avoids unnecessary delay. One commenter recommended that district engineers use their discretionary authority to expedite certain time-sensitive maintenance and inspection projects associated with energy projects.

District engineers have the responsibility to review a PCN. After the Corps district receives a PCN, the prospective permittee cannot 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. The Corps declines to add a provision requiring that all project proponents receive written authorization from the Corps prior to commencing the authorized activity. The terms and conditions of the NWPs describe the circumstances (*e.g.*, when Section 7 ESA or Section 106 NHPA consultation is required) when a project proponent must wait for a written response from the Corps prior to commencing the activity. We agree that district engineers, as a general rule should request information necessary to make a PCN complete only one time. District engineers may make additional requests for information when the project proponent has not provided the requested information to the district engineer. District engineers manage their workload, including actions associated with energy projects, consistent with applicable policy.

One commenter recommended that paragraph (b) be revised to clarify that the 45-day time period does not begin until the district engineer receives a delineation report which meets a recommended minimum standard. Many commenters requested that wetland delineations be accepted when they are sufficiently detailed, rather than requiring a field wetland delineation. Many commenters recommended that the Corps clarify that paragraph (b)(5) only applies to jurisdictional waters. One commenter stated that the term "project site" is not clear and should be replaced with the term "proposed limits of construction" because the term "project site" results

in the expense of delineating of waters that are on a property but distant from the area where work is proposed.

General condition 32 paragraph (b)(5) requires a delineation of waters, wetlands, and special aquatic sites prepared in accordance with the current method required by the Corps. In accordance with CWA Section 404(e), the NWPs are intended to authorize activities with little, if any, delay or paperwork. Prospective permittees are not required to submit a delineation report compliant with a recommended standard. The recommended minimum standards for reports that accompany a delineation are not mandatory. These recommended minimum standards have been developed as a tool to assist prospective permittees in providing information in a manner that could expedite reviews of jurisdictional determinations and permit applications. 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.

Field verification of a delineation by the Corps district is not required for a complete PCN. 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. An approved jurisdictional determination is not required for a complete PCN. If the project proponent did not obtain and/or does not wish to obtain an approved jurisdictional determination for the project site, for the purposes of evaluating the PCN, the district engineer will presume the wetlands, streams, and other waters on the project site are subject to CWA jurisdiction. General condition 23 clarifies that project site means "on site".

One commenter stated that paragraph (b) should be revised to require the prospective permittee's email address, information about essential fish habitat that might be affected by the activity, and to specify information about any required individual water quality certification request.

The Corps declines to modify paragraph (b) Contents of a PCN. Paragraph (c) encourages prospective permittees use the NWP PCN form (ENG 6082) to submit their PCN information or provide the required information in a letter. Prospective permittees may also submit their PCN and all supplemental

information electronically through the Corps' Regulatory Request System³ (RRS). Both ENG Form 6082 and RRS encourage the prospective permittee to provide their email address. Essential fish habitat (EFH) is generally confined to coastal waters and anadromous waters. District engineers in areas where EFH has been identified may require information regarding essential fish habitat to be included in the PCN through the development of regional conditions. General condition 25 (Water Quality) requires the prospective permittee to provide any issued or waived water quality certification for the proposed discharge authorized by a specific NWP activity, to the district engineer when the certifying authority previously denied the certification request for the issuance of the NWPs. Consistent with 33 CFR 330.4(c), an NWP is denied without prejudice until a project proponent provides an individual water quality certification or waiver.

One commenter stated that the NWPs should limit how many times an NWP can be used to prevent piecemealing and causing more than minimal impacts. Many commenters stated that the term "separate and distant" requires clarification and is used inconsistently by the Corps, allowing for piecemealing of projects.

Section 404(e) of the CWA does not require NWPs to have quantified acreage or other limits to ensure that authorized activities result in no more than minimal individual and cumulative adverse effects. General condition 28 (Use of Multiple Nationwide Permits) limits the amount of loss of waters of the United States for each single and complete project and each single and complete linear project. The definition of "single and complete linear project" does not allow piecemealing. Under paragraph (b)(4) of general condition 32, PCNs for linear projects are required to include those crossings of waters of the United States that require NWP PCNs as well as those crossings that will utilize the NWPs and do not require PCNs. When the district engineer reviews the PCN, he or she considers the cumulative effects of both the NWP activities that

³ Regulatory Request System (RRS) is a web-based national online application portal and management platform created to modernize the Corps' Regulatory Program permitting process and meet user expectations by providing a straightforward transparent process for the submittal of permit requests. RRS provides general information on the Regulatory Program and allows the public to submit pre-application meeting requests, jurisdictional determination requests, and individual and general permit applications and other necessary information electronically. RRS can be accessed at the following address: rrs.usace.army.mil/rrs.

require PCNs and the NWP activities that do not require PCNs when deciding if the activity will cause no more than minimal adverse effects.

What constitutes “separate and distant” crossings can vary across the country because of differences in the distribution of waters and wetlands in the landscape, local hydrologic conditions, local geologic conditions, and other factors. Application of the definition of “separate and distant” crossings is more appropriately determined by district engineers on a case-by-case basis. Separate and distant crossings of waters of the United States associated with linear projects can be authorized by separate NWPs consistent with longstanding practice that has been codified in the Corps’ regulations at 33 CFR 330.2(i) since 1991 (see 56 FR 59110).

One commenter stated that paragraph (d) should allow agencies 45 days to respond to agency coordination. With some exceptions (*e.g.*, requirements of general conditions 18 (Endangered Species Act) or 20 (Historic Properties), paragraph (a)(2) allows permittees to begin their activity 45 days after the district engineer receives a PCN. When agency coordination is required, the agencies have a total of 25 days to provide substantive comments on a PCN. This 25-day timeframe is necessary so that the district engineer can fully consider the concerns of the resource agency during review of the PCN with sufficient time to determine if the NWP-specific activity must be modified, suspended, or revoked in order to ensure that the regulated activity will cause no more than minimal adverse environmental effects.

The general condition is adopted as proposed.

H. Responses to Comments on Section D. District Engineer’s Decision

In Section D, “District Engineer’s Decision,” the Corps proposed to add a sentence to paragraph 3 to clarify that compensatory mitigation shall not be required for activities authorized by NWP 27. The addition of this sentence is intended to ensure that a district engineer’s decision is consistent with the terms of NWP 27.

One commenter supported the changes to Section D, “District Engineer’s Decision.” Many commenters recommended adding language to Section D to clarify the scope of the district engineer’s cumulative effects analysis.

During their reviews of PCNs, district engineers use their discretion to determine the appropriate regional scale for evaluating cumulative effects for the

purposes of 33 CFR 330.5(d)(1), 33 U.S.C. 1344(e)(1), 33 CFR 322.2(f)(1), and/or 33 CFR 323.2(h)(1). The appropriate regional scale is dependent, in part, on what types of NWP activities are occurring, where they are occurring, and what types of adverse environmental effects they might be causing.

“District Engineer’s Decision” is adopted as proposed.

I. Responses to Comments on Section E. Further Information

One commenter recommended that item 3 in this section be revised to insert “or extinguish” after “do not grant.” One commenter requested a new item be added to this section to affirm that the Corps will give due regard to the property rights of Americans and consider property rights when making determinations about the public interest.

The language in Section E is taken directly from 33 CFR 330.4(b). It would not be appropriate to deviate from the language in the Corps’ implementing regulations. During the process to reissue the NWPs, the Corps completes a public interest review in accordance with 33 CFR 320.4, as documented in the national decision document for each NWP. The public interest review includes a consideration of property ownership consistent with 33 CFR 320.4(g). The considerations of property ownership addressed in 33 CFR 320.4(g) are applicable to NWPs and are relevant to the comments raised.

J. Responses to Comments on Section F. Definitions

In the 2025 Proposal, the Corps proposed changes to two of the NWP definitions and the Corps proposed to add one definition. As discussed in the proposed rule, the Corps proposed to modify the definitions of “Ecological reference” and “Stream bed.” The Corps proposed to add a definition of “Nature-based solutions.”

Many commenters expressed support for the changes to the definitions. One commenter recommended adding a definition for “soft bank stabilization.” One commenter requested the addition of a definition of “oil or natural gas pipeline” that includes any gaseous or liquid fuel, particularly hydrogen. One commenter recommended adding a definition of “special aquatic sites.” Many commenters stated that the NWPs should not include a definition of “waters of the United States”. Many commenters stated that the Corps should rely on definition of waters of the United States that is in effect at the time of the NWP-specific activity. One

commenter recommended adding a definition for “waters of the United States” to differentiate between waters subject to Section 10 of the RHA and waters subject to Section 404 of the CWA.

The Corps does not believe that “soft bank stabilization” requires a definition because there are number of examples of soft bank stabilization listed in Note 2 in NWP 13. The phrase “oil or natural gas pipeline” is defined in NWP 12 and includes any pipe or pipeline for the transportation of any form of oil or natural gas, including products derived from oil or natural gas, such as gasoline, jet fuel, diesel fuel, heating oil, petrochemical feedstocks, waxes, lubricating oils, and asphalt. The Corps declines to include “any liquid or gaseous fuel” in the definition of oil or natural gas pipeline.

NWP 58 authorizes activities associated with utility lines for substances, excluding oil, natural gas, products derived from oil or natural gas, and electricity. The Department of Energy states that hydrogen can be produced from a variety of sources, including natural gas, renewable power, or nuclear power.⁴ The Corps declines to add “any gaseous or liquid fuel,” or hydrogen to the definition of oil or natural gas pipeline. The Corps relies on the definition of special aquatic sites in 33 CFR 320.2(j). Special aquatic sites include wetlands, mudflats, vegetated shallows, coral reefs, riffle and pool complexes, sanctuaries, and refuges. The Corps does not believe it is necessary to replicate the definition of special aquatic sites in Section F. Definitions. The Corps declines to add a definition of waters of the United States to Section F (Definitions) and will continue to rely on the definition of “waters of the United States” in 33 CFR part 328.

Best management practices (BMPs). The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Compensatory mitigation. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Currently serviceable. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

⁴ <https://www.energy.gov/eere/fuelcells/hydrogen-fuel-basics>.

Direct effects. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Discharge. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Ecological reference. The Corps proposed modifications to this definition to align with proposed changes to the second paragraph of NWP 27, which discusses the requirement for aquatic ecosystem restoration, enhancement, and establishment activities associated with activities that require DA authorization to be planned, designed, and implemented to result in aquatic ecosystems that resemble ecological references. The proposed revisions to this definition discuss three types of ecological references: (1) an aquatic ecosystem type or riparian area type that currently exists in the region (*i.e.*, a contemporary ecological reference); (2) an aquatic ecosystem type or riparian area type that existed in the region in the past (*i.e.*, an historic ecological reference); and (3) indigenous and local ecological knowledge that applies to the aquatic ecosystem type or riparian area type (*i.e.*, an ecological reference based on a cultural ecosystem). The Corps also proposed to change this definition to include cultural ecosystems.

Many commenters supported the proposed modifications to this definition. Several of these commenters stated that such provisions recognize the historical role of human management in ecosystem development and provide realistic restoration targets in highly altered landscapes. One commenter opposed changes to this definition, stating that the change could cause confusion regarding the selection of a suitable ecological reference. Many commenters argued that defining ecological references to include ecosystems developed under human management activities contradicts the premise that references should be based on natural systems or may result in project proponents arguing that maintenance activities constitute restoration.

Many commenters expressed concerns that historical references might not be self-sustaining under current landscape conditions and recommended focusing on functioning systems under comparable present conditions. Many commenters stated that the definition of ecological reference should require that the reference be of the highest quality. Many commenters requested

clarification regarding how an ecological reference would be implemented. One commenter recommended that the Corps take a broad view of what constitutes an ecological reference. One commenter was concerned that a low value stream that was present in the past would be valued the same as an unaltered stream that is currently present.

Ecological references are based on natural ecosystems. An ecological reference takes into account the range of variation of the aquatic habitat type or riparian area type in the region. Ecological references are based on natural ecosystems which are “developed by natural processes and are self-organizing and self-maintaining” (Society for Ecological Restoration International Science & Policy Working Group 2004). Natural ecosystems are rarely pristine or unimpacted by human influences. Ecological standards are not limited to the highest and best quality of an ecosystem. Most natural ecosystems have been impacted by human influences to varying degrees and may be managed by people to varying degrees.

Understanding that all ecosystems are cultural ecosystems to varying degrees because of pervasive human influences on these ecosystems is important for establishing realistic and achievable goals and objectives for aquatic ecosystem restoration, enhancement, and establishment activities for human influenced ecological references. Realistic objectives for resembling an ecological standard involve establishing a “lift” to the net functions and services, not necessarily an attempt to achieve the highest quality of that aquatic ecosystem. This is consistent with the concepts in the 2008 Compensatory Mitigation Rule’s (33 CFR 332.2) definition of “reference aquatic resources,” which are defined as “a set of aquatic resources that represent the full range of variability exhibited by a regional class of aquatic resources as a result of natural processes and anthropogenic disturbances.”

This definition was revised to align with the changes to NWP 27 (Aquatic Ecosystem, Restoration, Enhancement, and Establishment). The permittee must comply with the terms of NWP 27 and the NWP general conditions. The NWP 27 requires that the proposed restoration, enhancement, or establishment associated with activities that require DA authorization resemble an ecological reference, and must also result in net increases in aquatic ecosystem functions and services.

Many commenters approve of the inclusion of cultural ecosystems or

indigenous and local knowledge in the use of determining ecological reference standard. Many commenters objected to the inclusion of references to “indigenous knowledge” and encouraged the Corps to delete the term and consider indigenous knowledge as captured by local knowledge.

Ecological references may be based on indigenous knowledge or local ecological knowledge. Recognition of indigenous knowledge does not privilege this type of information above other types or sources of information, it recognizes that the people who have inhabited in an area over a long period of time have accumulated knowledge of that area.

The definition is adopted as proposed.

Enhancement. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Establishment (creation). The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

High Tide Line. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Historic property. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Independent utility. The Corps did not propose any changes to this definition. Many commenters recommended modifying this definition to eliminate the distinction between linear and non-linear projects. Many commenters requested the addition of “linear projects” to this definition.

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. There is a rational basis for distinguishing between linear projects and non-linear projects. For linear projects, impacts to jurisdictional waters and wetlands caused by activities authorized by NWPs are scattered throughout a large landscape that encompasses the point of origin and terminal point of the linear projects, and all of the crossings of jurisdictional waters and wetlands in between the origin and terminus. Under most circumstances, those crossings

impact distinctly different waterbodies, although there may be cases where there are multiple crossings of the same waterbody at separate and distant locations. For a long linear project, a large number of different waterbodies may be impacted by crossings that are a substantial distance from each other. In contrast, for a non-linear project, the impacts to jurisdictional waters and wetlands are concentrated within a much smaller landscape unit (usually a single parcel of land) that is defined by the boundaries of the non-linear project (e.g., the boundaries of the residential or commercial development). For a nonlinear project, the impacts of activities authorized by NWP or other DA permits usually occur to a single waterbody and its tributaries and adjacent wetlands.

As a general concept, cumulative impacts accrue to a single waterbody as a result of multiple impacts occurring over time, which include direct impacts to the waterbody and the indirect effects of activities occurring in the watershed of that waterbody. For a linear project, the incremental contribution of a linear project crossing of a waterbody to the cumulative impacts for that particular waterbody is small. For a linear project, the sum of the authorized impacts occurs to the various waterbodies crossed by that linear project. A non-linear project may have a larger incremental contribution to the cumulative impacts for a particular waterbody, because all of the authorized impacts will occur in or near that waterbody.

The definition is adopted as proposed.

Indirect effects. The Corps did not propose any changes to this definition. One commenter recommended the removal of this definition, stating that it is too broad. District engineers will review PCNs consistent with paragraph 2 of Section D (District Engineer's Decision), which requires consideration of the direct and indirect impacts caused by the NWP activity, as well as the cumulative effects in order to determine if the activity would cause no more than minimal adverse environmental effects. The NWP activity is the activity subject to DA jurisdiction—the discharge of dredged or fill material into waters of the United States and work and structures in navigable waters of the United States. The Corps believes that the definition of indirect effects should be retained to inform the district engineer's decision.

The definition is adopted as proposed.

Loss of waters of the United States. The Corps did not propose any changes

to this definition. Many commenters recommended modifying the definition to include temporary impacts as a loss of waters of the United States. Many commenters recommended that language be added to NWPs to clarify that the acreage impact limit applies to activities or discharges that would result in a complete loss of waters of the United States and not to temporary or long-term impacts to the waters. One commenter recommended revising this definition to state that placement of dredged or fill material that results in an increase in the aquatic resource functions and services of the aquatic resource is not a loss of waters.

Loss of waters of the United States does not include waters of the United States temporarily filled, flooded, excavated, or drained. Permittees must comply with general conditions 11 (Equipment) and 13 (Removal of Temporary Structures of Fills) which require areas to be restored to pre-construction elevations and revegetated, as appropriate. Under Section 404 of the CWA, DA authorization is required for discharges of dredged or fill material into waters of the United States unless exempted by CWA Section 404(f). Discharges of dredged or fill material involve the addition of material within or into waters of the United States, regardless of whether the effect of the discharge is beneficial or adverse. The Corps declines to remove discharges that result in beneficial effects from this definition. Consistent with the District Engineer's Decision (Section D), the district engineer can consider the duration of the effects and whether the regulated activity would result in beneficial effects in their determination whether the NWP activity would cause more than minimal adverse effects to the environmental.

The definition is adopted as proposed.

Nature-based solutions. The Corps proposed to add a definition of "nature-based solutions" to Section F. For the reasons discussed in Section II.D, the definition is adopted as proposed.

Navigable waters. The Corps did not propose any changes to this definition. One commenter recommended revising this definition to clarify that variations of the term "navigable waters" such as "navigable water," "navigable waters of the United States," or "navigable water of the United States" all refer to waters subject to Section 10 of the RHA (i.e., Section 10 waters) as defined in 33 CFR 329. The Corps agrees that the terms listed here all refer to navigable waters of the United States as defined in 33 CFR 329 but finds it unnecessary to add these terms to this definition.

One commenter requested that Corps districts provide a list of navigable waters of the United States subject to Section 10 of the RHA on district websites. Consistent with 33 CFR 329.16, Corps districts maintain a list of navigable waters and the Corps will evaluate the best way to make these lists available to the public.

One commenter stated that the Corps should clarify if waters under the authority of Section 10 of the RHA are also "traditional navigable waters." "Traditional navigable waters" include but are not limited to "navigable waters" as defined in this definition.

The definition is adopted as proposed.

Non-tidal wetland. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Open water. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Ordinary high water mark. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Perennial stream. The Corps did not propose any changes to this definition. Many commenters expressed opposition to defining this term and recommended its removal from the definitions. This term is used in NWP 40 (Agricultural Activities) and in NWP 43 (Stormwater Management Facilities) as such, the Corps declines to remove this definition. The definition is adopted as proposed.

Practicable. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Pre-construction notification. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Preservation. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Re-establishment. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Rehabilitation. The Corps did not propose any changes to this definition. The Corps did not receive any

comments on the proposed definition. The definition is adopted as proposed.

Restoration. The Corps did not propose any changes to this definition. One commenter requested that the definition use the phrase “and biological” instead of “or biological.” The use of “or” preserves the option to manipulate some but not all characteristics of an aquatic resource to improve natural functions. The Corps declines to make the recommended change in this definition. The definition is adopted as proposed.

Riffle and pool complex. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Riparian areas. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Shellfish seeding. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Single and complete linear project. The Corps did not propose any changes to this definition. Many commenters expressed support for this definition. Many commenters opposed this definition and stated that it should be removed. Many commenters stated that the ability to use multiple NWP to authorize individual segments of linear projects should be eliminated because that practice violates numerous laws. Many commenters stated that the definition of “single and complete linear project” is used to piecemeal large projects into NWPs.

The term “single and complete project” is defined in the regulations implementing the NWP program that were promulgated in 1991 and are still in effect (33 CFR 330.2(i)). The definition in regulation addresses what constitutes a “single and complete project” generally as well as in the context of linear projects. The definitions concerning single and complete projects in the NWPs are consistent with the NWP regulations issued in 1991. The basis for treating each crossing involved in a linear project as a separate activity is that the effects of the activities that can be authorized within the limitations of the applicable NWPs and by definition minor and are typically limited to the waterbody being impacted. For linear projects, impacts to jurisdictional waters and wetlands caused by activities authorized by NWPs are scattered throughout a large landscape that encompasses the point of

origin and terminal point of the linear projects, and all of the crossings of jurisdictional waters and wetlands in between the origin and terminus. Under most circumstances, those crossings impact distinctly different waterbodies, although there may be cases where there are multiple crossings of the same waterbody at separate and distant locations. For a long linear project, a large number of different waterbodies may be impacted by crossings that are a substantial distance from each other. This is distinguished from a non-linear project which is more likely to concentrate the effects of multiple activities within a single waterbody or watershed. As an additional backstop against the possibility of impacts compounding across multiple separate crossings, when a PCN is required for an activity associated with a linear project, the PCN must include information on all crossings associated with that linear project which require DA authorization. The district engineer will review the PCN to ensure that the cumulative adverse environmental effects of all crossings associated with linear projects are no more than minimal. As explained in the rulemaking establishing the definition of “single and complete project” in 33 CFR 330.2(i) (see 56 FR 59110, 59113–13), the definition of “single and complete linear project” does not allow piecemealing. Under paragraph (b)(4) of general condition 32, PCNs for linear projects are required to include those crossings of waters of the United States that require NWP PCNs as well as those crossings that will utilize the NWPs and do not require PCNs. When the district engineer reviews the PCN, he or she considers the cumulative effects of both the NWP activities that require PCNs and the NWP activities that do not require PCNs. The Corps declines to make any changes to this definition.

The definition is adopted as proposed.

Single and complete non-linear project. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stormwater management. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stormwater management facilities. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stream bed. The Corps proposed to modify the definition of “stream bed” by adding a sentence that states that the substrate of a stream bed may also be comprised, in part, of large and small wood fragments, leaves, algae, and other organic materials. A few commenters requested clarification whether wetlands within the ordinary high water mark are considered part of the stream bed. Several commenters stated that the definition should be corrected to read “bedrock or inorganic particles.” We have corrected the second sentence in the definition to include the word “or.” Wetlands landward, or outside, the ordinary high water marks are not part of the stream bed. Areas waterward, or between, the ordinary high water marks are part of the stream bed. Some areas waterward of the ordinary high water mark may meet the definition of wetland.

The definition is adopted as proposed.

Stream channelization. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Structure. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Tidal wetland. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Tribal lands. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Tribal rights. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Vegetated shallows. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Waterbody. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

III. Compliance With Relevant Statutes

A. National Environmental Policy Act

The Corps has prepared a decision document for each NWP. Each decision document contains an EA to fulfill the

requirements of the NEPA. The EA discusses the anticipated impacts the NWP will have on the human environment. Each decision document also includes a public interest review conducted in accordance with 33 CFR 320.4. If an NWP authorizes discharges of dredged or fill material into waters of the United States, the decision document for that NWP also includes a CWA Section 404(b)(1) Guidelines analysis conducted in accordance with the applicable provisions of 40 CFR part 230, including 40 CFR 230.7 which address the issuance of general permits. These decision documents evaluate the environmental effects of each NWP from a national perspective.

The Corps solicited comments on the draft national decision documents, and any comments received were considered when preparing the final decision documents for the NWPs. The final decision documents for each NWP are available on the internet at: www.regulations.gov (docket ID number COE-2025-0002) as “Supporting and Related Materials” for this final action.

Many commenters stated that the Corps has not met its obligations under NEPA. Many commenters stated the reissuance of the NWPs requires the preparation of Environmental Impact Statement(s). Many commenters stated that the draft decision documents do not support the finding that the NWP Program has not resulted in significant environmental harm. Many commenters stated that the Corps has not taken a hard look at the impacts of the NWP.

The Corps prepared components of the draft and final national decision documents in accordance with NEPA (42 U.S.C. 4321 *et seq.*). The final decision documents prepared by Corps Headquarters for the reissuance of these NWPs provide an analysis of the impacts expected to be caused by the activities authorized by these NWPs during the five-year period they are expected to be in effect, including estimates of the number of times an NWP is anticipated to be used, the anticipated impacts to jurisdictional waters and wetlands, and the compensatory mitigation required to offset losses of jurisdictional waters and wetlands. Those impacts, and the compensatory mitigation, are evaluated against the current environmental setting (*i.e.*, the affected environment).

In the decision document, the Corps evaluated the effects or impacts on the human environment that are reasonably foreseeable and have a reasonably close causal relationship to the activities authorized by these NWPs. The national decision document prepared for each NWP issued by this final action

discusses alternatives, examines the effects and impacts of the proposed action (*i.e.*, the issuance of the NWP by Corps Headquarters), including actions not under the authority of the Department of the Army. The national decision documents include an environmental assessment with a finding of no significant impact and satisfy the requirements of NEPA.

Many commenters stated that the Corps is not in compliance with NEPA because the process to reissue the NWPs or review NWP-specific activities does not include sufficient public participation. One commenter requested clarification on the responsibility of districts in communicating with the public if a project requires a PCN. This commenter was concerned that determining a project is non-notifying is final agency decision subject to judicial review under the Administrative Procedure Act.

The Corps solicited comments on the proposed rule to reissue the NWPs, and on the draft national decision documents, and any comments received were considered when preparing the final action and the final decision documents for the NWPs. The Corps considered comments on thresholds for submittal of a PCN in finalizing this action. The NWPs authorize only those activities that have no more than minimal adverse environmental effects, so it is not necessary to issue public notices to announce the tens of thousands of NWP verification letters Corps districts issue each year.

Many commenters stated that the Corps' analysis in the decision documents lacks sufficiently detailed data and analysis of impacts. One commenter stated that the lack of information in the draft decision documents limits the public's ability to provide substantive comments. Many commenters stated that there are unexplained data inconsistencies between the 2021 NWP decision documents and the draft 2026 NWP decision documents. One commenter recommended distinguishing between temporary or permanent impacts in the analysis.

The draft and final decision documents for the NWPs issued in this final action estimate usage, acreage of impacts, and acreage of compensatory mitigation for the 2026 NWPs. The estimated acreage of impacts combines temporary and permanent impacts. The national decision documents assess reasonably foreseeable impacts at a national scale based on reliable data and resources. The impacts are evaluated against the current environmental setting or baseline, in accordance with

typical practices for conducting environmental impact analyses. Differences between the estimates for the projected use of the 2021 NWPs in the 2021 national decision documents and the estimated use of the 2021 NWPs in the 2026 national decision documents are based on reliable data and resources available at the time of the analysis. Reasons for changes in the data include, but are not limited to, changes in an industry or economy, improved avoidance and minimization, the exercise of the district engineer's discretion under paragraph (d) of general condition 23 (Mitigation), improvements in available compensatory mitigation, or changes in data collection.

A few commenters said the decision documents imply that the district commander completes an activity-specific NEPA analysis. Many commenters stated that the Corps inappropriately tiers the NEPA analysis.

The Corps Headquarters has prepared national decision documents for each NWP to address the environmental effects of the reissuance of each NWP in accordance with NEPA. Since the Corps fulfills the requirements of NEPA when it issues its national decision document for the reissuance of that NWP, no additional NEPA analysis or documentation is completed for case-specific activities authorized by that NWP. The supplemental documentation prepared by the division engineer and the documentation prepared by the district engineer for NWP-specific activities do not contain a NEPA analysis.

Many commenters stated that the Corps' alternative analysis inappropriately assumes that individual permits would be less protective than the NWP. Many commenters oppose reliance on potential mitigation to offset effects, contrary to NEPA. One commenter stated that the Corps cannot rely on compensatory mitigation to offset impacts without monitoring the completion or success of the compensatory mitigation.

The NWPs incentivize project proponents to design their project to minimize losses of waters to qualify for NWP authorization rather than having to apply for individual permits for authorization that results in larger losses of waters. For example, in FY 2023, 74 percent of the NWP verifications involving discharges of dredged or fill material into waters of the United States had impacts of less than $\frac{1}{10}$ -acre, well below the $\frac{1}{2}$ -acre limit in numerous NWPs. The use of compensatory mitigation and other forms of mitigation to ensure that activities authorized by

an NWP result in no more than minimal adverse environmental effects is codified in the Corps' NWP regulations at 33 CFR 330.1(e)(3). Compensatory mitigation projects required for activities authorized by the NWPs must comply with the Corps' regulations at 33 CFR part 332, which require monitoring and other actions to ensure that the required compensatory mitigation successfully offsets the permitted wetland or stream losses. General condition 30 (Compliance Certification) requires the permittee to certify that the authorized activity and any required compensatory mitigation is complete.

B. Compliance With 404(e) of the Clean Water Act

The NWPs are issued in accordance with Section 404(e) of the CWA and 33 CFR part 330. These NWPs authorize categories of activities that are similar in nature. The similar in nature requirement does not mean that activities authorized by an NWP must be identical to each other. The phrase "categories of activities that are similar in nature", "as determined by the Secretary," is best read to confer broad discretion on the Secretary to facilitate the practical implementation of this general permit program.

Nationwide permits, as well as other general permits, are intended to reduce administrative burdens on the Corps and the regulated public while maintaining environmental protection, by efficiently authorizing activities that have no more than minimal adverse environmental effects, consistent with Congressional intent in the 1977 amendments to the Federal Water Pollution Control Act. The NWPs incentivize project proponents to minimize impacts to jurisdictional waters and wetlands to qualify for NWP authorization instead of having to apply for individual permits. Keeping the number of NWPs manageable is a key component for making the NWPs protective of the environment and streamlining the authorization process for those general categories of activities that have no more than minimal individual and cumulative adverse environmental effects.

These 404(b)(1) Guidelines analyses in the national decision documents were conducted in accordance with 40 CFR part 230.7. The 404(b)(1) Guidelines analyses in the national decision documents also include cumulative effects analyses done in accordance with 40 CFR 230.7(b) and 230.11(g).

Before the 2026 NWPs go into effect, division engineers will issue supplemental documents to evaluate

environmental effects on a regional basis (*e.g.*, a state or Corps district) and to determine whether regional conditions are necessary to ensure that the NWPs will result in no more than minimal individual and cumulative adverse environmental effects on a regional basis. The supplemental documents are prepared by Corps districts but must be approved and issued by the appropriate division engineer, since the NWP regulations at 33 CFR 330.5(c) state that the division engineer has the authority to modify, suspend, or revoke NWP authorizations in a specific geographic area within his or her division. For some Corps districts, their geographic area of responsibility covers an entire state. For other Corps districts, their geographic area of responsibility may be based on watershed boundaries.

For some states, there may be more than one Corps district responsible for implementing the Corps' Regulatory Program, including the NWP program. In states with more than one Corps district, there is a lead Corps district responsible for preparing the supplemental documents for all of the NWPs. The supplemental documents will discuss regional conditions imposed by division engineers to protect the aquatic environment, compliance with other applicable federal laws, and ensure that any adverse environmental effects resulting from NWP activities in that region will be no more than minimal both individually and cumulatively.

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

If the NWP is not suspended or revoked in a state or a Corps district, the supplemental document includes a certification that the use of the NWP in that district, with any applicable

regional conditions, will result in no more than minimal cumulative adverse environmental effects.

After the NWPs are issued or reissued and go into effect, district engineers will monitor the use of these NWPs on a regional basis (*e.g.*, within a watershed, county, state, Corps district or other appropriate geographic area), to ensure that the use of a particular NWP is not resulting in more than minimal cumulative adverse environmental effects. The Corps' staff that evaluate NWP PCNs often work in a particular geographic area and have an understanding of the activities that have been authorized by NWPs, regional general permits, and individual permits over time, as well as the current environmental setting for that geographic area. If the Corps district staff believe that the use of an NWP in that geographic region may be approaching a threshold above which the cumulative adverse environmental effects for that category of activities may be more than minimal, the district engineer may either make a recommendation to the division engineer to modify, suspend, or revoke the NWP authorization in that geographic region in accordance with the procedures in 33 CFR 330.5(c). Alternatively, under the procedures at 33 CFR 330.5(d), the district engineer may also modify, suspend, or revoke NWP authorizations on a case-by-case basis to ensure that the NWP does not authorize activities that result in more than minimal cumulative adverse environmental effects.

The various terms and conditions of these NWPs, including the NWP regulations at 33 CFR 330.1(d) and 330.4(e), allow district engineers to exercise discretionary authority to modify, suspend, or revoke NWP authorizations or to require individual permits, and ensure compliance with Section 404(e) of the CWA. For each NWP that may authorize discharges of dredged or fill material into waters of the United States, the national decision documents prepared by Corps Headquarters include a 404(b)(1) Guidelines analysis. The supplemental documents prepared by division engineers will discuss regional circumstances, to provide the basis for division engineers to add regional conditions to the NWPs to address relevant factors in the 404(b)(1) Guidelines.

One commenter stated that the decision document should include the NEPA analysis, the 404(b)(1) guidelines analysis, the public interest review, and the discussion of reasonably foreseeable effects. Many commenters stated that

the NWP's do not comply with the 404(b)(1) guidelines. Many commenters stated that the proposal is not compliant with the regulations that govern NWP's nor with the CWA. Many commenters stated that the Corps has failed to justify that NWP's have no more than minimal adverse effects on the environment individually and cumulatively.

The national decision documents for each NWP include a NEPA analysis and a public interest review, including a discussion of reasonably foreseeable effects. For each NWP that authorizes discharges of dredged or fill material into waters of the United States, the decision document contains a 404(b)(1) Guidelines analysis. Section 230.7(b) of the 404(b)(1) Guidelines requires a "written evaluation of the potential individual and cumulative impacts of the categories of activities to be regulated under the general permit." When we issue the NWP's, we fully comply with the requirements of the 404(b)(1) Guidelines at 40 CFR 230.7, which govern the issuance of general permits under Section 404 of the CWA. Since the required evaluation must be completed before the NWP is issued, the analysis is predictive in nature. The estimates of potential individual and cumulative impacts, as well as the projected compensatory mitigation that will be required, are based on the data from the Corps district offices, including the past use of NWP's.

In our decision documents, we also used reliable national data on the status of wetlands and other aquatic habitats in the United States, and the foreseeable impacts of the NWP's on those waters. In the national decision document, the Corps addressed the elements required for a CWA Section 404(b)(1) Guidelines analysis for the issuance of a general permit, including a cumulative effects analysis conducted in accordance with 40 CFR 230.7(b)(3) and concluded that the reissuance of the NWP's would not cause or contribute to significant degradation of the aquatic environment. The Corps has determined that the NWP's would cause no more than minimal adverse effects to the environment, both individually and cumulatively.

Many commenters stated that the NWP's have authorized activities that caused cumulative effects to ecosystems and waterways. Many commenters said that the Corps has not completed any meaningful analysis of effects of the NWP's. A few commenters stated that the cumulative effects analysis is appropriate. Many commenters stated that the Corps defers cumulative effects analysis to the activity-specific analysis completed by the district engineer. One

commenter stated that the Corps has not provided a cumulative effects analysis since 2001. Many commenters stated that the Corps cannot complete its cumulative impact analysis in reliance on mitigation that is imposed by the district engineer after case-specific review of each NWP activity. Several commenters stated that the cumulative impacts do not include temporary impacts. One commenter stated that the district engineer should not have the discretion to issue waivers because analysis has not been conducted to determine if the cumulative impacts are minimal.

Section 404(e) of the CWA recognizes that activities authorized by general permits, including NWP's, will result in adverse environmental impacts. One requirement of Section 404(e) of the CWA is that general permits, including NWP's, authorize only those activities that result in no more than minimal adverse environmental effects, individually and cumulatively. The terms and conditions of the NWP's, such as acreage limits and the mitigation measures in some of the NWP general conditions, are imposed to ensure that the NWP's authorize only those activities that result in no more than minimal adverse effects on the aquatic environment and other public interest review factors. The national decision documents consider the reasonably foreseeable impacts compared to the baseline condition, estimating the number of times the NWP is anticipated to be used during the five-year period it will be in effect, the estimated impacts to jurisdictional waters and wetlands, and the compensatory mitigation required to offset losses of jurisdictional waters and wetlands. The national decision documents prepared for this final action provide the analysis to support the Corps' determination that the NWP's will cause no more than minimal adverse environmental effects, both individually and cumulatively. Division engineers prepare supplemental documentation which provide the cumulative effects analysis for a region, which is usually a state or Corps district. When a district engineer issues a verification letter in response to a PCN or a voluntary request for an NWP verification, the district engineer prepares a brief document that explains the decision that the proposed NWP activity, after considering permit conditions such as mitigation requirements, will result in no more than minimal individual and cumulative adverse environmental effects.

The Corps Regulatory Program's automated information system (ORM)

tracks NWP verifications issued, regional general permit verifications issued, and individual permits issued, including the types of activities authorized by those general permits and individual permits and the Corps uses this information to inform our cumulative effects analysis. The Corps, including divisions and districts, will use available information, which may include ORM data, to complete the cumulative effects analysis.

For some NWP's, when submitting a PCN, an applicant may request a waiver for a particular limit specified in the NWP's terms and conditions. If the applicant requests a waiver of an NWP limit and the district engineer determines, after coordinating with the resource agencies under paragraph (d) of NWP general condition 32 (Pre-Construction Notification), that the proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects, the district engineer may grant such a waiver. Following the conclusion of the district engineer's review of a PCN, he or she prepares an official, publicly available document. This document discusses the district engineer's findings as to whether a proposed NWP activity qualifies for NWP authorization, including compliance with all applicable terms and conditions, and the rationale for any waivers granted, and activity-specific conditions needed to ensure that the activity being authorized by the NWP will have no more than minimal individual and cumulative adverse environmental effects and will not be contrary to the public interest (see 33 CFR 330.6(a)(3)(i)). We have retained the district engineer's discretion to waive particular limits when he or she determines that the authorized activity will cause no more than minimal adverse environmental effects.

Many commenters suggested that Corps districts publish permit, impact, and mitigation data, and other permit-related information on Corps district websites to provide more detail about cumulative impacts at a regional level. Many commenters stated that the Corps' cumulative impacts tool should be publicly available. One commenter stated that the Corps should make all project records available without a Freedom of Information Act (FOIA) request.

Data which is relied upon to complete the NEPA analysis, 404(b)(1) Guidelines analysis, and public interest review are published in the national decision documents. This data includes the estimated annual use of NWP's, estimated annual impacts authorized by

NWPs and estimated annual required compensatory mitigation. This data is published in this final action and in the national decision documents. The Corps makes information on other permit types available on our website. Congress established the Freedom of Information Act as the means for the public to access records from federal agencies, unless the information is exempt from release.

Many commenters stated that the NWPs do not authorize categories of activities that are similar in nature. Many commenters stated that the NWPs authorize activities that are similar in nature.

Section 404(e) of the CWA does not specify how broadly or narrowly the Corps has to identify any category of activities for the issuance of a general permit, including the NWPs. Section 404(e) only requires that the activities in that category are similar in nature. Likewise, under the Corps' definition of general permit in its Section 10 regulations at 33 CFR 322.2(f), there are no standards regarding how broad or narrow the category has to be. We believe that the "categories of activities that are similar in nature" requirement in CWA Section 404(e) is to be interpreted broadly, for practical implementation of this general permit program.

Many commenters stated that the NWPs are contrary to the public interest. Many commenters stated that the Corps disregards impacts of activities authorized by the NWPs which occur beyond the aquatic environment or outside the Corps' jurisdiction.

The Corps prepared a national decision document for each NWP which includes a public interest review. If a proposed NWP authorizes discharges of dredged or fill material into waters of the United States, the decision document also includes an analysis conducted pursuant to the CWA Section 404(b)(1), in particular 40 CFR part 230.7. These decision documents evaluate, from a national perspective, the public interest factors and the environmental effects of each NWP. The final national decision documents conclude that the reissuance of the NWPs is not contrary to the public interest. The Corps evaluates reasonably foreseeable impacts of the actions within DA jurisdiction. The Corps does not have the authority to take actions to control potential impacts that may occur which are far attenuated from the action subject to DA jurisdiction.

C. Compliance With the Endangered Species Act

The Corps has carefully evaluated its Endangered Species Act (ESA) obligations for the issuance of these NWPs. The Corps has determined that finalizing this action issuing these NWPs has no effect on any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) due to the terms and requirements of 33 CFR 330.4(f)(2) and general condition 18. The basis for this determination is outlined in an October 15, 2012, letter from the Corps' Chief Counsel to the FWS and NMFS (the Services), as further described below. The no effect determination is further supported by a biological assessment prepared by the Corps to support this rulemaking action.

Requirements of the ESA

Section 7 of ESA requires each federal agency to insure, through consultation with the Services, that "any action authorized, funded, or carried out" by that agency is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat (16 U.S.C. 1536(a)(2)). Section 7 consultation is a procedural process. This process for satisfying this procedural requirement is set out in regulation at 50 CFR part 402. Those regulations require the action agency to consult with the appropriate Service when the action "may affect" listed species or critical habitat (50 CFR 402.14). The regulations also require an action agency to confer with the appropriate Service if the action is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat (50 CFR 402.10(a)). If the action agency determines that the action would have no effect on listed species or designated critical habitat, then no consultation or conference is necessary (Section 3.5 of Section 7 Consultation Handbook, March 1998).

Requirements and Limitations Imposed by General Condition 18 and 33 CFR 330.4(f)

The issuance or reissuance of the NWPs by the Chief of Engineers imposes express limitations on activities authorized by the NWPs. These limitations are imposed by the NWP terms and conditions, including the general conditions that apply to all NWPs regardless of whether PCN is required. With respect to listed species and critical habitat, general condition 18

expressly prohibits any activity "which 'may affect' a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed." General condition 18 also states that if an activity "might affect" a listed species (or a species proposed for listing) or critical habitat (or critical habitat proposed for such designation) or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation, a non-federal applicant must submit a PCN and "shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized."

Similarly, 33 CFR 330.4(f)(2) imposes a PCN requirement for proposed NWP activities by non-federal permittees where listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or are in the vicinity of the proposed NWP activity. Section 330.4(f)(2) also prohibits those permittees from beginning the NWP activity until notified by the district engineer that the requirements of the ESA have been satisfied, and that the activity is authorized. Permit applicants that are federal agencies should follow their own requirements for complying with the ESA (see 33 CFR 330.4(f)(1)), and if their proposed NWP activities require PCNs, then their PCNs must include documentation demonstrating their compliance with the ESA (see paragraph (b)(7) of general condition 32).

General condition 18 and 33 CFR 330.4(f) establish a more stringent threshold than the threshold set forth in the Services' ESA Section 7 regulations for initiation of Section 7 consultation. While Section 7 consultation must be initiated for any activity that "may affect" listed species or critical habitat, for non-federal permittees general condition 18 requires submission of a PCN to the Corps if "any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat" and prohibits work until "notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized." (See paragraph (c) of general condition 18.) The PCN must "include the name(s) of the endangered or threatened species (or species proposed for listing) that might

be affected by the proposed work or that utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed work.” (See paragraph (b)(7) of general condition 32.)

In other words, those regulations and general condition 18 require non-federal permittees to submit PCNs if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation. The district engineer then evaluates the PCN and makes an effect determination for the proposed NWP activity for the purposes of ESA Section 7. The requirements and limitations imposed by the NWP regulations at 33 CFR 330.4(f) and NWP general condition 18 (Endangered Species) mean that the promulgation of these NWPs by the Chief of Engineers do not have any effect on listed (or proposed) species or designated (or proposed) critical habitat.

The text of paragraph (e) of general condition 18 is clear: an NWP does not authorize the “take” of an endangered or threatened species. Activities authorized by an NWP may not result in “take” of a listed species unless the district engineer or other federal agency completes consultation, receives an incidental take statement from the FWS or NMFS and incorporates reasonable and prudent measures as conditions to the NWP in the NWP verification.

Paragraph (e) of general condition 18 also states that a separate authorization (e.g., an ESA Section 10 permit or a biological opinion with an “incidental take statement”) is required to take a listed species. In addition, paragraph (a) of general condition 18 states that no activity is authorized by NWP which is likely to “directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation” or “which will directly or indirectly destroy or adversely modify designated critical habitat or critical habitat proposed for such designation.” Such activities would require district engineers to exercise their discretionary authority and subject the proposed activity to the individual permit review process, because an activity that would jeopardize the continued existence of a listed species, or a species proposed for listing, or that would destroy or adversely modify designated critical habitat or critical habitat proposed for such designation would not result in no more than minimal adverse

environmental effects and thus cannot be authorized by an NWP.

The Corps’ NWP regulations at 33 CFR 330.1(c) state that an “activity is authorized under an NWP only if that activity and the permittee satisfy all of the NWP’s terms and conditions.” Thus, if a project proponent moves forward with an activity that “might affect” an ESA listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) without complying with the PCN requirement or other requirements of general condition 18, the activity is not authorized under Section 404 of the CWA or Section 10 RHA. In this case, the project proponent could be subject to enforcement action and penalties under 33 CFR 326. In addition, if the unauthorized activity results in a “take” of listed species as defined by the ESA and its implementing regulations, then the person conducting that activity could be subject to penalties, enforcement actions, and other actions by the FWS or NMFS under Section 11 of the ESA.

In summary, the issuance or reissuance of NWPs has “no effect” on listed species or critical habitat because (1) no NWP can or does authorize an activity that may affect a listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) absent an activity-specific ESA Section 7 consultation, conference, or an applicable regional programmatic ESA Section 7 consultation, and because (2) any activity that may affect listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) must undergo an activity-specific consultation, conference, or be in compliance with a regional programmatic ESA Section 7 consultation before the district engineer can verify that the activity is authorized by an NWP. Accordingly, the action being “authorized” by the Corps (i.e., the issuance or re-issuance of the NWPs themselves) has no effect on listed species or critical habitat.

Chief Counsel’s Letter Explaining the Basis for the No Effect Determination

On October 15, 2012, the Chief Counsel for the Corps sent a letter to the Services clarifying the Corps’ legal position regarding compliance with Section 7 of the ESA for the NWPs. That letter explained that the issuance or reissuance of the NWPs, along with compliance with ESA Section 7 through NWP general condition 18 (which applies to every NWP, and which relates to endangered and threatened species)

and 33 CFR 330.4(f), results in “no effect” to listed species or critical habitat, and therefore the reissuance/issuance action itself does not require ESA Section 7 consultation. Although the reissuance/issuance of the NWPs itself has no effect on listed species or their critical habitat and thus requires no ESA Section 7 consultation, the terms and conditions of the NWPs, including general condition 18 and 33 CFR 330.4(f), ensure that ESA consultation will take place on an activity-specific basis wherever appropriate at the field level of the Corps, and the Services. The principles discussed in the Corps’ October 15, 2012, letter apply to this issuance/reissuance of NWPs.

Although section 7 has not been amended, the Services have amended the regulations implementing Section 7 of ESA (50 CFR part 402) several times since the 2012 Chief Counsel letter was written. Those changes in regulation do not affect the analysis and conclusion reached in the letter.

Revisions made in in 2015 (80 FR 26832) defined two types of programmatic ESA Section 7 consultations and discussed the circumstances under which providing an incidental take statement with a biological opinion for a programmatic Section 7 consultation is appropriate. The two types of programmatic Section 7 consultations are: framework programmatic actions and mixed programmatic actions. While programmatic consultations are designed to cover large-scale programmatic actions, they are not required or appropriate for all national programmatic actions. In some cases, it is more appropriate to address consultation at a regional or local level. Indeed, in the preamble to the 2015 final rule, the Services identified the Corps’ NWP program as an example of a framework action at a national scale that can address ESA Section 7 consultation requirements at a later time as appropriate, as specific activities are authorized, funded, or carried out (see 80 FR 26835). In their 2015 final rule, the Services also stated that this regulatory change does not imply that Section 7 consultation is required for a framework programmatic action that has no effect on listed species or critical habitat (see 80 FR 26835).

As discussed in this final action, the NWP program has been structured, through the requirements of NWP general condition 18 and 33 CFR 330.4(f), to focus ESA Section 7 compliance at the activity-specific and regional scales. Each year, Corps districts initiate thousands of formal

and informal ESA Section 7 consultations for specific NWP activities (see below), and many Corps districts have worked with the Services to develop formal and informal regional programmatic consultations.

Additional revision made in 2019 (84 FR 44976) and 2024 (89 FR 24268) modified definitions and elements of the consultation process. These amendments changed how agencies determine the “effects of the action” that must be considered when making an effects determination or reaching a “no effect” conclusion. However, this change does not alter the analysis in the 2012 Chief Counsel letter nor in the operation of NWP general condition 18 and 33 CFR 330.4(f) because general condition 18 covers any direct or indirect effect and explicitly incorporates the current definition of “effects of the action” from 50 CFR 402.02.

Biological Assessment Making a “No Effect” Determination

Although not required by the statute, the Corps has prepared a biological assessment for this rulemaking action. The biological assessment includes the list of active and pending regional programmatic ESA Section 7 consultations that can be used for NWP activities. The biological assessment concludes that the issuance or reissuance of NWPs has “no effect” on listed species and designated critical habitat and does not require ESA Section 7 consultation. This conclusion was reached because no activities authorized by any NWPs “may affect” listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) without first completing an activity-specific ESA Section 7 consultation (or conference) with the Services, as required by general condition 18 and 33 CFR 330.4(f). A copy of the biological assessment is available at: <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/> (at the link titled “Biological Assessment for the 2026 Nationwide Permits”).

The Corps recognizes that this procedural process is different than the programmatic ESA Section 7 consultations the Corps conducted for the 2007 and 2012 NWPs as voluntary consultations. The voluntary programmatic consultation conducted with the NMFS for the 2012 NWPs resulted in a biological opinion issued on February 15, 2012, which was replaced by a new biological opinion issued on November 24, 2014. A new

biological opinion was issued by NMFS after the proposed action was modified and triggered re-initiation of that programmatic consultation. The programmatic consultation on the 2012 NWPs with the FWS did not result in a biological opinion. Those consultations were not mandated by section 7 of the ESA. Rather, the Corps voluntarily consulted with the Services to further bolster the protectiveness of the NWPs generally. The Services have since confirmed that it can be appropriate to address ESA Section 7 procedural requirements at a later time, rather than at the initial national framework action level (see 80 FR 26835). For the 2017 or 2021 NWPs, Corps Headquarters did not request a national programmatic consultation, nor did the Directors. For the 2021 NWPs, Corps Headquarters prepared a biological assessment concluding that the issuance or reissuance of NWPs through the rulemaking process had no effect on listed species and designated critical habitat. Neither the Director of FWS nor the Director of NMFS has requested the Corps to enter into consultation for this action, as they are authorized to do under 50 CFR 402.12(a) if they identify any action of an agency that may affect listed species or critical habitat and for which there has been no consultation.

Regional and Action-Specific Implementation

During the process for developing regional conditions, Corps districts coordinate or consult with FWS and/or NMFS regional or field offices to identify regional conditions to protect listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) and ensure that an NWP for a specific activity only authorizes no more than minimal individual and cumulative adverse environmental effects. Regional conditions must comply with the Corps’ regulations at 33 CFR 325.4 for adding permit conditions to DA authorizations. Division engineers decide whether suggested regional conditions identified during this coordination are appropriate for the NWPs. Such regional conditions may add PCN requirements to one or more NWPs in areas inhabited by listed species (or species proposed for listing) or where designated critical habitat (or habitat proposed for such designation) occurs. Regional conditions may also establish time-of-year restrictions when no NWP activity can take place to ensure that individuals of listed species are not adversely affected by such activities. Furthermore, after review of a PCN and conclusion of any ESA Section

7 consultation, a district engineer can add activity-specific conditions to an NWP verification to ensure the effects of the activity on listed species, species proposed for listing, critical habitat, or habitat proposed for such designation, are no more than minimal.

Through regional consultations, local initiatives, or other cooperative efforts, district engineers consider additional information and measures to ensure protection of listed species and critical habitat, consistent with the requirements established by general condition 18 (which apply to all uses of all NWPs), and other provisions of the Corps’ regulations. Corps district offices meet with local representatives of the Services to establish or modify existing procedures, where necessary, to ensure that the Corps has the latest information regarding the existence and location of any threatened or endangered species or their critical habitat. Corps districts can also establish, through local procedures or other means such as regional programmatic consultations or standard local operating procedures, additional safeguards that ensure that NWP activities will not jeopardize any threatened and endangered species or result in the destruction or adverse modification of designated critical habitat.

The Corps collects data on all individual permit applications, all NWP PCNs, all voluntary requests for NWP verifications where the NWP or general conditions do not require PCNs, and all verifications of activities authorized by regional general permits. For all written authorizations issued by the Corps, the collected data includes authorized impacts and required compensatory mitigation, as well as information on all consultations conducted under Section 7 of the ESA. Every year, the Corps evaluates approximately 25,000 NWP PCNs and voluntary requests for NWP verifications for activities that do not require PCNs and provides written verifications for those activities when district engineers determine those activities result in no more than minimal adverse environmental effects. During the review of a PCN, district engineers assess potential impacts to listed species and critical habitat and conduct Section 7 consultations whenever they determine proposed NWP activities “may affect” listed species or critical habitat. District engineers will exercise discretionary authority and require individual permits when proposed NWP activities will result in more than minimal adverse environmental effects.

Each year, the Corps conducts thousands of ESA Section 7

consultations with the Services for activities authorized by NWP. In FY 2024 (October 1, 2023 to September 30, 2024), Corps districts conducted 217 formal consultations and 2,647 informal consultations under ESA Section 7 for NWP PCNs and verification requests. During that time period, the Corps also used regional programmatic consultations for 4,667 NWP PCNs and verification requests to comply with ESA Section 7. Therefore, during FY 2024 more than 7,500 ESA Section 7 consultation actions were completed for NWP PCNs or voluntary verification requests where either formal or informal consultations were conducted or existing regional programmatic ESA Section 7 consultations (formal and informal) were utilized to comply with ESA Section 7.

For a linear project authorized by NWP 12, 14, 57, or 58, where the district engineer determines that one or more crossings of waters of the United States that require Corps authorization “may affect” listed species or designated critical habitat, the district engineer initiates a single Section 7 consultation with the FWS and/or NMFS for all of those crossings that she or he determines “may affect” listed species or designated critical habitat. The number of Section 7 consultations provided above represents the number of NWP PCNs that required some form of ESA Section 7 consultation, not the number of single and complete projects authorized by NWP that may be included in a single PCN. A single NWP PCN may include more than one single and complete project, especially if it is for a linear project such as a utility line or road with multiple separate and distant crossings of jurisdictional waters and wetlands from its point of origin to its terminal point.

Section 7 consultation is only required when a Corps district makes a “may affect” determination. Regional conditions, standard local operating procedures for endangered species (*i.e.*, SLOPES), and regional programmatic consultations protect listed species and critical habitat and tailor the NWP program to address specific species, their habitats, and the stressors that affect those species.

This layered approach of implementing successively more specific protections for listed species and designated critical habitat facilitates the efficient permitting of those activities that could not possibly affect those protected resources while ensuring that activities that might affect those resources are appropriately evaluated at the activity-specific level.

Response to Comments

The Corps received numerous comments regarding compliance with the Endangered Species Act for both the rulemaking process for issuing, reissuing, and modifying the NWP by Corps Headquarters, and compliance for specific activities authorized by NWP. Comments concerning hypothetical specific activities authorized by these NWP is beyond the scope of this rulemaking.

Many commenters stated that the reissuance of the NWP violate the ESA because the Corps did not complete programmatic Section 7 consultation. Many commenters stated that programmatic consultation is necessary in order to consider the cumulative effects of all activities authorized by NWP on protected species. Many commenters stated the reissuance of the NWP result in adverse effects to listed species.

One commenter opposed the authorization of activities in critical habitat. Many commenters support the Corps’ determination that the reissuance of the NWP will have “no effect.” One commenter stated that the Corps should request written concurrence from the Services on the determination that no programmatic consultation is required. Many commenters stated that the Corps cannot rely on general condition 18 to satisfy the requirements of the ESA because the Corps has authorized activities using an NWP for case-specific activities without completing consultation.

The NWP issuance or reissuance has no effect on listed species or critical habitat and any proposed NWP activity that “may affect” listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) will undergo an activity-specific ESA Section 7 consultation, conference, or an applicable regional programmatic ESA Section 7 consultation therefore there is no requirement that the Corps undertake programmatic consultation for the NWP program. Regional programmatic consultations may be conducted voluntarily by Corps districts and regional or local offices of the FWS and/or NMFS to tailor regional conditions and procedures to ensure the “might affect” threshold is implemented consistently and effectively.

The only activities that potentially could be immediately authorized by NWP, assuming they meet all other applicable NWP conditions, are activities that would have “no effect” on listed species or designated critical habitat within the meaning of Section 7

of the ESA and its implementing regulations at 50 CFR part 402. In accordance with general condition 18, (Endangered Species) non-federal prospective permittees may not begin work until the district engineer has completed consultation with the Services for activities that “may affect” listed species or critical habitat. Federal permittees must follow their own regulations for complying with Section 7 of the ESA. Activities which will jeopardize listed species (or species proposed for listing) or cause adverse modification to critical habitat (or habitat proposed for such designation) are not authorized by any NWP.

D. Compliance With Section 106 of the National Historic Preservation Act

The NWP regulations at 33 CFR 330.4(g) and general condition 20 (Historic Properties) ensure that all activities authorized by NWP 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 established the “might have the potential to cause effects” criterion under its own regulatory authorities in paragraph (c) general condition 20 to require PCNs for those activities to provide an additional layer of protection for cultural resource values. Upon receipt of the PCN, the district engineer will evaluate the proposed NWP activity and make a threshold determination under 36 CFR 800.3(a)(1) whether the activity has no potential to cause effects to historic properties or whether it has potential to cause effects to historic properties and thus require NHPA 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 an NWP until either (1) the Corps district makes a “no potential to cause effects” determination or (2) 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, the district engineer will notify the non-federal applicant and the

activity is not authorized by an 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 an NWP. In such situations, it is an unauthorized activity and the Corps district will determine an appropriate course of action to address the unauthorized activity under its regulations at 33 CFR 326.

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 an 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 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 preconstruction notification is required. With respect to historic properties, general condition 20 expressly prohibits reliance on an NWP authorization for

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 NHPA Section 106 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 the general condition 20 (Historic Properties)).

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 NHPA Section 106 consultation (unless that activity is covered under a programmatic agreement) before the district engineer can verify that the activity is authorized by an NWP, the issuance or reissuance of NWPs has “no potential to cause effects” on historic properties. Accordingly, the action being “authorized” by the Corps, which is the issuance or re-issuance of the NWPs by Corps Headquarters, has no potential to cause effects on historic properties.

To help ensure protection of historic properties general condition 20 establishes an additional layer of protection for cultural resource values occurring prior to any later threshold determination set forth in the Advisory Council’s NHPA Section 106 regulations for initiation of Section 106 consultation. Specifically, while NHPA Section 106 consultation must be initiated for any activity that “has the potential to cause effects to historic properties, assuming such historic properties were present,” for non-federal permittees general condition 20 requires submission by the non-Federal permittee of a PCN to the Corps preceding any assessment under Section 106, 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 activity in reliance upon an NWP “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 (d) 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, Pre-Construction Notification.)

In emergency situations, consistent with 33 CFR 325.2(e)(4), 33 CFR 325 Appendix C, paragraph 14, and 36 CFR 800.12 if an activity has the potential to cause effects to historic properties, the district engineer will make reasonable efforts to obtain comments from the State Historic Preservation Officer and the Advisory Council on Historic Preservation. The district engineer will comply with the provisions of 33 CFR 325 Appendix C 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, “to the extent that time and the emergency situation allows.”

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) for NWP activities undertaken by non-federal permittees. 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.

One commenter opposes the reissuance of the NWP's citing the lack of consultation with SHPOs, THPOs, Tribes, and other consulting parties. Many commenters support the development of a programmatic agreement for all general permits.

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) for NWP activities undertaken by non-federal permittees. Such regional conditions can add PCN requirements to one or more NWP's 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 NWP's), and other provisions of the Corps' regulations and guidance ensure full compliance with NHPA Section 106.

Many commenters stated that the Corps cannot use Appendix C to comply with Section 106 of the NHPA. A few commenters supported the Corps' reliance on Appendix C. One commenter stated that the Corps does not have the authority to promulgate Section 106 procedures codified in general condition 20 and at 33 CFR 330.4(g).

Section 110(a)(2)(E)(i) of the NHPA and 36 CFR 14(a) states that federal agencies can develop their own procedures for complying with section 106 as long as those procedures are consistent with the regulations issued by the Advisory Council on Historic Preservation. Neither of those provisions require ACHP to approve program alternatives. The Corps' regulations for complying with Section 106 of the NHPA are found at Appendix C to 33 CFR part 325. Appendix C remains in effect as a counterpart regulation to 36 CFR part 800, and no federal court has invalidated Appendix C. The Corps continues to use Appendix C and the 2005 and 2007 interim guidance, in addition to 36 CFR 800, to comply with Section 106 of the NHPA.

Section 404(e) of the CWA gives the Corps the authority to develop NWP's. The Corps has issued or reissued the NWP's, including general condition 20

and the regulations at 33 CFR 330.4 in accordance with the Administrative Procedures Act in accordance with the authority delegated to the Chief of Engineers through Section 404 of the CWA and Section 10 of the RHA. General condition 20 and/or 33 CFR 330.4 were not developed as alternative procedures to 36 CFR 800, rather they set the requirements for the NWP program to comply with Section 106 of the NHPA.

Many commenters stated that most NWP's should require a PCN in order for the district engineer to review the activity for potential to effect historic properties.

Non-federal permittees must submit a PCN if the NWP activity "might have the potential to cause effects on 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 threshold that triggers submittal of a PCN under paragraph (c) of general condition 20 is that the activity "might have the potential to cause effects." The actions by the non-federal permittee to submit a PCN occur before the Section 106 process begins. Upon receipt of a PCN, the district engineer will determine if there is potential to cause effects, and whether he or she has further obligations under Section 106 of NHPA.

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

The NWP Program's compliance with the essential fish habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act is achieved through EFH consultations between Corps districts and NMFS regional offices. This approach continues the EFH Conservation Recommendations provided by NMFS Headquarters to Corps Headquarters in 1999 for the NWP Program. Corps districts that have EFH designated within their geographic areas of responsibility will coordinate with NMFS regional offices, to the extent necessary, to develop NWP regional conditions that conserve EFH, are consistent with NMFS regional EFH Conservation Recommendations, and are approved by division engineers under the procedures at 33 CFR 330.5(c). District engineers may also add conditions to NWP authorizations to address EFH Conservation Recommendations made by NMFS during activity-specific EFH

consultations. Corps districts will conduct consultations in accordance with the EFH consultation regulations at 50 CFR 600.920.

One commenter said that there will be cumulative impacts to EFH as a result of impacts authorized by NWP's. In those Corps districts where EFH has been designated, district engineers review PCNs for proposed NWP activities to determine whether those proposed activities may adversely affect EFH. If the district engineer determines a proposed NWP activity may adversely affect EFH, she or he initiates EFH consultation with the NMFS. Division engineers can add PCN requirements via regional conditions to those NWP's that do not require PCNs for all activities to ensure that EFH consultation is conducted for proposed activities that may adversely affect EFH.

F. Section 401 of the Clean Water Act

A water quality certification granted by a state, authorized tribe, or EPA (certifying authority), or a waiver thereof, is required by Section 401 of the CWA, for an activity authorized by NWP which may result in a discharge from a point source into waters of the United States. Water quality certifications (WQC) may be granted without conditions, granted with conditions, denied, or waived for specific NWP's.

Nationwide permits 15, 16, 17, 18, 21, 25, 29, 30, 34, 39, 40, 41, 42, 43, 46, 49, 50, and 59 authorize activities that may result in discharges and therefore 401 WQC or waiver is required for those NWP's. Nationwide permits 3, 4, 5, 6, 7, 12, 13, 14, 19, 20, 22, 23, 27, 31, 32, 33, 36, 37, 38, 44, 45, 48, 51, 52, 53, 54, 57, 58, and 60 authorize various activities, some of which may result in a discharge and require 401 WQC or waiver, and others which may not. Nationwide permits 1, 2, 9, 10, 11, 24, 28, 35, and 55 authorize work or structures which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States and therefore do not require 401 WQC or waiver. However, the final decision of whether WQC is needed for any of the activities authorized by these nine NWP's (NWP's 1, 2, 9, 10, 11, 24, 28, 35, and 55) rests with the certifying authority. In the case of NWP 8, it only authorizes activities seaward of the territorial seas where the CWA does not apply and therefore does not require WQC.

Prior to the issuance of this final action, certifying authorities made their decisions on whether to grant, grant with conditions, deny, or waive WQC for the issuance of the NWP's. If a certifying authority granted WQC or

granted WQC with conditions for the issuance of these NWP, district engineers reviewed the WQCs in accordance with 40 CFR 121.8. If the district engineer determined that any WQC for the issuance of the NWP did not comply with the requirements of 33 U.S.C. 1341 and/or 33 CFR 330.4(c)(2), district engineers declined to rely on the WQC and considered the WQC to be denied. In such cases, the district engineer notified the certifying authority. The conditions in the WQC for the issuance of the NWP became become conditions of the NWP authorization in accordance with Section 401(d) of the CWA and 33 CFR 330.4(c)(2). The 401(a)(2) process occurred per current requirements at 40 CFR 121.12 and 121.13.

If a certifying agency denied WQC for the issuance of an NWP, then the proposed discharges are not authorized by that NWP unless and until a project proponent obtains WQC for the specific discharge from the certifying authority, or a waiver of WQC occurs.

Many commenters supported the reasonable period of time of six months. A few commenters objected to requests to make decisions to grant, waive, or deny water quality based on the 2025 Proposal rather than the final action. One commenter expressed concern that granted water quality certifications may be made invalid by changes to the NWP from the 2025 Proposal to this final action. One commenter requested that district engineers include all conditions from granted water quality certifications in the same manner as regional and general conditions. Some commenters stated that conditions to granted water quality certifications are unlawful and burdensome.

Section 401 of the CWA states that no permit shall be issued until water quality certification has been obtained or waived. Therefore, the water quality certification process must be completed before the final NWP are issued. That process is consistent with the Corps' NWP regulations at 33 CFR 330.4(c)(1), which says that "water quality certification pursuant to Section 401 of the CWA, or waiver thereof, is required prior to the issuance or reissuance of NWP authorizing activities which may result in a discharge into waters of the United States." As discussed above, certifying authorities must act on certification requests before the Corps can issue the final NWP.

The process to request water quality certification for the NWP in this action is consistent with Section 401 of the CWA and EPA's final certification regulation at 40 CFR part 121. Corps districts sent certification requests to

certifying authorities soon after the 2025 Proposal was published in the **Federal Register** (90 FR 26100), in June 2025. As stated in general condition 25 (Water Quality) and reiterated in the Note to Section C. (Nationwide Permit General Conditions) permittees must comply with the conditions of granted water quality certifications. The Corps has limited authority to review conditions to water quality certifications that were granted in accordance with EPA's certification regulation.

After the final NWP are issued and division engineers have approved the final regional conditions for the NWP, Corps districts will issue public notices announcing the final regional conditions for the NWP and the disposition of WQC for the final NWP. The Corps will post copies of these district public notices in the www.regulations.gov docket for this rulemaking action (docket number COE-2025-0002). It is the certifying authorities' responsibility to develop conditions for their WQCs for the issuance of the NWP.

G. Section 307 of the Coastal Zone Management Act (CZMA)

Any state with a federally-approved CZMA program must concur with the Corps' determination that activities authorized by NWP which are within or will have reasonably foreseeable effects on any land or water uses or natural resources of the state's coastal zone, are consistent with the CZMA program to the maximum extent practicable. CZMA consistency concurrences may be issued without conditions, issued with conditions, or denied for specific NWP.

Prior to the issuance of this final action, states made their decisions on whether to concur with or object to the Corps' CZMA consistency determination for the issuance of the NWP. If a state issued a concurrence with conditions for the issuance of these NWP, district engineers reviewed the conditions in those consistency concurrences to determine whether they comply with the Corps' regulations for permit conditions at 33 CFR 330.4(d)(2). If a state objected to the Corps' CZMA consistency determination for the issuance of an NWP, then the activity is not authorized by that NWP unless and until a project proponent obtains a consistency concurrence from the state or a presumption of concurrence occurs.

The Corps' CZMA consistency determination only applied to NWP authorizations for activities that are within, or affect, any land, water uses or natural resources of a State's coastal zone. A state's coastal zone management

plan may identify geographic areas in federal waters on the outer continental shelf, where activities that require federal permits conducted in those areas require consistency certification from the state because they affect any coastal use or resource. In its coastal zone management plan, the state may include an outer continental shelf plan. An outer continental shelf plan is a plan for "the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act" and regulations issued under that Act (see 15 CFR 930.73).

Activities requiring federal permits that are not identified in the state's outer continental shelf plan are considered unlisted activities. If the state wants to review an unlisted activity under the CZMA, then it must notify the applicant and the federal permitting agency that it intends to review the proposed activity. Nationwide permit authorizations for activities that are not within or would not affect a state's coastal zone do not require the Corps' CZMA consistency determinations and thus are not contingent on a State's concurrence with the Corps' consistency determinations.

If a state objects to the Corps' CZMA consistency determination for an NWP, then the affected activities are not authorized by an NWP within that state until a project proponent obtains an individual CZMA consistency concurrence, or sufficient time (*i.e.*, six months) passes after requesting a CZMA consistency concurrence for the applicant to make a presumption of consistency, as provided in 33 CFR 330.4(d)(6). However, when applicants request NWP verifications for activities that require individual consistency concurrences, and the Corps determines that those activities meet the terms and conditions of the NWP, in accordance with 33 CFR 330.6(a)(3)(iii) the Corps will issue provisional NWP notification letters.

A provisional notification letter will contain general and regional conditions as well as any activity-specific conditions the Corps determines are necessary for the NWP authorization. The Corps will notify the applicant that he or she must obtain an activity-specific CZMA consistency concurrence or a presumption of concurrence before he or she is authorized to start work in waters of the United States. That is, NWP authorization will be contingent upon obtaining the necessary CZMA consistency concurrence from the state, or a presumption of concurrence. Anyone wanting to perform such activities where PCN to the Corps is not

required has an affirmative responsibility to present a CZMA consistency determination to the appropriate state agency for concurrence. Upon concurrence with such CZMA consistency determinations by the state, the activity would be authorized by the NWP. This requirement is provided at 33 CFR 330.4(d).

After the final NWPs are issued and division engineers have approved the final regional conditions for the NWPs, Corps districts will issue public notices announcing the final regional conditions for the NWPs and the disposition of CZMA concurrences for the final NWPs. The Corps will post copies of these district public notices in the *www.regulations.gov* docket for this rulemaking action (docket number COE-2025-0002). It is the states' responsibility to develop conditions for their WQCs for the issuance of the NWPs.

After the final NWPs are issued and division engineers have approved the final regional conditions for the NWPs, Corps districts will issue public notices announcing the final regional conditions for the NWPs and the disposition of CZMA concurrences for the final NWPs. The Corps will post copies of these district public notices in the *www.regulations.gov* docket for this rulemaking action (docket number COE-2025-0002). It is the states' responsibility to develop conditions for their WQCs for the issuance of the NWPs.

IV. Economic Impact

The NWPs are expected to increase the number of regulated activities eligible for NWP authorization and reduce the number of regulated activities that require individual permits. The Corps estimates that these NWPs will authorize an additional 123 individual activities each year. Subsequently, 123 fewer activities each year would require individual permits. By authorizing more activities by NWP, this final action will reduce burden for the regulated public primarily in the form of compliance costs. The changes will increase the number of categories of activities authorized by NWP and subsequently reduce the number of activities that require individual permits. By increasing the number of activities that can be authorized by NWPs, the changes will decrease compliance costs for permit applicants since, as discussed below, the compliance costs for obtaining NWP authorization are less than the compliance costs for obtaining individual permits.

In addition, the NWPs incentivizes project proponents to minimize impacts to jurisdictional waters and wetlands in exchange for receiving the required Department of the Army authorization in less time compared to the amount of time required to obtain individual permits. In fiscal year 2024, the average time to receive an NWP verification was 55 days from the date the Corps district received a complete PCN, compared to 253 days to receive a standard individual permit after receipt of a

complete permit application (see table 1.2 of the regulatory impact analysis for this final action, which is available in the *www.regulations.gov* docket (docket number COE-2025-0002)).

As discussed in the Regulatory Impact Analysis for this final action, the Corps estimates that a permit applicant's compliance cost for obtaining NWP authorization in 2024\$ (2024 dollars) ranges from \$5,289 to \$17,631 (The 2001 compliance cost estimates were originally made using 1999\$, which the Corps adjusted to 2024\$ to account for inflation using the GDP deflator approach).⁵ The Corps estimates that a permit applicant's compliance costs for obtaining an individual permit for a proposed activity impacting up to 3 acres of wetland ranges from \$21,157 to \$42,314 in 2024\$. Considering how these NWPs will increase the number of activities authorized by an NWP each year, the Corps estimates that the NWPs authorized by this final action, when compared with the 2021 NWPs, will decrease compliance costs for the regulated public by approximately \$3.5 million per year. The Corps invited comment on the assumptions and methodology used to calculate the compliance costs and burden in general associated with the NWP.

One commenter stated that the Corps should conduct research to update the data on the average costs of NWPs compared to standard permits, as well as costs of compliance. The Corps uses reliable data and resources to prepare the Regulatory Impact Analysis.

Nationwide permit(s)	Changes	Anticipated impacts
• NWP 12	Revised Note recommending permittee provide information to National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS) for charting. Added Note recommending permittee contact USCG about project.	No change in number of NWP authorizations.
• NWP 13	Added new paragraph clarifying that this NWP authorizes nature-based solutions to provide habitat and other ecosystem functions and services with bank stabilization activities. Added a new Note to reference the Corps' regulations about selecting bank stabilization approaches, and examples of the factors to be considered.	May increase number of activities authorized by NWP and decrease number of activities requiring individual permits. (Prior versions of NWP 13 could have authorized bank stabilization activities incorporating nature-based solutions.)
• NWP 15	Added General Bridge Act of 1946 as an applicable statutory authority for bridges authorized by the U.S. Coast Guard.	No change in number of NWP authorizations.
• NWP 23	Modify paragraph (a) to reference sections 106, 109, and 111(1) of NEPA. Modified text to state that any changes to approved categorical exclusions applicable to this NWP will be announced in the Federal Register .	No change in number of NWP authorizations.
• NWP 24	Removed Florida from list of states that have assumed the Clean Water Act Section 404 permit program.	No change in number of NWP authorizations.

⁵ Institute for Water Resources (IWR). 2001. Cost analysis for the 2000 issuance and modification of

nationwide permits. Institute for Water Resources (Alexandria, VA). 29 pp. plus appendices.

Nationwide permit(s)	Changes	Anticipated impacts
• NWP 27	Changed title of NWP. Revised ecological reference requirement to include historic ecosystems, cultural ecosystems, and indigenous and local ecological knowledge. Removed list of examples. Required reports for all activities and modify report requirements. Removed PCN thresholds. Excluded dam removal activities. Added new Note to address delineation requirement when NWP 27 activities require PCNs because of general conditions or regional conditions imposed by division engineers.	Increased number of activities authorized by NWP; decreased number of activities requiring individual permits. Decreased number of PCNs.
• NWP 39	Added “data centers (to include for example, artificial intelligence and machine learning facilities), pharmaceutical manufacturing facilities,” and “storage facilities” to list of examples of commercial facilities authorized by this NWP.	No change in number of NWP authorizations.
• NWP 43	Replaced “green infrastructure” and “low impact development integrated management features” with “nature-based solutions” and provided additional examples of nature-based solutions related to stormwater management.	No change in number of NWP authorizations.
• NWP 45	Modified “Notification” paragraph to extend timeframe within which the permittee must submit a PCN to the district engineer from 12 to 18 months of the date of the damage.	No change in number of NWP authorizations.
• NWP 48	Excluded marine and estuarine waters within Washington State. Revised Note recommending permittee contact USCG about project. Added Note recommending permittee provide information to National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS) for charting.	No change in number of NWP authorizations because commercial shellfish mariculture activities in Washington State are currently being authorized by individual permits.
• NWP 52	Revised Note recommending permittee provide information to National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS) for charting. Added Note recommending permittee contact USCG about project.	No change in number of NWP authorizations.
• NWP 54	Added gravel and cobble to types of substrate used for living shorelines. Clarify that small pocket beaches can be authorized. Add text to NWP to specify that also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to construct the living shoreline activity.	No change in number of NWP authorizations because using cobble and gravel for living shorelines was not prohibited and small portions of a living shoreline could be without living components.
• NWP 55	Revised Note recommending permittee contact USCG about project. Add Note recommending permittee provide information to National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS) for charting.	No change in number of NWP authorizations.
• NWP 57	Revised Note recommending permittee provide information to National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS) for charting. Added Note recommending permittee contact USCG about project.	No change in number of NWP authorizations.
• NWP 58	Revised Note recommending permittee provide information to National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS) for charting. Added Note recommending permittee contact USCG about project. Added clarifying language to correct inconsistency in language about activities which require authorization under Section 10 of RHA.	No change in number of NWP authorizations.
• NWP 60	Issued new NWP to authorize activities to improve passage of fish and other aquatic organisms.	Increased number of activities authorized by NWP; decreased number of activities requiring individual permits.
• General condition 9, Management of Water Flows.	Added “including tidal flows” to clarify that tidal flows should be considered as “expected high flows”.	No change in number of NWP authorizations.
• General condition 11, Equipment.	Added a sentence requiring affected areas to be returned to pre-construction elevations, and revegetated as appropriate to rectify soil compaction that may occur from using mats.	No change in number of NWP authorizations.
• General condition 18, Endangered Species.	Removed the reference to 50 CFR 402.17 because that section was removed by a final rule issued by the Services in 2024.	No change in number of NWP authorizations.
• General condition 25, Water Quality.	Added “into waters of the United States” after “discharge” to make it clear that the discharge must be into waters of the United States.	No change in number of NWP authorizations.

Nationwide permit(s)	Changes	Anticipated impacts
<ul style="list-style-type: none"> General condition 28, Use of Multiple NWP's. General condition 30, Compliance certifications. 	<p>Modified general condition to clarify application to NWP's with different numeric limits.</p> <p>Modified general conditions to change "successful" to "successful completion" to clarify that any required permittee-responsible mitigation has to be successfully completed by the permittee.</p>	<p>No change in number of NWP authorizations.</p> <p>No change in number of NWP authorizations.</p>
<ul style="list-style-type: none"> General condition 32, Pre-Construction Notification. 	<p>Modified paragraph (a)(2) to include species proposed for listing and critical habitat proposed for designation. Modify paragraph (b)(5) to refer to Note 2 of NWP 27 when an NWP 27 activity requires a PCN.</p>	<p>No change in number of NWP authorizations.</p>

V. Administrative Requirements

Plain Language

In compliance with the principles in the President's Memorandum of June 1, 1998, (63 FR 31885, June 10, 1998) regarding plain language, this preamble is written using plain language. For this final action, the Corps has used short sentences, and common everyday terms except for necessary technical terms.

Paperwork Reduction Act

The paperwork burden associated with the NWP relates exclusively to the

preparation of the PCN. While different NWP's require that different information be included in a PCN, the Corps estimates that a PCN requires, on average, 11 hours to complete. The NWP's would slightly increase the total paperwork burden associated with this program because the Corps estimates that under this final action 44 more PCN's would be required each year. This increase is primarily due to the modification to NWP 13 to incorporate nature-based solutions into bank stabilization activities and the issuance

of NWP 60 to authorize activities to improve the passage of fish and other aquatic organisms. Both of these changes are expected to result in a reduction in the number of activities requiring individual permits. The paperwork burden associated with these NWP's is expected to increase by approximately 1,034 hours per year from 237,193 hours to 238,227 hours.

The following table summarizes the projected changes in paperwork burden from the 2021 NWP's to the NWP's issued in this final action.

	Number of NWP PCNs per year	Number of NWP activities not requiring PCNs per year	Estimated changes in NWP PCNs per year	Estimated changes in number of authorized NWP activities	Estimated changes in number of standard individual permits per year	Estimated hours to prepare NWP PCNs per year	Estimated cost to prepare NWP PCNs per year (2024\$ millions)
2021 NWP's	21,563	31,690	237,193	\$379
2026 NWP's	21,657	31,719	+44	+123	- 123	238,227	381

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. For the Corps' Regulatory Program under Section 10 of the RHA, Section 404 of the CWA, and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, the current OMB approval number for information collection requirements is maintained by the Corps of Engineers (OMB approval number 0710-0003).

Executive Order 12866

This action is a significant regulatory action under Executive Order 12866 (58 FR 51735, October 4, 1993) that was submitted to the Office of Management and Budget (OMB) for review.

Executive Order 13132

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires the Corps to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of

regulatory policies that have federalism implications." The issuance and modification of NWP's does not have federalism implications. The Corps does not believe that the final NWP's will have substantial direct effects on the States, on the relationship between the federal government and the States, or on the distribution of power and responsibilities among the various levels of government. These NWP's will not impose any additional substantive obligations on state or local governments. Therefore, Executive Order 13132 does not apply to this final action.

Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the final action will not have a

significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of the issuance and modification of NWP's on small entities, a small entity is defined as: (1) a small business based on Small Business Administration size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

The statutes under which the Corps issues, reissues, or modifies NWP's are Section 404(e) of the CWA (33 U.S.C. 1344(e)) and Section 10 of the RHA (33 U.S.C. 403). Under Section 404, Department of the Army (DA) permits are required for discharges of dredged or fill material into waters of the United States. Under Section 10, DA permits are required for any structures or other

work that affect the course, location, or condition of navigable waters of the United States. Small entities proposing to discharge dredged or fill material into waters of the United States and/or install structures or conduct work in navigable waters of the United States must obtain DA permits to conduct those activities, unless a particular activity is exempt from those permit requirements. Individual permits and general permits can be issued by the Corps to satisfy the permit requirements of these two statutes. NWP are a form of general permit issued by the Chief of Engineers.

NWPs automatically expire and become null and void if they are not modified or reissued within five years of their effective date (see 33 CFR 330.6(b)). Furthermore, Section 404(e) of the CWA states that general permits, including NWPs, can be issued for no more than five years. If the current NWPs are not modified or reissued, they will expire on March 14, 2026, and small entities and other project proponents would be required to obtain alternative forms of DA permits (*i.e.*, standard permits, letters of permission, or regional general permits) for activities involving discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States. Regional general permits that authorize similar activities as the NWPs may be available in some geographic areas, but small entities conducting regulated activities outside those geographic areas would have to obtain individual permits for activities that require DA permits.

The issuance of NWPs to authorize activities under Section 404 of the CWA and Section 10 of the RHA reduces the burden of regulation because if the NWPs are not issued, project proponents would be required to obtain individual permits for those activities unless Corps districts issue regional general permits or programmatic general permits to authorize those activities. Each year, the NWPs authorize approximately 55,000 activities that result in no more than minimal individual and cumulative adverse environmental effects. In FY 2024, the average time for the Corps to process an application for a standard individual permit from date of receipt of a complete application to date of issuance was 253 days. During FY 2024, the average time for the Corps to process an NWP verification request was 55 days from date of receipt of a complete pre-construction notification to the issuance date. The shorter review period for NWP activities versus activities requiring standard individual permits reduces

regulatory burdens on members of the public that need to obtain Department of the Army authorization for their activities.

When compared with the compliance costs for individual permits, most of the terms and conditions of the NWPs are expected to result in decreases in the costs of complying with the permit requirements of Sections 10 and 404. For this final action, the Corps has prepared a Regulatory Impact Analysis in accordance with OMB Circular A-4 (2003). The Regulatory Impact Analysis is available in the www.regulations.gov docket for this rulemaking action (docket number COE-2025-0002, under "Supporting and Related Materials"). In the Regulatory Impact Analysis, the Corps estimates that under the 2026 NWPs, the estimated annual direct compliance costs (in 2024\$) would be between \$382,000,000 and \$652,000,000 per year, \$3.5 million to \$10.2 million per year less than the baseline direct compliance costs (*i.e.*, the estimated annual direct compliance costs under the 2021 NWPs). The direct compliance costs of the 2026 NWPs represent the cost savings achieved by the final NWPs compared to the baseline of the 2021 NWPs. The anticipated decrease in compliance cost results from the lower cost of obtaining NWP authorization instead of standard permits. Unlike standard permits, NWPs authorize activities without the requirement for public notice and comment on each proposed activity.

Another requirement of Section 404(e) of the CWA is that general permits, including NWPs, authorize only those activities that result in no more than minimal adverse environmental effects, individually and cumulatively. The terms and conditions of the NWPs, such as acreage limits and mitigation measures, are imposed to ensure that the NWPs authorize only those activities that result in no more than minimal adverse effects on the aquatic environment and other public interest review factors.

After considering the economic impacts of the issuance of these NWPs on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. Small entities may obtain required DA authorizations through the NWPs, in cases where there are applicable NWPs authorizing those activities and the proposed work will result in only minimal adverse effects on the aquatic environment and other public interest review factors. The terms and conditions of the NWPs finalized in this action will not impose substantially higher costs on small entities than those

of the existing NWPs. If an NWP is not available to authorize a particular activity, then another form of DA authorization, such as an individual permit or a regional general permit authorization, must be secured. However, as noted above, the Corps expects a slight to moderate increase in the number of activities that can be authorized through NWPs, because the Corps made some modifications to the NWPs to authorize additional activities. Because those activities required authorization through other forms of DA authorization (*e.g.*, individual permits or regional general permits) the Corps expects a concurrent decrease in the numbers of individual permit authorizations required for these activities.

Unfunded Mandates Reform Act

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

small governments on compliance with the regulatory requirements.

The Corps has determined that these NWP do not contain a federal mandate that may result in expenditures of \$100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. The NWP are generally consistent with current agency practice, do not impose new substantive requirements and therefore do not contain a federal mandate that may result in expenditures of \$100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. Therefore, this final action is not subject to the requirements of Sections 202 and 205 of the UMRA. For the same reasons, the Corps has determined that the NWP contain no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the issuance and modification of the NWP is not subject to the requirements of Section 203 of UMRA.

Executive Order 13045

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

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

Executive Order 13175

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

between the federal government and the Tribes, or on the distribution of power and responsibilities between the federal government and Tribes."

The issuance of these NWP does not have tribal implications. It is generally consistent with current agency practice and will not have substantial direct effects on tribal governments, on the relationship between the federal government and the tribes, or on the distribution of power and responsibilities between the federal government and tribes. Therefore, Executive Order 13175 does not apply to this final action. However, in the spirit of Executive Order 13175, the Corps specifically requested comment from tribal officials on the proposed rule. Corps districts conducted government-to-government consultation with tribes who requested such consultation, to identify regional conditions or other local NWP modifications that may be necessary to protect aquatic resources of interest to tribes, as part of the Corps' responsibility to protect trust resources. The Corps' Regulatory Program follows a number of existing Department of Defense, Army, and Corps' tribal consultation policies. Information on these tribal consultation policies are available at: <https://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/>.

Many commenters objected to the reissuance of the NWP. One commenter stated that the Corps has not demonstrated how NWP reissuance would affect tribal treaty rights. Many commenters stated that there is insufficient time for tribes to consult with the Corps on the 2025 Proposal. Several commenters said that the Corps is required to consult and coordinate with the tribes on the proposed rule. One commenter stated that the Corps should extend its comment period 60 days or should withdraw its proposal to allow early tribal engagement.

While the NWP are issued through rulemaking, we believe the final NWP will not have substantial direct effects on tribal governments, on the relationship between the federal government and the tribes, or on the distribution of power and responsibilities between the federal government and tribes. We have taken, and will continue to take, measures (such as Corps districts consulting with tribes on specific NWP activities that may have adverse effects on tribal rights) to ensure that the NWP will not have substantial direct effects on tribal governments, on the relationship between the federal government and the tribes, or on the distribution of power

and responsibilities between the federal government and tribes.

General condition 17 (Tribal Rights) states that no NWP activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights. Tribes use NWP for activities they conduct that require DA authorization under Section 404 of the CWA and/or Section 10 of the RHA. For example, tribes that conduct commercial shellfish aquaculture activities have used NWP 48, and tribes that conduct aquatic habitat restoration activities have used NWP 27.

For the 2026 NWP, the Corps provided a 30-day comment period on the 2025 Proposal, which we believe is appropriate when considering the minor changes proposed to the NWP. The Corps has considered comments received from tribes on the 2025 proposal, including letters from 18 tribes or tribal organizations. Corps districts conducted consultations with tribes to identify regional conditions to ensure activities comply with general conditions 17 and 20 (Historic Properties). The Corps has consulted and will continue to consult with tribes consistent with our tribal consultation policies. Division engineers can modify, suspend, or revoke one or more NWP in a region to protect tribal rights.

During the consultation on regional conditions to the NWP, district engineers can develop coordination procedures with tribes to provide tribes with opportunities to review proposed NWP activities and provide their views on whether those activities will cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. When a Corps district receives a PCN 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. If, after considering mitigation, the district engineer determines the proposed NWP activity will have more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands, he or she will exercise discretionary authority and require an individual permit. A district engineer can modify, suspend, or revoke an NWP to protect tribal rights, protected tribal resources, and tribal lands.

One commenter requested that the Corps develop cooperative agreements with tribes. One commenter stated that the Corps is shifting the responsibility of monitoring and oversight to tribes as a result in changes to jurisdiction. A few

commenters stated that the Corps should engage in co-management with tribes on enforcement and impacts analysis using tribal ecological knowledge. One commenter requested that the Corps provide additional training to staff on tribal trust resources.

Corps districts are encouraged by regulations at 33 CFR 320.4(j)(6) to consult with tribes to establish procedures for establishing official communications with tribes within their districts. The Corps cannot require permits or monitoring of activities in aquatic resources that are not waters of the United States. Corps districts are responsible for enforcing compliance with NWP conditions unless the state or eligible tribe has assumed the responsibility of the Section 404 permit program in certain waters of the United States in accordance with Section 404(g) of the CWA. Consistent with general conditions 17 and 20, Corps districts will consult with tribes when evaluating use of an NWP for resolution of enforcement actions that might impact tribal rights or historic properties. The Corps provides regular training to staff on the responsibilities of the federal government to uphold the tribal trust responsibility.

Environmental Documentation

A decision document has been prepared for each NWP being issued. Each decision document includes an environmental assessment and public interest review determination. If an NWP authorizes discharges of dredged or fill material into waters of the United States, the decision document includes a 404(b)(1) Guidelines analysis. The decision documents are available at: www.regulations.gov (docket ID number COE-2025-0002). They are also available by contacting Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street NW, Washington, DC 20314-1000.

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The Corps will submit a report containing the final NWPs and other required information to the U.S. Senate, the U.S. House of Representatives, and the Government Accountability Office. A major rule cannot take effect until 60 days after it

is published in the **Federal Register**. The NWPs are not a “major rule” as defined by 5 U.S.C. 804(2), because they are not likely to result in: (1) An annual effect on the economy of \$100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Executive Order 13211

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

VI. References

A complete list of all references cited in this document is available on the internet at <http://www.regulations.gov> in docket number COE-2025-0002 or upon request from the U.S. Army Corps of Engineers (see **FOR FURTHER INFORMATION CONTACT**).

Authority

The Corps is reissuing 56 existing NWPs and issuing one new NWP under the authority of Section 404(e) of the Clean Water Act (33 U.S.C. 1344) and/or Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*).

Jason E. Kelly,

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

Nationwide Permits, Conditions, Further Information, and Definitions

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

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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 of dredged or fill material, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After 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 of dredged or fill material 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 of dredged or fill material does not exceed 1/10-acre in

waters of the U.S. Discharges of dredged or fill material 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. *Oil or Natural Gas Pipeline Activities.* Activities required for the construction, maintenance, repair, and removal of oil and natural gas pipelines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.

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

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

be stabilized immediately upon completion of the utility line crossing of each waterbody.

Oil or natural gas pipeline substations: This NWP authorizes the construction, maintenance, or expansion of substation facilities (*e.g.*, oil or natural gas or gaseous fuel custody transfer stations, boosting stations, compression stations, metering stations, pressure regulating stations) associated with an oil or natural gas pipeline in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than 1/2-acre of waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

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

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

This NWP may authorize oil or natural gas pipelines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (see 33 CFR part 322). Oil or natural gas pipelines routed in, over, or under section 10 waters without a discharge of dredged or fill material may require a section 10 permit.

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

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) a section 10 permit is required; (2) the discharge will result in the loss of greater than 1/10-acre of waters of the United States; or (3) the proposed oil or natural gas pipeline activity is associated with an overall project that is greater than 250 miles in length and the project purpose is to install new pipeline (*vs.* conduct repair or maintenance activities) along the majority of the distance of the overall project length. If the proposed oil or gas pipeline is greater than 250 miles in length, the pre-construction notification must include the locations and proposed impacts (in acres or other appropriate unit of measure) for all crossings of waters of the United States that require DA authorization, including those crossings authorized by an NWP would not otherwise require pre-construction notification. (See general

condition 32.) (Authorities: Sections 10 and 404)

Note 1: Where structures or work are authorized in navigable waters of the United States (*i.e.*, section 10 waters) within the coastal United States, the Great Lakes, and United States territories, the permittee should provide a copy of the 'as-built drawings' and the geographic coordinate system used in the 'as-built drawings' to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), to inform updates to nautical charts and Coast Pilot corrections. The information should be transmitted via email to ocs.ndb@noaa.gov.

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

Note 3: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the oil or natural gas pipeline must be removed upon completion of the work, in accordance with the requirements for temporary fills.

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

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

Note 6: For NWP 12 activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b)(4) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

Note 7: Where structures or work are proposed in navigable waters of the United

States, project proponents should ensure they provide the location and dimensions of the proposed structures to the U.S. Coast Guard (USCG) prior to submittal of a Pre-Construction Notification, or prior to beginning construction. The USCG may assess potential navigation-related concerns associated with the location of proposed structures or work and may inform project proponents of marking and lighting requirements necessary to comply with General Condition 1 (Navigation). For assistance identifying the appropriate USCG District or Sector Waterways Management Staff responsible for the area of the proposed work, contact USCG at CGWWM@uscg.mil.

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 of dredged or fill material 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 of dredged or fill material 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 of dredged or fill material 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.

In addition, this NWP authorizes discharges of dredged or fill material into waters of the United States and structures and work in navigable waters of the United States to incorporate nature-based solutions into new and existing bank stabilization activities to provide habitat and other ecosystem functions and services and to reduce adverse effects of bank stabilization activities on the aquatic environment. Examples of nature-based solutions for bank stabilization activities include the use of construction materials for seawalls and bulkheads that have textured surfaces, crevices, shelves, benches, and pits that support attachment and growth of benthic organisms; vegetative stabilization; bioengineering; the construction of rock pools next to the bank stabilization activity; the construction of small pocket beaches next to the bank stabilization activity; the use of various sizes of rock for revetments to provide different sizes of spaces between rocks for habitat for various species of organisms; the placement of rock clusters next to a seawall or bulkhead; the placement of large wood next to seawalls, bulkheads, and revetments; and the placement of bags of molluscs or the placement of small reef structures to provide habitat for molluscs and other sessile aquatic organisms next to a seawall, bulkhead, or revetment. Nature-based solutions should be appropriate for the physical and biological characteristics of the site.

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 of dredged or fill material, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the bank stabilization activity: (1) involves discharges of dredged or fill material into special aquatic sites; or (2) is in excess of 500 feet in length; or (3) will involve the discharge of dredged or fill material 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)

Note 1: In coastal waters and the Great Lakes, living shorelines may be an appropriate option for bank stabilization, and may be authorized by NWP 54.

Note 2: Under 33 CFR 320.4(g)(2), a landowner has the general right to protect his or her property from erosion, and the district engineer can provide general guidance to the landowner regarding possible alternative methods of protecting his or her property. Permittees are encouraged to use soft bank stabilization approaches (e.g., bioengineering, vegetative stabilization) at sites where those methods are likely to be effective in managing erosion, such as sites where shorelines and banks are subject to moderate to low erosive forces. However, hard bank stabilization activities (e.g., seawalls, bulkheads, revetments, riprap) may be necessary at sites where shorelines and banks are subject to strong erosive forces. An appropriate and effective approach to managing shoreline or bank erosion at a specific site requires consideration of a variety of factors, including but not limited to: bank height; bank condition; the energy of tides, waves, currents, or other water flows that the bank is exposed to; fetch; nearshore water depths; the potential for storm surges; sediment or substrate type; tidal range in waters subject to the ebb and flow of tides; shoreline configuration and orientation; the width of the waterway; and whether there is infrastructure in the vicinity of the proposed bank stabilization activity that needs to be protected and the degree of protection needed.

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, driveways, airport runways, and taxiways) in waters of the United States. For linear transportation projects in non-tidal waters, the discharge of dredged or fill material cannot cause the loss of greater than ½-acre of waters of the United

States. For linear transportation projects in tidal waters, the discharge of dredged or fill material cannot cause the loss of greater than $\frac{1}{3}$ -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 of dredged or fill material, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. 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 $\frac{1}{10}$ -acre; or (2) there is a discharge of dredged or fill material 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 of dredged or fill material 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)(4) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

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 the General Bridge Act of 1946, 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 Clean Water Act 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 Clean Water Act 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 10,000 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 dredged or fill 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 of dredged or fill material will not cause the loss of more than $\frac{1}{10}$ -acre of waters of the United States; and

(c) The discharge of dredged or fill material 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 of dredged or fill material 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 of dredged or fill material 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 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. This NWP does not authorize discharges of dredged or fill material 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. (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 the vessel is listed or eligible for listing in the National Register of Historic Places, 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: Intentional ocean disposal of vessels at sea requires a permit from the U.S. EPA under the Marine Protection, Research and Sanctuaries Act, which specifies that ocean disposal should only be pursued when land-based alternatives are not available. 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 Section 106, 109, and 111(1) of the National Environmental Policy Act, 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 Letter(s) (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. Any changes to approved categorical exclusions applicable to this NWP will be announced in the **Federal Register** and posted on this same website.

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 Clean Water Act Section 404 permit programs.

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

25. Structural Discharges. Discharges of dredged or fill 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)

27. Aquatic Ecosystem 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 rivers and streams and their riparian areas, the restoration and enhancement of other non-tidal open waters, and the restoration and enhancement of tidal streams, tidal wetlands, and tidal open waters, provided those activities result in net increases in aquatic ecosystem functions and services.

To be authorized by this NWP, the aquatic ecosystem restoration, enhancement, or establishment activity must be planned, designed, and implemented so that it results in an aquatic ecosystem that resembles an ecological reference (*i.e.*, a natural ecosystem). An ecological reference may be based on the characteristics of aquatic ecosystems or riparian areas that currently exist in the region, or the characteristics of aquatic ecosystems or riparian area that existed in the region in the past. Ecological references include cultural ecosystems, which are ecosystems that have developed under the joint influence of natural processes and human management activities (*e.g.*, fire stewardship for vegetation management). An ecological reference may also be based on regional ecological knowledge, including indigenous and local ecological knowledge, of the target aquatic ecosystem type or riparian area.

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 ecosystem functions and services.

This NWP does not authorize: (1) dam removal activities; (2) stream channelization activities; and (3) the conversion of tidal wetlands to open water impoundments and other aquatic uses unless the conversion is solely for the purpose of enhancing the functions of tidal wetlands.

Only native plant species should be planted at the site. Compensatory mitigation is not required for activities authorized by this NWP because these activities must result in net increases in aquatic ecosystem functions and services.

Reversion. For aquatic ecosystem restoration, enhancement, 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), Bureau of Land Management (BLM), 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 of dredged or fill material 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, BLM, 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 Program requirements are applicable to that type of land at the time. The requirement that the activity results in a net increase in aquatic ecosystem 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. The permittee must submit a report containing information on the proposed aquatic ecosystem restoration, enhancement, and establishment activity to the district engineer at least

30 days prior to commencing activities in waters of the United States authorized by this NWP. The report must include the following information:

- (1) Name, address, and telephone numbers of the prospective permittee;
- (2) Location of the proposed activity;
- (3) Information on baseline ecological conditions at the project site, including a general description and map of aquatic and terrestrial habitat types on that site. The map of existing aquatic and terrestrial habitat types and their approximate boundaries on the project site should be based on recent aerial imagery or similar information, and verified with photo points or other field-based data points for each mapped habitat type;

- (4) A sketch of the proposed project elements of the NWP 27 activity drawn over a copy of the map of existing aquatic and terrestrial habitat types on the project site;

- (5) The objectives of the proposed aquatic ecosystem restoration, enhancement, or establishment activity and a description of the techniques or mechanisms that are proposed to be used to increase aquatic ecosystem functions and services on the project site to meet the objectives;

- (6) And if applicable, a copy of: (a) the binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement with the FWS, NRCS, FSA, NMFS, NOS, USFS, BLM, or their designated state cooperating agencies; (b) the NRCS or USDA Technical Service Provider documentation for the voluntary stream enhancement or restoration action or wetland restoration, enhancement, or establishment action; or (c) the SMCRA permit issued by OSMRE or the applicable state agency. (Authorities: Sections 10 and 404)

Note 1: 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.

Note 2: If an activity authorized by this NWP requires a PCN because of an NWP general condition (*e.g.*, NWP general condition 18, endangered species) or a regional condition imposed by a division engineer, the information required by paragraph (3) of the Reporting requirement substitutes for the delineation of waters, wetlands, and other special aquatic sites required by paragraph (b)(5) of general condition 32.

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. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

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, 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 of dredged or fill material, 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 of dredged or fill material, 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, repair, or replacement of boat ramps, provided the activity meets all of the following criteria:

(a) The discharge of dredged or fill material 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 of dredged or fill material 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 of dredged or fill material 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 of dredged or fill material 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 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 affect 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, storage facilities, restaurants, business parks, data centers (to include for example, artificial intelligence and machine learning facilities), pharmaceutical manufacturing facilities, 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. This NWP does not authorize discharges of

dredged or fill material 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 by the Corps 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 jurisdictional 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 $\frac{1}{2}$ -acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

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 of dredged or fill material into waters of the United States 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 and Irrigation 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 and

irrigation ditches constructed in waters of the United States, for the purpose of improving water quality by regrading the drainage or irrigation 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 drainage ditch cannot increase drainage capacity beyond the original as-built capacity nor can it expand the area drained by the drainage ditch as originally constructed (*i.e.*, the capacity of the drainage 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 or irrigation ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage or irrigation ditch must be approximately the same as the location of the centerline of the original drainage or irrigation 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 $\frac{1}{2}$ -acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

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 nature-based solutions for managing stormwater and reducing inputs of sediments, nutrients, and other pollutants into waters. Examples of such nature-based solutions include, but are not limited to, stream biofilters, bioretention ponds or swales, rain gardens, vegetated filter strips, vegetated swales (bioswales), constructed wetlands, infiltration trenches, and regenerative stormwater conveyances, as well as other nature-based solutions and other features that are conducted to meet reduction targets established under Total Maximum Daily 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, and nature-based solutions for managing stormwater and reducing inputs of sediments, nutrients, and other pollutants into waters. The maintenance of stormwater management facilities and nature-based solutions that do not contain waters of the United States does not require a section 404 permit.

The discharge must not cause the loss of greater than $\frac{1}{2}$ -acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters. 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 of dredged or fill material into non-tidal waters of the United States for the construction of new stormwater management facilities or nature-based solutions, or the expansion of existing stormwater management facilities or nature-based solutions, 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 nature-based solution. (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 jurisdictional wetlands, the discharge must not cause the loss of greater than 1/2-acre of non-tidal jurisdictional wetlands;

(b) For mining activities involving discharges of dredged or fill material in non-tidal jurisdictional open waters (e.g., rivers, streams, lakes, and ponds) or work in non-tidal navigable waters of the United States (i.e., section 10 waters), 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.

This NWP does not authorize discharges of dredged or fill material 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 18-months of the date of the damage; for major storms, floods, or other discrete events, the district engineer may waive the 18-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 Clean Water Act 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 of dredged or fill material 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)

48. Commercial Shellfish Mariculture Activities. Structures or work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States necessary for new and continuing commercial shellfish mariculture operations (i.e., the cultivation of bivalve molluscs such as oysters, mussels, clams, and scallops) 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 mariculture 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. This NWP does not authorize structures or work in navigable waters of the United States or discharges of dredged or fill material into waters of the United States within Washington State.

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; or

(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.

Notification: The permittee must submit a pre-construction notification to the district engineer if the activity directly affects more than 1/2-acre of submerged aquatic vegetation. If the operator will be conducting commercial shellfish mariculture 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.) (Authorities: Sections 10 and 404)

Note 1: Where structures or work are proposed in navigable waters of the United States, project proponents should ensure they provide the location and dimensions of the proposed structures to the U.S. Coast Guard (USCG) prior to submittal of a Pre-Construction Notification, or prior to beginning construction. The USCG may assess potential navigation-related concerns associated with the location of proposed structures or work, and may inform project proponents of marking and lighting requirements necessary to comply with General Condition 1 (Navigation). For assistance identifying the appropriate USCG District or Sector Waterways Management

Staff responsible for the area of the proposed work, contact USCG at CGWWM@uscg.mil.

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.”

Note 4: Where structures or work are authorized in navigable waters of the United States (*i.e.*, section 10 waters) within the coastal United States, the Great Lakes, and United States territories, the permittee should provide a copy of the ‘as-built drawings’ and the geographic coordinate system used in the ‘as-built drawings’ to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), to inform updates to nautical charts and Coast Pilot corrections. The information should be transmitted via email to ocs.ndb@noaa.gov.

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 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 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 ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters. 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. (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)

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 ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

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 ¼-acre of waters of the United States. (See

general condition 32.) (Authorities: Sections 10 and 404)

Note 1: Electric 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 electric utility lines may be authorized by NWP 57 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 electric utility lines and/or road crossings, then NWP 57 and/or NWP 14 shall be used if those activities meet the terms and conditions of NWPs 57 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 by the Corps 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 ½-acre of waters of the United States. 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 limit.

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: Electric 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 electric utility lines may be authorized by NWP 57 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 review and/or approval from the Corps under 33 U.S.C. 408.

Note 3: Where structures or work are authorized in navigable waters of the United States (*i.e.*, section 10 waters) within the coastal United States, the Great Lakes, and

United States territories, the permittee should provide a copy of the 'as-built drawings' and the geographic coordinate system used in the 'as-built drawings' to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), to inform updates to nautical charts and Coast Pilot corrections. The information should be transmitted via email to ocs.ndb@noaa.gov.

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 by the Corps to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

Note 6: Where structures or work are proposed in navigable waters of the United States, project proponents should ensure they provide the location and dimensions of the proposed structures to the U.S. Coast Guard (USCG) prior to submittal of a Pre-Construction Notification, or prior to beginning construction. The USCG may assess potential navigation-related concerns associated with the location of proposed structures or work, and may inform project proponents of marking and lighting requirements necessary to comply with General Condition 1 (Navigation). For assistance identifying the appropriate USCG District or Sector Waterways Management Staff responsible for the area of the proposed work, contact USCG at CGWWM@uscg.mil.

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 generally defined as a dam or weir built across a stream to pass flows from upstream over all, or nearly all, of the width of the dam crest and 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. A low-head dam may have been built for a range of purposes (*e.g.*, check dam, mill dam, irrigation, water supply, recreation, hydroelectric, or cooling pond), but in all cases, it provides little or no 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 that 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, but a portion of a living shoreline may consist of an unvegetated cobble, gravel, and/or sand beach, (*i.e.*, a pocket beach). The following conditions must be met:

(a) The structures and fill area, including cobble, gravel, and/or 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 and elevation, 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 cobble, gravel, and/or 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 also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to construct the living shoreline activity. Appropriate measures must be taken to maintain high flows, tidal flows or seiches, when temporary structures, work, and discharges of dredged or fill material, including cofferdams, are necessary for construction activities, access fills, or dewatering of

construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows, tidal flows or seiches. 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.

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.

55. Seaweed Mariculture Activities. Structures in marine and estuarine waters, including structures anchored to the seabed in waters overlying the outer continental shelf, for seaweed mariculture activities. This NWP also authorizes structures for bivalve shellfish mariculture if shellfish production is a component of an integrated multi-trophic mariculture system (e.g., the production of seaweed and bivalve shellfish on the same structure or a nearby mariculture structure that is part of the single and complete project).

This NWP authorizes the installation of buoys, long-lines, floats, anchors, rafts, racks, and other similar structures into navigable waters of the United States. Rafts, racks and other floating structures must be securely anchored and clearly marked. To the maximum extent practicable, the permittee must remove these structures from navigable waters of the United States if they will no longer be used for seaweed mariculture activities or multi-trophic mariculture activities.

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.

This NWP does not authorize:

(a) The cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 or the cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody; or

(b) Attendant features such as docks, piers, boat ramps, stockpiles, or staging areas.

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

In addition to the information required by paragraph (b) of general condition 32, the preconstruction notification must also include the following information: (1) a map showing the locations and dimensions of the structure(s); (2) the name(s) of the species that will be cultivated during the period this NWP is in effect; and (3) general water depths in the project area(s) (a detailed survey is not required). No more than one pre-construction notification per structure or group of structures should be submitted for the seaweed mariculture operation during the effective period of this NWP. The pre-construction notification should describe all species and culture activities the operator expects to undertake during the effective period of this NWP. (Authority: Section 10)

Note 1: Where structures or work are proposed in navigable waters of the United States, project proponents should ensure they provide the location and dimensions of the proposed structures to the U.S. Coast Guard (USCG) prior to submittal of a Pre-Construction Notification, or prior to beginning construction. The USCG may assess potential navigation-related concerns associated with the location of proposed structures or work, and may inform project proponents of marking and lighting requirements necessary to comply with General Condition 1 (Navigation). For assistance identifying the appropriate USCG District or Sector Waterways Management Staff responsible for the area of the proposed work, contact USCG at CGWWM@uscg.mil.

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.”

Note 4: Where structures or work are authorized in navigable waters of the United States (*i.e.*, section 10 waters) within the coastal United States, the Great Lakes, and United States territories, the permittee should provide a copy of the ‘as-built drawings’ and the geographic coordinate system used in the ‘as-built drawings’ to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), to inform updates to nautical charts and Coast Pilot corrections. The information should be transmitted via email to ocs.ndb@noaa.gov.

57. *Electric Utility Line and Telecommunications Activities.*

Activities required for the construction, maintenance, repair, and removal of electric utility lines, telecommunication 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.

Electric utility lines and telecommunication 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 electric utility lines and telecommunication lines. There must be no change in pre-construction contours of waters of the United States. An “electric utility line and telecommunication line” is defined as any cable, line, fiber optic line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and internet, radio, and television communication.

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 electric utility line or

telecommunication line crossing of each waterbody.

Electric utility line and telecommunication substations: This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with an electric utility line or telecommunication 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 of dredged or fill material into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

Foundations for overhead electric utility line or telecommunication line towers, poles, and anchors: This NWP authorizes the construction or maintenance of foundations for overhead electric utility line or telecommunication 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 electric utility lines or telecommunication lines, including overhead lines and 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 of dredged or fill material into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (*e.g.*, at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize electric utility lines or telecommunication 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). Electric utility lines or telecommunication lines constructed over section 10 waters and

electric utility lines or telecommunication 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 electric utility lines or telecommunication 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 electric utility lines or telecommunication lines.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the electric 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 of dredged or fill material, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) a section 10 permit is required; or (2) the discharge will result 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: Where structures or work are authorized in navigable waters of the United States (*i.e.*, section 10 waters) within the coastal United States, the Great Lakes, and United States territories, the permittee should provide a copy of the ‘as-built drawings’ and the geographic coordinate system used in the ‘as-built drawings’ to the National Oceanic and Atmospheric

Administration (NOAA), National Ocean Service (NOS), to inform updates to nautical charts and Coast Pilot corrections. The information should be transmitted via email to ocs.ndb@noaa.gov.

Note 2: For electric utility line or telecommunications 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. Electric utility line and telecommunications activities must comply with 33 CFR 330.6(d).

Note 3: Electric utility lines or telecommunication 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 electric utility line or telecommunication line must be removed upon completion of the work, in accordance with the requirements for temporary fills.

Note 5: This NWP authorizes electric utility line and telecommunication 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 6: For overhead electric utility lines and telecommunication lines authorized by this NWP, a copy of the PCN and NWP verification will be provided by the Corps to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

Note 7: For activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b)(4) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

Note 8: Where structures or work are proposed in navigable waters of the United States, project proponents should ensure they provide the location and dimensions of the proposed structures to the U.S. Coast Guard (USCG) prior to submittal of a Pre-Construction Notification, or prior to

beginning construction. The USCG may assess potential navigation-related concerns associated with the location of proposed structures or work, and may inform project proponents of marking and lighting requirements necessary to comply with General Condition 1 (Navigation). For assistance identifying the appropriate USCG District or Sector Waterways Management Staff responsible for the area of the proposed work, contact USCG at CGWWM@uscg.mil.

58. Utility Line Activities for Water and Other Substances. Activities required for the construction, maintenance, repair, and removal of utility lines for water and other substances, excluding oil, natural gas, products derived from oil or natural gas, and electricity. Oil or natural gas pipeline activities or electric utility line and telecommunications activities may be authorized by NWPs 12 or 57, respectively. This NWP also authorizes associated utility line 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 for water and other substances, 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 that is not oil, natural gas, or petrochemicals. Examples of activities authorized by this NWP include utility lines that convey water, sewage, stormwater, wastewater, brine, irrigation water, and industrial products that are not petrochemicals. 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 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 of dredged or fill material into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

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

Access roads: This NWP authorizes the construction and maintenance of utility lines, including 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 of dredged or fill material into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (*e.g.*, at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize 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 may require a section 10 permit.

This NWP authorizes, to the extent that Department of the Army

authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing 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 of dredged or fill material, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) a section 10 permit is required; or (2) the discharge will result in the loss of greater than $\frac{1}{10}$ -acre of waters of the United States. (See general condition 32.) (Authorities: Sections 10 and 404)

Note 1: Where structures or work are authorized in navigable waters of the United States (*i.e.*, section 10 waters) within the coastal United States, the Great Lakes, and United States territories, the permittee should provide a copy of the 'as-built drawings' and the geographic coordinate system used in the 'as-built drawings' to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), to inform updates to nautical charts and Coast Pilot corrections. The information should be transmitted via email to ocs.ndb@noaa.gov.

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: 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 4: Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to the General Bridge Act of 1946. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit (see NWP 15).

Note 5: 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 6: For activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b)(4) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

Note 7: Where structures or work are proposed in navigable waters of the United States, project proponents should ensure they provide the location and dimensions of the proposed structures to the U.S. Coast Guard (USCG) prior to submittal of a Pre-Construction Notification, or prior to beginning construction. The USCG may assess potential navigation-related concerns associated with the location of proposed structures or work, and may inform project proponents of marking and lighting requirements necessary to comply with General Condition 1 (Navigation). For assistance identifying the appropriate USCG District or Sector Waterways Management Staff responsible for the area of the proposed work, contact USCG at CGWWM@uscg.mil.

59. *Water Reclamation and Reuse Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction, expansion, and maintenance of water reclamation and reuse facilities,

including vegetated areas enhanced to improve water infiltration and constructed wetlands to improve water quality.

The discharge of dredged or fill material must not cause the loss of greater than $\frac{1}{2}$ -acre of waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

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

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

60. *Activities to Improve Passage of Fish and Other Aquatic Organisms.* Discharges of dredged or fill material into waters of the United States and structures and work in navigable waters of the United States for activities that restore or enhance the ability of fish and other aquatic organisms to move through aquatic ecosystems. Examples of activities that may be authorized by this NWP include, but are not limited to: the construction, maintenance, modification, or expansion of conventional/technical and nature-like fishways; the construction, maintenance, modification, or expansion of fish bypass channels around existing in-stream structures; the replacement of existing structures (*e.g.*, culverts, low-water crossings) with structures planned, designed, and constructed to restore or enhance passage of fish and other aquatic organisms; the installation of fish screens and other devices to minimize entrainment and entrapment of fish and other aquatic organisms in irrigation ditches and other features; devices to guide fish and other aquatic organisms through passage features; fish lifts and

fish by-pass pipes; the modification of existing in-stream structures, such as dams or weirs, to improve the ability of fish and other aquatic organisms to move past those structures.

The activity must not cause the loss of greater than one acre of waters of the United States.

This NWP does not authorize dam removal activities. This NWP also does not authorize the construction or installation of new culverts at crossings of waterbodies where there are not existing culverts.

Notification: For activities resulting in the loss of greater than 1/10-acre of waters of the United States, 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)

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 or her 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, including tidal flows. The activity must not restrict or impede the passage of normal or high flows, including tidal 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. If mats are used to minimize soil disturbance, the affected areas must be returned to pre-construction elevations, and revegetated as appropriate. In circumstances where the use of mats has caused significant soil compaction, efforts using techniques (e.g., soil re-aeration techniques) to break up the compaction should be employed to return the soil to a pre-construction state prior to returning to pre-construction elevations.

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 Structures and Fills.** Temporary structures must be removed, to the maximum extent practicable, after their use has been discontinued. 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. Permittees shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

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

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

18. *Endangered Species.* (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify designated critical habitat or critical habitat proposed for

such designation. No activity is authorized under any NWP which “may affect” a listed species or critical habitat, unless ESA section 7 consultation addressing the consequences of the proposed activity on listed species or critical habitat has been completed. See 50 CFR 402.02 for the definition of “effects of the action” for the purposes of ESA section 7 consultation.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA (see 33 CFR 330.4(f)(1)). 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 species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation, 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 species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), the pre-construction notification must include the name(s) of the endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or that utilize the designated critical habitat (or critical habitat proposed for such designation) 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. For activities where the non-federal applicant has identified listed species (or species proposed for listing) or designated critical habitat (or

critical habitat proposed for such designation) 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 species proposed for listing or designated critical habitat (or critical habitat proposed for such designation), or until ESA section 7 consultation or conference 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 or conference 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 permittee 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 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 that an action authorized by an NWP complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting the appropriate local office of the U.S. Fish and Wildlife Service to determine what measures, if any, are necessary or appropriate to reduce adverse effects 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) No activity is authorized under any NWP which may have the potential to cause effects on properties listed, or eligible for listing, in the National Register of Historic Places 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 (see 33 CFR 330.4(g)(1)). 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 on 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 commensurate with potential impacts, which may include background research, consultation, oral history interviews, sample field investigation, and/or 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 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.

(d) Where the non-federal applicant has identified historic properties on which the proposed NWP activity might have the potential to cause effects and has 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 on historic properties or that NHPA section 106 consultation has been completed. 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.* Permittees that discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activities authorized by NWPs, must immediately notify the district engineer of what they 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 NWP 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, 52, 57 and 58 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 by permittees in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after she or he determines that the impacts to the critical resource waters will be no more than minimal.

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

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

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

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

case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects.

(d) Compensatory mitigation at a minimum one-for-one ratio will be required for all losses of stream bed that exceed $\frac{3}{100}$ -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. This compensatory mitigation requirement may be satisfied through the restoration or enhancement of riparian areas next to streams in accordance with paragraph (e) of this general condition. For losses of stream bed of $\frac{3}{100}$ -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. Compensatory mitigation for losses of streams should be provided, if practicable, through stream rehabilitation, enhancement, or preservation, because 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. If restoring riparian areas involves planting vegetation, only native species should be planted. 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)). If permittee-responsible mitigation is the proposed option, and the proposed compensatory mitigation site is located on land in which another federal agency holds an easement, the district engineer will

coordinate with that federal agency to determine if proposed compensatory mitigation project is compatible with the terms of the easement.

(5) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan needs to address only the baseline conditions at the impact site and the number of credits to be provided (see 33 CFR 332.4(c)(1)(ii)).

(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 $\frac{1}{2}$ -acre, it cannot be used to authorize any NWP activity resulting in the loss of greater than $\frac{1}{2}$ -acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that an NWP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the 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 or federal, 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.* (a) Where the certifying authority (state, authorized tribe, or EPA, as appropriate) has not previously certified compliance of an NWP with CWA section 401, a CWA section 401 water quality certification for the proposed activity which may result in any discharge from a point source into waters of the United States must be obtained or waived (see 33 CFR 330.4(c)). If the permittee cannot comply with all of the conditions of a water quality certification previously issued by the certifying authority for the issuance of the NWP, then the permittee must obtain a water quality certification or waiver for the proposed activity which may result in any discharge from a point source into waters of the United States in order for the activity to be authorized by an NWP.

(b) If the NWP activity requires pre-construction notification and the certifying authority has not previously certified compliance of an NWP with CWA section 401, the proposed activity which may result in any discharge from a point source into waters of the United States is not authorized by an NWP until water quality certification is obtained or waived. If the certifying authority issues a water quality certification for the proposed discharge into waters of the United States, the permittee must submit a copy of the certification to the district engineer. The discharge into waters of the United States is not authorized by an NWP until the district engineer has notified the permittee that the water quality certification requirement has been satisfied (*i.e.*, by the issuance of a water quality certification or a waiver and completion of the Section 401(a)(2) process).

(c) The district engineer or certifying authority 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)). If the permittee cannot comply with all of the conditions of a coastal zone management consistency concurrence previously issued by the state, then the permittee must obtain an individual coastal zone management consistency concurrence or presumption of concurrence in order for the activity to be authorized by an NWP. 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 CWA 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 authorized, subject to the following restrictions:

(a) The total acreage loss of waters of the United States for a single and complete project cannot exceed the acreage limit of the NWP with the highest specified acreage limit when multiple NWPs are used to authorize an activity.

(b) If only one of the NWPs used to authorize the single and complete project has a specified acreage limit, the acreage loss of waters of the United States for that single and complete project cannot exceed that specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14 (which has an acreage limit of $\frac{1}{3}$ acre in tidal waters), with associated bank stabilization authorized by NWP 13 (which does not have a specified acreage limit), the maximum acreage loss of waters of the United States for the total project cannot exceed $\frac{1}{3}$ -acre.

(c) If two or more of the NWPs used to authorize the single and complete project have specified acreage limits, the acreage loss of waters of the United States authorized by each of those NWPs cannot exceed the specified

acreage limits of each of those NWPs. For example, if a commercial development is constructed under NWP 39 (which as a 1/2-acre limit), and the single and complete project includes the filling of a ditch authorized by NWP 46 (which has a 1-acre limit), the maximum acreage loss of waters of the United States for the construction of the commercial development under NWP 39 cannot exceed 1/2-acre, and the total acreage loss of waters of United States caused by the combination of the NWP 39 and NWP 46 activities cannot exceed 1 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 successful completion 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 review by, or 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 and/or review is not authorized by an NWP until the appropriate Corps office issues the section 408 permission or completes its review 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 species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) 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. 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) (i) 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.

(ii) For linear projects where one or more single and complete crossings require pre-construction notification, 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 (including those single and complete crossings authorized by an NWP but do not require PCNs). This information will be used by the district engineer to evaluate the cumulative adverse environmental effects of the proposed linear project, and does not change those non-PCN NWP activities into NWP PCNs.

(iii) 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 waters, wetlands, and other special aquatic sites 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. For NWP 27 activities that require PCNs because of other general conditions or regional

conditions imposed by division engineers, see Note 2 of that NWP;

(6) If the proposed activity will result in the loss of greater than $\frac{1}{10}$ -acre of wetlands or $\frac{3}{100}$ -acre of stream bed and a PCN is required, the prospective permittee must submit a statement describing how the compensatory 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 species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat (or critical habitat proposed for such designation), the PCN must include the name(s) of those endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or utilize the designated critical habitat (or critical habitat proposed for such designation) 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 NWP activity that requires permission from, or review by, 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, or review by, the Corps office having jurisdiction over that USACE project.

(c) *Form of Pre-Construction Notification:* The nationwide permit pre-construction notification form (Form ENG 6082) should be used for NWP PCNs. 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 $\frac{1}{2}$ -acre of waters of the United States; (ii) 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 (iii) 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 email, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate federal or state offices (FWS, state natural resource or water quality agency, EPA, 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 email 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 NWP, including the need for mitigation to ensure that 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 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 single and complete crossings of waters of the United States that require PCNs 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 of waters of the United States authorized by an NWP. If an applicant requests a waiver of an applicable limit, as provided for in NWPs 13, 36, 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.

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 an 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 activity-specific conditions to the NWP authorization to address site-specific environmental concerns.

3. If the proposed NWP activity requires a PCN and will result in a loss of greater than $\frac{1}{10}$ -acre of wetlands or $\frac{3}{100}$ -acre of stream bed, 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. However, compensatory mitigation shall not be required for activities authorized by NWP 27 because those activities must result in net increases in aquatic resource functions and services (see the text of NWP 27). The district engineer will consider any proposed compensatory mitigation or other mitigation measures the applicant has included in the proposal when

determining whether the net adverse environmental effects of the proposed NWP activity are no more than minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the proposed 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 that 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 NWP 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 review period (unless additional time is required to comply with general conditions 16, 18, 20, and/or 31), 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. Nationwide Permit 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 ecosystem restoration, enhancement, or establishment activity under NWP 27. An ecological reference may be based on: (1) the structure, functions, and dynamics of an aquatic ecosystem type or a riparian area type that currently exists in the region; (2) the structure, functions, and dynamics of an aquatic ecosystem type or riparian area type that existed in the region in the past; and/or (3) indigenous and local ecological knowledge that apply to the aquatic ecosystem type or riparian area type (*i.e.*, a cultural ecosystem). Cultural ecosystems are ecosystems that have developed under the joint influence of natural processes and human management activities (*e.g.*, fire stewardship). 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.

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.

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. The loss of stream bed includes the acres of stream bed that are permanently adversely affected by filling or excavation 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 or wetlands 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. 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.

Nature-based solutions: Actions to protect, sustainably manage, and restore natural or modified ecosystems, that address societal challenges effectively and adaptively, simultaneously providing human well-being and biodiversity benefits.

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 NWP, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of flowing or standing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of “open waters” include rivers, streams, lakes, and ponds.

Ordinary High Water Mark: The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

Perennial stream: A perennial stream has surface water flowing continuously year-round during a typical year.

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

Pre-construction notification: A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants

confirmation that the activity is authorized by nationwide permit.

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

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

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

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

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

Riparian areas: Riparian areas are lands next to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects riverine, lacustrine, estuarine, and marine waters with their adjacent wetlands, non-wetland waters, or uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 23.)

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

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

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

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

Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and best management practices, which retain water for a period of time to control runoff and/or improve the quality (*i.e.*, by reducing the concentration of nutrients,

sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. The substrate may also be comprised, in part, of organic matter, such as large or small wood fragments, leaves, algae, and other organic materials. 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 jurisdictional 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 NWP, a waterbody is a "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)).

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