This document is scheduled to be published in the
Federal Register on 01/06/2017 and available online at
https://federalregister.gov/d/2016-31355, and on **FDsys.gov**

Billing Code 3720-58

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Chapter II

[COE-2015-0017]

RIN 0710-AA73

Issuance and Reissuance of Nationwide Permits

AGENCY: Army Corps of Engineers, DoD.

ACTION: Final rule.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is reissuing 50 existing nationwide permits (NWPs), general conditions, and definitions, with some modifications. The Corps is also issuing two new NWPs and one new general condition. The effective date for the new and reissued NWPs is March 19, 2017. These NWPs will expire on March 18, 2022. The NWPs will protect the aquatic environment and the public interest while effectively authorizing activities that have no more than minimal individual and cumulative adverse environmental effects.

DATES: These NWPs, general conditions, and definitions will go into effect on March 19, 2017.

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

FOR FURTHER INFORMATION CONTACT: Mr. David Olson at 202-761-4922 or access the U.S. Army Corps of Engineers Regulatory Home Page at http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits.aspx.

SUPPLEMENTARY INFORMATION:

Executive Summary

The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWPs) to authorize certain activities that require Department of the Army permits under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. The purpose of this regulatory action is to reissue 50 existing NWPs and to issue two new NWPs. In addition, one new general condition is being issued. The NWPs can only be issued for a period of no more than five years and cannot be extended. These 52 NWPs go into effect on March 19, 2017 and expire on March 18, 2022.

The NWPs authorize activities that have no more than minimal individual and cumulative adverse environmental effects. The NWPs authorize a variety of activities, such as aids to navigation, utility line crossings, erosion control activities, road crossings, stream and wetland restoration activities, residential developments, mining activities, commercial shellfish aquaculture activities, and agricultural activities. The two new NWPs authorize the removal of low-head dams and the construction and maintenance of living shorelines. Some NWP activities may proceed without notifying the Corps, as long as those activities comply with all applicable terms and conditions of the NWPs, including regional conditions imposed by division engineers. Other NWP activities cannot proceed until the project proponent has submitted a pre-construction notification to the Corps, and for most NWPs that require pre-construction notifications the Corps has 45 days to notify the project proponent whether the activity is authorized by NWP.

Background

The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWPs) to authorize activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 that will result in no more than minimal individual and cumulative adverse environmental effects. The NWPs can only be issued for a period of five years or less, unless the Corps reissues those NWPs (see 33 U.S.C. 1344(e) and 33 CFR 330.6(b)). We are reissuing 50 existing NWPs and issuing two new NWPs. These NWPs will go into effect on March 19, 2017, and will expire on March 18, 2022. Division engineers will add regional conditions to these NWPs to ensure that, on a regional basis, these NWPs only authorize activities that have no more than minimal individual and cumulative adverse environmental effects.

Section 404(e) of the Clean Water Act 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. The Secretary's authority to issue general permits has been delegated to the Chief of Engineers and his or her designated representatives. Nationwide permits are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities in jurisdictional waters and wetlands that have no more than minimal adverse environmental impacts (see 33 CFR 330.1(b)). Activities authorized by NWPs and other general permits must be similar in nature, cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment (see 33 U.S.C. 1344(e)(1)). Nationwide permits can also be issued to authorize activities pursuant to Section 10 of the Rivers and

Harbors Act of 1899 (see 33 CFR 322.2(f)). The NWP program is designed to provide timely authorizations for the regulated public while protecting the Nation's aquatic resources.

The phrase "minimal adverse environmental effects when performed separately" refers to the direct and indirect adverse environmental effects caused by a 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 the all the activities authorized by a particular NWP during the time period that NWP is in effect (which can be no more than 5 years) in a specific geographic region. The appropriate geographic area for assessing cumulative effects is determined by the decision-making authority for the general permit. For each NWP, Corps Headquarters prepares national-scale cumulative effects analyses. Division engineers consider cumulative effects on a regional basis (e.g., a state, Corps district, or other geographic area) when determining whether to modify, suspend, or revoke NWPs on a regional basis (see 33 CFR 330.5(c)). When evaluating NWP pre-construction notifications (PCNs), district engineers evaluate cumulative adverse environmental effects in an appropriate geographic area (e.g., watershed, ecoregion, Corps district geographic area of responsibility, other geographic region).

When Corps Headquarters issues or reissues an NWP, it conducts a national-scale cumulative impact assessment in accordance with the National Environmental Policy Act (NEPA) definition of "cumulative impact" at 40 CFR part 1508.7. The NEPA cumulative effects analysis prepared by Corps Headquarters for an NWP examines the impact on the environment which results from the incremental impact of its action (i.e., the activities

that will be authorized by that NWP) and adds that incremental impact to "other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions" (40 CFR 1508.7). In addition to environmental impacts caused by activities authorized by the NWP, other NWPs, and other types of DA permits, the Corps' NEPA cumulative effects analysis in each of its national decision documents discusses, in general terms, the environmental impacts caused by other past, present, and reasonably foreseeable future Federal, non-Federal, and private actions. For example, wetlands and other aquatic ecosystems are affected by a wide variety of Federal, non-Federal, and private actions that involve land use/land cover changes, pollution, resource extraction, species introductions and removals, and climate change (Millennium Ecosystem Assessment (MEA) 2005b).

Corps Headquarters fulfills the requirements of NEPA when it finalizes the environmental assessment in its national decision document for the issuance or reissuance of an NWP. An NWP verification issued by a district engineer does not require separate NEPA documentation. (See 53 FR 3126, the Corps' final rule for implementing the National Environmental Policy Act, which was published in the February 3, 1988, issue of the Federal Register.) When a district engineer issues an NWP verification, he or she is merely verifying that the activity is authorized by an NWP issued by Corps Headquarters. That verification is subject to any activity-specific conditions added to the NWP authorization by the district engineer. When reviewing a request for an NWP verification, the district engineer considers, among other factors, the "cumulative adverse environmental effects resulting from activities occurring under the NWP" (33 CFR 330.5(d)(1)). When documenting the decision to issue an NWP verification, the district

engineer will explain that the NWP activity, plus any applicable regional conditions and any activity-specific conditions added by the district engineer (e.g., mitigation requirements) will ensure that the adverse environmental effects caused by the NWP activity will only be minimal on an individual and cumulative basis.

If an NWP authorizes discharges of dredged or fill material into waters of the United States, the Corps also conducts a national-scale cumulative effects analysis in accordance with the Clean Water Act section 404(b)(1) Guidelines. The 404(b)(1) Guidelines approach to cumulative effects analysis for the issuance or reissuance of general permits is described at 40 CFR part 230.7(b).

For each NWP, Corps Headquarters issues a decision document, which includes a NEPA environmental assessment, a public interest review, and if applicable, a 404(b)(1) Guidelines analysis. Each NWP is a stand-alone general permit.

When the Corps issues or reissues an NWP, Corps divisions are required to prepare supplemental decision documents to provide regional analyses of the environmental effects of that NWP. Those supplemental decision documents are not subject to a public notice and comment process. The supplemental decision documents also support the division engineer's decision to modify, suspend, or revoke the NWP in a particular region. An NWP is modified on a regional basis through the addition of regional conditions, which restricts the use of the NWP in the geographic area(s) where those regional conditions apply. The supplemental decision document includes a regional cumulative effects analysis, and if the NWP authorizes discharges of dredged or fill material into waters of the United States, a regional 404(b)(1) Guidelines cumulative

effects analysis. The geographic region used for the cumulative effects analyses in a supplemental decision document is at the division engineer's discretion. In the supplemental decision document, the division engineer may evaluate cumulative effects of the NWP at the scale of a Corps district, state, or other geographic area, such as a watershed or ecoregion. If the division engineer is not suspending or revoking the NWP in a particular region, the supplemental decision document also includes a statement finding that the use of that NWP in the region will cause only minimal individual and cumulative adverse environmental effects.

For some NWPs, the project proponent may proceed with the NWP activity as long as he or she complies with all applicable terms and conditions, including applicable regional conditions. When required, Clean Water Act section 401 water quality certification and/or Coastal Zone Management Act consistency concurrence must be obtained or waived (see general conditions 25 and 26, respectively). Other NWPs require project proponents to notify Corps district engineers of their proposed activities prior to conducting regulated activities, so that the district engineers can make case-specific determinations of NWP eligibility. The notification takes the form of a pre-construction notification (PCN). The purpose of a PCN is to give the district engineer an opportunity to review a proposed NWP activity (generally 45 days after receipt of a complete PCN) to ensure that the proposed activity qualifies for NWP authorization. If it does not qualify for NWP authorization, the district engineer will inform the applicant and advise him or her on the process for applying for another form of Department of the Army (DA) authorization. The PCN requirements for the NWPs are stated in the text of those NWPs,

as well as a number of general conditions, especially general condition 32. Paragraph (b) of general condition 32 lists the information required for a complete PCN.

Twenty-one of the NWPs require PCNs for all activities, including the two new NWPs. Twelve of the proposed NWPs require PCNs for some authorized activities. Nineteen of the NWPs do not require PCNs, unless pre-construction notification is required to comply with certain general conditions or regional conditions imposed by division engineers. All NWPs require PCNs for any proposed NWP activity undertaken by a non-federal entity that might affect listed species or designated critical habitat under the Endangered Species Act (see general condition 18 and 33 CFR part 330.4(f)(2)). All NWPs require PCNs for any proposed NWP activity undertaken by a non-federal entity that may have the potential to cause effects to historic properties listed, or eligible for listing in, the National Register of Historic Places (see general condition 20 and 33 CFR part 330.4(g)(2)).

Except for NWPs 21, 49, and 50, and activities conducted by non-Federal permittees that require PCNs under paragraph (c) of general conditions 18 and 20, if the Corps district does not respond to the PCN within 45 days of a receipt of a complete PCN the activity is authorized by NWP (see 33 CFR 330.1(e)(1)). Regional conditions imposed by division engineers may also add PCN requirements to one or more NWPs.

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. The district engineer applies the criteria in paragraph 2 of section D, "District Engineer's Decision." If the district engineer reviews

the PCN and determines that the proposed activity will result in more than minimal individual and cumulative adverse environmental effects, he or she will notify that applicant and offer the prospective permittee the opportunity to submit a mitigation proposal to reduce the adverse environmental effects so that they are no more than minimal (see 33 CFR 330.1(e)(3)).

Mitigation requirements for NWP activities can include permit conditions (e.g., time-of-year restrictions or use of best management practices) to avoid or minimize adverse effects on certain species or other resources. Mitigation requirements may also consist of 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 that the district engineer requires for an NWP activity must comply with the Corps' compensatory mitigation regulations at 33 CFR part 332.

At the conclusion of his or her review of the PCN, the district engineer prepares a decision document to explain his or her conclusions. The decision document explains the rationale for adding conditions to the NWP authorization, including mitigation requirements that the district engineer determines are necessary to ensure that the verified NWP activity results in no more than minimal individual and cumulative adverse environmental effects. The decision document includes the district engineer's consideration of cumulative adverse environmental effects resulting from the use of that NWP within a watershed, county, state, or a Corps district. 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 or 14) 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 those NWPs within the appropriate geographic area. Mitigation required by the district engineer can help ensure that the NWP activity results only in minimal adverse environmental effects. The decision document is part of the administrative record for the NWP verification.

Because the required NEPA cumulative effects and 404(b)(1) Guidelines cumulative effects analyses are conducted by Corps Headquarters in its decision documents for the issuance or reissuance of the NWPs, district engineers do not need to do comprehensive cumulative effects analyses for each NWP verification. For an NWP verification, the district engineer only needs to evaluate the cumulative adverse environmental effects of the applicable NWP(s) at an appropriate geographic scale (e.g., Corps district, watershed, ecoregion). In his or her decision document, the district engineer will include a statement declaring whether the proposed NWP activity, plus any required mitigation, will or will not result in more than minimal individual and cumulative adverse environmental effects.

Some NWP activities that require PCNs also require agency coordination (see paragraph (d) of general condition 32). If, in the PCN, the applicant requests a waiver of an NWP limit that the terms of the NWP allow the district engineer to waive (e.g., the 300 linear foot limit for the loss of intermittent and ephemeral stream bed authorized by NWP 29), and the district engineer determines, after coordinating the PCN with the resource agencies, that the proposed NWP activity will result in no more than minimal

adverse environmental effects, the district engineer's decision document explains the basis his or her decision.

If the district engineer determines, after considering mitigation, that there will be more than minimal cumulative adverse environmental effects, he or she will exercise discretionary authority and require an individual permit for the proposed activity. That determination will be based on consideration of the information provided in the PCN and other available information. Discretionary authority may also be exercised in cases where the district engineer has sufficient concerns for any of the Corps public interest review factors (see 33 CFR 330.4(e)(2)).

Regional conditions may be imposed on the NWPs by division engineers to take into account regional differences in aquatic resource functions and services across the country and to restrict or prohibit the use of NWPs to protect those resources. Through regional conditions, a division engineer can modify an NWP to require submission of PCNs for certain activities. Regional conditions may also restrict or prohibit the use of an NWP in certain waters or geographic areas, if the use of that NWP in those waters or areas might result in more than minimal individual or cumulative adverse environmental effects. Regional conditions may not be less stringent than the NWPs.

A district engineer may impose activity-specific conditions on an NWP authorization to ensure that the NWP activity will result in no more than minimal individual and cumulative adverse effects on the environment and other public interest review factors. In addition, activity-specific conditions will often include mitigation requirements, including avoidance and minimization, and possibly compensatory

mitigation, to reduce the adverse environmental effects of the proposed activity so that they are no more than minimal. Compensatory mitigation requirements for NWP activities must comply with the applicable provisions of 33 CFR part 332. Compensatory mitigation may include the restoration, establishment, enhancement, and/or preservation of wetlands. Compensatory mitigation may also include the rehabilitation, enhancement, or preservation of streams, as well as the restoration, enhancement, and protection/maintenance of riparian areas next to streams and other open waters. District engineers may also require compensatory mitigation for impacts to other types of aquatic resources, such as seagrass beds, shallow sandy bottom marine areas, and coral reefs.

Compensatory mitigation can be provided through mitigation banks, in-lieu fee programs, and permittee-responsible mitigation. If the required compensatory mitigation will be provided through mitigation bank or in-lieu fee program credits, the conditions in the NWP verification must comply with the requirements at 33 CFR 332.3(k)(4), and specify the number and resource type of credits that need to be secured by the permittee. If the required compensatory mitigation will be provided through permittee-responsible mitigation, the conditions added to the NWP authorization must comply with 33 CFR 332.3(k)(3).

Today's final rule reissuing the 50 existing NWPs with some modifications and issuing two new NWPs reflects the Corps commitment to environmental protection. In response to the comments received on the June 1, 2016, proposed rule, we made changes to the text of the NWPs, general conditions, and definitions so that they are clearer and can be more easily understood by the regulated public, government personnel, and interested parties. The terms and conditions of these NWPs protect the aquatic

environment and other public interest review factors. The changes to the NWPs, general conditions, definitions, and other provisions are discussed below.

Making the text of the NWPs clearer and easier to understand will also facilitate compliance with these permits, which will also benefit the aquatic environment. The NWP program allows the Corps to authorize activities with only minimal adverse environmental impacts in a timely manner. The NWP program also provides incentives to project proponents to design their activities to avoid and minimize adverse impacts to jurisdictional waters and wetlands to qualify for the streamlined NWP authorization. In FY 2016, the average evaluation time for a request for NWP authorization was 40 days, compared to the average evaluation time of 217 days for a standard individual permit application. Regional general permits issued by district engineers provide similar environmental protections and incentives to project proponents. In addition, the NWPs help the Corps better protect the aquatic environment by focusing its limited resources on those activities that have the potential to result in more severe adverse environmental effects.

Benefits and Costs of the NWPs

The NWPs provide benefits by encouraging project proponents to minimize their proposed impacts to waters of the United States and design their projects within the scope of the NWPs, rather than applying for individual permits for activities that could result in greater adverse impacts to the aquatic environment. The NWPs also benefit the regulated public by providing convenience and time savings compared to standard individual permits. The minimization encouraged by terms and conditions of an NWP, as well as

compensatory mitigation that may be required for specific activities authorized by an NWP, helps reduce adverse environmental effects to jurisdictional waters and wetlands, as well as resources protected under other laws, such as federally-listed endangered and threatened species and designated critical habitat, as well as historic properties. For an analysis of the monetized benefits of the NWPs, refer to the Regulatory Impact Analysis which is available at www.regulations.gov, docket number COE-2015-0017.

The costs of the NWPs relate to the paperwork burden associated with completing the PCNs. See the section on Paperwork Reduction Act for a response to comments and additional discussion of the paperwork burden.

Grandfather Provision for Expiring NWPs

An activity completed under the authorization provided by a 2012 NWP continues to be authorized by that NWP (see 33 CFR part 330.6(b)). Activities authorized by the 2012 NWPs that have commenced or are under contract to commence by March 18, 2017, will have one year (i.e., until March 18, 2018) to complete those activities under the terms and conditions of the 2012 NWPs (see 33 CFR section 330.6(b)). Activities previously authorized by the 2012 NWPs that have not commenced or are not under contract to commence by March 18, 2017, will require reauthorization under the 2017 NWPs, provided those activities still comply with the terms and conditions of qualify for authorization under the 2017 NWPs. If those activities no longer qualify for NWP authorization because they do not meet the terms and conditions of the 2017 NWPs (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.

In response to the June 1, 2016, proposed rule, several commenters requested that the Corps provide a longer grandfathering period for activities authorized under the 2012 NWPs. A few commenters suggested changing the grandfather period to 2 years and some commenters recommended changing it to 3 years.

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). It would require a separate rulemaking to change section 330.6(b) to establish a longer grandfathering period for authorized NWP activities. We believe the one-year period is sufficient for project proponents to complete their NWP activities. If they determine more time is needed to complete the NWP activity, the one-year period gives them sufficient time to request verification under the reissued NWP(s). If a proposed activity was authorized by the 2012 NWPs, but is no longer authorized by these new or reissued NWPs, then the project proponent should apply for an individual permit during the grandfather period to try to obtain the individual permit before the one-year grandfather period expires.

Clean Water Act Section 401 Water Quality Certifications and Coastal Zone Management Act Consistency Determinations

The NWPs issued today will become effective on March 19, 2017. This Federal Register notice begins the 60-day Clean Water Act Section 401 water quality certification (WQC) and the 90-day Coastal Zone Management Act (CZMA) consistency determination processes.

After the 60-day period, the latest version of any written position taken by a state, Indian Tribe, or U.S. EPA on its WQC for any of the NWPs will be accepted as the state's, Indian Tribe's, or EPA's final position on those NWPs. If the state, Indian Tribe, or EPA takes no action by [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER], WQC will be considered waived for those NWPs.

After the 90-day period, the latest version of any written position taken by a state on its CZMA consistency determination for any of the NWPs will be accepted as the state's final position on those NWPs. If the state takes no action by [INSERT DATE 90 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER], CZMA consistency concurrence will be presumed for those NWPs.

Discussion of Public Comments

Overview

In response to the June 1, 2016, Federal Register notice, we received more than 54,000 comment letters, of which approximately 53,200 were form letters pertaining to NWP 12. In addition, we received over 700 form letters opposing the reissuance of NWP 21 and over 50 form letters opposing the issuance of proposed new NWP B. In addition to the various form letters, we received a several hundred individual comment letters. Those individual comment letters, as well as examples of the various form letters, are posted in the www.regulations.gov docket (COE-2015-0017) for this rulemaking action. We reviewed and fully considered all comments received in response to the proposed rule.

Response to General Comments

Many commenters expressed general support for the proposed rule, as well as the NWP program as a whole. Several commenters voiced their concerns about the proposed NWPs being able to be issued before the 2012 NWPs expire. One commenter said the NWPs are duplicative of state and local government permit programs. Another commenter requested that the final NWPs include a statement informing the public that many of the categories of activities authorized by NWP are also regulated by state or local government wetland regulatory programs. A commenter stated that Corps district engineers should not have the authority to add conditions to NWPs or be able to suspend NWP authorizations. One commenter expressed appreciation of the policy statements included in the NWPs, stating that such statements promote consistency in program implementation among Corps districts. One commenter requested that the Corps issue the NWPs for a period of ten years. One commenter stated that because of the effects of climate change, the predictability and confidence in the use of the NWPs are likely to decline, and recommend shortening the renewal cycle for certain NWPs, and require more frequent monitoring of specific projects that have been approved by NWPs.

We worked to develop and issue the final NWPs before the 2012 NWPs expire on March 18, 2017. While there are a number of states that have aquatic resource regulatory programs that are similar to the Corps regulatory program, there are often important differences between the Corps' regulatory program and those state regulatory programs. In states where there is close alignment between the Corps and state regulatory programs, programmatic general permits can be developed and issued by district engineers to reduce duplication and streamline the authorization process for the regulated public. In areas where local governments also have adopted regulatory programs to protect aquatic

resources, there is likely to be variability from the Corps regulatory program. Despite the existence of state and local regulatory programs in some areas, the Corps still has the responsibility for implementing section 404 of the Clean Water Act, as well as section 10 of the Rivers and Harbors Act of 1899. For section 404 of the Clean Water Act, Michigan and New Jersey are exceptions where they have assumed the section 404 program. We appreciate the acknowledgment that policy statements made through the NWP program help improve Corps regulatory program consistency.

The ability for division and district engineers to modify, suspend, or revoke NWPs on a regional or case-by-case basis is a key tool for ensuring that the NWPs only authorize activities that cause no more than minimal individual and cumulative adverse environmental effects. There is substantial variation in aquatic resource types across the country, as well as a large amount of variability among geographic regions in the quantity of those resources. Those regional differences require division and district engineers to have the authority to tailor the NWPs to address regional and site-specific concerns. The NWPs can only be issued for a period of 5 years because of the statutory language in section 404(e) of the Clean Water Act, as well as the Corps' regulations at 33 CFR 330.6(b). Section 330.6(b) states that if "an NWP is not modified or reissued within five years of its effective date it automatically expires and becomes null and void." Nationwide permits are an important tool for adapting to the effects of climate change, by authorizing a variety of activities such as utility line crossings, road crossings, bank stabilization activities, living shorelines, and aquatic habitat restoration and enhancement activities. The 5-year cycle for reissuing the NWPs is sufficient time to make necessary

changes to the NWPs to ensure the NWPs only authorize those activities that result in no more than minimal individual and cumulative adverse environmental effects.

Many commenters objected to the proposed NWPs, stating that they authorize activities that result in more than minimal individual and cumulative adverse environmental effects and that they do not authorize categories of activities that are similar in nature. A few commenters said that since the Corps does not require pre-construction notifications (PCNs) for all NWP activities, it could not ensure that NWP activities result in no more than minimal individual and cumulative adverse environmental effects. One commenter said that Corps districts should improve their tracking of cumulative impacts. A number of commenters opposed the NWPs, stating that they authorize activities associated with larger projects that have substantial environmental impacts. Several commenters said that the NWPs should either not authorize activities that impact streams and rivers occupied by anadromous salmon, or compensatory mitigation should always be required for those activities. One commenter stated that the NWPs should not be used in areas with substantial cumulative impacts, such as essential fish habitat and areas inhabited by ESA-listed species.

The NWP program provides a three-tiered approach to ensure compliance with section 404(e) of the Clean Water Act. Those three tiers are: (1) the terms and conditions of the NWPs issued by Corps Headquarters; (2) the authority of division engineers to modify, suspend, or revoke NWPs on a regional basis; and (3) the authority of district engineers to modify, suspend, or revoke NWPs on a case-by-case basis. We interpret the requirement for general permits to authorize categories of activities that are similar in nature broadly, to provide program efficiency, to keep the number of NWPs manageable,

and to facilitate implementation by the Corps and project proponents that need to obtain Department of the Army (DA) authorization for activities that have only minimal adverse environmental effects.

The NWP activities that do not require PCNs are those activities that have characteristics that do not result in more than minimal adverse environmental effects, such as small structures in navigable waters subject to section 10 of the Rivers and Harbors Act of 1899 or minor fills in waters of the United States associated with maintenance activities or temporary impacts. While we recognize that many NWP activities are components of larger overall projects, the Corps' authorities under the NWP program are limited to discharges of dredged or fill material into waters of the United States that are regulated under Section 404 of the Clean Water Act, and structures and work in navigable waters that are regulated under Section 10 of the Rivers and Harbors Act of 1899. The Corps does not regulate other components of those larger overall projects, such as activities that occur in upland areas. In many cases, the NWPs are authorizing minor features that are part of those larger overall projects.

Division engineers can impose regional conditions on the NWPs to protect rivers and streams inhabited by anadromous fish, including salmon. For those salmonids that are listed as endangered or threatened under the Endangered Species Act (ESA), general condition 18 requires PCNs for all NWP activities that might affect those listed species or their designated critical habitat, or that occur in their designated critical habitat. District engineers have the discretion to require compensatory mitigation to offset stream losses caused by NWP activities. A division engineer also has the authority to modify, suspend, or revoke one or more NWPs in a geographic region if he or she determines the use of

that NWP or NWPs will result in more than minimal cumulative adverse environmental effects. An area that has essential fish habitat or is inhabited by ESA-listed species is not necessarily experiencing more than minimal cumulative impacts due to activities authorized by NWPs. The physical, chemical, and biological characteristics of essential fish habitat may be altered by a variety of human activities other than the activities authorized by NWPs. Essential fish habitat may be altered by land use and land cover changes in the watershed, point source and non-point source pollution, excess nutrients, resource extraction activities, introductions and removals of species, and changing environmental conditions, including climate change. Species may be listed as endangered or threatened because of habitat destruction and modification, overexploitation, disease or predation, the inadequacy of existing regulatory mechanisms, and other man-made or natural factors affecting their continued existence (see section 4(a)(1)(A)-(E) of the Endangered Species Act).

One commenter said the NWPs should not authorize activities that result in adverse environmental impacts. A commenter asserted that the NWPs should not authorize activities in marine or estuarine waters. One commenter stated that the terms and conditions of the NWPs should not be changed to be less protective of the environment. One commenter said that the NWPs should be subjected to a multi-agency peer review process. Several commenters said that public notices should be issued for NWP PCNs to disclose proposed NWP activities and increase public participation. A number of commenters suggested that NWPs should require no net loss of aquatic resources. A number of commenters asked why the proposed NWPs use the term “no

more than minimal adverse environmental effects" instead of "no more than minimal adverse effects on the aquatic environment."

Section 404(e) of the Clean Water Act 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. Regulated activities that occur in marine and estuarine waters often result in no more than minimal adverse environmental effects, as long as they comply with the NWP terms and conditions that are imposed on such activities. We have adopted terms and conditions for the NWPs to be sufficiently protective of the aquatic environment while allowing activities that result in only minimal adverse environmental effects to be conducted. The NWPs are already subject to multi-agency peer review process, through the rulemaking requirements of Executive Order 12866, Regulatory Planning and Review.

Requiring public notices for PCNs would be contrary to the purpose of the general permit program established through section 404(e) of the Clean Water Act, for a streamlined authorization process for activities that result in no more than minimal individual and cumulative adverse environmental effects. In addition, it is unlikely that there would be any meaningful public comment submitted to Corps districts in response to public notices for the minor activities authorized by these NWPs that would warrant the reduction in permitting efficiency providing such a comment period would cause. Compensatory mitigation can only be required by the district engineer after he or she reviews the PCN and determines that compensatory mitigation is necessary to comply with the "no more than minimal adverse environmental effects" requirement for NWPs (see 33 CFR 330.1(e)(3)). 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 Clean Water Act 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.

The NWP program provides valuable protection to the Nation's aquatic resources by establishing incentives to avoid and minimize losses of jurisdictional waters and wetlands in order to qualify for the streamlined NWP authorizations. A large majority of authorized fills in jurisdictional waters and wetlands authorized by general permits and individual permits are less than 1/10-acre (Corps-EPA 2015, Figure 5). The 2017 NWPs use the term "no more than minimal adverse environmental effects" to be consistent with the text of section 404(e) of the Clean Water Act and 33 CFR 322.2(f)(1). When making no more than minimal adverse environmental effects determinations for proposed NWP activities, the district engineer considers the adverse effects to the aquatic environment and any other factor of the public interest (e.g., 33 CFR 330.1(d)). The use of the term "no more than minimal adverse environmental effects" does not expand the Corps' scope of analysis. The Corps' control and responsibility remains limited to the activities it has the authority to regulate, and the effects to the environment caused by those activities.

One group of commenters requested a public hearing on the proposed NWPs because of their concerns about the permitting of oil and gas pipelines. Another organization requested a public hearing because of the proposal to reissue NWP 48. We denied the requests for a public hearing on the proposed 2017 NWPs because we determined that a public hearing is unlikely to provide information that was not already

provided through the thousands of comments we received on the proposal to reissue NWP 12, and the many comments we received on the proposed NWP 48. See our responses to comments on NWP 12 and 48 below for more information.

One commenter said that Corps districts should not be allowed to suspend NWPs to use regional general permits (RGPs) instead of the NWPs if the overall project crosses state lines or international boundaries. Regional general permits are an acceptable permitting mechanism to authorize activities requiring Department of the Army (DA) authorization that are part of an overall larger project that crosses state boundaries or international boundaries. The NWPs already provide an expedited review process for regulated activities that result in no more than minimal adverse environmental effects, although we recognize that it takes more time to issue NWP verifications that require compliance with other federal laws, such as section 7 of the Endangered Species Act and section 106 of the National Historic Preservation Act. For an NWP activity that requires Clean Water Act section 401 water quality certification and/or Coastal Zone Management Act (CZMA) consistency concurrence, the district engineer may issue a provisional NWP verification, but that activity is not authorized by NWP until the project proponent obtains the required water quality certification or waiver, and/or the required CZMA consistency concurrence or presumption of concurrence.

A few commenters suggested that the Corps develop procedures to expedite the review of proposed NWP activities and that additional mitigation should not be required in states that have regulatory programs similar to the Corps regulatory program. One commenter said that there should be waivers in NWPs for activities reviewed and permitted by states. When an NWP activity that also requires authorization under state

law requires compensatory mitigation, the Corps district is encouraged to work with its state counterparts to develop compensatory mitigation requirements that satisfy both federal and state permit requirements. Waivers for NWP authorization or NWP limits cannot be issued solely on the basis that activities may be regulated by both the Corps and state regulatory agencies. The requirements in Section 404(e) of the Clean Water Act for general permits, including NWPs, may be different from the requirements for state-issued general permits. For categories of activities authorized by NWPs, those NWPs satisfy the permitting requirements of section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899.

One commenter said that the expiration dates of NWP verification letters issued by Corps districts do not correspond to the expiration date of the NWPs themselves. Another commenter stated that individual permits, rather than NWPs, should be required for all wetland fills. One commenter requested an expedited review process for emergency projects. One commenter requested information on how cumulative impacts are assessed by the Corps.

On January 28, 2013 (78 FR 5733), we issued a final rule amending 33 CFR 330.6(a)(3)(ii) to allow district engineers to issue NWP verifications that expire on the same date the NWPs expire, unless the district engineer modifies, suspends, or revokes the NWP authorization. Not all wetland fills result in more than minimal adverse environmental effects, so authorization by NWP is appropriate when the wetland fill activity is authorized by an NWP and complies with all applicable terms and conditions, including any regional conditions imposed by the division engineer and any activity-specific conditions imposed by the district engineer. Those activity-specific conditions

may cover wetland compensatory mitigation requirements. Emergency projects that are not covered by NWPs or regional general permits may be addressed under the Corps' emergency permitting procedures at 33 CFR 325.2(e)(4). Our general approach for evaluating cumulative effects in the NWP program is described above in this final rule.

National Environmental Policy Act Compliance

We have prepared a decision document for each NWP. Each decision document contains an environmental assessment (EA) to fulfill the requirements of the National Environmental Policy Act (NEPA). The EA includes the public interest review described in 33 CFR part 320.4(b). The EA generally discusses the anticipated impacts the NWP will have on the human environment and the Corps' public interest review factors. 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 Clean Water Act section 404(b)(1), in particular 40 CFR part 230.7. These decision documents evaluate, from a national perspective, the environmental effects of each NWP.

The final decision document for each NWP is available on the internet at: www.regulations.gov (docket ID number COE-2015-0017) as Supporting Documents for this final rule. Before the 2017 NWPs go into effect, division engineers will issue supplemental decision 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 decision 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 decision documents for all of the NWPs. The supplemental decision documents will also discuss regional conditions imposed by division engineers to protect the aquatic environment and other public interest review factors and ensure that any adverse environmental effects resulting from NWP activities in that region will be no more than minimal, individually and cumulatively.

For the NWPs, the assessment of cumulative effects occurs at three levels: national, regional, and the activity-specific verification stage. Each national NWP decision document includes a national-scale NEPA cumulative effects analysis. Each supplemental decision document has a cumulative effects analysis conducted for the geographic region covered by the supplemental decision document, which is usually a state or Corps district. When a district engineer issues an NWP verification letter in response to a PCN or a voluntary request for a NWP verification, the district engineer prepares a brief decision document. That decision document explains the district engineer's determination whether the proposed NWP activity, after considering permit conditions which might include 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 decision 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. When a division engineer adds regional conditions to one or more NWPs, the district engineer announces those regional conditions in a public notice.

After the NWPs are issued or reissued, district engineers will monitor the use of NWPs, and those evaluations may result the district engineer recommending that the division engineer modify, suspend, or revoke one or more NWPs in a particular geographic region or watershed. For such recommendations, the district engineer would present information indicating that the use of one or more NWPs in a particular geographic area may result in more than minimal individual or cumulative adverse environmental effects. In such cases, the division engineer will amend the applicable supplemental decision documents to account for the modification, suspension, or revocation of those NWPs, and issue a public notice announcing the new regional conditions or the suspension or revocation of the applicable NWP(s).

A few commenters said that the Corps' cumulative effects analyses were properly conducted, and a few commenters expressed opinions that those analyses were inadequate. One commenter said that cumulative effects analyses should not be limited to the NWP verification stage, but should also be conducted at national and regional scales to improve resource protection. One commenter stated that in its draft decision documents, the Corps failed to assess the cumulative impacts of the NWPs and did not take into account the full scope of adverse impacts to the nation's waters. Another

commenter said that the Corps' cumulative effects analysis did not properly consider past actions and reasonably foreseeable future actions.

All of the national decision documents have a cumulative impact analysis conducted in accordance with the Council on Environmental Quality's NEPA regulations at 40 CFR 1508.7 (see section 4.3 of each national decision document). For those NWPs that authorize discharges of dredged or fill material into waters of the United States, each the national decision document includes a cumulative effects analysis conducted under 40 CFR 230.7(b)(3). Cumulative effects analyses are also conducted at regional scales, in the supplemental decision documents approved by division engineers. When issuing an NWP verification, the district engineer makes a determination confirming that the use of the NWP will result in no more than minimal cumulative adverse environmental effects. If the district engineer determines, after considering mitigation proposed by the applicant, that the use of that NWP will result in more than minimal individual or cumulative adverse environmental effects, he or she will exercise discretionary authority and require an individual permit.

The cumulative impact analyses in the national decision documents, especially the NEPA cumulative effects analyses, examine the wide variety of activities that affect the structure, dynamics, and functions of the nation's waters and wetlands. The ecological functionality or ecological condition of those waters and wetlands are directly and indirectly affected by many types of human activities, not just discharges of dredged or fill material regulated under section 404 of the Clean Water Act or structures or work regulated under section 10 of the Rivers and Harbors Act of 1899. The Corps' NEPA cumulative effects analyses considers past actions in the aggregate, consistent with the

Council on Environmental Quality's 2005 guidance entitled "Guidance on the Consideration of Past Actions in Cumulative Effects Analyses." The aggregate effects of past actions includes the present effects of past actions that were authorized by earlier versions of the NWPs, as well as other DA permits. In the national decision documents, the Corps added more discussion of the contribution of reasonably foreseeable future actions to NEPA cumulative effects, based on general information on reasonably foreseeable future actions that can be discerned at a national scale for categories of activities associated with NWP activities. Many of the reasonably foreseeable future actions related to the operation of the facility, after the permitted activities were completed. The Corps does not have the authority to regulate the operation of facilities that may be been constructed under activities authorized by NWPs or other DA permits, unless those operation activities involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States.

One commenter declared that NWP verifications do not need to include NEPA analyses because compliance with NEPA is accomplished through the national decision documents issued by Corps Headquarters. Another commenter expressed the opinion that the national decision documents, the supplemental decision documents signed by division engineers, and NWP verifications issued by district engineers do not comply with NEPA. A number of commenters said that making the draft decision documents available for public review during the comment period for the proposed NWPs does not comply with NEPA requirements. One commenter said that the comment period for the draft decision documents should be 90 days. A few commenters asserted that the draft decision documents prematurely made a "finding of no significant impact." One

commenter said the national decision documents support a "finding of no significant impact" under NEPA for each of the NWPs. Several commenters stated that each NWP requires an environmental impact statement.

When district engineers evaluate NWP PCNs, they are not required to conduct NEPA analyses because the Corps fulfills the requirements of NEPA through the environmental assessments in the combined decision documents prepared by Corps Headquarters when an NWP is issued, reissued, or modified. The NWP verification can be simply confirmation that a proposed NWP activity complies with the terms and conditions of applicable NWP(s), and will result in no more than minimal individual and cumulative adverse environmental effects. The administrative record for an NWP verification will include a brief document explaining the district engineer's determination regarding the NWP authorization for that activity, and whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. The requirements of NEPA are fulfilled by the national decision documents issued by Corps Headquarters. The supplemental decision documents signed by division engineers and the NWP verifications issued by district engineers are part of the tiered decision-making process to demonstrate compliance with the "no more than minimal individual and cumulative adverse environmental effects" requirements for general permits. This tiered process is consistent with the requirements under section 404(e) of the Clean Water Act and for NWPs issued under the authority of section 10 of the Rivers and Harbors Act of 1899, 33 CFR 322.2(f).

The Council on Environmental Quality's NEPA regulations require agencies to "involve environmental agencies, applicants, and the public, to the extent practicable, in

preparing assessments" (40 CFR 1501.4(b)) but do not require that environmental assessments be made available in draft form for public comment. However, the Corps' NWP regulations require that the draft decision documents prepared by Corps Headquarters are made available for public comment (see 33 CFR 330.5(b)(3)). Thus we made them available for public review and comment. We believe that 60 days is a sufficient comment period for the public to provide meaningful comments on the draft decision documents.

In its draft decision documents for these proposed NWPs, the Corps did not make a "finding of no significant impact"; the draft decision documents had place-holders stating that those decisions could be made for the final NWPs. The Corps' "finding of no significant impact" in each national decision document for an issued or reissued NWP marks the completion of the NEPA process. When the Corps issues an EA with a finding of no significant impact, the NEPA process is concluded and an environmental impact statement is not necessary. Because the NWPs only authorize activities that have no more than minimal adverse environmental effects, individually and cumulatively, the issuance or reissuance of an NWP does not result in significant impacts to quality of the human environment and does not trigger the requirement to prepare an environmental impact statement.

One commenter said that a purpose and need statement should be included in each national decision document. This commenter also stated that the Corps' alternatives analysis and its evaluation of direct, indirect, and cumulative impacts is inadequate. One commenter stated that the division engineer's supplemental decision documents and the imposition of regional conditions does not comply with NEPA and the Clean Water Act.

Several commenters recommended that the final decision documents discuss impacts to climate change.

The NWPs authorize categories of activities that generally satisfy specific purposes (e.g., residential development, maintenance, bank stabilization, aquatic habitat restoration). The national decision documents describe, in general, the purposes for which the NWP activity would be used, and the needs of citizens that would be fulfilled by the authorized activities. Therefore, a more specific purpose and need statement in the national decision documents is not necessary. Each of the national decision documents includes a NEPA alternatives analysis, as well as general evaluations of anticipated direct, indirect, and cumulative impacts. The NWPs are issued or reissued prior to site-specific activities being proposed or authorized, so it is not possible to provide more than general, prospective impact analyses. The supplemental decision documents issued by division engineers provide regional analyses to support the use of NWPs in those regions, and with regional conditions that are imposed by division engineers, help ensure compliance with section 404(e) of the Clean Water Act. As stated above, the Corps fulfills the requirements of NEPA when it issues the national decision document for the issuance, reissuance, or modification of an NWP. The national decision documents have been revised to discuss climate change.

Compliance with Section 404(e) of the Clean Water Act

The NWPs are issued in accordance with Section 404(e) of the Clean Water Act and 33 CFR part 330. Section 404(e)(1) allows the Corps to issue nationwide permits for "categories of activities that are similar in nature." We interpret the "similar in nature" requirement to be applied in a broad manner, as a general category, rather than as a

requirement that NWP activities must be identical to each other. We believe that this approach is consistent with implementing this general permit program in a practical, efficient manner.

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. 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.

The various terms and conditions of these NWPs, including the NWP regulations at 33 CFR 330.1(d) and 33 CFR 330.4(e), allow district engineers to exercise discretionary authority to modify, suspend, or revoke NWP authorizations to ensure compliance with Section 404(e) of the Clean Water Act. District engineers also have the authority to exercise discretionary authority and require an individual permit for any proposed activity that will result in more than minimal individual and cumulative adverse environmental effects. For each NWP that may authorize discharges of dredged or fill material into waters of the United States, the national and supplemental decision documents include national and regional 404(b)(1) Guidelines analyses, respectively. The 404(b)(1) Guidelines analyses are conducted in accordance with 40 CFR 230.7.

The 404(b)(1) Guidelines analyses in the national and supplemental decision documents also include cumulative effects analyses, in accordance with 40 CFR 230.7(b)(3). A 404(b)(1) Guidelines cumulative effects analysis is provided in addition to the NEPA cumulative effects analysis because the implementing regulations for NEPA and the 404(b)(1) Guidelines define "cumulative impacts" or "cumulative effects" differently.

Many commenters asserted that the proposed NWPs will authorize activities that will cause more than minimal adverse environmental effects. Several commenters stated that the proposed NWPs do not comply with the 404(b)(1) Guidelines. Several commenters said that the proposed NWPs authorize activities with only minimal adverse environmental effects. One commenter indicated that the proposed NWPs authorize categories of activities that are not similar in nature. Another commenter said eliminating the NWPs that authorize separate and distant crossings of waters of the United States by separate NWP authorization would violate the Clean Water Act. One commenter stated that activities authorized by NWPs have resulted in significant degradation of waters of the United States. One commenter suggested that NWP PCNs should include an alternatives analysis.

The terms and conditions of the NWPs, including the PCN requirements that are in many of the NWPs, are designed to ensure that the NWPs authorize only those categories of activities that have no more than minimal individual and cumulative adverse environmental effects. For those NWPs that authorize discharges of dredged or fill material into waters of the United States, each national decision document includes a 404(b)(1) Guidelines analysis. As stated above, we interpret the "categories of activities

that are similar in nature" requirement broadly to keep the NWP program manageable in terms of the number of NWPs. With the NWPs issued today, for linear projects (e.g., utility lines and roads) we are continuing our approach of authorizing separate and distant crossings of waters of the United States through separate NWP authorizations, consistent with 33 CFR 330.2(i). As demonstrated by our 404(b)(1) Guidelines analyses provided in the national decision documents, we have determined that the activities authorized by the NWPs do not result in significant degradation. Alternatives analyses are not required for specific activities authorized by NWPs (see 40 CFR 230.7(b)(1)). Paragraph (a) of general condition 23 requires that project proponents avoid and minimize adverse effects to waters of the United States to the maximum extent practicable on the project site, but an analysis of off-site alternatives is not required.

2015 Revisions to the Definition of "Waters of the United States"

In the June 1, 2016, proposed rule, we solicited comments from NWP users and other interested parties on how the revisions to the definition of "waters of the United States" published in the June 29, 2015, edition of the Federal Register (80 FR 37054) might affect the applicability and efficiency of the proposed NWPs. We also requested comments on changes to the NWPs, general conditions, and definitions that would help ensure that activities that result in no more than minimal individual and cumulative adverse environmental effects can continue to be authorized by the NWPs. On October 9, 2015, the United States Court of Appeals for the Sixth Circuit issued a stay of the June 29, 2015, final rule pending further order of that court.

Many commenters recommended writing the final NWPs so that they are neutral with respect to any particular regulation defining "waters of the United States" pending

the outcome of the litigation that is occurring for the June 29, 2015, final rule. These commenters suggested that the final NWPs should use general terms relating to jurisdiction that would be applied using whichever regulation is in effect at the time a PCN or voluntary request for NWP verification is being processed and evaluated by the district engineer. Many commenters stated that the Corps should not implement the 2015 final rule until the litigation is completed. Several commenters expressed support for implementing the 2015 final rule. Several commenters said that the Corps should delay issuing the final NWPs until after the litigation on the 2015 final rule has concluded.

We have changed the text of some NWPs, general conditions, and definitions so that they do not cite specific provisions of 33 CFR part 328, unless those provisions were not addressed in the 2015 final rule. We continue to rely on general terms relating to jurisdiction, such as "adjacent" and "ordinary high water mark," which have been used in the Corps regulatory program and the NWP program for many years. When a Corps district receives a PCN or a voluntary request for NWP verification, the district will process that PCN or request in accordance with the current regulations and guidance for identifying waters of the United States. If the stay issued by the Sixth Circuit is still in effect, the current regulations and guidance will be the definition of "waters of the United States" published in the November 13, 1986, issue of the Federal Register (51 FR 41206) plus the January 2003 clarifying guidance regarding the U.S. Supreme Court's decision in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) (see 68 FR 1995) and the December 2008 guidance entitled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States." Our districts will not implement

the 2015 final rule defining "waters of the United States" unless the stay is lifted and that rule goes back into effect. The 2012 NWPs expire on March 18, 2017, and they cannot be extended. Section 404(e) of the Clean Water Act imposes a 5-year limit for general permits, including the NWPs. Therefore, we have to reissue the NWPs before the litigation on the 2015 final rule is completed.

Many commenters suggested that the Corps conduct additional rulemaking to modify the NWPs if the stay of the 2015 final rule is lifted. Many commenters recommended increasing the acreage limits and PCN thresholds for the NWPs in case the 2015 final rule goes back into effect. Several commenters said the Corps should retain the current acreage limits, PCN thresholds, and general conditions until the litigation concerning the 2015 final rule is concluded. Several commenters requested that the Corps withdraw the proposed NWP rule until the litigation on the definition of "waters of the United States" is resolved. Several commenters said that it was inappropriate for the Corps to seek comment on the effects of the 2015 final rule on the NWPs because the 2015 final rule was only in effect for several weeks before the stay was issued by the Sixth Circuit. They said that there was not sufficient time to collect data and examples of the effects of the 2015 final rule on the utility of the NWPs, and to provide meaningful comment to the Corps.

If the Corps determines that the NWPs issued today need to be modified to address changes in the geographic scope of Clean Water Act jurisdiction or other regulation changes, the Corps will conduct rulemaking in accordance with the Administrative Procedure Act prior to making those changes. We are retaining the proposed acreage limits and PCN thresholds for these NWPs. It would not be prudent to

withdraw the proposed NWPs pending the outcome of the litigation on the 2015 final rule because the 2012 NWPs expire on March 18, 2017, and cannot be extended. We appreciate the challenges with providing data on the effects of the 2015 final rule on the proposed NWPs, but we believe it was necessary to ask those questions because of concerns that were expressed by multiple stakeholders since the 2015 final rule was issued.

Many commenters requested that the Corps clarify the definitions of "adjacent" and "waterbody" regardless of whichever regulatory definition of "waters of the United States" is in effect. One commenter asked that the Corps define what constitutes a valid waste treatment system. One commenter stated that if the 2015 final rule goes back into effect, more activities will be regulated and thus may require NWP authorization, which will increase financial burdens on the regulated public. Another commenter said that under an increased number of waters and wetlands subject to Clean Water Act jurisdiction, the NWPs would no longer be consistent with Congressional intent for a streamlined permitting process for activities resulting in no more than minimal individual and cumulative adverse environmental effects. One commenter said that any substantial changes to the final NWPs that are made in response to comments must comply with the notice and comment requirements of the Administrative Procedure Act.

We do not believe it would be appropriate to clarify the definition of "adjacent" in these NWPs. When evaluating a PCN or voluntary request for NWP verification, Corps districts will apply the definition of "adjacent" that is in effect at the time the PCN or NWP verification request is received. We have modified the definition of "waterbody" to remove references to specific regulations. Wetlands adjacent to a waterbody will be

identified through the regulations and guidance in effect when the PCN or NWP verification is being reviewed by the district engineer. Waste treatment systems will be identified on a case-by-case basis by district engineers to determine when the waste treatment exclusion applies under the Clean Water Act. Notwithstanding which regulations defining "waters of the United States" are in effect at a particular time, the NWPs continue to provide a streamlined authorization process for categories of regulated activities that result in no more than minimal adverse environmental effects. We believe that the changes made for the final NWPs are a logical outgrowth of the proposed rule and are reasoned responses to comments received on the June 1, 2016, proposed rule.

Acreage Limits and Pre-Construction Notification Thresholds

In the June 1, 2016, proposed rule we requested comment on whether to retain the 1/2-acre limit that has been imposed on a number of NWPs (i.e., NWPs 12, 14, 21, 29, 39, 42, 43, 44, 50, 51, and 52), or to impose different acreage limits on those NWPs. We sought comment on the acreage limits to help determine whether there are alternative acreage limits that would be more effective at ensuring that the NWPs continue to meet their intended purpose of providing a streamlined authorization process for activities that result in no more than minimal individual and cumulative adverse environmental effects. In the proposed rule we said that comments suggesting changes to the acreage limits should include relevant data and other information that explain why the acreage limits should be changed. Different acreage limits can be suggested for NWPs that authorize different categories of activities.

The proportion of commenters stating that the acreage limits for the NWPs should be unchanged was roughly the same as the proportion of commenters recommending

increases in acreage limits. Many of the commenters favoring increases in acreage limits did so because of their concerns regarding the effect of the 2015 final rule defining "waters of the United States" on the NWPs if the stay issued by the Sixth Circuit is lifted. Several commenters said the 1/2-acre limit should be increased to one or two acres. A few commenters recommended decreasing the acreage limits. One commenter suggested lowering the 1/2-acre limit to 5,000 square feet. Some commenters said that acreage and linear foot limits should be imposed on all NWPs. One commenter recommended establishing acreage limits that are based on a sliding scale that is proportional to the project size in acres.

We are retaining the current acreage limits for those NWPs that have 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. We believe the current acreage limits, along with the current PCN thresholds, provide effective environmental protection while allowing district engineers flexibility to take into account site-specific characteristics of the affected aquatic resources. In addition, division engineers have the authority to modify NWPs on a regional basis to reduce acreage limits through regional conditions. 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. Imposing acreage limits by

using a sliding scale related to overall project size would not ensure compliance with the "no more than minimal adverse environmental effects" requirement for the NWPs because projects larger in size (and general environmental impact) would have higher acreage limits and thus larger impacts to jurisdictional waters and wetlands. That suggested approach would add complexity to the NWP program and involve challenges in determining what the project size is for a particular proposal.

Two commenters stated that the limits of the NWPs should be based on the quality of the aquatic resources that would be impacted by the NWP activities. Another commenter said there should be no acreage limits on the NWPs. Several commenters said that the acreage limits should not include temporary impacts. Two commenters recommended increasing the acreage limit for NWPs that authorize activities associated with renewable energy generation and transmission projects. One commenter said the 1/2-acre limit is arbitrary. Another commenter asserted that the NWP acreage limits are too high and reduce the number of activities subject to public review.

Basing the limits of NWPs on the quality of aquatic resources that would be impacted by a proposed NWP activity is not practical because the rapid ecological assessment methods that would be needed to implement such an approach are not uniformly available across the country for all types of jurisdictional waters and wetlands. Acreage limits are necessary for some NWPs because the type of activity authorized by NWPs with acreage limits are not self-limiting due to the nature of the category of the activity authorized by the NWP. For example, NWP 29, which authorizes discharges of dredged of fill material into waters of the United States to construct residential developments, requires an acreage limit to satisfy the "no more than minimal adverse

environmental effects" requirement because residential developments can vary substantially in size and in the amount of losses of jurisdictional waters and wetlands they can cause. Under the NWP definition of "loss of waters of the United States" temporary impacts are not applied to the acreage limit; only permanent adverse effects are applied. We are retaining the 1/2-acre limit for renewable energy generation and transmission projects. The 1/2-acre limit found in several NWPs was adopted in 2000 when many of those NWPs were issued for the first time. The current acreage limits are based, in part, on past experience in soliciting public comment on proposed activities that require DA authorization, and those acreage limits relate to regulated activities that generated little or no public comment.

Section 404(e) of the Clean Water Act states that NWPs and other general permits may only authorize activities that "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. 1433(e). Section 404(e) does not define the term "minimal," so we consider common definitions of "minimal," experience, and sound judgement when addressing compliance with section 404(e) through the establishment of acreage and other limits for the NWPs.

For a program that is national in scope, such as the NWP program, defining "minimal" is extremely challenging because of the substantial variation in the structure, functions, and dynamics exhibited by the various types of aquatic resources found across the country subject to regulation under the Corps' permitting authorities. The value that society places on those aquatic resources also varies substantially across the country, and from person to person. In paragraph 2 of Section D, District Engineer's Decision, we

have identified a number of factors for district engineers to consider when making their "no more than minimal adverse environmental effects" determinations for proposed NWP activities. All the factors listed above result in a degree of complexity that makes it infeasible to use a quantitative scientific approach to define an acreage limit that will be applied across the country and will ensure that NWP activities will have no more than minimal individual and cumulative adverse environmental effects. Since a quantitative scientific approach is not feasible, we have to rely on other approaches for establishing acreage and other limits and ensuring compliance with section 404(e) of the Clean Water Act.

The 1/2-acre limit found in many of these NWPs, as well as other quantitative limits in the NWPs, is in effect a policy decision that is made through the rulemaking process. The rulemaking process includes solicitation of public comment on what various interested parties think the acreage and other numeric limits should be. The Corps also uses its experience on soliciting public comment on specific activities, and the number and quality of comments it receives in response to a public notice for a proposed activity. For proposed activities that will result in small amounts of losses of jurisdictional waters and wetlands, those public notices rarely result in substantive comments that will affect the permit decision. In addition to the acreage and other numeric limits, the PCN process is a valuable tool for satisfying the "no more than minimal adverse environmental effects" requirement for the NWPs. The combination of acreage and other numeric limits, with the PCN requirements, provides district engineers with the opportunity and the responsibility to make site-specific decisions on whether the "no more than minimal adverse environmental effects" requirement has been satisfied. In

addition, division engineers have the authority to modify, suspend, or revoke one or more NWPs to reduce the national limits on a regional basis. For those activities that do not qualify for NWP authorization because they exceed the acreage or other limits, the project proponent must obtain DA authorization through other types of permits, such as individual permits or regional general permits.

The regional conditioning process provides division engineers with the opportunity to lower acreage limits on a regional basis to take into account local variations in aquatic resource type, functions, and services. In addition, the PCN requirements allow district engineers evaluate proposed activities on a case-by-case basis and impose conditions to ensure that those activities cause no more than minimal adverse environmental effects. In response to a PCN, a district engineer can also exercise discretionary authority to require an individual permit if mitigation cannot be done to satisfy the "no more than minimal adverse environmental effects" requirement for NWPs.

Several commenters expressed support for retaining the 300 linear foot limit for losses of stream bed that is in a number of NWPs. A few commenters suggested increasing the 300 linear foot limit, and one commenter said that limit should be 500 linear feet. Several other commenters recommended removing the 300 linear foot limit for stream losses and relying solely on the 1/2-acre limit. Several commenters expressed support for limiting losses of intermittent and ephemeral stream bed to 1/2-acre when district engineers waive the 300 linear foot limit for such losses. One commenter said that limits for stream bed impacts should quantified as linear feet instead of acres. A few commenters said the 300 linear foot limit should not apply to ephemeral streams. A few

commenters suggested that the limits for stream impacts should be based on stream order and stream type.

We have retained the 300 linear foot limit for losses of stream bed in those NWPs that have that limit. The 300 linear foot limit is used in conjunction with the 1/2-acre limit to further restrict losses of stream bed, although district engineers have the authority to waive the 300 linear foot limit in a case-by-case basis if they determine that the loss of intermittent or ephemeral stream bed (up to 1/2-acre) would result in no more than minimal adverse environmental effects, individually and cumulatively. Under no circumstances may the loss of stream bed exceed 1/2-acre under those NWPs that have both a 1/2-acre limit for losses of waters of the United States and a 300 linear foot limit for losses of stream bed.

Because the physical, chemical, and biological processes in streams occur within the area occupied by the stream channel (with contributions of areas outside the stream channel, such as floodplains, riparian areas, and hyporheic zones), acres are appropriate for quantifying stream impacts. The use of acres to quantify losses of stream bed is discussed in more detail in the "Definitions" section preamble for the definition of "loss of waters of the United States." Regulated activities that result in the loss of ephemeral streams that are determined to be waters of the United States are subject to the terms and conditions of the NWPs, including any applicable acreage or linear foot limits. Limiting stream impacts using a classification system based on stream order or stream type would requiring choosing a classification system that would be applied across the country for the NWP program. We believe that is not a practical option for complying with the "no more than minimal adverse environmental effects" requirement because of challenges in

relating stream order to the degree of adverse environmental effects. When evaluating PCNs, district engineers can take into account the stream type and the location of the stream in the watershed when determining whether a proposed activity is authorized by NWP. They can also use appropriate stream assessment tools, if such tools are available.

We also solicited comments on changing the PCN thresholds for those NWPs that require pre-construction notification. Many commenters said the current PCN thresholds should remain unchanged. Several commenters expressed support for the use of PCNs to provide flexibility and help ensure that NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects. Two commenters stated that PCNs are an important tool in helping to assess the cumulative impacts of NWP activities. Several commenters recommended that PCNs be required for all NWP activities so that the impacts of the NWP program can be fully evaluated. One commenter said that PCNs should be made available to the public.

In this final rule, we have retained the PCN thresholds that were in the proposal rule. We acknowledge that 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 comply with the general permit requirements. Pre-construction notifications also facilitate compliance with section 7 of the Endangered Species Act and section 106 of the National

Historic Preservation Act. In our automated information system, we record all NWP PCNs and voluntary requests for NWP verification, which assists in our monitoring of cumulative impacts that result from activities authorized by NWPs. For those NWPs that do not require PCNs or are not voluntarily reported to the Corps, we estimate their contribution to cumulative impacts.

A number of categories of NWP activities do not require PCNs because they are unlikely to cause more than minimal cumulative adverse environmental effects. However, division engineers may modify these NWPs on a regional basis to require PCNs if they have concerns about the potential for more than minimal cumulative adverse environmental effects occurring as a result of those NWP activities. Requiring PCNs for all NWP activities is not practical and would be contrary to the streamlined authorization process envisioned by section 404(e) of the Clean Water Act. Specific activities authorized by NWPs do not require public notices and making those PCNs available to the public would add no value to the verification process. The public notice and comment process for the NWPs takes place at the appropriate phase: the rulemaking process for the issuance or reissuance of an NWP. If the Corps were to accept public comment on PCNs, it would turn the general permit process into an individual permit process.

Several commenters recommended increasing the PCN thresholds for a number of NWPs. Some commenters suggested increasing the PCN threshold for all NWPs. A few commenters said that PCN thresholds should be raised only if the Sixth Circuit lifts its stay on the 2015 final rule defining "waters of the United States." One commenter stated that PCNs should not be required for NWP activities that only result in temporary

impacts. One commenter objected to the use of PCNs, stating that PCNs reduce the efficiency of the NWPs. One commenter said that reliance on the PCN process to determine whether a proposed NWP activity results in no more than minimal adverse environmental effects violates section 404(e) of the Clean Water Act.

Recommendations for changing PCN thresholds for specific NWPs are discussed below, in the preamble discussion for each NWP. Most of the PCN thresholds apply to "losses of waters of the United States" which are based on permanent losses, not temporary impacts that are restored after completion of the authorized work. We believe the PCN process increases the efficiency of the NWP program, by allowing district engineers to determine whether activities will have no more than minimal adverse environmental effects. If the NWP PCN process were not available, the acreage and other limits of the NWPs would probably have to be decreased to ensure compliance with section 404(e) of the Clean Water Act. That would result in more activities requiring individual permits. Section 404(e) of the Clean Water Act is silent on whether general permit can use a PCN process to comply with the statutory requirements for general permits. We believe that NWP PCNs are consistent with Congressional intent as it pertains to section 404(e), because if PCNs were not an available tool we would have to decrease the limits of the NWPs and require individual permits for those activities that do not satisfy the lower limits that allow activities to proceed under NWP authorization without PCNs.

Waivers of Certain Nationwide Permit Limits

In the June 1, 2016, proposal to reissue the NWPs, we announced our commitment to improve our tracking of waivers issued by district engineers, by adding a

field to our automated information system to indicate whether a waiver was issued for an NWP verification. We also requested comments on five aspects of the use of waivers in the NWPs. This tool allows district engineers to waive certain NWP limits when they find that proposed activities, after agency coordination, will result in no more than minimal adverse environmental effects.

We solicited comments on these five topics relating to waivers: (1) changing the numeric limits that can be waived; (2) whether to retain the authority of district engineers to issue activity-specific waivers of certain NWP limits; (3) whether to impose a linear foot cap on waivers to the 500 linear foot limit for NWPs 13 and NWP 54 or the 20 foot limit in NWP 36; (4) whether to impose a linear foot cap on losses of intermittent and ephemeral stream bed potentially eligible for waivers of the 300 linear foot limit for losses of stream bed; and (5) whether to require compensatory mitigation to offset all losses of stream bed authorized by waivers of the 300 linear foot limit for the loss of stream bed in NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. We also requested that commenters provide data and other information supporting their views on these questions.

Many commenters expressed support for the current waivers and the processes for evaluating waiver requests. A few commenters said there should not be any changes to the existing waivable limits of the NWPs. Many commenters opposed the use of waivers. Several commenters expressed support for the Corps' commitment to modify its automated information system to explicitly track the use of waivers, beginning with the 2017 NWPs. Several commenters stated that the Corps should issue annual reports on the approval of waivers in NWP verifications. A few commenters said that agency

coordination should be required for all PCNs requesting waivers of certain NWP limits. A few commenters stated that public notices should be issued for waiver requests.

We are retaining the waiver provisions in the 2017 NWPs as they were proposed in the June 1, 2016, Federal Register notice. Waivers are an important tool to provide flexibility in the NWP program to authorize activities that are determined by district engineers to have no more than minimal adverse environmental effects after coordinating certain waiver requests with other government resources agencies. A waiver can only occur after the district engineer makes a written determination that a waiver is appropriate and that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. If the district engineer does not respond to a complete PCN within 45 days of receipt of that PCN, the waiver is not authorized through a default authorization.

In response to several commenters and in keeping with our overall commitment toward increasing transparency of regulatory decisions, we will develop quarterly reports that show overall summary statistics pertaining to the use of each NWP, aggregated per Corps District, and display it on our website. Some statistics that may be reported regarding the NWPs may include number of verifications provided per quarter, acres of waters of the United States permanently lost, as well as including summary information on the use of waivers during the previous quarter. All data provided will be aggregated by NWP and all information on waivers will pertain only to those NWPs that include a waiver provision. With the exception of NWP 36 (boat ramps), all PCNs requesting waivers of specific limits must be coordinated with the resource agencies in accordance with paragraph (d) of general condition 32. We do not believe agency coordination is

necessary for requested waivers under NWP 36 because the width of a boat ramp or the amount of fill used to construct a boat ramp will not be much larger than the 20 foot width limit or the 50 cubic yard limit. Requiring public notices for waiver requests would be inconsistent with the general principles of general permits. We believe that agency coordination is sufficient to obtain additional information to assist in the district engineer's decision on activity-specific waiver requests.

Many commenters said that there should be no caps on waivers, but several commenters suggested that there should be waiver caps on all NWPs. One commenter stated that the limits under which a waiver can occur should be increased if the Sixth Circuit's stay of the 2015 rule defining "waters of the United States" is lifted and that rule goes back into effect. One commenter stated that all NWPs should have waivable limits. Several commenters indicated that some of the acreage limits of the NWPs should be able to be waived by district engineers. A few of those commenters recommended allowing district engineers to waive the 1/2-acre limit, and allow up to 5 acres of losses of waters of the United States under a waiver issued by the district engineer.

We have not added any additional caps to waivers, because the PCN process, the agency coordination process, and the requirement for district engineers to make written determinations in response to waiver requests are sufficient to ensure that NWPs that include waiver provisions continue to comply with section 404(e) of the Clean Water Act. Many of the NWPs that have waiver provisions have a 1/2-acre limit that cannot be waived. We do not agree that all limits for the NWPs should be waivable. Hard limits or caps, especially for the acreage limits (e.g., the 1/2-acre limit in NWPs 12, 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52), are critical tools for ensuring the NWPs only authorize those

activities that will result in no more than minimal adverse environmental effects, individually and cumulatively. In areas of the country where categories of activities that result in the loss of greater than 1/2-acre of waters of the United States (or other limits for other NWPs) generally result in no more than minimal adverse environmental effects, district engineers can issue regional general permit to authorize those activities.

Several commenters said that compensatory mitigation should not be required for all waivers, and should only be required on a case-by-case basis. A few commenters recommended requiring compensatory mitigation for waivers for losses of stream bed. One commenter supported the use of alternative approaches for providing compensatory mitigation for waivers.

District engineers will continue to make case-by-case determinations on whether compensatory mitigation is necessary to offset losses of waters of the United States authorized by NWPs, including losses authorized by waivers of certain NWP limits. Those decisions will be made in accordance with 33 CFR 330.1(e)(3) and general condition 23, mitigation. Regional conditions added by division engineers may also specify additional compensatory mitigation requirements for one or more NWPs. Compensatory mitigation for losses of stream bed is determined by district engineers on a case-by-case basis. When district engineers require stream compensatory mitigation for NWP activities, that compensatory mitigation may consist of stream rehabilitation, enhancement, or preservation in accordance with paragraph (d) of general condition 23 and 33 CFR 332.3(e)(3). Mitigation may also be provided for stream impacts authorized by NWP through the restoration, enhancement, or protection/maintenance of riparian areas next to streams (see paragraph (e) of general condition 23).

Compliance with the Endangered Species Act

In the June 1, 2016, proposed rule (see 81 FR 35192 – 35195), the Corps explained that the NWP regulations at 33 CFR 330.4(f) and NWP general condition 18, endangered species, ensure that all activities authorized by NWPs comply with section 7 of the Endangered Species Act (ESA). Section 330.4(f)(2) and paragraph (c) of general condition 18 require non-federal permittees to submit PCNs "if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat." Federal permittees should follow their procedures for ESA section 7 compliance (see 33 CFR 330.4(f)(1)). The Corps evaluates the non-federal permittee's PCN and makes an effect determination for the proposed NWP activity for the purposes of ESA section 7. The Corps established the "might affect" threshold in 33 CFR 330.4(f)(2) and paragraph (c) of general condition 18 because it is more stringent than the "may affect" threshold for section 7 consultation in the U.S. Fish and Wildlife Service's (FWS) and National Marine Fisheries Service's (NMFS) ESA Section 7 consultation regulations at 50 CFR part 402. The word "might" is defined as having "less probability or possibility" than the word "may" (Merriam-Webster's Collegiate Dictionary, 10th edition).

Paragraph (b)(7) of general condition 32 requires the project proponent to identify, in the PCN, the listed species that might be affected by the proposed NWP activity or utilizes the designated critical habitat in which the NWP activity is proposed to occur. If the project proponent is required to submit a PCN because the proposed activity might affect listed species or critical habitat, the activity is not authorized by NWP until

either the Corps district makes a “no effect” determination or makes a “may affect” determination and completes formal or informal ESA section 7 consultation.

When evaluating a PCN, the Corps either will make a “no effect” determination or a “may affect” determination. If the Corps makes a “may affect” determination, the district will notify the non-federal applicant and the activity is not authorized by NWP until ESA Section 7 consultation has been completed. If the non-federal project proponent does not comply with 33 CFR 330.4(f)(2) and general condition 18, and does not submit the required PCN, then the activity is not authorized by NWP. In such situations, it is an unauthorized activity and the Corps district will determine an appropriate course of action to respond to the unauthorized activity.

Federal agencies, including state agencies (e.g., certain state Departments of Transportation) to which the Federal Highway Administration has assigned its responsibilities pursuant to 23 U.S.C. 327, are required to follow their own procedures for complying with Section 7 of the ESA (see 33 CFR 330.4(f)(1) and paragraph (b) of general condition 18). This includes circumstances when an NWP activity is part of a larger overall federal project or action. The federal agency’s ESA section 7 compliance covers the NWP activity because it is undertaking the NWP activity and possibly other related activities that are part of a larger overall federal project or action.

On October 15, 2012, the Chief Counsel for the Corps issued a letter to the FWS and NMFS (the Services) clarifying the Corps’ legal position regarding compliance with the ESA for the February 13, 2012, reissuance of 48 NWPs and the issuance of two new NWPs. That letter explained that the issuance or reissuance of the NWPs, as governed by

NWP general condition 18 (which applies to every NWP and which relates to endangered and threatened species), and 33 CFR part 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 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, FWS, and NMFS. The principles discussed in the Corps' October 15, 2012, letter apply to the 2017 NWPs as well.

Division engineers can add regional conditions to the NWPs to protect listed species and critical habitat, and to facilitate compliance with general condition 18. For the 2017 NWPs, Corps districts coordinated with regional or local offices of the FWS and NMFS to identify regional conditions for these NWPs. Regional conditions can add PCN requirements to one or more NWPs in areas inhabited by listed species or where designated critical habitat occurs. Regional conditions can also be used to 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. Corps districts will continue to consider through regional consultations, local initiatives, or other cooperative efforts additional information and measures to ensure protection of listed species and critical habitat, the requirements established by general condition 18 (which apply to all uses of all NWPs), and other provisions of the Corps regulations ensure full compliance with ESA section 7.

In the Corps regulatory program's automated information system (ORM2), 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 include authorized impacts and required compensatory mitigation, as well as information on all consultations conducted under section 7 of the ESA. Every year, the Corps districts evaluate over 30,000 NWP PCNs and requests for NWP verifications when PCNs are not required, and provides written verifications for those activities when district engineers determine those activities result in no more than minimal adverse environmental effects. During the evaluation process, district engineers assess potential impacts to listed species and critical habitat and conduct ESA section 7 consultations whenever they determine proposed NWP activities may affect listed species or designated 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 FWS and NMFS for activities authorized by NWPs. These section 7 consultations are tracked in ORM2. During the period of March 19, 2012, to September 30, 2016, Corps districts conducted 1,402 formal consultations and 9,302 informal consultations for NWP activities under ESA section 7. During that time period, the Corps also used regional programmatic consultations for 9,829 NWP verifications to comply with ESA section 7. Therefore, each year NWP activities are covered by an average of more than 4,500

formal, informal, and programmatic ESA section 7 consultations with the FWS and/or NMFS.

In response to the June 1, 2016, proposed rule many commenters expressed their support for the Corps' "no effect" determination for the issuance or reissuance of the NWPs for the purposes of ESA section 7. Several commenters recommended that, for the 2017 NWPs, the Corps conduct national programmatic ESA section 7 consultations with the FWS and NMFS. A few commenters said ESA section 7 consultation is required for the issuance or reissuance of the NWPs. Several commenters stated their agreement with the Corps' determination that the issuance or reissuance of NWPs does not trigger a need to consult under ESA section 7. One commenter said that the Corps should not conduct a voluntary national programmatic ESA section 7 consultation for the NWPs. One commenter asked why the Corps uses the term "might affect" instead of "may affect" in its regulations at 33 CFR 330.4(f)(2) and in general condition 18.

The Corps has not changed its position, as articulated in the June 1, 2016, proposed rule, that the issuance or reissuance of the NWPs by Corps Headquarters has "no effect" on listed species or critical habitat. Therefore, ESA section 7 consultation is not required whenever Corps Headquarters issues or reissues NWPs. As discussed above and in the June 1, 2016, proposed rule, when district engineers evaluate PCNs or voluntary requests for NWP verification, they will determine whether the proposed activities "may affect" listed species or designated critical habitat, and will conduct ESA section 7 consultation for any proposed NWP activity that "may affect" listed species or designated critical habitat. Project proponents that want to use NWPs for activities that require DA authorization are required to submit PCNs whenever their proposed activities

might affect listed species or designated critical habitat, or if listed species or designated critical habitat are in the vicinity of the proposed activity, so that district engineers can determine whether those proposed activities will have "no effect" on listed species or critical habitat, or whether they "may affect" listed species or critical habitat and thus require either informal or formal ESA section 7 consultation. The requirements of ESA section 7 may also be fulfilled through programmatic section 7 consultations. As discussed above, the term "might affect" is a lower threshold than "may affect."

One commenter asked whether activities authorized by the 2012 NWPs, for which ESA section 7 consultation was conducted, would be grandfathered under the 2017 NWPs. One commenter said that the Corps should allow state agencies, who can act as federal sponsors, to make their own effects determinations for listed species and critical habitat. A few commenters requested that activity-specific ESA section 7 consultations be completed within 30 to 60 days.

Activities authorized under the 2017 NWPs must comply with general condition 18. If ESA section 7 consultation was conducted for an activity authorized under one of the 2012 NWPs and the project proponent needs more time to complete the authorized activity, there is a possibility that the previous section 7 consultation could continue to apply to the 2017 NWP authorization. The project proponent should discuss that situation with the district engineer to determine whether the previous section 7 consultation applies or whether a new ESA section 7 consultation is needed. Unless a state agency is a department of transportation which the Federal Highway Administration has assigned its responsibilities pursuant to 23 U.S.C. 327, it remains the Corps' responsibility to make ESA section 7 effect determinations for activities authorized by

the NWPs that will be conducted by non-federal permittees. The timeframes for formal ESA section 7 consultation are established by the statute, as well as the FWS's and NMFS's interagency consultation regulations at 50 CFR part 402. The Corps cannot change those timeframes. For informal ESA section 7 consultations, there are no timeframes in law or regulation. Under informal section 7 consultation, the Corps must obtain written concurrence from the FWS and/or NMFS for the informal consultation process to be completed.

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 coordinate with NMFS regional offices, to the extent necessary, to develop NWP regional conditions that conserve EFH and are consistent the NMFS regional EFH Conservation Recommendations. For NWP activities, Corps districts will conduct consultations in accordance with the EFH consultation regulations at 50 CFR 600.920. Division engineers may add regional conditions to the NWPs to address the requirements of the Magnuson-Stevens Act.

Compliance with Section 106 of the National Historic Preservation Act

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

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

When evaluating a PCN, the Corps will either make a "no potential to cause effects" determination or a "no historic properties affected," "no adverse effect," or "adverse effect" determination. If the Corps makes a "no historic properties affected," "no adverse effect," or "adverse effect" determination, it will notify the non-federal applicant and the activity is not authorized by NWP until NHPA Section 106 consultation

has been completed. If the non-federal project proponent does not comply with general condition 20, and does not submit the required PCN, then the activity is not authorized by NWP. In such situations, it is an unauthorized activity and the Corps district will determine an appropriate course of action to respond to the unauthorized activity.

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

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

and extent of the specific activities "authorized" by the NWPs and the timing of that authorization.

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

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

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

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

During the process for developing regional conditions, Corps districts can coordinate or consult with State Historic Preservation Officers, Tribal Historic Preservation Officers, and tribes to identify regional conditions that can provide additional assurance of compliance with general condition 20 and 33 CFR 330.4(g)(2). Such regional conditions can add PCN requirements to one or more NWPs where historic

properties occur. Corps districts will continue to consider through regional consultations, local initiatives, or other cooperative efforts and additional information and measures to ensure protection of historic properties, the requirements established by general condition 20 (which apply to all uses of all NWPs), and other provisions of the Corps regulations and guidance ensure full compliance with NHPA section 106.

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

Tribal Rights

We received a number of comments from tribes regarding NWP general condition 17, which addresses tribal rights. One commenter said that general condition 17 does not adequately reflect the Corps' responsibility to uphold tribal treaty rights. Another commenter said that general condition 17 should be modified to ensure that all reserved tribal treaty rights are not impaired, not just reserved water rights and treaty fishing and hunting rights. The general condition should be expanded to address all tribal rights provided under federal law, either through statute or by common law. For example, general condition 17 should cover rights regarding tribal lands. One commenter said that the NWPs should provide opportunities to consult on specific NWP activities that may impact tribal treaty resources or access to usual and accustomed hunting and fishing

grounds. A few commenters stated that general condition 17 should require PCNs for all NWP activities to ensure they do not impair treaty rights. Another commenter stated that NWPs should not authorize activities that have more than a *de minimis* impact on treaty rights. One commenter cited the 1998 Department of Defense (DoD) American Indian and Alaska Native Policy to demonstrate the need to change general condition 17 to be consistent with that policy and ensure that the Corps conducts meaningful consultations with tribes to ensure that NWP activities will not impair treaty rights.

In response to these comments, and to address the full suite of tribal rights, we have made changes to general condition 17 to make this general condition consistent with the 1998 Department of Defense American Indian and Alaska Native Policy (1998 DoD Policy) and therefore cover all tribal rights, including protected tribal resources and tribal lands. We have revised general condition 17 as follows: "No NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands." The 1998 DoD Policy is available at: http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/techbio/DoDPolicy.pdf . To assist users of the NWPs in complying with general condition 17, we have added definitions for the following terms to Section F, Definitions: protected tribal resources, tribal rights, and tribal lands. These definitions were taken from the 1998 DoD Policy.

We believe that the revised general condition will not change the number of activities that qualify for NWP authorization. Compared to prior versions of this general condition, the revised general condition more clearly identifies the tribal rights that must be considered by district engineers. The proposed general condition 17 applied to all tribal rights, and provided some examples of those tribal rights: "…including, but not

limited to, reserved water rights and treaty fishing and hunting rights." In other words, the proposed general condition 17 and the general condition that was in prior sets of NWPs was not limited to those examples of tribal rights. In general condition 17 for the 2017 NWPs, we have replaced those examples to more explicitly cover the suite of tribal rights, including treaty rights, protected tribal resources, and tribal lands. We also believe that replacing the word "impair" with "no more than minimal adverse effects on" will provide more clarity and consistency in application, because it is congruous with the threshold for general permit authorization, that is, an NWP activity can cause no more than minimal individual and cumulative adverse environmental effects.

The threshold for consultation with tribes established by the 1998 DoD Policy is actions that "may have the potential to significantly affect" protected tribal resources, tribal rights, and tribal lands. The 1998 DoD Policy uses the word "significantly" as a synonym for "material" or "important." For the modification of general condition 17, we have replaced the word "impair" with the phrase "cause more than minimal adverse effects" to be consistent with the threshold for general permits established by section 404(e) of the Clean Water Act. In other words, under general condition 17 no "NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands." If the district engineer reviews an NWP PCN or a voluntary request for an NWP verification, and determines that the proposed NWP activity will cause more than minimal adverse effects to tribal rights (including treaty rights), protected tribal resources, or tribal lands, and the applicant's mitigation proposal cannot reduce the adverse effects to that they are no more than

minimal, he or she will exercise discretionary authority and require an individual permit for the proposed activity.

Regional Conditioning of Nationwide Permits

Under section 404(e) of the Clean Water Act, NWPs can only be issued for those activities that result in no more than minimal individual and cumulative adverse environmental effects. For activities that require authorization under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403), the Corps' regulations at 33 CFR 322.2(f) have a similar requirement. An important mechanism for ensuring compliance with these requirements is regional conditions imposed by division engineers to address local environmental concerns. Coordination with federal and state agencies and Tribes, and the solicitation of public comments, assist division and district engineers in identifying and developing appropriate regional conditions for the NWPs. Effective regional conditions protect local aquatic ecosystems and other resources and helps 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/Coastal Zone Management Act consistency determination regional conditions.

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. The process for adding Corps regional conditions to the NWPs is described at 33 CFR 330.5(c).

Corps regional conditions approved by division engineers cannot remove or reduce any of the terms and conditions of the NWPs, including general conditions. Corps regional conditions cannot decrease PCN requirements. In other words, 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.

Water quality certification (WQC) regional conditions are added to the NWPs as a result of water quality certifications issued by states, Tribes, or the U.S. EPA. Regional conditions are also added to the NWPs through the state Coastal Zone Management Act consistency review process. These WQC/CZMA regional conditions are reviewed by Corps division engineers to determine whether they are consistent with the Corps regulations for permit conditions at 33 CFR 325.4. Regulatory Guidance Letter 92-4, issued on September 14, 1992, provides additional guidance and information on WQC and CZMA conditions for the NWPs.

For the 2017 NWPs, the division engineer will issue supplemental decision documents for each NWP in a specific region (e.g., a state or Corps district). Each supplemental decision document will evaluate the NWP on a regional basis (e.g., by Corps district geographic area of responsibility or by state) and discuss the need for NWP regional conditions for that NWP. Each supplemental decision document will also include a statement by the division engineer, which 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.

After the division engineer approves the Corps regional conditions, each Corps district will issue a final public notice for the NWPs. The final public notice will announce both the final Corps regional conditions and any final WQC/CZMA regional conditions. The final public notices will also announce the final status of water quality certifications and CZMA consistency determinations for the NWPs. Corps districts may adopt additional regional conditions after following public notice and comment procedures, if they identify a need to add or modify regional conditions, and the division engineer approves those regional conditions. Information on regional conditions and the suspension or revocation of one or more NWPs in a particular geographic area can be obtained from the appropriate district engineer.

In cases where a Corps district has issued a regional general permit that authorizes similar activities as one or more NWPs, during the regional conditioning process the district will clarify the use of the regional general permit versus the NWP(s). For example, the division engineer may revoke the NWP(s) that authorize the same categories of activities as the regional general permit so that only the regional general permit is available for use to authorize those activities.

Two commenters supported the use of regional conditions for the NWPs. Three commenters said that there is inconsistency in regional conditions and that those inconsistencies add delays and costs in obtaining NWP verifications. A few commenters said that Corps Headquarters should review and approve regional conditions, as well as other requirements districts impose on NWP activities. One commenter requested that the

Corps compile all regional conditions into one document to assist users of the NWPs that do work in more than one Corps district. One commenter stated that districts should not propose regional conditions until after the final NWPs are issued because there are changes made to the NWPs in response to public comments.

There is substantial variation in aquatic resources across the country, the ecological functions and services those aquatic resources provide, and the values local people place on those aquatic resources. Because of that regional variability, there will be differences in regional conditions among Corps divisions and districts. Regional conditions that may be appropriate in one Corps district might not be appropriate in another Corps district, even if that Corps district is located in the same Corps division. Regional conditions are critical for ensuring that the NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects. Corps divisions and districts have the best understanding of aquatic resources in their geographic areas of responsibility, so Corps Headquarters review and approval of regional conditions is not necessary for the regional conditioning process. After the regional conditions are approved by the division engineer, the Corps district should post those regional conditions on its web site.

There are not sufficient resources available for Corps Headquarters to compile and maintain a single document with all the NWP regional conditions, including Corps regional conditions and WQC/CZMA regional conditions, and revising that document whenever regional conditions are changed. Proposing regional conditions at nearly the same time as the proposed NWPs are published in the Federal Register for public comment provides efficiency and allows time for discussions among interested parties to

develop regional conditions that will protect local resources. There is not sufficient time between the date the final NWPs are issued and their effective date for districts to seek comment on proposed regional conditions, submit their supplemental decision documents to the division engineer, and get the regional conditions approved by the division engineer before the 2017 NWPs go into effect.

Section 401 of the Clean Water Act

One commenter said that reissuance of the NWPs in a timely manner is critical for state water quality certification programs. Regardless of when the final NWPs are issued, states will have 60 days to make their water quality certification decisions for the 2017 NWPs. If there are less than 60 days between the date the final NWPs are issued and March 19, 2017 (i.e., the effective date of these NWPs), if a project proponent wants to use an NWP that requires water quality certification before the end of the 60-day period, he or she must obtain an individual water quality certification or waiver from the state if that state has not yet made its water quality certification decision for the NWP. General condition 25, water quality, requires each project proponent to obtain an individual water quality certification or waiver for discharges authorized by the NWP if the state or authorized tribe has not previously certified compliance of the NWP with CWA section 401 (see 33 CFR 330.4(c)).

Section 307 of the Coastal Zone Management Act (CZMA)

One commenter inquired about the CZMA consistency determination process for lands held in trust by the United States for tribes, and whether the state has a role in making a consistency determination for those lands. One commenter asked if a tribe has adopted coastal zone management regulations under the tribal government's inherent

authority, would the Corps seek a consistency concurrence from that tribe? Or would the Corps defer to the tribal permitting process to protect coastal resources?

For lands held in trust by the federal government for a tribe, NWP activities occurring on those lands that directly affect the coastal zone must be consistent, to the maximum extent practicable, with the approved state coastal zone management program (see 33 CFR 320.4(h)). Under the Coastal Zone Management Act, only states have the authority to develop coastal zone management programs and make determinations regarding consistency with those state coastal zone management programs. If a tribe has developed its own coastal management regulations, the Corps will not seek consistency concurrence from that tribe because the Coastal Zone Management Act only gives states the authority to develop coastal zone management programs and make consistency determinations. Tribal permit requirements are an alternative means of protecting coastal resources on tribal lands.

Nationwide Permit Verifications

Certain NWPs require the permittee to submit a PCN, and thus request confirmation from the district engineer prior to commencing the proposed NWP activity, to ensure that the NWP activity complies with the terms and conditions of the NWP. The requirement to submit a PCN is identified in the NWP text, as well as certain general conditions. General condition 18 requires non-federal permittees to submit PCNs for any proposed activity that might affect ESA-listed species or designated critical habitat, if listed species or designated critical habitat are in the vicinity of the proposed activity, or if the proposed activity is located in critical habitat. General condition 20 requires non-federal permittees to submit PCNs for any proposed activity that may have the potential

to cause effects to any historic properties listed in, determined to be eligible for listing in, or potentially eligible for listing in, the National Register of Historic Places.

In the PCN, the project proponent must specify which NWP or NWPs he or she wants to use to provide the required Department of Army authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. For voluntary NWP verification requests (where a PCN is not required), the request should also identify the NWP(s) the project proponent wants to use. The district engineer should verify the activity under those NWP(s), as long as the proposed activity complies with all applicable terms and conditions, including any applicable regional conditions imposed by the division engineer. All NWPs have the same general requirements: that the authorized activities can 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 he or she exercises discretionary authority and requires an individual permit. If the proposed activity does not meet the terms and conditions of the NWP identified by the applicant in his or her 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, he or she should explain to the applicant why the proposed activity is not authorized by NWP.

Pre-construction notification requirements may be added to NWPs 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 he or she wants written confirmation that the activity is authorized by NWP. Some project proponents submit permit applications without specifying the type of authorization they are seeking. In such cases, 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, he or she will notify the permittee. Activity-specific conditions, such as compensatory mitigation requirements, may be added to an NWP authorization to ensure that the NWP activity results in only minimal individual and cumulative adverse environmental effects. The activity-specific conditions are incorporated into the NWP verification, 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, he or she 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 NWPs

21, 49, and 50, and for proposed NWP activities that require Endangered Species Act section 7 consultation and/or National Historic Preservation Act section 106 consultation, if the project proponent has not received a reply from the Corps within 45 days, he or she may assume that the project is authorized, consistent with the information provided in the PCN. For NWPs 21, 49, and 50, and for proposed NWP activities that require ESA Section 7 consultation and/or NHPA Section 106 consultation, the project proponent may not 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.

Climate Change

Climate change represents one of the greatest challenges our country faces with profound and wide-ranging implications for the health and welfare of Americans, economic growth, the environment, and international security. Evidence of the warming of climate system is unequivocal and the emission of greenhouse gases from human activities is the primary driver of these changes (IPCC 2014). Already, the United States is experiencing the impacts of climate change and these impacts will continue to intensify as warming intensifies. It will have far-reaching impacts on natural ecosystems and human communities. These effects include sea level rise, ocean warming, increases in precipitation in some areas and decreases in precipitation in other areas, decreases in sea ice, more extreme weather and climate events including more floods and droughts, increasing land surface temperatures, increasing ocean temperatures, and changes in plant

and animal communities (IPCC 2014). Climate change also affects human health in some geographic area by increasing exposure to ground-level ozone and/or particulate matter air pollution (Luber et al. 2014). Climate change also increases the frequency of extreme heat events that threaten public health and increases risk of exposure to vector-borne diseases (Luber et al. 2014). Climate impacts affect the health, economic well-being, and welfare of Americans across the country, and especially children, the elderly, and others who are particularly vulnerable to specific impacts. Climate change can affect ecosystems and species through a number of mechanisms, such as direct effects on species, populations, and ecosystems; compounding the effects of other stressors; and the direct and indirect effects of climate change mitigation or adaptation actions (Staudt et al. 2013). Other stressors include land use and land cover changes, natural resource extraction (including water withdrawals), pollution, species introductions, and removals of species (Staudt et al. 2013, Bodkin 2012, MEA 2005d) and changes in nutrient cycling (Julius et al. 2013).

Mitigation and adaptation can reduce the risk of impacts caused climate change (IPCC 2014). Mitigation actions reduce emissions of greenhouse gases and help avert the most damaging impacts of climate change. Activities authorized by NWPs, such as the construction of land-based renewable energy generation facilities authorized by NWP 51 and the construction and maintenance of utility lines authorized by NWP 12 to transport and transmit natural gas and electricity will support activities that help mitigate the impacts of climate change by supporting reductions in greenhouse gas emissions.

Adaptation can reduce risks associated with climate change and help protect communities and ecosystems. Adaptation occurs at various levels, including individuals,

local governments, state governments, and the federal government (NRC 2010). Adaptation involves decision-making to deal with climate change to avoid or minimize disruptions to American society, its economy, and the environment (NRC 2010). Examples of adaptation to respond to climate change include improving water consumption, implementing sustainable forestry and agricultural practices, and restoring and protecting ecosystems that provide carbon storage and other ecosystem services including by serving as a natural buffer against extreme weather impacts (IPCC 2014). Adaptation to sea level rise and lake level changes can involve retrofitting and protecting public infrastructure such as stormwater management facilities, wastewater systems, roads, bridges, and ports. The improvement of stormwater management facilities and other infrastructure can be a response to changes in precipitation patterns. Impacts to water supplies and the distribution of water can result in the need for adaptation measures such as repairing and improving utility lines such as water supply lines. The production and distribution of energy also involves climate change adaptation measures, including switching to renewable energy generation facilities such as solar, wind, and water energy, and improving the utility lines that transmit the energy generated by those facilities. Adaptation for coastal communities and residents will involve approaches to respond to erosion and flooding, as well as sea level rise. Adaptation requires regional approaches, because there is increasing scientific uncertainty regarding climate risks and vulnerabilities as the geographic scale of scope of impact analysis increases, as well as the various stressors that interact with climate change to affect communities and ecosystems (NRC 2010).

The adaptation actions described above comprise only a partial list taken from a report on climate change adaptation (NRC 2010). Those actions were selected from the report because some of those actions may be authorized by one or more NWP(s), if those actions involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States. The NWPs are, and will be, and important tool for climate change adaptation, to fulfill the needs of society and communities, and to avoid and minimize adverse effects to jurisdictional waters and wetlands that help provide resilience to changing environmental conditions.

Response to Comments on Specific Nationwide Permits

NWP 1. Aids to Navigation. We did not propose any changes to this NWP and did not receive any comments on this NWP. This NWP is reissued without change.

NWP 2. Structures in Artificial Canals. We did not propose any changes to this NWP and did not receive any comments on this NWP. This NWP is reissued without change.

NWP 3. Maintenance. We proposed to modify this NWP to state that it also authorizes regulated activities associated with the removal of previously authorized structures or fills. We also proposed to modify paragraph (c) of this NWP to clarify that the use of temporary mats in jurisdictional waters and wetlands is also authorized by this NWP, if those mats are used to minimize impacts during regulated maintenance activities.

Many commenters supported all proposed modifications of NWP 3. Several commenters objected to the reissuance of this NWP, and some stated that it does not

authorize a category of activities that is similar in nature. Two commenters opposed the reissuance of NWP 3, stating that it allows for piecemealing of maintenance activities and does not require evaluation of practicable alternatives. A few commenters said that maintenance activities should require individual permits.

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

Two commenters requested clarification regarding the use of the phrase "previously authorized" under paragraph (a), and whether it is necessary to supply the district engineer with documentation of the previous authorization. One commenter questioned whether a grandfathering provision is required for any currently serviceable structure or fill authorized by 33 CFR 330.3. Several commenters objected to the proposal to modify paragraph (a) of this NWP to authorize the removal of previously authorized structures or fills, and several commenters expressed their support for that

proposed modification. Several commenters requested further clarification of the meaning of "minimum necessary" in paragraph (a), while one commenter said that there is no need to clarify this term. Two commenters asked for an explanation of the circumstances under which an activity would be considered a maintenance activity authorized by this NWP.

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

One commenter suggested adding a 200-foot limit to paragraph (a) of this NWP. Three commenters suggested adding "stabilization" after the phrase "repair, rehabilitation, or replacement" to clarify that stabilization activities are authorized by paragraph (a) of this NWP. One commenter recommended authorizing wetland dike maintenance under paragraph (a). One commenter said that there should be a limit on the size of structures or fills that can be removed under paragraph (a). Two commenters

requested clarification regarding whether NWP 3 requires the removal of structures. Two commenters stated that in site-specific cases it may be environmentally preferable to abandon a structure or pipeline and keep it in place. A few commenters stated that maintenance activities often go beyond the intent of this NWP and, occasionally in emergency situations, are more extensive than necessary to respond to the emergency. They said those activities should require PCNs after the emergency response is completed if additional work is required.

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

to respond to an emergency, did not comply with the terms and conditions of NWP 3, and an excessive amount of work was done, he or she can take action to address the alleged non-compliance. One potential approach might be to require an individual permit for that activity.

For paragraph (b) of NWP 3, one commenter recommended removing the 200-foot limit. Two commenters suggested increasing that limit to 300 feet. One commenter said that any new riprap should be limited to being placed in the original project footprint. One commenter asked whether new or additional riprap to protect a structure or fill could be authorized by this NWP. Two commenters said the use of riprap should be discouraged, and other means of controlling erosion should be used. A number of commenters said that the use of riprap in paragraph (b) should not require a PCN. One commenter said that in some cases, it is not possible to restore the waterway in the vicinity of the existing structure to the approximate dimensions that existed when the structure was built, because of changes to the stream channel that naturally occurred over time since the structure was originally constructed. One commenter stated support for the language requiring restoration of the waterway to those approximate dimensions.

We are retaining the 200-foot limit in paragraph (b) because we believe it is an appropriate limit, along with the PCN requirement, for ensuring that authorized activities result in no more than minimal adverse environmental effects. We have removed the last two sentences of this paragraph. The use of riprap or other erosion control measures such as bioengineering to protect the structure or fill from erosion may be authorized by other NWPs, such as NWP 13. The use of the word “approximate” in that sentence in paragraph (b) allows for the restoration of the waterway even though changes to the

watershed and other alterations may have caused stream dimensions to change over time. Because all activities authorized by paragraph (b) require PCNs, district engineers will have the opportunity to consider the changes that have occurred to the stream over time, and determine whether the proposed activity is authorized by NWP 3 despite those changes.

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

We have retained the use of timber mats in paragraph (c) of this NWP. District engineers will determine on a case-by-case basis whether using timber mats to conduct NWP activities requires Department of the Army authorization. For this NWP, only activities authorized by paragraph (b) require PCNs, unless an NWP general condition triggers a PCN requirement (e.g., paragraph (c) of general condition 18, endangered species or paragraph (c) of general condition 20, historic properties) or a regional condition. Since temporary mats authorized by paragraph (c) are temporary features, it is

not necessary to impose quantitative limits on their use. We do not agree that the "promptly" should be added to the fourth sentence of paragraph (c) because there will be circumstances where temporary fills need to remain in place for a longer time period. An example would be to allow the affected areas to stabilize before removing temporary fills.

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

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

the structure or fill needs to be reconstructed. For repair, rehabilitation, or replacement activities conducted after storms or other discrete events, the structure or fill should be similar to what was damaged or destroyed, and constructed in the same general footprint as the original structure or fill.

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

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

require a PCN unless a general condition or regional condition triggers a PCN requirement for those activities. The removal of accumulated sediment and debris outside of the immediate vicinity of the structure or fill, and up to 200 feet from that structure or fill, could be authorized by paragraph (b) and would therefore require a PCN. The PCN requirement for activities authorized under paragraph (b) of this NWP applies to activities that require section 10 and/or section 404 authorization.

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

Any proposed NWP 3 activity conducted by a non-federal permittee that might affect an ESA-listed species or designated critical habitat requires a PCN because of the requirements of general condition 18. Cumulative effects analyses under the National Environmental Policy Act and Clean Water Act section 404(b)(1) guidelines have been conducted for the 2017 NWP 3. Those cumulative effects analyses are presented in the national decision document for this NWP. We do not agree that compensatory mitigation should be required for all activities authorized by this NWP, because maintenance activities generally cause no more than minimal adverse environmental effects. For those NWP 3 activities that require PCNs, district engineers will determine whether compensatory mitigation or another form of mitigation is necessary to ensure the

proposed activities will result in no more than minimal adverse environmental effects, in accordance with 33 CFR 330.1(e)(3). General condition 12, soil erosion and sediment controls, requires the use of appropriate soil erosion and sediment controls for NWP activities. General condition 10, fills in 100-year floodplains, requires fills in those floodplains to comply with applicable Federal Emergency Management Agency (FEMA)-approved state or local floodplain management requirements.

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

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

practicable, and that the capacity of open waters should be maintained. Treated wood may be considered a suitable material for maintenance activities, as long as the district engineer determines that its use complies with general condition 6, suitable material.

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

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

This NWP is reissued with the modifications discussed above.

NWP 4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities. We did not propose any changes to this NWP and we did not receive any comments on this NWP. This NWP is reissued without change.

NWP 5. Scientific Measurement Devices. We did not propose any changes to this NWP and we did not receive any comments on this NWP. This NWP is reissued without change.

NWP 6. Survey Activities. We did not propose any changes to this NWP. One commenter objected to the proposed reissuance of this NWP, stating that individual

permits should be required for these survey activities. Several commenters requested a definition of "temporary pads" and asked for clarification whether the use of timber mats would be considered as fill for access roads. Several commenters suggested expanding this NWP to include temporary access to survey locations. One commenter said that tribes should be provided with advance notice of proposed NWP 6 activities. Another commenter stated that wetland areas should be protected to the extent possible using best management practices.

The activities authorized by this NWP generally result in no more than minimal adverse environmental effects so authorization by general permit is appropriate. In regions where there are concerns that the activities authorized by this NWP might result in more than minimal individual and cumulative adverse environmental effects, division engineers have the authority to modify, suspend, or revoke this NWP. We do not think it is necessary to define the term "temporary pad." Timber mats may be used for temporary access to survey sites to minimize adverse environmental effects. District engineers will determine on a case-by-case basis whether the use of timber mats requires DA authorization as a discharge of fill material into waters of the United States. Temporary access activities requiring DA authorization may be authorized by NWP 33. For the 2017 NWPs, Corps districts have been consulting with tribes to identify regional conditions that protect tribal trust resources. Corps districts may also establish coordination procedures with tribes to ensure that NWP 6 activities do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands. Paragraph (a) of general condition 23, mitigation, requires adverse effects to

jurisdictional wetlands and other waters of the United States to be minimized to the maximum extent practicable on the project site.

One commenter requested that limits be placed on exploratory trenching. Another commenter recommended limiting discharges of fill material to 25 cubic yards. This commenter also suggested that project proponents wanting to construct numerous small pads with a total fill volume exceeding 25 cubic yards should be required to obtain individual permits.

The requirements in NWP 6 for exploratory trenching ensure that impacts from those activities are temporary and therefore a limit is unnecessary. Likewise, because of the nature of the activities authorized by this NWP and the small volumes of dredged or fill material involved in those activities, it is not necessary to add a 25 cubic yard limit. If there are regional concerns about the volumes of dredged or fill material being discharged under this NWP, the division engineer can modify this NWP and impose a volume limit on regulated discharges. Each temporary pad that is a single and complete project is subject to the 1/10-acre limit.

This NWP is reissued without change.

NWP 7. Outfall Structures and Associated Intake Structures. In the June 1, 2016, proposed rule, we did not propose any changes to this NWP. Several commenters said they support the reissuance of this NWP. One commenter recommended limiting bank stabilization for outfall structures to 25 feet along the bank. One commenter said that outfall structures should be installed in a manner that avoids permanent impacts to streams, and that velocity dissipation devices should be required to ensure that discharges

from outfalls do not cause erosion. One commenter stated that outfall structures should not be located immediately adjacent to oyster or clam beds so that those clams and oysters can continue to be fit for human consumption. One commenter said that outfall structures should not be located in areas used by fish for foraging or spawning, or in areas inhabited by marine vegetation. Another commenter said that advance notice of proposed NWP 7 activities should be provided to tribes to avoid unresolved tribal treaty issues.

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

This NWP is reissued without change.

NWP 8. Oil and Gas Structures on the Outer Continental Shelf. We did not propose any changes to this NWP. One commenter objected to the proposed reissuance

of this NWP and said that individual permits should be required for these activities. Another commenter stated that these activities should require environmental impact statements and consultation with the National Marine Fisheries Service to address potential impacts to marine mammals.

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

This NWP is reissued without change.

NWP 9. Structures in Fleeting and Anchorage Areas. We did not propose any changes to this NWP. One commenter said that the U.S. Coast Guard does not establish anchorage or fleeting areas and requested that this language be removed from the NWP. According to the U.S. Coast Guard's regulations at 33 CFR 101.105, a barge fleeting facility means "a commercial area, subject to permitting by the Army Corps of Engineers, as provided in 33 CFR part 322, part 330, or pursuant to a regional general permit the purpose of which is for the making up, breaking down, or staging of barge tows." The

barge fleeting activity would have to be authorized by the Corps under section 10 of the Rivers and Harbors Act of 1899, rather than being designated by the U.S. Coast Guard.

We have modified this NWP by removing the phrase "the U.S. Coast Guard has established" and adding the phrase "have been established" after the word "areas." This modification will provide authorization under section 10 of the Rivers and Harbors Act of 1899 for barge fleeting activities that have not been covered because of the wording of NWP 9 that has been in place since 1982.

This NWP is reissued with the modification discussed above.

NWP 10. Mooring buoys. We did not propose any changes to this NWP. One commenter said that compensatory mitigation should be required for all NWP 10 activities. Several commenters requested that the Corps provide tribes with advance notice of proposed NWP 10 activities and consult on those activities. One commenter stated that the Corps should conduct a study of the entire shoreline of Puget Sound to assess the impact of NWP 10 activities. One commenter recommended prohibiting the use of NWP 10 in any waterbody where downgrades or closures of shellfish beds occur because of the number of vessels in the waterway. Several commenters suggested limiting the density of mooring buoys to one per acre. Several commenters recommended require PCNs for all NWP 10 activities.

Activities authorized by this NWP do not result in losses of aquatic resources and, as a general rule, do not require compensatory mitigation. Mooring buoys are located in open waters and float on those waters. The anchor used to secure the mooring buoy occupies little of the bottom of the waterbody. In addition, mooring buoys can help

reduce the adverse effects the use of vessels can have on bottom habitat of navigable waters, by reducing the use of anchors that disturbs that bottom habitat each time an anchor is used. For example, mooring buoys can be a mitigation measure to reduce adverse effects to corals.

For the 2017 NWPs, Corps districts have been consulting with tribes to identify regional conditions that protect tribal trust resources. Corps districts may also establish coordination procedures with tribes to ensure that NWP 10 activities do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands. 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. The Corps does not regulate the discharge of pollutants from boats, discharges of stormwater, or non-point source pollutants that cause restrictions or closures of shellfish beds.

We do not agree that there should be a national limit of one mooring buoy per acre. Mooring buoys are small structures that cause no more than minimal individual and cumulative environmental effects, but in areas where there is potential for these activities to result in more than minimal adverse environmental effects, division and district engineers will use their authorities to modify, suspend, or revoke NWP 10 authorizations as appropriate. Division engineers can modify this NWP to require PCNs in certain waterbodies.

This NWP is reissued without change.

NWP 11. Temporary Recreational Structures. We did not propose any changes to this NWP and did not receive any comments on this NWP. This NWP is reissued without change.

NWP 12. Utility Line Activities. In the June 1, 2016, proposed rule we proposed to make several changes to this NWP. We proposed to clarify that this NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States for crossings of those waters associated with the construction, maintenance, repair, and removal of utility lines. In addition, we proposed to modify the definition of "utility line" to make it clear that utility lines can also include optic cables and other lines that communicate through the internet. We also proposed to add a paragraph to this NWP to authorize, to the extent that DA authorization is required, discharges of dredged or fill material into waters subject to section 404 of the Clean Water Act and structures and work in waters subject to section 10 of the Rivers and Harbors Act of 1899, necessary to remediate inadvertent returns of drilling fluids that can occur during horizontal directional drilling operations to install utility lines under jurisdictional waters and wetlands. Other proposed changes to NWP 12 are discussed in more detail in the preamble to the June 1, 2016, proposal (see 81 FR 35198 – 35199).

Several commenters expressed their support for the proposed modifications to NWP 12. Some of these commenters agreed with the clarification that, for utility lines authorized by NWP 12, the Corps is only authorizing regulated activities to cross waters of the United States, including navigable waters. Several commenters said that utility lines crossing multiple waterbodies should require individual permits, instead of authorizing each separate and distant crossing by NWP. In contrast, several commenters

said they support the use of NWP 12 to authorize separate and distant crossings of waters of the United States. One commenter suggested clarifying that "crossing" only refers to regulated activities, and to not activities such as horizontal directional drilling and aerial crossings of jurisdictional waters. Several commenters said this NWP does not authorize activities that are similar in nature. A couple of these commenters asserted that this NWP does not authorize activities that are similar in nature because pipelines can carry a variety of types of fluids, some of which are harmful and some of which are benign. Other commenters made the "not similar in nature" objection, stating that pipelines that carry fluids such as oil are different than pipelines that carry water or sewage, which are different than utility lines that carry electricity.

We are retaining the long-standing practice articulated in the NWP regulations at 33 CFR 330.2(i), in which each separate and distant crossings of waters of the United States is authorized by NWP. The utility line activities authorized by NWP 12 are similar in nature because they involve linear pipes, cables, or wires to transport physical substances or electromagnetic energy from a point of origin to a terminal point. For the purposes of this NWP, the term "crossing" refers to regulated activities. However, it should be noted that installing utility lines under a navigable water of the United States subject to section 10 of the Rivers and Harbors Act of 1899 via horizontal directional drilling, as well as aerial crossings of those navigable waters, require authorization under section 10 of the Rivers and Harbors Act of 1899. The substations, tower foundations, roads, and temporary fills that are also authorized by NWP 12 (when those activities require Department of the Army (DA) authorization) are integral to the fulfilling the

purpose of utility lines, and thus fall within the "categories of activities that are similar in nature" requirement for general permits stated in section 404(e) of the Clean Water Act.

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

The Corps does not regulate oil and gas pipelines, or other types of pipelines, per se. For utility lines, including oil and gas pipelines, our legal authority is limited to regulating discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States, under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899, respectively. We do not have the authority to regulate the operation of oil and gas pipelines, and we do not have the authority to address spills or leaks from oil and gas pipelines. General condition 14, proper maintenance, requires that NWP activities, including NWP 12 activities, be properly maintained to ensure public safety. The proper maintenance required by general condition 14 also ensures compliance with the other NWP general conditions, many of which are designed to protect the environment, as well as any regional conditions imposed by the division engineer and activity-specific conditions imposed by the district engineer. In addition, we do not have the legal authority to regulate the construction, maintenance, or repair of upland segments of pipelines or other types of utility lines. For

example, for a recent oil pipeline (e.g., the Flanagan South pipeline), the segments of the oil pipeline that were subject to the Corps' jurisdiction (i.e., the crossings of waters of the United States, including navigable waters of the United States, that were authorized by the 2012 NWP 12) was only 2.3% of the total length of the pipeline; the remaining 97.7% of the oil pipeline was constructed in upland areas outside of the Corps' jurisdiction. Interstate natural gas pipelines are regulated by the Federal Energy Regulatory Commission. The Federal Energy Regulatory Commission also regulates some electric transmission projects.

There are other federal laws that address the operation of pipelines and spills and leaks of substances from pipelines. Those laws are administered by other federal agencies. Under the Natural Gas Pipeline Safety Act of 1968, the Department of Transportation (DOT) regulates pipeline transportation of natural gas and other gases. The DOT also regulates the transportation and storage of liquefied natural gas. Under the Hazardous Liquid Pipeline Safety Act, the DOT regulates pipeline transportation of hazardous liquids including crude oil, petroleum products, anhydrous ammonia, and carbon dioxide. The DOT administers its pipeline regulations through the Office of Pipeline Safety (OPS), which is in its Pipelines and Hazardous Materials Safety Administration (PHMSA). Specific to oil pipelines, the PHMSA is responsible for reviewing oil spill response plans for onshore oil pipelines.

Oil spills are also addressed through the Oil Pollution Act of 1990, which is administered by the U.S. Environmental Protection Agency and the U.S. Coast Guard. Under the Oil Pollution Act of 1990, EPA is responsible for addressing oil spills occurring in inland waters and the U.S. Coast Guard is responsible for addressing oil

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

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

The purpose of the NWPs, as well as regional general permits, is to provide a streamlined authorization process for activities that result in no more than minimal individual and cumulative adverse environmental effects. When section 404(e) of the

Clean Water Act became law in 1977, lawmakers endorsed the general permit concept that was developed by the Corps in its 1975 and 1977 regulations (see 40 FR 31335 and 42 FR 37140, 37145 respectively). For the issuance or reissuance of NWPs and other general permits, the public involvement process occurs during the development of the general permit. If public notices were required to authorize specific activities after the NWP or other general permit was issued, it would not provide the streamlined process intended by Congress. Individual pipelines may be able to operate independently to transport substances from a point of origin to a terminal point, even though they may be part of a larger network of pipelines. The Corps may authorize these independent pipelines, if all crossings of waters of the United States involving regulated activities qualify for NWP authorization.

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

Activities authorized by NWP 12 are currently playing, and will continue to play, and important role in helping the nation achieve goals regarding the increased reliance on clean energy projects to meet the energy needs of its populace, to help reduce emissions of greenhouse gases that contribute to climate change. Clean energy projects include the construction, operation, and maintenance of more efficient and cleaner fossil-fuel energy

generation facilities, nuclear power plants, and renewable energy generation projects that use solar and wind energy. Natural gas and electricity transmission and distribution systems will also need to be constructed or upgraded to bring clean energy to consumers.

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

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

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

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

The consultation between Corps districts and tribes that has been conducted for these NWPs can result in additional procedures or regional conditions to protect tribal trust resources. District engineers will work to establish procedures with interested tribes to coordinate on specific NWP 12 activities to assist the Corps in executing its tribal trust responsibilities, or add mitigation requirements that the district engineer determines are necessary to ensure that the verified NWP activity results in no more than minimal individual and cumulative adverse environmental effects. Division engineers will, as necessary, impose regional conditions on this NWP, including requiring more activities to require pre-construction notification, to ensure that these activities do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands. When a Corps district receives a pre-construction notification that triggers a need to

consult with one or more tribes, that consultation will be completed before the district engineer makes his or her decision on whether to issue the NWP verification. Regional conditions and coordination procedures can help ensure compliance with general condition 17. The Corps does not, and cannot, delegate its tribal trust responsibilities to permit applicants.

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

Paragraph 2 of Section E, "Further Information," states that the NWPs do not remove the need to obtain other required federal, state, or local authorizations as required by law. The NWPs have a 45-day review period (with some exceptions), so district engineers cannot wait for all other federal, state, or local authorizations to be issued. Otherwise, the proposed NWP activity would be authorized after the 45-day period passed with no response from the Corps. The default NWP authorization would not have any activity-specific conditions, such as mitigation requirements, to ensure that the adverse environmental effects are no more than minimal. This NWP authorizes temporary fills to construct a utility line. Concerns about the use of this NWP in Appalachia are more appropriately addressed by the appropriate division engineer, who

has the authority to modify, suspend, or revoke the NWP in a specific region. General condition 12 requires the use of soil and erosion controls to ensure that sediments associated with an NWP activity are not released downstream.

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

We are retaining the 1/2-acre limit for this NWP because we believe it is an appropriate limit for authorizing most utility line activities that have no more than minimal individual and cumulative adverse environmental effects. Division engineers can modify this NWP on a regional level to reduce the acreage limit if necessary to ensure that no more than minimal adverse environmental effects occur in that region. We do not agree that the acreage limit should apply to the entire utility line because the separate and distant crossings of waters of the United States are usually at separate waterbodies scattered along the length of the utility line, and are often in different watersheds especially for utility lines that run through multiple counties, states, or Corps

districts. For utility lines that cross the same waterbody (e.g., a river or stream) at separate and distant locations, the distance between those crossings will usually dissipate the direct and indirect adverse environmental effects so that the cumulative adverse environmental effects are no more than minimal. If the district engineer determines after reviewing the PCN that the cumulative adverse environmental effects are more than minimal, after considering a mitigation proposal provided by the project proponent, he or she will exercise discretionary authority and require an individual permit.

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

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

recommended removal of the reference to “telegraph lines” from the list of types of utility lines covered by this NWP.

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

lines that previously conveyed telegraph messages may now carry other forms of communication.

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

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

non-tidal wetlands adjacent to tidal waters is more likely to result in more than minimal adverse environmental effects.

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

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

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

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

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

Several commenters expressed support for adding the paragraph on remediation of inadvertent returns of drilling fluids from directional drilling activities. A few commenters said that the term "frac-out" should not be used when referring to inadvertent returns of drilling fluids during horizontal directional drilling operations. A commenter recommended replacing the term "sub-soil" with "subsurface." One commenter objected to the proposed addition, stating that these inadvertent returns of drilling fluids occur too frequently. One commenter asked for a definition of "inadvertent return" and said the NWP should explain that inadvertent returns of drilling fluids during horizontal directional drilling activities may require a Clean Water Act section 402 permit. One commenter requested clarification that activities which

remediate inadvertent returns of drilling fluids minimize environmental impacts. One commenter agreed that inadvertent returns of drilling fluids that occur during horizontal directional drilling activities are not discharges of dredged or fill material into waters of the United States. One commenter said that for horizontal directional drilling activities, the NWP should require entry and exit 50 feet from the stream bank, and sufficient depths prevent inadvertent returns of drilling fluids. One commenter said that the NWP should require upland containment of drilling fluids. One commenter requested that this paragraph distinguish between horizontal directional drilling for the purposes of utility line installation or replacement, and directional drilling for oil and gas extraction.

Horizontal directional drilling for utility line installation and replacement is an important technique for avoiding and minimizing adverse effects to jurisdictional waters and wetlands during the construction of utility lines. We believe that modifying NWP 12 to authorize remediation activities that involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States and are necessary to address these inadvertent returns to protect the aquatic environment is a prudent course of action. We have removed the term "frac-out" from the text of this NWP, and replaced the term "mud" with "fluid." We have also replaced the term "sub-soil" with "subsurface" because horizontal directional drilling activities usually occur well below the soil. District engineers may add conditions to NWP verifications to require activity-specific remediation plans to address potential inadvertent returns that might occur during the construction of the utility line.

If the horizontal directional drilling activities require DA authorization, the district engineer may add conditions to the NWP authorization to specify entry and exit

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

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

If the horizontal directional drilling involves activities that require authorization under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act, the PCN should describe those activities and their environmental effects. The PCN should also describe mitigation measures that will be used to ensure compliance with the terms and conditions of the NWP. We believe that remediating the inadvertent returns of drilling fluids and restoring, to the maximum extent practicable, the affected

jurisdictional waters and wetlands is sufficient mitigation. District engineers can add conditions to the NWP authorization to require contingency plans for utility line activities that require DA authorization. We do not agree that it is necessary to require PCNs for inadvertent returns of drilling fluids or to conduct agency coordination. Through this provision of NWP 12, we are trying to encourage timely remediation of these inadvertent returns of drilling fluids to protect the aquatic environment. States can determine whether water quality certification is required for activities conducted to remediate inadvertent returns of drilling fluids. States can require water quality certification for any discharge into jurisdictional waters and wetlands, not just discharges of dredged or fill material.

Several commenters said they support the addition of temporary mats to minimize impacts of utility line activities. Two commenters requested clarification that not all uses of temporary mats in jurisdictional waters and wetlands results in a regulated activity. One commenter recommended adding language to this paragraph to include other measures that distribute the weight of construction equipment to minimize soil disturbance. Another commenter stated that this paragraph should require best management practices, such as low pressure equipment, wide tires, and varying travel paths, to minimize the adverse environmental effects of NWP 12 activities. One commenter suggested inserting the word “promptly” between the words “be removed” to require the prompt removal of all temporary fills.

District engineers will determine on a case-by-case basis whether the use of timber mats in jurisdictional waters and wetlands requires DA authorization. We believe that the proposed language in this paragraph allows for a variety of temporary structures,

fills, and work necessary to construct, maintain, or repair a utility line, substation, foundation for overhead utility lines, or access road. We do not believe it is necessary to provide, for NWP 12 activities, a comprehensive list of techniques to minimize soil disturbance and minimize the impacts of construction equipment. We also do not agree with the proposed addition of "promptly" because it may be more protective of the environment to keep temporary fills in place until post-construction restoration activities or permanent fills have had time to stabilize.

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

We have not made any changes to the PCN thresholds for this NWP. We do not agree that PCNs should be required for all activities authorized by this NWP because the current PCN thresholds have been effective in identifying proposed NWP 12 activities that should be reviewed by district engineers on a case-by-case basis to ensure that they result in only minimal individual and cumulative adverse environmental effects. In

addition, paragraph (b)(4) of general condition 32 requires that NWP 12 PCNs (and PCNs for other NWPs) also include information on other crossings of waters of the United States for the linear project that will use NWP 12 authorizations but do not require PCNs. This requirement is also explained in Note 8 of NWP 12.

All NWP 12 activities that require authorization under section 10 of the Rivers and Harbors Act of 1899 require PCNs to ensure that these utility lines will have no more than minimal adverse effects on navigation. This includes the maintenance of aerial crossings of navigable waters. We agree that the current PCN thresholds should be maintained instead of simplifying the PCN thresholds to a single PCN threshold for the loss of greater than 1/10-acre of waters of the United States. Item 4 of the "Notification" paragraph requires pre-construction notification for utility lines placed in jurisdictional waters and wetlands if the proposed utility line runs parallel to, or along, a stream bed. These activities require PCNs to allow district engineers to evaluate potential impacts to the stream. General condition 18, endangered species, requires PCNs for all NWP activities to be conducted by non-federal permittees that might affect listed species or critical habitat (see paragraph (c) of general condition 18).

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

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

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

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

There is no conflict between 33 CFR 330.6(d) and 33 CFR 330.2(i). In addition, these regulations do not conflict with the NWP definition of "single and complete linear project" in Section F of these NWPs. It should be noted that both 33 CFR 330.2(i) and the NWP definition of "single and complete linear project" do not discuss the concept of "independent utility." We cannot establish national thresholds for determining when crossings of waters of the United States are "separate and distant" because a variety of factors should be considered by district engineers when making those decisions, such as topography, geology, hydrology, soils, and the characteristics of wetlands, streams, and other aquatic resources. Corps districts may establish local guidelines for identifying "separate and distant" crossings.

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

As stated above, we have removed the phrase "with independent utility" from the second sentence of Note 2. District engineers will apply the concept of independent utility in 33 CFR 330.6(d) to determine when NWP authorizations can be combined with individual permit authorizations, or whether an individual permit is required for the regulated activities. Therefore, there is no need to further explain the concept of "stand-alone" activities or "stand-alone linear project." Note 2 covers linear projects, not single

and complete non-linear projects, so Note 2 should not be applied to non-linear projects. There are separate definitions of "single and complete linear project" and "single and complete non-linear project" in the Definitions section of these NWPs because these are different concepts for the NWP program.

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

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

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

result in temporary impacts to those jurisdictional waters and wetlands. The use of the term "separate and distant" in Note 2 is the same as its use in 33 CFR 330.2(i) and the definition of "single and complete linear project" in the "Definitions" section of the NWPs (Section F).

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

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

For oil pipelines and other utility lines, the activities that are subject to the Corps' regulatory authorities and require DA authorization are crossings of jurisdictional waters and wetlands, as well as utility line substations, foundations for overhead utility lines, and access roads, that involve discharges of dredged or fill material into waters of the United

States or structures or work in navigable waters of the United States. Segments of an oil pipeline or other utility line in upland areas outside of the Corps' jurisdiction, or attendant features constructed in upland areas, do not require DA authorization and therefore are not, for the purposes of the Corps' compliance with section 106 of the NHPA, "undertakings." The Corps does not have direct or indirect jurisdiction over pipeline segments in upland areas. The Corps does not regulate oil pipelines, or other utility lines per se; we only regulate those components of oil pipelines or other utility lines, that involve activities regulated under our authorities (i.e., section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899).

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

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

One commenter agreed with the proposed addition of Note 6. Several commenters said the word "that" should be added before the phrase "do not qualify."

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

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

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

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

Several commenters said that Corps districts should be prohibited from suspending or revoking NWP 12 and using RGPs for utility lines that cross state or district boundaries. One commenter recommended that NWP 12 include prescriptive national standard best management practices (BMPs) and provide notifications to stakeholders when pipelines, cables, and utility lines are proposed to be constructed in marine transportation routes. These notifications would also be provided to the U.S. Coast Guard and the National Marine Fisheries Service. A few commenters said that the mitigation process for NWP 12 is not in compliance with the National Environmental Policy Act (NEPA) because the public is not provided with an opportunity to comment on requests for NWP verifications. A few commenters also stated that reliance on a district engineer's compensatory mitigation requirement for an NWP 12 verification is

inadequate to support a finding of no significant impact under an environmental assessment prepared to satisfy NEPA requirements.

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

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

documents include the NWP general conditions, which help ensure that NWP activities result in no more than minimal adverse environmental effects.

The draft decision document for NWP 12 was made available for public review and comment concurrent with the proposed rule that was published in the Federal Register on June 1, 2016. The decision document describes, in general terms, mitigation that helps ensure that NWP 12 activities result in no more than minimal adverse environmental effects. Mitigation requirements, including compensatory mitigation requirements, will be determined by district engineers for activity-specific NWP verifications. Compliance with NEPA is accomplished when the NWP is issued by Corps Headquarters, with its decision document. Individual NWP 12 verifications do not require NEPA documentation, nor do they require an opportunity for public comment. The public comment process occurs during the rulemaking procedures to issue or reissue an NWP. A public notice and comment process for NWP verifications would not be consistent with the Congressional intent of section 404(e) of the Clean Water Act, which envisions a streamlined authorization process for activities that result in no more than minimal individual and cumulative adverse environmental effects.

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

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

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

District engineers have the discretion to require compensatory mitigation for the permanent conversion of forested wetlands to scrub-shrub wetlands, if that permanent conversion is conducted as a result of activities that require DA authorization (see paragraph (i) of general condition 23, mitigation). General condition 12, soil erosion and sediment controls, requires permittees to stabilize exposed soils and fills at the earliest

practicable date, to minimize dispersion by currents, rainfall, or other erosive forces. Excavation activities require Clean Water Act section 404 authorization if they result in regulated discharges of dredged or fill material into waters of the United States (see the definitions at 33 CFR 323.2).

Paragraph 1 of Section D, District Engineer's Decision, requires district engineers to consider the cumulative effects of all crossings of waters of the United States for a single and complete linear project that is authorized by NWP, including those crossings that require DA authorization but do not otherwise require pre-construction notification. A complete PCN requires the project proponent to identify, in addition to the NWP 12 activities that require PCNs, the NWP 12 activities that do not require PCNs (see paragraph (b)(4) of general condition 32 and Note 8). The information regarding the cumulative effects of all of the utility line activities authorized by NWP 12 will be considered by the district engineer in his or her decision-making process for an NWP 12 verification.

A number of commenters asserted that the issuance of NWP 12 requires an environmental impact statement. A few commenters stated that the cumulative effects analysis for NWP 12 in the draft decision document was insufficient. A few commenters said that the cumulative effects analysis for NWP 12 in the draft decision document was properly done. One commenter indicated that the Corps improperly deferred the requirement to do a NEPA cumulative effects analysis to the district engineer's NWP verification decision. One commenter opined that the Corps defers its NEPA review for later stages in the permitting process and that NWP 12 provides no guarantee that the Corps district will conduct a NEPA analysis for the NWP verification. One commenter

said that Corps districts should prepare supplemental environmental impact statements for NWP 12 verifications. One commenter stated that the decision document should discuss NWP 12 activities and their effects on climate change. Many commenters remarked that the Corps should not issue permits for pipelines because the burning of fossil fuels contributes greenhouse gases that cause climate change.

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

To issue an NWP verification the district engineer does not need to prepare a NEPA document because the requirements for NEPA were fulfilled when Corps Headquarters issued the national decision document for the NWP. Since NEPA compliance is achieved by Corps Headquarters through the preparation of a combined

decision document that includes an environmental assessment and finding of no significant impact, Corps districts do not need to prepare supplemental environmental impact statements for NWP verifications. If a proposed NWP activity will result in more than minimal individual and cumulative adverse environmental effects after considering the mitigation proposal submitted by the prospective permittee, the district engineer will assert discretionary authority and require an individual permit if the adverse environmental effects will be more than minimal. During the individual permit process, the district engineer will prepare the appropriate NEPA documentation.

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

We also conducted a cumulative effects analysis in accordance with the 404(b)(1) Guidelines because this NWP authorizes discharges of dredged or fill material into waters of the United States. The Corps does not defer the NEPA cumulative effects analysis to the NWP verification stage of the authorization process. Corps Headquarters conducts the required NEPA analyses when it issues or reissues the NWP. The final national

decision document includes a discussion of NWP 12 activities and climate change. Activities authorized by NWP will result in small incremental contributions to greenhouse gas emissions during construction periods, if the equipment used to construct the crossings of waters of the United States, utility line substations, footings for overhead utility lines, or access roads in waters of the United States consumes fossil fuels. The Corps does not have the authority to regulate the burning of fossil fuels that may be transported by utility lines. The Corps does not have the legal authority to regulate emissions of greenhouse gases during the operation and maintenance of the utility line activities, if those operations and maintenance activities do not involve activities that require DA authorization.

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

The decision document for NWP 12 treats oil spills and gas pipeline leaks as reasonably foreseeable future actions in the NEPA cumulative impact analysis section. The decision document also discusses the potential for inadvertent returns of drilling

fluids to occur during horizontal directional drilling activities used to install or replace utility lines. As discussed above, the Corps does not regulate the operation of oil or gas pipelines, or leaks that might occur. In addition, the Corps does not regulate inadvertent returns of drilling fluids that might occur as a result of subsurface fractures during horizontal directional drilling activities. Oil spills and gas leaks are addressed by other federal agencies under other federal laws.

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

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

conditions of this NWP encourage the project proponent to minimize adverse effects to jurisdictional waters and wetlands to qualify for NWP authorization, instead of having to apply for an individual permit.

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

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

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

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

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

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

This NWP is reissued with the modifications discussed above.

NWP 13. Bank Stabilization. We proposed to modify the first paragraph of this NWP to clarify that it authorizes a wide variety of bank stabilization measures. In addition, we proposed to modify paragraph (c) to clarify that the quantity of the dredged or fill material discharged into waters of the United States must not exceed one cubic yard per running foot below the plane of the ordinary high water mark or the high tide line, as measured along the bank.

Many commenters supported the reissuance of this NWP, including many of the proposed changes. Many commenters objected to the reissuance of this NWP. Several commenters said that all bank stabilization activities should require individual permits. One commenter asserted that this NWP should not authorize new bank stabilization activities. One commenter stated that NWP 13 should not be used to create more land. One commenter opined that the use of NWP 13 is contrary to the public interest because the only positive value of a bulkhead is limited to the landowner, and bulkheads have adverse impacts that affect society as a whole. One commenter said that this NWP should not be reissued because it does not comply with the requirements of section 404 of the Clean Water Act.

We are reissuing this NWP, with some changes made in response to comments that are discussed below. Many bank stabilization activities have no more than minimal individual and cumulative adverse environmental effects and are appropriate for NWP authorization. The Corps' regulations recognize that landowners have the general right to protect their property from erosion (33 CFR 320.4(g)(2)). The terms and conditions of this NWP provide a means of implementing this provision of the Corps' regulations by

authorizing bank stabilization activities that can be conducted with minimal amounts of dredged or fill material being discharged into waters of the United States.

We acknowledge that bank stabilization will have indirect adverse effects on streams, rivers, lakes, estuaries, and oceans. In coastal waters, bank stabilization structures change natural shoreline processes and alter habitats (Nordstrom 2014). Bank stabilization structures in coastal waters create barriers to animal movements between habitats, cause the loss of some habitat, reduce or eliminate intertidal habitats, and alter species richness and abundance (Nordstrom 2014). Gittman et al. (2016) concluded after conducting a meta-analysis of coastal shore protection measures that a 23 percent decline in biodiversity and a 45 percent decline in organism abundance occurred near bulkheads and seawalls. Stone revetments, sills, and breakwaters exhibited little or no difference in biodiversity and organism abundance compared to natural shorelines (Gittman et al. 2016). In rivers and streams, bank stabilization measures such as riprap affect riverine processes including sediment transport, hydrodynamics, water levels, sediment input, sediment characteristics of the river or stream bed, and wood input (Reid and Church 2015). Riprap to stabilize river and stream banks also alters habitat quality and vertebrate and invertebrate populations (Reid and Church 2015).

We believe that in most cases, the indirect adverse environmental effects caused by bank stabilization authorized by NWP 13 are no more than minimal. While bank stabilization may result in some losses of waters of the United States along the stream or river bank or along the shore, the waterbody itself is not lost and that waterbody continues to provide ecological functions and services. For those activities that require PCNs, district engineers will review those activities and their direct and indirect adverse

environmental effects. If a proposed bank stabilization activity will result in more than minimal individual and cumulative adverse environmental effects after the district engineer considers the applicant's mitigation proposal, he or she will exercise discretionary authority and require an individual permit. This NWP authorizes new bank stabilization activities and the modification, repair, or replacement of existing bank stabilization activities as long as those activities comply with the terms and conditions of the NWP.

Paragraph (a) of this NWP requires that the amount of material placed in jurisdictional waters and wetlands for the bank stabilization activity must be the minimum necessary for erosion protection. Therefore, this NWP does not authorize activities that create more land for property owner or the reclamation of previously lost lands. Bank stabilization activities authorized by this NWP, including bulkheads, revetments, and other erosion control approaches, are conducted not only for private property, but for public property as well. Therefore, it cannot be stated that NWP 13 activities only benefit private landowners; the NWP can also benefit larger communities especially at waterfront parks and other public spaces along shorelines that are eroding. In the national decision document, we have completed a 404(b)(1) Guidelines analysis and determined that the reissuance of this NWP complies with the Guidelines.

Many commenters stated that the construction of bulkheads, seawalls, revetments, and other shoreline hardening structures should not be authorized by this NWP, and they should require individual permits. One commenter said that gabion baskets, sills, and stream barbs should not be authorized by NWP 13. Two commenters suggested replacing the words "such as" with "including, but not limited to" to the list of examples

of activities authorized by this NWP to clarify that the list is not an all-inclusive list. Several commenters expressed their support of including hybrid bank stabilization activities that combine vegetated slope protection and riprap protection.

In the June 1, 2016, proposed rule, we proposed to modify the text of this NWP to make it clear that NWP 13 authorizes a variety of bank stabilization activities, not just the construction and maintenance of bulkheads, seawalls, revetments, gabion baskets, and other shoreline hardening structures. The construction and maintenance of bulkheads, seawalls, revetments, gabion baskets, etc. has, especially in waterbodies in urban areas, no more than minimal adverse environmental effects. This NWP can be used to authorize vegetative stabilization and bioengineering to reduce erosion, as well as other bank stabilization techniques. Stream barbs can be effective at reducing bank erosion and can have fewer adverse effects to streams and their banks than armoring the stream bank. Sills have been authorized by NWP 13 in the past and help protect existing fringe marshes from erosion. The use of the phrase "such as" in the first paragraph of NWP 13 makes it clear that the list of bank stabilization activities is not an exhaustive list. Other types of bank stabilization activities can be authorized by NWP 13 as long as those activities comply with the terms and conditions of this NWP.

One commenter stated that NWP 13 should be modified to prohibit hard bank stabilization structures landward of, or directly adjacent to, tidal marshes, mangroves, or submerged aquatic vegetation. One commenter stated that this NWP should not authorize bank stabilization activities in coastal estuaries. One commenter suggested adding a provision to NWP 13 to encourage the use of living shorelines as bank stabilization and erosion prevention methods. Several commenters voiced their support

that NWP 13 not specify a preference for one bank stabilization approach over another approach.

This NWP requires PCNs for any proposed activities that involve discharges of dredged or fill material into special aquatic sites, including wetlands and vegetated shallows. Constructing bank stabilization activities, including bulkheads and revetments, landward of tidal marshes, mangroves, or submerged aquatic vegetation is a means of complying with paragraph (a) of general condition 23, mitigation, by minimizing adverse effects to those special aquatic sites. If the bank stabilization activity is constructed landward of the high tide line and there are no jurisdictional wetlands or waters at the proposed site for the bank stabilization activity, then DA authorization is not required. Many areas of coastal estuaries are subject to strong wave energies and other erosive forces (e.g., large vessel wakes) where the construction of seawalls, bulkheads, or revetments is the only effective and sustainable bank stabilization technique.

We are issuing a separate NWP to authorize discharges of dredged or fill material into waters of the United States and structure or work in navigable waters of the United States for the construction and maintenance of living shorelines. That new NWP gives coastal landowners another option to protect their property from erosion. We agree that the NWPs should not establish a preference for one approach to bank stabilization over other approaches. The science surrounding living shorelines is relatively new and their long-term effectiveness compared to other bank stabilization methods has not been well studied (Saleh and Weinstein 2016). Therefore, at this time it would be premature to establish a regulatory preference for living shorelines.

Landowners can seek advice from consultants regarding which bank stabilization approach will be suitable and sustainable under the conditions at a particular site. District engineers will evaluate NWP PCNs and voluntary requests for NWP verification to determine whether the proposed bank stabilization activity qualifies for NWP authorization. Corps district staff cannot design bank stabilization activities for landowners because it would create liability for the federal government. Some general advice can be offered to landowners, but it is up to the landowner to decide how he or she wants to protect his or her property from erosion. Corps district staff can only evaluate the applicant's proposal and determine whether it qualifies for NWP or regional general permit authorization or requires an individual permit.

Several commenters stated that NWP 13 should not be reissued because too much shoreline has been armored by bank stabilization activities. These commenters cited a study that determined that 14 percent of the coastal shorelines along the Atlantic and Pacific Oceans and the Gulf of Mexico have been altered by the construction of bulkheads, seawalls, jetties, and groins (Gittman et al. 2015). One commenter said stated that NWP 13 should not authorize hard bank stabilization structures on public beaches. Another commenter expressed the opinion that hardened bank stabilization projects should only be authorized in cases where public safety is at risk. One commenter said bank stabilization fills or structures that prevent the establishment of rooted vegetation should only be authorized in limited circumstances, specifically in areas with excessive and active shoreline erosion, areas with highly erodible soils, and shorelines exposed to frequent flux and wave action. This commenter also stated that hard bank stabilization

structures should be limited to areas with critical public infrastructure where other bank stabilization approaches could not be done.

According to the National Oceanic and Atmospheric Administration's report entitled: "National Coastal Population Report: Population Trends from 1970 to 2020," 39 percent of the population of the United States (123.3 million people) lives in coastal shoreline counties. Approximately 52 percent of the nation's population lives in coastal watersheds (NOAA and U.S. Census Bureau 2013). That report defines "coastal shoreline counties" as counties that are "directly adjacent to the open ocean, major estuaries, and the Great Lakes." These coastal shoreline counties experience most of the direct effects of coastal hazards, and therefore people living in these areas need bank stabilization activities to protect their property and infrastructure. As long as the entities responsible for land use planning and zoning (primarily local and state governments) continue to allow development in coastal areas, there will be a need for bank stabilization activities as people living in areas determine a need to take action to protect their property.

Although according to the study mentioned above (Gittman et al. 2015), an estimated 14 percent of coastal shoreline in the United States estimated has been altered by hard bank stabilization such as bulkheads, seawalls, jetties, and groins, it is important to consider how much of that hardened shoreline is located in coastal environments subject to higher energy erosive forces where bulkheads, seawalls, jetties, breakwaters, or revetments are necessary to control erosion and protect existing buildings and infrastructure. The percentage of shore estimated to be hardened by bank stabilization structures should also be considered in the overall context of the large number of people

that live in coastal areas of the United States and the extensive proportion of land area in coastal zones that people have altered for their use. The 52 percent of the nation's population that lives in coastal watersheds has a large impact on the ecological condition of coastal waters because of the cumulative effects of human activities in those coastal zones. Those cumulative impacts to coastal ecosystems are caused by: pollution from land, rivers, and oceans; overharvesting fishery resources; habitat loss; species introductions; nutrient inputs; activities that reduce sediment inputs necessary to maintain coastal ecosystems; land use changes that convert coastal habitats such as forests, wetlands to urban, industrial, and recreational developments; the construction and operation of ports and other facilities; transportation projects; dredging; aquaculture activities; and shore protection structures (MEA 2005a). In summary, there are many other categories of activities in coastal areas besides bank stabilization activities that adversely affect coastal waters and their associated ecosystems and eliminate or diminish the ecological functions and services those waters and ecosystems provide.

Humans have long had substantial impacts on ecosystems and the ecological functions and services they provide (Ellis et al. 2010). Over 75 percent of the ice-free land on Earth has been altered by human occupation and use (Ellis and Ramankutty 2008). Approximately 33 percent of the Earth's ice-free land consists of lands heavily used by people: urban areas, villages, lands used to produce crops, and occupied rangelands (Ellis and Ramankutty 2008). Human population density is a good indicator of the relative effect that people have had on local ecosystems, with lower population densities causing smaller impacts to ecosystems and higher population densities having larger impacts on ecosystems (Ellis and Ramankutty 2008). According to NOAA and the

U.S. Census Bureau (2013), in 2010 U.S. coastal shoreline counties had an average density of 446 people per square mile and U.S. coastal watershed counties had an average density of 319 people per square mile. Both of these densities are considered high population densities under the classification system used by Ellis and Ramankutty 2008). Human activities such as urbanization, agriculture, and forestry alter ecosystem structure and function by changing their interactions with other ecosystems, their biogeochemical cycles, and their species composition (Vitousek et al. 1997).

Given the relatively high percentage of the United States population that lives in coastal shoreline counties, and the fact that many coastal shoreline counties have been long been significantly altered by human activities, the estimated percentage of hardened shoreline should be considered in the context of the cumulative impacts that have occurred in coastal shoreline counties or coastal watersheds. As explained above, there is a wide variety of activities that contribute to cumulative effects to coastal waters (also see MEA 2005b). Bank stabilization activities are a small subset of human activities that adversely affect coastal waters and wetlands.

It is also important to consider that a large number of waterfront property owners will want to protect their property with bank stabilization structures, such as bulkheads, seawalls, and revetments. Some waterfront property owners have taken different approaches (e.g., vegetative stabilization, bioengineering, living shorelines) to control erosion of their lands. Those landowners that perceive that erosion is not a problem will choose not to install any erosion control measures. Landowners will choose erosion control methods they believe will protect their property over a long term. They may have property fronted by tidal fringe wetlands that already protects their property. Gittman et

al. (2015) estimated that only 1 percent of the United States coastline with tidal marsh has been armored by seawalls, bulkheads, revetments, or other hard structures, and those erosion control structures were often constructed landward of the tidal marsh. Gittman et al. (2015) does not indicate what proportion of those erosion control structures were constructed outside of the Corps' jurisdiction (e.g., landward of the high tide line and jurisdictional wetlands) and which proportion were authorized by DA permits, including NWPs. Areas defined by Gittman et al. (2015) as "sheltered shorelines" (i.e., shorelines located in bays, sounds, lagoons, or tidally influenced rivers) may not have site characteristics where living shorelines or vegetative stabilization might be appropriate and effective in controlling erosion. Some of these sheltered shorelines have larger fetches and be regularly exposed to higher energy waves and therefore require hard bank stabilization approaches to effectively protect coastal property and infrastructure. In general, living shorelines are limited to shores with gentle slopes and small fetches that are subject to low- to mid-energy waves

The entity responsible for managing a public beach is responsible for proposing an appropriate bank stabilization activity and the Corps will evaluate the proposal if it requires DA authorization. Bank stabilization measures are being used by people that want to protect their property, and by federal, tribal, state, and local governments as well as private entities that want to protect their infrastructure and other facilities. Vegetative stabilization is only effective in certain coastal areas where erosive forces (e.g., waves, currents, boat wakes) are low or moderate. The need to implement erosion control measures is a reaction to a perceived erosion problem that occurs after waterfront

property has been developed. The responsibility for land use planning and zoning, including land use in coastal zones, generally falls on state and local governments.

We recognize that in coastal waters bulkheads, seawalls, and revetments have adverse effects on the structure, function, and dynamics of coastal ecosystems (e.g., Nordstrom et al. 2014; Gittman et al. 2016). We also recognize that other approaches to bank stabilization, such as living shorelines, also have some adverse effects on coastal ecosystems, such as habitat conversions (e.g., Bilkovic et al. 2016; Sutton-Grier et al. 2015). As discussed above, bank stabilization activities are not the only activities in coastal areas that adversely affect the structure, function, and dynamics of coastal waters and wetlands. The cumulative effects of large number of people living in these coastal areas over the centuries has altered the structure, function, and dynamics of coastal ecosystems.

Three commenters said this NWP should be modified to increase its limits to encourage vegetative stabilization or bioengineering. Two commenters stated that they support the Corps' encouragement of bioengineering, but that there should be a limitation as to how much fill is authorized within a floodplain for bioengineered projects. Two commenters requested that NWP 13 clearly state that vegetative bank stabilization will not be required by the Corps at any particular site.

The NWP currently provides sufficient flexibility to landowners, public works agencies, and other entities to use a wide range of options to stabilize banks. The Corps does not regulate fills in floodplains unless there are discharges of dredged or fill material into waters of the United States. The Corps regulatory program does not regulate

activities in floodplains per se; we only regulate activities in floodplains that require authorization under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899. Corps districts cannot mandate the use of a particular bank stabilization approach, such as vegetative stabilization, because district engineers can only provide advice on a landowner's proposed bank stabilization activity (see 33 CFR 320.4(g)(2)). The district engineer will evaluate the proposed activity, and if he or she determines the proposed activity will result in more than minimal adverse environmental effects, he or she will exercise discretionary authority and require an individual permit.

One commenter said that proposed paragraph (a) allows cumulative impacts to fish. Cumulative impacts to fish are caused not only by the placement of material into jurisdictional waters and wetlands to stabilize banks, but also by a wide variety of other activities that the Corps does not have the legal authority to regulate. Examples of other contributors to cumulative impacts to fish include: point source discharges of pollutants authorized by Clean Water Act section 402 permits, non-point sources of pollution, habitat loss and alterations that do not involve activities regulated by the Corps under its authorities, overharvesting of fish, climate change, land use/land cover changes in the watershed draining to the waterbodies inhabited by those fish, and resource extraction activities, such as water withdrawals.

Two commenters stated that the 500 linear foot limit is too high, and two commenters said the 500 linear foot limit should be removed because it is arbitrary. Another commenter said that the 500 linear foot limit encourages bank armoring. One commenter stated that the linear foot limit for bank stabilization by hard armoring should be 300 linear feet. Three commenters expressed concern that there is no linear foot limit

for non-bioengineered bank stabilization projects and they recommend a limit of 500 linear feet for those projects. Two commenters recommended increasing the linear foot limit to 1,000 feet. One commenter stated that 500 linear foot bank stabilization activities should only be authorized by NWP on large rivers. One commenter said that a 500-foot bulkhead cannot have more than minimal adverse environmental effects. Another commenter remarked that NWP 13 activities should be limited to 300 linear feet in non-tidal waters inhabited by state or federally listed threatened or endangered freshwater mussel species. One commenter suggested changing the linear foot limits for stream bank stabilization authorized by NWP 13 to 500 linear feet for hard armoring and 200 linear feet for scour protection.

The 500 linear foot limit was established to help ensure that NWP 13 activities result in no more than minimal individual and cumulative adverse environmental effects. Division engineers can modify this NWP through regional conditions to reduce the 500 linear foot limit if there are regional concerns regarding the potential for more than minimal adverse environmental effects to occur. The district engineer can waive the 500 linear foot limit on a case-by-case basis if he or she makes a written determination, after conducting agency coordination that the proposed activity will result in only minimal individual and cumulative adverse environmental effects. However, to address concerns about the adverse effects of bulkheads on coastal ecosystems, we have imposed a 1,000 linear foot limit on waivers for bulkheads. For proposed bulkheads that are 501 to 1,000 feet in length, district engineers can waive the 500 linear foot limit if they make written determinations after agency coordination that the proposed bulkheads will result in no more than minimal adverse environmental effects.

We are only applying the 1,000 linear foot cap to bulkheads because bulkheads have the potential, in some circumstances, to cause more severe adverse environmental effects than other bank stabilization techniques, such as bioengineering, vegetative stabilization, sills, rip rap, revetment, and stream barbs. Bulkheads constructed in estuaries cause losses of intertidal habitat through erosion caused by reflection of wave energy, changes in sediment transport, and inhibiting migration of the shoreline in response to sea level change (Dugan et al. 2011; Bilkovic and Mitchell 2013). In a recent meta-analysis, Gittman et al. (2016) found that species diversity and abundance near bulkheads are substantially lower compared to natural shorelines, and in general species diversity and abundance near shorelines protected by riprap or revetments do not differ from natural shorelines. Our decision to cap bulkheads at 1,000 linear feet is based on our experience and judgment to provide additional assurance that NWP 13 only authorizes those bank stabilization activities that have no more than minimal individual and cumulative adverse environmental effects. Project proponents that want to construct bulkheads longer than 1,000 linear feet along the shore can seek Department of the Army authorization by applying for an individual permit. Other bank stabilization techniques (e.g., bioengineering, vegetative stabilization, riprap) are not subject to this 1,000 linear foot cap, but for those proposed activities that exceed 500 linear feet in length along the shore, to be authorized by NWP 13 the district engineer must issue a written waiver of the 500 linear foot limit. That waiver must be based on a written determination made by the district engineer that the proposed activity results in only minimal adverse environmental effects.

The flexibility provided in the waiver process precludes the need to consider higher linear foot limits for this NWP. The 500 linear foot limit does not drive the decision whether the proposed bank stabilization activity should be a bulkhead or other hard structure; that is the decision of the landowner, public works department, or other responsible entity. The selected bank stabilization approach is mostly dependent on site conditions, and the likely effectiveness of that approach in controlling erosion. Any NWP 13 activity proposed by a non-federal permittee that might affect federally-listed endangered or threatened species or designated critical habitat, is in the vicinity of those listed species or critical habitat, or is located in critical habitat, requires a PCN (see paragraph (c) of general condition 18, endangered species). For proposed NWP 13 activities that the district engineer determines "may affect" listed species or critical habitat, he or she will conduct formal or informal ESA section 7 consultation. Impacts to state-listed species are more appropriately addressed by state laws and regulations. The 500 linear foot limit should be the same for hardened stream bank stabilization and scour protection because they are both bank stabilization approaches.

Two commenters supported the proposed modification of paragraph (c) of this NWP, and recommended adding "or as needed for a stable maintainable side slope." Two commenters stated that NWP 13 should not authorize stabilization or fill placement below the ordinary high water mark or mean high water line. One commenter said that the one cubic yard per running foot limit is arbitrary and should be removed. Another commenter remarked that allowing discharges of one cubic yard per running foot for bulkheads below the ordinary high water mark or mean high water line frequently leads to scouring of the shore in front of the bulkhead. One commenter stated that this NWP

should clarify that buried bank stabilization measures are not included in the quantity or length limits. One commenter suggested replacing the terms “high tide line” and “ordinary high water mark” in paragraph (c) with “high astronomical tide,” except for the Great Lakes where “ordinary high water mark” would continue to be used.

We believe that the proposed text of paragraph (c) is sufficient to ensure that these activities result in no more than minimal adverse environmental effects. We do not believe it is necessary to add a requirement to establish a “stable maintainable side slope.” If more than one cubic yard per running foot in waters of the United States is needed to make a suitable side slope, then the project proponent can request a waiver from the district engineer. Prohibiting discharges of dredged or fill material into waters of the United States below the ordinary high water mark or mean high water line would result in most bank stabilization activities requiring individual permits, even though they would have no more than minimal adverse environmental effects. If the bank stabilization activity is not properly integrated into the bottom of the waterbody, the bank stabilization activity is likely to collapse as erosion undercuts the bank stabilization measure.

The one cubic yard per running foot limit is intended to limit fills to ensure that NWP 13 activities result in only minimal adverse environmental effects. District engineers can issue written waivers of this one cubic yard per running foot limit, if they determine after conducting agency coordination that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. In some situations, the placement of riprap at the bottom of the bulkhead is necessary to prevent scouring and undercutting of the bulkhead. Any discharges of dredged or fill material

below the plane of the ordinary high water mark or high tide line are counted towards the one cubic yard per running foot limit, even if those fills are keyed into the bottom of the waterbody to reduce the potential for undercutting of the bank stabilization activity. The term "high tide line" is provided in the "Definitions" section of these NWPs (Section F), and is to be used for these NWPs, is identical to the definition at 33 CFR 328.3(d) that was published in the Corps' final rule issued on November 13, 1986 (51 FR 41251).

Two commenters said the placement of fill within special aquatic sites for bank stabilization should be prohibited. The placement of fill in special aquatic sites for the purposes of bank stabilization can have no more than minimal adverse environmental effects. A proposed discharge of dredged or fill material into a special aquatic site requires the submission of a PCN to the district engineer and a request for a waiver of that prohibition. The district engineer will coordinate the PCN with the other agencies, in accordance with paragraph (d) of general condition 32. To waive that prohibition, the district engineer must issue a written waiver with a finding of no more than minimal adverse environmental effects. A waiver might require mitigation to ensure that the authorized activity results in no more than minimal adverse environmental effects.

One commenter supported the proposed modification stating that NWP 13 authorizes the maintenance and repair of existing bank stabilization features. A few commenters said this paragraph should be changed to limit maintenance and repair activities to previously authorized bank stabilization activities. One commenter objected to proposed paragraph (h), stating that it requires maintenance of a bank stabilization project in perpetuity. This commenter said the NWP should specify a period of time for the bank stabilization activity to become established.

We have concluded that it is not necessary to limit this provision to the maintenance and repair of previously authorized bank stabilization activities. Such a requirement would discourage the maintenance and repair of bank stabilization activities that have deteriorated over time and may be allowing sediments and other materials to enter the waterbody, adversely affecting water quality. In addition, there may be older bank stabilization activities that did not require DA authorization at the time they were constructed but changing environmental conditions makes their maintenance and repair subject to DA permit requirements. Paragraph (h) does not require a landowner or other entity to maintain a bank stabilization activity in perpetuity. The landowner or other entity also has the option of removing that bank stabilization activity and restoring the affected area to the extent practical. We do not believe it would be appropriate or practical to establish a period of time for a bank stabilization activity to become established because bioengineering or vegetative stabilization activities generally require more time than bulkheads or revetments. There are also a variety of other factors that affect the functional lifespan of a bank stabilization activity.

One commenter suggested adding timber mats to the paragraph authorizing temporary structures and fills, to minimize construction impacts. One commenter suggested that the word "promptly" be inserted before "removed" in the fourth sentence of this paragraph so that the temporary structures or fills are quickly removed after the work is completed.

We have added temporary mats, including timber mats, to this paragraph, consistent with the corresponding paragraphs proposed in NWPs 3 and 12. We do not agree that the word "promptly" should be added to that sentence because it may be

necessary and environmentally beneficial to allow temporary fills to remain in place while the permanent fills settle and stabilize.

One commenter suggested allowing the use of non-native plants for bioengineering or vegetative bank stabilization in situations when native species are not as well-suited for a given project. Another commenter recommended adding "where practicable" to this provision to allow for flexibility.

To make the requirement to use native plants more visible in the text of this NWP, we have moved it to a new paragraph (g). If native plants cannot be used for a bioengineering or vegetative bank stabilization activity, perhaps bioengineering or vegetative stabilization is not an appropriate option. There should be native plant species available for those activities. Contractors that rely on non-native plant species for their bioengineering or vegetative stabilization projects should seek sources of native plants that can serve those purposes.

Many commenters said that all NWP 13 activities should require PCNs. One commenter asserted that no NWP 13 activities should require PCNs. Some commenters stated that PCNs should be required for all NWP 13 activities involving bank or shoreline hardening. One commenter asserted that the terms and conditions of this NWP could not be enforced if PCNs are not required for all activities. Several commenters stated that the Corps could not track cumulative impacts unless PCNs are required for all activities. Some commenters remarked that the Corps could not ensure compliance with the Endangered Species Act or National Historic Preservation Act if PCNs are not required for all activities. Many commenters stated that if all proposed NWP B activities require

PCNs, then all NWP 13 activities should require PCNs to provide more equivalency to those NWPs. Some of these commenters said that if not all NWP 13 activities require PCNs, then the NWP program would continue to have a bias towards bank stabilization activities that harden shorelines.

We do not believe that all NWP 13 activities, including all hard structures such as seawalls, bulkheads, revetments, and riprap, should require PCNs because they can often be constructed with only relatively small amounts of fill in jurisdictional waters. In shorelines or banks where there are strong erosive forces, hard bank stabilization structures are likely to be the only feasible options to protect property and infrastructure, and they will result in only minimal adverse environmental effects. The current PCN thresholds and the PCN requirements of certain general conditions (e.g., general condition 18, endangered species, and general condition 20, historic properties) are sufficient to ensure that NWP 13 activities result in no more than minimal individual and cumulative adverse environmental effects. Division engineers may modify this NWP to impose regional conditions that require PCNs for more activities authorized by this NWP. In our automated information system, we track NWP 13 activities that require PCNs as well as those NWP 13 activities where project proponents request NWP verifications even though they are not required to submit PCNs. Those reported activities, as well as estimates of NWP 13 activities that occurred without the requirement to submit PCNs, are considered in the Corps' cumulative effects analyses presented in the national decision document.

General condition 18, endangered species, requires non-federal permittees to submit PCNs for any proposed NWP activity that might affect ESA-listed species or

designated critical habitat, is in the vicinity of listed species or designated critical habitat, or is in designated critical habitat. A similar requirement applies to general condition 20, historic properties. General condition 20 requires non-federal permittees to submit PCNs for any proposed NWP activity that may have the potential to cause effects to historic properties. If a non-federal project proponent does not comply with general conditions 18 and 20 and does not submit the required PCNs under the circumstances identified in paragraph (c) of those general conditions, the activity is not authorized by NWP and is an unauthorized activity.

The PCN thresholds for NWPs 13 and the new NWP 54 (proposed NWP B) differ because the living shorelines authorized by NWP 54 typically involve greater amounts of fill into jurisdictional waters and wetlands, as well as fills and structures that typically extend a distance into subtidal or shallow waters. In other words, NWP 13 activities and NWP 54 activities, as a general rule, are not equivalent in terms of the amounts of fill that are typically discharged into jurisdictional waters and wetlands to conduct those activities, and the amount of encroachment into the waterbody. Nationwide permit 54 does not have a cubic yard limit on the amount of fill that can be discharged below the plane of the high tide line or ordinary high water mark. Bank stabilization activities authorized by NWP 13 often have small footprints in jurisdictional waters and wetlands and small encroachments into waterbodies because of the characteristics of the authorized activities. For example, seawalls and bulkheads that may be authorized by NWP 13 consist of vertical walls, perhaps with some backfilling behind the wall structure. Riprap, stone revetments, and gabions can be constructed close to the existing bank, with minor amounts of encroachment into the waterbody. Vegetative stabilization and

bioengineering can also be constructed close to the existing bank with minimal encroachment into the waterbody. General condition 23, mitigation, requires the adverse effects of NWP activities to be avoided and minimized to the maximum extent practicable on the project site.

This NWP requires a PCN for any proposed activity that involves a discharge of dredged or fill material that exceeds an average of one cubic yard per running foot as measured along the length of the treated bank. The district engineer can waive this one cubic yard per running foot limit after conducting agency coordination under paragraph (d) of general condition 32 and making a written determination that the proposed activity will result in no more than minimal adverse environmental effects.

As discussed above, the activities authorized by new NWP 54 usually involve larger fills distributed over broader areas of waters to achieve the necessary marsh establishment area and/or molluscan reef structures to control erosion. If, instead of issuing a new NWP to authorize the construction and maintenance of living shorelines, we proposed to modify NWP 13 to authorize these activities, the vast majority of living shorelines would require PCNs and waivers of the one cubic yard per running foot limit. In addition, activities authorized by NWP 54 are more likely to encroach into state-owned lands in navigable waters that are held in trust for the benefit of the public. Because of those likely encroachments into navigable waters, NWP 54 construction activities will be reviewed on a case-by-case basis to ensure that those activities have no more than minimal adverse effects on navigation. Therefore, the activities typically authorized by NWPs 13 and 54 have some fundamental differences in fill quantities and encroachment

into waters, and potential impacts to navigation and trust resources that warrant different PCN thresholds.

Many commenters said the 500 linear foot PCN threshold is too high, and the linear foot threshold should be reduced so that the Corps would be required to review more NWP 13 activities to make sure they result in no more than minimal adverse environmental effects. One commenter recommended requiring PCNs for any bank stabilization activity that requires mechanical equipment to be used in aquatic resources to construct that bank stabilization activity.

We believe the 500 linear foot PCN threshold, as well as the other PCN thresholds, is sufficient to require PCNs for any proposed NWP 13 activity that might have the potential to result in more than minimal adverse environmental effects. Division engineers can modify this NWP on a regional basis to lower that PCN threshold by imposing regional conditions. By requiring more PCNs for NWP 13 activities, and thus more activity- and site-specific evaluations, division engineers can provide greater assurance that on a regional basis those activities will result in no more than minimal individual and cumulative adverse environmental effects.

In many circumstances, mechanical equipment used to construct or maintain bank stabilization activities authorized by NWP 13 can be operated from uplands or from barges or types of other work vessels to minimize their impacts on the aquatic environment. Division engineers can regionally condition this NWP to require PCNs for the use of mechanical equipment, if they have identified specific regional concerns regarding their use and its effect on aquatic resources. The current PCN thresholds, along

with the additional PCNs required through regional conditions, are sufficient to ensure that NWP 13 activities result in no more than minimal individual and cumulative adverse environmental effects.

Several comments regarding the proposed PCN form were received, some of which addressed the proposed questions described in the June 1, 2016, proposed rule. One commenter suggested that questions relating to bank stabilization for the proposed PCN form should be addressed instead through general condition 32, pre-construction notification. Two commenters said that asking if there are qualified professionals in the area that construct living shorelines would discourage the use of living shorelines. One of these commenters suggested changing the question to directly ask whether a living shoreline can be used instead of a hardened bank stabilization activity. These two commenters also said that the term "qualified" needs to be defined and suggested that the question distinguish between the concepts of design and construction because one person might be qualified to construct a living shoreline but not to design it. One commenter said that it should not be necessary that the qualified consultant or engineer be a local person. One commenter stated that the Corps should provide information on methods for protecting and conserving shorelines, instead of asking the applicants through the PCN form.

The purpose of the information requirements in general condition 32 is to provide the district engineer with information on a specific proposed NWP activity, to help the district engineer determine whether the proposed activity qualifies for NWP authorization. The intent of the questions on the proposed PCN form is to gather information to inform future rulemaking efforts, not to evaluate specific NWP activities

or potential alternatives. Comments on the proposed questions on the PCN form will be responded to in the documentation for the PCN form, if the form is approved. Alternatives analyses are not required for NWP PCNs. The suite of appropriate options for bank stabilization approach is highly site-specific. In addition, there are different approaches for living shorelines, so asking whether a living shoreline "could" be used will not provide much useful information. District engineers can only provide general information to landowners regarding bank stabilization options. District engineers cannot design a landowner's bank stabilization activity. They can only evaluate the landowner's proposal to determine whether it qualifies for general permit authorization or whether an individual permit is required.

Two commenters stated that PCNs for NWP 13 should discuss whether the project site is in an area designated as suitable for living shoreline approaches based on a regional or state-level living shoreline analysis. They said that the Corps should consider the state's determination and apply it to the NWP verification decision. Another commenter said that NWP 13 PCNs should include a statement whether the proposed activity is consistent with regional policy and standards. Several commenters said that NWP 13 PCNs should include a statement explaining why a living shoreline is not appropriate for the project site, if a living shoreline is not being proposed.

If regional or state living shoreline analyses have been done, and those analyses are available to the public, then landowners can use those analyses to help evaluate bank stabilization options to protect their property. Because we are not establishing a preference for a particular approach to bank stabilization or erosion control, we do not believe that PCNs should require information on regional or state living shoreline

analyses. If the 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. If that shore erosion activity requires DA authorization, then the state's regulations or permit decision will influence the landowner's permit application or PCN (if a PCN is required for an NWP activity). Living shorelines are feasible and effective in limited circumstances in coastal waters, so we do not agree that a statement regarding the appropriateness of living shorelines should be required as a standard statement in NWP 13 PCNs.

One commenter stated that, for proposed maintenance activities, the NWP 13 PCN should include evidence that the bank stabilization structure had been previously authorized. Several commenters said that project proponents submitting NWP 13 PCNs should clearly demonstrate that there are erosion risks, to justify the proposed bank stabilization activities. One commenter requested that NWP 13 PCNs include detailed information on the shoreline type and the status of adjacent properties, the water quality status of adjacent waters, a description of site conditions that demonstrate that it is necessary to do a bank stabilization activity rather than taking no action or constructing a living shoreline, and a written justification for proposing a hardened bank stabilization activity. Two commenters recommended using a public database for the collection of NWP 13 PCN information.

We do not believe it is necessary to demonstrate that the bank stabilization activity was previously authorized. It may have been authorized by a non-reporting NWP or other general permit and there might not be a written verification that shows what was previously authorized. It is also possible it did not require DA authorization at the time it

was constructed. Erosion is a natural process. Therefore, wherever land and flowing water interact with each other, there will be erosion. Requiring permit applicants to demonstrate that erosion is occurring would not add value to the PCN process. In general, a landowner is not going to expend the time and expense to submit a PCN or hire a consultant or contractor to prepare a PCN and construct the bank stabilization activity if there is not an erosion problem at his or her property. Most landowners will only incur the expenses to construct bank stabilization activities if they believe that there is an erosion problem that needs to be addressed.

Landowners or their consultants, when preparing PCNs for NWP 13 activities, may include information beyond the requirements of paragraph (b) of general condition 32, to assist the district engineer in his or her decision-making process. Such information can include the shoreline type and the types of bank stabilization (if any) already present at adjacent properties. The applicant may also describe site conditions to support his or her desired approach to bank stabilization (e.g., revetment, vegetative stabilization). The applicant does not need to demonstrate that a living shoreline is not practical or feasible at the site of the proposed NWP 13 activity, or provide a written justification for a hard bank stabilization approach. All NWP 13 verifications are tracked in our automated information system (ORM2), but that information is not publicly available on a web site. As discussed above, we will develop quarterly reports that show overall summary statistics pertaining to the use of each NWP, aggregated per Corps District, and display it on our website. Some statistics that may be reported regarding the NWPs may include number of verifications provided per quarter, acres of waters of the United States permanently lost, as well as including summary information on the use of waivers during

the previous quarter. All data provided will be aggregated by NWP and all information on waivers will pertain only to those NWPs that include a waiver provision.

Several commenters stated that no waivers should be granted for NWP 13 activities. A number of commenters supported the waiver provisions for NWP 13. One commenter said that the use of waivers violates the Clean Water Act, and another commenter asserted that waivers allow more than minimal impacts to occur. One commenter stated that waivers should not be issued for bulkheads, revetments, and other bank hardening projects. A few commenters said there should be no caps on waivers.

We are retaining the proposed 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 have substantial impacts on the aquatic environment. The use of waivers in the NWP program is not contrary to the Clean Water Act because all waivers require a written determination by the district engineer that the authorized NWP activity will have no more than minimal individual and cumulative adverse environmental effects, consistent with the requirements of section 404(e) of the Clean Water Act. No waiver of an NWP limit can occur without a written determination by the district engineer, and the issuance of an NWP verification letter by that district engineer. Waivers can be issued for bulkheads, revetments, and other hard bank stabilization activities that the district engineer determines will result in only 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. We agree that there does not need to be caps on waivers because all waivers must be granted in writing by district engineers, after making a finding of "no more than minimal adverse environmental effects."

One commenter stated that no waivers should be granted to exceed the 500-foot limit. Another commenter said that waivers should not be granted for discharges of dredged or fill material into special aquatic sites. One commenter stated that there should be no limit to waivers because most bank stabilization projects are beneficial to streams. One commenter recommended allowing waivers for fills in perennial streams. One commenter said that if an NWP 13 activity exceeds a limit, the applicant should be required to develop a restoration plan to address the causes of the erosion problem. A commenter stated that mitigation should be required for all waivers of the linear foot limit.

All requests for waivers of the 500 linear foot limit or the prohibition against discharges of dredged or fill material into special aquatic sites require site-specific evaluations by district engineers as well as agency coordination. The district engineer will evaluate the information in the PCN and comments received from the resource agencies before making his or her decision whether to grant the waiver. The waiver requires a written determination that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. We agree that waivers may be appropriate to manage erosion in streams where streams may be impaired by excessive erosion, and the bank stabilization activity will result in no more than minimal adverse environmental effects. For NWP 13, waivers can be issued for bank stabilization activities in perennial streams. We do not agree that restoration (or any other form of

compensatory mitigation) should be required for all NWP 13 activities requiring waivers. The district engineer will determine when compensatory mitigation should be required for a specific NWP activity, in accordance with 33 CFR 330.1(e)(3), to ensure that the authorized impacts are no more than minimal.

Several commenters suggested adding a provision to NWP 13 that requires a determination that the proposed bank stabilization activity is the least environmentally damaging practicable alternative because a living shoreline is not practicable because of site conditions such as excessive erosion, high energy conditions, excessive water depths, or navigation concerns. Many commenters expressed their position that NWP 13 must not be reissued because it violates the Clean Water Act. They said that proposed NWP B should be used in place of NWP 13. They assert that activities authorized by NWP 13 result in more than minimal individual and cumulative adverse environmental effects because hardened shorelines provide less habitat than natural shorelines. Two commenters stated that applicants requesting NWP 13 authorization for bulkheads need to demonstrate that a living shoreline is not feasible. One commenter suggested modifying NWP 13 to authorize living shorelines instead of proposed NWP B.

Activities authorized by NWP do not require a 404(b)(1) Guidelines alternatives analysis, including the identification of the least environmentally damaging practicable alternative (see 40 CFR 230.7(b)(1)). As discussed in its decision document, especially the 404(b)(1) Guidelines analysis, the reissuance of NWP 13 fully complies with the Clean Water Act. A decrease in the amount or quality of habitat along a shoreline does not necessarily mean that the adverse environmental effects are more than minimal, individual or cumulatively. Discharges of dredged or fill material into waters of the

United States, and structures or work in navigable waters of the United States, for activities authorized by NWP 13 and NWP 54 will have no more than minimal adverse environmental effects as long as the project proponent complies with all applicable terms and conditions of these NWPs, including the PCN requirements. All forms of bank stabilization, including living shorelines, have some adverse environmental effects because they directly and indirectly alter nearshore aquatic habitats, including animal and plant communities. As long as those adverse environmental effects are no more than minimal, they can be authorized by NWP. We do not agree that NWP 13 should include a requirement for the permittee to demonstrate that living shorelines are not feasible. Living shorelines are limited to coastal waters, including the Great Lakes, while NWP 13 activities can be conducted in a wide range of waters, from small streams to ocean waters. We believe that a separate NWP should be issued to authorize living shorelines, because of the limited circumstances in which living shorelines are an effective means of erosion control and the limited waters in which they can be used (i.e., shorelines in coastal waters with gentle slopes, low fetch, and low- to mid-energy waves).

One commenter stated that living shorelines are a practicable alternative to shoreline armoring because they are less expensive to construct and maintain. A number of commenters expressed the view that NWP 13 should establish a hierarchy for evaluating erosion control options to authorize the alternative that would result in the least environmentally damaging practicable alternative. Many commenters said that landowners should be allowed to select the bank stabilization technique used to protect their property from erosion, and that the final NWPs should not establish a preference for living shorelines over the bank stabilization techniques authorized by NWP 13. These

commenters emphasized that landowners should be allowed to propose their preferred bank stabilization technique from a suite of available techniques.

We agree that, in certain circumstances, living shorelines are a feasible alternative to bulkheads, seawalls, and revetments. We also agree that landowners should be able to propose their preferred approach to bank stabilization, which may be based on guidance provided by any contractors or consultants they hire. Corps districts will evaluate the PCNs for proposed bank stabilization activities and determine whether they qualify for NWP authorization. We believe that it is not appropriate to establish a preference hierarchy for bank stabilization techniques because the appropriate bank stabilization approach for a particular site is highly dependent on site characteristics and the types of aquatic resources (e.g., streams, rivers, lakes, estuaries, oceans) in which the bank stabilization techniques will occur. In addition, there are regional differences among bank stabilization practices that cannot be addressed through a national rule such as the NWPs.

One commenter said that the requirements of general condition 3, spawning areas, when applied to NWP 13 activities would place an increased burden on road stabilization activities near tidal waters and may make those activities economically infeasible. Two commenters stated that bank armoring activities should require mitigation. One commenter said that undeveloped ocean shorelines should not be altered except when bank stabilization is justified to prevent or reduce threats to adjacent developed areas.

General condition 3 requires that NWP activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. The qualifier “to

the maximum extent practicable" gives some flexibility to NWP 13 activities for roads near tidal waters that may need to be stabilized quickly to prevent them from eroding away. While there may be circumstances in which bank armoring activities warrant mitigation to ensure that the adverse environmental effects are no more than minimal, such decisions are made by the district engineer after evaluating a PCN. We do not agree that mitigation should be required for all bank armoring activities authorized by NWP 13. If a parcel of land with an ocean shoreline is undeveloped, but one or both adjacent properties are developed (and may be protected by bank stabilization structures), the owner of the undeveloped parcel should be allowed to protect that bank if the bank will erode and the erosion is likely to encroach into the adjacent properties.

One commenter objected to the statement in the preamble to the proposed rule that said there are different PCN thresholds for NWPs 13 and 54 because living shorelines require substantial amounts of fill material. This commenter's objection was based on the assertion that living shorelines control erosion by planting vegetation or using a combination of vegetation and technical structures, not by the introduction of fill material.

For most living shorelines, it is necessary to discharge fill along the shoreline to achieve the proper grade for dissipating wave energy and protecting the bank from erosion and undercutting. These fills are planted with vegetation to hold the fill in place, and the plant stems also help dissipate wave energy. Sills, breakwaters, and other structures may also be necessary to reduce the energy of water reaching the shore to reduce erosion and protect fringe wetlands. If we had proposed to modify NWP 13 to authorize the construction and maintenance of living shorelines instead of proposing a

new NWP, a large majority of proposed living shorelines would require PCNs. This is because they would exceed the cubic yard limit in paragraph (c) and require a written waiver from the district engineer because of the amount of fill required to provide the proper grade for wave energy dissipation and vegetation plantings, and stone sills or breakwaters or other fill structures. Under NWP 54, waivers are not required unless the proposed living shoreline impacts exceed the waivable limits in that NWP. One of the waivable limits in NWP 54 is for structures and fills encroaching into waters up to 30 feet from the mean low water line is not included in NWP 13 because of the differences between living shorelines and the forms of bank stabilization authorized by NWP 13.

The construction of living shorelines does have some adverse effects on the waters and special aquatic sites affected by these projects, including the organisms that inhabit those areas. Living shorelines do not produce the same degree of ecological functions and services as natural shorelines (Pilkey et al. 2012). With living shorelines, there are trade-offs in ecological functions and services as fills convert subtidal waters to intertidal waters. Under the 404(b)(1) Guidelines, discharges of dredged or fill material into waters of the United States are to be avoided and minimized to the maximum extent practicable (see also paragraph (a) of general condition 23, mitigation).

One commenter stated that this NWP should have conditions requiring final bank elevations to be no higher than the bank that existed prior to the bank stabilization activity. This commenter said that a floodway analysis should be conducted to demonstrate that there would be no increase in flood elevation as a result of the bank stabilization activity. Two commenters recommended adding provisions to this NWP that require the use of best management practices to minimize downstream impacts, such

as instream sediment booms and oil booms. One commenter stated that there should be restrictions imposed on bank stabilization activities to protect forage fish spawning areas and critical habitat, channel migration zones, and habitat for ESA-listed species.

District engineers, when evaluating PCNs, can impose activity-specific conditions regarding final bank elevations to be established at the site after the NWP 13 activity is completed. The requirement to conduct a floodway analysis is more appropriately addressed through state and local floodplain management authorities. Activities authorized by NWP 13 and other NWPs must comply with general condition 10, fills within 100-year floodplains. The use of best management practices to minimize downstream impacts is more appropriately addressed by district engineers through activity-specific conditions imposed on NWP authorizations, taking into account the site-specific characteristics of the proposed activity. General condition 3 requires measures to minimize adverse effects to fish spawning areas during spawning seasons. General condition 18, endangered species, establishes procedures for complying with the requirements of section 7 of the Endangered Species Act (ESA). District engineers will conduct ESA section 7 consultations for any proposed NWP 13 activities that they determine, after reviewing PCNs, may affect listed species or designated critical habitat.

Several commenters objected to the following sentence, which appeared in the preamble to the proposed rule (81 FR 35200): "Many landowners prefer bulkheads and revetments because well-constructed bulkheads last approximately 20 years and revetments can last up to 50 years (NRC 2007)." These commenters said this statement was not a conclusion of the committee that wrote the 2007 NRC report entitled "Mitigating Shore Erosion along Sheltered Coasts." These commenters asserted that the

2007 NRC report concluded that prior regulatory practices and local marine contractors are the main reason why landowners choose bulkheads and revetments. They said that in many cases landowners are not informed that there are other alternatives to erosion control. These commenters also expressed the opinion that the decisions of landowners are not driven by the lifespans of bulkheads and revetments. They said that it is a lack of understanding of alternative approaches to shore protection and institutional bias that causes the continued use of seawalls, bulkheads, and revetments.

The sentence on page 35,200 of the proposed rule should have been written as follows, to avoid misrepresenting the 2007 NRC report: "Well-constructed bulkheads last approximately 20 years and revetments can last up to 50 years (NRC 2007). Many landowners may prefer bulkheads and revetments because of the longevity of those structural measures to control erosion and protect their properties."

The section of the 2007 NRC report (pages 73-76) that discusses landowner options for addressing bank erosion presents a number of hypothetical scenarios to illustrate those options. If the life expectancies of bulkheads or stone revetments are irrelevant to the landowner's decision-making process, why were those life expectancies discussed in the bulkhead or stone revetment options? That section of the 2007 NRC report provides no information on how long marsh plantings or marsh plantings combined with stone sills will effectively control erosion, other than to say that a planted marsh fringe will require on-going maintenance and some maintenance will likely be required for the stone sill and marsh plantings after they are exposed to storm events. The landowner is a critical part of the decision-making process, because his or her property is at risk. Some landowners prefer bulkheads and revetments because they make

them feel more secure (Popkin 2015). It should be noted that in response to the proposal to issue a new NWP to authorize the construction and maintenance of living shorelines, we received many comments opposing the issuance of the new NWP 54. Many of those commenters expressed concern that they would be required to use living shorelines, instead of being able to use other approaches to erosion control.

In many coastal areas, hard bank stabilization measures are the only effective option in coastal environments where high energy erosive forces are present. A landowner may prefer a bank stabilization approach that he or she views as being more durable and requires less maintenance. Current regulatory frameworks and contractor preferences are only part of the decision-making process. The landowner makes the final decision unless the regulatory agency (federal, state, or local) decides to deny the landowner's permit application. Since the options (#2a and #2b) in that section of the 2007 NRC report include two living shoreline options, the report's discussion of the various options could be interpreted as including consideration of the expected longevities of those shore erosion control options, as well as their maintenance requirements. Living shorelines are relatively new, and there is much to be learned about their effectiveness over the long term, and in different areas of the country. As discussed above, many commenters stated that landowners and other entities should be allowed to choose how they protect their waterfront properties and their infrastructure. Those comments indicate that landowners are informed about various erosion control approaches and are not passively deferring to the contractors and consultants they hire to provide advice, design, and planning services, and to construct the authorized activities.

One commenter said that due to the increasing risks and costs of protecting ocean shorelines, applicants should be required to share substantially in the costs and responsibilities of implementing shoreline stabilization projects authorized by NWP 13. One commenter stated that the Corps needs to provide advance and meaningful notice to tribes to avoid unresolved impacts to tribal treaty natural resources and cultural resources. A couple of commenters asked how the Corps will enforce the terms and conditions of NWP 13 for bank stabilization activities. One commenter stated that the proposed changes to NWP 13 will cause an unfair burden to local agencies when they try to determine whether bank stabilization projects are authorized and whether pre-construction notification is required.

Landowners pay for the bank stabilization activities authorized by NWP 13 that they construct to protect their property. For the 2017 NWPs, the Corps districts consulted with interested tribes to identify regional conditions to protect tribal resources, including natural and cultural resources retained by, or reserved by or for, tribes through treaties. District engineers can also establish coordination procedures with interested tribes to coordinate proposed NWP 13 activities to help ensure that these activities do not cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. 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. Local agencies that are unsure whether their proposed bank stabilization activities qualify for NWP 13 authorization are encouraged to contact the appropriate Corps district to seek their advice on whether the

proposed activity might qualify for NWP 13 or a different general permit or whether an individual permit would be needed.

One commenter requested that the Corps evaluate regional impacts to local governments caused by division engineers adding regional conditions to this NWP and lengthening the time it takes to receive NWP verifications. Two commenters stated that NWP 13 activities should require a professional engineer's certification that the proposed bank stabilization activity will not exacerbate any upstream or downstream flooding problems.

Division engineers impose regional conditions on the NWPs to ensure that those NWPs comply with section 404(e) of the Clean Water Act and that authorized activities result in no more than minimal individual and cumulative adverse environmental effects. The regional conditioning process is a key tool for addressing regional differences in aquatic resources, as well as the ecological functions and services they provide. Regional conditions also facilitate compliance with other federal laws, such as section 7 of the Endangered Species Act and section 106 of the National Historic Preservation Act, as well as the Corps' tribal trust responsibilities. District engineers are required to respond to NWP PCNs within 45 days of receipt of a complete PCN, regardless of whether division engineers have imposed regional conditions on the NWPs. There are some exceptions to the 45-day response requirement, such as PCNs that require ESA section 7 and/or NHPA section 106 consultations and PCNs for activities authorized by NWPs 21, 49, and 50. Establishing requirements for a professional engineer's certification of bank stabilization activities and effects on upstream and downstream flooding are more

appropriately addressed by state and local governments that have the authority to manage flooding risks. The Corps Regulatory Program does not have this authority.

Two commenters said that an environmental impact statement must be prepared for the reissuance of NWP 13. One commenter said that the reissuance of NWP 13 requires an environmental impact statement because of impacts to ESA-listed species. One commenter stated that the draft decision document failed to take into account the direct, indirect, and cumulative effects of NWP 13 activities. A few commenters asserted that the reissuance of NWP 13 requires ESA section 7 consultation.

For the reissuance of this NWP, Corps Headquarters complied with the requirements of the National Environmental Policy Act (NEPA) by preparing an environmental assessment with a finding of no significant impact. The environmental assessment describes, in general terms, the mitigation measures (including the requirements of NWP general conditions) that ensure that activities authorized by NWP result in no more than minimal individual and cumulative adverse environmental effects. Certain NWP 13 activities require pre-construction notification, another mechanism that helps ensure that NWP activities cause no more than minimal adverse environmental effects. The national decision document also generally describes compensatory mitigation practices that may be required by district engineers for specific NWP activities to ensure that those activities have no more than minimal adverse environmental effects. Compliance with the requirements in 33 CFR part 332, and activity-specific compensatory mitigation requirements, will help ensure that compensatory mitigation required by district engineers will offset the authorized impacts to jurisdictional waters and wetlands.

The decision document prepared for this NWP describes, in general, the direct, indirect, and cumulative impacts of these activities. The direct and indirect effects caused by NWP 13 activities are described throughout the decision document. These direct and indirect effects are described in general terms because the decision to reissue this NWP is made prior to the NWP going into effect and authorizing specific activities at specific project sites. We prepared a NEPA cumulative effects analysis based on the Council on Environmental Quality's definition of "cumulative impact" at 40 CFR 1508.7, as well as a 404(b)(1) Guidelines cumulative effects analysis based on the requirements of 40 CFR 230.7(b)(3).

The decision document issued by Corps Headquarters discusses compliance with section 7 of the ESA, including the "no effect" determination Corps Headquarters made for the reissuance of this NWP. Our "no effect" determination is also presented in this final rule. The decision document discusses the processes and tools that the Corps uses to comply with ESA section 7, to ensure that this NWP is not likely to jeopardize the continued existence of listed species, or adversely modify or destroy critical habitat that has been designated for those listed species. The reissuance of NWP 13 has "no effect" on listed species or critical habitat because of the requirements of general condition 18, endangered species, and 33 CFR 330.4(f). For any proposed NWP activity that might affect listed species or designated critical habitat, is in the vicinity of listed species or designated critical habitat, or is located in designated critical habitat, the project proponent must submit a PCN, and the district engineer will evaluate that PCN to determine whether ESA section 7 consultation is required. If the district engineer makes

a “may affect” determination for a proposed NWP activity, that activity is not authorized by NWP until after ESA section 7 consultation is completed.

The Corps has determined that the reissuance of this NWP does not result in a significant impact on the human environment that warrants the preparation of an environmental impact statement. This is because of the various protections in the NWP program that are applied to ESA-listed species and designated critical habitat and the fact that an NWP can only authorize activities that have no more than minimal adverse environmental effects.

A few commenters said that the proposed reissuance of NWP 13 is contrary to Executive Order 13653, Preparing the United States for the Impacts of Climate Change, which requires federal agencies to consider the challenges that climate change add to their programs, policies, rules, and operations, to ensure that those items continue to be effective as the climate changes. These commenters also stated that the Corps failed to consider the October 7, 2015, Presidential Memorandum entitled “Incorporating Natural Infrastructure and Ecosystem Services in Federal Decision-Making.” These commenters indicated that the proposed rule also did not consider current Corps policies concerning climate change and sea level rise.

The activities authorized by NWP 13 are an important tool for landowners and communities to adapt to the effects caused by climate change, especially sea level rise and increases in the frequency of severe storm events. As sea level changes at a particular site, the landowner may need to conduct new or modified bank stabilization activities to protect his or her property. Nature-based infrastructure approaches such as

living shorelines may not be feasible or effective in higher energy coastlines subject to sea level rise. Existing buildings and other infrastructure may prevent inland migration of wetlands (Enwright et al. 2016). Public works agencies and utility companies may need to use NWP 13 activities to protect roads and utility lines from damage caused by erosion. In sum, NWP 13 activities will help landowners, public agencies, and other respond to sea level rise and other effects of climate change. This NWP authorizes bank stabilization activities undertaken by private landowners, who are not subject to the policies the Corps developed for the federal water resource projects it designs and implements.

Several commenters said that the Corps, in its draft decision document, did not demonstrate that NWP 13 will result in no more than minimal impacts, because that draft decision document only provides an estimate of impacts that will be authorized over a 5-year period. They also stated that the draft decision document ignores cumulative impacts, fails to account for climate change, and fails to assess impacts on ESA-listed species. One commenter said that the cumulative impact analysis within the draft decision document is impermissibly narrow and improperly delegates the cumulative impact analysis to specific projects. This commenter stated that if the Corps cannot conduct an adequate cumulative impact at the national level, it should not reissue NWP 13. One commenter asserted that the draft decision document did not evaluate the secondary impacts of bulkheads, because secondary effects are not discussed anywhere in that document. One commenter stated that NWP 13 violates the 404(b)(1) Guidelines because it causes significant degradation of waters of the United States.

Because the NWPs are issued before they go into effect and will be used over the next five years (unless they are modified, suspended, or revoked before the expiration date) to authorize specific activities being conducted by project proponents, the estimate of permitted impacts is a forward-looking estimate. In addition, the approach used in the decision document is fully consistent with the requirements of the 404(b)(1) Guidelines at 40 CFR 230.7(b)(3). The decision document includes two cumulative effects analyses: one to satisfy the requirements of NEPA, using the definition of "cumulative impact" at 40 CFR 1508.7. The other cumulative effects analysis satisfies the requirements of the 404(b)(1) Guidelines at 40 CFR 230.7(b)(3). The final decision document has been revised to discuss climate change. The decision document also discusses compliance with the Endangered Species Act, as well as cumulative effects to ESA-listed species (see the NEPA cumulative effects analysis, which includes ESA-listed species as a one of the "resources of concern" discussed in that analysis).

The cumulative effects analyses in the decision document prepared by Corps Headquarters satisfies the requirements of NEPA and the 404(b)(1) Guidelines and does not defer the cumulative impact analyses to district engineers who evaluate PCNs for specific activities. When evaluating an NWP PCN or a voluntary request for NWP verification, the district engineer will consider cumulative impacts when determining whether the proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects. The district engineer's consideration of cumulative impacts does not need to be an extensive analysis because he or she is simply verifying whether NWP authorization is appropriate. The district engineer is not considering whether the issuance of the NWP is appropriate, that is the decision that is

being made by Corps Headquarters when it issues this rule, along with the more extensive cumulative effects analysis.

The draft decision document, as well as the final decision document, discusses in general terms the direct and indirect effects of NWP 13 activities on the environment. Secondary effects are analogous to indirect effects, and therefore do not warrant separate consideration in the decision document. The final decision document also concluded that the reissuance of this NWP complies with the 404(b)(1) Guidelines. Section 7.1.3 of the decision document discusses our determination that the reissuance of this NWP will not cause significant degradation of waters of the United States.

Three commenters expressed concern with the apparent overlap of authorization of bank stabilization projects using NWPs 13 and 27, and the proposed NWP B. These commenters pointed out that there are different limits for these NWPs and believe those differences encourage applicants to request authorization under the NWP that has the least restrictions or requirements. These commenters recommended clarifying the purposes of each of these NWPs so that project proponents apply for authorization under the most appropriate NWP. One commenter recommended that the NWPs provide incentives for landowners to retrofit existing seawalls with bioengineered methods. This commenter said that a streamlined process for retrofitting bank stabilization projects will encourage property owners to do these types of projects, instead of replacing an old seawall with a new seawall.

We have made changes to NWP 27 to limit it to aquatic habitat restoration, enhancement, and establishment activities so that it should no longer be used to authorize

bank stabilization activities. We have also modified the definition of "living shoreline" in new NWP 54 to clarify that living shorelines are limited to coastal waters. We have also added a Note to NWP 54 to point prospective permittees to NWP 13 if they want to use an NWP to authorize vegetative stabilization activities or bioengineering activities in inland waters, such lakes other than the Great Lakes, and inland rivers and streams.

We cannot require landowners to retrofit existing seawalls with bioengineering, but landowners may propose to do those types of retrofits. Since we have clarified that NWP 13 authorizes bioengineering approaches to bank stabilization, in addition to seawalls, bulkheads, and revetments, project proponents may seek authorization for such retrofits through this NWP, if those retrofits require DA authorization.

Several commenters objected to the proposal to reissue NWP 13, stating that armoring shorelines with bulkheads and revetment prevent wetlands from migrating inland in response to sea level rise or land subsidence.

There are a number of reasons why coastal wetlands might not be able to migrate inland as sea level rises. Wetland migration may be impeded by natural and man-made impediments. Natural impediments include topography, such as steep coastal bluffs (Enwright et al. 2016). Man-made impediments include coastal urbanization and levees constructed to protect developed and agricultural areas (Enwright et al. 2016). Inland migration of wetlands is usually limited to undeveloped coasts and protected areas (e.g., wildlife refuges) with low, gentle slopes (Enwright et al. 2016). Other factors that affect inland wetland migration are: erosion, subsidence, sedimentation, hydrologic alterations, water management. Inland migration in abandoned urban areas is likely to be limited to

areas that have soil instead of asphalt or other hardened surfaces (Enwright et al. 2016). It should be noted that tidal wetlands have demonstrated strong resilience by being able to adjust to sea level rise by migrating vertically through accelerated soil buildup (Kirwan et al. 2016).

This NWP is reissued with the modifications discussed above.

NWP 14. Linear Transportation Projects. We proposed to add a note to this NWP similar to proposed Note 2 in NWP 12 to explain that separate and distant crossings of waters of the United States for linear projects may qualify for separate authorization by NWP.

Several commenters objected to the proposed reissuance of this NWP and several commenters supported reissuing this NWP. One commenter said that this NWP does not authorize activities that are similar in nature. Another commenter stated that individual permits should be required for these linear transportation projects. One commenter said that this NWP should authorize parking lots.

The category of activities authorized by this NWP, that is activities necessary for the construction, expansion, modification, or improvement of linear transportation projects, is a category of activities that are similar in nature because they are limited for use in transportation. The activities in jurisdictional waters and wetlands authorized by this NWP typically result in no more than minimal adverse environmental effects and would generate little or no public comment if they were evaluated through the individual permit process. This NWP requires PCNs for activities that have the potential to result in more than minimal adverse environmental effects, so that district engineers can review

those activities on a case-by-case basis and, after considering any mitigation proposed by applicants, assert discretionary authority for those activities determined to result in more than minimal adverse environmental effects.

The paragraph preceding the "Notification" paragraph states that NWP 14 does not authorize parking lots. In the preamble to the final 2012 NWPs, which was published in the February 21, 2012, issue of the Federal Register, we stated that NWP 14 authorized parking lots (see 77 FR 10200). That statement was an error. The construction of parking lots that involve discharges of dredged or fill material into waters of the United States may be authorized by other NWPs, if it meets the terms and conditions of an applicable NWP.

Several commenters stated that the acreage limits for this NWP should not be changed. Several commenters suggested increasing the acreage limits of this NWP, and a few of these commenters recommended a one-acre limit for individual crossings of waters of the United States. One commenter said the acreage limit for losses of non-tidal waters should be increased to 3 acres. One commenter stated that the acreage limit should be decreased to 1/4-acre for both non-tidal waters and tidal waters, and another commenter said that the acreage limit should be 1/10-acre for losses of non-tidal and tidal waters. A number of commenters requested clarification in how the acreage limit is applied to each crossing of waters of the United States. One commenter recommended a stream impact limit of 1/10-acre. One commenter stated that the scientific rationale in the draft decision document is insufficient to justify the 1/2- and 1/3-acre limits.

In this NWP, we are retaining the 1/2-acre limit for losses of non-tidal waters of the United States and the 1/3-acre limit for losses of tidal waters of the United States. We believe these acreage limits, with the PCN requirements, are appropriate for ensuring that this NWP only authorizes activities that result in no more than minimal individual and cumulative adverse environmental effects. For those activities that require PCNs, district engineers will review those activities, and may impose conditions such as mitigation requirements, to provide assurance that the authorized activities will have no more than minimal individual and cumulative adverse environmental effects. In addition, division engineers have the authority to modify this NWP to reduce the acreage limits, if there are regional concerns for the environment that warrant changing the acreage limits. The acreage limit is applied to each single and complete crossing of waters of the United States (see the definition of "single and complete linear project" in the Definitions section of these NWPs). The acreage limits for this NWP and other NWPs are determined by our experience and judgment regarding regulated activities that typically result in no more than minimal individual and cumulative adverse environmental effects.

One commenter stated that use of this NWP for the expansion, modification, or improvement of previously authorized projects could result in cumulative impacts that exceed these acreage limits and that the impacts of previously authorized projects should count towards the acreage limit.

Division and district engineers will monitor the use of this NWP and if they determine that the activities authorized by this NWP may be resulting in more than minimal cumulative adverse environmental effects, they will modify, suspend, or revoke this NWP. In cases where the expansion, modification, or improvement of an existing

NWP 14 activity will result in additional losses of waters of the United States, the district engineers will determine whether the expansion, modification, or improvement is part of the original single and complete project. If it is, then the district engineer will combine the original loss with the proposed loss to determine if the acreage limit has been exceeded.

A number of commenters stated that this NWP should not authorize discharges into wetlands or other special aquatic sites. Two commenters suggested adding a linear foot limit to this NWP to ensure that it only authorizes activities with minimal adverse effects on the aquatic environment. One commenter recommended adding a 200 linear foot limit either for individual or cumulative impacts. Three commenters recommended a stream impact limit of 300 linear feet.

This NWP requires PCNs for all discharges into wetlands and other special aquatic sites. The PCN review process is an important tool for ensuring that NWP 14 only authorize activities with no more than minimal adverse environmental effects to special aquatic sites. We do not agree that a 200 or 300 linear foot limit is necessary for this NWP, because most linear transportation projects cross jurisdictional streams either perpendicular, or nearly perpendicular to the centerline of the stream. The 1/2-acre and 1/3-acre limits, plus the PCN requirements, are sufficient to ensure that this NWP only authorizes activities that have no more than minimal individual and cumulative adverse environmental effects.

One commenter objected to allowing the district engineer to waive any of the limits of this NWP. One commenter recommended modifying this NWP to allow district

engineers to waive certain limits. One commenter said that district engineers should be able to waive the limits of this NWP if the proposed activity would take place in low quality waters or wetlands.

This NWP does not include any provisions that allow district engineers to waive the acreage limits of this NWP. None of the NWPs allow waivers of acreage limits. This NWP does not have a 300 linear foot limit for losses of stream bed that is similar to the waivable 300 linear foot limit in NWPs 29 and 39 and a number of other NWPs.

Two commenters recommended that the paragraph authorizing temporary structures and fills include the language regarding the use of temporary mats similar to the proposed changes for NWPs 3 and 12. We have added temporary mats to this paragraph of NWP 14 to be consistent with NWPs 3, 12, and 13.

Several commenters said that PCNs should be required for all activities authorized by this NWP. A number of commenters stated that the PCN thresholds should not be changed for this NWP. A few commenters suggested increasing the PCN threshold to 1/2-acre if the acreage limit is increased to one acre. One commenter said that PCNs should not be required for all discharges into wetlands; instead the PCN threshold for losses of wetlands should be 1/10-acre. Another commenter asserted that the second PCN threshold should be eliminated and that PCNs should only be required for discharges resulting in the loss of greater than 1/10-acre of special aquatic sites.

We are retaining the current PCN thresholds for this NWP. We believe these PCN thresholds are necessary for providing opportunities for district engineers to review proposed NWP 14 activities that have potential for resulting in more than minimal

adverse environmental effects. In response to a PCN, the district engineer can issue an NWP verification, with or without permit conditions. The district engineer can also exercise discretionary authority to require an individual permit, if after considering the applicant's mitigation proposal, he or she determines that more than minimal adverse environmental effects will occur.

Several commenters supported the addition of Note 1 to explain that separate and distant crossings of waters of the United States for linear projects may qualify for separate authorization under NWP 14. Two commenters said that linear transportation projects should be reviewed in their entirety and not just at individual crossings. One commenter recommended deleting Note 1. One commenter objected to the addition of Note 1 because it could require more individual permits for railways. One commenter stated that the text of Note 1 does not clearly define when it is appropriate to combine this NWP with an individual permit. One commenter stated that an individual permit for the entire project is appropriate when the entire linear transportation project impacts more than 1/2-acre of jurisdictional waters and wetlands. Two commenters stated that an individual permit for the entire project is appropriate when one crossing does not qualify for authorization under NWP 14. One commenter said that the use of NWP 14 in combination with an individual permit should be at the discretion of the district engineer.

Consistent with Note 2 of NWP 12 and for the same reasons, we have modified Note 1 for NWP 14 by deleting the phrase "with independent utility" from the second sentence. The objective of the second sentence of this note is to serve as a reminder of 33 CFR 330.6(d), which addresses the combining of NWP authorizations with individual permit authorizations. Section 330.6(d) has been in effect since 1991, so the adoption of

Note 1 should not result more individual permits for railways. District engineers will determine on a case-by-case basis when it is appropriate to combine for linear transportation projects NWP authorizations with individual permits, or whether all of the proposed activities require individual permit authorization.

Two commenters requested clarification regarding the difference between "stand-alone" projects and "segments" as described in the preamble to the June 1, 2016, proposed rule. Two commenters asked for a definition of independent utility and noted that the definition of "single and complete linear project" does not explicitly include the term "independent utility."

When evaluating individual permit applications and NWP PCNs, district engineers will use their judgment in applying 33 CFR 330.6(d) to determine when linear transportation projects can be authorized by combinations of NWPs and individual permits, or whether individual permits is required for all regulated activities for linear transportation projects that require DA authorization. The term "independent utility" is defined in the Definitions section of these NWPs (Section F). The definition of "single and complete linear project" does not include the term "independent utility" because each crossing of waters of the United States is needed for the single and complete linear project to fulfill its purpose of transporting people, goods, and services from the point of origin to the terminal point.

One commenter remarked that Note 3 is not a substantive change. Two commenters expressed concern that the requirements in Note 3 would result in district engineers requiring compensatory mitigation for cumulative impacts. One commenter

supported the addition of Note 3 to explain that the district engineer may require mitigation to ensure the authorized activity causes no more than minimal individual and cumulative adverse environmental effects. One commenter stated that mitigation always should be required because the district engineer has too much discretion. One commenter asked if Note 3 is for multiple crossings that do not have independent utility. Two commenters said that the impacts of separate and distant crossings of waterbodies should be considered separately when determining mitigation requirements, instead of combining the impacts of separate and distant crossings.

Note 3 is not a substantive change from prior NWPs, but it is a clarification. The addition of Note 3 does not impose any new compensatory mitigation requirements on this NWP. The purpose of Note 3 is to remind users of the NWPs that if a linear transportation project includes crossings of waters of the United States that are authorized by NWP but do not require PCNs, and one or more crossings of waters of the United States requires pre-construction notification, then the PCN must include those non-PCN crossings, in accordance with the requirements of paragraph (b)(4) of general condition 32. The district engineer requires information on those non-PCN NWP 14 activities to make his or her determination whether the proposed activity will result in no more than minimal cumulative adverse environmental effects. Under 33 CFR 330.1(e)(3), which was promulgated in 1991, the district engineer has had the authority to require compensatory mitigation to ensure that the cumulative adverse environmental effects caused by NWP activities are no more than minimal.

When it is feasible, project proponents usually design their NWP activities so that they do not trigger compensatory mitigation requirements. According to the Corps'

NWP regulations at 33 CFR 330.1(e)(3), compensatory mitigation is only required if district engineer first determines that the proposed NWP activity would result in more than minimal individual and cumulative adverse environmental effects, and then offers the applicant the opportunity to propose mitigation, including compensatory mitigation, to reduce the adverse environmental effects so that they are no more than minimal. If the adverse environmental effects cannot be reduced so that they are no more than minimal, the district engineer will exercise discretionary authority and require an individual permit for the proposed activity.

Note 3 does not address whether individual crossings of waters of the United States authorized by NWP have independent utility. That question is more appropriately addressed through implementation of 33 CFR 330.6(d), and case-by-case decisions made by district engineers. When determining compensatory mitigation requirements for linear projects authorized by NWPs, district engineers have the discretion to require compensatory mitigation at a single site (e.g., an approved mitigation bank or a permittee-responsible mitigation project), or at multiple sites (e.g., mitigation bank credits from different mitigation banks whose service areas are crossed by the linear project).

One commenter recommended adding a condition to NWP 14 that prohibits its use when linear transportation projects are likely to result in land use changes that will negatively impact the environment. Two commenters requested clarification of the phrase “minimum necessary” which is used in the last sentence of the first paragraph of this NWP, for stream channel modifications. One commenter stated that the “minimum

necessary" phrase is ambiguous and should be quantified. Another commenter expressed support for the use of that phrase in the NWP.

Land use decisions are made primarily by state, tribal, and local governments, through their zoning programs and their other land use authorities (see 33 CFR 320.4(j)(2)). The Corps does not have the authority to control land use changes that do not involve activities that require DA authorization. Application of the term "minimum necessary" is subject to the district engineer's discretion, and is highly dependent on site-specific and activity-specific circumstances. It is not possible to develop a quantifiable, defensible definition of the term "minimum necessary." It is a judgment call that must be made by the district engineer when evaluating a PCN and the proposed activity's compliance with the terms and conditions of this NWP.

One commenter asked for clarification regarding whether a linear transportation project with multiple separate and distant crossings of waters of the United States that require pre-construction notification can be provided to the Corps district in one PCN, or if individual PCNs are required for each crossing that requires notification. Several commenters requested that the Corps define what a separate and distant location is. A couple of these commenters asked whether there is a minimum distance for two crossings of waterbodies to be considered separate and distant. One commenter said that the text of NWP 14 uses the terms "separate and distinct" and "separate and distant."

A permit application or PCN for a linear transportation projects should include all crossings of waters of the United States that require DA authorization. Whether proposed crossings of waters of the United States are to be considered together or as separate and

distant is to be determined by district engineers on a case-by-case basis, after evaluating site and regional characteristics (e.g., topography, geology, hydrology, climate). It is not possible to establish a specific distance that could be effectively applied across the country. Nowhere in the June 1, 2016, proposed rule is the term "separate and distinct" used. "Distant" is the key word in the phrase "separate and distant" because it is the distance between crossings of waters of the United States at reduces the potential for synergistic interactions among regulated activities and their impacts to occur. The greater the distance between crossings that are authorized by NWP 14, the more attenuated the adverse environmental effects of those crossings becomes, so that there is less likelihood of more than minimal adverse cumulative impacts occurring.

Three commenters recommended that the use of best management practices should be a specific requirement to minimize sediment loading and wetland disturbance. One commenter said that this NWP should require that riprap placed in the stream should be installed at grade with the existing stream substrate and mimic the existing contours of the stream channel. One commenter said that this NWP should prohibit the use of grout. One commenter stated that culvert bottoms should be installed in a manner to allow natural substrate to become reestablished. One commenter said that culvert installation should not result in over-widening of the stream channel.

Several NWP general conditions require practices to minimize adverse effects to jurisdictional waters and wetlands. For example, general condition 12, soil erosion and sediment controls, requires appropriate measures to minimize sediment inputs to waters and wetlands. General condition 13, removal of temporary fills, requires the permittee to remove temporary fills and restore affected areas, which may include wetlands. We do

not agree that riprap should be required in all cases to be placed at grade of a stream. The use of grout is more appropriately determined on a case-by-case basis, if the use of grout is a component of a regulated activity. The appropriate approach for culvert installation is also a case-by-case determination and highly dependent on the characteristics of the stream, including its geomorphology. The effects of culvert installation on stream widening are also most appropriately evaluated on a case-by-case basis by district engineers.

One commenter stated that NWP 14 should authorize the removal of road crossings and require the affected areas to be restored using natural channel design principles. One commenter said that this NWP should require the evaluation of practicable alternatives. One commenter expressed concern that NWP 14 activities could result in indirect adverse environmental effects in areas distant from linear transportation projects. One commenter stated that this NWP should not authorize energy projects.

We do not believe it is necessary to modify NWP 14 to authorize the removal of road crossings. If the road crossing is temporary, the NWP 14 authorization should include conditions that apply to the removal of the temporary road crossing after it has fulfilled its intended purpose. If the road crossing is permanent, the removal of the road may be authorized by NWP 3 if the removal activity requires DA authorization. We do not think it is appropriate to prescribe, at a national level, a particular approach to restoring streams that were adversely affected by NWP activities. There are a number of different techniques that can be used to restore streams, and the appropriate approach is dependent on the objectives of the restoration activity, the site characteristics, and numerous other factors. Activities authorized by NWP 14 can have indirect adverse

environmental effects, and when PCNs are required for those activities, district engineers will evaluate both the direct and indirect adverse environmental effects when determining if NWP authorization is appropriate. This NWP does not authorize energy projects per se, but it may authorize road crossings and other linear transportation projects associated with an energy facility, including renewable energy generation facilities.

One commenter stated that federal and state natural resource agency coordination should be required for any stream losses that exceed 300 linear feet or 1/2-acre. One commenter said that this NWP should not authorize activities that jeopardize ESA-listed species. One commenter suggested modifying this NWP by adding a limit for cumulative effects to protect endangered species in estuaries. One commenter said that this NWP should require linear transportation projects to be designed to maintain aquatic organism passage. One commenter stated that this NWP should require advanced notice to tribes to avoid impacts on tribal treaty natural resources and cultural resources.

This NWP does not have a 300 linear foot limit for losses of stream beds. The 1/2-acre limit for losses of non-tidal waters cannot be waived or exceeded. The NWPs cannot be used to authorize activities that jeopardize the continued existence of ESA-listed species or adversely modify or destroy critical habitat of those species (see paragraph (a) of general condition 18, endangered species, and 33 CFR 330.4(f)). Division engineers can modify, suspend, or revoke this NWP on a regional basis to protect ESA-listed species in specific regions or waterbodies. General condition 2, aquatic life movements, requires NWP activities to be designed and constructed so that they do not substantially disrupt the necessary life cycle movements of indigenous aquatic species, unless the primary purpose of the NWP activity is to impound water. For

the 2017 NWPs, Corps districts initiated consultation with tribes to determine whether to develop regional conditions or coordination procedures to protect tribal trust resources, including natural and cultural resources. District engineers can establish procedures to coordinate with tribes to help ensure compliance with general condition 17, so that no NWP activity will cause more than minimal adverse effects on reserved tribal rights, protected tribal resources, or tribal lands.

One commenter said that NWP 14 activities have the potential to cause significant direct and cumulative adverse environmental effects and that the reissuance of this NWP requires an environmental impact statement. Two commenters asked how the cumulative effect analysis for this NWP accounts for activities that do not require pre-construction notification.

The Corps complied with the requirements of NEPA by preparing an environmental assessment with a finding of no significant impact. The environmental assessment and finding of no significant impact are in the national decision document prepared for this NWP. Since NEPA compliance was accomplished through the preparation of an environmental assessment with a finding of no significant impact, an environmental impact statement is not required.

The decision document for this NWP that was prepared by Corps Headquarters analyzes, at a national level, the direct, indirect, and cumulative impacts caused by activities authorized by this NWP. The decision document includes a cumulative impact analysis prepared in accordance with the Council on Environmental Quality's NEPA definition of "cumulative impact" at 40 CFR 1508.7. We also prepared a cumulative

effects assessment for the 404(b)(1) Guidelines compliance determination, as required by 40 CFR 230.7(b)(3). The cumulative effects analysis conducted for the 404(b)(1) Guidelines includes estimates of the number of non-PCN activities likely to occur during the five year period this NWP is in effect, as well as the estimated impacts of these non-PCN activities to jurisdictional waters and wetlands. Those estimated impacts include both temporary and permanent impacts.

This NWP is reissued, with the changes discussed above.

NWP 15. U.S. Coast Guard Approved Bridges. We did not propose any changes to this NWP and we did not receive any comments on this NWP. This NWP is reissued without change.

NWP 16. Return Water From Upland Contained Disposal Areas. We did not propose any changes to this NWP. One commenter stated that the proposed NWP did not include enough information for the state to make a decision on its Clean Water Act Section 401 water quality certification decision.

This NWP authorizes activities that will occur during the five year period the NWP is in effect. The issuance of this NWP is not associated with any specific dredging project or disposal site. States can choose to issue water quality certification for the NWP, or require individual water quality certifications for case-specific NWP 16 authorizations. For those states that choose to require individual water quality certifications for activities authorized by this NWP, they can require additional information from the project proponent to determine whether a proposed discharge from

an upland contained dredged material disposal area complies with state water quality standards. This NWP is reissued without change.

NWP 17. Hydropower Projects. We did not propose any changes to this NWP. One commenter objected to the proposed reissuance of this NWP, stating that these activities should require individual permits. One commenter recommended increasing the generating capacity limit in item (a) of the NWP to 10,000 kilowatts.

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

This NWP is reissued without change.

NWP 18. Minor Discharges. We did not propose any changes to this NWP. Two commenters said these activities should require individual permits, instead of being authorized by NWP. Several commenters stated that this NWP should include a requirement for permittees to explicitly describe their avoidance and minimization efforts. One commenter remarked that this NWP should distinguish between dredging in open waters and excavation activities that occur in wetlands.

The activities authorized by this NWP involve only small discharges of dredged or fill material into jurisdictional waters and wetlands, and the PCN thresholds provide

district engineers with opportunities to review proposed activities that have the potential to result in more than minimal adverse environmental effects. In response to a PCN, a district engineer may require mitigation to ensure the no more than minimal adverse environmental effects requirement for NWPs is satisfied. If mitigation cannot be used to ensure the adverse environmental effects are only minimal, the district engineer will exercise discretionary authority and require an individual permit (see 33 CFR 330.1(e)(3)). For those activities that require PCNs, the project proponent may describe minimization measures in the PCN (see paragraph (b)(4) of general condition 32) to assist the district engineer in his or her decision-making process. Paragraph (b) of the NWP applies to excavation activities in open waters and paragraph (c) applies to discharges of dredged or fill material in wetlands or waters that results in a loss of those wetlands or waters. Not all wetland excavation activities result in regulated discharges of dredged material (see 33 CFR 323.2(d)).

Several commenters said this NWP should limit its use to once per verification, instead of authorizing recurring maintenance activities. One commenter recommended increasing the 25 cubic yard limit for discharges that only take place in wetlands. Another commenter suggested increasing the cubic yard limit to 50 cubic yards. One commenter asked the Corps to increase the first PCN threshold to 25 cubic yards in ephemeral streams because these streams do not have flowing water on a regular basis, and they have no permanent fish populations.

If a district engineer determines that this NWP is being used too frequently for maintenance activities in the same location, he or she may talk with the project proponent to determine if measures can be taken to address the cause for the recurring maintenance.

The 1/10-acre limit applies to losses of jurisdictional wetlands located above the plane of the ordinary high water mark or high tide line. The 25 cubic yard limit applies to discharges located below the plane of the ordinary high water mark or high tide line. We believe 25 cubic yards is the appropriate limit for ensuring that the activities authorized by this NWP result in only minimal individual and cumulative adverse environmental effects. In areas of the country where 50 cubic yards is an appropriate limit for general permit authorization of minor discharges, district engineers can issue regional general permits. We do not agree that there should be no PCNs for NWP 18 activities in ephemeral streams. Discharges of more than 10 cubic yards of dredged or fill material into ephemeral streams might result in more than minimal adverse environmental effects in some cases. Therefore, PCNs should continue to be required for those activities. Increasing the PCN threshold to 25 cubic yards would eliminate that PCN threshold since this NWP has a limit of 25 cubic yards.

This NWP is reissued without change.

NWP 19. Minor Dredging. We proposed to add a sentence requiring the dredged material to be deposited and retained at an area that has no waters of the United States, unless the district engineer specifically authorizes the placement of that dredged material into jurisdictional waters and wetlands through a separate authorization.

Several commenters expressed their support for the proposed change to this NWP. Several commenters recommended modifying this NWP to authorize the placement of the dredged material into coastal waters below the mean high tide line to nourish the beach. One commenter said that requiring a separate authorization for placing the

dredged material into jurisdictional waters and wetlands is redundant and counter to the purpose of a streamlined NWP program. Another commenter noted that NWP 18, another NWP, or a regional general permit could be used to authorize the placement of the dredged material into jurisdictional waters and wetlands. One commenter objected to the proposed reissuance of this NWP, and said these activities should require individual permits. One commenter said that clamshell bucket dredging does not result in only minimal adverse environmental effects.

If the project proponent wants to use the dredged material for beach nourishment, and the dredged material is to be placed in navigable waters of the United States (i.e., RHA section 10 waters) or waters of the United States (e.g., channelward of the high tide line), DA authorization is required. Depending on the quantity of dredged material and the amount of area to be filled by the dredged material that authorization may be provided through NWP 18, another NWP, a regional general permit, or an individual permit. The small amounts of dredging authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. However, division engineers can modify, suspend, or revoke this NWP if they are concerned that more than minimal adverse environmental effects will occur in a region. In addition, if a proposed NWP 19 activity requires pre-construction notification, the district engineer can assert discretionary and require an individual permit if he or she determines the proposed activity will, after considering mitigation, result in more than minimal adverse environmental effects. This NWP authorizes minor dredging regardless of the equipment used. Clamshell bucket dredging conducted in accordance with the terms and conditions of this NWP typically causes no more than minimal adverse environmental effects.

Several commenters stated there should be designation of strategic areas for the placement of dredged material to ensure that it is available for natural geomorphic processes to move that material to eroding shorelines or to ensure that it is available for other beneficial uses. One commenter suggested adding a requirement for agency coordination when the proposed dredging activity would occur in non-tidal waters where special status species are known to occur. Another commenter stated that this NWP should not be used in non-tidal waters inhabited by special status species. One commenter said that tribes should be provided with advance notice of these activities. Another commenter expressed concern that the dredged material may have sediments that are contaminated and harmful to aquatic organisms.

The designation of strategic areas of the placement of dredged material is beyond the scope of the NWP program. Those designations are more appropriately made by district engineers or addressed through other federal, tribal, state, and local programs. The requirements of general condition 18, endangered species, apply to this NWP and will address special status species that are listed as endangered or threatened under the federal Endangered Species Act, or proposed for listing under the ESA. Division engineers can impose regional conditions on this NWP to require coordination for proposed NWP 19 activities that may affect other types of special status species, or to prohibit its use in certain waters. For the 2017 NWPs, Corps districts have been consulting with tribes to identify regional conditions that protect tribal trust resources. Corps districts may also establish coordination procedures with tribes to ensure that NWP 19 activities do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands.

This NWP is reissued as proposed.

NWP 20. Response Operations for Oil or Hazardous Substances. We did not propose any changes to this NWP, other than to change its title. We did not receive any comments on this NWP. This NWP is reissued without change.

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

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

All activities authorized by this NWP are subject to the 1/2-acre limit and all other terms and conditions of this NWP. The 1/2-acre and the 300 linear foot limits, as well as

the PCN review process, will ensure that activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. Division engineers may modify, suspend, or revoke this NWP on a regional basis. Division engineers may also impose regional conditions to ensure that authorized activities result in no more than minimal adverse environmental effects.

Corps districts can review NWP 21 PCNs concurrent with the Office of Surface Mining's or the state's SMCRA review process. Since the Office of Surface Mining or the state has authority over the entire coal mining activity, and the Corps has jurisdiction only over activities that involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters, the project proponent cannot proceed with the surface coal mining activity until he or she has secured his or her SMCRA authorization. Therefore, the Corps' completion of its review of the NWP 21 PCN prior to the SMCRA authorization decision would not benefit the project proponent. We have not made any changes to that provision.

One commenter said that the 1/2-acre limit should be used for all NWP 21 activities. One commenter stated that district engineers should not be able to waive the 1/2-acre limit. Several commenters requested removal of the provision that allows district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream beds. Many commenters said that the 300 linear foot limit should be decreased. Most of these commenters stated that if the waiver provision is retained, there should be a maximum waiver limit of 500 linear feet and compensatory mitigation should be required for losses of greater than 300 linear feet of intermittent and ephemeral stream

bed. Many commenters supported the provision that does not authorize discharges of dredged or fill material into waters of the United States to construct valley fills.

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

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

Division engineers can modify this NWP to add regional conditions to protect specific types of wetlands, such as pitcher plant bogs or bald cypress/tupelo wetlands. They can restrict or prohibit the use of this NWP in certain types of wetlands. A regional

condition may also require agency coordination for certain NWP 21 activities. The project proponent can provide additional information in the PCN to assist the district engineer in his or her decision-making process. A self-verification process will not make the district engineer's verification process more streamlined. The PCN process is necessary for all activities authorized by this NWP because of the potential for more than minimal adverse environmental effects to occur. The PCN process requires the district engineer to make an independent determination on whether the proposed activity will result in no more than minimal adverse environmental effects and whether NWP 21 authorization is appropriate.

This NWP is reissued as proposed.

NWP 22. Removal of Vessels. We proposed to modify Note 2 to refer to the possibility of shipwrecks being historic properties. We did not receive any comments on this NWP. This NWP is reissued without change.

NWP 23. Approved Categorical Exclusions. We proposed to modify this NWP by clarifying that environmental documentation may consist of either an environmental impact statement or an environmental assessment. Several commenters objected to the proposed reissuance of this NWP, stating that it does not authorize categories of activities that are similar in nature. Some of these commenters also said the NWP authorizes some activities with no limits on impacts to jurisdictional waters and wetlands. Several commenters requested that the Corps revise Regulatory Guidance Letter 05-07 to reflect the changes the Federal Highway Administration's list of approved categorical

exclusions. One commenter said that tribes should receive advance notice of activities to be conducted under the authorization provided by this NWP.

This NWP authorizes categories of activities that are similar nature, in that those categories relate to the types of activities identified in the approved categorical exclusions. The authorized activities that have the potential to result in more than minimal individual and cumulative adverse environmental effects require PCNs. District engineers will review those PCNs and issue NWP verifications only for those activities they determine will cause no more than minimal adverse environmental effects.

The revision of RGL 05-07 to address the Federal Highway Administration's current categorical exclusions will be a separate future effort. We will publish a notice in the Federal Register to solicit comment on which of their revised categorical exclusions that involve activities regulated under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899 should be authorized by this NWP. As a result of the Corps districts' consultations with tribes on the 2017 NWPs, Corps districts may establish procedures to coordinating NWP 23 PCNs with interested tribes to ensure that the activities authorized by this NWP do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands.

This NWP is reissued without change.

NWP 24. Indian Tribe or State Administered Section 404 Programs. We did not propose any changes to this NWP and did not receive any comments. This NWP is reissued without change.

NWP 25. Structural Discharges. We did not propose any changes to this NWP. One commenter said that this NWP should require concrete to be cured for seven days

before coming into contact with water. Requirements for curing of concrete used for structural discharges authorized by this NWP are more appropriately addressed through regional conditions imposed by division engineers or activity-specific conditions added to NWP verifications by district engineers. This NWP is reissued without change.

NWP 27. Aquatic Habitat Restoration, Enhancement, and Establishment Activities. In the June 1, 2016, proposed rule we did not propose any changes to this NWP. One commenter objected to the reissuance of this NWP, stating that the authorized activities do not produce benefits. Many commenters supported the reissuance of this NWP.

One of the basic requirements of this NWP is that the aquatic habitat restoration, enhancement, or establishment activity must result in a net gain in aquatic resource functions and services. It will take time for these increases in aquatic resource functions and services to occur, as the treated area undergoes ecosystem development processes after the restoration, enhancement, or establishment activity takes place.

A number of commenters said that there have been activities, such as bank stabilization activities and wetland or stream conversion activities that are not aquatic habitat restoration, enhancement, or establishment activities but that have been verified as being authorized by NWP 27. These commenters suggested modifying this NWP to make it clear that project proponents should seek DA authorization for those activities through other NWPs, regional general permits, or individual permits instead of NWP 27. A few commenters said that this NWP should not authorize the conversion of wetlands, streams, or other aquatic resources to other aquatic resource types (e.g., installing water control structures in headwater streams to construct wetland impoundments) to reduce

sediments, nutrients, and other pollutants subject to Total Daily Maximum Loads (TMDLs) established under section 303(d) of the Clean Water Act. One commenter said that NWP 27 should not be used to authorize activities that are more appropriately authorized by NWPs 13 (bank stabilization) or 43 (stormwater management facilities).

To address those concerns, we have added a paragraph to NWP 27 to state that aquatic habitat restoration, enhancement, and establishment activities authorized by this NWP must be based on ecological references. This change makes it clear that NWP 27 does not authorize bank stabilization activities (including living shorelines to control erosion), stormwater management activities, and pollutant-reduction best management practice facilities constructed to meet TMDLs established under section 303(d) of the Clean Water Act. In coastal waters, living shorelines can be authorized by the new NWP 54. Living shorelines that use stone sills, breakwaters, or other types of structures do not resemble natural shorelines (Pilkey et al. 2012). In inland waters, vegetative or bioengineering bank stabilization activities may be authorized by NWP 13. We are modifying NWP 43 to authorize discharges of dredged or fill material into waters of the United States to construct and/or maintain pollutant reduction best management practice facilities that reduce inputs of pollutants to waterbodies to meet the TMDLs established for those waterbodies.

Ecological references are often used for aquatic habitat and riparian area restoration, enhancement, or establishment activities because they can provide templates for planning and designing those activities to resemble natural aquatic habitats or riparian areas (Smith et al. 2013, Society for Ecological Restoration (SER) 2004). Ecological references can help assess the naturalness of aquatic habitats and riparian areas and can

take into account the direct and indirect effects of human disturbances and other activities on ecosystem structure, dynamics, and functions (Stoddard et al. 2006). There are a variety of approaches for using ecological references for planning, designing, and implementing ecological restoration activities (Clewell and Aronson 2013, chapter 7), including aquatic habitat restoration, enhancement, and establishment activities, as well as riparian area restoration and enhancement activities. Ecological references should take into account the range of variation exhibited by the target ecosystem type in the region (SER 2004).

For the purposes of this particular modification of NWP 27, we suggest a couple of approaches for using ecological references. Project proponents can use either of the suggested approaches or other ecological reference approaches. One suggested approach is to identify and use ecological references based on the structure, functions, and dynamics of aquatic habitats and riparian areas that currently exist in the region where the NWP 27 activity is proposed. The appropriate region can be determined through discussions with the district engineer. The ecological reference should be the same type (e.g., forested wetland, emergent tidal wetland, forested riparian area) as the aquatic habitat or riparian area that is the outcome target of the proposed NWP 27 activity.

Another suggested approach is to construct an ecological reference based on a conceptual model for the aquatic habitat type or riparian area type to be restored, enhanced, or established as a result of the NWP 27 activity. The conceptual model can be simple, and consist of a mental picture of the structure, functions, and dynamics of the desired type of aquatic habitat or riparian area (Clewell and Aronson 2013). That mental picture can be based on various information sources (Clewell and Aronson 2013) and

take into account the historic range of variation for the target habitat type (SER 2004). In other words, the conceptual model used as an ecological reference would be based on knowledge of the natural aquatic habitats or riparian areas of the same type that are, or were, found in the region.

One commenter requested that we modify NWP 27 to authorize certain activities identified in watershed implementation plans to meet TMDL requirements, such as activities to reduce sediment and nutrient inputs to waters. This commenter said that modifying NWP 27 to authorize these activities without an acreage limit would provide a streamlined authorization process for these TMDL-related restoration activities. This commenter asked that the Corps modify NWP 27 to allow conversions of one aquatic habitat type to another (e.g., forested wetland to emergent wetland) as long as there will be a net increase in aquatic resource functions and services. This commenter pointed to the change in NWP 27 that was made in 2012 to allow changes in plant communities resulting from restoring wetland hydrology. This commenter also said that NWP 27 should authorize stream restoration activities that will reduce sediment and nutrient inputs to waters to meet TMDL requirements.

Aquatic habitat restoration, enhancement, and establishment activities can help reduce inputs of sediment, nutrients, and other pollutants to waterbodies, but they are only authorized by NWP 27 if they will result in net increases in aquatic resource functions and services, do not involve prohibited conversions, and resemble ecological references. For example, the re-establishment of upland or wetland riparian areas next to a stream can reduce inputs of sediment and nutrients to the stream by physical and biogeochemical processes, and can be authorized by NWP 27 if those activities involve

discharges of dredged or fill material into jurisdictional waters and wetlands. In contrast, the constructing a dam or other structure across a headwater stream to establish a wetland that will trap sediments and transform nutrients is conversion of aquatic habitat type that is not authorized by NWP 27. The latter activity might be authorized by the reissuance and modified NWP 43.

There is likely to be differences in opinion in whether conversions of forested wetlands to emergent wetlands, other types of aquatic habitat conversions, or aquatic habitat enhancement activities will result in net increases in aquatic resource functions and services. The full suite of aquatic habitat 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 PCNs or reports to demonstrate net increases in aquatic resource functions and services.

The provision in the fourth paragraph of this NWP that states that changes in plant communities resulting from restoring wetland hydrology are acceptable under this NWP was added to take into account the fact that restoring wetland hydrology has a high likelihood of changing the plant community, and such changes are usually an objective of those wetland restoration activities. A stream restoration activity that also helps reduce sediment, nutrient, and pollutant inputs to downstream waters and helps meet established

TMDLs can be authorized by this NWP, as long as the restored stream will resemble an ecological reference for that stream type in the region.

Activities intended to address TMDLs for nutrients, sediment, and other pollutants that are not aquatic habitat or riparian restoration, enhancement, or establishment activities based on ecological references may be authorized by NWP 43, which has a 1/2-acre limit for losses of non-tidal waters of the United States. Activities in tidal waters and wetlands intended to address TMDLs that are not authorized by NWP 27 may be authorized by other NWPs, regional general permits, or individual permits.

One commenter asked for more specific examples of the types of projects that can be authorized by NWP 27. One commenter stated that this NWP should authorize the conversion of one wetland type to another type to support enhancement of a specific function. One commenter said that this NWP should be modified to allow sidecasting of material removed from a wetland into adjacent wetlands, if the affected area would still be a wetland. One commenter suggested adding low head dam removal to the types of activities authorized by this NWP. One commenter said this NWP should authorize the installation of riprap or other energy dissipation measures immediately adjacent to dikes, berms, and water control structures. One commenter requested that the Corps add "the removal of stream barriers, such as undersized culverts, fords, and grade control structures" to the list of examples of activities authorized by NWP 27.

This NWP already has a comprehensive list of examples of aquatic habitat restoration, enhancement, and establishment activities that can be authorized by this NWP. This NWP only authorizes the relocation of non-tidal waters, including non-tidal

wetlands, on the project site. The enhancement of a specific wetland function may cause the loss of, or reduce, other wetland functions; to be authorized by this NWP an aquatic habitat enhancement activity must result in a net gain in aquatic resource functions and services. If the restoration of wetland hydrology results in a change in wetland plant community that resembles reference wetlands in the region that have that hydrologic regime, we do not consider that activity to be a conversion of wetland type. The sidecasting of excavated material into jurisdictional waters and wetlands as part of the wetland restoration, enhancement, or establishment activity is authorized by this NWP as long as the activity will result in a net increase in wetland functions and services.

The removal of low-head dams is authorized by NWP 53 (see below). The removal of small water control structures, dikes, and berms is still authorized by NWP 27, and these small structures will typically be found in headwater streams. The removal of low-head dams authorized by NWP 53 is not limited to headwater streams. This NWP can be used to authorize the placement of riprap in jurisdictional waters and wetlands as long as it is part of an aquatic habitat restoration, enhancement, or establishment activity that will result in net increases in aquatic resource functions and services. We have added "the removal of stream barriers, such as undersized culverts, fords, and grade control structures" to the list of examples of activities authorized by this NWP.

One commenter said this NWP should limit the linear feet of riprap placed for bank stabilization projects that also have a restoration purpose. If bank stabilization is the primary purpose of the proposed activity, then that activity should be considered for authorization by NWPs 13 or 54. Aquatic habitat restoration, enhancement, or establishment activities may require the placement of some riprap as part of the overall

activity to increase aquatic resource functions and services. For NWP 27 activities, we do not believe that it is necessary to place a limit on the length of riprap placed in jurisdictional waters and wetlands. The appropriate amount will depend on the specific activity authorized by NWP 27.

One commenter said that all NWP 27 activities convert one wetland to another, and suggested revising this NWP by removing the language regarding aquatic habitat conversions and simply require a net increase in aquatic resource function and services, regardless of the impacts. Several commenters stated that this NWP should authorize conversions of streams to wetlands that diversify wetland habitats, with an acreage limit on those conversions. One commenter said this NWP should be modified to allow the conversion of forested wetlands to emergent wetlands. One commenter requested examples of when is it appropriate to use NWP 27 to authorizes the relocation of non-tidal waters.

Wetland restoration activities can involve conversions in wetland type, and those conversions are authorized by this NWP if they result from removing one or more impairments that are preventing the former wetland or degraded or disturbed wetland from returning to its pre-impairment structure, functions, and dynamics. Ecological restoration activities should result in a damaged or degraded wetland, stream, or riparian area resuming its historic ecological development trajectory under contemporary environmental conditions (SER 2004). The prohibition against conversions in the fourth paragraph of this NWP focuses on conversions of wetlands to streams or the conversions of natural wetlands to other aquatic habitat types. The prohibition against conversions of natural wetlands, and the general requirement that NWP 27 activities result in net

increase in aquatic resource functions and services are intended to prohibit wetland enhancement activities that would improve one or two wetland functions but cause substantial declines in other wetland functions.

Streams perform a number of important ecological functions and services (e.g., Fischenich 2006) and modifying this NWP to authorize the conversion of streams to wetlands would result in losses of those stream functions and services. Forested wetlands also perform a number of functions and services that differ substantially from those performed by emergent wetlands. Project proponents that believe that the ecological trade-offs that would occur as a result of converting streams to wetlands, or converting forested wetlands to emergent wetlands are desirable can seek DA authorization for those activities under another NWP, a regional general permit, or an individual permit. A project proponent who is uncertain whether proposed relocations of non-tidal wetlands on a site would qualify for NWP 27 authorization should contact the appropriate Corps district to schedule a pre-application consultation.

One commenter said that NWP 27 should not allow the reversion of enhanced wetlands if the wetland enhancement was done to fulfill compensatory mitigation requirements. This commenter also said that activities completed under this NWP should not be allowed to be filled at a later date. One commenter expressed concern about the that he reversion provision, stating that it gives landowners a loophole to convert wetlands to other uses.

The reversion provision in this NWP only applies to the specific categories of agreements or activities listed in that paragraph. Those agreements or activities do not

include compensatory mitigation projects required as conditions of DA permits. If there are jurisdictional waters and wetlands on the site after the authorized reversion is completed, then a separate DA authorization would be required if the project proponent wants to do activities that require authorization under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899. The reversion provision is not a loophole because it is intended to allow the affected land to revert to its prior condition when appropriate. Aquatic habitat restoration, enhancement, and establishment activities that are intended to be implemented only for a limited period of time still provide important ecosystem functions and services while they are in place.

Many commenters said there should be no changes to the PCN thresholds for this NWP. One commenter stated that the activities that require reporting should require PCNs instead. Two commenters recommended eliminating the PCN requirement for activities conducted on non-federal public and private lands in accordance with the terms and conditions of a binding restoration agreement between the U.S. Fish and Wildlife Service, Natural Resources Conservation Service, Farm Service Agency, National Marine Fisheries Service, National Ocean Service, U.S. Forest Service, or state agencies. One commenter said that if the PCN does not clearly state the purpose of the restoration project, the Corps should require a detailed explanation of the increases in aquatic resource functions and services that will be provided, and seek input from the public and interest groups.

We are not making any changes to the PCN thresholds or reporting requirements for this NWP. We believe the current PCN thresholds and reporting requirements are sufficient to provide assurance that proposed activities will comply with the terms and

conditions of this NWP. The PCN and reporting requirements provide an important mechanism for ensuring that NWP 27 activities are aquatic habitat restoration, establishment, and enhancement activities that result in net increases in aquatic resource functions and services. As stated above, we received a number of comments expressing concern about the use of NWP 27 for activities that are not aquatic resource restoration, enhancement, or establishment activities but serve other intended purposes. Those concerns validate the need to continue the current PCN and reporting requirements. When a Corps district reviews a PCN or a report for a proposed NWP 27 activity, if the information in the PCN or report does not clearly show that the proposed activity will result in net increases in aquatic resource functions and services, the district can request additional information from the project proponent. For specific activities authorized by NWP 27 or any other NWP, the Corps does not issue public notices to solicit public comment. Public comment is sought during the rulemaking process to issue, reissue, or modify NWPs.

One commenter said that this NWP should require best management practices to avoid sediment loading and introduction of excess sediment into jurisdictional waters and wetlands. One commenter stated that this NWP should require an analysis of impacts to downstream communities, especially communities inhabited by threatened and endangered species. One commenter recommended adding a provision prohibiting activities that impact federally listed plant species.

Activities authorized by this NWP must comply with general condition 12, soil erosion and sediment controls, to ensure that there are not excessive amounts of sediment being released to jurisdictional waters and wetlands as a result of these activities. Any

non-federal permittee proposing an NWP 27 activity that might affect ESA-listed species or designated critical habitat, is in the vicinity of listed species or designated critical habitat, or is in designated critical habitat must submit a PCN instead of a report. The "might affect" threshold in paragraph (c) of general condition 18, endangered species, includes direct and indirect effects anticipated to be caused by the NWP activity, including downstream indirect effects caused by the NWP activity. The requirements of general condition 18 apply to federally listed plant species under the ESA.

One asked why the Corps oversees NWP 27 activities because many other state agencies have stream restoration programs. One commenter asserted that NWP 27 should not be used to authorize mitigation banks. One commenter stated that requiring monitoring plans for NWP 27 activities places an undue burden on the applicant, especially if the intent was to restore a wetland. One commenter recommended adding to the text of this NWP an explanation of which aquatic habitat restoration, enhancement, or establishment activities may be eligible for Clean Water Act section 404(f) exemptions. One commenter asked if this NWP authorizes the removal of bulkheads, derelict structures, and piles.

We require PCNs or reporting for all NWP 27 activities to ensure the proposed activities comply with the terms and conditions of this permit, especially the requirement that authorized activities result in net increases in aquatic resource functions and services. While there are a number of states that implement stream restoration programs, there is still much debate over the most appropriate methods to use to restore streams. Therefore, the Corps' review is necessary to ensure that proposed stream restoration activities in jurisdictional waters and wetlands are authorized by this NWP. We will continue to use

of NWP 27 to authorize regulated activities associated with the construction and management of approved mitigation banks. Nationwide permit 27 may also be used to authorize aquatic habitat restoration, enhancement, and establishment activities for in-lieu fee projects. Under the requirements of 33 CFR 332.8(d), all proposed mitigation banks and in-lieu fee programs must go through a public notice and comment process, as well as interagency review.

If NWP 27 is used to authorize discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States to conduct a compensatory mitigation project required as conditions of a DA permit, monitoring will be required (see 33 CFR 332.6). If an NWP 27 activity is not being conducted as compensatory mitigation to fulfill the requirements for a DA permit, then monitoring may or may not be required, depending on the activity-specific circumstances. Monitoring of NWP 27 activities can provide information useful to other practitioners of aquatic habitat restoration, enhancement, or establishment activities, but it is optional unless the district engineer imposes conditions in the NWP verification to require monitoring.

In general, the Clean Water Act section 404(f) exemptions do not have much applicability to NWP 27 activities, with the possible exception of maintenance activities. Therefore, we do not believe that there needs to be text added to this NWP to explain when the Clean Water Act section 404(f) exemptions might apply to aquatic habitat restoration, enhancement, and establishment activities. The removal of bulkheads, derelict structures, and piles could be authorized by this NWP if that removal is a component of the aquatic habitat restoration or enhancement activity, such as a wetland

restoration activity in estuarine waters. The removal of those structures may also be authorized by NWP 3.

This NWP is reissued with the modifications discussed above.

NWP 28. Modifications of Existing Marinas. We did not propose any changes to this NWP. One commenter asked whether modifications of existing marinas should not include overwater coverage, increases in slip size, or additional vessel moorage.

This NWP authorizes modifications of existing marinas, including changes to the arrangement of structures within the previously authorized marina boundaries. This NWP does not authorize structures in navigable waters outside of the boundaries of the authorized marina. The area occupied by the authorized marina cannot change but within that occupied area the permittee can increase slip size or decrease slip size. If slip size is increased to accommodate larger vessels, there will be fewer slips within the marina. If slip size is decreased to provide slips for smaller vessels, there will be more slips in the marina for those smaller vessels to use. This NWP is reissued without change.

NWP 29. Residential Developments. We proposed to modify the terms of this NWP to clarify that any loss of stream bed applies towards the 1/2-acre limit, and that 1/2-acre limit for all losses cannot be exceeded.

Several commenters objected to the proposed reissuance of this NWP, and some said that the activities authorized by this NWP result in more than minimal adverse environmental effects. One commenter said this NWP should not authorize residential developments in channel migration zones and floodplains where direct and indirect impacts to special status species could occur. Several commenters stated that NWP 29

should be limited to residential developments that use low-impact development construction practices, demonstrate avoidance and minimization of impacts, and do not involve channelization or relocation of perennial and intermittent streams. One commenter recommended limiting this NWP to single family homes.

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. Division engineers can modify, suspend, or revoke this NWP in geographic areas where there is potential for more than minimal individual and cumulative adverse environmental impacts to occur. Regional conditions can be added by division engineers to protect important regional resources by restricting or prohibiting impacts to those resources caused by discharges of dredged or fill material into jurisdictional waters and wetlands. Impacts to 100-year floodplains are minimized through the requirements general condition 10, fills in 100-year floodplains, which states that all NWP activities must comply with applicable FEMA-approved state or local floodplain management requirements. The protection of federally-listed threatened and endangered species is addressed through general condition 18, endangered species. District engineers will review PCNs and conduct ESA section 7 consultation for any proposed activity that may affect listed species or designated critical habitat. Other categories of special status species can be protected through regional conditions imposed by division engineers, or activity-specific conditions added to NWP authorizations by district engineers.

It is not necessary to limit NWP 29 to low-impact development activities because other types of residential development activities may also result in no more than minimal adverse environmental effects and thus qualify for NWP authorization. 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. If the project proponent is proposing to channelize or relocate perennial or intermittent streams, the district engineer will evaluate the PCN and determine whether the proposed activity will result in only minimal adverse environmental effects. The district engineer may add conditions to the NWP authorization to require mitigation to reduce the adverse environmental effects so that they are no more than minimal. This NWP does not need to be limited to single family residences because the terms and conditions of the NWP, including the "subdivisions" paragraph, will ensure that multiple unit residential developments will result in no more than minimal individual and cumulative adverse environmental effects.

One commenter said the 1/2-acre limit should apply cumulatively to the original construction and to all subsequent phases of the residential development. One commenter recommended reducing the acreage limit to 1/10-acre. Another commenter stated that the acreage and linear foot limits of this NWP are too high and compensatory mitigation should be required for all impacts to wetlands and streams. One commenter said stream impacts authorized by this NWP should be limited to ephemeral streams.

The subdivision provision of this NWP, the requirements of general condition 15 (single and complete project), and the application of the definition of "single and complete non-linear project" will limit the environmental impacts of the phases of multi-

unit residential developments so that they are no more than minimal. 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 only those activities with no more than minimal adverse environmental effects, instead of reducing the acreage limit to 1/10-acre.

Compensatory mitigation requirements for activities authorized by this NWP are determined on a case-by-case basis by district engineers when they review PCNs, in accordance with 33 CFR 330.1(e)(3) and general condition 23. Compensatory mitigation is only required when the district engineer determines the proposed impacts are more than minimal and the project proponent submits a compensatory mitigation plan that the district engineer determines will ensure that the authorized activity will result in no more than minimal adverse environmental effects. When district engineers evaluate PCNs, they will evaluate any proposed impacts to perennial and intermittent streams, so we do not think it is necessary to limit this NWP to ephemeral streams. Division engineers can modify this NWP by adding regional conditions to restrict or prohibit its use in certain types of waters, such as perennial and intermittent streams.

Several commenters said that district engineers should not be allowed to waive the 300 linear foot limit for losses of stream bed. One commenter stated that resource agencies should review requests for waivers of the 300 linear foot limit.

All requests for waivers of the 300 linear foot require PCNs and those PCNs will be coordinated with the resource agencies in accordance with paragraph (d) of general condition 32. The district engineer will fully consider agency comments when making

his or her decision whether to provide a written waiver of the 300 linear foot limit and issue the NWP verification. The district engineer's review process, including the agency coordination for waiver requests, will ensure that losses of stream bed authorized by this NWP will result in no more than minimal adverse environmental effects, individually and cumulatively.

This NWP is reissued as proposed.

NWP 30. Moist Soil Management for Wildlife. We did not propose any changes to this NWP. Several commenters requested clarification of the activities authorized by this NWP. Several commenters suggested imposing limits on this NWP. Several commenters said that PCNs should be required for NWP 30 activities.

This NWP authorizes discharges of dredged or fill material into non-tidal waters of the United States to manipulate wetland soils so that habitat and feeding areas can continue to support target wildlife populations. This NWP does not authorize the construction of new features on these wildlife management areas, and it does not authorize the conversion of wetlands to uplands or open waters. Because this NWP only authorizes on-going soil management activities and does not authorize any losses of jurisdictional wetlands, we do not think an acreage limit or a PCN requirement is necessary. Moist soil management activities conducted by non-federal permittees that might affect species listed under the Endangered Species Act, are in the vicinity of listed species or designated critical habitat, or are in designated critical habitat, require PCNs under general condition 18, endangered species.

This NWP is reissued without change.

NWP 31. Maintenance of Existing Flood Control Facilities. We did not propose any changes to this NWP. Several commenters objected to the proposed reissuance of this NWP. Several commenters recommended changing the definition of "abandoned" at the end of the second paragraph of this NWP. They said that the definition of "abandoned" should not include facilities where the owner or responsible party is making a good faith effort to secure the required approvals for maintenance activities. One commenter stated that the provisions regarding abandoned facilities should be removed. One commenter said that PCNs should be required for all NWP 31 activities.

We have added a sentence to the end of the second paragraph of this NWP to state that the Corps will not consider the flood control facility to be abandoned if the applicant is trying to obtain other authorizations or approvals that are required by other agencies to conduct the maintenance activities. We understand that there may be delays in obtaining authorizations or approvals from other government agencies. There may also be delays caused by the time it takes to complete Endangered Species Act section 7 consultations for the activities authorized by this NWP. Such delays should not cause these facilities to be considered "abandoned" as long as the entity responsible for these flood control facilities is making a good faith effort to obtain all required approvals and authorizations. We believe the abandonment provision should be retained because this NWP only authorizes maintenance activities, not the reconstruction of flood control facilities that have been abandoned long enough to require rebuilding those facilities. All activities authorized by this NWP already require PCNs, and the PCN may cover maintenance activities anticipated to take place during the 5 year period this NWP is in effect.

One commenter recommended modifying the last sentence of the first paragraph of this NWP to state that all dredged material must be placed outside of waters of the United States and the 100-year floodplain, and require the use of proper siltation controls. Several commenters suggested adding requirements for establishing the maintenance baseline, such as specifically identifying the responsible party, the completion deadline, and the approval authority. These commenters also said that the maintenance baseline should be reviewed and updated at prescribed intervals.

We have modified the last sentence of the first paragraph of this NWP to make it consistent with similar provisions in NWPs 19 and 35, and to make a separate sentence to address the need for sediment controls. In the final NWP, the second to the last sentence of the first paragraph reads as follows: "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." We have added "and excavated" after "dredged" to make it clear that the requirement in this sentence includes material removed by excavation activities that require Clean Water Act section 404 authorization. We have changed the word "siltation" to "sediment" so that the new last sentence of this paragraph is consistent with the terminology used in general condition 12, soil erosion and sediment controls, and to acknowledge that sediment is not limited to silt, but ranges in size from clay particles to boulders.

The Corps does not regulate activities in 100-year floodplains, unless they consist of discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States. Therefore, we cannot require that materials dredged or excavated for flood control facility maintenance be placed outside of

100-year floodplains because in many areas of the country 100-year floodplains consist of large areas of uplands. We do not believe that the identification of the maintenance baseline requires identification of the responsible party, the completion deadline, or the approval authority. As already stated in the NWP, revocation or modification of the final determination of the maintenance baseline can only be done by following the procedures in 33 CFR 330.5. Since this NWP only authorizes maintenance activities relative to a prior constructed or approved capacity, maintenance baselines should not require periodic reviews or updates.

One commenter requested removal of the requirement for mitigation. A commenter said that recurring maintenance activities should not require mitigation, and that facilities constructed before the enactment of the Clean Water Act should not require mitigation. Several commenters recommended requiring mitigation for recurring maintenance activities. Another commenter stated that this NWP should require mitigation for habitat losses, impacts to anadromous fish, and impacts to special status species.

We are retaining the provisions that allow district engineers to impose one-time compensatory mitigation requirements after the maintenance baseline is established. We are providing additional guidance on applying the term "one-time." We have added a Note to this NWP to clarify that the one-time compensatory mitigation requirement applies only once since NWP 31 was first issued in 1996 (61 FR 65873). Each subsequent reissuance of NWP 31 did not create an opportunity for district engineers to impose a new one-time compensatory mitigation requirement on activities authorized by previous versions of NWP 31, because the activities authorized by NWP 31 are limited to

maintenance activities. For example, if an entity responsible for an existing flood control facility established a maintenance baseline and received an NWP verification under the NWP 31 issued in 1996, and did one-time compensatory mitigation under that 1996 authorization, then that entity does not have to do compensatory mitigation for each subsequent reissuance of NWP 31 that authorizes maintenance back to the maintenance baseline established under the 1996 NWP 31 authorization.

We do not believe that compensatory mitigation under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899 should be required for recurring maintenance activities. For example, if the maintenance activities authorized by NWP 31 are determined by the district engineer to "may affect" listed species or critical habitat, ESA section 7 consultation is required (see general condition 18). There may be flood control maintenance activities where ESA section 7 compliance is accomplished through informal consultation and written concurrence from the U.S. Fish and Wildlife Service and/or National Marine Fisheries Services, with mitigation in the form of avoidance and minimization so that the flood control maintenance activity will have no adverse effects on listed species or critical habitat and will not result in incidental take of listed species. If formal ESA section 7 consultation is required for the NWP 31 activity, the biological opinion may include terms and conditions, including mitigation measures in the form of minimization, to minimize incidental take of listed species. Mitigation measures conducted for the purposes of ESA section 7 are not counted toward the one-time mitigation provision in the "mitigation" paragraph of this NWP.

This NWP is reissued with the modifications discussed above.

NWP 32. Completed Enforcement Actions. We proposed to modify paragraph (i)(a) of this NWP to clarify that the 5 acre and 1 acre limits apply to the areas adversely affected by the activities that remain after resolution has been achieved. Several commenters expressed their support for the proposed modification of this NWP. Several commenters recommended deleting paragraphs (a) and (b) of this NWP, saying there should be no acreage limits for this NWP or a requirement to provide environmental benefits.

We have adopted the proposed modification of this NWP. The acreage limits in paragraph (a)(i) of this NWP, as well as the requirement for net environmental benefits, are necessary to ensure that authorized activities result in no more than minimal individual and cumulative adverse environmental effects.

One commenter said that NWP 32 should be limited to formal enforcement actions for intentional and willing violations that warrant penalties, instead of after-the-fact authorizations. This commenter also stated that use of NWP 32 should not preclude a state's ability to pursue enforcement actions under applicable state laws and regulations. One commenter suggested deleting the second to last sentence of this NWP, which states that the 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." One commenter stated that the Corps should consult with affected tribes before administering any enforcement action. Another commenter said that NWP 32 should be modified to allow additional enforcement actions, such as assessment of civil penalties, if the permittee does not comply with the NWP 32 authorization.

We believe that this NWP should be available to authorize activities regulated by the Corps to complete the types of enforcement actions listed in the text of the NWP. The use of NWP 32 to complete enforcement actions only provides DA authorization for applicable activities. It does not affect a state's authority to conduct its own enforcement actions under applicable state laws and regulations. The second to last sentence of this NWP is an important limitation and we will not delete it. For the 2017 NWPs, Corps districts are consulting with tribes to identify regional conditions to protect tribal trust resources. Additionally, Corps districts can develop procedures to consult with tribes prior to conducting enforcement actions. We have modified the first sentence of the last paragraph of this NWP to state that non-compliance with the terms and conditions of an NWP 32 authorization may result in an additional enforcement action, such as a Class I civil administrative penalty under 33 CFR 326.6.

This NWP is reissued as proposed.

NWP 33. Temporary Construction, Access, and Dewatering. We proposed to modify this NWP to change the PCN threshold to require notification only for temporary construction, access, and dewatering activities in navigable waters of the United States (i.e., waters subject to Section 10 of the Rivers and Harbors Act of 1899). Several commenters supported the proposed change to this NWP and several commenters opposed the proposed change. We have changed the "Notification" requirement to only require PCNs for activities in waters subject to section 10 of the Rivers and Harbors Act of 1899.

One commenter stated that this NWP should clarify that impact thresholds only apply to permanent, not temporary, losses of waters of the United States. One

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

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

One commenter said that NWP 33 should be revised to avoid conflicts with excavation activities that do not require Clean Water Act section 404 authorization, such as removal of accumulated sediment from a dry stream channel. In addition, this

commenter stated that this NWP should not require the removed material be returned to its original location or that the excavated area be returned to pre-construction elevations. One commenter suggested requiring PCNs and coordination with federal and state natural resource agencies when proposed activities occur in non-tidal waters in which federally- and/or state-listed endangered and threatened mussels are known to occur.

This NWP only authorizes temporary construction, access, and dewatering activities that require DA authorization. If an excavation activity does not involve regulated discharges of dredged or fill material into waters of the United States, then there is no conflict with the activities that require DA authorization and are covered by this NWP. This NWP requires waters of the United States that are temporarily filled as a result of regulated activities to be restored to pre-construction elevations. If a proposed activity might affect ESA-listed endangered or threatened species or designated critical habitat, such species are in the vicinity of the proposed activity, or if the proposed activity is in designated critical habitat, general condition 18 requires non-federal permittees to submit PCNs. The district engineer will review those PCNs and determine if ESA section 7 consultation is required because the proposed activity may affect listed species or designated critical habitat. If ESA section 7 consultation it is required, the district engineer will conduct formal or informal consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service, as appropriate. Effects to state-listed endangered or threatened species are more appropriately addressed through state regulatory and non-regulatory programs.

Several commenters said that this NWP should require PCNs for all activities involving discharges of dredged or fill material into special aquatic sites. Two

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

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

as appropriate. For the 2017 NWPs, Corps districts are consulting with tribes to identify regional conditions to protect tribal trust resources. Those regional conditions can require PCNs for those NWP 33 activities that have the potential to affect tribal trust resources, and district engineers can coordinate those PCNs with interested tribes. The terms and conditions of this NWP, plus the requirements of water quality certifications issued by states, tribes, or the U.S. EPA, will ensure that NWP 33 activities will have only minimal adverse effects on water quality. Concerns regarding methane emissions are more appropriately addressed by agencies that have regulatory authority over such emissions.

This NWP is reissued as proposed.

NWP 34. Cranberry Production Activities. We did not propose any changes to this NWP. One commenter objected to the reissuance of this NWP and said that these activities should require individual permits.

This NWP requires pre-construction notification for all activities, so that the district engineer can determine whether a specific cranberry production activity will result in no more than minimal adverse environmental effects. The district engineer will exercise discretionary authority and require an individual permit for a cranberry production activity that requires authorization under section 404 of the Clean Water Act and is determined, after considering the applicant's mitigation proposal, to result in more than minimal adverse environmental effects. Corps districts, through their division commanders, may also revoke this NWP and develop regional general permits with

different terms and conditions to authorize these activities. This NWP is reissued as proposed.

NWP 35. Maintenance Dredging of Existing Basins. We proposed to modify this NWP to state that all dredged material must be placed in an area that has no waters of the United States, unless placement of the dredged material into waters of the United States is authorized by a separate DA authorization.

One commenter expressed support for the proposed modification. Another commenter objected to the proposed modification, stating that the NWP should authorize the placement of dredged material into jurisdictional waters. Another commenter objected to the reissuance of this NWP, saying that clamshell bucket dredging causes more than minimal adverse environmental effects.

The placement of the dredged material into jurisdictional waters and wetlands can be authorized by other NWPs, regional general permits, or individual permits. We have revised that sentence so that it is consistent with the text of NWP 19. Clamshell bucket dredging within existing basins will not cause more than minimal adverse environmental effects. Those existing basins are currently being used by vessels and the additional adverse effects resulting from dredging these disturbed basins will be no more than minimal. Also, the incidental soil movement that occurs during clamshell dredging for normal navigational dredging activities is not a regulated discharge under section 404 of the Clean Water Act (see 33 CFR 323.2(d)(3)(ii)).

One commenter remarked that beneficial use of dredged material may be a better alternative that disposal in upland areas, because beneficial use can improve aquatic habitat. One commenter suggested authorizing beneficial uses of dredged material after

conducting coordination with federal and state natural resource agencies. One commenter said that this NWP should have a limit to the volume of material excavated from existing basins. Another commenter stated that this NWP should not authorize activities in waters with known or suspected sediment contamination at levels that would be harmful to aquatic organisms.

If the project proponent or other entity identifies beneficial uses for the material dredged from the basin, then he or she can seek DA authorization through another NWP, a regional general permit, or an individual permit. If the proposed beneficial use is authorized by a general permit, then the project proponent may or may not have to submit a PCN to the district engineer, depending on the terms and conditions of the applicable general permit. If authorized by general permit, there may or may not be agency coordination depending on the procedures associated with that general permit. Beneficial uses of dredged material that require individual permits will public notices and coordination with federal and state natural resource agencies. Maintenance dredging activities in areas with known or suspected sediment contaminants can use best management practices and other techniques to minimize the adverse environmental effects that might be caused by exposure of those contaminants during dredging. Concerns regarding contaminants in existing basins will be considered by district engineers for those NWP 35 activities that require PCNs.

This NWP is reissued with the modifications discussed above.

NWP 36. Boat Ramps. We did not propose any changes to this NWP. One commenter objected to the proposed reissuance of this NWP and said that individual permits should be required for these activities. Several commenters recommended

limiting fills in jurisdictional waters and wetlands to 25 cubic yards. One commenter suggested increasing the width limit from 20 to 30 feet and increasing the discharge limit to 100 cubic yards. Several commenters said that district engineers should not be authorized to issue waivers to allow permittees to exceed the cubic yard and width limits for this NWP.

Most boat ramps are constructed within the limits of this NWP and result in no more than minimal individual and cumulative adverse environmental effects. For those activities that have the potential to result in more than minimal adverse environmental effects, this NWP requires PCNs so that district engineers can evaluate those proposed activities to ensure that they result in no more than minimal adverse environmental effects. If the proposed boat ramp will result in more than minimal adverse environmental effects, the district engineer will ask the prospective permittee to submit a mitigation proposal. If the mitigation proposal will ensure the proposed boat ramp will result in no more than minimal adverse environmental effects, the district engineer will issue the NWP verification with conditions requiring the implementation of the mitigation. If the mitigation proposal is not sufficient to ensure no more than minimal adverse environmental effects, the district engineer will exercise discretionary authority and require an individual permit. These procedures also apply to PCNs requesting waivers of the 50 cubic yard limit and/or the 20-foot width limit.

We are retaining the 50 cubic yard limit and the width limit of 20 feet, as well as the waiver provisions for these limits. This is to provide flexibility so that district engineers can use NWP 36 to authorize those activities that they determine, after

reviewing the PCNs, to result in no more than minimal individual and cumulative adverse environmental effects.

This NWP is reissued without change.

NWP 37. Emergency Watershed Protection and Rehabilitation. We did not propose any changes to this NWP and did not receive any comments. This NWP is reissued without change.

NWP 38. Cleanup of Hazardous and Toxic Waste. We did not propose any changes to this NWP, and no comments were received. This NWP is reissued without change.

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

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

commercial and institutional developments in channel migration zones or floodplains critical to salmon populations.

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

The construction of commercial and institutional developments in jurisdictional waters and wetlands within floodplains must comply with general condition 10, fills in 100-year floodplains. All activities authorized by this NWP require PCNs and the district engineer will review the PCN to determine if the proposed activity may affect any ESA-listed endangered or threatened species, or their designated critical habitat. If the district engineer determines the proposed activity may affect listed species or designated critical habitat and the prospective permittee is a non-federal permittee, the district engineer will conduct formal or informal ESA section 7 consultation with the U.S. Fish and Wildlife

Service and/or the National Marine Fisheries Service. If the project proponent is a non-federal permittee, the activity is not authorized by NWP until section 7 consultation is completed and the district engineer issues the NWP verification. Division engineers can add regional conditions to this NWP to restrict or prohibit its use in waters of the United States in channel migration zones. District engineers can add activity-specific conditions to NWP verifications to restrict its use in waters of the United States in channel migration zones.

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

We are retaining the 1/2-acre and 300 linear foot limits for this NWP, as well as the ability for district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed upon making a written determination that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. All of the activities authorized by this NWP require PCNs, which provide case-by-case review to ensure that all authorized activities result in no more than minimal adverse environmental effects. To assist district engineers in making their written determinations for waiver requests, agency coordination is required for PCNs requesting waivers of the 300 linear foot limit (see paragraph (d) of general condition

32). The loss of stream bed is counted towards the 1/2-acre limit for this NWP, and that 1/2-acre limit cannot be exceeded under any circumstances. The limits for losses of stream bed apply to perennial, intermittent, and ephemeral streams. Reducing the acreage limit to 1/10-acre would result in commercial and institutional development activities that result in no more than minimal adverse environmental effects requiring individual permits. In accordance with 33 CFR 330.1(e)(3) and general condition 23, compensatory mitigation is only required when the district engineer determines that compensatory mitigation is necessary for a particular activity to ensure that that NWP activity results in only minimal individual and cumulative adverse environmental effects.

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

We believe that it is necessary to require PCNs for all NWP 39 activities to ensure they will cause only minimal individual and cumulative adverse environmental effects. The acreage limit applies to each single and complete project. See the definition of "single and complete non-linear project" which applies to most NWP 39 activities. There could be NWP 39 activities that are linear projects, but they are likely to be rare. If the expansion of a commercial or institutional development requires DA authorization and the expansion does not have independent utility from the existing commercial or institutional development, then the acreage limit applies to the original, existing

commercial or institutional development (if it was originally authorized by NWP 39) and the proposed expansion.

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

This NWP is reissued with the modification discussed above.

NWP 40. Agricultural Activities. In the June 1, 2016, proposed rule, we requested comments on whether any clarifications are needed for this NWP. We also proposed to modify the terms of this NWP to clarify that any loss of stream bed applies towards the 1/2-acre limit, and that 1/2-acre limit cannot be exceeded.

Many commenters expressed their support for the proposed reissuance of this NWP. A few commenters objected to the proposed reissuance of this NWP and said that individual permits should be required for these activities. One commenter asserted that NWP 40 should not be reissued because it authorizes a broad range of activities that are difficult to distinguish from commercial or residential developments. One commenter requested clarification of which activities are authorized by this NWP. Another commenter said that the Corps should consider the cumulative effects of all activities that were ever authorized by this NWP.

The terms and conditions of this NWP, including the 1/2-acre and 300 linear foot limits as well as the PCN requirements, will ensure that the activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. All activities authorized by this NWP require PCNs, so all

proposed activities are reviewed by district engineers. This NWP complies with section 404(e) of the Clean Water Act because it authorizes a distinct category of activities that is similar in nature, that is agricultural activities that involve discharges of dredged or fill material into waters of the United States. There may be some overlap with NWP 39, for people who consider farm buildings to be commercial buildings. 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. We believe that the current list of examples of activities authorized by this NWP is sufficient. If a project proponent or concerned individual has questions about whether a particular activity is authorized by NWP 40, then he or she can contact the local Corps district office to ask those questions. In our NEPA cumulative effects analysis in the decision document for this NWP, we considered the aggregate impacts of activities authorized by past versions of NWP 40.

One commenter stated that the acreage limit for this NWP is too high, and that waivers of the 300 linear foot limit for losses of stream bed should not be authorized for impacts to streams inhabited by anadromous salmon. Another commenter opposed allowing district engineers to waive the 300 linear foot limit for losses of intermittent or ephemeral stream bed, while another commenter voiced support for that provision. One commenter said that district engineers should be allowed to waive the 1/2-acre limit. This commenter said that all NWP 40 activities should require mitigation. One commenter said the acreage limit should be reduced to 1/16-acre. One commenter asked

for clarification of "loss of stream bed" as it applies to the 300 linear foot limit. One commenter said that impacts to intermittent streams should not be authorized by this NWP. Another commenter said that compensatory mitigation should not be required for activities authorized by this NWP.

The 1/2-acre limit, and the review of PCNs by district engineers, will ensure that activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. Proposed NWP 40 activities that might affect anadromous salmon that are listed under the Endangered Species Act, or their designated critical habitat, must comply with general condition 18, endangered species. District engineers will review PCNs and conduct ESA section 7 consultations for any proposed NWP 40 activities that will be conducted by non-federal permittees, when they determine that the proposed activities may affect listed species or designated critical habitat. In those cases, the activities are not authorized by NWP until ESA section 7 consultation is completed and the district engineers issue the NWP verifications.

We are retaining the ability for district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed. To be authorized by NWP 40, the district engineer must issue a written waiver after conducting agency coordination with a finding that the proposed activity will result in no more than minimal adverse environmental effects. We are retaining the 1/2-acre limit for this NWP and that 1/2-acre limit cannot be waived. Any loss of stream bed applies to that 1/2-acre limit. Agricultural activities resulting in the loss of greater than 1/2-acre of waters of the United States require authorization by individual permit, or if available, by regional general permit. Compensatory mitigation requirements are determined by district engineers on a

case-by-case basis during the evaluation of PCNs. District engineers will apply 33 CFR 330.1(e)(3) and general condition 23 to determine when compensatory mitigation is to be required for NWP 40 activities. The definition of "loss of waters of the United States" in Section F explains how losses of stream bed are calculated for the purposes of the NWPs. The district engineer will evaluate proposed losses of intermittent streams and determine whether those losses qualify for NWP 40 authorization.

This NWP is reissued as proposed.

NWP 41. Reshaping Existing Drainage Ditches. In the June 1, 2016, proposal, we solicited comment on clarifications or changes to NWP 41 that might encourage more landowners to reshape their drainage ditches to help improve local water quality. We also requested suggestions for text to clarify the NWP for circumstances where original ditch configuration information is not available. We also proposed to remove the requirement to submit a PCN if more than 500 linear feet of ditch is to be reshaped.

One commenter expressed support for the reissuance of NWP 41. One commenter asked if this NWP applies to agricultural ditches. Several commenters suggested adding a list of ditch modifications that are authorized by NWP 41. Several commenters recommended removal of the prohibition against increasing the amount of land area drained by the ditch. One commenter said this NWP should authorize discharges for small berms or grade breaks to manage flows. Another commenter stated that this NWP should authorize minor ditch relocation and stabilization activities.

This NWP authorizes the reshaping of existing, currently serviceable drainage ditches constructed in waters of the United States that are used for any purpose, including

agricultural ditches. We do not believe it is necessary to provide a list of ditch modifications authorized by this NWP because this NWP only authorizes modifications of the cross-sectional configuration of the ditch to improve water quality. Other types of ditch modifications require separate DA authorization if those activities involve discharges of dredged or fill material into waters of the United States. This NWP does not authorize ditch relocation activities; those activities may be authorized by NWPs 29, 39, or 40, or other NWPs, or may be authorized by regional general permits or individual permits. Bank stabilization activities may be authorized by NWP 13.

Several commenters said that NWP 41 should authorize standard ditch reshaping activities that have 1:6 front slopes and 1:4 back slopes, or require ditch reshaping activities to match adjoining ditch segments. Another commenter asserted that slope stability should be addressed by requiring, at a minimum, 2:1 ditch side slopes, prohibiting vertical side slopes, and conducting the ditch reshaping activity in a manner that prevents the release of excavated material into the water.

For this NWP, it would not be appropriate for us to prescribe specific side slopes for the reshaped ditches. The appropriate side slopes should be determined on a case-by-case basis by the project proponent, and that project proponent may want to consult with people that have expertise in modifying ditch configurations to improve water quality without changing the area drained by the ditch. Sediment erosion controls should be used when appropriate to minimize releases of excavated material into jurisdictional waters. See general condition 12, soil erosion and sediment controls, for additional information.

Many commenters supported removing the PCN requirement, and many commenters objected to removing the PCN requirement. One commenter stated that it is unclear how removing PCN requirements for NWP 41 would facilitate reshaping of drainage ditches. One commenter recommended requiring PCNs for all NWP 41 activities. One commenter stated that the Corps should accept electronic PCNs.

We have removed the PCN requirement for this NWP, but it should be noted that proposed NWP 41 activities must comply with general condition 18, endangered species, and general condition 20, historic properties. Those general conditions require non-federal permittees to submit PCNs when any proposed activity might affect ESA-listed species or designated critical habitat and/or may have has potential to cause effects to historic properties. See the text of those general conditions for more information. If PCNs are not required for the activities authorized by this NWP, potential project proponents may be less reluctant to pursue these activities. Paragraph (c) of general condition 32, pre-construction notification, allows district engineers to accept electronic copies of PCNs when district engineers have established mechanisms for accepting electronic documents.

Several commenters said that this NWP should require best management practices for NWP 41 activities. A few commenters suggested adding a requirement for excavated material to be placed in upland areas. One commenter asked for an explanation of how to determine whether a ditch is subject to Clean Water Act jurisdiction.

Division engineers can add regional conditions to this NWP to require regional best management practices associated with the reshaping of existing drainage ditches to

improve water quality. Regional conditions are a more appropriate mechanism for ensuring that NWP 41 activities are consistent with regional water quality management approaches. Requiring excavated material to be placed in upland areas would prohibit using the excavated material to reshape the ditch, and be contrary to the objective of this NWP of providing a means of improving water quality by changing ditch configurations. The district engineer will apply the regulations and guidance that are in effect at the time he or she is processing a request for a jurisdictional determination for a ditch or ditches.

This NWP is reissued as proposed.

NWP 42. Recreational Facilities. We proposed to modify the terms of this NWP to clarify that any loss of stream bed applies towards the 1/2-acre limit, and that 1/2-acre limit cannot be exceeded. One commenter said that this NWP should not authorize recreational facilities in channel migration zones and floodplains where those facilities might have direct and indirect impacts to special status species or essential fish habitat. One commenter said that the 1/2-acre limit is too high. Another commenter stated that this NWP should not authorize activities in perennial and intermittent streams; it should only authorize activities in ephemeral streams.

Activities authorized by this NWP must comply with general condition 18, endangered species. All activities authorized by this NWP require PCNs. District engineers will review these PCNs, and if the district engineer determines that a proposed activity that will be conducted by a non-federal permittee may affect listed species or designated critical habitat, the district engineer will conduct formal or informal ESA section 7 consultation with the U.S. Fish and Wildlife Service and/or the National Marine

Fisheries Service. The proposed activity is not authorized by NWP until ESA section 7 consultation is completed.

Division engineers can impose regional conditions on this NWP to restrict or prohibit its use to protect other regionally important species. Activities authorized by NWP 42 that may adversely affect essential fish habitat require consultation with the appropriate office of the National Marine Fisheries Service. We believe that the 1/2-acre limit, along with the requirement that all NWP 42 activities require PCNs and thus activity-specific review by district engineers, will ensure that only those activities with no more than minimal adverse environmental effects are authorized by this NWP. The activity-specific review of PCNs by district engineers will ensure that the authorized activities will have no more than minimal adverse effects on perennial, intermittent, and ephemeral streams. Division engineers can add regional conditions to this NWP to restrict or prohibit its use in specific high-value rivers or streams.

This NWP is reissued without changes.

NWP 43. Stormwater Management Facilities. We proposed to modify the sentence that states that the maintenance of stormwater management facilities that are determined to be waste treatment systems under 33 CFR part 328.3(a)(8) generally does not require a section 404 permit. We also proposed to modify the terms of this NWP to clarify that any loss of stream bed applies towards the 1/2-acre limit for construction of stormwater management facilities, and that 1/2-acre limit cannot be exceeded.

We have removed the reference to 33 CFR 328.3(b)(6) from the last sentence of the second paragraph of this NWP, because the 2015 final rule defining "waters of the

United States" is currently under a stay issued by the U.S. Court of Appeals for the Sixth Circuit. We have revised this sentence so that it simply states that the maintenance of stormwater management facilities that are not waters of the United States does not require a section 404 permit. We have retained the 1/2-acre limit for the construction of stormwater management facilities, and the statement that any losses of stream bed apply towards that 1/2-acre limit.

Several commenters said that the maintenance and expansion of existing stormwater management facilities in upland areas should be authorized without requiring PCNs. One commenter stated that stormwater management facilities should only be constructed in upland areas. One commenter said that only constructed wetlands should be used for stormwater detention or treatment. One commenter stated that NWP 43 should not be issued for developments that are proposed in channel migration zones and floodplains where direct and indirect impacts to special status species could occur.

If a stormwater management facility is expanded into an upland area, and that expansion does not involve discharges of dredged or fill material into waters of the United States, then that expansion does not require Clean Water Act section 404 authorization. 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. Division engineers may add regional conditions to this NWP to protect other special status species.

Activities authorized by this NWP must comply with general condition 10, fills in 100-year floodplains.

We have retained the provision that prohibits discharges of dredged or fill material into waters of the United States for the construction of new stormwater management facilities in perennial streams. Stormwater management facilities may or may not include constructed wetlands, depending on the design decisions made by the project proponent. Activities authorized by this NWP must comply with general condition 18, endangered species. For the construction of new stormwater management facilities, or the expansion of existing stormwater management facilities, all activities require PCNs. District engineers will review those PCNs and will conduct ESA section 7 consultation for any proposed activity that may affect listed species or designated critical habitat. For the maintenance of stormwater management facilities, if proposed activities that require DA authorization might affect listed species or designated critical habitat, are in the vicinity of listed species or designated habitat, or are in designated critical habitat, non-federal permittees are required to submit PCNs. District engineers will review those PCNs and conduct ESA section 7 consultation for any proposed maintenance activity that may affect listed species or designated critical habitat.

One commenter recommended removing any references to waste treatment systems from the text of this NWP. Several commenters stated their support for clarifying language regarding application of the waste treatment system exclusion to the facilities covered by this NWP. These commenters recommended that the final NWP clarify that both the 1986 final rule (51 FR 41250-41251) and the 2015 final rule defining "waters of the United States" state that waste treatment systems designed to meet the

requirements of the Clean Water Act are not subject to Clean Water Act section 404 jurisdiction. A few commenters requested clarification that, under NWP 43, PCNs are not required for stormwater management facilities constructed in upland areas and areas that are not waters of the United States.

As discussed above, we have removed the reference to 33 CFR 328.3(b)(6) from this NWP. The district engineer will determine whether a particular stormwater management facility is, or is not, a water of the United States by using the regulations and guidance for identifying waters of the United States that are in effect at the time the PCN is being evaluated. We do not believe it is necessary to cite specific regulations in the text of this NWP. Pre-construction notification is only required for the construction or expansion of new stormwater management facilities and pollutant load reduction best management practice facilities that involve discharges of dredged or fill material into waters of the United States. We have modified the first sentence of the "Notification" paragraph of this NWP to make it clear that PCNs are only required for certain regulated activities authorized by this NWP.

One commenter asserted that the 1/2-acre limit is too high. One commenter said that the provision allowing the district engineer to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed should be consistent with the provision in NWPs 29 and 39. Another commenter remarked that this NWP should not authorize losses of perennial and intermittent stream beds; authorized losses of stream bed should be limited to ephemeral streams. A few commenters stated their support for allowing district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed when district engineers determine in writing that proposed

activities will result in no more than minimal adverse environmental effects. A few commenters said there should be no caps on waivers.

The 1/2-acre limit and the PCN requirements, as well as the district engineer's review of activities that require PCNs, will ensure that the activities authorized by this NWP will result in no more than minimal adverse environmental effects. The second sentence of the third paragraph of this NWP is the same as the corresponding sentence in NWP 29. We have corrected the corresponding sentence in NWP 39 so that it is consistent with NWPs 29 and 43.

This NWP does not authorize discharges of dredged or fill material into waters of the United States for the construction of new stormwater management facilities in perennial streams. Maintenance activities in perennial steams are authorized, if such activities require authorization under section 404 of the Clean Water Act. This NWP also authorizes losses of stream bed for the construction and maintenance of pollutant reduction best management practice facilities and those losses are subject to the 1/2-acre and 300 linear foot limits. We are retaining the authority for district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed if they make written determinations granting these waivers after reviewing PCNs and comments received during agency coordination. Under no circumstances may the 1/2-acre limit be exceeded for the losses of stream bed and other jurisdictional waters and wetlands.

In response to comments received on the proposal to reissue NWP 27, we are modifying NWP 43 to authorize the construction and maintenance of pollutant reduction green infrastructure features. Some commenters expressed concern about NWP 27 being

used to authorize nutrient and sediment reduction features that are not aquatic habitat restoration or enhancement activities. Green infrastructure uses a combination of the natural environment and engineered features to help improve water quality and conserve ecosystem functions and services, to benefit people and wildlife.[1] The construction of these pollutant reduction green infrastructure features in jurisdictional waters and wetlands will be subject to the 1/2-acre limit in NWP 43. These pollutant reduction green infrastructure features may be constructed in jurisdictional waters and wetlands and involve discharges of dredged or fill material into those waters and wetlands. Those features may be constructed to reduce inputs of sediments, nutrients, and other pollutants into waterbodies to meet Total Daily Maximum Loads (TMDLs) established under the Clean Water Act. In cases where green infrastructure features do not resemble ecological references for aquatic habitats or riparian areas in the region, authorization by NWP 43 instead of NWP 27 is appropriate. District engineers will review PCNs for the construction of these proposed pollutant reduction green infrastructure features and determine whether they qualify for NWP 43 authorization. These features may also require periodic maintenance that involves discharges of dredged or fill material into jurisdictional waters and wetlands. These maintenance activities may also be authorized by NWP 43.

This NWP is reissued with the modifications discussed above.

NWP 44. Mining Activities. We proposed changes to the terms of this NWP to clarify the application of the 1/2-acre limit for losses of waters of the United States. In

[1] https://www.americanrivers.org/threats-solutions/clean-water/green-infrastructure/what-is-green-infrastructure/ (accessed December 9, 2016).

addition, we proposed to amend the text of this NWP to clarify that the loss of non-tidal waters of the United States, plus the loss of stream bed, cannot exceed 1/2-acre.

Several commenters said that mining activities result in more than minimal individual and cumulative adverse environmental effects, and should require individual permits. One commenter recommended that the Corps issue a separate NWP for aggregate mining activities with a higher acreage limit. A couple of commenters said that the limits for NWP 44 should be based on impacts instead of losses of waters of the United States. One commenter suggested reducing the acreage limit to 1/16-acre. One commenter stated that there is a difference in regulation of these activities under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899. Under Clean Water Act section 404, excavation activities that result in only incidental fallback are not regulated, but any dredging of navigable waters under section 10 of the Rivers and Harbors Act of 1899 requires DA authorization. One commenter said this NWP should prohibit discharges of processed materials created from mining activities into waters of the United States.

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 comply with the "no more than minimal adverse environmental effects" requirement for NWPs and other general permits. 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 protect aquatic resources in certain regions or specific waterbodies. This NWP authorizes aggregate mining activities, and we do not believe a separate NWP for those activities is warranted.

Because of the types of waterbodies in which these activities are conducted (i.e., open waters and wetlands), the acreage limits of this particular NWP are a hybrid of losses and impacts. There is a 1/2-acre limit for losses of non-tidal wetlands, and a 1/2-acre limit for impacts to open waters such as rivers and lakes. A mining activity that involves regulated activities in both non-tidal wetlands and non-tidal open waters is subject to an overall 1/2-acre limit. The 1/2-acre limit and the PCN requirements are sufficient to ensure that authorized activities result in no more than minimal individual and cumulative adverse environmental effects, so it is not necessary to reduce the acreage limit to 1/16-acre. The acreage limits only apply to regulated activities. Mining activities in waters subject only to Clean Water Act jurisdiction (i.e., non-section 10 waters) that do not result in regulated discharges of dredged or fill material into waters of the United States are not counted towards the 1/2-acre limit. All mining activities in non-tidal waters subject to section 10 of the Rivers and Harbors Act of 1899 are subject to the 1/2-acre limit. Discharges of processed mine materials into waters of the United States may require authorization under section 402 of the Clean Water Act.

We have modified the fourth paragraph as follows, to be consistent with the other NWPs that have similar terms: “The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district

engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects."

This NWP is reissued with the modification discussed above.

NWP 45. Repair of Uplands Damaged by Discrete Events. To provide flexibility in the use of this NWP after major flood events or other natural disasters, we proposed to modify the PCN requirement to allow district engineers to waive the 12-month deadline for submitting PCNs.

One commenter said this NWP should not authorize restoration or repair activities involving structures waterward of the ordinary high water mark unless there is an immediate threat to the primary structure or associated infrastructure. One commenter recommended requiring the use of upland material to restore upland areas. One commenter asserted that the repair of upland areas damaged as a result of natural disasters should require individual permits. Another commenter stated that living shorelines should be encouraged as an alternative to restoring the affected upland areas and protecting them with hard bank stabilization techniques. One commenter said these activities should require advance notice to tribes. A commenter said that this NWP should state it does not authorize rerouting a stream to a historic course or alignment.

Any structures placed in navigable waters of the United States (i.e., channelward of the ordinary high water mark or the mean high water in waters subject to section 10 of the Rivers and Harbors Act of 1899) require separate DA authorization. That authorization may be provided by another NWP, a regional general permit, or an individual permit. 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. It also authorizes bank stabilization activities, as long as those activities do not extend beyond the prior ordinary high water mark or contours. If the eroded material is still in the vicinity of the damaged upland areas, then that material can be used to repair those upland areas. The project proponent can use some material from the bottom of the waterbody, but cannot substantially alter the contours of the waterbody that existed before the damaging event occurred. The repair of upland areas damaged by discrete events is limited to the ordinary high water mark and contours that existed prior to that discrete event, so the adverse environmental effects will be no more than minimal unless the district engineer reviews the PCN and determines that the proposed activity will result in more than minimal adverse environmental effects and exercises discretionary authority.

As an alternative to using this NWP, the property owner can approach mitigating the damage done by the discrete event in a different way. He or she can propose to construct a living shoreline and submit a PCN for NWP 54 authorization. Alternatively, he or she can propose another method of bank stabilization that might be authorized by NWP 13. Corps districts have consulted with tribes on the 2017 NWPs. These consultations may result in regional conditions on this NWP or other NWPs that ensure that the NWPs do not cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. These consultations may also result in coordination procedures to seek a tribe's views on a PCN for a proposed NWP 45 activity. This NWP only authorizes repair of upland areas damaged by storms, floods, or other discrete events. It does not authorize the relocation or rerouting of streams.

One commenter said that minor dredging should be limited to 25 cubic yards. Several commenters expressed support for the proposed modification that would allow district engineers to waive the 12-month deadline for submitting PCNs.

The NWP limits dredging to the minimum necessary to restore the damaged uplands and does not allow significant changes to the pre-event bottom contours of the waterbody. Limiting the dredging to 25 cubic yards could prevent removal of eroded material that would be used to restore the upland areas and restore the dimensions of the waterbody, if more than 25 cubic yards of material eroded ended up in the waterbody. We have adopted the proposed modification that allows the district engineer to waive the 12-month deadline.

This NWP is reissued as proposed.

NWP 46. Discharges in Ditches. We did not propose any changes to this NWP. One commenter requested that the acreage limit be reduced to 1/2-acre from the current 1 acre limit. This commenter also said that there should be no waivers of the acreage limit.

We have had a 1-acre limit for this NWP since it was first issued in 2007. This acreage limit differs from the 1/2-acre limit in a number of other NWPs because NWP 46 is limited to authorizing discharges of dredged or fill material into upland ditches that are determined to be waters of the United States. Pre-construction notification is required for all activities authorized by this NWP, to allow district engineers to evaluate the ecological functions and services being provided by specific ditches constructed in uplands and determine whether the adverse environmental effects caused by filling those ditches will be no more than minimal. When reviewing the PCN, the district engineer

may also determine whether mitigation (e.g., minimization) should be required to satisfy the terms and conditions of the NWP.

This NWP is reissued without change.

NWP 47. [Reserved].

NWP 48. Commercial Shellfish Aquaculture Activities. We proposed to modify this NWP to clarify that it authorizes new and continuing commercial shellfish aquaculture operations in authorized project areas. In addition, we proposed to define the project area as the area in which the operator is authorized to conduct commercial shellfish aquaculture activities during the period the NWP is in effect. Also, we proposed to define a "new commercial shellfish aquaculture operation" as an operation in a project area where commercial shellfish aquaculture activities have not been conducted during the past 100 years. We also proposed to modify the PCN thresholds and requirements and those proposed changes are more fully described in the June 1, 2016, proposed rule.

Several commenters expressed their support for the proposed reissuance of this NWP, including the proposed changes. Many commenters objected to the reissuance of this NWP, stating that it authorizes activities with substantial adverse environmental impacts. Several of these commenters said that commercial shellfish aquaculture activities should require individual permits. One commenter remarked that these activities should be authorized by regional general permits instead of an NWP, to take into account regional differences in aquaculture activities and the ecosystems in which they occur. Several commenters stated that NWP 48 does not authorize a category of

activities that is similar in nature. Several commenters said that this NWP does not comply with section 404(e) of the Clean Water Act because it has no limits.

The terms and conditions of this NWP, including its PCN requirements, will ensure that commercial shellfish aquaculture activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. Any commercial shellfish aquaculture activity to be conducted by a non-federal permittee that might affect Endangered Species Act (ESA) listed species or designated critical habitat, or is located in designated critical habitat, requires a PCN under general condition 18, endangered species. The district engineer will evaluate the PCN, and if he or she determines the proposed activity may affect listed species or designated critical habitat, the district engineer will conduct ESA section 7 consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service. Division engineers may impose regional conditions to require PCNs for proposed NWP 48 activities that might affect treaty rights, tribal trust resources, submerged aquatic vegetation, or other concerns.

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. Commercial shellfish aquaculture activities occur in various regions of the country, and NWP 48 has been used in Washington State, Alabama, California, Florida, New Jersey, New York, Oregon, and South Carolina. The availability of this NWP reduces the need

for the Corps districts in those states to develop regional general permits, and an NWP can promote national consistency in the authorization of these activities.

This NWP only authorizes discharges of dredged or fill material into waters of the United States and structures and work in navigable waters of the United States associated with commercial shellfish aquaculture activities. That is a specific category of activities that is similar in nature. Section 404(e) of the Clean Water Act does not require that general permits, including NWPs, have acreage or other numeric limits. Section 404(e) only requires that general permits authorize categories of activities that are similar in nature that have no more than minimal individual and cumulative adverse environmental effects.

One commenter said that the Corps should clarify the scope of its authority under section 404 of the Clean Water Act as it applies to commercial shellfish aquaculture activities. This commenter expressed the position that these activities are not regulated under section 404. One commenter requested that the Corps add a new Note to NWP 48 that would state that commercial shellfish aquaculture activities are not regulated under section 404 of the Clean Water Act. This commenter said that the Clean Water Act exempts normal farming activities from the requirement to obtain section 404 permits, and that on-going commercial shellfish aquaculture operations are normal farming operations eligible for the Clean Water Act section 404(f)(1)(A) exemption. This commenter remarked that NWP 48 should clearly state that the farming exemption applies to any commercial shellfish aquaculture operation in a project area where those activities have occurred during the past 100 years. This commenter also stated that bottom culture and off-bottom culture shellfish farming activities do not involve

regulated discharges of dredged or fill material. This commenter said that sediment movement during shellfish harvesting activities are *de minimis* and should not be regulated under section 404 of the Clean Water Act. This commenter stated that only concentrated aquatic animal production facilities are point source aquaculture operations under the U.S. EPA's National Pollutant Discharge Elimination System regulations issued pursuant to section 402 of the Clean Water Act, and that shellfish farms are not included in EPA's regulations because there is no feed added to the water.

Typical commercial shellfish aquaculture activities, including those described in the provisions of NWP 48, may involve discharges of dredged or fill material into waters of the United States. For example, mechanized harvesting activities typically involve a discharge of dredged or fill material, but the culture of oysters in bags suspended on long-lines, where there is no discharge of shell or gravel for bed preparation, typically does not result in a discharge of dredged or fill material and therefore does not require authorization under section 404 of the Clean Water Act. The term "discharge of dredged material" is defined at 33 CFR 323.2(d). The term "discharge of fill material" is defined at 33 CFR 323.3(f). The U.S. EPA has the authority to make the final determination as to which activities qualify for the exemptions in section 404(f) of the Clean Water Act. That authority is described in the 1989 "Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act."

Several commenters said that commercial shellfish aquaculture activities cause minimal adverse environmental effects and that they can have beneficial effects on

aquatic habitat and water quality. Many commenters stated that commercial shellfish aquaculture activities cause adverse impacts to intertidal zones, submerged aquatic vegetation (especially eelgrass), community structure and function of intertidal and subtidal habitats, species composition, sediment and water chemistry, soil integrity, impediments to migration, exclusion or displacement of native species, endangered species, competition for food and space, fish spawning and migration areas, and aesthetics.

The effects of commercial shellfish aquaculture activities on the structure, dynamics, and functions of marine and estuarine waters are complicated, and there has been much discussion in the scientific literature on whether those effects are beneficial or adverse (e.g., Dumbauld et al. 2009). Oysters are ecosystem engineers that have substantial impacts on coastal ecosystems by adding habitat for other species, altering ecological and biogeochemical processes, and filtering large volumes of water, thus providing a number of ecosystem goods and services (Ruesink et al. 2005). For example, in Willapa Bay, Washington, two introduced cultured bivalve species (*Crassostrea gigas* and *Ruditapes philippinarum*) have increased secondary production in the waterbody by approximately 2.5 times more than the peak historic secondary production of native oysters (*Ostreola conchaphila*) (Ruesink et al. 2006). Sites where Pacific oysters (*Crassostrea gigas*) are grown provide hard substrate used by fish, invertebrates, and macroalgae in estuaries where such substrate is rare because those estuaries have mostly soft bottom habitats (Ruesink et al. 2006). The scale at which impacts are evaluated is an important factor in determining whether impacts are positive or negative (Dumbauld and McCoy 2015). For example, at a small spatial scale (e.g., the site directly impacted by a

specific aquaculture activity) there will be an adverse effect, but at a landscape scale the adverse effects may be minor or there may be beneficial effects because of management approaches and ecosystem resilience (Dumbauld and McCoy 2015).

While commercial shellfish aquaculture activities have some adverse effects on the biotic and abiotic components of coastal waters, including intertidal and subtidal areas, those adverse effects should to be considered in a cumulative effects context. Commercial shellfish aquaculture activities also provide some ecosystem functions and services, such as water filtration that removes plankton and particulates from the water column, secondary production that results in food, and habitat for other organisms in the waterbody including fish and invertebrates (Ruesink et al. 2005). Under the Council on Environmental Quality's definition of "cumulative impact" at 40 CFR 1508.7, cumulative impacts are due to the effects of past, present, and reasonably foreseeable future actions taken by federal, non-federal, and private entities. In 2010, over 123,000,000 people (39 percent of the population of the United States) were living in coastal counties (NOAA and U.S. Census Bureau 2013). Categories of activities that directly and indirectly affect coastal intertidal and subtidal habitats include land use/land cover changes in the watershed (e.g., coastal development, agriculture), pollution from point and non-point sources throughout coastal watersheds, overexploitation of estuarine and marine resources including fish and shellfish, resource extraction, and human activities that contribute to climate change (MEA 2005b). Commercial shellfish aquaculture activities are a minor subset of human activities that affect coastal intertidal and subtidal habitats and contribute to cumulative effects to those coastal habitats.

Terrestrial areas, which include coastal lands, have been substantially altered by people for millennia (Perring and Ellis 2013). The high proportion of people living along the coasts have directly and indirectly altered coastal waters and their productivity (Vitousek et al. 1997). All marine ecosystems have also been altered to varying degrees by people (Halpern et al. 2008). Nearly all landscapes have been influenced or altered to some extent by past and present use by human communities, resulting in cultural, semi-cultural, and natural landscapes (Clewell and Aronson 2013). The bays and other waterbodies in which commercial shellfish aquaculture activities take place can be considered semi-cultural ecosystems because of their use by people over long periods of time for various activities. While shellfish aquaculture activities have local and temporary effects on the structure, function, and dynamics of estuaries, they do not cause losses of intertidal and subtidal areas or degrade water quality, in contrast to the habitat losses and water quality degradation caused by other types of human activities in or near coastal waters, such as coastal development, pollution, wetland losses, and freshwater diversions (Dumbauld et al. 2009). According to Dumbauld et al. (2009), the disturbances caused by commercial shellfish aquaculture activities are similar in scope and intensity to natural disturbances such as storm events and disturbances caused by other ecosystem engineers such as eelgrass and burrowing shrimp.

Several commenters said that the Corps has not fully documented that commercial shellfish aquaculture activities provide water quality benefits similar to wild bivalves. Many commenters expressed concern about conversions of natural shorelines to commercial shellfish production and impacts to native shellfish, forage fish, salmon, eelgrass, and birds. One commenter stated that a certain amount of natural shoreline

should be required between aquaculture sites. One commenter stated that NWP 48 should restrict the use of mechanical harvesting.

Both commercially-grown bivalves and wild bivalves are filter feeding molluscs with the same basic anatomy and physiology. Different oyster species have different filtration rates, with larger oyster species filtering more water (Ruesink et al. 2005). Bivalves influence water quality by filtering out particles from the water column and removing nutrients, which increases the clarity of the water in the waterbody and can help reduce anthropogenic causes of eutrophication (Dumbauld et al. 2009). While commercial shellfish aquaculture activities have some impacts on intertidal and subtidal habitats, fish, eelgrass, and birds, coastal development and other human activities in these waterbodies and the watersheds that drain to these waterbodies have substantial impacts on those resources as well (e.g., MEA 2005b). Commercial shellfish aquaculture activities are conducted near shorelines and coastal lands that have long been occupied and altered by people. The human occupation of these shorelines over time has changed the structure, function, and dynamics of these nearshore ecosystems, including the other species that use those ecosystems. Various coastal development activities have substantially altered shoreline characteristics, as well the water quality of coastal waters and the species that utilize nearshore waters. Shorelines have been altered by a variety of human activities for many years. Land use decisions, including the use and development of shorelines, is the primary responsibility of state and local governments. States can manage coastal development through their authorities under the Coastal Zone Management Act and state laws. The Corps' authorities are limited to regulating

activities that involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States.

Glascoe and Christy (2004) examined the effects of coastal urbanization on water quality, especially microbial contamination of shellfish production areas. The quality of coastal waters and their habitats are strongly influenced by coastal development, and the pollution generated by the people that live in coastal areas (Glascoe and Christy 2004). They found that non-point source pollution, including pollution from stormwater runoff, wastes generated by livestock on land-based farms, and failing on-site septic systems, is the leading cause of declines in water quality in shellfish growing areas. Point source discharges from industrial and municipal wastewater systems also contribute to declining water quality in estuaries where shellfish production occurs (Glascoe and Christy 2004). While commercial shellfish aquaculture activities do have some adverse effects on eelgrass and other species that inhabit coastal waters, especially competition for space (Tallis et al. 2009), there are also substantial adverse effects caused by coastal land use and land cover changes, other uses of coastal lands and waters by people, and the activities of people who live in these coastal watersheds, especially the pollution they generate through those activities.

Division engineers can also add regional conditions to ensure that mechanical harvesting activities that require Department of the Army authorization result in no more than minimal individual and cumulative adverse environmental effects.

Several commenters asserted that the use of canopy nets has caused extensive modification of shorelines. They said these nets also make it difficult for birds to feed

and may trap birds. One commenter stated that commercial shellfish aquaculture operators should not be allowed to harass birds and use large canopy net to keep birds from feeding on planted shellfish. One commenter remarked that the Corps must comply with regulations to protect migratory birds. Many commenters also expressed concern about use of chemicals to remove eelgrass and native invertebrates, the introduction of non-native species, the introduction of plastics into the marine food web, and risks of parasitism and disease.

The use of canopy nets and their effects on birds are more appropriately addressed by district engineers on a case-by-case basis if the use of canopy nets is directly linked to commercial shellfish aquaculture activities that require DA authorization. General condition 19 addresses the requirements of the Migratory Bird Treaty Act. The Corps does not have the authority to regulate discharges of pesticides. Discharges of pesticides may require authorization by states or the U.S. EPA under section 402 of the Clean Water Act. Division engineers can impose regional conditions to address the use of plastics, if plastic materials are used for the activities regulated under the Corps' authorities.

Invasions of species from one area to another is a natural biological phenomenon, while human activities have greatly sped up the rates of those invasions (Vitousek et al. 1997). Introductions of non-native species occur through a variety of mechanisms, such as land use/land cover changes, commerce (e.g., intentional introductions), and inadvertent introductions due to accidental transport (Vitousek et al. 1997), not just commercial shellfish aquaculture activities. Most ecosystems and human dominated lands are inhabited by native and non-native species and ecosystems, including their species composition, are changing a very rapid rate (Davis et al. 2011). The Corps does

not have the authority to regulate the introduction of non-native species into waterbodies. In addition, the Corps does not have the authority to address risks of parasitism and disease from shellfish production or consumption. Those concerns are more appropriately addressed by state or local public health agencies.

Many commenters also said that there has not be a sufficient cumulative impact analysis conducted for NWP 48. One commenter said that the Corps needs to track cumulative impacts of these activities.

The cumulative effects analyses prepared by Corps Headquarters for the reissuance of this NWP were done in accordance with the definitions of "cumulative impact" provided in the applicable federal regulations. For the environmental assessment in the national decision document, we used the definition of "cumulative impact" in the Council on Environmental Quality's NEPA regulations at 40 CFR 1508.7. For the 404(b)(1) Guidelines analysis in the national decision document, we predicted cumulative effects using the approach specified at 40 CFR 230.7(b)(3), which states that the permitting authority is to predict the number of activities expected to occur until the general permit expires. Corps districts track the use of NWP 48 and other NWPs in our automated information system, ORM2. In ORM2, we track NWP activities that require PCNs as well as NWP activities that do not require PCNs but are voluntarily reported to Corps districts in cases where the project proponents want written verifications from the Corps.

Many commenters objected to the proposed definition of "new commercial shellfish aquaculture operation" which stated that it is "an operation in an area where

commercial shellfish aquaculture activities have not been conducted during the past 100 years." Many commenters objected to using 100 years as a threshold for identifying new commercial shellfish aquaculture activities. These commenters stated that the proposed definition would greatly expand fallow shellfish aquaculture areas, which they assert have recovered to their former natural state. Several of these commenters said that the proposed definition "grandfathers" commercial shellfish aquaculture operations, in contrast to the five year limits of other NWPs. One commenter recommended changing the threshold from 100 years to 5 years and another commenter suggested changing it to 4 years. Several commenters objected to paragraph (d) of the proposed NWP, which prohibits commercial shellfish aquaculture activities that directly affect more than 1/2-acre of submerged aquatic vegetation beds in project areas that have not been used for those activities during the past 100 years. They said that this paragraph essentially places no limits on the amount of submerged aquatic vegetation that can be disturbed by these activities.

Paragraph (d) of the proposed NWP 48 is linked to the proposed definition of "new commercial shellfish aquaculture operation" in the first paragraph of the proposed NWP as well as the definition of "project area." Our intent with the definition of "new commercial shellfish aquaculture operation" and the 100-year period is to recognize that many of these activities have taken place over long periods of time, even though some sections of project areas may have been fallow for a number of years. The long time frame provided by the 100-year period is also in recognition that commercial shellfish aquaculture activities do not cause losses of intertidal and subtidal habitats and that components of those intertidal and subtidal ecosystems (e.g., submerged aquatic

vegetation, benthic organisms, and nekton that utilize those habitats) are resilient to the impacts of these activities and other disturbances. In general, those groups of organisms recover in a relatively short time after disturbances caused by planting, harvesting, or other commercial shellfish aquaculture activities. The Corps' regulatory authorities are limited to discharges of dredged or fill material into waters of the United States and structures or work in navigable waters, and the direct and indirect effects caused by those activities. The use of rotation cycles for farmed and fallow areas of commercial shellfish aquaculture operations will not affect the Corps' determination of eligibility for NWP 48 authorization. This is because the Corps considers the entire project area, as well as the description of the 5-year commercial shellfish activity provided in the PCN in the context of the overall ecosystem function, when determining whether the proposed activities will, or will not, result in no more than minimal adverse environmental effects, and thus qualify, or not, for NWP 48 authorization.

In addition, commercial shellfish aquaculture activities and submerged aquatic vegetation have been shown to co-exist with each other. The combination of shellfish and submerged aquatic vegetation provides a number of ecosystem functions and services (Dumbauld and McCoy 2015). Submerged aquatic vegetation is resilient to disturbances caused by oyster aquaculture activities, and the disturbances caused by oyster aquaculture activities are comparable to natural disturbances caused by winter storms (Dumbauld and McCoy 2015). Intertidal and subtidal marine and estuarine ecosystems, as well as other ecosystems, are dynamic, not static. As long as ecosystems are not too degraded by human activities and other environmental factors, they have resilience to recover after disturbances. Compared to the disturbances and degradation caused by coastal

development, pollution, and other human activities in coastal areas, commercial shellfish aquaculture activities present relatively mild disturbances to estuarine and marine ecosystems. Dumbauld et al. (2009) presents a review of empirical evidence of the resilience of estuarine ecosystems and their recovery (including the recovery of eelgrass) after disturbances caused by shellfish aquaculture activities. Because of the demonstrated co-existence of shellfish aquaculture and submerged aquatic vegetation and their resilience to withstand disturbances, we do not believe it is necessary to impose buffers around submerged aquatic vegetation beds. In areas where there are concerns regarding impacts to submerged aquatic vegetation, division engineers can modify NWP 48 to require PCNs for all activities, so that district engineers can review each proposed NWP 48 activity to ensure that those activities result in no more than minimal individual and cumulative adverse effects on submerged aquatic vegetation.

One commenter expressed concern that the proposed definition of "new commercial shellfish aquaculture operation" would adversely affect treaty rights. One commenter said that the Corps has no legal basis to apply the 100-year threshold to tribal uses or treaty rights. Several commenters recommended reverting back to the requirements in the 2007 NWP 48, which limited commercial shellfish aquaculture operations to the "the area of waters of the United States occupied by the existing operation." These commenters also suggested an alternative of limiting new commercial shellfish aquaculture activities to areas where the operator can document that those areas have been part of a regular rotation of cultivation. One commenter stated that U.S. v. Washington subproceeding No. 89-3 set forth specific requirements to prove prior aquaculture activities and that these same requirements should be used for NWP 48.

Several commenters expressed concern about the unknown quantity of new operations that would occur because of the 100-year threshold, the lack of a baseline, the lack of harvest records, cumulative impacts of changes to aquaculture species, and the potential to harm other species, including species listed under the Endangered Species Act. One commenter stated that large shellfish corporations have been gathering large numbers of leases in anticipation of the adoption of the 100-year threshold in NWP 48.

The definition of "project area" is focused on the geographic area in which the operator is authorized to conduct commercial shellfish aquaculture activities through a variety of instruments, including treaties. All NWP activities, including NWP 48 activities, must comply with general condition 17, tribal rights. General condition 17 has been modified to state that no NWP activity may cause more than minimal adverse effects to tribal rights (including treaty rights), protected tribal resources, or tribal lands. Division engineers can add regional conditions to this NWP to ensure that commercial shellfish aquaculture activities do not result in more than minimal adverse effects on tribal rights. These regional conditions may require PCNs for activities that might have the potential to affect tribal rights (including treaty rights), protected tribal resources, or tribal lands, to provide district engineers the opportunity to consult with the appropriate tribe(s) to ensure that the NWP activity complies with general condition 17. If the district engineer is uncertain whether a proposed NWP 48 activity might cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands, he or she should consult with the appropriate tribe or tribes, as well as his or her Office of Counsel staff, to understand the relevant treaty or treaties and applicable case law when determining the applicability of NWP 48.

We do not agree that NWP 48 should revert to the 2007 terms and conditions of that NWP, which limited the project area to the area for an existing commercial shellfish aquaculture activity. After the experience of implementing the 2007 and 2012 versions of NWP 48, as well as our understanding of the no more than minimal adverse environmental effects caused by these activities, we believe the definition of project area in this NWP, as well as the 100-year threshold, is appropriate to allow long established commercial shellfish aquaculture operations to be authorized by this NWP. This approach takes into account the dynamic nature of these operations over space and time, and does not discourage shellfish growers from letting portions of their project areas go fallow for periods of time.

Nationwide permits, as well as other DA permits, do not grant any property rights or exclusive privileges (see 33 CFR 330.4(b)(3) and 33 CFR 325, Appendix A). If the operator has an enforceable property interest established 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, then the activity can be authorized by NWP 48 as long as the operator complies with all applicable terms and conditions of the NWP, including regional conditions imposed by the division engineer and activity-specific conditions imposed by the district engineer. As discussed above, we believe that commercial shellfish aquaculture activities that comply with the terms and conditions of NWP 48 will have no more than minimal individual and cumulative adverse environmental effects because the disturbances caused by these activities on intertidal and subtidal ecosystems are temporary and those ecosystems have demonstrated their ability to recover from those temporary disturbances. These activities will cause little

change to the environmental baseline of these intertidal and subtidal areas. They cause far less change to the environmental baseline than the adverse effects caused by development activities, pollution, and changing hydrology that results from the people living and working in the watersheds that drain to coastal waters where commercial shellfish aquaculture activities occur. To comply with the requirements for general permits issued under its authorities (i.e., section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899), we do not need to examine historic records of harvests or cultivated species. Many species co-exist with commercial shellfish aquaculture activities and many species benefit from these activities (Dumbauld et al. 2009). Compliance with the Endangered Species Act is achieved through the requirements of general condition 18, and activity-specific and regional programmatic ESA section 7 consultations.

The 100-year threshold is used only to identify new commercial shellfish aquaculture activities for the purposes of applying the 1/2-acre limit for direct effects to submerged aquatic vegetation. If a commercial shellfish aquaculture activity is identified as a new activity and it will directly affect more than 1/2-acre of submerged aquatic vegetation, then the proposed activity does not qualify for NWP 48 authorization and an individual permit or a regional general permit would be required.

A couple of commenters supported the proposed 100-year threshold for identifying new commercial shellfish aquaculture operations because portions of shellfish farms lie fallow for extended periods of time. One commenter suggested modifying the definition to refer to a “project area” instead of an “area” because the term “project area” is used throughout the NWP. This commenter said that the general term “area” could be

interpreted as applying to a smaller portion of the "project area." This commenter also recommended using the term "project area" in paragraph (d) of this NWP.

We have changed "an area" to "a project area" to consistently refer to "project area" throughout the text of NWP 48. We have modified paragraph (d) to refer to "project area" instead of "area." Paragraph (a) of this NWP states that the NWP does not authorize the cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody. The first PCN threshold in the "Notification" paragraph states that a PCN is required if the proposed NWP activity will include a species that has never been cultivated in the waterbody. To clarify the relationship between the prohibition in paragraph (a) and this PCN threshold, if an operator proposes to cultivate a nonindigenous species in the waterbody that has never been cultivated in that waterbody, an individual permit is required. If the operator wants to continue to grow that nonindigenous species in the waterbody after the 2017 NWP 48 expires, the regulated activities associated with the continued cultivation of that nonindigenous species could be authorized by future versions of NWP 48, if NWP 48 is reissued and the terms and conditions of the future NWP 48s are the same as the 2017 NWP 48.

One commenter referenced NWPs 19 and 27 and their restrictions or prohibitions of impacts to submerged aquatic vegetation and said that similar limitations should be placed on NWP 48. One commenter stated that commercial shellfish aquaculture activities should be separated by submerged aquatic vegetation beds by buffers that are a minimum of 25 feet wide. One commenter said that the Corps has ignored the recommendations of other federal agencies relating to the protection of eelgrass. One commenter stated that this NWP should impose strict limits on these activities.

Nationwide permit 19 prohibits dredging in submerged aquatic vegetation because the dredging may result in water depths in which the submerged aquatic vegetation might take a long time to recover. Nationwide permit 27 authorizes aquatic habitat restoration, enhancement, and establishment activities, as long as those activities result in net increases in aquatic resource functions and services. Nationwide permit 27 prohibits the conversion of tidal wetlands to other uses, including the explicit prohibition against the construction of oyster habitat in vegetated tidal waters, to help ensure that there are not trade-offs that will result in net decreases in aquatic resource functions and services. The terms and conditions of NWP 48 serve a different purpose: to authorize commercial shellfish aquaculture activities that require DA authorization and result in no more than minimal individual and cumulative adverse environmental effects. In areas where there are concerns about cumulative effects to eelgrass or other species inhabiting areas where commercial shellfish aquaculture activities occur, division engineers can impose regional conditions to restrict or prohibit the use of this NWP.

One commenter stated that commercial shellfish aquaculture activities should be at least 100 feet from spawning areas to protect the species that spawn in those areas. In addition, this commenter said that this NWP should impose time-of-year restrictions to minimize impacts during spawning seasons. One commenter said that NWP 48 should not authorize activities that involve the cultivation of non-native species.

General condition 3, spawning areas, requires NWP activities to avoid, to the maximum extent practicable, being conducted in spawning areas during spawning seasons. We do not believe it is necessary, at a national level, to impose a buffer from spawning areas. Division engineers may impose regional conditions to restrict or

prohibit NWP activities during certain periods during a year, such as spawning seasons. District engineers can impose similar conditions on specific NWP activities by adding conditions to the NWP authorization on a case-by-case basis. We do not agree that NWP 48 should be limited to the cultivation of native shellfish species. Five of the nine species of shellfish commonly cultivated on the west coast for commercial production are native species, and the other four species are from Europe or Asia. On the west coast, introduced shellfish species have been cultivated for decades (Ruesink et al. 2006), and are an important commercial commodity that provides more food for people than native oyster species.

One commenter said that the definition of "project area" could be interpreted in two different ways. One interpretation could be that the project area is the area in which an agreement specifically authorizes the operator to conduct aquaculture activities. Another interpretation could be that the project area is the area where a legally binding agreement establishes an enforceable property interest for the operator. This commenter stated that the proposed definition could mean that anyone who has a property interest in tidelands is also authorized to conduct commercial shellfish aquaculture activities. This commenter suggested modifying the definition of project area as: "the area in which the operator conducts commercial shellfish aquaculture activities, as authorized by a lease or permit or other legally binding agreement."

The definition of "project area" can be applied under either approach, depending on other laws and regulations that apply to areas that could be used for commercial shellfish aquaculture activities. An operator might not have an enforceable property interest because the state might own the subtidal lands that are needed for commercial

shellfish aquaculture activities, but the state might issue a permit that allows that operator to conduct those activities on state submerged lands. In other states, the operator might be granted an enforceable property interest through an easement, lease, deed, contract, or other legally binding agreement to do commercial shellfish aquaculture. For example, in Washington State in 1895, the Bush and Callow Acts allowed nearly 19,000 acres of tidelands to be deeded for private ownership for the specific purpose of commercial shellfish aquaculture (Dumbauld et al. 2009). We believe the proposed definition is needed to provide clarity on the various types of instruments that could be used to establish an enforceable property interest for the grower, and provide flexibility to authorize these activities.

One commenter expressed support for the proposed definition of "project area" by including a lease or permit issued by an appropriate state or local government agency because such a lease or permit establishes a clear use or a clear intention of use of an area. A couple of commenters said that the definition of "project area" should not refer to deeds. One commenter said that in the State of Washington, large areas of tidelands were sold by the state that were made unsuitable for cultivation, but since those sales were made aquaculture practices have changed and those areas can now be used for cultivation.

A deed might be an appropriate instrument for conveying an enforceable property interest, depending on state law. If the tidelands can now be used for commercial shellfish aquaculture, even if they were unsuitable at the time the land was sold, then those activities can be authorized by NWP 48 if they require DA authorization.

One commenter requested that the NWP define "commercial shellfish aquaculture operations" and that the definition must not conflict with a tribe's treaty-secured rights to take shellfish. Another commenter suggested adding a definition of "existing activity," and define that term as the area under cultivation when NWP was first issued in 2007 or where the operator can document that the area has been subject to a regular rotation of cultivation.

We do not think it is necessary to define the term "commercial shellfish aquaculture activity" in the text of the NWP. It is simply the commercial production of shellfish. General condition 17 states that NWP activities cannot cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. If there are disputes between operators with valid commercial shellfish aquaculture permits or leases or other enforceable property interests, and a tribe's rights under one or more treaties to take shellfish, those disputes need to be resolved by the appropriate authorities. It is not necessary to define "existing activity" in NWP 48 because the NWP is because NWP 48 authorizes existing commercial shellfish aquaculture activities as long as they have been conducted in the project area at some time during the past 100 years.

Two commenters voiced their support for the proposed changes to the PCN requirements for this NWP. Several commenters objected to the proposed removal of the PCN threshold for dredge harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation because they said submerged aquatic vegetation is important habitat. One commenter said the proposed removal of this PCN threshold is contrary to the Corps' and the Department of Defense's tribal consultation policies. One

commenter said that a PCN should be required for an NWP 48 activity if the proposed activity will include a species that has never been cultivated in the waterbody, or the proposed activity occurs in a project area that has not been used for commercial shellfish aquaculture activities during the past 100 years.

We have determined it is no longer is necessary to require PCNs for dredge harvesting, tilling, or harrowing activities in areas inhabited by submerged aquatic vegetation because the submerged aquatic vegetation recovers after those disturbances occur. In a geographic area where dredge harvesting, tilling, or harrowing activities might result in more than minimal adverse effects to submerged aquatic vegetation, the division engineer can add regional conditions to this NWP to require PCNs for those activities. The removal of this PCN requirement is not contrary to Corps tribal consultation policies and the Department of Defense American Indian and Alaska Native Policy, because those policies do not directly address commercial shellfish aquaculture activities in areas inhabited by submerged aquatic vegetation. In addition, for the 2017 NWPs, Corps districts are consulting with tribes, and those consultations may result in regional conditions that address tribal concerns about impacts to submerged aquatic vegetation. Those consultations may also result in the development of procedures for coordinating NWP 48 PCNs with tribes before making decisions on whether to issue NWP 48 verifications to ensure that NWP 48 activities do not cause more that minimal adverse effects to treaty fishing rights or other tribal rights. A division engineer can impose a regional condition to require PCNs for dredge harvesting, tilling, or harrowing activities in areas inhabited by submerged aquatic vegetation, if he or she determines such a regional condition is necessary to ensure that NWP 48 activities cause no more

than minimal individual and cumulative adverse environmental effects, which includes adverse effects to tribal rights (including treaty rights), protected tribal resources, and tribal lands. We have retained the proposed PCN thresholds in the final NWP.

Several commenters objected to the proposed removal of the PCN threshold for activities that involve a change from bottom culture to floating or suspended culture. One commenter stated that floating aquaculture facilities should be required to complete benthic surveys to adequately evaluate impacts to the benthos. Several commenters said that notification to tribes is important to avoid tribal treaty fishing access issues, especially in situations where the operator is proposing to change from bottom culture to suspended culture. These commenters stated that suspended culture can impact tribal net fisheries. One commenter stated that floating aquaculture disrupts the ability of the tribe to exercise their treaty rights as overwater structures interfere with net fisheries and takes away surface water areas of usual and accustomed fishing areas.

Because of the terms and conditions of this NWP, the activities it authorizes will result in no more than minimal individual and cumulative adverse environmental effects. The intertidal and subtidal habitats in which these activities occur are dynamic systems that recover after the short-term disturbances caused by commercial shellfish aquaculture activities and other short-term activities or natural events. The short-term disturbances caused by bottom culture versus floating culture are not substantive enough to warrant requiring PCNs for those changes in culture methods. Given the dynamic nature of these intertidal and subtidal ecosystems, the ecological benefits of commercial shellfish aquaculture activities, and the minimal disturbances those activities cause, we do not believe it is necessary to require benthic surveys. For the 2017 NWPs, Corps districts

have been consulting with tribes to identify regional conditions to protect tribal rights (including treaty rights), protected tribal resources, or tribal lands and ensure compliance with revised general condition 17, tribal rights. District engineers can also develop coordination procedures with interested tribes to ensure that proposed NWP 48 activities do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands. If an operator is authorized to conduct a commercial shellfish aquaculture activity because he or she was granted a permit, lease, or other enforceable property interest, and there is a dispute regarding the effects of that activity on net fisheries conducted by tribes, then that dispute needs to be resolved by the appropriate authorities.

Two commenters objected to the proposed change in the PCN threshold from "new project area" to an "area that has not been used for commercial shellfish aquaculture activities during the past 100 years." One commenter said tribes require notification and opportunity to comment on shellfish aquaculture projects as they may have impacts to treaty rights. One commenter said by defining new commercial shellfish aquaculture operations as operations occurring within the footprint of a previously authorized lease site within the past 100 years, almost all leases in North Carolina would be considered "new operations" and potentially require PCNs.

The proposed change in that PCN threshold is consistent with the proposed definition of "new commercial shellfish aquaculture operation." For this NWP, Corps districts can develop coordination procedures with interested tribes to help district engineers determine whether proposed NWP 48 activities comply with general condition 17, tribal rights. Division engineers can add regional conditions to this NWP to require

PCNs for NWP 48 activities that have the potential to affect treaty rights, so that districts can review those activities and consult with the tribes that might be affected. The definition of "new commercial shellfish aquaculture activities" and the associated PCN threshold do not require existing commercial shellfish aquaculture activities to have continuously conducted those activities in the project area for 100 years. Those activities only need to be conducted for some period of time during that 100-year period. Those activities may have been conducted by different operators over time. For example, if a particular tract has been used for commercial shellfish aquaculture during the past 100 years, and that tract has been transferred or leased to a different commercial shellfish aquaculture operator then that tract is not considered a "new" project area. As explained in the proposed rule, for NWP 48 we are including areas that have been fallow for some time as part of the "project area." We have also modified the "Notification" paragraph to state that if the operator will be conducting commercial shellfish aquaculture activities in multiple contiguous project areas, he or she has the option of either submitting one PCN for those contiguous project areas or submitting a separate PCN for each project area. We also made conforming changes to the last paragraph of NWP 48 to reference the project area or a group of contiguous project areas.

Two commenters suggested adding text to paragraph describing the information to be included in an NWP 48 PCN. Their suggested text is: "No more than one pre-construction notification must be submitted for a commercial shellfish operation during the effective term of this permit. The PCN may include all species and culture activities that may occur on the project area during the effective term of the permit. If an operator intends to undertake unanticipated changes to the commercial shellfish operation during

this period, and those changes involve activities regulated by the Corps, the operator may contact the Corps district to request a modification of the NWP verification, instead of submitting another PCN. If the Corps does not deny such a modification request within 14 days, it shall be deemed approved." As an alternative to including this text in the terms of NWP 48, these commenters said that there could be a form signed by the operator in which he or she attests that there will be no changes in operation during the five year period this NWP is in effect.

We have added the suggested text to that paragraph, with some modifications. If the operator requests a modification of the NWP verification, he or she must wait for the verification letter from the district engineer. We cannot include a 14-day default approval of a proposed modification. For example, the proposed modification may trigger a need to re-initiate ESA section 7 consultation if the prior NWP verification was for an activity that required an activity-specific ESA section 7 consultation. The added text to the paragraph discussing the information to be included in a PCN is a more appropriate means of reducing the number of PCNs that need to be submitted during the five year period this NWP is in effect. The development of a new form would likely require review and approval under the Paperwork Reduction Act. The added text to the "Notification" paragraph is a more efficient alternative to developing a new form.

One commenter said that NWP 48 PCNs should include information demonstrating compliance with the limits on impacts to submerged aquatic vegetation, providing mitigation for impacts to submerged aquatic vegetation and other special aquatic sites. One commenter stated that PCNs should include recent surveys identifying eelgrass, macroalgae, and forage fish. Several commenters said that PCNs should be

required for each commercial shellfish aquaculture operation (i.e., farm). Several commenters stated that any conversions of natural intertidal areas to intensive aquaculture farms should require PCNs. One commenter remarked that the PCN should state whether the operator will be applying pesticides to manage ghost shrimp or sand shrimp, which pesticides he or she will use, and if the operator will be using neonicotinoids.

As discussed above, we believe that the activities authorized by NWP 48 will have no more than minimal individual and cumulative adverse environmental effects on submerged aquatic vegetation and other special aquatic sites. The only limit to impacts to submerged aquatic vegetation is the 1/2-acre limit that applies to new commercial shellfish aquaculture operations. In areas where a Corps district determines that NWP 48 activities may have more than minimal adverse effects on submerged aquatic vegetation or other special aquatic sites, the district can request that the division engineer add a regional condition to this NWP to require PCNs for activities that have impacts to submerged aquatic vegetation or other special aquatic sites or impose limits on impacts to submerged aquatic vegetation or other special aquatic sites. As stated in paragraph (b)(5) of general condition 32, if a PCN is required then the PCN must include a delineation of special aquatic sites. We do not think it is necessary to require NWP 48 PCNs to include surveys of macroalgae or forage fish. Only NWP 48 activities that trigger one or both PCN thresholds in the "Notification" paragraph require PCNs. Pre-construction notifications are also required for proposed activities to be conducted by non-federal permittees that trigger the PCN requirements in paragraph (c) of general condition 18, which addresses compliance with the Endangered Species Act. We do not think it is

necessary to require PCNs for each farm. If there are concerns within a particular region regarding conversions of intertidal areas to commercial shellfish aquaculture, the division engineer can modify this NWP to add PCN requirements for those activities. The Corps does not have the authority to regulate the use of insecticides and other pesticides, so we cannot modify the PCN requirements to gather that information. The use of insecticides and other pesticides may be regulated under other federal or state laws.

Many commenters said that mitigation should be required for all impacts to submerged aquatic vegetation and other special aquatic sites. Several commenters asserted that compensatory mitigation should be required for conversions of intertidal and subtidal areas. Several commenters stated that if the NWP 48 activity does not require a PCN, then compensatory mitigation cannot be required. One commenter said that compensatory mitigation should be required for the following activities: removal of embedded natural rocks, shells, et cetera; removal or relocation of aquatic life; clearing native aquatic vegetation; grading, filling or excavation of tidelands; adding gravel or shell to make tidelands suitable for aquaculture; operations near intertidal forage fish spawning sites; unnaturally high densities of filtering bivalves; plastic and canopy pollution from aquaculture gear; and the effects of periodic substrate harvest. Many commenters indicated that commercial shellfish aquaculture activities have adverse effects on aquatic ecosystems because they use large amounts of plastic. These plastics include PVC tubes, poly lines, and synthetic canopy nets. One commenter said that plastics pose threats to human and aquatic life. One commenter stated that the Corps failed to adequately describe the possible direct, indirect, and cumulative effects caused by commercial shellfish aquaculture activities or how Corps district might require

mitigation measures to ensure that the adverse environmental effects of these activities are no more than minimal.

Commercial shellfish aquaculture activities are compatible with submerged aquatic vegetation and other special aquatic sites, because those special aquatic sites quickly recover after disturbances caused by those aquaculture activities. Commercial shellfish aquaculture activities also provide important ecological functions and services. Therefore, as a general rule, we do not believe that these activities should require compensatory mitigation. We agree that if an NWP 48 activity does not require a PCN and the project proponent does not submit a voluntary request for an NWP verification, then the district engineer cannot require compensatory mitigation. None of the activities listed by these commenters in the preceding paragraph would normally result in a compensatory mitigation requirement, primarily because they are unlikely to cause resource losses that would result in more than minimal adverse environmental effects. Trash, garbage, and plastic wastes are not considered fill material regulated under section 404 of the Clean Water Act (see 33 CFR 323.2(e)(3), which excludes trash and garbage from the definition of "fill material"). As discussed above, we believe that the adverse effects of commercial shellfish aquaculture activities that comply with the terms and conditions of this NWP, including regional conditions imposed by division engineers and activity-specific conditions imposed by district engineers, will result in only minimal individual and cumulative adverse environmental effects.

Many commenters said that the terms and conditions of NWP 48 are not sufficient to protect species listed under the Endangered Species Act. Two commenters said that for NWP 48 the Corps must conduct ESA section 7 consultation and essential fish habitat

consultation. One commenter stated that the Corps does not have enough staff to monitor compliance with those terms and conditions.

All activities authorized by this NWP must comply with general condition 18, endangered species. Paragraph (c) of general condition 18 requires that a non-federal permittee submit a PCN if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat. Corps districts will conduct ESA section 7 consultation for any activity proposed by a non-federal applicant that may affect listed species or designated critical habitat. The Corps district may conduct either formal or informal section 7 consultations, depending on whether there will be adverse effects to listed species or designated critical habitat. Corps districts may also conduct regional programmatic ESA section 7 consultations, if appropriate. For proposed NWP 48 activities that may adversely affect essential fish habitat, district engineers will conduct essential fish habitat consultation with the appropriate office of the National Marine Fisheries Service. District engineers may also conduct regional programmatic essential fish habitat consultations. Corps districts have sufficient staff and other resources to monitor compliance with the terms and conditions of NWP 48 and the other NWPs.

Several commenters stated that commercial shellfish aquaculture activities pose navigation hazards because netting can become caught on boat props and wind surfers, limiting the use of waters of safe recreation and navigation. Two commenters said that the Corps should coordinate with Puget Sound recovery goals and should use the Puget Sound model to identify where impacts from NWP 48 activities are likely to occur and

may result in more than minimal individual and cumulative adverse environmental effects.

All NWP 48 activities must comply with general condition 1, navigation. The U.S. Coast Guard may require the operator to install aids to navigation to ensure that boaters and recreational users of the waterbody do not accidentally encroach on the structures in navigable used for the commercial shellfish aquaculture activities. Note 1 recommends that the permittee contact the U.S. Coast Guard. The locations for NWP 48 activities will be identified through permits or leases or other instruments or documents that establish enforceable property interests for the operators. Corps participation in Puget Sound recovery goals is more appropriately conducted at the Corps district level, in coordination with the Corps division office, rather than a rulemaking effort by Corps Headquarters (i.e., the reissuance of this NWP). Any regional conditions added to NWP 48 to support Puget Sound recovery goals must be approved by the division engineer.

Several commenters said that the draft decision document does not comply with the requirements of the National Environmental Policy Act (NEPA). Several commenters asserted that the reissuance of NWP 48 requires an environmental impact statement. Several commenters said that the draft decision document for NWP 48 did not provide sufficient information on cumulative impacts and the potential effects of NWP 48 activities, and insufficient analysis of information to support a no more than minimal adverse environmental effects determination. Commenters also stated that the decision document did not include monitoring requirements. One commenter noted that the draft decision document stated that NWP 48 would result in impacts to approximately 56,250 acres of waters of the United States, including wetlands, and no compensatory mitigation

would be required to offset those impacts. Several commenters said that the Corps did not present any peer reviewed scientific studies that have examined the effects of commercial shellfish aquaculture on natural shorelines, aquatic species, and birds. One commenter said that the Corps made no effort to provide information to the public on impacts of past NWP 48 activities, and there is no system in place to monitor and evaluate these impacts.

We believe that the final decision document fully addresses the requirements of NEPA, the 404(b)(1) Guidelines, and the Corps' public interest review. We prepared an environmental assessment with a finding of no significant impact to fulfill NEPA requirements. Therefore, an environmental impact statement is not required for the reissuance of this NWP. In addition, we determined that the reissuance of this NWP complies with the 404(b)(1) Guidelines. We also determined that the reissuance of this NWP, with the modifications discussed above, is not contrary to the public interest.

The NWP does not include explicit monitoring requirements. District engineers can conduct compliance inspections on NWP 48 activities, to ensure that the operator is complying with all applicable terms and conditions of this NWP, including any regional conditions imposed by the division engineer and activity-specific conditions imposed by the district engineer. If the district engineer determines that the permittee is not complying with those terms and conditions, he or she will take appropriate action. While the decision document states that we estimate that NWP 48 activities will impact approximately 56,250 acres of jurisdictional waters and wetlands during the 5-year period this NWP is in effect, it is important to remember that the vast majority of activities authorized by this NWP are on-going recurring activities in designated project areas.

Many of these activities have been conducted in these project areas for decades. It is also important to understand that these activities do not result in losses of jurisdictional waters and wetlands and that their impacts are temporary. The estuarine and marine waters affected by these activities recover after the disturbances caused by shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Those temporary impacts and the recovery of ecosystem functions and services results in no losses that require compensatory mitigation.

In this final rule, as well as the decision document, we discuss the effects of commercial shellfish aquaculture on natural shorelines, aquatic species, and birds. The Corps is not required to provide the public with information on the past use of NWP 48. The NEPA cumulative effects analysis in the decision document for this NWP includes past commercial shellfish aquaculture activities as the present effects of past actions.

Several tribes requested the development of regional conditions to address tribal concerns about NWP 48 activities. One commenter said that regional conditions must be consistent with treaty-reserved rights and support protection of nearshore habitat. One commenter said that NWP 48 is used a lot in some areas of the country, and that commenter believes that high usage results in more than minimal cumulative adverse environmental effects. One commenter recommended transferring the responsibility for processing NWP 48 PCNs for commercial shellfish aquaculture activities in Washington State to either North Pacific Division or Corps Headquarters.

The development of regional conditions is achieved through efforts conducted by the division engineer and the Corps district, and the approval of the regional conditions is made under the division engineer's authority. For the 2017 NWPs, Corps districts

conducted consultation with tribes to develop regional conditions for this NWP and other NWPs. Those 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. Division engineers can also modify, suspend, or revoke this NWP in geographic areas where there may be more than minimal individual and cumulative adverse environmental effects. Examples of such geographic areas include specific waterbodies, watersheds, ecoregions, or counties. Review of NWP 48 PCNs is the responsibility of Corps districts, and Corps divisions have oversight over their districts.

This NWP is reissued with the modifications discussed above.

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

The purpose of this NWP is to provide general permit authorization for the remining of an unreclaimed coal mining site. Requiring that these activities result in net increases in aquatic resource functions will help restore unreclaimed areas that might otherwise not be restored. The restoration of unreclaimed coal mining areas is one of the most effective ways to reverse degraded water quality in a watershed. District engineers

will determine on a case-by-case basis using applicable regulations and guidance whether aquatic resources on previously mined areas are waters of the United States and therefore subject to the Clean Water Act. A former coal mining site might be a suitable mitigation bank or in-lieu fee project if the sponsor obtains the required approvals from the Corps in accordance with the procedures in 33 CFR 332.8. Rapid ecological assessment tools, or other tools, can be used to determine whether a proposed NWP 49 activity will result in net increases in aquatic resource functions. Such tools may include watershed considerations in determining increases in specific ecological functions or overall ecological condition.

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

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

which were published in the February 21, 2012, issue of the Federal Register (77 FR 10233).

This NWP is reissued without change.

NWP 50. Underground Coal Mining Activities. We did not propose any changes to this NWP, other than to clarify that any loss of stream bed applies to the 1/2-acre limit. Several commenters objected to the reissuance of this NWP, stating that these activities should require individual permits because they result in more than minimal adverse environmental effects.

The 1/2-acre limit for this NWP, as well as the requirement that all activities require PCNs and written verifications from district engineers, will ensure that this NWP only authorizes activities that result in no more than minimal adverse environmental effects, individually and cumulatively. If the district engineer reviews the PCN and determines that the proposed activity, after considering any mitigation proposal submitted by the applicant, will result in more than minimal adverse environmental effects, he or she will assert discretionary authority and require an individual permit for that activity.

This NWP is reissued as proposed.

NWP 51. Land-Based Renewable Energy Generation Facilities. We proposed to split Note 1 of the 2012 NWP 51 into two notes. We also sought comments on changing the PCN threshold in this NWP, which currently requires PCNs for all authorized activities.

One commenter said that these activities should require individual permits, instead of being authorized by an NWP. One commenter recommended adding terms to this NWP to authorize temporary structures, fills, and work that are necessary to

construct, expand, or modify land-based renewable energy generation facilities. One commenter stated that this NWP should not authorize facilities in channel migration zones and floodplains where there will be direct and indirect impacts to special status species. Several commenters said that Note 1 should be modified to include linear transportation projects and their potential authorization by NWP 14. One commenter suggested splitting the revised Note 1 into two notes. Several commenters recommended the removal of Note 3.

The 1/2-acre limit, along with the PCN requirements and compliance with the NWP general conditions, will ensure that the activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. In response to a PCN, if the district engineer determines after considering the applicant's mitigation proposal that the proposed activity will cause more than minimal adverse environmental effects, he or she will exercise discretionary authority and require an individual permit for that activity. Temporary structures, fills, and work necessary to construct, expand, or modify these facilities may be authorized by NWP 33. Since we have removed the PCN requirement for temporary construction, access, and dewatering activities in waters and wetlands subject only to Clean Water Act section 404, the use of NWP 33 with this NWP will not result in a PCN requirement unless a PCN is required because of general condition 18, endangered species, general condition 20, historic properties, or another general condition.

Activities authorized by this NWP must comply with general condition 10, fills in 100-year floodplains. Proposed activities that might affect ESA-listed species or designated critical habitat or are in the vicinity of such species or critical habitat, or are

located in designated critical habitat, require PCNs if the project proponent is a non-federal permittee (see paragraph (c) of general condition 18). Division engineers may impose regional conditions that require PCNs for impacts to other types of special status species. We do not believe it is appropriate to add NWP 14 activities to Note 1. The purpose of Note 1 is to address utility lines that transmit the energy generated by these land-based renewable energy generation facilities to other areas. There is no need to split Note 1 into separate notes because those two sentences cover the general concept of utility lines that transmit the energy to other places.

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

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

The category of activities authorized by this NWP, and the adverse environmental effects of those activities, more closely resemble the categories of activities authorized by

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

Several commenters said the PCN threshold should be increased to 1/2-acre. A few commenters recommended changing the PCN threshold to 1/10-acre. One commenter stated that the Corps should continue to require PCNs for all NWP 51 activities. One commenter suggested requiring PCNs for proposed losses of greater than 1/10-acre of waters of the United States or losses of greater than 500 linear feet of stream bed. Several commenters said that agency coordination should be required for all NWP 51 PCNs. One commenter stated that the removal of the PCN requirement for NWP 51 will not ensure that those activities have no more than minimal adverse impacts, because those impacts would not be assessed or tracked. This commenter said that these types of projects have the potential to impact ESA-listed species.

We are changing the PCN threshold to require PCNs for losses of greater than 1/10-acre of waters of the United States. Land-based renewable energy projects provide an important public interest function by producing energy while contributing to energy industry reductions in greenhouse gas emissions. Changing the PCN threshold to 1/2-acre would result in no activities requiring PCNs because we are retaining the 1/2-acre

limit for this NWP and not adopting the one acre limit suggested by several commenters. For non-federal permittees, all proposed activities that might affect ESA-listed species or designated critical habitat, are in the vicinity of listed species or critical habitat, or are in designated critical habitat require PCNs under general condition 18, endangered species. All proposed NWP 51 activities to be conducted by non-federal permittees that may have the potential to cause effects to historic properties require PCNs under general condition 20, historic properties. We will continue to track NWP 51 activities that require PCNs and that are voluntarily reported to Corps districts. To assess cumulative impacts of these activities, we will estimate the number of activities that are conducted but did not require PCNs.

This NWP is reissued with the modifications discussed above.

NWP 52. Water-Based Renewable Energy Generation Pilot Projects. We proposed to add floating solar panels to the types of water-based renewable energy generation pilot projects authorized by this NWP because they are another technology for generating renewable energy in waterbodies. We also requested comment on whether to continue limiting this NWP to pilot projects, or to modify the NWP to authorize permanent water-based renewable energy generation facilities.

One commenter said that these activities should require individual permits instead of being authorized by NWP. Several commenters opposed removing the limitation in NWP 52 to pilot projects. Several commenters supported removing the limitation to pilot projects. Several commenters asked whether wave-generated energy pilot projects are authorized by this NWP. Several commenters expressed support for adding pilot floating

solar energy generation facilities. One commenter stated that activities that interfere with treaty fishing rights should be required to obtain individual permits.

We are retaining the limitation to pilot projects, to allow project proponents to collect data and determine whether they want to apply for individual permit authorization for permanent water-based renewable energy generation facilities. We have added wave energy devices to the list of types of water-based renewable energy generation pilot projects that can be authorized by this NWP. Activities authorized by this NWP must comply with general condition 17, tribal rights, and not cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. For the 2017 NWPs, Corps districts are consulting with tribes to identify regional conditions that protect reserved tribal rights and tribal trust resources. District engineers may also develop coordination procedures with tribes to help determine whether a proposed NWP activity might cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands.

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

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

Several commenters voiced their support for the 1/2-acre limit for floating solar generation units. One commenter said that floating solar panels should be limited to 50 square feet. Several commenters said that there should be no limits on the number of water-based renewable energy generation units. One commenter stated that this NWP

should not authorize activities in submerged aquatic vegetation, areas inhabited by shellfish, and shellfish spawning areas. One commenter remarked that NWP 52 activities should be prohibited in fish-bearing streams. This commenter also said that the NWP should only authorize activities in ephemeral streams. Several commenters recommended prohibiting all activities in special aquatic sites. One commenter said that the 300 linear foot limit for losses of stream bed is too high. A few commenters suggested allowing waivers to the limits of this NWP.

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

The renewable energy generation units authorized by this NWP require deeper waters and most fish will be able to avoid these units. Therefore, these units will have no more than minimal adverse effects on fish inhabiting those deep rivers. Since ephemeral streams only have flowing water during, and a short time after, precipitation events, they are not suitable for water-based renewable energy generation facilities. All activities authorized by this NWP require PCNs, which gives district engineers the opportunity to

evaluate the effects these activities have on special aquatic sites. The loss of stream bed will be limited to losses caused by the construction of attendant features. While district engineers can waive the 300 linear foot limit for losses of stream bed if the affected streams are intermittent or ephemeral, they cannot waive the 1/2-acre limit. This NWP is consistent with the other NWPs that have 1/2-acre limits in that the 1/2-acre limit cannot be waived.

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

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

We have also made some additional changes to this NWP. Some of these other changes are intended to be consistent with other NWPs. We have modified the third paragraph of this NWP by adding a sentence to explain that the loss of stream bed plus any other losses of jurisdictional waters and wetlands caused by the NWP activity cannot exceed 1/2-acre. We have modified Note 3 to remove the phrase “pre-construction notification and” to be consistent with Note 1 of NWP 12. Corps districts will send a

copy of the NWP verification to the National Ocean Service for charting. The facility and its associated utility lines do not need to be charted if the district engineer does not issue an NWP verification letter. If the district engineer exercises discretionary authority and requires an individual permit, the relevant information will be provided to the National Ocean Service if the individual permit is issued.

This NWP is reissued with the modifications discussed above.

NWP 53. Removal of Low-Head Dams. This NWP was proposed as NWP A to authorize structures and work in navigable waters of the United States, as well as associated discharges of dredged or fill material into waters of the United States, for the removal of low-head dams. The removal of low-head dams restores rivers and streams and helps improve public safety. This NWP only authorizes the removal of low-head dams; it does not authorize the construction of new dams to replace low-head dams that are removed. The removal of dams restores stream and riparian area functions (Roni et al. 2013, Doyle et al. 2005, Bushaw-Newton et al. 2002) and improves public safety (Tschantz and Wright 2011), especially for dams that are in need of repair or replacement or are no longer being used for their intended purposes.

Several commenters said they support the issuance of this new NWP. A few commenters expressed their support because the proposed NWP would authorize the removal of dams larger than the small water control structures that can be removed under the authorization provided by NWP 27. Several commenters stated that the activities authorized by this new NWP would restore small streams, restore floodplain connectivity, improve recreational access, improve public safety, and improve fish passage. Some commenters stated that NWP 27 could be modified to authorize these

activities instead of issuing a new NWP. Other commenters said that low-head dams could be removed using NWP 3. One commenter objected to the proposed NWP. One commenter said that due to the wide variety of dam shapes and sizes, individual permits should be required for the removal of low-head dams.

We believe that there should be a separate NWP to authorize the removal of low-head dams instead of modifying NWP 27 to authorize these activities. Nationwide permit 27 authorizes a broad range of aquatic habitat restoration and enhancement activities, including wetland and stream restoration and enhancement. By issuing a separate NWP, we can keep this NWP focused on low-head dam removal activities and allow division engineers to add regional conditions to address regional concerns specific to low-head dam removal activities. While we have modified NWP 3 to authorize the removal of previously authorized structures or fills, there is and would be limited use of NWP 3 to authorize low-head dam removal activities. Many low-head dams were constructed long before DA permits were required for those activities. Many of these dams were built in the 19th century or earlier, to provide water and power for towns and cities, as well as power for industry (Tschantz and Wright 2011). Since many low-head dams were not authorized by the Corps because they did not require such authorization at the time they were constructed, NWP 3 cannot be used to remove those dam structures. This NWP only authorizes the removal of low-head dams that meet the definition provided in the text of the NWP. The removal of small water control structures is still authorized by NWP 27. Other dam removal activities, including dams that are not low-head dams, will require individual permits unless the Corps district has issued a regional general permit to authorize the removal of those other types of dams.

One commenter expressed support for the proposed definition of "low-head dam" and stated that the removal of dams that do not meet this definition should require an individual permit. Many commenters requested clarification of the definition of "low-head dam." Several commenters suggested adding a definition of the term "dam crest" to clarify that this refers to the top of the dam from left abutment to right abutment, including if present, an uncontrolled spillway.

To respond to comments received on the proposed definition of "low-head dam" we have expanded the definition to provide additional criteria to identify low-head dams that can be removed under the authorization provided by this NWP. The revised definition is as follows:

> For the purposes of this NWP, the term "low-head dam" is defined as a dam built across a stream to pass flows from upstream over all, or nearly all, of the width of the dam crest on a continual and uncontrolled basis. (During a drought, there might not be water flowing over the dam crest.) In general, a low-head dam does not have a separate spillway or spillway gates but it may have an uncontrolled spillway. The dam crest is the top of the dam from left abutment to right abutment, and if present, an uncontrolled spillway. A low-head dam provides little storage function.

The revised definition is a functional definition to limit this NWP to the removal of low-head dams that will result in no more than minimal individual and cumulative adverse environmental effects. Under this definition a low-head dam does not function as a storage dam. While a low-head dam imposes a barrier to the movement of fish and

other aquatic organisms, especially those species that travel upstream, it still allows continuous water flow and does not substantially disrupt sediment transport (Csiki and Rhoads 2014). Downstream sediment transport continues despite the presence of the low-head dam, especially during higher flow events (Fencl et al. 2015). Another important feature of this definition is that it explicitly states that the low-head dam has little storage function. Since these low-head dams do not provide much storage, the amount of sediment that might be stored in the impoundment will be small and therefore relatively small amounts of sediment will be transported downstream after the low-head dam structure is removed. An example of a low-head dam with small storage function is a 2-meter high low head dam in Pennsylvania, which had a 2-hour hydraulic residence time in the impoundment before the low-head dam was removed (Bushaw-Newton 2002).

We have also added a parenthetical to address situations where a drought may result in no water flowing over the dam crest. We did not want to preclude the use of this NWP in situations where an applicant or a district engineer did not observe water flowing over the dam crest during a prolonged drought. The abutment is the valley side or valley wall against which the dam structure is constructed. To respond to commenters, we also defined the term "dam crest." There are some low-head dams that have uncontrolled spillways. For an uncontrolled spillway, the crest of the spillway is what controls which specific water flows are discharged from the dam. A controlled spillway has gates that are manipulated to control water flows from the dam. There may be some low-head dams that have small navigational locks or millrace diversions, but these will be relatively rare. However, if these features are present, the removal of those low-head dams may be authorized by this NWP. These features do not occur frequently enough to include them

in the definition in the text of the NWP. The district engineer will use his or her discretion to determine whether a dam proposed for removal is a low-head dam as defined by this NWP.

One commenter recommended defining "low-head dam" by using standards for "small" dams established by the Federal Energy Regulatory Commission (FERC) and Federal Emergency Management Agency (FEMA). One commenter suggested defining "low-head dam" as a dam less than five meters in height. Another commenter recommended defining "low-head dam" as "a dam built across a stream designed to pass flows from upstream to downstream over the entire width of the dam crest on an uncontrolled basis, or any dam up to 25 feet in height." This commenter said that the definition needs to be clear that a low head dam is designed and constructed to pass flows from upstream to downstream. One commenter said that the proposed rule appeared to treat low-head dams as run-of-the-river dams, which includes large hydroelectric dams that operate in a run-of-the-river mode. One commenter stated that the definition should be based on height criteria to authorize the removal of small dams that have different structural designs. This commenter noted that this would allow the NWP to authorize the removal of: (1) small earthen dams that spill through low-level outlets, (2) uniquely constructed dams, and (3) dam-like structures such as fords or grade control structures that some states may define as dams.

As discussed above, we are using a functional definition to identify low-head dams for this NWP in order to limit the use of this NWP to dams that have the key features presented in the definition. There may be low-head dams slated for removal that district engineers, local agency staff, and others might not consider to be "small" but

could still be removed under the authorization provided by this NWP because they satisfy the components of the definition provided in the NWP text. The term "small dam" and how it has been used in various contexts makes that term too ambiguous to use in this NWP. For example, as stated in the proposed rule, some people consider small dams to be dams that are not included in the National Inventory of Dams (see 81 FR 35204). There is a substantial amount of variability in those small dams because different states use different criteria to determine whether to include specific dams in the inventory. Definitions used by FERC and FEMA serve purposes other than river and stream restoration. As stated in the June 1, 2016, proposed rule, we proposed this NWP to provide a general permit to authorize a category of activities that restores rivers and streams and improves safety for users of small craft such as canoes and kayaks.

We believe that the functional definition provided in the NWP text is more effective than establishing a threshold height for identifying low-head dams. Dams that are five meters (16.4 feet) or 25 feet in height may have a substantial storage function. The definition in the final NWP does recognize that the low-head dam passes flows from upstream to downstream on a continual and uncontrolled basis, unless there is a drought. In the final NWP, we are providing more detail in the definition of "low-head dam" and are not using the term "run-of-the-river dam." The preamble discussion of the proposed new NWP in the June 1, 2016, proposed rule was a general discussion of different dam classification approaches, and included a discussion of differences between run-of-the-river dams and storage dams. The preamble also included a general discussion of the scientific literature on dam removal. Some of the dam removal studies cited in the proposed rule examined the outcomes of removal of run-of-the-river dams or other types

of dams, not just low-head dams. The removal of large hydropower run-of-the-river dams may be authorized by individual permits. The removal of small dam structures in headwater streams that do not meet the definition of low-head dam in this NWP might be authorized by NWP 27. 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, or fords or grade-control structures. The removal of fords or in-stream grade-control structures might also be authorized by NWP 27 as a stream restoration activity.

One commenter asked for more details on the scale of low-head dam removal that is authorized by this NWP. One commenter said that after the low-head dam is removed, it might be necessary to conduct a hydraulic analysis to update FEMA's Flood Insurance Rate Map for the affected area. One commenter stated that low-head dam removal projects will have both positive and negative impacts well beyond the dam footprint as a result of dewatering the former impoundment, releasing stored sediment, depositing surplus sediment on downstream benthic habitats, and changing the sediment dynamics. This commenter also said that low-head dam removal activities could affect state water rights, state owned stream channels, and other local jurisdictions. This commenter also said that lowering of water levels could impact state listed species. This commenter recommended coordinating PCNs for these activities with state resource agencies.

This NWP authorizes the removal of the low-head dam structure. It 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 river or stream channel or its riparian areas after the low-head dam is removed. The restoration of the river or stream channel and associated riparian areas may be authorized by NWP 27, if the project proponent wants to do restoration work beyond removing the low-head dam. The project proponent may also choose to allow the river or stream and its riparian areas to recover through natural processes. Updating Flood Insurance Rate Maps after a low-head dam is removed is the responsibility of either the project proponent or the appropriate federal, state, or local floodplain management authority in that jurisdiction.

We recognize that the removal of low-head dams will have both positive and negative adverse impacts, generally with short-term adverse environmental effects and long-term beneficial environmental effects. Ecological restoration activities are intentional interventions intended to bring back ecological processes that were impaired, usually by human actions, to restore the historic continuity or ecological trajectory of the impaired ecosystem (Clewell and Aronson 2013). For this NWP, the intentional intervention is the removal of the low-head dam that has been impairing river and stream structure, functions, and dynamics. The removal of the low-head dam allows the structure, functions, and dynamics of the river or stream to recover in its contemporary watershed condition. The construction of the low-head dam resulted in long-term impairment of the river or stream by altering its hydrology and hydrodynamics, sediment transport processes, the movement of aquatic organisms through the stream network, and other ecological processes. The changes to river and stream structure, functions, and dynamics caused by the low-head dam resulted in losses or reductions of riverine functions and services. The adverse effects caused by the removal of low-head dams will

be temporary, and the river or stream where the low-head dam was located will recover from those temporary adverse effects. Over time, as ecosystem development processes take place in the absence of the removed low-head dam, the structure, functions, and dynamics of the river or stream will recover. That recovery may not be full recovery if there were substantial changes to the watershed since the low-head dam was constructed (Doyle et al. 2005).

Low-head dam removal activities may require other authorizations from state governments. The authorization provided by this NWP does not obviate the need for the project proponent to obtain other federal, state, or local permits, approvals, or authorizations required by law (see item 2 of Section E, Further Information). Impacts to state listed species are more appropriately addressed by state agencies that are responsible for ensuring compliance with state laws and regulations. We do not believe it is necessary to require agency coordination for the PCNs for these activities. District engineers have the expertise to evaluate these activities, and, if necessary, they can discuss specific proposals with their counterparts at federal, tribal, state, or local resource agencies.

One commenter said that this NWP should not authorize low-head dam removals if there are undesirable non-native species downstream of the low-head dam, because removal of dam structure would open a corridor to allow them to move upstream and colonize upstream reaches. This commenter also recommended that the NWP require staged dewatering of the impoundment if the low-head dam is located in a low-gradient stream. Another commenter suggested limiting removal activities to periods of low flow to prevent downstream adverse effects. This commenter recognized that many of the

potential adverse effects are mitigated through the requirements of various NWP general conditions.

If the low-head dam is preventing harmful non-native species from reaching upstream reaches, the district engineer can exercise discretionary authority if he or she determines that the adverse environmental effects resulting from the removal of a barrier that prevents the migration of a harmful non-native species would be more than minimal. In such cases, an individual permit would be required and the district engineer could determine whether the proposed activity is not contrary to the public interest. Under the individual permit process, the district engineer could deny the authorization. In response to a PCN, a district engineer may add conditions to the NWP authorization to require staged dewatering of the impoundment to ensure that the individual and cumulative adverse environmental effects caused by the removal of the low-head dam are no more than minimal. Division engineers can add regional conditions to this NWP to limit low-head dam removal activities to certain times of the year in order to protect species during important life cycle events such as spawning seasons. The district engineer may also impose time-of-year restrictions on a case-by-case basis by adding conditions to a specific NWP authorization. We agree that a number of environmental concerns about these activities are already addressed by the NWP general conditions.

Several commenters stated that they agreed that district engineers should have discretion to determine whether sediment testing is necessary. One of these commenters said that the decision document for this NWP should make clear that questions related to sediment management should be addressed through the Clean Water Act section 401 water quality certification process. This commenter expressed concern that having

district engineers require sediment testing would create a process that duplicates the state's water quality certification process.

The risk for contaminant-laden sediments is dependent on past and present uses of the watershed, the location of the impoundment, the history of excavating material from the impoundment, and sediment composition (Bushaw-Newton 2002). Prior to making such a determination, the district engineer should apply the guidance provided in Regulatory Guidance Letter 05-04, entitled: "Guidance on the Discharge of Sediments From or Through a Dam and the Breaching of Dams, for Purposes of Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899." That guidance will inform the district engineer whether the release of sediment from the low-head dam removal activity will result in a regulated discharge of dredged or fill material under section 404 of the Clean Water Act. If that sediment release will not result in a regulated discharge under section 404 of the Clean Water Act, the district engineer should defer to the state water quality agency regarding whether sediment testing is necessary to ensure compliance with applicable water quality standards. If release of sediments will result in a regulated discharge of dredged or fill material, the district engineer has the discretion to determine that there is a need to test sediment that might be stored in the impoundment for contaminants, based on a "reason to believe" approach similar to the EPA's inland testing manual for dredged material.

We agree with the commenters that said that decisions to require testing of sediments stored by low-head dams are more appropriately made by the agencies responsible for making water quality certification decisions under section 401 of the Clean Water Act. Under section 401, those agencies have broader authority over those

concerns than the Corps because they can require water quality certification for any discharge into waters of the United States, not just discharges of dredged or fill material into those jurisdictional waters and wetlands. We have made the appropriate changes to the decision document for this NWP to recognize the water quality certification agencies' authorities to ensure that any discharges from low-head dam removal activities comply with applicable water quality standards. For example, one study of a low-head dam removal (Bushaw-Newton et al. 2002) found that the removal of the low-head dam did not cause a substantial change in water quality.

Several commenters stated that the phrase "under separate authorization" should be removed from second paragraph of the proposed NWP. These commenters said that this NWP should authorized beneficial uses of natural material that was removed during low-head dam removal. One of these commenters remarked that the phrase "in an area that has no waters of the United States" is unclear and recommended replacing it with "not in waters of the United States" for clarity.

We are retaining this provision of the NWP because the NWP is intended to only authorize the removal of these low-head dams. After the low-head dam is removed, rivers and streams can re-establish themselves through natural ecosystem development processes. If the project proponent wants to conduct activities to accelerate the re-establishment of the river or stream channel and its riparian area and use material from the removal of the low-head dam structure he or she can seek authorization under NWP 27 or another form of DA authorization. Under NWP 27 or other forms of DA authorization, the material removed from the dam structure may be used for the restoration activity. We are using the phrase "an area that has no waters of the United

States" because it is consistent with other NWPs that have similar terms. An area in which material removed from the low-head dam is deposited might have no jurisdictional waters or wetlands, it might have some jurisdictional waters or wetlands, or it might consist entirely of jurisdictional waters and wetlands. If it is the last two situations, then another form of DA authorization would be needed to authorize the placement of that material into those jurisdictional waters and wetlands. That authorization may be another NWP, a regional general permit, or an individual permit.

One commenter suggested that the PCN should require a description of how the low-head dam will be removed, the timing of the removal activity, and how the removed materials will be disposed. One commenter said that timing of the low-head dam removal is important to protect aquatic organisms from sediment plumes generated by low-head dam removal. One commenter observed that the proposed NWP does not include a requirement to sample pre- and post-removal sediment loads. Several commenters said that PCNs for these activities should include site assessments of legacy sediments, which would describe the quality, quantity, and types of sediments stored behind the low-head dam. Several commenters stated that the PCN should also include a sediment assessment and sediment management plan and that the PCN should be coordinated with the applicable Clean Water Act section 401 agency.

The method, timing, and disposal practices for low-head dam removal should be determined on a case-by-case basis, and prospective permittees should describe these aspects of the proposed low-head dam removal in their PCNs. Paragraph (b)(4) of general condition 32 states that the prospective permittee may describe in the PCN proposed mitigation measures intended to reduce the adverse environmental effects

caused by the NWP activity. For activities authorized by this NWP, this may include a description of how the low-head dam will be removed to avoid or minimize adverse environmental effects. For example, the project proponent may propose to conduct the low-head dam removal during a specific time of the year to protect aquatic species. He or she may also propose to remove the low-head dam in phases, to control releases of water and sediment from upstream of the dam. The PCN should also identify where the removed materials will be deposited, to ensure that they will not be deposited in waters of the United States unless the district engineer authorizes, under separate authorization, that disposal those jurisdictional waters and wetlands.

This NWP does not include a requirement to sample pre- and post-sediment loads because it is limited to low-head dams that have little storage capacity. Therefore, there will be little sediment stored in the low-head dam impoundments. Removal of the low-head dam structure will restore sediment transport functions to the river or stream, and any adverse effects caused by the small amount of sediment released from the removal of the low-head dam will be temporary as water flows transport and distribute that sediment downstream.

As discussed above, we agree with commenters that stated that agencies with responsibility for implementing section 401 of the Clean Water Act are the appropriate authorities for deciding whether sediment releases comply with applicable water quality standards. When evaluating water quality concerns during the PCN review process, the district engineer should also consider water quality in a watershed context, specifically adverse effects to water quality caused by non-point sources of pollution and stormwater discharges in that watershed. Under the Clean Water Act, the states have the authority to

address non-point sources of pollution. Section 402(p) of the Clean Water Act addresses stormwater discharges. When considered in the context of non-point source pollution and stormwater pollution throughout the watershed that reaches the river or stream, the incremental contribution of pollutants associated with sediments that might be released as a result of low-head dam removal activities may be small.

One commenter said that these activities may result in a need to re-establish stream banks, and recommended that the PCN require information on how the applicant will re-establish a stable stream bank. Another commenter said that the PCN should describe how stream bank erosion will be prevented after the low-head dam is removed. One commenter requested that the PCN explain how the permittee will prevent streambank erosion once the water is drawn down.

After the low-head dam is removed, the river or stream channel upstream of the low-head dam will adjust to the change in hydrology and sediment transport. Downstream of the removed low-head dam, the river or stream channel will also adjust. For low-head dams with little storage function, there will likely be minor changes to river or stream channel bed morphology as the stream adjusts itself to a more natural water flow and sediment transport regime. The adjustment of a river or stream channel to low-head dam removal involves bed aggradation, bed degradation, bar development, and floodplain formation, to eventually resemble reference stream reaches (Bushaw-Newton et al. 2002). The low-head dam impaired those stream functions, and the removal of the low-head dam allows those functions to recover to the degree they can recover in a watershed that has changed during the period the low-head dam was in place (Doyle et al. 2005). After a dam is removed, vegetation rapidly colonizes the sediments exposed in

the former impoundment (Orr and Stanley 2006). If the project proponent wants to conduct discharges of dredged or fill material into jurisdictional waters and wetlands or other regulated activities to repair the river or stream channel and riparian areas, then he or she can request authorization under NWP 27 or other form of DA authorization. We have added a Note to this NWP to make it clear that NWP 27 or another form of DA authorization is required for those other river or stream restoration activities, because this NWP only authorizes regulated activities conducted to remove the low-head dam.

The PCN does not need to describe how the permittee will re-establish stable stream banks. Rivers and streams are dynamic systems and erosion and deposition are natural processes. If the project proponent or riparian landowners want to conduct bank stabilization activities, they may seek authorization under NWP 13, other NWPs, or other forms of DA authorization. In the Note we added to this NWP, we also added a sentence to inform permittees that bank stabilization activities may be authorized by NWP 13. In the PCN, the prospective permittee may describe mitigation measures to minimize the adverse effects of the low-head dam removal activity. Such mitigation measures could include phased removal of the dam structure, sediment management activities, or conducting the low-head dam removal activity to a time of year when aquatic organisms are not spawning.

One commenter stated that compensatory mitigation should be required for wetland losses resulting from changes in hydrology caused by the removal of a low-head dam. One commenter stated that the PCN for these activities should describe how the project proponent will offset any losses of riparian wetlands that were established by the presence of the low-head dam. One commenter suggested that upstream wetlands should

be monitored after the low-head dam is removed, to determine if there are adverse impacts to those wetlands. One commenter recommended adding a provision to this NWP similar to a provision of NWP 27 that states that compensatory mitigation is not required for those activities because they must result in net increases in aquatic resource functions and services. This commenter said such a provision is appropriate because any wetlands that were established as a result of the construction and operation of a low-head dam became established through losses of river and stream functions.

We have added a sentence to this NWP to state that, as a general rule, wetland compensatory mitigation is not required for low-head dam removal activities authorized by this NWP because these activities are restoration activities. Because the activities authorized by this NWP are intended to restore river and stream structure, functions, and dynamics, we do not believe that for most cases wetland compensatory mitigation should be required for losses of wetlands that were established as a result of the water stored by the low-head dam. However, there may be cases where the wetlands associated with the low-head dam impoundment provide high levels of ecological functions and services and the district engineer may determine that compensatory mitigation should be required to ensure that the wetland losses caused by the NWP activity result in no more than minimal adverse environmental effects. River and stream functions provide important ecological services, and one of the objectives of this NWP is to facilitate the restoration of those ecological functions and services. Wetlands that were present before the low-head dam was constructed may recover if local hydrology has not changed substantially since the low-head dam was constructed. For these reasons, the PCN should not include a wetland

compensatory mitigation proposal. There also does not need to be monitoring of upstream wetlands after the low-head dam is removed.

One commenter asked for clarification on how the Corps would determine whether a low-head dam is actually being used for its intended purpose. Many commenters said that the Corps should issue public notices for proposed low-head dam removals to solicit the views of upstream riparian landowners and to notify downstream landowners that additional water will be released in an effort to avoid property damage or hazards to people who use the river or stream for recreation.

This NWP only authorizes the removal of low-head dams. It does not authorize the construction or maintenance of low-head dams. Therefore, the current use of the low-head dam is not relevant to PCN review process because the district engineer is evaluating the reasonably foreseeable direct and indirect adverse environmental effects of the removal of the low-head dam. The NWP authorization would apply to the entity that has the authority to remove the low-head dam. That entity may be the dam owner or a federal, state, or local government agency if there is no private owner of the low-head dam. Riparian landowners upstream of the low-head dam should address their concerns to the owner of the low-head dam, or other party responsible for deciding whether to remove the low-head dam or conduct the repairs necessary to bring the low-head dam in compliance with current dam safety requirements.

We are limiting this NWP to the removal of low-head dams, which have little storage volume. There will be little additional water released downstream as the dam structure is removed. For low-head dams, storm flows pass over the dam crest (Tschantz and Wright 2011), and any damage to downstream properties is likely to be due to the

higher stream discharges that occur during, and for a period of time after, those storm events. The removal of low-head dams will improve public safety, because these dams present a safety hazard to users of small craft such as canoes and kayaks (Tschantz and Wright 2011). We believe that limiting this NWP to low-head dams helps ensure that adverse effects on downstream landowners will be no more minimal. The removal of other types of dams (e.g., storage dams or run-of-the-river dams), which may have substantial effects on downstream landowners, is more appropriately evaluated under the individual permit process.

Several commenters stated their support for requiring PCNs for all activities authorized by this NWP. One of these commenters said that the PCNs should be coordinated with the resource agencies.

We are requiring PCNs for all activities authorized by this NWP. There are a number of variables that need to be considered when evaluating dam removal activities, such as the physical characteristics of the dam, sediment loads, geomorphology of the stream system, hydrodynamics, and potential contaminants attached to fine sediments (Bushaw-Newton 2002). We believe that limiting this NWP to the removal of low-head dams reduces narrows the potential activity-specific expression of those variables so that these low-head dam removal activities will result in no more than minimal individual and cumulative adverse environmental effects. If the district engineer evaluates the activity-specific characteristics and determines the proposed activity 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. We are not requiring agency coordination for these PCNs, but district engineers have the

discretion to conduct agency coordination on a case-by-case basis if they need assistance from other agencies in making their decisions on whether to issue NWP verifications.

Proposed NWP A is issued as NWP 53, with the modifications discussed above.

NWP 54. Living Shorelines. This NWP was proposed as NWP B 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 the construction and maintenance of living shorelines. While some activities associated with living shorelines have been authorized by NWPs 13 and 27, the construction of living shorelines usually requires individual permits because the structures, work, and fills do not fall within the terms and conditions of the NWPs. Therefore, we proposed to issue this NWP to authorize the construction and maintenance of living shorelines, and make available to landowners another NWP that authorizes shore erosion control activities in coastal waters, to provide another option for streamlined NWP authorization to control coastal erosion.

We received many comments supporting the issuance of this NWP and many comments opposing the issuance of this NWP. Many commenters stated that they should have the right to protect their waterfront property from erosion using whatever techniques authorized by NWP that they choose as long as those activities will have no more than minimal adverse environmental impacts. Many commenters voiced their concerns that this new NWP would mandate the use of living shorelines over other approaches to bank stabilization. These commenters said that landowners should continue to be allowed to use bulkheads or revetments for shore erosion control if they want to protect their land in that way. Several commenters stated that this NWP should be withdrawn and that all bank stabilization and shore erosion control activities should require individual permits.

One commenter opposed this NWP stating that it has the potential to result in impacts to tribal treaty fishing rights.

We are issuing this NWP to provide general permit authorization for the construction of 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. Built infrastructure (e.g., bulkheads, revetments), natural infrastructure (e.g., fringe wetlands, oyster reefs, beach dunes), and hybrid infrastructure (e.g., living shorelines) to control erosion all have various strengths and weaknesses (Sutton-Grier et al. 2015, Table 1). The strengths of built shoreline infrastructure include long periods of experience in using these approaches, expertise in how to design and construct these features, understanding the level of protection provided by these structures, and their immediate effectiveness in controlling erosion after they are constructed (Sutton-Grier et al. 2015). Weaknesses of built shore protection infrastructure include an inability to adjust to changing environmental conditions (e.g., sea level rise), decreasing effectiveness over time as structures deteriorate, and negative impacts to coastal ecosystems on the project site (Sutton-Grier et al. 2015).

The strengths of living shorelines and other hybrid infrastructure shore protection approaches include the ability to use the best features of built and natural infrastructure, the provision of some ecological services other than erosion protection, the ability to design and implement innovative shore protection systems, and their ability to be used in coastal areas where there is not sufficient space for natural infrastructure (Sutton-Grier et al. 2015). Living shorelines may be an approach to adapting to sea level rise in coastal areas where there is space available for landward migration of fringe wetlands (Bilkovic

et al. 2016). The weaknesses of living shorelines and other hybrid infrastructure approaches include: the present lack of empirical data demonstrating their performance, the need for more studies on the most effective designs for these hybrid approaches, their inability to provide all the ecological services that natural infrastructure supplies, the limited expertise of coastal planners and developers with these approaches, their negative impacts on species diversity, and the lack of cost-benefit data for these approaches (Sutton-Grier et al. 2015).

In these NWPs, we are not establishing a preference over one approach to shore erosion control over other approaches because there are numerous factors that must be considered when choosing an appropriate shore erosion control technique. The appropriate approach for shore erosion control is dependent on a variety of factors, such as substrate characteristics, site topography, water depths near the shore, fetch, and the extent of coastal development in the area (Saleh and Weinstein 2016). The type of waterbody is also important.

We are limiting this NWP to coastal waters, which consists of estuarine and marine waters and the Great Lakes. Another consideration in determining the appropriate shore erosion technique is the lack of space on urban coasts where there is not enough area to implement hybrid or natural approaches to shore erosion control (Sutton-Grier et al. 2015). We have revised the definition of "living shoreline" in this NWP using information in the Systems Approach to Geomorphic Engineering (SAGE) publication entitled: "Natural and structural measures for shoreline stabilization"[2] which was published in 2015 by the National Oceanic and Atmospheric Administration (NOAA)

[2] http://sagecoast.org/

and the U.S. Army Corps of Engineers (USACE). According to this publication, living shorelines are only applicable in coastal waters with low- to mid-energy waves, small fetch, and gentle slopes. Landowners and other entities that identify a need to protect their property and infrastructure from erosion can request authorization (if the proposed activity requires a PCN) under the NWP that is appropriate for the erosion control approach they propose to use.

There are other factors to consider when evaluating appropriateness and feasibility of living shorelines (Bilkovic et al. 2016). The construction of a living shoreline may require grading the riparian area and removing riparian vegetation (Bilkovic et al. 2016), which provides a number of ecological functions and services (NRC 2002). The removal of that riparian vegetation may not be consistent with local water quality or habitat protection requirements (Bilkovic et al. 2016). As an alternative to grading the riparian area and removing the vegetation, the living shoreline components may be constructed further into the waterbody, which may require variances from state or local tidewater regulations and impair navigation (Bilkovic et a. 2016). Finally, the construction of living shorelines in subtidal waters can infringe on state subaqueous lands (Bilkovic et al. 2016) and affect the finfish, shellfish, and other resources that use those tidewaters and submerged lands.

We have added a Note to this NWP to inform prospective permittees that bank stabilization activities outside of coastal waters, such as bioengineering and vegetative stabilization in inland rivers and streams, may be authorized by NWP 13. This NWP authorizes the construction and maintenance of living shorelines, as long as those activities result in no more than minimal individual and cumulative adverse

environmental effects. 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 (see also paragraph (a) of general condition 23, mitigation). 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. Activities authorized by this NWP must comply with general condition 17, tribal rights. Under that general condition, NWP activities cannot cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.

Several commenters said that this NWP should be withdrawn and that these activities should be authorized by modifying NWP 13. Many commenters expressed support for this proposed NWP because they are concerned that it is easier to obtain NWP 13 authorization than authorization to construct a living shoreline. These commenters said that under the current NWPs, living shorelines usually require individual permits, which discourage use of living shorelines as an alternative to hardened bank stabilization measures such as bulkheads, seawalls, and revetments. Several commenters said they support a new NWP that reduces the amount of time to obtain DA authorization for these activities. These commenters acknowledged the shorter timeframes in which an NWP authorization can be provided. One commenter noted that the issuance of this NWP would relieve regulatory burdens and support landowner preferences for the aesthetics and ecosystem services of living shorelines.

We have determined that it would be more appropriate to issue a separate NWP to authorize the construction and maintenance of living shorelines. Living shorelines are effective in specific areas of coastal waters, while NWP 13 authorizes a variety of bank stabilization approaches in a range of different categories of waters, from headwater streams to small lakes, larger rivers, high energy coastlines, and open ocean waters. The PCN thresholds differ between NWPs 13 and this new NWP because bank stabilization activities authorized by NWP 13 can often be constructed with small amounts of fill. On the other hand, living shorelines require larger amounts of fill to achieve desired grades for wave dissipation and vegetation establishment to reduce erosion, as well as fill structures such as sills to protect the sand fills and vegetation. If we had modified NWP 13 to authorize living shorelines, most proposed living shorelines would require written waivers from district engineers because they would exceed the limit of one cubic yard of fill material per running foot. Under this new NWP, written waivers from district engineers are only required if the structures or fills extend more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes, or if more than 500 linear feet of shoreline as measured along the bank is to occupied by the proposed living shoreline. Despite the differences in PCN thresholds, this NWP provides general permit authorization for the construction and maintenance of living shorelines. During FY 2106, the average (mean) evaluation time for NWP verifications was 40 days and the mean evaluation time for standard individual permits was 217 days.

Several commenters stated that living shorelines are not appropriate in the Great Lakes or other inland waters, especially inland lakes because long-term fluctuations of lake levels and major impacts of ice on the shorelines of these lakes.

We have modified the definition of "living shoreline" in the NWP to state that it can be used to authorize living shorelines in the Great Lakes. Living shorelines are not appropriate for streams, rivers, small lakes, and other inland waters. Vegetative stabilization and bioengineering may be used in inland waters to control erosion, and we have added a Note to this NWP to inform potential users of this NWP of the availability of NWP 13 to authorize those activities. If ice is likely to periodically damage or destroy the living shoreline and cause frequent maintenance and repair activities to be conducted after ice seasons, then other approaches to shore erosion control might be more appropriate for those sites.

Several commenters said that the NWP should use NOAA's definition of living shoreline. One commenter stated that under the certain conditions living shorelines can be used in higher energy shorelines. Another commenter said that properly engineered living shorelines can be used in any environment. One commenter recommending deleting the terms "low-energy" and "mid-energy" from the definition.

As discussed above, we have modified the definition of "living shoreline" to incorporate the site characteristics amenable to living shorelines that are identified in the 2015 NOAA-USACE SAGE publication that describes nature-based measures for shoreline protection. For the definition used for this NWP, we have used some concepts from NOAA's 2015 guidance on considerations for the use of living shorelines. We have utilized NOAA's definition with respect to a living shoreline being comprised mostly of native material, and incorporating living materials such as marsh plants with or without hard structures such as oyster reefs or stone sills.

We have deleted the following sentence from the first paragraph of the proposed NWP B: "'Living shoreline' is a broad term that encompasses a range of shoreline stabilization techniques along estuarine coasts, bays, sheltered coastlines, and tributaries." This sentence conveys an expansive view of living shorelines and where they are appropriate for use, and could lead to landowners and other entities considering the use of living shorelines on sites where they will not be appropriate or effective and where other approaches to erosion control should be used instead. We do not agree that living shorelines can be used in high energy coastlines. For those sites, substantial amounts of hard structures would be needed to protect the shoreline, and it is doubtful that there would be much of a sustainable living component in that higher energy erosive forces (Pilkey et al. 2012). We are not deleting the term "low- to mid-energy" from the definition because it is a critical component of the definition and it helps prospective permittees better understand where living shorelines are appropriate and feasible.

One commenter asked whether an oyster reef, by itself, could serve as the biological element of a living shoreline. This commenter said the text of this NWP should clarify that "reef structures" refers to oyster reefs. One commenter stated that this NWP should authorize restoration of sandy beaches in front of existing bulkheads.

An oyster reef can provide the biological element of a living shoreline. We have modified the first paragraph of this NWP to state that the reef structures may be inhabited by oysters or mussels. We have also modified paragraph (e) to refer to oyster or mussel reef structures. Sandy beaches restored in front of existing bulkheads may not be sustainable because the wave energy reflected from the bulkhead may erode the sand.

Many commenters said that living shorelines are not appropriate for man-made hydropower reservoirs where water levels are determined by the operator of the reservoir. Many commenters stated that living shorelines are not appropriate for shores subject to waves from boats, wind, and storms and that bulkheads and riprap are the appropriate erosion control measures for these types of sites. Several commenters opined that living shorelines are impractical for any waterbody that does not have a "no wake" restriction. Several commenters requested clarification on which other lakes and inland waters this NWP could be used. One commenter said this NWP should not authorize activities in inland freshwater lakes or rivers other than the Great Lakes and that NWPs 13 and 27 should be modified to allow for natural shoreline stabilization in inland waters.

We have modified the definition of "living shoreline" to make it clear that living shorelines are limited to coastal waters, including the Great Lakes. This NWP cannot be used to authorize erosion control activities in other lakes or inland waters, including hydropower reservoirs. In coastal waters, living shorelines may be successfully used for shorelines exposed to short fetches and subject to low- to mid-energy waves, including waves generated by moving vessels, wind, and storms. Landowners may seek advice from contractors and consultants to determine which shore erosion control approaches would be most appropriate and effective for their waterfront properties. Living shorelines can be effective for coastal shorelines subject to low to moderate boat wakes. We do not believe further clarification is necessary regarding which types of lakes living shorelines can be used because we are limiting this NWP to the Great Lakes and other coastal waters. We have added a Note to this NWP to notify prospective permittees of the availability of NWP 13 to authorize bank stabilization activities, including vegetative

stabilization and bioengineering, in waters that are not coastal waters. Nationwide permit 27 only authorizes aquatic habitat restoration, enhancement, and establishment activities and does not authorize bank stabilization activities per se. Please see the preamble discussion of the modifications we made to NWP 27 to help ensure that it only authorizes aquatic habitat restoration, enhancement, and establishment activities.

One commenter requested justification of the following sentence, which appeared in the preamble of the proposed rule (81 FR 35206): "Living shorelines maintain the continuity of natural land-water interface and provide ecological benefits which hard bank stabilization structures do not, such as improved water quality, resilience to storms, and habitat for fish and wildlife." This commenter stated that the statement should be removed or modified to improve its accuracy.

There is a growing number of studies and other documents that explain the features of living shorelines and the ecological services or benefits they can provide. Living shorelines, such as marsh-sill features, are nature-based measures to control shore erosion that provide some degree of ecological functions and services through fringe wetlands or shellfish reefs that are integral components of those shore protection measures (NOAA-USACE 2015, Bilkovic and Mitchell 2013, Gittman et al. 2016). A bulkhead or seawall results in an abrupt barrier between aquatic and terrestrial environments (Dugan et al. 2011, Peterson and Lowe 2009). Both hard shore protection structures and living shorelines provide protection against storms and offer varying degrees of resilience, and sills and breakwaters and protect shorelines while continuing to allow fish and wildlife to access intertidal areas. Bulkheads, revetments, and seawalls do little to improve water quality, except to reduce sediment loads to waterbodies.

Constructed fringe marshes along estuarine shorelines sequester carbon and nitrogen as those fringe wetlands develop over time (Craft et al. 2003).

One commenter recommended changing the 30-foot limit in paragraph (a) to 70 feet. Another commenter said the 30-foot limit should be increased to 35 feet, or use a 1/2-acre limit instead. A third commenter said that either the 30-foot limit should be eliminated or measured from the mean low water shoreline. This commenter recommended using the mean low water shoreline in tidal waters because using the mean high tide line would often require oyster reef components of living shorelines to be installed in intertidal waters rather than subtidal waters. One commenter said the proposed 30-foot limit is appropriate for the Great Lakes. One commenter said that the proposed 30-foot limit should be measured from the highest astronomical tide determined by the current National Tidal Datum Epoch. One commenter suggested replacing the 30-foot limit with a provision that limits the placement of structures and fills into waters less than 3 feet deep at mean low water in tidal waters or the ordinary high water elevation in non-tidal waters. Another commenter recommended authorizing living shorelines in regions with tidal ranges between 4 and 8 feet. The 4-foot tidal range would allow encroachment to 45 feet from the mean high water line and the 8-foot tidal range would allow encroachment up to 85 feet from the mean high water line.

We have changed paragraph (a) to measure the 30-foot encroachment from the mean low water line instead of the mean high water line in tidal waters. Since tidal range is not an issue in the Great Lakes, we are retaining the ordinary high water mark as the shoreline from which the 30-foot limit would be applied. This change should reduce the number of waivers needed by project proponents to construct oyster or mussel reef

structures in subtidal waters. Using the highest astronomical tide to measure the 30-foot limit would result in nearly every living shoreline requiring a written waiver of that limit from the district engineer. We believe that using a linear foot limit for encroachments into the waterbody will be more effective at ensuring that these activities result in no more than minimal adverse environmental effects. For a narrow waterfront property an acreage limit could allow substantial encroachment into the waterbody. Using tidal ranges or water depths to limit encroachments of structures and fills into a waterbody would not be an effective approach for ensuring no more than minimal adverse environmental effects because substantial areas of the waterbody could be filled if it has shallow water depths that extend over a substantial distance.

One commenter said the 30-foot limit for this NWP should be changed to require fills to extend no more than 5 feet waterward from the edge of natural wetlands or to the mid-tide depth contour, whichever is deeper. This commenter also recommended that along shores where no wetlands exist, the landward edge of the sill should not extend greater than 30 feet waterward of the mean high water mark of tidal waterbodies or the ordinary high water mark of n non-tidal waterbodies. One commenter stated that grading steeper banks up to 30 feet into the water in an attempt to establish vegetation is likely to have the effect of altering the natural shoreline and extending the uplands. One commenter asked whether this NWP authorizes fills, especially sand fills, landward of sills, breakwaters, or other fill structures.

Changing the 30-foot limit to a 5-foot limit measured from the edge of existing wetlands would not be practical because there might not be vegetated wetlands along the existing shore, or the wetland vegetation might be sparse and the shore would need to be

filled with sand and graded to construct a marsh fringe. The 30-foot limit, as measured from mean low water in tidal waters or the ordinary high water mark in non-tidal waters, is a simpler approach than trying to establish different limits based on the presence or absence of an existing marsh. As stated in the definition of "living shoreline" provided in the final NWP, living shorelines are constructed along shores with gentle slopes. Living shorelines may be less desirable to landowners with waterfront property that has steep slopes or bluffs if substantial grading of nearshore lands is necessary to install a living shoreline. We have modified paragraph (a) to include sand fills along with sills, breakwaters, or reefs, to make it clear that this NWP authorizes sand fills landward of sills, breakwaters, or reefs. Such fills may be necessary to achieve the proper shore elevations for the establishment of a wetland fringe, either through plantings or natural recruitment.

One commenter said that the 30 foot and 500 linear foot limits are too prescriptive, given the variability of shorelines across the United States. This commenter said that these limits should be determined through the regional conditioning process.

We are allowing the 30-foot and 500 linear foot limits to be waived by the district engineer 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 has to issue a written determination with a finding that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. Division engineers can reduce these 30-foot and 500 linear foot limits through the regional conditioning process. If these limits and the ability to waive these limits make the use and administration of this NWP challenging in a particular geographic region, the district

engineer can issue a regional general permit with different limits and procedures than this NWP and its general conditions.

One commenter recommended removing the 500 linear foot limit to encourage landowners and community groups to collectively implement living shorelines in a more cost effective manner. One commenter stated that activities in the Great Lakes that are over 500 feet long should require individual permits. One commenter stated that there should be no length limit on shoreline projects as long as those activities comply with state Coastal Zone Management Act (CZMA) policies.

The 500 linear foot limit does not preclude groups of adjoining landowners from working together to construct living shorelines at the same time, and working out arrangements with contractors to lower costs. For a proposed living shoreline in the Great Lakes that exceeds 500 feet in length, the district engineer will review the PCN and coordinate that PCN with the resource agencies. If the district engineer makes a written determination that the proposed living shoreline will result in no more than minimal individual and cumulative adverse environmental effects, he or she will issue an NWP verification with or without additional conditions. The criteria under which states can issue CZMA consistency concurrences may be different from the "no more than minimal adverse environmental effects" requirement for NWPs and other general permits. States can impose conditions on these activities through their CZMA consistency determinations. To be authorized by this NWP, these activities require either CZMA consistency concurrences or presumptions of concurrence (see general condition 26, coastal zone management).

One commenter stated that the length limit should be defined as the total shoreline length of an activity minus any breaks in the treated shoreline. In other words, if the total length, minus the length of breaks, is greater than 500 feet, then a waiver would be required. One commenter said there should be no linear foot limits for this NWP. Several commenters asked how the length of a proposed activity would be calculated. One commenter suggested that as technology improves with the use of living shorelines, the 500 linear foot limit should be increased.

The 500 linear foot limit applies to the entire length of the treated shoreline. The treated shoreline is the footprint of the structures and fills for the living shoreline. If there are segments of the shore where no living shoreline will be constructed and those shore segments will be left in their current condition, then those segments are not counted towards the 500 linear foot limit. The 500 linear foot limit is necessary to ensure that these activities result in no more than minimal individual and cumulative adverse environmental effects. The waiver provision for this limit adds flexibility to the NWP, to allow district engineers to authorize activities that exceed the 500 linear foot limit without going through the individual permit process. To determine whether the 500 linear foot limit is exceeded, the length of treated shoreline for a single and complete project would be added. The 500 linear foot limit will be reevaluated during future rulemakings to reissue this NWP.

Several commenters recommended adding terms to this NWP to limit the use of oysters, mussels, and vegetation in living shoreline projects to native species. One commenter said that the NWP should allow natural processes to vegetate the living shoreline, instead of requiring vegetation to be planted. One commenter said that this

NWP should authorize the use of mud for substrate to establish vegetation. Many commenters stated that this NWP should specify a minimum amount of living material to be required to meet the definition of living shoreline. One commenter asked for a definition of "native material."

We have revised paragraph (d) of this NWP to state that native plants appropriate for site conditions, including salinity, must be used for living shorelines that have tidal or lacustrine fringe wetlands, if the site is planted by the permittee. Natural revegetation is an effective approach to establishing or re-establishing coastal fringe wetlands, as long as the appropriate sediment elevations are provided for the development of the fringe wetland (Mitsch and Gosselink 2015, Chapter 18). In different areas of the country, various oyster and mussel species have been introduced into waterbodies and provide important ecosystem functions and services. If those non-native molluscan species are already the waterbody, there is not likely to be a substantive benefit to prohibiting their use in reefs for living shorelines. Mud is not an appropriate substrate for living shorelines, because it will be rapidly transported by tides, waves, and currents. For constructed marshes in estuaries, coarse grain sands are often used to reduce the likelihood of erosion of the substrate used for marsh plantings. The term "native material" generally applies to the plant materials that may be used for living shorelines. It may also refer to other organic materials such as oyster shell, coir logs, or wood that may be used for the construction and maintenance of living shorelines (Bilkovic et al. 2016).

One commenter said that the NWP should allow the use of beneficial, non-native structural material as long as that material does not pose a risk to wildlife. One

commenter stated that if fill material is used the fill material must meet water quality standards and support the target vegetation. One commenter stated that sills can be constructed of native material found in a particular part of the country or use other local native materials that may have higher biological value than traditional slab concrete. This commenter also said that placement of clean, soft, dredged sediment can be beneficially reused for living shorelines and placed in coastal areas that have subsided.

The use of non-native structural materials may be necessary for some living shorelines. General condition 6 requires that suitable materials be used for NWP activities. Sills are usually constructed with stone, rather than concrete, slabs. If dredged material is suitable for the construction or maintenance of living shorelines then that material may be used.

One commenter stated that this NWP should require planting plans that show that no invasive species will be planted. One commenter said that this NWP should allow natural recruitment to establish the wetland fringe, instead of requiring the permittee to install plants for the wetland fringe. One commenter suggested adding a condition to require that all habitats altered or created by a living shoreline be free from non-native invasive plants for a minimum of 5 years. One commenter said this NWP should have a condition prohibiting the introduction of non-native species.

Paragraph (d) requires the use of native plants appropriate for current site conditions, including salinity, to be used for living shorelines that will have a wetland fringe, if the permittee wants to install plants to facilitate the development of the wetland fringe. As discussed above, the permittee may also allow natural recruitment to vegetate

the wetland fringe for the living shoreline. A condition requiring permittees, over a five-year period, to remove any non-native plants that colonize a living shoreline is not reasonably enforceable, so adding such a condition would be contrary to the Corps' policy for permit conditions at 33 CFR 325.4(a). There have been a number of non-native species introduced to coastal waters over time. Those non-native plants and animals have naturalized and are as likely to occupy living shorelines as they have established themselves in a variety of coastal habitats.

Several commenters stated that breakwaters and groins should not be authorized by this NWP. One commenter requested clarification of what constitutes an artificial reef. One commenter said that this NWP should include a design standard for sills. This commenter expressed concern that not having a design standard would result in hardening of the shoreline in a manner inconsistent with the intent of the proposed NWP.

Breakwaters and groins may be a necessary component of living shorelines in coastal environments subject to higher energy waves, boat wakes, and currents. For the purposes of this NWP, a reef structure may consist of oyster or mussel bags, or other fill structures occupied by oysters or mussels. We do not use the term artificial reef, to avoid confusion with artificial reefs constructed for other purposes under 33 CFR 322.5(b). There are a variety of approaches for constructing living shorelines, so it would not be appropriate to establish a national design standard in an NWP that can be used in coastal waters across the country.

One commenter said that many living shorelines are armored shorelines given a different name. This commenter stated that living shorelines have substantial adverse

effects on estuarine beaches by altering their habitat characteristics and decreasing their ability to support estuarine communities. This commenter recommended requiring minimal use of larger hard, engineered structures, to prevent unneeded and damaging hard stabilization of these shorelines.

We have added a new paragraph (f) to this NWP to require sills, breakwaters, and other structures that are needed to protect the living shoreline's fringe wetlands to be the minimum size necessary to protect those wetlands. New paragraph (f) follows the recommendation in Bilkovic et al. (2016) which states that engineered structures should only be used when they are needed to support the wetland fringe and beach habitat of the living shoreline. Engineered structures such as sills and breakwaters should not be oversized relative to the living components (Bilkovic et al. 2016, Pilkey et al. 2012). Paragraph (a) of general condition 23, mitigation, also requires NWP activities, including the activities authorized by this NWP, to be designed and constructed to avoid and minimize permanent and temporary adverse effects to the maximum extent practicable on the project site.

One commenter remarked that if the proposed activity would compromise the flow of water, it should require an individual permit. One commenter stated that proposed paragraph (f) should require that any temporary impacts to living shorelines resulting from seawall repair or replacement should be exempt from mitigation requirements, as long as the area is restored after that seawall is repaired or replaced.

Living shorelines, especially living shorelines with sills or breakwaters, will have some effects on water flows because they are constructed to decrease the energy of

incoming waves and other erosive water flows. Paragraph (f) of the proposed NWP has been redesignated as paragraph (g). This NWP requires that living shorelines be designed, constructed, and maintained so that they only have minimal adverse effects on water flows between the waterbody and the shore. Repair activities do not generally require compensatory mitigation. If a bulkhead or seawall is located landward of a living shoreline, and repair activities will have temporary impacts on the living shoreline, then the living shoreline should be repaired as well.

Several commenters said that paragraph (g) of the proposed NWP should be removed. One commenter stated that living shorelines should not be authorized in special aquatic sites.

We have removed the requirement to obtain a waiver for discharges of dredged or fill material into special aquatic sites. All activities authorized by this NWP require PCNs. Pre-construction notifications for this NWP require delineations of special aquatic sites (see the "Notification" paragraph of this NWP), as well as a delineation of other waters and wetlands on the project site (see paragraph (b)(4) of general condition 32). The construction and maintenance of living shorelines in special aquatic sites can be authorized by this NWP, as long as the permanent and temporary impacts to those special aquatic sites are minimized to the maximum extent practicable, and the district engineer determines that the adverse environmental effects are no more than minimal.

One commenter suggested adding language to the NWP to clarify that the maintenance of structures cannot increase the size of those structures beyond what was originally authorized. One commenter asked for clarification of the duration of this NWP

and how that duration applies to long-term maintenance and repair activities. One commenter said paragraph (h) in the proposed NWP should be eliminated.

General condition 14 requires activities authorized by NWP to be properly maintained. The requirement for proper maintenance is emphasized by paragraph (h) of this NWP, because living shorelines require periodic maintenance to continue to serve as living shorelines. After storm events, it may be necessary to repair stone sills, breakwaters, reef structures, sand fills for fringe wetlands, and other components of the living shoreline. We have included maintenance activities in this NWP so that any required maintenance can be conducted under the authorization provided by this NWP. The NWP authorization applies for the length of time the authorized structures and fills are in place. If the landowner or other responsible party no longer wants to maintain the living shoreline, the structures and fills should be removed and the affected area restored.

Several commenters stated that beach nourishment to control erosion should be authorized by this NWP. We have not included beach nourishment in this NWP because they 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. This NWP does not authorize those beach restoration or replenishment activities because those types of shore protection approaches do not include a living component as required by the definition of "living shoreline." For a living shoreline, 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 this NWP we do not specify a minimum percent cover for vegetation, if the living shoreline

authorized through an NWP 54 verification is designed to have a wetland fringe. In addition, we recognize that some movement of sand fill may be necessary to maintain the living shoreline. We have also revised paragraph (h) to make it clear that for maintenance activities the permittee has the option of planting vegetation or allowing natural recruitment of vegetation.

Many commenters said that the PCN requirements should be changed to provide a more streamlined authorization process. Many commenters supported the proposed PCN thresholds. Several commenter stated that PCNs should not be required for activities authorized by this NWP. Several commenters said that the PCN thresholds should be changed to make them equivalent to the PCN thresholds for NWP 13. Several commenters stated that all activities authorized by this NWP should require PCNs because living shorelines result in adverse environmental effects that need to be evaluated on a case-by-case basis to ensure that they are no more than minimal, individually and cumulatively. One commenter supported the proposal to not require PCNs for maintenance activities, but stated that if native corals or other organisms settle on the structure to be repaired, then a PCN should be required and the relocation of corals should be required.

We are requiring PCNs for all activities authorized by this NWP because living shorelines usually require substantial amounts of fill material, and the structures and work may extend 30 feet into the waterbody, with potential impacts to navigation and public resources in submerged lands. Living shorelines often convert subtidal habitats to intertidal habitats, so there are ecological tradeoffs (e.g., Bilkovic and Mitchell 2013) that need to be considered by district engineers when making their decisions on whether to

issue NWP verifications. As stated elsewhere in this final rule, NWP 13 activities can often be constructed with minor amounts of fills in waters of the United States, whereas activities authorized by this new NWP typically require larger amounts of fill to construct fringe wetlands (Bilkovic and Mitchell 2013), protective structures such as sills and breakwaters, and oyster or mussel reefs. We have retained the provision that does not require PCNs for maintenance activities. If the proposed maintenance activity might affect Endangered Species Act (ESA) listed species or designated critical habitat, including ESA-listed coral species, and the prospective permittee is a non-federal permittee, then a PCN is required under general condition 18, endangered species.

Several commenters suggested that the PCN require information on the types of materials to be used for the proposed activity and to specify the height and slope of the proposed activity. One commenter said that the PCN should include information on how the methods and timing of construction may affect threatened or endangered species. One commenter said that the PCN should include a detailed biological assessment of the habitat that is proposed to be altered by the proposed living shoreline. One commenter stated that the PCN should include an alternatives analysis and explain why installation of a living shoreline is needed to control erosion.

The PCN must include the information required in paragraph (b)(4) of general condition 32. The PCN must include a description of the proposed living shoreline. We also recommend that the PCN include sketches or plans of the proposed NWP activity. If, during the review of the PCN, the district engineer determines that the proposed activity may affect ESA-listed species or designated critical habitat, then he or she will conduct ESA section 7 consultation. The formal or informal ESA section 7 consultation

may result in permit conditions that impose time-of-year restrictions and other conditions to protect listed species and critical habitat. Those consultations may also result in conditions that affect the construction methods to avoid or minimize impacts to listed species or critical habitat. We do not believe a detailed biological assessment of the potentially impacted coastal habitat is required. If ESA section 7 consultation is required for the proposed activity, then a biological assessment or biological evaluation will be prepared for that formal section 7 consultation. If informal section 7 consultation is conducted and a written concurrence is issued by the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service, the district engineer will add applicable conditions to the NWP authorization that were necessary to get the written concurrence for the informal consultation request. Activities authorized by NWPs do not require an alternatives analysis (see 40 CFR 230.7(b)(1)). However, 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.

Many commenters expressed support for the proposed waiver provisions and many other commenters stated their opposition to the proposed waiver provisions. One commenter said that waivers not be issued for any of these activities. This commenter stated that if waivers are included, they should be capped at 50 feet for structures or fills extending into the water from the mean high tide line or ordinary high water mark. This commenter also recommended capping the length along the shore to no more than 750 linear feet. Proposed activities exceeding these thresholds would require individual permits. This commenter also said there should be no waivers for discharges in special

aquatic sites. One commenter stated that waiver requests should be coordinated with other natural resource agencies prior to issuing those waivers.

We have retained the waiver provisions for the 30-foot limit for structures and fills extending into the waterbody, and for the 500-foot limit. The waivers provide the district engineer with the flexibility to authorize a living shoreline activity by NWP if he or she determines in writing, after coordinating the PCN with the resource agencies, that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. We do not believe that caps on waivers are necessary for the numeric limits in paragraphs (a) and (b) because of the requirement for the district engineer to issue a written waiver determination. A proposed activity that requires a waiver of one or both of these limits is not authorized unless the district engineer issues that written determination and an NWP verification is issued to the permittee. If the district engineer does not issue that written waiver determination, then the waiver is not granted and an individual permit is required. As discussed above, we have removed the provision requiring waivers for discharges in special aquatic sites. Paragraph (d)(2)(iv) of general condition 32 states that requests for waivers for this NWP require agency coordination.

One commenter asked how it would be determined if a living shoreline is appropriate for a particular location. Several commenters suggested rewording the text of this NWP to include shoreline restoration, shoreline softening, and shoreline enhancement projects. One of these commenters said the Corps should collect data on all shoreline stabilization projects to share with applicants examples of successful projects. Two commenters stated that there should be an evaluation period for new living

shorelines to determine their effectiveness. One commenter suggested requiring multi-landowner projects that would result in large-scale living shorelines.

The project proponent determines whether to propose a living shoreline to control erosion at the coastal shoreline. The project proponent may hire a consultant or contractor to evaluate options for controlling erosion and determine which approach would satisfy the project proponent's needs. A coastal waterfront property owner may feel safer with a bulkhead, seawall, or revetment (Popkin 2015). The district engineer may offer advice to the project proponent on potential alternatives for controlling erosion at the site (see 33 CFR 320.4(g)(2)). Shoreline restoration, shoreline softening, and shoreline enhancement projects likely mean different things to different people, so we have not changed the text of this NWP to incorporate those terms. For example, shoreline restoration may be an ecological restoration activity authorized by NWP 27 because it returns structure, functions, and dynamics to a shoreline that has been damaged or degraded by human activities. Shoreline softening may mean the removal of a bulkhead, seawall, or revetment and replacing those hard structures with a tidal fringe wetland protected by stone sills. Shoreline enhancement projects may be actions taken to improve ecological functions performed by the shore at a particular site. These activities are likely to serve different purposes and authorization by other NWPs may be appropriate, or those activities may require other forms of DA authorization.

It would be more appropriate for consultants and contractors to share information on successful living shoreline activities with landowners and other entities that are considering using living shorelines to protect their property or infrastructure. As this NWP is used over the next five years, we expect to receive feedback from Corps districts,

permittees, contractors, consultants, and other interested parties. That feedback will be considered as we develop the proposed rule for the 2022 NWPs. There is also likely to be evaluations conducted by scientists and other academics on the effectiveness and long-term sustainability of living shorelines. Adjoining landowners can work together to plan, design, and implement living shorelines.

One commenter stated that this NWP should require the use of qualified consultants and contractors. Another commenter suggested that this NWP require that the work to design the proposed living shoreline be done under the supervision of a certified ecological designer. Several commenters stated that Corps districts should work with local designers and agencies to determine the availability of living shoreline contractors in their geographic areas of responsibility. Several commenters said that this NWP should require consultation with local watershed planning entities, water supply entities, or other local government agencies to ensure that proposed NWP activities do not interfere with a local level project or issue. One commenter said that living shorelines should not be built on undeveloped shorelines. One commenter stated that this NWP should require the installation of reflectors or other types of markers at intervals along the living shoreline. One commenter said that the PCN should require a monitoring plan for these activities.

An NWP cannot specify qualifications for consultants and contractors. Project proponents need to do their due diligence in selecting a consultant or contractor. We cannot add terms to this NWP to require the living shoreline to be designed and constructed under the supervision of a certified ecological designer. General condition 7, water supply intakes, states that no NWP activity may occur in the proximity of a public

water supply intake, unless it is needed to repair or improve that intake or for adjacent bank stabilization. Authorization of the construction and maintenance of living shorelines by this NWP does not eliminate the need for the permittee to obtain other required federal, state, or local permits, approvals, or authorizations that are required by law. If the shoreline is undeveloped, then there might not be a need for a living shoreline to control erosion. However, if the parcel in question is zoned for development, it may be developed in the near future and the developer or landowner might request NWP authorization for a living shoreline in advance of constructing a house or other structure on that parcel. Paragraph (b) of general condition 1, navigation, requires for authorized activities the installation of any safety lights or signals prescribed by the U.S. Coast Guard. District engineers can add conditions to this NWP to require monitoring of the living shoreline to ensure that it is developing the intended features. However, we do not believe a monitoring plan should be required for all PCNs for these activities.

One commenter suggested adding a provision to this NWP that requires living shorelines to be designed, constructed, and maintained for the specific lifetime of the project. This commenter stated that this NWP should authorize temporary fills for the construction of these activities, similar to the language in NWP 13. One commenter stated that working at low tide should not be a requirement of this NWP. One commenter requested a definition of the term "shoreline." One commenter stated that this NWP should require the permittee to provide assurances that the structures are sound and that they will not pose hazards to navigation.

Paragraph (h) of this NWP requires the authorized activity to be properly maintained. We have modified this paragraph as follows: "The living shoreline must be

properly maintained, which may require periodic repair of sills, breakwaters, and reefs, or replacing sand fills and replanting vegetation after severe storms or erosion events. This NWP authorizes those maintenance and repair activities, including any minor deviations necessary to address changing environmental conditions." These changes are intended to authorize repair activities, plus minor deviations needed to response to changing environmental conditions such as an increase in sea level at the site, so that the living shoreline can continue to function as a living shoreline. We have removed the phrase "to the original permitted conditions" that was in the proposed paragraph (h) to recognize the dynamic nature of coastal shorelines and the likely need to adjust living shoreline projects over time as environmental conditions change.

All activities authorized by this NWP require PCNs, so using NWP 33 to authorize temporary structures or fills that are not covered by this NWP would not place any additional burdens on prospective permittees. Their PCNs would specify this NWP and NWP 33 as the NWPs for which they are seeking verification from the district engineer. We have not added any terms and conditions that require regulated activities to be conducted at low tide. A shoreline is where a land mass intersects with a waterbody. That intersection may be identified in a number of ways, such as a high tide line, mean high tide line, mean low tide line, or other criteria. Activities authorized by this NWP must comply with general condition 1, navigation. Under that general condition, the Corps may require the permittee to remove the authorized structures or work (see paragraph (c) of that general condition).

One commenter stated that if the proposed living shoreline will impact one resource type and replace it with another resource type, the proposed activity should only

qualify for this NWP if the district engineer determines the resource type substitution represents a desirable ecological outcome for the affected system. One commenter said that this NWP should not authorize activities in areas with Endangered Species Act listed species or designated critical habitat. One commenter asked for clarification whether mitigation is required for activities authorized by this NWP. One commenter stated that mitigation should not be required for living shorelines even if those activities result in impacts greater than 1/10-acre, because these activities result in net ecological gains through enhancement. One commenter said that this NWP should not be used by a permittee to provide compensatory mitigation for another activity.

All activities authorized by this NWP require PCNs, to provide district engineers the opportunity to review proposed activities to ensure that they result in no more than minimal individual and cumulative adverse environmental effects. We recognize that these activities will require ecological tradeoffs, as shallow water habitats are filled to construct features that reduce erosion, even though those features will have some living component such as fringe wetlands or oyster or mussel reefs and provide some ecological functions and services. Activities authorized by this NWP must comply with general condition 18, endangered species. District engineers will review PCNs and determine whether the proposed activities may affect ESA-listed species or designated critical habitat. For those activities that district engineers determine may affect listed species or designated critical habitat, they will conduct formal or informal ESA section 7 consultations.

District engineers may require mitigation for activities authorized by this NWP. If the district engineer reviews a PCN and determines that the proposed activity will

result in more than minimal adverse environmental effects, he or she will notify the project proponent and offer the applicant an opportunity to submit a mitigation proposal. If the applicant submits a mitigation proposal that is acceptable to the district engineer, then the district engineer will add conditions to the NWP authorization to require implementation of the mitigation proposal. Living shorelines are likely to provide some ecological functions and services, but they might not produce net gains because of the ecological tradeoffs that occur as a result of the structures and fills for living shorelines causing changes to plant and animal communities in nearshore estuarine waters (e.g., Gittman et al. 2016, Bilkovic and Mitchell 2013, Pilkey et al. 2012). Those changes may be beneficial for some organisms and harmful to other organisms.

The construction and maintenance of a living shoreline could be considered by a district engineer to be a mitigation measure, especially if the project proponent proposes to replace a bulkhead, seawall, or revetment with a living shoreline to provide some additional ecological functions and services at a coastal site. But a living shoreline would not be considered compensatory mitigation because its primary purpose is shore erosion control, not aquatic resource restoration, enhancement, or preservation to offset unavoidable losses of jurisdictional waters or wetlands.

One commenter stated that the text of this NWP should make it clear that it authorizes the construction and maintenance of living shorelines on the west coast. More specifically, this commenter said that this NWP should authorize activities in bodies of water, such as the San Francisco Bay. One commenter remarked that the final NWP rule should recognize that coastal areas have other types of habitats, such as tidal marshes, mudflats, shellfish beds, submerged aquatic vegetation, microalgal and other vegetative

beds. Many commenters expressed their support for the use of regional conditions to tailor this NWP to different geographic areas of the country.

This NWP authorizes the construction and maintenance of living shorelines in all coastal waters, not just the east and Gulf coasts. Approaches to designing and constructing living shorelines may vary by geographic region. Division engineers can impose regional conditions on this NWP to account for regional differences in aquatic resource functions and services, and potential regional impacts and benefits of living shorelines. San Francisco Bay is a coastal waterbody, so this NWP can be used to authorize living shorelines in that waterbody. There are many different types of habitats in coastal waters, and evaluation of impacts to the habitat types present at a specific site will be conducted during the PCN review process.

Proposed NWP B is issued as NWP 54, with the changes discussed above.

General Conditions

We received a number of comments recommending new general conditions for the NWPs. A few commenters suggested adding a new general condition that would require the permittee to clearly mark the limits of disturbance on the project site, or areas where the use of equipment would be excluded. A few commenters said that a new general condition should be added to require the permittee to provide post-construction reports that would include as-built plans, a description of the types of material discharged, the actual impacts, photo documentation of the completed activity, and a description of the compliance measures that were implemented to address the NWP general conditions.

District engineers can add conditions to NWP authorizations to require permittees to mark authorized limits of disturbance to avoid and minimize direct and indirect impacts to jurisdictional waters and wetlands. Because the NWPs authorize a wide variety of activities, many of which do not involve land disturbance activities, we do not think an NWP general condition is warranted. In general, compliance with the terms and conditions of the NWP verification are already addressed through the requirements of general condition 30, compliance certification. For an NWP authorization where permittee-responsible mitigation is required by the district engineer, permit conditions may be added to the NWP authorization or through the approved mitigation plan to require submission of as-built plans, photo documentation of the compensatory mitigation project, and other compensatory mitigation requirements (see 33 CFR 332.3(k) and 33 CFR 332.6(a)). It is not necessary for a permittee to address compliance with each NWP general condition through a post-construction report submitted to the district engineer.

One commenter recommended adding a general condition that would require reporting of any activity that involves water withdrawals, water withdrawal structures, or related appurtenances that do not require state wetland or stream permits. One commenter requested a new general condition that prohibits the use of treated wood except for framing structures above waters inhabited by salmonids. One commenter suggested adding a general condition that would require best management practices, such as horizontal directional drilling, the use of double silt fences, and doubling soil stabilization measures, in riparian areas to minimize impacts to mussels and fish during construction activities. Another commenter said that there should be a general condition

that requires project areas to be assessed for the presence or absence of rare mussel habitat, pre-construction mussel surveys, and avoidance of direct disturbance of habitat and degradation of water quality when ESA-listed mussels and their habitat are found.

The Corps does regulate the withdrawal of water from waterbodies. Department of the Army authorization is required for structures in navigable waters subject to section 10 of the Rivers and Harbors Act of 1899, including structures that withdraw water from those waterbodies. If the waterbody is only subject to section 404 of the Clean Water Act, DA authorization is not required for a water intake structure unless there is an associated discharge of dredged or fill material into jurisdictional waters and wetlands that requires Clean Water Act section 404 authorization. Water intake structures that require DA authorization under section 10 of the Rivers and Harbors Act of 1899 and/or section 404 of the Clean Water Act may be authorized by NWP 7, which requires PCNs to Corps districts. The use of treated wood for activities authorized by NWP is more appropriately addressed by Corps districts on a case-by-case basis, after considering the specific NWP activity and its potential direct and indirect adverse environmental effects. Nationwide permit activities that might affect ESA-listed mussels or their designated critical habitat are addressed though compliance with general condition 18, endangered species. District engineers will conduct ESA section 7 consultation for any proposed NWP activity that they determine may affect listed mussel species or their designated critical habitat.

Discussion of Proposed Modifications to Nationwide Permit General Conditions

GC 1. Navigation. We did not propose any changes to this general condition. Two commenters asked for an explanation of what constitutes a more than minimal

adverse effect to navigation. These commenters also asked if temporary obstructions could be mitigated with portage.

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

The general condition is adopted as proposed.

GC 2. Aquatic Life Movements. We did not propose any changes to this general condition. Several commenters supported the proposed text of this general condition. Several commenters recommended changes to the general condition.

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

being tracked or enforced, stating that NWP activities often disrupt necessary life cycle movements of aquatic life indigenous to the waterbody, including their migration.

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

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

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

One commenter said this general condition should be more specific in terms of protocols to be used to ensure that NWP activities have no more than minimal adverse environmental effects. One commenter stated that there is a growing body of scientific literature that shows that a large percentage of culverted stream crossings across the country are not properly designed to allow for the safe passage of fish and other aquatic organisms. This commenter said there should be changes to this general condition to encourage the use of best management practices in the design, construction, modification, and replacement of bridges or culverts that cross waterbodies. This commenter recommended changing this general condition to require the use of stream-simulation principles to maintain or restore the waterbody's natural course, condition, capacity, and flows necessary to sustain the movement of those aquatic species. This commenter also said that this general condition should also require the use of open-bottom bridges and culverts whenever possible, or if the waterbody cannot be spanned with an open-bottom

bridge or culvert the bottom of the bridge or culvert should be covered with natural substrate. This commenter also stated that the minimum crossing width must be 1.2 times the width of the waterbody from ordinary high water mark to ordinary high water mark. This commenter also said that the general condition should require the gradient or slope of the crossing structure to match the stream profile, so that the velocity and depth of water in the structure matches that of the stream. One commenter stated that this general condition should require maintenance of the natural bank full capacity or cross-sectional area of the stream channel.

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

culvert cannot be used, then the crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

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

The general condition is adopted as proposed.

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

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

This general condition is adopted as proposed.

GC 4. Migratory Bird Breeding Areas. We did not propose any changes to this general condition and no comments were received. The general condition is adopted as proposed.

GC 5. Shellfish Beds. We did not propose any changes to this general condition. A few commenters expressed support for the general condition as proposed. One commenter requested that the Corps define the term "concentrated shellfish bed" and clarify whether it refers to oyster and clam beds and not to streams inhabited by mussels. One commenter asked if this general condition only applies to marine waters. A commenter asked for clarification as to what constitutes a "concentrated shellfish population" and how that term relates to living shorelines that would be authorized by

proposed new NWP B. This commenter inquired whether this general condition applies to waters that have large shellfish populations and whether it prohibits NWP activities on extant shellfish reefs.

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

Areas that have concentrated shellfish populations are not suitable for the construction of living shorelines, because this general condition prohibits NWP activities in those areas, except for activities authorized by NWPs 4 or 48. District engineers will review PCNs for NWP 54 activities to determine if the proposed activity is precluded from NWP authorization by general condition 5 because it occurs in an area of

concentrated shellfish populations. If it is precluded, the district engineer will inform the project proponent that an individual permit will be required for the construction of the proposed living shoreline. This general condition applies to areas within a waterbody that have concentrated shellfish populations. It does not apply to other areas of the waterbody that do not have concentrated shellfish populations. If there is an extant shellfish reef, this general condition prohibits NWP activities, except for activities authorized by NWPs 4 and 48.

This general condition is adopted as proposed.

CG 6. Suitable Material. We did not propose any changes to this general condition. One commenter supported the proposed general condition. One commenter suggested adding tires and encapsulated flotation devices to the list of unsuitable materials in the parenthetical in the text of the general condition.

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

GC 7. Water Supply Intakes. We did not propose any changes to this general condition. Three commenters requested clarification on what constitutes "proximity" to a water supply intake for the purposes of this general condition. They also expressed concern over the review procedures used to determine compliance with this general condition. Two commenters said that all NWP activities should be prohibited within water source protection areas for public water systems. One commenter asserted that district engineers are not ensuring compliance with general condition 7, and suggested

that this general condition should be modified to mirror the review and documentation requirements for general condition 18, endangered species, and general condition 20, historic properties.

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

We do not agree that all NWP activities should be prohibited in water source protection areas for public water systems. NWP activities can be conducted in those areas with little or no minimal adverse effects to water quality. In addition, all NWPs that authorize discharges into waters of the United States require Clean Water Act section 401 water quality certification. States can deny water quality certification for any NWP activity that might result in a discharge that is not in compliance with applicable water quality standards. General conditions 18 and 20 are based on federal laws impose specific requirements (e.g., ensure its actions are not likely to jeopardize the continued existence of any endangered species or threatened species) or trigger consultation

requirements. There is no federal law that imposes a comparable requirement for federal actions that take place in proximity to a public water supply intake. Division engineers can add regional conditions to the NWPs to prohibit the use of one or more NWPs in areas used for public water supplies.

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

For those NWP 12 activities that require PCNs or are voluntarily reported to the Corps, district engineers will review those proposed activities to ensure that they comply with this general condition. Division engineers can restrict or prohibit the use of NWP 12 in water source protection areas for public water systems. District engineers can also take action if they determine that a specific activity does not comply with this general condition and therefore does not qualify for NWP authorization.

This general condition is adopted as proposed.

GC 8. Adverse Effects from Impoundments. We did not propose any changes to this general condition. One commenter supported the proposed general condition. One commenter asked for a definition of the term "maximum extent practicable" as it applies to this general condition, or for examples of activities that satisfy that provision.

District engineers will use their discretion in determining whether specific impoundments authorized by NWP have minimized, to the maximum extent practicable,

adverse effects to the aquatic system as a result of accelerated water flows or restricted water flows. The application of that term is dependent on case-specific circumstances and site conditions. This general condition is adopted as proposed.

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

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

One commenter stated that this general condition should be modified to ensure that the pre-construction course and condition of a waterbody is maintained during the construction of permanent and temporary crossings of the waterbody. This commenter said that this is especially important because road crossings of streams that do not account for various flow conditions may fail during severe storms and flooding events.

This commenter recommended adding “and the construction, replacement, or rehabilitation of temporary and permanent crossings (e.g., bridges or culverts)” after “stormwater management activities”.

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

This general condition is adopted with the modification discussed above.

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

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

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

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

This general condition is adopted as proposed.

GC 11. Equipment. We did not propose any changes to this general condition. Two commenters said they support the reissuance of this general condition as proposed. One commenter stated that this general condition should provide examples of other minimization measures that should be taken when equipment is used in streams, such as minimization of soil disturbance, proper installation of turbidity barriers, and the

placement of oil booms downstream of equipment used in waters. This commenter also suggested that water quality sampling should be required to ensure water quality standards are met throughout the construction period. One commenter said that the use of heavy equipment in jurisdictional waters and wetlands has potential to leak or spill petroleum products into those waters and wetlands. This commenter recommended modifying this general condition to require equipment to be maintained in good working order to ensure that there will be no leaks of contaminants, and require spill kits for on-site emergency cleanups.

Actions taken to minimize the impacts of equipment on streams are more appropriately identified on a case-by-case basis, after considering the type of work to be done in the stream, the flow regime, the geomorphology of the stream, and other factors. Ensuring that activities authorized by NWPs meet applicable water quality standards is achieved through the water quality certification process. If an individual water quality certification is required for an NWP activity, the certification may include activity-specific conditions that require actions, such as water quality sampling, to ensure the NWP activity complies with applicable water quality standards. We recognize that there is a potential for mechanical equipment to leak or spill petroleum products. Such discharges may also be addressed through the water quality certification process. Leaks and spills of fuel, hydraulic fluids, transmission fluids, and other fluids from equipment used to conduct NWP activities are not discharges of dredged or fill material that are regulated under section 404 of the Clean Water Act. Such spills or leaks may also require action under other federal, state, or local laws and regulations. The purpose of this general condition is to minimize adverse effects to jurisdictional waters and wetlands

that are caused by equipment that disturbs soil. We do not have the authority to regulate the maintenance of equipment, or to mandate the use of spill kits for on-site emergency cleanups. Project proponents should comply with all other applicable federal, state, and local laws and regulations, which may address the operation and maintenance of construction equipment and responding to spills and leaks from that equipment during construction activities.

This general condition is adopted as proposed.

GC 12. Soil Erosion and Sediment Controls. To clarify the application of this general condition in tidal waters, we proposed to modify the last sentence to encourage permittees to conduct work during low tides to reduce soil erosion and sediment transport during construction activities in waters subject to the ebb and flow of the tide.

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

The last sentence of this general condition clearly states that permittees are encouraged to conduct NWP activities in waters of the United States during periods of no-flow or low-flow or during low tides. The general condition does not mandate that

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

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

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

This general condition is adopted as proposed.

GC 13. Removal of Temporary Fills. We did not propose any changes to this general condition. One commenter said that temporary fills should be limited to no more than 180 days. A few commenters stated that temporary mats should not be considered to be fill material and should not be counted towards NWP acreage limits. One commenter said that temporary mats are not necessary for activities authorized by NWPs 3 and 12.

One commenter stated that the sidecasting of material excavated from a ditch is not a discharge of dredged or fill material, and that the Corps lacks the authority to regulate excavation activities.

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

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

The sidecasting of excavated material during ditch maintenance may be exempt from Clean Water Act section 404 permit requirements (see 33 CFR 323.4(a)(3)). If the ditch maintenance activity does not qualify for the Clean Water Act section 404(f)(1)(C)

exemption, the deposition of excavated material into jurisdictional waters and wetlands may be considered a discharge of dredged material (see 33 CFR 323.2(d)). District engineers will determine on a case-by-case basis whether excavation activities require DA authorization under section 404 of the Clean Water Act by applying the current regulations, including the current definition of "discharge of dredged material."

This general condition is adopted as proposed.

GC 14. Proper Maintenance. We did not propose any changes to this general condition. One commenter stated support for this general condition. One commenter said this general condition should require precautions during maintenance activities to minimize impacts to jurisdictional waters and ensure that downstream water quality is maintained.

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

This general condition is adopted as proposed.

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

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

One commenter said that this general condition should define "single and complete project" in the same manner as the definition of "single and complete non-linear project" in Section F of the NWPs. One commenter stated that the same definition of "independent utility" should be applied to both linear and non-linear projects, to avoid piecemealing. This commenter said that linear roadway crossings generally do not have independent utility, so the definition of linear transportation projects should conform with the definition of single and complete non-linear project. This commenter stated that this

recommended change would result in a more accurate cumulative impact analysis. Another commenter said that linear and non-linear projects should not be treated differently for the purposes of applying the limits of the NWPs.

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

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

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

This general condition is adopted as proposed.

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

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

The Wild and Scenic Rivers Act does not prohibit activities in a Wild and Scenic River or a study river; it requires coordination with the federal agency with direct

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

One commenter stated that the term "component" is too broad and said that specific river segments should be identified. One commenter requested a list of current "study rivers" for purpose of submitting PCNs. One commenter said that PCNs should not be required for NWP 3 activities within Wild and Scenic Rivers or study rivers. This commenter also stated that PCNs should not be required for agencies that have direct management responsibilities for Wild and Scenic Rivers or study rivers. One commenter requested clarification of the review process for these PCNs and suggested that the NWP activity should not be prohibited if the federal agency with direct management

responsibility for that river does not issue a written determination that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

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

This general condition is adopted with the modifications discussed above.

GC 17. Tribal Rights. We did not propose any changes to this general condition. One commenter supported the proposed general condition. Several commenters stated that the federal government's tribal trust responsibilities requires federal agencies to

protect tribal rights, resources, and cultures and this general condition does not adequately fulfill those responsibilities. Several commenters stated that NWPs should not authorize activities that affect tribal rights and that individual permits should be required to ensure that tribal treaty rights are addressed in the Corps' review process. One commenter said that NWPs should not authorize any activity that implicates tribal treaty rights. Several commenters noted that some NWP activities can occur without pre-construction notification and said that tribes should be involved in the review of NWP PCNs.

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

Several commenters stated that the NWPs do not examine cumulative or indirect impacts on treaty rights. They said that NWP activities in the aggregate can have serious

consequences to treaty-reserved resources. One commenter mentioned that resolution #SPO-16-002 was adopted in June 2016 by the National Congress of American Indians. That resolution urged the Department of Defense to reaffirm its commitment to consult with Tribal Nations when its activities impact tribal interests. That resolution represents 562 individually recognized Indian Tribes across the United States, and expresses their concern that the Department of Defense's tribal consultation principles and policies are not being followed and therefore the Department of Defense is not fulfilling its federal trust obligations and not protecting tribal interests.

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

One commenter said that this general condition should be invoked for NWPs 3, 13, and 48 because the activities authorized by these NWPs affect salmon or shellfish and the natural resources upon which they depend. One commenter requested establishment

of a dispute resolution procedures for tribal consultation and clarification on how the NWP PCN will be handled when a tribe objects to the proposed activity.

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

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

During the past three rulemakings for the NWPs (2007 and 2012 and this rulemaking for 2017), Corps Headquarters issued memoranda to its division and district offices that requested that Corps districts consult with tribes on the NWPs to develop regional conditions, coordination procedures, and other measures to ensure that the NWPs have no more than minimal adverse effects on tribal trust resources and tribal

rights. For the 2017 NWPs, the memorandum was issued on March 10, 2016. We have revised general condition 17 to read as follows: "No activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands." We have removed the phrase "or its operation" because the Corps may not have the legal authority to regulate the operation of the facility or structure after the authorized activity is completed.

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

The terms "tribal rights," "protected tribal resources," and "tribal lands" are defined in the Department of Defense American Indian and Alaska Native Policy. Tribal rights are defined as: "Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial

decisions, executive order or agreement, and that give rise to legally enforceable remedies." Protected tribal resources are defined as: "Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources." Tribal lands are defined as: "Any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation." To make these definitions readily accessible to users of the NWPs, we have added these definitions to the "Definitions" section of the NWPs (Section F).

There are presently 567 federally-recognized tribes, including Alaska Native tribes, and 370 ratified treaties[3]. In addition, each tribe is a distinct and separate government, and consultations may vary among tribes. Consultation procedures with tribes will vary, because different tribes have different customs and organization. Also, consultation with tribes is the responsibility of the federal government, not prospective permittees. Given the number of federally-recognized tribes, the number of ratified treaties, the fact that each tribe is a distinct and separate government, and that different consultation approaches are necessary for different tribes, we cannot expect most prospective permittees understand applicable treaties, what the protected tribal resources are, and other relevant factors to know when to submit PCNs for proposed NWP activities that might cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. A more effective approach for

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

addressing tribal rights, protected tribal resources, and tribal lands is the regional conditioning process and the development of coordination procedures between Corps districts and tribes.

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

This general condition is adopted with the modifications discussed above.

GC 18. Endangered Species. We proposed to modify paragraph (a) of this general condition to define the terms "direct effects" and "indirect effects." We also proposed to modify paragraph (b) to clarify that federal agencies only need to submit documentation of compliance with section 7 of the Endangered Species Act (ESA) when the terms and conditions of the NWP, or regional conditions imposed by the division engineer, require the submission of a PCN. In addition, we proposed to modify paragraph (d) to clarify that the district engineer may add activity-specific conditions to an NWP authorization after conducting formal or informal ESA Section 7 consultation.

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

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

conduct ESA section 7 consultations for NWP activities that may affect those terrestrial listed species.

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

We have retained the proposed changes in paragraph (b) of this general condition. The appropriate documentation to provide to district engineers to demonstrate a federal permittee's compliance with ESA section 7 can be a biological opinion issued by the U.S. FWS and/or NMFS, a written concurrence from the U.S. FWS and/or NMFS for an informal ESA section 7 consultation, or a written "no effect" determination made by the federal permittee. Unless a state agency is a department of transportation which the Federal Highway Administration has assigned its responsibilities pursuant to 23 U.S.C.

327, it remains the Corps' responsibility to make ESA section 7 effect determinations for activities authorized by the NWPs that will be conducted by non-federal permittees. The delegation of responsibilities to state departments of transportation through 23 U.S.C. 139(c)(3) only applies to NEPA responsibilities, not to ESA responsibilities. Responsible entities under the Department of Housing and Urban Development's Community Development Block Grant program can take responsibility for ESA section 7 compliance under the provisions of 24 CFR part 58. The project proponent that needs to obtain SMCRA authorization from the state mining regulatory authority is a non-federal permittee that must comply with paragraph (c) of this general condition.

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

species or designated critical habitat “might be affected” fails to include candidate species and is not in compliance with conferencing regulations under Section 7 of the ESA.

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

As explained in the preamble to the June 1, 2016, proposed rule, we established the “might affect” threshold in 33 CFR part 330.4(f)(2) and paragraph (c) of general condition 18 because it is more stringent than the “may affect” threshold for section 7 consultation in the U.S. FWS’s and NMFS’s ESA section 7 regulations at 50 CFR part 402. The word “might” is defined as having “less probability or possibility” than the word “may” (Merriam-Webster’s Collegiate Dictionary, 10th edition). As we also discussed in the June 1, 2016, proposed rule, we cannot explicitly define the term “in the vicinity” for the purposes of general condition 18 because the “vicinity” is dependent on

a variety of factors, such as species distribution, ecology, life history, mobility, and, if applicable, migratory patterns, as well as habitat characteristics and species sensitivity to various environmental components and potential stressors. The vicinity is also dependent on the NWP activity and the types of direct and indirect effects that might be caused by that NWP activity. If a non-federal project proponent conducts an activity and does not comply with general condition 18 or any other applicable general condition, then the activity is not authorized by NWP. The district engineer will take appropriate action for the unauthorized activity.

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

conferences will only be necessary in rare circumstances for proposed NWP activities and do not need to address conferences in this general condition. District engineers will conduct conferences for proposed NWP when necessary.

One commenter said that a PCN should only be required if there are potential impacts to listed species and/or designated critical habitat, and a PCN should not be required for the potential presence of a listed species. One commenter stated that a PCN should only be required when ESA section 7 consultation is required. One commenter stated that a PCN not be required in Northern long-eared bat habitat when there is no effect to the species, specifically when no clearing is involved. This commenter said that based on the term "in the vicinity" in paragraph (c), non-federal applicants would be required to submit a PCN for every NWP activity within this species' broad range. One commenter said that the Corps should require PCNs for proposed NWP activities that would take place within 10 river miles of ESA-listed species. One commenter stated that non-federal applicants should be allowed to satisfy the PCN requirement by demonstrating that ESA section 7 consultation has already been satisfactorily completed.

Under paragraph (c) of general condition 18, and 33 CFR 330.4(f)(2), PCNs are required if any listed species or designated critical habitat might be affected by the proposed NWP activity or is in the vicinity of the proposed NWP activity, or if the proposed NWP activity is located in designated critical habitat. The district engineer reviews the PCN and determines whether ESA section 7 consultation is required, because under section 7(a)(2) of the ESA, federal agencies are responsible for ensuring that actions they authorize are not likely to jeopardize the continued existence of listed species, or destroy or adversely modify designated critical habitat. The prospective

permittee does not decide whether ESA section 7 consultation is required for NWP activities; that is the Corps' responsibility. The prospective permittee's responsibility is to submit a PCN to the district engineer when there is a possibility that the proposed NWP activity might affect listed species or designated critical habitat. We acknowledge that the requirements of general condition 18 will result in more PCNs for listed species that have large ranges, but those requirements are necessary to comply with ESA section 7(a)(2). A PCN threshold of 10 river miles within the location of ESA-listed species would not be an effective PCN threshold, especially for mobile listed species. As discussed below, we have added a new paragraph (f) to general condition 18 to allow ESA compliance through a valid ESA section 10(a)(1)(B) incidental take permit. If the applicant does not have a valid ESA section 10(a)(1)(B) incidental take permit, and the proposed NWP activity may affect listed species or designated critical habitat, then the Corps is required to conduct ESA section 7 consultation.

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

require section 7 consultation. This commenter also said the general condition should prohibit the prospective permittee from beginning construction of the linear project until after those consultations are completed.

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

District engineers have discretion in timing the issuance of NWP verifications for NWP activities that require PCNs. Linear projects often have crossings that require PCNs and crossings that do not require PCNs. For those linear projects, the PCN must also identify the use of NWP(s), regional general permit(s), or individual permit(s) to authorize other separate and distant crossings that require DA authorization (see paragraph (b)(4) of general condition 32). If some or all of the other separate and distance crossings are authorized by NWP without a requirement to submit a PCN (and

they do not trigger the PCN requirements in paragraph (c) of general conditions 18 or 20, or other general conditions), then those activities are authorized by NWP unless the district engineer exercises his or her authority at 33 CFR 330.5(d) to suspend or revoke those NWP authorizations. There are also likely to be substantial segments of linear projects that are sited in uplands over which the Corps has no control and responsibility. The entity constructing the linear project can begin construction in the uplands prior to receiving the NWP verification or other DA authorizations.

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

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

One commenter said that the Corps is required to seek concurrence from the U.S. FWS and/or NMFS for any “no effect” determination. One commenter voiced support

for using regional programmatic consultations to comply with section 7 of the ESA. A few commenters suggested that the Corps develop an informational guidance document and website dedicated to region-specific listed species under the jurisdiction of U.S. FWS, similar to what was developed by the NMFS.

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

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

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

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

The U.S. FWS's and NMFS's ESA section 7 regulations at 50 CFR 402.02 define the term "action area" as "…all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." When the Corps initiates ESA section 7 consultation on proposed activity that it determines "may affect" listed species or designated critical habitat, it consults on the direct and indirect effects caused by the proposed NWP activity. In paragraph (a) of this general condition, we define the terms "direct effects" and "indirect effects." Indirect effects can be some distance from the direct effects of the proposed NWP activity. The Corps' approach to conducting ESA section 7 consultations for linear projects complies with the ESA. Section 7(a)(2) consultations for linear projects may include the effects of interdependent and interrelated activities. Interrelated and interdependent activities are not federal actions, because they are not authorized, funded, or carried out by the Corps or other federal agency. Including interrelated and interdependent activities in a formal ESA

Section 7 consultation and biological opinion does not grant the Corps any authority to regulate those activities and their effects on listed species and critical habitat. Therefore, the Corps does not have the legal authority to enforce conditions that the U.S. FWS and/or NMFS might impose on those interrelated and interdependent activities in an incidental take statement in a biological opinion. The FWS and NMFS would be responsible for enforcing those provisions of the incidental take statement that apply to the upland activities outside of the Corps' jurisdiction.

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

Several commenters recommended using Habitat Conservation Plans to streamline compliance with this general condition if the prospective permittee has been issued an ESA section 10 permit that also authorizes incidental take that may result from the proposed NWP activity. Several commenters said that PCNs should not be required

for non-federal permittees when their "take" of listed species is authorized by ESA section 10 permits and is addressed through HCPs with incidental take statements. A few commenters said that a non-federal permittee should be able to proceed with the proposed NWP activity 15 days after providing the district engineer with the ESA section 10(a)(1)(B) incidental take permit and HCP. One commenter said the PCN requirement of this general condition should be satisfied through a programmatic notification submitted to the district engineer, if more than one activity to be authorized by NWP has been the subject of a prior ESA section 7 consultation.

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

that issued the ESA section 10(a)(1)(B) incidental take permit considered the proposed NWP activity and the associated incidental take in its internal ESA section 7 consultation for that ESA section 10(a)(1)(B) permit.

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

verifications before proceeding with the authorized work. We cannot replace the PCN requirement individual NWP activities with a programmatic notification, because each proposed NWP activity needs to be evaluated to determine if ESA section 7 consultation is required.

One commenter expressed concern that the requirements of this general condition result in ESA section 7 consultations occurring in the absence of a real potential for listed species conflicts. One commenter said that ESA section 7 consultations should only occur if the site for the proposed activity has an occurrence of listed species or the site is located in designated critical habitat. One commenter stated that the requirements of general condition 18 should only apply to activities in jurisdictional areas that might affect endangered species.

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

wetlands can have indirect effects on listed species or designated critical habitat outside of those jurisdictional waters and wetlands, and thus require the district engineer to conduct ESA section 7 consultation.

This general condition is adopted with the modifications discussed above.

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

Several commenters stated their support for the proposed modification. Two commenters said that the proposed modification will increase burdens on applicants and create delays in the NWP verification process. This general condition does not require any action by district engineers and will not delay their reviews of PCNs and voluntary requests for NWP verifications. Permittees are responsible for contacting the local office of the U.S. Fish and Wildlife Service to determine if they need to take action to reduce impacts to migratory birds or bald or golden eagles, or obtain incidental take permits under these two laws.

This general condition is adopted as proposed.

GC 20. Historic Properties. Parallel with the proposed modifications of paragraph (b) of general condition 18, we also proposed to modify paragraph (b) of general condition 20 to state that federal permittees only need to submit documentation of their

compliance with section 106 of the National Historic Preservation Act (NHPA) if the proposed NWP activity requires pre-construction notification because of other terms and conditions, including regional conditions imposed by division engineers.

One commenter asked how district engineers will determine if NWP activities will affect historic properties and who is expected to satisfy the requirements of section 106 of the NHPA. One commenter recommended revising paragraph (a) as follows: "In cases where the district engineer is notified, or determines based on scoping performed in accordance with 36 CFR 800.4(a), that the activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized until the district engineer finds that the requirements of Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations (36 CFR Part 800) have been satisfied."

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

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

Federal permittees have an independent obligation to comply with section 106 of the NHPA. If an NWP activity that will be conducted by a federal permittee requires a PCN and the district engineer determines while reviewing the PCN that the federal permittee's section 106 compliance documentation is insufficient, then he or she will notify the federal permittee that additional section 106 consultation may be necessary. Paragraph (b) of this general condition is not equivalent to a lead federal agency concept. The purpose of paragraph (b) is to avoid duplicative consultation efforts, because federal agencies have their own obligation to comply with NHPA section 106. When a federal permittee is conducting an NWP activity, it is either conducting the same undertaking as the Corps (i.e., the permitted activity), or a larger undertaking that involves other activities that the Corps does not have the authority to regulate. If there is no federal permittee, then paragraph (c) of this general condition would apply.

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

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

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

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

Modifying paragraph (c) to require non-federal applicants to provide documentation from qualified professionals goes beyond the "good faith effort" required to identify historic properties for minor activities authorized by the NWPs. The magnitude and nature of the undertaking and the degree of federal involvement are considerations for determining what is required to identify historic properties (see 36 CFR 800.4(b)(1)), and for many NWP activities these are both minimal. For activities that have the potential to cause effects to historic properties, applicants often hire consultants to assist in the section 106 process. We have modified the third sentence of paragraph (c) to include "designated tribal representative" as an option for assistance

regarding information on the location of potential historic resources, consistent with 36 CFR 800.2(c)(2)(i)(B).

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

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

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

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

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

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

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

Several commenters said that this general condition unlawfully limits the scope of the Corps' "permit area." One commenter stated that 33 CFR part 325, Appendix C is not approved by the Advisory Council on Historic Preservation (ACHP) as a program alternative, as required by 36 CFR 800.14. This commenter said that Appendix C is an

internal Corps process that does not fulfill the requirements of section 106 of NHPA. One commenter recommended that the Corps continue working with the ACHP in order to bring its regulations into compliance with the NHPA. One commenter stated that Appendix C violates tribal consultation requirements, and more importantly, meaningful consultation with tribes.

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

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

If a state agency is a department of transportation to which the Federal Highway Administration has assigned its responsibilities pursuant to 23 U.S.C. 327, then that state agency would be responsible for section 106 compliance under paragraph (b) of this general condition. We do not need to make any changes to the text of this general condition to recognize this assignment of authority. If a PCN is required, non-federal applicants, including state departments of transportation that have not been assigned authority under 23 U.S.C. 327 are asked to provide any documentation which may expedite the review process for NHPA section 106. For NWP activities conducted by non-federal permittees, it is the Corps' responsibility to comply with the requirements of section 106.

One commenter stated that reliance on general conditions 20 and 32, is not a substitute for activity-specific compliance with section 106 of the NHPA. This commenter said that the Corps should conduct a section 106 review out prior to reissuing the NWPs. One commenter said that the general condition should state that the Corps is

not obligated to delay issuance of an NWP verification until after an official agreement is obtained from a state.

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

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

with the NWP activity. One commenter said that the Corps should eliminate the open-ended review process for section 106 of the NHPA.

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

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

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

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

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

This general condition is adopted with the modifications discussed above.

GC 21. Discovery of Previously Unknown Remains and Artifacts. We did not proposed any changes to this general condition. One commenter expressed support for

general condition 21, but requested that this condition require the permittee to cease work in the area of the discovery of the previously unknown historic, cultural, or archeological remains and artifacts. This commenter noted that the wording of this general condition only allows for recovery activities or eligibility determinations, while failing to address other types of measures that might be determined necessary to avoid, minimize, or mitigate adverse effects to historic properties. One commenter said that general condition 21 is not a substitute for compliance with section 106 of the NHPA in individual cases. This commenter asserted that in absence of a section 106 review process that is carried out prior to reissuance of the NWPs, the Corps fails to meet the requirements of 36 CFR part 800.

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

The purpose of this general condition is to address previously unknown remains and artifacts that are revealed during while the authorized NWP activity is being

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

This general condition is adopted as proposed.

GC 22. Designated Critical Resource Waters. We did not propose any changes to this general condition, except to add proposed new NWP B to paragraph (b). We did not receive any comments on this general condition. Since we are issuing proposed new NWP B as NWP 54, we have added NWP 54 to paragraph (b).

This general condition is adopted with the modification discussed above.

GC 23. Mitigation. We proposed to modify the opening paragraph of this general condition and paragraph (b) to clarify that mitigation can be required by district engineers to ensure that activities authorized by NWPs will result in no more than minimal

individual and cumulative adverse environmental effects. Also, we proposed to modify paragraph (d) to state that compensatory mitigation for stream losses should be provided through rehabilitation, enhancement, or preservation, to be consistent with 33 CFR 332.3(e)(3), which states that streams are difficult-to-replace resources. In paragraph (e), we proposed to modify the first sentence to state that compensatory mitigation provided through riparian areas can be accomplished by restoration, enhancement, or maintenance of those areas. In addition, we proposed to modify paragraph (f)(1) to state that if the district engineer determines compensatory mitigation is required for the proposed NWP activity, the preferred mechanism for providing compensatory mitigation is either mitigation bank credits or in-lieu credits. In the June 1, 2016, proposed rule we also requested comment on ways to improve how compensatory mitigation conducted under the NWP program is implemented to offset direct, indirect, and cumulative effects.

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

The Corps' regulations at 33 CFR 330.1(e)(3) state that district engineers can require mitigation to ensure that activities authorized by NWPs result in no more than

individual and cumulative adverse environmental effects. Under the procedure in 33 CFR 330.1(e)(3), district engineers offer prospective permittees the opportunity to submit mitigation proposals to reduce the adverse environmental effects caused by NWP activities. The mitigation required under the authority of 33 CFR 330.1(e)(3) can be compensatory mitigation, but it can also be additional on-site avoidance and minimization of adverse impacts to jurisdictional waters and wetlands. District engineers have the discretion to determine when compensatory mitigation is to be required for NWP activities, and consider the degree of functions being performed by the jurisdictional waters and wetlands that will be adversely affected by the NWP activities (see paragraph 2 of Section D, District Engineer's Decision).

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

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

If a project proponent wants an approved jurisdictional determination for a parcel where he or she might be proposing an NWP activity, the project proponent should request and receive that approved jurisdictional determination prior to submitting a PCN for the proposed NWP activity.

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

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

Compensatory mitigation is only required when necessary to ensure that activities authorized by NWPs result in no more than minimal individual and cumulative adverse

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

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

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

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

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

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

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

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

compensatory mitigation. One commenter asked which types of projects can be done to mitigate for the loss of stream length.

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

Stream restoration and enhancement can be done using a variety of techniques, such as dam removal and modification, culvert replacement or modification, fish passage structures when connectivity cannot be restored or improved by dam removal or culvert replacement, levee removal or setbacks, reconnecting floodplains and other riparian habitats, road removal, road modifications, reducing sediment and pollution inputs to streams, replacing impervious surfaces with pervious surfaces, restoring adequate in-

stream or base flows, restoring riparian areas, fencing streams and their riparian areas to exclude livestock, improving in-stream habitat, recreating meanders, and replacing hard bank stabilization structures with bioengineering bank stabilization measures (Roni et al. 2013). Stream restoration projects should focus on restoring ecological processes, through activities such as dam removal, watershed best management practices, improving the riparian zone, and reforestation, instead of focusing on the manipulation the structure of the stream channel (Palmer et al. 2014).

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

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

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

Riparian mitigation requirements are determined by district engineers on a case-by-case basis. District engineers can develop local guidelines for riparian mitigation. The restoration of riparian areas is important for rivers, streams, and other open waters, because those riparian areas provide substantial contributions to the ecological functions and services performed by rivers, streams, and other open waters. Paragraph (e) of general condition 23 allows district engineers to require riparian areas a little wider than 25 feet if there are documented water quality or habitat concerns. There are limits to the widths of riparian areas required by district engineers, because compensatory mitigation requirements for NWPs and other DA authorizations must be roughly proportional to the permitted impacts (see 33 CFR 320.4(r)(2) and 33 CFR 332.3(f)(1)). We have modified paragraph (e) to state that compensatory mitigation provided through riparian areas can be accomplished by maintenance/protection of those riparian areas. A well-developed, functional riparian does not need to be restored if it provides ecological functions in its present state.

Several commenters said that paragraph (f)(1) of general condition 23 should be modified to make it clear that the use of mitigation banks or in-lieu fee programs is not mandatory if they are impractical when compared to other mitigation alternatives. One commenter objected to the change in paragraph (f)(1) to establish a preference for the use of mitigation bank or in-lieu fee program credits to provide compensatory mitigation for

NWP activities. One commenter said that the proposed modification of paragraph (f)(1) places mitigation banks and in-lieu fee programs on the same level, contrary to the 2008 mitigation rule. This commenter also said that permittees should be allowed to do permittee-responsible mitigation when it is justified. One commenter said that permittee-responsible mitigation remain a viable option, as it may be more ecologically and financially appropriate for some projects. One commenter said that the applicant should be allowed to propose any mitigation option he or she thinks is appropriate, instead of following the hierarchy in 33 CFR 332.3(b). One commenter expressed support for the mitigation hierarchy in 33 CFR 332.3(b). A few commenters object to the hierarchy of mitigation banks being the first consideration. One commenter said that the Corps should select the most environmentally preferable method for wetland mitigation, rather than using the hierarchy listed in the 2008 rule.

As stated in proposed paragraph (f)(1), the use of mitigation bank and in-lieu fee program credits to provide compensatory mitigation for NWP activities is preferred, not required. This preference is based on the hierarchical framework for considering compensatory mitigation options for NWPs and other DA permits that is provided in 33 CFR 332.3(b). That framework was developed to manage risk and uncertainty in aquatic resource compensatory mitigation projects. The proposed paragraph (f)(1) was also made in recognition of the higher risk and uncertainty associated with permittee-responsible mitigation, especially on-site permittee-responsible mitigation where changes to hydrology and other site characteristics caused by the permitted activity make it more difficult to achieve the intended objectives of a compensatory mitigation project (NRC 2001). As stated in the 2001 NRC report, third-party mitigation approaches such as

mitigation banks and in-lieu fee programs have some advantages over permittee-responsible mitigation. Paragraph (f)(1) does not supersede the framework established in 33 CFR 332.3(b); it merely reflects Conclusion 5 in the 2001 NRC report. Paragraph (f)(1) does not preclude the use of permittee-responsible mitigation, if such compensatory mitigation is approved by the district engineer after contemplating the considerations discussed in 33 CFR 332.3(a) and (b).

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

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

We added a new paragraph (f)(2) to state that the amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse

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

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

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

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

required to provide alternative compensatory mitigation (see 33 CFR 332.7(a)(4)). In addition, the party responsible for providing the compensatory mitigation must notify the district engineer 60 days prior to taking any action that would void or modify the site protection instrument or site management plan (see 33 CFR 332.7(a)(3)).

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

Monitoring requirements for compensatory mitigation projects are determined by district engineers on a case-by-case basis. General requirements for monitoring are provided at 33 CFR 332.6. Monitoring is required to ensure that the compensatory mitigation project site is meeting its performance standards, and to determine if measures such as remediation or adaptive management are necessary to ensure that the compensatory mitigation project is accomplishing its objectives. Monitoring requirements will vary, depending on the specific characteristics of the compensatory mitigation project, such as the compensatory mitigation mechanism (e.g., restoration, enhancement, establishment, or preservation), the type of aquatic resource being provided as compensatory mitigation (e.g., forested wetlands, perennial stream), and the ecosystem development characteristics of the compensatory mitigation project. Either the approved mitigation plan or permit conditions will specify the monitoring requirements for a particular compensatory mitigation project. Monitoring requirements are commensurate

with the characteristics of the compensatory mitigation project, not the impacts authorized by NWP or other types of DA permits.

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

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

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

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

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

We have retained the provisions in paragraph (i) as proposed. Because the purpose of mitigation, including compensatory mitigation, in the NWP program is to reduce the adverse environmental effects caused by an NWP activity to ensure that they

are no more than minimal, individually and cumulatively, compensatory mitigation requirements established by the district engineer must relate to the direct and indirect effects caused by the NWP activity. That would be the discharges of dredged or fill material in waters of the United States and/or the structures of work in navigable waters of the United States.

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

The restoration, enhancement, preservation, and in some circumstances, the establishment of aquatic resources has been demonstrated to increase or maintain ecological functions and services, which offset losses of ecological functions and services caused by activities authorized by NWPs and other types of DA permits. For difficult-to-replace aquatic resources, such as streams, bogs, and springs, compensatory mitigation should be provided through in-kind rehabilitation, enhancement, or preservation (see 33 CFR 332.3(e)(3)) because these types of aquatic resources cannot be established by manipulating uplands. When a district engineer receives a permittee-responsible

mitigation proposal from the applicant, he or she carefully evaluates that proposal to determine whether it will be ecologically successful and fulfill its objectives in providing certain aquatic resource functions and services. If the permittee-responsible mitigation project is approved, the district engineer requires monitoring to ensure that it is meeting its ecological performance standards and is developing into the target aquatic resource. If the permittee-responsible mitigation project is not meeting its ecological performance standards, the district engineer will work with the permittee to identify actions, including adaptive management, to make adjustments to the mitigation project so that it meets its objectives. If the permittee-responsible mitigation project fails, the permittee may be required to provide alternative compensatory mitigation.

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

For the issuance or reissuance of the NWPs, the decision documents for those NWPs describe, in general terms, the mitigation measures taken for NWP activities to ensure they result in no more than minimal individual and cumulative adverse effects.

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

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

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

Upland buffers can be used to provide compensatory mitigation for NWPs (see 33 CFR 332.3(i)). District engineers can use rapid ecological assessment tools to assess indirect effects to wetland caused by activities authorized by NWPs. If rapid ecological assessment tools or other tools are not available or practical to use, then district engineers will use their judgement in evaluating those indirect impacts. Compensatory mitigation is required for temporary impacts when the district engineer determines such compensatory mitigation is necessary to ensure the NWP activity results in no more than minimal adverse environmental effects. Paragraph (f) of this general condition states that compensatory mitigation projects must comply with the applicable provisions of 33 CFR part 332, so the compensatory mitigation requirements for the NWP program are the same as for other types of DA permits.

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

Compensatory mitigation requirements for NWP activities are determined by district engineers on a case-by-case basis. The Corps complied with the 404(b)(1) Guidelines when it issued or reissued the NWPs. For a specific activity authorized by an

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

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

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

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

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

stream bed, compensatory mitigation should only be required for the linear feet of losses of stream bed that exceed the 300 linear foot limit.

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

Several commenters stated that when district engineers make compensatory mitigation decisions for NWP activities, they should take into consideration whether the

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

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

This general condition is adopted with the modifications discussed above.

GC 24. Safety of Impoundment Structures. We did not propose any changes to this general condition and no comments were received. This general condition is adopted as proposed.

GC 25. Water Quality. We did not propose any changes to this general condition and no comments were received. This general condition is adopted as proposed.

GC 26. Coastal Zone Management. We did not propose any changes to this general condition and no comments were received. This general condition is adopted as proposed.

GC 27. Regional and Case-by-Case Conditions. We did not propose any changes to this general condition. We did not receive any comments on it. This general condition is adopted as proposed.

GC 28. Use of Multiple Nationwide Permits. We did not propose any changes to this general condition. One commenter said that combining NWPs should be prohibited. One commenter suggested adding regional general permits to this general condition. Two commenters recommended prohibiting the use of multiple NWPs and other DA permits that authorize numerous encroachments in close proximity to navigable waters. One of these commenters stated that regardless of whether project components are independent of one another, they are likely to cause cumulative impacts within the navigable waterway, and those impacts need to be evaluated together.

The purpose of this general condition is to ensure that acreage limits are not exceeded when two or more NWPs are combined to authorize a single and complete project. When an NWP is combined with a regional general permit to authorize a single and complete activity, it is the district engineer's determination whether the adverse environmental effects will be no more than minimal. Both NWPs and regional general permits must comply with the same standard established under section 404(e) of the Clean Water Act. When district engineers evaluate proposed NWP activities, they consider the cumulative effects of the use of those NWPs on a regional basis. They also consider the cumulative effects of activities authorized by their regional general permits,

and may modify, suspend, or revoke their regional general permits when they determine those general permits are resulting in activities that have more than minimal cumulative adverse environmental effects. During the evaluation of applications for individual permits, district engineers conduct cumulative impact analyses to comply with NEPA requirements, if they are preparing environmental assessments or environmental impact statements. If the proposed activity requires an individual permit and involves discharges of dredged or fill material into waters of the United States, the district engineer will also conduct a cumulative effects analysis under the 404(b)(1) Guidelines.

This general condition is adopted as proposed.

GC 29. Transfer of Nationwide Permit Verifications. We did not propose any changes to this general condition and no comments were received. This general condition is adopted as proposed.

GC 30. Compliance Certification. We proposed to modify this general condition to add a timeframe for submitting the completed certification document. The proposed modification states that the completed certification should be sent to the district engineer within 30 days of completing the authorized activity or the completion of the implementation of any required compensatory mitigation.

Several commenters said they supported the proposed modification, and some suggested an extension to the 30-day timeframe. Two commenters stated that the 30-day timeframe is not long enough and should be extended to 90 days because permittees have internal reviews and need more time to carefully certify the compliance certification document. One of these commenters asked what is considered "implementation" of the compensatory mitigation project. One commenter said the proposed modification would

provide important information to the Corps to ensure that the program is causing no more than minimal adverse environmental impacts. One commenter recommended assigning a timeframe to ensure the receipt of a compliance certification. One commenter agreed with the 30-day timeframe but expressed concerns regarding what would happen if the due date is missed.

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

One commenter stated that this general condition should be modified to state that the completed certification should be submitted within 30 days of completing the authorized activity or completing the implementation of the required compensatory mitigation. One commenter said the 2012 general condition should be retained and

require submission of the certification within 30 days of project completion. This commenter remarked that there is frequently a time lapse between completing the compensatory mitigation requirement and completing the NWP activity.

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

This general condition is adopted with the modification discussed above.

GC 31. Activities Affecting Structures or Works Built by the United States. We proposed this new general condition to address activities that are required under Section 14 of the Rivers and Harbors Act of 1899 (33 U.S.C. 408) to secure permission from the Secretary of the Army for the alteration or occupation or use of structures or works built by the United States (i.e., U.S. Army Corps of Engineers federally authorized Civil

Works projects). The authority to issue these section 408 permissions has been delegated to Corps Headquarters, Corps divisions, or Corps districts depending on the case-specific circumstances for a 408 permission request. Some of these activities also require authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899, and may be eligible for one or more NWPs.

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

We do not have any statistics on how long section 408 reviews typically take. As stated in the text of this general condition, the proposed NWP activity is not authorized by NWP until the appropriate Corps office issues the 408 permission. In other words, if the proposed NWP activity requires section 408 permission the 45-day default authorization does not apply. If a PCN is required under general condition 31, the activities cannot be authorized by NWP until the Corps issues the 408 permission, or determines that a 408 permission is not required. We have modified the last sentence of this general condition to change “Corps district office” to “Corps office” because some section 408 permissions are issued by Corps Headquarters. To ensure that NWP

activities that will alter or temporarily or permanently occupy or use USACE projects obtain the required 408 permissions before the project proponent conducts those NWP activities, the general condition must apply to both major and minor section 408 reviews. The PCN requirement is necessary to give district engineers the opportunity to add conditions to the NWP authorization to protect the USACE project and to ensure that any needed internal coordination is done.

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

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

conducted concurrently. The section 408 and NWP PCN reviews are independent of each other and they often occur in different Corps offices.

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

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

This general condition is adopted with the modification discussed above.

GC 32. Pre-Construction Notification. We proposed to modify paragraph (b) by adding a new paragraph (b)(3) to state that the PCN should identify the specific NWP(s) the project proponent wants to use to authorize the proposed activity. In addition, we proposed to modify paragraph (b)(4) to require a description of mitigation measures the applicant intends to use to reduce adverse environmental effects caused by the proposed activity. For linear projects, we proposed to change paragraph (b)(4) to make it clear that the PCN should identify all crossings of waters of the United States that require DA authorization. We also proposed to modify paragraph (b)(4) to require, for linear projects, that the PCN include the quantity of proposed losses of waters of the United States for

each single and complete crossing of those waters. Please see the June 1, 2016, proposed rule for additional discussion on the proposed changes to this general condition.

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

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

One commenter said that PCNs should be required for all NWP activities to provide the public with the opportunity to comment on those activities, to provide information on other proposed activities that may contribute to cumulative impacts. One

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

Activities authorized by NWPs and other general permits do not require a public notice and comment process; the public notice and comment process occurs during the development of the NWP, regional general permit, or programmatic general permit. Requiring the solicitation of public comment on case-specific NWP activities would be contrary to the streamlined process envisioned by section 404(e) of the Clean Water Act. The Corps tracks the use of the NWPs, especially the NWP PCNs and the activities voluntarily reported to Corps district offices that do not require PCNs, to assess the NWP program's incremental contribution to cumulative environmental effects. Division engineers can add regional conditions to one or more NWPs for activities in Clean Water Act section 303(d) waters, for those NWPs that might contribute further to the impairment of those waters. Fills in 100-year floodplains must comply with the requirements of general condition 10 and do not require additional PCNs.

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

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

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

If water quality certification has not been previously issued by the state, tribe, or U.S. EPA for the NWP, an individual water quality certification is required (see general

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

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

Paragraph (a) is written to provide direction to district engineers to make only one additional information request. Except for certain NWPs (i.e., NWPs 21, 49, and 50) and for the requirements of certain general conditions (e.g., general conditions 18, 20, and 31), activities that require PCNs are authorized after 45 days have passed after district

engineers receive complete PCNs unless the district engineer exercises his or her authority to modify, suspend, or revoke the NWP authorization (see 33 CFR 330.1(e)(1)). District engineers can place priority on processing NWP PCNs for time-sensitive maintenance and inspection activities associated with energy projects. There are other regulatory program procedures for emergency situations and those procedures are found 33 CFR 325.2(e)(4).

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

We do not believe that any additional guidance is necessary. General condition 32 and Section D, District Engineer's decision, clearly articulate the process for reviewing PCNs. Paragraph (a) of general condition 32 describes the process for requesting additional information for PCNs to make them complete. Additional information may be required from the applicant to conduct other procedures associated with the PCN process, such as information necessary to conduct ESA section 7 consultation or information needed for NHPA section 106 consultation. General condition 32 states that, as a general rule, the district engineer should make only one request for information to make the PCN complete. We recognize that there may be

some situations where a piece of information needed to make the PCN complete was not identified, and the district engineer can request that information to proceed with the evaluation of the PCN. If that flexibility is not provided, the district engineer may be left with the option of suspending or revoking the NWP authorization because he or she was not allowed by the NWP rule to request that piece of additional information. We believe that 30 days is necessary to make completeness determinations for PCNs.

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

The NWP regulations at 33 CFR part 330 provide a 45-day default authorization for most NWP activities. There are exceptions for certain NWPs, such as NWPs 21, 49, and 50, and for certain general conditions. If ESA section 7 consultation and/or NHPA section 106 consultation is required for a proposed NWP activity, the project proponent cannot proceed with the NWP activity until after those consultations have been

completed and the district engineer notifies the project proponent. Activities authorized by the Corps are required to comply with ESA section 7 and NHPA section 106, and those consultations will be completed as soon as practicable. Section 404(e) of the Clean Water Act does not provide any exemptions from complying with ESA section 7 and/or NHPA section 106. The Corps only conducts those consultations where it is required to do so, and the consultation documentation is included in the administrative record for those NWP PCNs. For ESA section 7 consultations, the consultation process does not end until the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service issues their biological opinion for a formal consultation or its written concurrence for a request for informal consultation. For NHPA section 7 consultations, the consultation process does not end until after the applicable steps in the consultation process identified in 36 CFR part 800 have been completed.

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

Pre-application meetings can provide information that will be helpful in processing the NWP PCN, when the PCN is submitted to the district engineer. However, pre-application meetings are optional. Under 33 U.S.C. 2352, the Corps may accept and

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

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

While the NWPs may require a moderate amount of information for a complete PCN, that information is necessary for the district engineer to make his or her determination whether a proposed NWP activity will result in no more than minimal

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

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

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

NWP. If the district engineer decides that the proposed activity does not qualify for authorization under any NWP, he or she will notify the applicant and provide instructions on how to apply for authorization under an individual permit or a regional general permit.

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

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

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

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

A few commenters objected to including proposed mitigation measures in PCNs. Three commenters said that requiring the PCN to include mitigation measures is

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

The mitigation measures in paragraph (b)(4) may include describing avoidance and minimization of impacts to jurisdictional waters and wetlands on the project site. The prospective permittee is not required to propose any mitigation measures in his or her PCN. The prospective permittee can choose not to propose any mitigation measures. A description of mitigation measures is optional, and the project proponent is encouraged to describe, in the PCN, mitigation measures that will assist the district engineer in reaching a decision, earlier in the process, that the proposed activity will result in no more than minimal adverse environmental effects. The level of detail for the proposed mitigation measures described in the PCN is up to the project proponent. Otherwise, the district engineer may review the PCN and determine that mitigation is necessary to ensure that the proposed activity will cause no more than minimal adverse environmental effects and notify the prospective permittee that a mitigation plan is required. That will add more time to the district engineer's review process. It is the prospective permittee's decision

whether to suggest mitigation measures up front in the PCN or wait for the district engineer's request for a mitigation proposal.

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

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

In paragraph (b)(4), we have changed the phrase "waters of the United States" to "wetlands, other special aquatic sites, and other waters" to be consistent with paragraph (b)(5) of this general condition. As discussed below, neither approved jurisdictional determinations or preliminary jurisdictional determinations are not required for NWP PCNs, and if the project proponent wants an approved or preliminary jurisdictional

determination for the project site, he or she should request and receive that approved or preliminary jurisdictional determination prior to submitting an NWP PCN.

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

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

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

Paragraph (b)(5) only requires a delineation of wetlands, other special aquatic sites, and other waters to provide information to the district engineer to make his or her determination whether the proposed activity qualifies for NWP authorization. In the third

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

If the project proponent wants an approved jurisdictional determination to help him or her determine whether the proposed activity might qualify for NWP authorization, to identify jurisdictional waters and wetlands to provide in support of his or her PCN, or to avoid having to do compensatory mitigation for losses of wetlands, other special aquatic sites, or other waters that are not subject to Clean Water Act jurisdiction, the project proponent must submit a separate request for an approved jurisdictional determination. An NWP PCN and a request for an approved jurisdictional determination are separate actions, and if a project proponent submits a request for an approved jurisdictional determination with his or her NWP PCN, the district engineer will process those requests separately. General condition 32 does not require an approved jurisdictional determination for NWP PCNs; only a delineation of wetlands, other special aquatic sites, and other waters is required to make the PCN. With certain exceptions

identified in the NWPs (e.g., NWPs 21, 49, and 50) and some general conditions (e.g., general conditions 18 and 20), the decision on an NWP PCN must be made within 45 days of receipt of a complete PCN. There is no required timeframe for responding to requests for approved jurisdictional determinations, although the Corps strives to respond to those requests within 60 days.

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

We understand that various published maps, especially published maps generated by remote sensing, do not show all wetlands or accurately depict wetland boundaries, or show all streams. The remote sensing approaches used by the U.S. FWS for its National Wetland Inventory maps result in errors of omission that exclude wetlands that are difficult to identify through photointerpretation (Tiner 1997). These errors of omission are due to wetland type and the size of target mapping units (Tiner 1997). Likewise,

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

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

Some artificial waterbodies may be waters of the United States. For example, a lake that was created by impounding a jurisdictional river would likely be subject to Clean Water Act jurisdiction. If an area is not a wetland, another type of special aquatic site, or other water, then it does not need to be included in the delineation for the PCN. If the project proponent is uncertain whether a particular artificial waterbody or area of

irrigated land is subject to Clean Water Act jurisdiction, and wants a definitive determination from the Corps, then he or she can request an approved jurisdictional determination. Areas of prior converted cropland will be identified on a case-by-case basis. As explained above, we modified paragraph (b)(5) to remove the term "waters of the United States" so that there is no implication that a jurisdictional determination is necessary before the Corps issues an NWP verification.

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

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

One commenter stated that proposed paragraph (b)(8) does not address undiscovered historic properties. Undiscovered historic properties are addressed by general condition 21. If the historic properties are unknown at the time the PCN is submitted, then the prospective permittee cannot be expected to include that information in the PCN. If the non-federal project proponent thinks there might be historic properties that could potentially be affected by the NWP activity, then he or she should submit a PCN and the district engineer will determine whether NHPA section 106 consultation is necessary. We have modified paragraph (b)(10) by changing "Corps district" to "Corps office" because a 408 permission might be issued by Corps Headquarters.

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

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

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

The purpose of the agency coordination process in paragraph (d) is seek input from other federal and state agencies for certain proposed NWP activities to determine

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

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

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

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

We are retaining the agency coordination threshold of 500 linear feet for NWP 13 activities, because that is consistent with the applicable waiver provision in paragraph (b) of NWP 13. We have removed the agency coordination requirement for NWP 48 activities, as we proposed to do in the June 1, 2016, proposed rule.

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

Each separate and distant crossing that qualifies for NWP authorization is considered to be a separate NWP authorization. Therefore, the aggregate total of losses of waters of the United States is not used to determine whether agency coordination is

required under paragraph (d) of general condition 32. Since each single and complete project authorized by NWPs 12 or 14 has a 1/2-acre limit (or a 1/3-acre limit for losses of tidal waters authorized by NWP 14), then NWP 12 or 14 activities will not require agency coordination.

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

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

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

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

This general condition is adopted with the modifications discussed above.

District Engineer's Decision

Discussion of Proposed Modifications to Section D, "District Engineer's Decision"

We proposed to modify paragraph 1 to state that if an applicant requests authorization under one or more specific NWPs, the district engineer should issue the verification letter for those NWPs, if the proposed activity meets the terms and conditions of those NWP(s), unless he or she exercises discretionary authority to require an individual permit. We proposed to modify paragraph 2 to clarify that a condition assessment can also be used to help determine whether a proposed activity will result in no more than minimal adverse environmental effects. In the second sentence of paragraph 3, we proposed to change the text to state that applicants may also propose compensatory mitigation to offset impacts to other types of waters, such as streams. We also proposed to clarify that mitigation measures other than compensatory mitigation may also be used to ensure that a proposed NWP activity results in no more than minimal adverse environmental effects.

A number of commenters objected to the proposed change, stating that the district engineer should be able to determine which NWP should be used to authorize the proposed activity. One commenter said it was unclear what a condition assessment involves and whether the Corps or the applicant would prepare the condition assessment. One commenter said that there should be additional time to comply with general conditions 18 and 20. One commenter stated that paragraph 2 of Section D should include cumulative effects as one of the factors that the district engineer considers when making an adverse environmental effects determination. The current wording implies that

only direct and indirect effects are to be considered. One commenter said that district engineers should be required to evaluate entire pipelines and conduct an analysis of cumulative effects that is posted for public comment.

The modification of paragraph 1 of this section states that the district engineer should issue the NWP verification under the NWP requested by the applicant, if the proposed activity meets the terms and conditions of that NWP. If the proposed activity does not meet the terms and conditions of the NWP identified in the PCN, and another NWP would authorize the proposed activity, then the district engineer can authorize the proposed activity under the NWP that he or she identified. However, if the proposed activity meets the terms and conditions of two different NWPs, and the applicant submitted a PCN that identified one of those NWPs, then the district engineer should issue the NWP verification under the NWP the applicant identified in his or her PCN. We have modified paragraph 1 to add a reminder that for those NWPs that have a 1/2-acre limit with a waivable 300 linear foot limit for losses of intermittent or ephemeral stream bed, then the loss of stream bed plus any other losses of jurisdictional waters and wetlands cannot exceed 1/2-acre.

A condition assessment is a type of rapid ecological assessment that examines the relative ability of an aquatic resource to support and maintain a community of organisms having a species composition, diversity, and functional organization comparable to reference aquatic resources in the region (see 33 CFR 332.2). In most circumstances, the prospective permittee would conduct the condition assessment and provide the results to the district engineer. In some cases, the district engineer may conduct the condition

assessment. The extended time frames for complying with general conditions 18 and 20 are already addressed by paragraph 4.

We have modified paragraphs 1 and 2 of this section to state that the district engineer will consider, in addition to the direct and indirect effects, the cumulative effects of the NWP activities. The district engineer may require mitigation, including compensatory mitigation, to ensure that the cumulative adverse effects of the NWP activity or activities or no more than minimal. The district engineer's cumulative effects analysis does not have to be an exhaustive analysis, because the required NEPA cumulative effects analysis was done by Corps Headquarters in the decision document supporting the issuance or reissuance of the applicable NWP(s). If the applicable NWP(s) authorize discharges of dredged or fill material into waters of the United States, in the national decision document issued by Corps Headquarters there is a cumulative effects analyses to satisfy the requirements of the 404(b)(1) Guidelines. For pipelines and other linear projects, the cumulative effects of the activities authorized by NWPs for the overall project, within an appropriate geographic region, will be evaluated by district engineers. Unless the pipeline is constructed entirely in waters of the United States and involves activities that require DA authorization, the Corps is not required to evaluate the entire pipeline, or linear project. If the Corps is only authorizing the segments of the linear project, such as a pipeline, that cross jurisdictional waters and wetlands and involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States, then its analysis will focus on the regulated crossings of waters of the United States.

Further Information

In item 5, we proposed to add a cross-reference to proposed new general condition 31. If the Corps issues a section 408 permission, then the NWP activity would not be considered as interfering with the federal project. We received no comments on the proposed change, and we have adopted that change.

Definitions

In the June 1, 2016, proposed rule, we proposed changes to some of the NWP definitions. One commenter recommended removing the definitions from the NWPs and adding them to the Code of Federal Regulations so that they would apply to the entire regulatory program. One commenter stated that the definition of "independent utility" should be added to NWP 12 because this commenter said there is no rational basis for treating linear and non-linear projects differently.

The definitions in Section F were developed for use with the NWPs that are issued or reissued for the 5-year period those NWPs will be in effect. Incorporating those definitions into the Code of Federal Regulations so that they would apply to individual permits, regional general permits, and programmatic general permits would reduce flexibility in the regulatory program. Regional general permits and programmatic general permits may take different approaches to administering general permit programs, especially general permits intended to reduce duplication with other federal, tribal, state, or local agency regulatory programs.

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 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 non-linear project, the impacts of activities authorized by NWPs 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 occur 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.

We received a few comments suggesting that we provide a definition of "temporary." We believe that district engineers should have the discretion to determine

on a case-by-case basis what constitutes a temporary impact versus a permanent impact. A district engineer can issue guidelines for his or her district on what constitutes a temporary fill or a temporary structure or work. The length of time to consider an impact to be "temporary" depends on a variety of factors, including how soon the temporary structures and fills need to be removed after construction has been completed. In some cases they might need to be removed shortly after construction is completed. In other cases more time might be necessary to allow the completed structures and fills to stabilize prior to removing any temporary structures or fills. The appropriate length of time would depend on various factors, such as resource type, hydrodynamics, soils, geology, plant communities, and season. Providing a national definition of "temporary" would be less protective of the environment because it would constrain local decision making. For example, if the authorized structure or fill is not allowed sufficient time to stabilize, it may collapse or be washed away after the temporary structures or fills are removed.

A couple of commenters asked for definitions of "repair," "replacement," and "previously authorized." One of these commenters also requested definitions of "modification" and "riprap." One commenter requested a definition of "minimal adverse effect."

We do not see a need to define the terms "repair," "replacement," "previously authorized," "modification," and "riprap." The commonly understood definitions of these terms apply to the NWPs, and they do not warrant the development of new definitions. The term "minimal adverse effect" cannot be defined because it is a subjective term, with "minimal" and "adverse effect" dependent on the perspective of the person conducting the evaluation or assessment. In paragraph 2 of Section D, District

Engineer's Decision, we have provided a list of factors district engineers should consider when making their "no more than minimal adverse environmental effects" determinations for proposed NWP activities.

Best management practices (BMPs). We did not propose any changes to this definition. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Compensatory mitigation. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Currently serviceable. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Direct effects. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Discharge. We proposed to modify this definition to make it clear that the use of the term "discharge" in the NWPs refers to "discharges of dredged or fill material" and not to discharges of other types of pollutants. Point source discharges of other types of pollutants are regulated under Section 402 of the Clean Water Act.

Several commenters said they support the proposed change. One commenter stated that the Corps regulates under section 404 of the Clean Water Act, some but not all excavation activities. One commenter said that the 2015 final rule defining "waters of the United States" should not be referenced in this definition.

Under the definition of "discharge of dredged material" at 33 CFR 323.2(d), we regulate certain excavation activities in waters of the United States. The NWP definition of "discharge" refers to regulated discharges of dredged or fill material into waters of the United States. The definition of "discharge" does not refer to the 2015 final rule.

Ecological reference. To help implement the new provision of NWP 27 that requires aquatic habitat restoration, enhancement, and establishment activities to result in aquatic habitat that resembles an ecological reference, we are adding a definition of "ecological reference" using the concepts discussed in the preamble discussion of NWP 27.

Enhancement. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Ephemeral stream. We did not propose any changes to this definition. One commenter requested clarification on how ephemeral streams are to be identified and the mitigation requirements for impacts to ephemeral streams.

Ephemeral streams are distinguished from perennial and intermittent streams by their flow regimes, which are explained in the definition (i.e., they have flowing water only during, and for a short duration after, precipitation events in a typical year). Compensatory mitigation requirements for losses of ephemeral streams authorized by NWPs are determined on a case-by-case basis by district engineers. This definition is adopted as proposed.

Establishment (creation). We did not receive any comments on the proposed definition. The definition is adopted as proposed.

High Tide Line. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Historic property. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Independent utility. We did not propose any changes to this definition. A few commenters requested clarification that the concepts of independent utility and "single and complete" applies to both linear and non-linear projects. One commenter recommended including linear projects in this definition. One commenter said that the test to determine a "single and complete non-linear project" in this definition conflicts with proposed Note 2 in NWP 12 and proposed Note 1 in NWP 14.

The concept of independent utility does not apply to the definition of "single and complete linear project" because the crossings of waters of the United States between the point of origin of a linear project and its terminal point are necessary for the linear project to fulfill its purpose of transporting goods, services, and/or people from the point of origin to the terminal point. In other words, each of those crossings of waters of the United States for the single and complete linear project does not have independent utility. Therefore, It would not be appropriate to include linear projects in this definition, for the reasons explained above. This definition does not conflict with Note 2 of NWP 12 or Note 1 of NWP 14. The term "independent utility" was removed from both of those Notes.

This definition is adopted as proposed.

Indirect effects. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Intermittent stream. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Loss of waters of the United States. We proposed to modify this definition to clarify that loss of stream bed can be measured by area (e.g., acres, square feet) or by linear feet. For the NWPs that authorize discharges of dredged or fill material into waters of the United States that result in the loss of stream bed through filling or excavation, specified NWP limits may be expressed in acres, linear feet, or both.

One commenter supported the proposed changes to this definition. A few commenters said they support the proposed modification on quantification of losses of stream bed in acres. A few commenters objected to that proposed modification. A few commenters expressed disagreement that excavation in stream beds results in a loss of waters of the United States. One commenter said that this definition should not include stream modification and bank stabilization. One commenter asked whether the use of timber mats in waters of the United States counts towards the limits of the NWPs.

We have retained acres as an option for quantifying loss of stream bed. The physical, chemical, and biological processes that occur in aquatic ecosystems and other types of aquatic resources take place over the area of stream bed. For example, gross primary production and ecosystem respiration in rivers and streams is represented in

grams per square meter per day, secondary production in rivers and streams is quantified in grams per square meter per year, and river nitrogen and phosphorous yields are expressed in kilograms per hectare per year. (Allan and Castillo 2007). For streams, quantifying impacts and compensatory mitigation as linear feet does not take into account the width of the stream, which is important to indicate the area of stream that performs ecological functions and services (e.g., Bronner et al. 2013). The definition of "loss of waters of the United States" is intended to assist in the determination whether a proposed NWP activity will result in more than minimal adverse environmental effects, so it examines activities that cause adverse effects to jurisdictional waters and wetlands, even if those activities do not convert those waters or wetlands to uplands so that those wetlands area lost. Excavation of stream bed changes the stream bed and the functions it provides. Stream modification and bank stabilization activities can cause losses of stream bed, such as the filling of stream bed to construct the bank stabilization activity. Temporary use of timber mats in waters of the United States as a best management practice to minimize the adverse effects of activities authorized by NWPs does not count towards the NWP limits because that use of timber mats does not result in a loss of waters of the United States.

One commenter said that the word "excavation" should be deleted from this definition. One commenter asked for clarification whether excavation activities that remove material from waters of the United States, but do not restore the impact area to pre-construction contours and elevations, cause a loss of waters of the United States. One commenter asked how excavation activities are considered in the first sentence of this definition, which refers to waters of the United States that are temporarily filled, flooded,

excavated, or drained, but restored to pre-construction contours and elevations. A few commenters asserted that the proposed definition is arbitrary and capricious, particularly if it is applied to NWP 12 activities.

Excavation activities in jurisdictional waters and wetlands may require DA authorization, if they result in regulable discharges of dredged or fill material. District engineers apply the definitions at 33 CFR 323.2(c) – (f) to determine whether an excavation activity results in a discharge of dredged or fill material that requires DA authorization. For the purposes of this definition, regulated excavation activities in rivers and streams cause a loss of waters of the United States. The fifth sentence of this definition states that waters of the United States that are temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not considered to result in a loss of waters of the United States. Nationwide permit 12, as well as the other NWPs issued under section 404 of the Clean Water Act, authorizes discharges of dredged or fill material into waters of the United States that can result in permanently or temporarily filling, flooding, excavation, or draining waters of the United States. In other words, NWP 12 is treated no differently than other section 404 NWPs when it comes to applying the definition of "loss of waters of the United States."

A few commenters agreed with the proposed clarification that states that non-regulated activities are not to be included when calculating losses of waters of the United States. Several commenters said this definition should include the conversion of forested wetlands. One commenter stated that the definition should be modified to state that vegetation cutting does not cause a loss of waters of the United States. One commenter

stated that this definition should include permanent losses of wetlands from conversion activities as losses of waters of the United States.

The conversion of forested wetlands to emergent wetlands, other types of wetlands, or to open waters may be a loss of waters of the United States if that conversion involves activities that require DA authorization. For example, mechanized landclearing in a forested wetland that results in a regulated discharge of dredged material and converts the forested wetland to an emergent wetland requires DA authorization. In contrast, if a forested wetland is altered by cutting the trees above their crowns without removing the tree trunks and roots and causing a regulated discharge of dredged material, then that activity would not be considered a "loss of waters of the United States" under this definition.

This definition is adopted as proposed.

Navigable waters. We are adding this definition to clarify that if the term "navigable waters" is used in the text of an NWP, then the NWP authorizes activities in navigable waters of the United States subject to section 10 of the Rivers and Harbors Act of 1899. Navigable waters of the United States are defined at 33 CFR part 329.

Non-tidal wetland. We proposed to modify this definition to refer to 33 CFR 328.3(c)(4). One commenter said that the 2015 final rule defining "waters of the United States" should not be referenced in this definition.

We have removed the second sentence of this definition, which cited the definition of "wetland" promulgated in the 2015 final rule defining "waters of the United States." This definition is adopted with the modification discussed above.

Open water. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Ordinary high water mark. We proposed to change the regulation citation in this definition to 33 CFR part 328.3(c)(6), which was based on the 2015 final rule defining "waters of the United States." One commenter supported the proposed change, and one commenter did not agree with the proposed change. One commenter said that the 2015 final rule defining "waters of the United States" should not be referenced in this definition.

We have removed the reference to 33 CFR 328.3(c)(6) from this definition. This definition is adopted with the modification discussed above.

Perennial stream. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Practicable. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Pre-construction notification. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Preservation. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Protected tribal resources. We have added this definition to assist with compliance with general condition 17, tribal rights. This definition was taken from the 1998 Department of Defense American Indian and Alaska Native Policy.

Re-establishment. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Rehabilitation. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Restoration. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Riffle and pool complex. We did not propose any changes to this definition. One commenter stated that a more specific definition should be provided for the NWPs because this definition should not apply to a single pool in the vicinity of a bridge, with some cobbles near the pool.

This definition was taken from the 404(b)(1) Guidelines (40 CFR 230..45). This definition refers to "riffle and pool complexes." A single pool with some cobbles is not a riffle and pool complex. This definition is adopted as proposed.

Riparian areas. We proposed to change the word "adjacent" to "next" in the first sentence of this definition because riparian areas border rivers, streams, and other bodies of water.

One commenter supported the proposed modification and one commenter opposed the proposed modification. One commenter asked for further explanation why we proposed to change "adjacent" to "next" and ask whether this modification would change the meaning of "riparian area." This commenter said she was uncertain whether the proposed change would result in more or fewer riparian areas requiring mitigation or alter the type of mitigation required.

The proposed modification is intended to make this definition clearer, because riparian areas abut streams, lakes, and estuarine-marine shorelines. The Corps regulatory program has long defined adjacent wetlands as wetlands that are bordering, contiguous, or neighboring. Riparian areas are bordering or contiguous to streams, lakes, and estuarine-marine shorelines. Because "neighboring" ecosystems or habitats features may be adjacent to, but separated from, streams, lakes, and estuarine-marine shorelines by roads, levees, or other man-made features we believe the work "next" is a more precise term than "adjacent." This change will not alter the mitigation requirements for the NWPs, or change the implementation of paragraph (e) of general condition 23, mitigation. That paragraph addresses the restoration, enhancement, and protection/maintenance of riparian areas as compensatory mitigation for NWP activities.

This definition is adopted as proposed.

Shellfish seeding. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Single and complete linear project. We did not propose any changes to this definition. One commenter recommended changing this definition so that it is the same as the definition of "single and complete non-linear project." One commenter stated that use of the term "single and complete" indicates that if one crossing depends on another crossing being constructed, then those crossings will be considered together. One commenter said that the term "separate and distinct" should be used instead of "separate and distant."

The Corps' regulations at 33 CFR 330.2(i) provide different approaches to applying the concept of "single and complete project" to linear projects versus non-linear projects. These differences are explained in the definitions of "single and complete linear project" and "single and complete non-linear project" in Section F of the NWPs. For linear projects, the concept of "single and complete project" means that each separate and distant crossing may be authorized by an NWP. When the district engineer evaluates the PCN for a linear project, he or she considers the cumulative effects of those crossings that require DA authorization (see paragraph 1 of Section D, "District Engineer's Decision"). The correct terminology is "separate and distant," "not separate and distinct" (see 33 CFR 330.2(i)).

Several commenters said that the definition of "distant" is ambiguous and should be further defined. Several commenters requested that the Corps define "separate and distant," and requested that the Corps provide thresholds for determining when crossings

are separate and distant. One commenter asked how the term "separate and distant" would be applied to determine if the linear project requires an individual permit. One commenter stated that allowing authorization of "separate and distant crossings" under one NWP or separate NWPs is dependent on how the prospective permittee determines the end points of each waterbody crossing.

District engineers will use their discretion to determine what constitutes "distant" for the purposes of determining that separate and distant crossings of waters of the United States qualify for separate NWP authorization. We cannot establish thresholds at a national level because "separate and distant" depends on a variety of factors and is best determined on a case-by-case basis. Factors considered by district engineers may include topography, local hydrology, the distribution of waters and wetlands in the landscape, geology, soils, and other appropriate factors. District engineers will determine when proposed crossings of waters of the United States are not separate and distance and require individual permits because they exceed the acreage or other limits for an NWP. The district engineer's determination that crossings of waters of the United States are separate and distant is dependent on landscape factors, including the distribution of jurisdictional waters and wetlands in the landscape, and not on the prospective permittee's identification of end points for each waterbody crossing.

One commenter stated that the ability to use multiple NWPs to authorize individual segments of linear projects should be eliminated, including pipelines and bank stabilization activities, because that practice violates numerous laws. One commenter stated that the Corps violates the Clean Water Act by treating each crossing of waters of the United States as a single and complete project. That commenter said that a small

segment of a pipeline or transmission line crossing a water of the United States would have no independent utility. One commenter said that the definition of "single and complete linear project" should be amended to prohibit piecemealing of activities to meet NWP limits. Two commenters asserted that authorizing each single and complete crossing with an NWP fails to account for cumulative impacts of the linear project.

The Corps' practices for authorizing linear projects by NWP does not violate any laws. The NWP regulations for the Corps' practices were promulgated in 1991 and are still in effect. The definitions in the NWPs are consistent with the NWP regulations issued in 1991. Section 404(e) of the Clean Water Act does not provide any direction on general permit authorization for regulated activities for crossings of waters of the United States for linear projects. As explained elsewhere in this preamble, for a single and complete linear project the separate and distant crossings of waters of the United States do not have independent utility because they are necessary for transporting the goods or services from the point of origin to the terminal point. 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.

One commenter stated that there should be no changes to the way "single and complete" and "separate and distant" are applied to the NWPs, because any change may

result in more individual permits being required for linear projects that have previously been authorized by a NWP.

We have not made any changes to the proposed definition. This definition is adopted as proposed.

Single and complete non-linear project. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stormwater management. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stormwater management facilities. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stream bed. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stream channelization. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Structure. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Tidal wetland. We proposed to change the regulation citations to refer to the provisions in the 2015 final rule defining "waters of the United States." One commenter supported the proposed change and one commenter opposed the proposed change. One commenter said this definition should not reference the 2015 final rule.

We have modified this definition by removing the second sentence from the proposed definition. We also deleted the phrase “, which is defined at 33 CFR 328.3(c)(7)” from the end of the last sentence. These two changes remove the regulation references that were in the 2015 final rule. We also modified the first sentence of this definition by adding the word “jurisdictional” before the second use of the word “wetland” and deleting the parenthetical (i.e., water of the United States). This definition is adopted with these modifications.

Tribal land. We have added this definition to assist with compliance with general condition 17, tribal rights. This definition was taken from the 1998 Department of Defense American Indian and Alaska Native Policy.

Tribal rights. We have added this definition to assist with compliance with general condition 17, tribal rights. This definition was taken from the 1998 Department of Defense American Indian and Alaska Native Policy, but uses the term tribal lands instead of Indian lands.

Vegetated shallows. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Waterbody. We proposed to modify this definition by revising the second sentence as follows to reference the 2015 final rule defining “waters of the United States”: “If a wetland is adjacent to a waterbody determined to be a water of the United States under 33 CFR part 328.3(a)(1)-(5), that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR part 328.4(c)(2)).”

Several commenters said that if the Corps intends to use the term "waterbody" interchangeably with "water of the United States" in the NWP program, then we should delete the definition of "waterbody" from the NWPs and use the term "waters of the United States" instead. In the alternative, these commenters stated that this definition could be modified to avoid using concepts from the 2015 final rule defining "waters of the United States" and removing those regulation references. Several commenters said that this definition should not utilize the 2015 final rule's definitions of "adjacent" and "neighboring." One commenter asserted that the term "waterbody" should be removed from the NWPs.

We have modified this definition by removing the phrase "under 33 CFR 328.3(a)(1)-(5)" from the second sentence. We have retained the reference to 33 CFR 328.4(c)(2) because that provision of the Corps' regulations was not addressed by the 2015 final rule. The definition of "waterbody" needs to be retained because either the terms "waterbody" or "waterbodies" are used 18 times in the text of the NWPs and general conditions. A waterbody is a single aquatic unit and for a river or stream it includes wetlands adjacent to the river or stream.

This definition is adopted with the modification discussed above.

Administrative Requirements

Plain Language

In compliance with the principles in the President's Memorandum of June 1, 1998, (63 FR 31855) regarding plain language, this preamble is written using plain

language. The use of "we" in this notice refers to the Corps. We have also used the active voice, 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. The Corps estimates that applicants will submit 31,448 PCNs per year. Paragraph (b) of general condition 32 identifies the information that should be submitted with a PCN, and some NWPs identify additional information to be included in the PCN. While different NWPs require different information be included in a PCN, the Corps estimates that a PCN takes, on average, 11 hours to complete. That results in an average, annual paperwork burden of 345,928 hours.

The NWPs would increase the total paperwork burden associated with this program but decrease the net burden on the public. This is due to the fact that there is new paperwork burden associated with the inclusion of two new NWP (both of which have PCN requirements). Since, however, this time would otherwise be spent on completing an individual permit application, which we estimate also takes, on average, 11 hours to complete, the net effect on the public is zero.

The only real change to the public's paperwork burden from this final rule is a decrease due primarily to a modification to the PCN requirements for NWPs 33 and 48, the modification to paragraph (b) of NWP 3, and, to a lesser extent, a minor increase associated with the minor changes we made to the content required for a complete PCN (see paragraph (b) of general condition 32).

Specifically, we anticipate a reduction in paperwork burden from the final rule to require PCNs only for NWP 33 activities in section 10 waters. There will also be a paperwork reduction because of the change to the PCN thresholds for NWP 48, by eliminating the requirement to submit a PCN for dredged harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation. We estimate that the changes to NWP 33 would result in 210 fewer PCNs, with an estimated reduction of paperwork burden of 2,310 hours. The changes to the PCN thresholds for NWP 48 are expected to result in a reduction of 50 PCNs per year in waters where there are no listed species or critical habitat that would otherwise trigger the requirement to submit PCNs because of general condition 18. We estimate that 50 fewer PCNs will be required for NWP 48 activities, with a reduction of paperwork burden of 550 hours. We estimate that 50 fewer PCNs will be required for NWP 3(b) activities because the placement of riprap to protect the structure or fill will be authorized by NWP 13 and will not likely require a PCN. Therefore, the estimated net change in paperwork burden for this rule is an increase of 792 hours per year. Prospective permittees who are required to submit a PCN for a particular NWP, or who are requesting verification that a particular activity qualifies for NWP authorization, may use the current standard Department of the Army permit application form.

The following table summarizes the projected changes in paperwork burden for two alternatives relative to the paperwork burden under the 2012 NWPs. The first alternative is to reissue 50 NWPs and issue two new NWPs. The second alternative would result if these NWPs are not issued and reissued and regulated entities would have to obtain standard individual permits to comply with the permit requirements of section

404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899. The 302 standard individual permits included in the row for the 2012 NWPs represent the standard individual permits that would be required for activities that would be authorized by the changes to NWPs 3, 43, 45, and 52 and the two new NWPs (NWPs 53 and 54). The estimated 15 activities that would require authorization by standard individual permit under the 2017 NWPs represent surface coal mining activities that were authorized by paragraph (a) of the 2012 NWP 21 that will not be completed before the 2012 NWP expires and would thus require standard individual permits to complete the surface coal mining activity. We estimate that imposing a cap of 1,000 linear feet on bulkheads in NWP 13 will result in 10 bulkheads requiring individual permits each year. The modification of NWP 13 to make it clear that it authorizes stream barbs will reduce the number of individual permits by an estimated 10 per year. Those two changes to NWP 13 will result in no net changes in number of the number of individual permits required for bank stabilization activities each year.

	Number of NWP PCNs per year	**Number of NWP activities not requiring PCNs per year**	**Number of SIPs per year**	**Estimated changes in NWP PCNs per year**	**Estimated changes in number of NWP activities not requiring PCNs per year**	**Estimated changes in number of SIPs per year**
2012 NWPs	31,555	31,415	302			
2017 NWPs	31,448	31,979	15	-82	+492	-292
SIPs required if NWPs not reissued	0	0	49,838			

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number.

Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), we must determine whether the regulatory action is "significant" and therefore subject to review by OMB and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition,

jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, we have determined under item (4) that this rule is a "significant regulatory action" and the draft final rule was submitted to 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 NWPs does not have federalism implications. We do not believe that the final NWPs 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 NWPs will not impose any additional substantive obligations on State or local governments. Therefore, Executive Order 13132 does not apply to this rule.

One commenter stated that completing PCNs puts an administrative and financial burden on local governments, and requested that the Corps evaluate this impact in accordance with the National Environmental Policy Act, or revise the PCN requirements.

Local governments that want to do activities that require DA authorization under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899 must apply for permits from the Corps unless the proposed activity qualifies for authorization under a general permit that does not require notification to the Corps. If the proposed activity does not qualify for general permit authorization, the local government must submit an individual permit application. If the proposed activity potentially qualifies for NWP authorization, but requires submission of a PCN to the district engineer, then the local government must submit a PCN. As stating in our Regulatory Impact Analysis, the direct costs to permit applicants for obtaining NWP authorization are less than the direct costs of obtaining individual permit authorization.

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 rule 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 NWPs 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 statues under which the Corps issues, reissues, or modifies nationwide permits are section 404(e) of the Clean Water Act (33 U.S.C. 1344(e)) and section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403). Under section 404 of the Clean Water Act, Department of the Army (DA) permits are required for discharges of dredged or fill material into waters of the United States. Under section 10 of the Rivers and Harbors Act of 1899, 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 construct 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. Nationwide permits are a form of general permit issued by the Chief of Engineers.

Nationwide permits 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 Clean Water Act states that general permits, including NWPs, can be issued for no more than five years. If the current NWPs are not reissued, they will expire on March 18, 2017, and small entities and other project proponents would be required to obtain alternative forms of DA permits (i.e., standard individual

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.

When compared to 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 section 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act. The anticipated decrease in compliance cost results from the lower cost of obtaining NWP authorization instead of standard individual permits. Unlike standard individual permits, NWPs authorize activities without a requirement for public notice and comment on each proposed activity.

Another requirement of Section 404(e) of the Clean Water Act is that general permits, including nationwide permits, 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 or linear foot limits, 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 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 proposed activities will result in only minimal individual and cumulative adverse environmental effects. The terms and conditions of these NWPs will not impose substantially higher costs on small entities than those of the 2012 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, must be secured. However, as noted above, we expect a slight to moderate increase in the number of activities than can be authorized through NWPs, because we are issuing two new NWPs. Because those activities required authorization through other forms of DA authorization (e.g., individual permits or regional general permits) we expect a concurrent decrease in the numbers of individual permit and regional general permit authorizations required for these activities.

In the June 1, 2016, proposed rule we requested comments on the potential impacts of the NWPs on small entities. One commenter said that the proposed NWPs do not comply with the Regulatory Flexibility Act because the Corps failed to conduct the required analysis to certify will not have a significant impact on small businesses. We believe our Regulatory Flexibility Act analysis satisfies the requirements of that Act.

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, the 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 the 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.

We have determined that the NWPs 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. These NWPs 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 rule is not subject to the requirements of Sections 202 and 205

of the UMRA. For the same reasons, we have determined that the NWPs contain no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the issuance and modification of the NWPs 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, we must evaluate the environmental health or safety effects of the proposed rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

The NWPs are not subject to this Executive Order because they are not economically significant as defined in Executive Order 12866. In addition, the NWPs do not concern an environmental health or safety risk that we have 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 NWPs 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 rule. However, in the spirit of Executive Order 13175, we specifically requested comments from Tribal officials on the proposed rule. Their comments were fully considered during the preparation of this final rule. We have modified general condition 17 to more fully address tribal rights. Each Corps district conducted government-to-government consultation with Tribes, to identify regional conditions or other local NWP modifications to protect aquatic resources of interest to Tribes, as part of the Corps' responsibility to protect tribal trust resources and ensure that activities authorized by NWPs do not cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, and tribal lands.

One commenter stated that they disagreed with our determination that the proposal to reissue and issue the NWPs is not subject to E.O. 13175 because the NWPs are regulations under that Executive Order.

While the NWPs are regulations, we believe the final NWPs 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 NWPs 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 has been modified to state that no NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. Tribes use NWPs for activities they conduct that require DA authorization under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899. 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 2017 NWPs, Corps districts conducted consultations with tribes to identify regional conditions to ensure that NWP activities comply with general conditions 17 and 20. Through those consultations, district engineers can also develop coordination procedures with tribes to provide 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 pre-construction notification that triggers a need to consult with one or more tribes, that consultation will be completed before the district engineer makes his or her decision on whether to issue the NWP verification. 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. Division engineers can modify, suspend, or revoke one or more NWPs in a region to protect tribal rights. A district engineer can modify, suspend, or revoke an NWP to protect tribal rights, protected tribal resources, and tribal lands.

Environmental Documentation

A decision document, which includes an environmental assessment and Finding of No Significant Impact (FONSI) has been prepared for each NWP. The final decision documents for these NWPs are available at: www.regulations.gov (docket ID number COE-2015-0017). 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. We 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 Comptroller General of the United States. 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).

Executive Order 12898

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

The NWPs are not expected to negatively impact any community, and therefore are not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.

Executive Order 13211

These NWPs are 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 they are not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Authority

We are issuing new NWPs, modifying existing NWPs, and reissuing NWPs without change under the authority of Section 404 of the Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 et seq.).

Date: December 21, 2016.

_____

Donald E. Jackson

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

Nationwide Permits

1. Aids to Navigation

2. Structures in Artificial Canals

3. Maintenance

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

5. Scientific Measurement Devices

6. Survey Activities

7. Outfall Structures and Associated Intake Structures

8. Oil and Gas Structures on the Outer Continental Shelf

9. Structures in Fleeting and Anchorage Areas

10. Mooring Buoys

11. Temporary Recreational Structures

12. Utility Line Activities

13. Bank Stabilization

14. Linear Transportation Projects

15. U.S. Coast Guard Approved Bridges

16. Return Water From Upland Contained Disposal Areas

17. Hydropower Projects

18. Minor Discharges

19. Minor Dredging

20. Response Operations for Oil or Hazardous Substances

21. Surface Coal Mining Activities

22. Removal of Vessels

23. Approved Categorical Exclusions

24. Indian Tribe or State Administered Section 404 Programs

25. Structural Discharges

26. [Reserved]

27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities

28. Modifications of Existing Marinas

29. Residential Developments

30. Moist Soil Management for Wildlife

31. Maintenance of Existing Flood Control Facilities

32. Completed Enforcement Actions

33. Temporary Construction, Access, and Dewatering

34. Cranberry Production Activities

35. Maintenance Dredging of Existing Basins

36. Boat Ramps

37. Emergency Watershed Protection and Rehabilitation

38. Cleanup of Hazardous and Toxic Waste

39. Commercial and Institutional Developments

40. Agricultural Activities

41. Reshaping Existing Drainage Ditches

42. Recreational Facilities

43. Stormwater Management Facilities

44. Mining Activities

45. Repair of Uplands Damaged by Discrete Events

46. Discharges in Ditches

47. [Reserved]

48. Commercial Shellfish Aquaculture Activities

49. Coal Remining Activities

50. Underground Coal Mining Activities

51. Land-Based Renewable Energy Generation Facilities

52. Water-Based Renewable Energy Generation Pilot Projects

53. Removal of Low-Head Dams

54. Living Shorelines

Nationwide Permit General Conditions

1. Navigation

2. Aquatic Life Movements

3. Spawning Areas

4. Migratory Bird Breeding Areas

5. Shellfish Beds

6. Suitable Material

7. Water Supply Intakes

8. Adverse Effects from Impoundments

9. Management of Water Flows

10. Fills Within 100-Year Floodplains

11. Equipment

12. Soil Erosion and Sediment Controls

13. Removal of Temporary Fills

14. Proper Maintenance

15. Single and Complete Project

16. Wild and Scenic Rivers

17. Tribal Rights

18. Endangered Species

19. Migratory Bird and Bald and Golden Eagle Permits

20. Historic Properties

21. Discovery of Previously Unknown Remains and Artifacts

22. Designated Critical Resource Waters

23. Mitigation

24. Safety of Impoundment Structures

25. Water Quality

26. Coastal Zone Management

27. Regional and Case-by-Case Conditions

28. Use of Multiple Nationwide Permits

29. Transfer of Nationwide Permit Verifications

30. Compliance Certification

31. Activities Affecting Structures or Works Built by the United States

32. Pre-Construction Notification

District Engineer's Decision

Further Information

Definitions

Best management practices (BMPs)

Compensatory mitigation

Currently serviceable

Direct effects

Discharge

Ecological reference

Enhancement

Ephemeral stream

Establishment (creation)

High Tide Line

Historic property

Independent utility

Indirect effects

Intermittent stream

Loss of waters of the United States

Navigable waters

Non-tidal wetland

Open water

Ordinary high water mark

Perennial stream

Practicable

Pre-construction notification

Preservation

Protected tribal resources

Re-establishment

Rehabilitation

Restoration

Riffle and pool complex

Riparian areas

Shellfish seeding

Single and complete linear project

Single and complete non-linear project

Stormwater management

Stormwater management facilities

Stream bed

Stream channelization

Structure

Tidal wetland

Tribal lands

Tribal rights

Vegetated shallows

Waterbody

B. Nationwide Permits

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

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

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

(b) This NWP also authorizes the removal of accumulated sediments and debris outside the immediate vicinity of existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.). The removal of sediment is limited to the

minimum necessary to restore the waterway in the vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend farther than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization.

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

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

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

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

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

5. Scientific Measurement Devices. Devices, whose purpose is to measure and record scientific data, such as staff gages, tide and current gages, meteorological stations, water recording and biological observation devices, water quality testing and improvement devices, and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards. Upon completion of the use of the device to measure and

record scientific data, the measuring device and any other structures or fills associated with that device (e.g., foundations, anchors, buoys, lines, etc.) must be removed to the maximum extent practicable and the site restored to pre-construction elevations. (Authorities: Sections 10 and 404)

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

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

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

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

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

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

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

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

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

Utility lines: This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of utility lines, including outfall and intake structures. There must be no change in pre-construction contours of waters of the United States. A “utility line” is defined as any pipe or pipeline

for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and internet, radio, and television communication. The term "utility line" does not include activities that drain a water of the United States, such as drainage tile or french drains, but it does apply to pipes conveying drainage from another area.

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

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

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

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

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

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

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if any of the following criteria are met: (1) the activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the

United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials. (See general condition 32.) (Authorities: Sections 10 and 404)

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

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

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

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

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

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

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

Note 8: For NWP 12 activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

13. Bank Stabilization. Bank stabilization activities necessary for erosion control or prevention, such as vegetative stabilization, bioengineering, sills, rip rap, revetment,

gabion baskets, stream barbs, and bulkheads, or combinations of bank stabilization techniques, provided the activity meets all of the following criteria:

(a) No material is placed in excess of the minimum needed for erosion protection;

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects (an exception is for bulkheads – the district engineer cannot issue a waiver for a bulkhead that is greater than 1,000 feet in length along the bank);

(c) The activity will not exceed an average of one cubic yard per running foot, as measured along the length of the treated bank, below the plane of the ordinary high water mark or the high tide line, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(d) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(e) No material is of a type, or is placed in any location, or in any manner, that will impair surface water flow into or out of any waters of the United States;

(f) No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored native trees and treetops may be used in low energy areas);

(g) Native plants appropriate for current site conditions, including salinity, must be used for bioengineering or vegetative bank stabilization;

(h) The activity is not a stream channelization activity; and

(i) The activity must be properly maintained, which may require repairing it after severe storms or erosion events. This NWP authorizes those maintenance and repair activities if they require authorization.

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the bank stabilization activity: (1) involves discharges into special aquatic sites; or (2) is in excess of 500 feet in length; or (3) will involve the discharge of greater than an average of one cubic yard per running foot as measured along the length of the treated bank, below the plane of the ordinary high water mark or the high tide line. (See general condition 32.) (Authorities: Sections 10 and 404)

14. Linear Transportation Projects. Activities required for crossings of waters of the United States associated with the construction, expansion, modification, or improvement of linear transportation projects (e.g., roads, highways, railways, trails,

airport runways, and taxiways) in waters of the United States. For linear transportation projects in non-tidal waters, the discharge cannot cause the loss of greater than 1/2-acre of waters of the United States. For linear transportation projects in tidal waters, the discharge cannot cause the loss of greater than 1/3-acre of waters of the United States. Any stream channel modification, including bank stabilization, is limited to the minimum necessary to construct or protect the linear transportation project; such modifications must be in the immediate vicinity of the project.

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

This NWP cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) the loss of waters of the United States exceeds 1/10-acre; or (2) there is a discharge in a special aquatic site, including wetlands. (See general condition 32.) (Authorities: Sections 10 and 404)

Note 1: For linear transportation projects crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Linear transportation projects must comply with 33 CFR 330.6(d).

Note 2: Some discharges for the construction of farm roads or forest roads, or temporary roads for moving mining equipment, may qualify for an exemption under section 404(f) of the Clean Water Act (see 33 CFR 323.4).

Note 3: For NWP 14 activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

15. U.S. Coast Guard Approved Bridges. Discharges of dredged or fill material incidental to the construction of a bridge across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills, provided the construction of the bridge structure has been authorized by the U.S. Coast Guard under section 9 of the Rivers and Harbors Act of 1899 or other applicable laws. Causeways and approach fills are not included in this NWP and will

require a separate section 404 permit. (Authority: Section 404 of the Clean Water Act (Section 404))

16. Return Water From Upland Contained Disposal Areas. Return water from an upland contained dredged material disposal area. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d), even though the disposal itself occurs in an area that has no waters of the United States and does not require a section 404 permit. This NWP satisfies the technical requirement for a section 404 permit for the return water where the quality of the return water is controlled by the state through the section 401 certification procedures. The dredging activity may require a section 404 permit (33 CFR 323.2(d)), and will require a section 10 permit if located in navigable waters of the United States. (Authority: Section 404)

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

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

18. Minor Discharges. Minor discharges of dredged or fill material into all waters of the United States, provided the activity meets all of the following criteria:

(a) The quantity of discharged material and the volume of area excavated do not exceed 25 cubic yards below the plane of the ordinary high water mark or the high tide line;

(b) The discharge will not cause the loss of more than 1/10-acre of waters of the United States; and

(c) The discharge is not placed for the purpose of a stream diversion.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) the discharge or the volume of area excavated exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line, or (2) the discharge is in a special aquatic site, including wetlands. (See general condition 32.) (Authorities: Sections 10 and 404)

19. Minor Dredging. Dredging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States (i.e., section 10 waters). This NWP does not authorize the dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist but may not be present in a given year), anadromous fish spawning areas, or wetlands, or the connection of canals or other artificial waterways to navigable waters of the United States (see 33 CFR 322.5(g)). All dredged material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. (Authorities: Sections 10 and 404)

20. Response Operations for Oil or Hazardous Substances. Activities conducted in response to a discharge or release of oil or hazardous substances that are subject to the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR part 300) including containment, cleanup, and mitigation efforts, provided that the activities are done under either: (1) the Spill Control and Countermeasure Plan required by 40 CFR 112.3; (2) the direction or oversight of the federal on-scene coordinator designated by 40 CFR part 300; or (3) any approved existing state, regional or local contingency plan provided that the Regional Response Team (if one exists in the area) concurs with the proposed response efforts. This NWP also authorizes activities required for the cleanup of oil releases in waters of the United States from electrical equipment that are governed by EPA's polychlorinated biphenyl spill response regulations at 40 CFR part 761. This NWP also authorizes the use of temporary structures and fills in waters of the U.S. for spill response training exercises. (Authorities: Sections 10 and 404)

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

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

(b) The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district

engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal individual and cumulative adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre. This NWP does not authorize discharges into tidal waters or non-tidal wetlands adjacent to tidal waters; and

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

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

22. Removal of Vessels. Temporary structures or minor discharges of dredged or fill material required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This NWP does not authorize maintenance dredging, shoal removal, or riverbank snagging.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) the vessel is listed or eligible for listing in the National Register of Historic Places; or (2) the activity is conducted in a special aquatic site, including coral reefs and wetlands. (See general condition 32.) If condition 1 above is triggered, the permittee cannot commence the activity until informed by the district engineer that compliance with the "Historic Properties" general condition is completed. (Authorities: Sections 10 and 404)

Note 1: If a removed vessel is disposed of in waters of the United States, a permit from the U.S. EPA may be required (see 40 CFR 229.3). If a Department of the Army permit is required for vessel disposal in waters of the United States, separate authorization will be required.

Note 2: Compliance with general condition 18, Endangered Species, and general condition 20, Historic Properties, is required for all NWPs. The concern with historic properties is emphasized in the notification requirements for this NWP because of the possibility that shipwrecks may be historic properties.

23. Approved Categorical Exclusions. Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where:

(a) That agency or department has determined, pursuant to the Council on Environmental Quality's implementing regulations for the National Environmental Policy Act (40 CFR part 1500 et seq.), that the activity is categorically excluded from the requirement to prepare an environmental impact statement or environmental assessment analysis, because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment; and

(b) The Office of the Chief of Engineers (Attn: CECW-CO) has concurred with that agency's or department's determination that the activity is categorically excluded and approved the activity for authorization under NWP 23.

The Office of the Chief of Engineers may require additional conditions, including pre-construction notification, for authorization of an agency's categorical exclusions under this NWP.

Notification: Certain categorical exclusions approved for authorization under this NWP require the permittee to submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 32). The activities that require pre-construction notification are listed in the appropriate Regulatory Guidance Letters. (Authorities: Sections 10 and 404)

Note: The agency or department may submit an application for an activity believed to be categorically excluded to the Office of the Chief of Engineers (Attn: CECW-CO). Prior to approval for authorization under this NWP of any agency's activity, the Office of the Chief of Engineers will solicit public comment. As of the date of issuance of this NWP, agencies with approved categorical exclusions are: the Bureau of Reclamation, Federal Highway Administration, and U.S. Coast Guard. Activities approved for authorization under this NWP as of the date of this notice are found in Corps Regulatory Guidance Letter 05-07, which is available at: http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl05-07.pdf . Any future approved categorical exclusions will be announced in Regulatory Guidance Letters and posted on this same web site.

24. Indian Tribe or State Administered Section 404 Programs. Any activity permitted by a state or Indian Tribe administering its own section 404 permit program pursuant to 33 U.S.C. 1344(g)-(l) is permitted pursuant to section 10 of the Rivers and Harbors Act of 1899. (Authority: Section 10)

Note 1: As of the date of the promulgation of this NWP, only New Jersey and Michigan administer their own section 404 permit programs.

Note 2: Those activities that do not involve an Indian Tribe or State section 404 permit are not included in this NWP, but certain structures will be exempted by Section 154 of Pub. L. 94-587, 90 Stat. 2917 (33 U.S.C. 591) (see 33 CFR 322.4(b)).

25. Structural Discharges. Discharges of material such as concrete, sand, rock, etc., into tightly sealed forms or cells where the material will be used as a structural member for standard pile supported structures, such as bridges, transmission line footings, and walkways, or for general navigation, such as mooring cells, including the excavation of bottom material from within the form prior to the discharge of concrete, sand, rock, etc. This NWP does not authorize filled structural members that would support buildings, building pads, homes, house pads, parking areas, storage areas and other such structures. The structure itself may require a separate section 10 permit if located in navigable waters of the United States. (Authority: Section 404)

26. [Reserved]

27. Aquatic Habitat Restoration, Enhancement, and Establishment Activities. Activities in waters of the United States associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas, the restoration and enhancement of non-tidal streams and other non-tidal open waters, and the rehabilitation or enhancement of tidal streams, tidal wetlands, and tidal open waters, provided those activities result in net increases in aquatic resource functions and services.

To be authorized by this NWP, the aquatic habitat restoration, enhancement, or establishment activity must be planned, designed, and implemented so that it results in aquatic habitat that resembles an ecological reference. An ecological reference may be based on the characteristics of an intact aquatic habitat or riparian area of the same type

that exists in the region. An ecological reference may be based on a conceptual model developed from regional ecological knowledge of the target aquatic habitat type or riparian area.

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to: the removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms, as well as discharges of dredged or fill material to restore appropriate stream channel configurations after small water control structures, dikes, and berms, are removed; the installation of current deflectors; the enhancement, rehabilitation, or re-establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to enhance, rehabilitate, or re-establish stream meanders; the removal of stream barriers, such as undersized culverts, fords, and grade control structures; the backfilling of artificial channels; the removal of existing drainage structures, such as drain tiles, and the filling, blocking, or reshaping of drainage ditches to restore wetland hydrology; the installation of structures or fills necessary to restore or enhance wetland or stream hydrology; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; re-establishment of submerged aquatic vegetation in areas where those plant communities previously existed; re-establishment of tidal wetlands in tidal waters where those wetlands previously existed; mechanized land clearing to remove non-native

invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.

This NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands and streams, on the project site provided there are net increases in aquatic resource functions and services.

Except for the relocation of non-tidal waters on the project site, this NWP does not authorize the conversion of a stream or natural wetlands to another aquatic habitat type (e.g., the conversion of a stream to wetland or vice versa) or uplands. Changes in wetland plant communities that occur when wetland hydrology is more fully restored during wetland rehabilitation activities are not considered a conversion to another aquatic habitat type. This NWP does not authorize stream channelization. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

Compensatory mitigation is not required for activities authorized by this NWP since these activities must result in net increases in aquatic resource functions and services.

Reversion. For enhancement, restoration, and establishment activities conducted: (1) In accordance with the terms and conditions of a binding stream or wetland enhancement or restoration agreement, or a wetland establishment agreement, between the landowner and the U.S. Fish and Wildlife Service (FWS), the Natural Resources Conservation Service (NRCS), the Farm Service Agency (FSA), the National Marine Fisheries Service (NMFS), the National Ocean Service (NOS), U.S. Forest Service

(USFS), or their designated state cooperating agencies; (2) as voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or (3) on reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) or the applicable state agency, this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (i.e., prior to the restoration, enhancement, or establishment activities). The reversion must occur within five years after expiration of a limited term wetland restoration or establishment agreement or permit, and is authorized in these circumstances even if the discharge occurs after this NWP expires. The five-year reversion limit does not apply to agreements without time limits reached between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS, or an appropriate state cooperating agency. This NWP also authorizes discharges of dredged or fill material in waters of the United States for the reversion of wetlands that were restored, enhanced, or established on prior-converted cropland or on uplands, in accordance with a binding agreement between the landowner and NRCS, FSA, FWS, or their designated state cooperating agencies (even though the restoration, enhancement, or establishment activity did not require a section 404 permit). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit. Before conducting any reversion activity the permittee or the appropriate Federal or state agency must notify the district engineer and include the documentation of the

prior condition. Once an area has reverted to its prior physical condition, it will be subject to whatever the Corps Regulatory requirements are applicable to that type of land at the time. The requirement that the activity results in a net increase in aquatic resource functions and services does not apply to reversion activities meeting the above conditions. Except for the activities described above, this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion.

Reporting. For those activities that do not require pre-construction notification, the permittee must submit to the district engineer a copy of: (1) The binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement, or a project description, including project plans and location map; (2) the NRCS or USDA Technical Service Provider documentation for the voluntary stream enhancement or restoration action or wetland restoration, enhancement, or establishment action; or (3) the SMCRA permit issued by OSMRE or the applicable state agency. The report must also include information on baseline ecological conditions on the project site, such as a delineation of wetlands, streams, and/or other aquatic habitats. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing any activity (see general condition 32), except for the following activities:

(1) Activities conducted on non-Federal public lands and private lands, in accordance with the terms and conditions of a binding stream enhancement or restoration

agreement or wetland enhancement, restoration, or establishment agreement between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS or their designated state cooperating agencies;

(2) Voluntary stream or wetland restoration or enhancement action, or wetland establishment action, documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or

(3) The reclamation of surface coal mine lands, in accordance with an SMCRA permit issued by the OSMRE or the applicable state agency.

However, the permittee must submit a copy of the appropriate documentation to the district engineer to fulfill the reporting requirement. (Authorities: Sections 10 and 404)

Note: This NWP can be used to authorize compensatory mitigation projects, including mitigation banks and in-lieu fee projects. However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition, since compensatory mitigation is generally intended to be permanent.

28. Modifications of Existing Marinas. Reconfiguration of existing docking facilities within an authorized marina area. No dredging, additional slips, dock spaces, or expansion of any kind within waters of the United States is authorized by this NWP. (Authority: Section 10)

29. Residential Developments. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are

necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development).

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

Subdivisions: For residential subdivisions, the aggregate total loss of waters of United States authorized by this NWP cannot exceed 1/2-acre. This includes any loss of waters of the United States associated with development of individual subdivision lots.

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

(Authorities: Sections 10 and 404)

30. Moist Soil Management for Wildlife. Discharges of dredged or fill material into non-tidal waters of the United States and maintenance activities that are associated with moist soil management for wildlife for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage

habitat and feeding areas for wildlife. Such activities include, but are not limited to, plowing or discing to impede succession, preparing seed beds, or establishing fire breaks. Sufficient riparian areas must be maintained adjacent to all open water bodies, including streams, to preclude water quality degradation due to erosion and sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, or similar features associated with the management areas. The activity must not result in a net loss of aquatic resource functions and services. This NWP does not authorize the conversion of wetlands to uplands, impoundments, or other open water bodies. (Authority: Section 404)

Note: The repair, maintenance, or replacement of existing water control structures or the repair or maintenance of dikes may be authorized by NWP 3. Some such activities may qualify for an exemption under section 404(f) of the Clean Water Act (see 33 CFR 323.4).

31. Maintenance of Existing Flood Control Facilities. Discharges of dredged or fill material resulting from activities associated with the maintenance of existing flood control facilities, including debris basins, retention/detention basins, levees, and channels that: (i) were previously authorized by the Corps by individual permit, general permit, or 33 CFR 330.3, or did not require a permit at the time they were constructed, or (ii) were constructed by the Corps and transferred to a non-Federal sponsor for operation and maintenance. Activities authorized by this NWP are limited to those resulting from maintenance activities that are conducted within the "maintenance baseline," as described in the definition below. Discharges of dredged or fill materials associated with maintenance activities in flood control facilities in any watercourse that have previously

been determined to be within the maintenance baseline are authorized under this NWP. To the extent that a Corps permit is required, this NWP authorizes the removal of vegetation from levees associated with the flood control project. This NWP does not authorize the removal of sediment and associated vegetation from natural water courses except when these activities have been included in the maintenance baseline. All dredged and excavated material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. Proper sediment controls must be used.

Maintenance Baseline: The maintenance baseline is a description of the physical characteristics (e.g., depth, width, length, location, configuration, or design flood capacity, etc.) of a flood control project within which maintenance activities are normally authorized by NWP 31, subject to any case-specific conditions required by the district engineer. The district engineer will approve the maintenance baseline based on the approved or constructed capacity of the flood control facility, whichever is smaller, including any areas where there are no constructed channels but which are part of the facility. The prospective permittee will provide documentation of the physical characteristics of the flood control facility (which will normally consist of as-built or approved drawings) and documentation of the approved and constructed design capacities of the flood control facility. If no evidence of the constructed capacity exists, the approved capacity will be used. The documentation will also include best management practices to ensure that the adverse environmental impacts caused by the maintenance activities are no more than minimal, especially in maintenance areas where there are no constructed channels. (The Corps may request maintenance records in areas where there

has not been recent maintenance.) Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5. Except in emergencies as described below, this NWP cannot be used until the district engineer approves the maintenance baseline and determines the need for mitigation and any regional or activity-specific conditions. Once determined, the maintenance baseline will remain valid for any subsequent reissuance of this NWP. This NWP does not authorize maintenance of a flood control facility that has been abandoned. A flood control facility will be considered abandoned if it has operated at a significantly reduced capacity without needed maintenance being accomplished in a timely manner. A flood control facility will not be considered abandoned if the prospective permittee is in the process of obtaining other authorizations or approvals required for maintenance activities and is experiencing delays in obtaining those authorizations or approvals.

Mitigation: The district engineer will determine any required mitigation one-time only for impacts associated with maintenance work at the same time that the maintenance baseline is approved. Such one-time mitigation will be required when necessary to ensure that adverse environmental effects are no more than minimal, both individually and cumulatively. Such mitigation will only be required once for any specific reach of a flood control project. However, if one-time mitigation is required for impacts associated with maintenance activities, the district engineer will not delay needed maintenance, provided the district engineer and the permittee establish a schedule for identification, approval, development, construction and completion of any such required mitigation. Once the one-time mitigation described above has been completed, or a determination made that mitigation is not required, no further mitigation will be required for maintenance

activities within the maintenance baseline (see Note, below). In determining appropriate mitigation, the district engineer will give special consideration to natural water courses that have been included in the maintenance baseline and require mitigation and/or best management practices as appropriate.

Emergency Situations: In emergency situations, this NWP may be used to authorize maintenance activities in flood control facilities for which no maintenance baseline has been approved. Emergency situations are those which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if action is not taken before a maintenance baseline can be approved. In such situations, the determination of mitigation requirements, if any, may be deferred until the emergency has been resolved. Once the emergency has ended, a maintenance baseline must be established expeditiously, and mitigation, including mitigation for maintenance conducted during the emergency, must be required as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer before any maintenance work is conducted (see general condition 32). The pre-construction notification may be for activity-specific maintenance or for maintenance of the entire flood control facility by submitting a five-year (or less) maintenance plan. The pre-construction notification must include a description of the maintenance baseline and the disposal site for dredged or excavated material.

(Authorities: Sections 10 and 404)

Note: If the maintenance baseline was approved by the district engineer under a prior version of NWP 31, and the district engineer imposed the one-time compensatory

mitigation requirement on maintenance for a specific reach of a flood control project authorized by that prior version of NWP 31, during the period this version of NWP 31 is in effect (March 19, 2017, to March 18, 2022) the district engineer will not require additional compensatory mitigation for maintenance activities authorized by this NWP in that specific reach of the flood control project.

32. Completed Enforcement Actions. Any structure, work, or discharge of dredged or fill material remaining in place or undertaken for mitigation, restoration, or environmental benefit in compliance with either:

(i) The terms of a final written Corps non-judicial settlement agreement resolving a violation of Section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899; or the terms of an EPA 309(a) order on consent resolving a violation of section 404 of the Clean Water Act, provided that:

(a) The activities authorized by this NWP cannot adversely affect more than 5 acres of non-tidal waters or 1 acre of tidal waters;

(b) The settlement agreement provides for environmental benefits, to an equal or greater degree, than the environmental detriments caused by the unauthorized activity that is authorized by this NWP; and

(c) The district engineer issues a verification letter authorizing the activity subject to the terms and conditions of this NWP and the settlement agreement, including a specified completion date; or

(ii) The terms of a final Federal court decision, consent decree, or settlement agreement resulting from an enforcement action brought by the United States under

section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or

(iii) The terms of a final court decision, consent decree, settlement agreement, or non-judicial settlement agreement resulting from a natural resource damage claim brought by a trustee or trustees for natural resources (as defined by the National Contingency Plan at 40 CFR subpart G) under Section 311 of the Clean Water Act, Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, Section 312 of the National Marine Sanctuaries Act, section 1002 of the Oil Pollution Act of 1990, or the Park System Resource Protection Act at 16 U.S.C. 19jj, to the extent that a Corps permit is required.

Compliance is a condition of the NWP itself; non-compliance of the terms and conditions of an NWP 32 authorization may result in an additional enforcement action (e.g., a Class I civil administrative penalty). Any authorization under this NWP is automatically revoked if the permittee does not comply with the terms of this NWP or the terms of the court decision, consent decree, or judicial/non-judicial settlement agreement. This NWP does not apply to any activities occurring after the date of the decision, decree, or agreement that are not for the purpose of mitigation, restoration, or environmental benefit. Before reaching any settlement agreement, the Corps will ensure compliance with the provisions of 33 CFR part 326 and 33 CFR 330.6(d)(2) and (e). (Authorities: Sections 10 and 404)

33. Temporary Construction, Access, and Dewatering. Temporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary

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

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

34. Cranberry Production Activities. Discharges of dredged or fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated

with expansion, enhancement, or modification activities at existing cranberry production operations. The cumulative total acreage of disturbance per cranberry production operation, including but not limited to, filling, flooding, ditching, or clearing, must not exceed 10 acres of waters of the United States, including wetlands. The activity must not result in a net loss of wetland acreage. This NWP does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes of this NWP, the cumulative total of 10 acres will be measured over the period that this NWP is valid.

Notification: The permittee must submit a pre-construction notification to the district engineer once during the period that this NWP is valid, and the NWP will then authorize discharges of dredge or fill material at an existing operation for the permit term, provided the 10-acre limit is not exceeded. (See general condition 32.) (Authority: Section 404)

35. Maintenance Dredging of Existing Basins. The removal of accumulated sediment for maintenance of existing marina basins, access channels to marinas or boat slips, and boat slips to previously authorized depths or controlling depths for ingress/egress, whichever is less. All dredged material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. Proper sediment controls must be used for the disposal site. (Authority: Section 10)

36. Boat Ramps. Activities required for the construction of boat ramps, provided the activity meets all of the following criteria:

(a) The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or in the form of pre-cast concrete planks or slabs, unless the district engineer waives the 50 cubic yard limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(b) The boat ramp does not exceed 20 feet in width, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(c) The base material is crushed stone, gravel or other suitable material;

(d) The excavation is limited to the area necessary for site preparation and all excavated material is removed to an area that has no waters of the United States; and,

(e) No material is placed in special aquatic sites, including wetlands.

The use of unsuitable material that is structurally unstable is not authorized. If dredging in navigable waters of the United States is necessary to provide access to the boat ramp, the dredging must be authorized by another NWP, a regional general permit, or an individual permit.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge into waters of the United States exceeds 50 cubic yards, or (2) the boat ramp exceeds 20 feet in width. (See general condition 32.) (Authorities: Sections 10 and 404)

37. Emergency Watershed Protection and Rehabilitation. Work done by or funded by:

(a) The Natural Resources Conservation Service for a situation requiring immediate action under its emergency Watershed Protection Program (7 CFR part 624);

(b) The U.S. Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 2509.13);

(c) The Department of the Interior for wildland fire management burned area emergency stabilization and rehabilitation (DOI Manual part 620, Ch. 3);

(d) The Office of Surface Mining, or states with approved programs, for abandoned mine land reclamation activities under Title IV of the Surface Mining Control and Reclamation Act (30 CFR subchapter R), where the activity does not involve coal extraction; or

(e) The Farm Service Agency under its Emergency Conservation Program (7 CFR part 701).

In general, the prospective permittee should wait until the district engineer issues an NWP verification or 45 calendar days have passed before proceeding with the watershed protection and rehabilitation activity. However, in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the emergency watershed protection and rehabilitation activity may proceed immediately and the district engineer will consider the information in the pre-construction notification and any comments received as a result of agency coordination to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

Notification: Except in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the permittee must submit a

pre-construction notification to the district engineer prior to commencing the activity (see general condition 32). (Authorities: Sections 10 and 404)

38. Cleanup of Hazardous and Toxic Waste. Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority. Court ordered remedial action plans or related settlements are also authorized by this NWP. This NWP does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste.

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

Note: Activities undertaken entirely on a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act.

39. Commercial and Institutional Developments. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of commercial and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, storm water management facilities, wastewater treatment facilities, and recreation facilities such as playgrounds and playing fields. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping

centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The construction of new golf courses and new ski areas is not authorized by this NWP.

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

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

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

40. Agricultural Activities. Discharges of dredged or fill material into non-tidal waters of the United States for agricultural activities, including the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized land clearing;

land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities.

This NWP also authorizes the construction of farm ponds in non-tidal waters of the United States, excluding perennial streams, provided the farm pond is used solely for agricultural purposes. This NWP does not authorize the construction of aquaculture ponds.

This NWP also authorizes discharges of dredged or fill material into non-tidal waters of the United States to relocate existing serviceable drainage ditches constructed in non-tidal streams.

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

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

Note: Some discharges for agricultural activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4). This NWP authorizes

the construction of farm ponds that do not qualify for the Clean Water Act section 404(f)(1)(C) exemption because of the recapture provision at section 404(f)(2).

41. Reshaping Existing Drainage Ditches. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of currently serviceable drainage ditches constructed in waters of the United States, for the purpose of improving water quality by regrading the drainage ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, and increase uptake of nutrients and other substances by vegetation. The reshaping of the ditch cannot increase drainage capacity beyond the original as-built capacity nor can it expand the area drained by the ditch as originally constructed (i.e., the capacity of the ditch must be the same as originally constructed and it cannot drain additional wetlands or other waters of the United States). Compensatory mitigation is not required because the work is designed to improve water quality.

This NWP does not authorize the relocation of drainage ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage ditch must be approximately the same as the location of the centerline of the original drainage ditch. This NWP does not authorize stream channelization or stream relocation projects. (Authority: Section 404)

42. Recreational Facilities. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of recreational facilities. Examples of recreational facilities that may be authorized by this NWP include playing fields (e.g., football fields, baseball fields), basketball courts, tennis courts, hiking trails, bike paths, golf courses, ski areas, horse paths, nature centers, and campgrounds

(excluding recreational vehicle parks). This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables that are directly related to the recreational activity, but it does not authorize the construction of hotels, restaurants, racetracks, stadiums, arenas, or similar facilities.

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

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

43. Stormwater Management Facilities. Discharges of dredged or fill material into non-tidal waters of the United States for the construction of stormwater management facilities, including stormwater detention basins and retention basins and other stormwater management facilities; the construction of water control structures, outfall structures and emergency spillways; the construction of low impact development integrated management features such as bioretention facilities (e.g., rain gardens), vegetated filter strips, grassed swales, and infiltration trenches; and the construction of pollutant reduction green infrastructure features designed to reduce inputs of sediments,

nutrients, and other pollutants into waters to meet reduction targets established under Total Daily Maximum Loads set under the Clean Water Act.

This NWP authorizes, to the extent that a section 404 permit is required, discharges of dredged or fill material into non-tidal waters of the United States for the maintenance of stormwater management facilities, low impact development integrated management features, and pollutant reduction green infrastructure features. The maintenance of stormwater management facilities, low impact development integrated management features, and pollutant reduction green infrastructure features that are not waters of the United States does not require a section 404 permit.

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

Notification: For discharges into non-tidal waters of the United States for the construction of new stormwater management facilities or pollutant reduction green infrastructure features, or the expansion of existing stormwater management facilities or pollutant reduction green infrastructure features, the permittee must submit a pre-

construction notification to the district engineer prior to commencing the activity. (See general condition 32.) Maintenance activities do not require pre-construction notification if they are limited to restoring the original design capacities of the stormwater management facility or pollutant reduction green infrastructure feature. (Authority: Section 404)

44. Mining Activities. Discharges of dredged or fill material into non-tidal waters of the United States for mining activities, except for coal mining activities, provided the activity meets all of the following criteria:

(a) For mining activities involving discharges of dredged or fill material into non-tidal wetlands, the discharge must not cause the loss of greater than 1/2-acre of non-tidal wetlands;

(b) For mining activities involving discharges of dredged or fill material in non-tidal open waters (e.g., rivers, streams, lakes, and ponds) the mined area, including permanent and temporary impacts due to discharges of dredged or fill material into jurisdictional waters, must not exceed 1/2-acre; and

(c) The acreage loss under paragraph (a) plus the acreage impact under paragraph (b) does not exceed 1/2-acre.

The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects.

The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

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

45. Repair of Uplands Damaged by Discrete Events. This NWP authorizes discharges of dredged or fill material, including dredging or excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by storms, floods, or other discrete events. This NWP authorizes bank stabilization to protect the restored uplands. The restoration of the damaged areas, including any bank stabilization, must not exceed the contours, or ordinary high water mark, that existed before the damage occurred. The district engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this NWP. The work must commence, or be under contract to commence, within two years of the date of damage, unless this condition is waived in writing by the district engineer. This NWP cannot be used to reclaim lands lost to normal erosion processes over an extended period.

This NWP does not authorize beach restoration or nourishment.

Minor dredging is limited to the amount necessary to restore the damaged upland area and should not significantly alter the pre-existing bottom contours of the waterbody.

Notification: The permittee must submit a pre-construction notification to the district engineer (see general condition 32) within 12 months of the date of the damage;

for major storms, floods, or other discrete events, the district engineer may waive the 12-month limit for submitting a pre-construction notification if the permittee can demonstrate funding, contract, or other similar delays. The pre-construction notification must include documentation, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. (Authorities: Sections 10 and 404)

Note: The uplands themselves that are lost as a result of a storm, flood, or other discrete event can be replaced without a section 404 permit, if the uplands are restored to the ordinary high water mark (in non-tidal waters) or high tide line (in tidal waters). (See also 33 CFR 328.5.) This NWP authorizes discharges of dredged or fill material into waters of the United States associated with the restoration of uplands.

46. Discharges in Ditches. Discharges of dredged or fill material into non-tidal ditches that are: (1) constructed in uplands, (2) receive water from an area determined to be a water of the United States prior to the construction of the ditch, (3) divert water to an area determined to be a water of the United States prior to the construction of the ditch, and (4) determined to be waters of the United States. The discharge must not cause the loss of greater than one acre of waters of the United States.

This NWP does not authorize discharges of dredged or fill material into ditches constructed in streams or other waters of the United States, or in streams that have been relocated in uplands. This NWP does not authorize discharges of dredged or fill material that increase the capacity of the ditch and drain those areas determined to be waters of the United States prior to construction of the ditch.

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

47. [Reserved]

48. Commercial Shellfish Aquaculture Activities. Discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States necessary for new and continuing commercial shellfish aquaculture operations in authorized project areas. For the purposes of this NWP, the project area is the area in which the operator is authorized to conduct commercial shellfish aquaculture activities, as identified through a lease or permit issued by an appropriate state or local government agency, a treaty, or any easement, lease, deed, contract, or other legally binding agreement that establishes an enforceable property interest for the operator. A "new commercial shellfish aquaculture operation" is an operation in a project area where commercial shellfish aquaculture activities have not been conducted during the past 100 years.

This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures into navigable waters of the United States. This NWP also authorizes discharges of dredged or fill material into waters of the United States necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked.

This NWP does not authorize:

(a) The cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody;

(b) The cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990;

(c) Attendant features such as docks, piers, boat ramps, stockpiles, or staging areas, or the deposition of shell material back into waters of the United States as waste; or

(d) Activities that directly affect more than 1/2-acre of submerged aquatic vegetation beds in project areas that have not been used for commercial shellfish aquaculture activities during the past 100 years.

Notification: The permittee must submit a pre-construction notification to the district engineer if: (1) the activity will include a species that has never been cultivated in the waterbody; or (2) the activity occurs in a project area that has not been used for commercial shellfish aquaculture activities during the past 100 years. If the operator will be conducting commercial shellfish aquaculture activities in multiple contiguous project areas, he or she can either submit one PCN for those contiguous project areas or submit a separate PCN for each project area. (See general condition 32.)

In addition to the information required by paragraph (b) of general condition 32, the pre-construction notification must also include the following information: (1) a map showing the boundaries of the project area(s), with latitude and longitude coordinates for each corner of each project area; (2) the name(s) of the species that will be cultivated during the period this NWP is in effect; (3) whether canopy predator nets will be used; (4) whether suspended cultivation techniques will be used; and (5) general water depths in the project area(s) (a detailed survey is not required). No more than one pre-

construction notification per project area or group of contiguous project areas should be submitted for the commercial shellfish operation during the effective period of this NWP. The pre-construction notification should describe all species and culture activities the operator expects to undertake in the project area or group of contiguous project areas during the effective period of this NWP. If an operator intends to undertake unanticipated changes to the commercial shellfish aquaculture operation during the effective period of this NWP, and those changes require Department of the Army authorization, the operator must contact the district engineer to request a modification of the NWP verification; a new pre-construction notification does not need to be submitted. (Authorities: Sections 10 and 404)

Note 1: The permittee should notify the applicable U.S. Coast Guard office regarding the project.

Note 2: To prevent introduction of aquatic nuisance species, no material that has been taken from a different waterbody may be reused in the current project area, unless it has been treated in accordance with the applicable regional aquatic nuisance species management plan.

Note 3: The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 defines "aquatic nuisance species" as "a nonindigenous species that threatens the diversity or abundance of native species or the ecological stability of infested waters, or commercial, agricultural, aquacultural, or recreational activities dependent on such waters."

49. Coal Remining Activities. Discharges of dredged or fill material into non-tidal waters of the United States associated with the remining and reclamation of lands that

were previously mined for coal. The activities must already be authorized, or they must currently be in process as part of an integrated permit processing procedure, by the Department of the Interior Office of Surface Mining Reclamation and Enforcement, or by states with approved programs under Title IV or Title V of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Areas previously mined include reclaimed mine sites, abandoned mine land areas, or lands under bond forfeiture contracts.

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

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

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

approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977.

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

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

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

51. Land-Based Renewable Energy Generation Facilities. Discharges of dredged or fill material into non-tidal waters of the United States for the construction, expansion, or modification of land-based renewable energy production facilities, including attendant features. Such facilities include infrastructure to collect solar (concentrating solar power and photovoltaic), wind, biomass, or geothermal energy. Attendant features may include,

but are not limited to roads, parking lots, and stormwater management facilities within the land-based renewable energy generation facility.

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

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

Note 1: Utility lines constructed to transfer the energy from the land-based renewable energy generation facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate single and complete linear project. Those utility lines may be authorized by NWP 12 or another Department of the Army authorization.

Note 2: If the only activities associated with the construction, expansion, or modification of a land-based renewable energy generation facility that require Department of the Army authorization are discharges of dredged or fill material into

waters of the United States to construct, maintain, repair, and/or remove utility lines and/or road crossings, then NWP 12 and/or NWP 14 shall be used if those activities meet the terms and conditions of NWPs 12 and 14, including any applicable regional conditions and any case-specific conditions imposed by the district engineer.

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

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

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

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

losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

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

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

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

Upon completion of the pilot project, the generation units, transmission lines, and other structures or fills associated with the pilot project must be removed to the maximum extent practicable unless they are authorized by a separate Department of the Army authorization, such as another NWP, an individual permit, or a regional general permit. Completion of the pilot project will be identified as the date of expiration of the Federal

Energy Regulatory Commission (FERC) license, or the expiration date of the NWP authorization if no FERC license is required.

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

Note 1: Utility lines constructed to transfer the energy from the land-based collection facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate single and complete linear project. Those utility lines may be authorized by NWP 12 or another Department of the Army authorization.

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

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

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

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

53. Removal of Low-Head Dams. Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States associated with the removal of low-head dams.

For the purposes of this NWP, the term "low-head dam" is defined as a dam built across a stream to pass flows from upstream over all, or nearly all, of the width of the dam crest on a continual and uncontrolled basis. (During a drought, there might not be water flowing over the dam crest.) In general, a low-head dam does not have a separate spillway or spillway gates but it may have an uncontrolled spillway. The dam crest is the top of the dam from left abutment to right abutment, and if present, an uncontrolled spillway. A low-head dam provides little storage function.

The removed low-head dam structure must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization.

Because the removal of the low-head dam will result in a net increase in ecological functions and services provided by the stream, as a general rule compensatory mitigation is not required for activities authorized by this NWP. However, the district engineer may determine for a particular low-head dam removal activity that compensatory mitigation is necessary to ensure the authorized activity results in no more than minimal adverse environmental effects.

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

Note: This NWP does not authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters to restore the stream in the vicinity of the low-head dam, including the former impoundment area. Nationwide permit 27 or other Department of the Army permits may authorize such activities. This NWP does not authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters to stabilize stream banks. Bank stabilization activities may be authorized by NWP 13 or other Department of the Army permits.

54. Living Shorelines. Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction and maintenance of living shorelines to stabilize banks and shores in coastal waters, which includes the Great Lakes, along shores with small fetch and gentle slopes that are subject to low- to mid-energy waves. A living shoreline has a footprint that is made up mostly of native material. It incorporates vegetation or other living, natural "soft" elements alone or in combination with some type of harder shoreline structure (e.g., oyster or mussel reefs or rock sills) for added protection and stability. Living shorelines should maintain the natural continuity of the land-water interface, and retain or enhance shoreline ecological processes. Living shorelines must have a substantial biological component, either tidal or lacustrine fringe wetlands or oyster or mussel reef structures. The following conditions must be met:

(a) The structures and fill area, including sand fills, sills, breakwaters, or reefs, cannot extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes, unless the district engineer waives this criterion by making a written determination concluding that the activity will result in no more than minimal adverse environmental effects;

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the activity will result in no more than minimal adverse environmental effects;

(c) Coir logs, coir mats, stone, native oyster shell, native wood debris, and other structural materials must be adequately anchored, of sufficient weight, or installed in a manner that prevents relocation in most wave action or water flow conditions, except for extremely severe storms;

(d) For living shorelines consisting of tidal or lacustrine fringe wetlands, native plants appropriate for current site conditions, including salinity, must be used if the site is planted by the permittee;

(e) Discharges of dredged or fill material into waters of the United States, and oyster or mussel reef structures in navigable waters, must be the minimum necessary for the establishment and maintenance of the living shoreline;

(f) If sills, breakwaters, or other structures must be constructed to protect fringe wetlands for the living shoreline, those structures must be the minimum size necessary to protect those fringe wetlands;

(g) The activity must be designed, constructed, and maintained so that it has no more than minimal adverse effects on water movement between the waterbody and the shore and the movement of aquatic organisms between the waterbody and the shore; and

(h) The living shoreline must be properly maintained, which may require periodic repair of sills, breakwaters, or reefs, or replacing sand fills after severe storms or erosion events. Vegetation may be replanted to maintain the living shoreline. This NWP authorizes those maintenance and repair activities, including any minor deviations necessary to address changing environmental conditions.

This NWP does not authorize beach nourishment or land reclamation activities.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the construction of the living shoreline. (See general condition 32.) The pre-construction notification must include a delineation of special aquatic sites (see paragraph (b)(4) of general condition 32). Pre-construction notification is not required for maintenance and repair activities for living shorelines unless required by applicable NWP general conditions or regional conditions. (Authorities: Sections 10 and 404)

Note: In waters outside of coastal waters, nature-based bank stabilization techniques, such as bioengineering and vegetative stabilization, may be authorized by NWP 13.

C. Nationwide Permit General Conditions

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as applicable, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective

permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP. Every person who may wish to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR 330.1 through 330.6 apply to every NWP authorization. Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

1. Navigation. (a) No activity may cause more than a minimal adverse effect on navigation.

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

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

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

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

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

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

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

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

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

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

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

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

12. Soil Erosion and Sediment Controls. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest

practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow, or during low tides.

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

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

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

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

(b) If a proposed NWP activity will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, the permittee must submit a pre-construction notification (see general condition 32). The district engineer will coordinate the PCN with the Federal agency with direct

management responsibility for that river. The permittee shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

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

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

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

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. If pre-construction notification is required for the proposed

activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under section 7 of the ESA.

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

applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

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

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

(f) If the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed NWP activity, the non-federal applicant should provide a copy of that ESA section 10(a)(1)(B) permit with the PCN required by paragraph (c) of this general condition. The district engineer will coordinate with the agency that issued the ESA section 10(a)(1)(B) permit to determine whether the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation conducted for the ESA section 10(a)(1)(B) permit. If that coordination results in

concurrence from the agency that the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation for the ESA section 10(a)(1)(B) permit, the district engineer does not need to conduct a separate ESA section 7 consultation for the proposed NWP activity. The district engineer will notify the non-federal applicant within 45 days of receipt of a complete pre-construction notification whether the ESA section 10(a)(1)(B) permit covers the proposed NWP activity or whether additional ESA section 7 consultation is required.

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

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

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

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

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties might have the potential to be affected by the proposed NWP activity or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of, or potential for, the presence of historic properties can be sought from the State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include

background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted in the PCN and these identification efforts, the district engineer shall determine whether the proposed NWP activity has the potential to cause effects on the historic properties. Section 106 consultation is not required when the district engineer determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of section 106 of the NHPA: no historic properties affected, no adverse effect, or adverse effect. Where the non-Federal applicant has identified historic properties on which the activity might have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that NHPA section 106 consultation has been completed.

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

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

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

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

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

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

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

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

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

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

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

(e) Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, the restoration or maintenance/protection of riparian areas may be the only compensatory mitigation required. Restored riparian areas should consist

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

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

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

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

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

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

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

(6) Compensatory mitigation requirements (e.g., resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP

authorization, instead of components of a compensatory mitigation plan (see 33 CFR 332.4(c)(1)(ii)).

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

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

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert a forested or scrub-shrub

wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.

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

25. Water Quality. Where States and authorized Tribes, or EPA where applicable, have not previously certified compliance of an NWP with CWA section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The district engineer or State or Tribe may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

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

27. Regional and Case-By-Case Conditions. The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR

330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

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

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

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

_____

(Transferee)

_____

(Date)

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

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

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

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

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

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

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

the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity until either:

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

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

to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

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

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

(2) Location of the proposed activity;

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

(4) A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures. For single and complete linear projects, the PCN must include the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for

each single and complete crossing of those wetlands, other special aquatic sites, and other waters. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (e.g., a conceptual plan), but do not need to be detailed engineering plans);

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

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

(7) For non-Federal permittees, if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in

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

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

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

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

request for section 408 permission from the Corps office having jurisdiction over that USACE project.

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

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

(2) Agency coordination is required for: (i) all NWP activities that require pre-construction notification and result in the loss of greater than 1/2-acre of waters of the United States; (ii) NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 activities that require pre-construction notification and will result in the loss of greater than 300 linear feet of stream bed; (iii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iv) NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.

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

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

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

D. District Engineer's Decision

1. In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If a project proponent requests authorization by a specific NWP, the district engineer should issue the NWP verification for that activity if it meets the terms and conditions of that NWP, unless he or she determines, after considering mitigation, that the proposed activity will result in more than minimal individual and cumulative adverse effects on the aquatic environment and other aspects of the public interest and exercises discretionary authority to require an individual permit for the proposed activity. For a linear project, this determination will include an evaluation of the individual crossings of waters of the United States to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings authorized by NWP. If an applicant requests a waiver of the 300 linear foot limit on impacts to streams or of an otherwise applicable limit, as provided for in NWPs 13, 21, 29, 36, 39, 40, 42, 43, 44, 50, 51, 52, or 54, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in only minimal

individual and cumulative adverse environmental effects. For those NWPs that have a waivable 300 linear foot limit for losses of intermittent and ephemeral stream bed and a 1/2-acre limit (i.e., NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52), the loss of intermittent and ephemeral stream bed, plus any other losses of jurisdictional waters and wetlands, cannot exceed 1/2-acre.

2. When making minimal adverse environmental effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity. He or she will also consider the cumulative adverse environmental effects caused by activities authorized by NWP and whether those cumulative adverse environmental effects are no more than minimal. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (e.g., watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional or condition assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse environmental effects determination. The district engineer may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns.

3. If the proposed activity requires a PCN and will result in a loss of greater than 1/10-acre of wetlands, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for NWP activities with smaller impacts, or for impacts to other types of waters (e.g., streams). The district engineer will consider any proposed compensatory mitigation or other mitigation measures the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed activity are no more than minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are no more than minimal, after considering mitigation, the district engineer will notify the permittee and include any activity-specific conditions in the NWP verification the district engineer deems necessary. Conditions for compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k). The district engineer must approve the final mitigation plan before the permittee commences work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the proposed compensatory mitigation plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure the NWP activity results in no more than minimal adverse environmental effects. If the net adverse environmental effects of the NWP activity (after

consideration of the mitigation proposal) are determined by the district engineer to be no more than minimal, the district engineer will provide a timely written response to the applicant. The response will state that the NWP activity can proceed under the terms and conditions of the NWP, including any activity-specific conditions added to the NWP authorization by the district engineer.

4. If the district engineer determines that the adverse environmental effects of the proposed activity are more than minimal, then the district engineer will notify the applicant either: (a) that the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) that the activity is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal; or (c) that the activity is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse environmental effects, the activity will be authorized within the 45-day PCN period (unless additional time is required to comply with general conditions 18, 20, and/or 31, or to evaluate PCNs for activities authorized by NWPs 21, 49, and 50), with activity-specific conditions that state the mitigation requirements. The authorization will include the necessary conceptual or detailed mitigation plan or a requirement that the applicant submit a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal. When compensatory mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan or has determined

that prior approval of a final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation.

E. Further Information

1. District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP.

2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.

3. NWPs do not grant any property rights or exclusive privileges.

4. NWPs do not authorize any injury to the property or rights of others.

5. NWPs do not authorize interference with any existing or proposed Federal project (see general condition 31).

F. Definitions

Best management practices (BMPs): Policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural.

Compensatory mitigation: The restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Currently serviceable: Useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

Direct effects: Effects that are caused by the activity and occur at the same time and place.

Discharge: The term "discharge" means any discharge of dredged or fill material into waters of the United States.

Ecological reference: A model used to plan and design an aquatic habitat and riparian area restoration, enhancement, or establishment activity under NWP 27. An ecological reference may be based on the structure, functions, and dynamics of an aquatic habitat type or a riparian area type that currently exists in the region where the proposed NWP 27 activity is located. Alternatively, an ecological reference may be based on a conceptual model for the aquatic habitat type or riparian area type to be restored, enhanced, or established as a result of the proposed NWP 27 activity. An ecological reference takes into account the range of variation of the aquatic habitat type or riparian area type in the region.

Enhancement: The manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

Ephemeral stream: An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

Establishment (creation): The manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area.

High Tide Line: The line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

Historic Property: Any prehistoric or historic district, site (including archaeological site), building, structure, or other object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria (36 CFR part 60).

Independent utility: A test to determine what constitutes a single and complete non-linear project in the Corps Regulatory Program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in

the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

Indirect effects: Effects that are caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.

Intermittent stream: An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

Loss of waters of the United States: Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. The loss of stream bed includes the acres or linear feet of stream bed that are filled or excavated as a result of the regulated activity. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities that

do not require Department of the Army authorization, such as activities eligible for exemptions under section 404(f) of the Clean Water Act, are not considered when calculating the loss of waters of the United States.

Navigable waters: Waters subject to section 10 of the Rivers and Harbors Act of 1899. These waters are defined at 33 CFR part 329.

Non-tidal wetland: A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (i.e., spring high tide line).

Open water: For purposes of the NWPs, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of flowing or standing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of "open waters" include rivers, streams, lakes, and ponds.

Ordinary High Water Mark: An ordinary high water mark is a line on the shore established by the fluctuations of water and indicated by physical characteristics, or by other appropriate means that consider the characteristics of the surrounding areas.

Perennial stream: A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

Practicable: Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Pre-construction notification: A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

Preservation: The removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

Protected tribal resources: Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources.

Re-establishment: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

Rehabilitation: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded

aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

Restoration: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a course substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

Riparian areas: Riparian areas are lands next to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects riverine, lacustrine, estuarine, and marine waters with their adjacent wetlands, non-wetland waters, or uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 23.)

Shellfish seeding: The placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (i.e., spat on shell). Suitable

substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.

Single and complete linear project: A linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which often involves multiple crossings of one or more waterbodies at separate and distant locations. The term "single and complete project" is defined as that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the United States (i.e., a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

Single and complete non-linear project: For non-linear projects, the term "single and complete project" is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete non-linear project must have independent utility (see definition of "independent utility"). Single and complete non-linear projects may not be "piecemealed" to avoid the limits in an NWP authorization.

Stormwater management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water

quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and best management practices, which retain water for a period of time to control runoff and/or improve the quality (i.e., by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

Stream channelization: The manipulation of a stream's course, condition, capacity, or location that causes more than minimal interruption of normal stream processes. A channelized stream remains a water of the United States.

Structure: An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

Tidal wetland: A tidal wetland is a jurisdictional wetland that is inundated by tidal waters. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the

water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line.

Tribal lands: Any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

Tribal rights: Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: For purposes of the NWPs, a waterbody is a jurisdictional water of the United States. If a wetland is adjacent to a waterbody determined to be a water of the United States, that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of "waterbodies" include streams, rivers, lakes, ponds, and wetlands.

[FR Doc. 2016-31355 Filed: 1/5/2017 8:45 am; Publication Date: 1/6/2017]