This document is scheduled to be published in the
Federal Register on 01/13/2021 and available online at
**federalregister.gov/d/2021-00102**, and on **govinfo.gov**

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Chapter II

[Docket Number: COE-2020-0002]

RIN 0710-AA84

# Reissuance and Modification of Nationwide Permits

AGENCY: Army Corps of Engineers, DoD.

ACTION: Final rule.

SUMMARY: Nationwide Permits (NWPs) authorize certain activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. The NWPs help protect the aquatic environment and the public interest by providing incentives to reduce impacts on jurisdictional waters and wetlands while effectively authorizing activities that have no more than minimal individual and cumulative adverse environmental effects. In this final rule, the Corps is reissuing and modifying 12 existing NWPs and issuing four new NWPs. For these 16 NWPs, the Corps is also reissuing and modifying the NWP general conditions and definitions. The Corps is not reissuing or modifying the remaining 40 existing NWPs or finalizing proposed new NWP E at this time. Those 40 remaining NWPs continue to be in effect under the January 6, 2017, final rule and the existing general conditions and definitions in the 2017 final rule continue to apply to those permits.

DATES: These 16 NWPs, the 32 general conditions, and the associated definitions will go into effect on [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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 https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/.

SUPPLEMENTARY INFORMATION:

Table of Contents:

I. Background

A. General

B. Overview of Proposed Rule

C. Overview of This Final Rule

D. Status of Existing Permits

E. Nationwide Permit Verifications

F. Executive Order 13783, Promoting Energy Independence and Economic Growth

G. Executive Order 13777, Enforcing the Regulatory Reform Agenda

H. Executive Order 13921, Promoting American Seafood Competitiveness and Economic Growth

I. 2018 Legislative Outline for Rebuilding Infrastructure in America

II. Discussion of Public Comments

A. Overview

B. Responses to General Comments

C. Comments on Proposed Actions Under Executive Order 13921, Promoting American Seafood Competitiveness and Economic Growth

D. Comments on the 2018 Legislative Outline for Rebuilding Infrastructure in America

E. Comments on Regional Conditioning of Nationwide Permits

F. Comments on Proposed Removal of the 300 Linear Foot Limit for Losses of Stream Bed

G. Response to Comments on Specific Nationwide Permits

H. Responses to Comments on the Nationwide Permit General Conditions

I. Discussion of Proposed Modifications to Section D, District Engineer's Decision

J. Discussion of Proposed Modifications to Section F, Definitions

III. Compliance with Relevant Statutes

A. National Environmental Policy Act Compliance

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

C. 2020 Revisions to the Definition of ''Waters of the United States'' (i.e., the Navigable Waters Protection Rule)

D. Compliance with the Endangered Species Act

E. Compliance with the Essential Fish Habitat Provisions of the Magnuson-Stevens Fishery Conservation and Management Act

F. Compliance with Section 106 of the National Historic Preservation Act

G. Section 401 of the Clean Water Act

H. Section 307 of the Coastal Zone Management Act (CZMA)

IV. Economic Impact

V. Administrative Requirements

VI. References

Authority

Nationwide Permits, Conditions, Further Information, and Definitions

List of Acronyms

| | |
|---|---|
| BMP | Best Management Practice |
| CEQ | Council on Environmental Quality |
| CWA | Clean Water Act |
| DA | Department of the Army |
| EFH | Essential Fish Habitat |
| ESA | Endangered Species Act |
| FWS | U.S. Fish and Wildlife Service |
| GC | General Condition |
| NEPA | National Environmental Policy Act |
| NHPA | National Historic Preservation Act |
| NMFS | National Marine Fisheries Service |
| NPDES | National Pollutant Discharge Elimination System |
| NWP | Nationwide Permit |
| PCN | Pre-construction Notification |

List of Nationwide Permits Included in this Rule and General Conditions

Nationwide Permits (NWPs)

12. Oil or Natural Gas Pipeline Activities

21. Surface Coal Mining Activities

29. Residential Developments

39. Commercial and Institutional Developments

40. Agricultural Activities

42. Recreational Facilities

43. Stormwater Management Facilities

44. Mining Activities

48. Commercial Shellfish Mariculture Activities

50. Underground Coal Mining Activities

51. Land-Based Renewable Energy Generation Facilities

52. Water-Based Renewable Energy Generation Pilot Projects

55. Seaweed Mariculture Activities

56. Finfish Mariculture Activities

57. Electric Utility Line and Telecommunications Activities

58. Utility Line Activities for Water and Other Substances

<u>Nationwide Permit General Conditions</u>

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 Birds and Bald and Golden Eagles

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

## I. Background

### A. General

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, where those activities will result in no more than minimal individual and cumulative adverse environmental effects. NWPs were first issued by the Corps in 1977 (42 FR 37122) to authorize categories of activities that have minimal adverse effects on the aquatic environment, for the purpose of streamlining the authorization process for those minor activities. After 1977, NWPs have been issued or reissued in 1982 (47 FR

31794), 1984 (49 FR 39478), 1986 (51 FR 41206), 1991 (56 FR 59110), 1995 (60 FR 38650), 1996 (61 FR 65874), 2000 (65 FR 12818), 2002 (67 FR 2020), 2007 (72 FR 11092), 2012 (77 FR 10184), and 2017 (82 FR 1860).

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 for a period of no more than five years after the date of issuance (33 U.S.C. 1344 (e)). The Secretary's authority to issue 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 federally jurisdictional waters and wetlands, where those activities would have no more than minimal adverse environmental impacts (see 33 CFR 330.1(b)). The categories of activities authorized by NWPs must be similar in nature, cause only minimal adverse environmental effects when performed separately, and have only minimal cumulative adverse effect on the environment (see 33 U.S.C. 1344(e)(1)). NWPs can be issued for a period of no more than 5 years (33 U.S.C. 1344(e)(2)), and the Corps has the authority to modify or revoke the NWPs before they expire. 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 all the activities authorized by a particular NWP during the time period when the NWP is in effect (a period of no more than 5 years) in a specific geographic region. These concepts are defined in paragraph 2 of section D, "District Engineer's Decision." The appropriate geographic area for assessing cumulative effects is determined by the decision-making authority for the general permit (generally, the district engineer).

Some NWPs include pre-construction notification (PCN) requirements. PCNs give the Corps the opportunity to evaluate certain proposed NWP activities on a case-by-case basis to ensure that they will cause no more than minimal adverse environmental effects, individually and cumulatively. Except for activities conducted by non-Federal permittees that require PCNs under paragraph (c) of the "Endangered Species" and "Historic Properties" general conditions (general conditions 18 and 20, respectively), if the Corps district does not respond to the PCN within 45 days of a receipt of a complete PCN, the activity is deemed authorized by the NWP (see 33 CFR 330.1(e)(1)).

In fiscal year 2018, the average processing time for an NWP PCN was 45 days and the average processing time for a standard individual permit was 264 days. This difference in burden can incentivize project proponents to reduce the adverse effects of their planned activities that would otherwise require an individual permit under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899, in order to qualify for NWP authorization. This reduction in adverse effects can therefore reduce a project's impact on the Nation's aquatic resources.

There are 38 Corps district offices and 8 Corps division offices. The district offices administer the NWP program on a day-to-day basis by reviewing PCNs

for proposed NWP activities. The division offices oversee district offices and are managed by division engineers. Division engineers have the authority, after public notice and comment, to modify, suspend, or revoke NWP authorizations on a regional basis to take into account regional differences among aquatic resources and to ensure that the NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects in a region (see 33 CFR 330.5(c)). When a Corps district receives a PCN, the district engineer reviews the PCN and determines whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects, consistent with the criteria in paragraph 2 of section D, "District Engineer's Decision." At this point, the district engineer may add conditions to the NWP authorization to ensure that the verified NWP activity results in no more than minimal individual and cumulative adverse environmental effects, consistent with processes and requirements set out in 33 CFR 330.5(d). See Section II.G for more information on regional conditions for the NWPs.

For some NWPs, when submitting a PCN, an applicant may request a waiver for a particular limit specified in the NWP's terms and conditions. If the applicant requests a waiver of an NWP limit and the district engineer determines, after coordinating with the resource agencies under paragraph (d) of NWP general condition 32, that the proposed NWP activity will result in no more than minimal adverse environmental effects, the district engineer may grant such a waiver. Following the conclusion of the district engineer's review of a PCN, he/she prepares an official, publicly-available decision document. This document discusses the district engineer's findings as to whether a proposed NWP activity qualifies for NWP authorization, including compliance with all applicable terms and conditions, and the rationale for any waivers granted, and activity-specific

conditions needed to ensure that the activity being authorized by the NWP will have no more than minimal individual and cumulative adverse environmental effects and will not be contrary to the public interest (see §330.6(a)(3)(i)).

The case-by-case review of PCNs often results in district engineers adding activity-specific conditions to NWP authorizations to ensure that the adverse environmental effects are no more than minimal. These can include permit conditions such as time-of-year restrictions and/or use of best management practices and/or compensatory mitigation requirements to offset authorized losses of jurisdictional waters and wetlands so that the net adverse environmental effects caused by the authorized activity are no more than minimal. Any compensatory mitigation required for NWP activities must comply with the Corps' compensatory mitigation regulations at 33 CFR part 332. Review of a PCN may also result in the district engineer asserting discretionary authority to require an individual permit from the Corps for the proposed activity, if he or she determines, based on the information provided in the PCN and other available information, that the adverse environmental effects will be more than minimal, or otherwise determines that "sufficient concerns for the environment or any other factor of the public interest so requires" consistent with 33 CFR 330.4(e)(2)).

During the review of PCNs, district engineers assess cumulative adverse environmental effects at an appropriate regional scale. Cumulative effects are the result of the accumulation of direct and indirect effects caused by multiple activities that persist over time in a particular geographic area (MacDonald 2000), such as a watershed or ecoregion (Gosselink and Lee 1989). Therefore, the geographic and temporal scales for cumulative effects analysis are larger than the analysis of the direct and indirect adverse environmental effects caused by

specific activities. For purposes of the NWP program, cumulative effects are the result of the combined effects of activities authorized by NWPs during the period the NWPs are in effect. The cumulative effects are assessed against the current environmental setting to determine whether the cumulative adverse environmental effects are more than minimal. The district engineer uses his or her discretion to determine the appropriate regional scale for evaluating cumulative effects.

For the NWPs, the appropriate regional scale for evaluating cumulative effects may be a waterbody, watershed, county, state, or a Corps district, as appropriate. The appropriate regional scale is dependent, in part, on where the NWP activities are occurring. For example, for NWPs that authorizes structures and/or work in navigable waters of the United States under Section 10 of the Rivers and Harbors Act of 1899, the appropriate geographic region for assessing cumulative effects may be a specific navigable waterbody. For NWPs that authorize discharges of dredged or fill material into non-tidal jurisdictional wetlands and streams, the appropriate geographic region for assessing cumulative effects may be a watershed, county, state, or Corps district. The direct individual adverse environmental effects caused by activities authorized by NWPs are evaluated within the project footprint, and the indirect individual adverse environmental effects caused by activities authorized by NWPs are evaluated within the geographic area to which those indirect effects extend.

When the district engineer reviews a PCN and determines that the proposed activity qualifies for NWP authorization, he or she will issue a written NWP verification to the permittee (see 33 CFR 330.6(a)(3)). If an NWP verification includes multiple authorizations using a single NWP (e.g., linear projects with crossings of separate and distant waters of the United States

authorized by NWPs 12 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 the applicable NWP authorizations within the geographic area that she or he determines is appropriate for assessing cumulative effects caused by activities authorized by that NWP. As discussed above, the geographic area may be a waterbody, watershed, county, state, Corps district, or other geographic area.

Further, the Corps' public interest review regulations at 33 CFR 320.4(a)(1) require consideration of cumulative impacts for the issuance of DA permits. Since the required public interest review and 404(b)(1) Guidelines cumulative effects analyses are conducted by Corps Headquarters in its decision documents for the issuance of the NWPs, district engineers do not need to do comprehensive cumulative effects analyses for NWP verifications. For an NWP verification, the district engineer needs only to include a statement in the administrative record stating whether the proposed activity to be authorized by an NWP, plus any required mitigation, will result in no more than minimal individual and cumulative adverse environmental effects. If the district engineer determines, after considering mitigation, that a proposed NWP activity will result in more than minimal cumulative adverse environmental effects, she or he will exercise discretionary authority and require an application for an individual permit.

There may be activities authorized by NWPs that cross more than one Corps district or more than a single state. On May 15, 2018, the Director of Civil Works at Corps Headquarters issued a Director's Policy Memorandum titled: "Designation of a Lead USACE District for Permitting of Non-USACE Projects

Crossing Multiple Districts or States." [1] This Director's Policy Memorandum identified lead districts for states that have more than one Corps district and established a policy for designating a lead district for activities that require Department of the Army permits that cross district or state boundaries. Under this policy, when the Corps receives an NWP PCN or individual permit application for such activities, a lead Corps district will be designated by the applicable Corps division office(s) using the criteria in the 2018 Director's Policy Memorandum, and that district will be responsible for serving as a single point of contact for each permit applicant, forming a Project Delivery Team comprising representatives of each of the affected districts, ensuring consistent reviews by the affected districts, and taking responsibility for identifying and resolving inconsistencies that may arise during the review. The list of lead districts for states is also used during the regional conditioning process for the NWPs. For that process the lead district is responsible for coordinating the development of the regional conditions and preparing the supplemental documents required by 33 CFR 330.5(c)(1)(iii). The Corps requests comments on whether there are efficiencies that can be adopted to improve the coordination and regional conditioning processes.

B. Overview of Proposed Rule

On September 15, 2020, the Corps published in the Federal Register (85 FR 57298) a proposed regulation to reissue with modification the existing NWPs and associated general conditions and definitions and to create five new NWPs (2020 Proposal). The Corps provided a 60-day public comment period which closed on November 16, 2020. Among other things, the Corps proposed the

[1] This document is available at: https://usace.contentdm.oclc.org/digital/collection/p16021coll11/id/2757/ (accessed 3/12/2020).

following: (1) to create two new NWPs to authorize certain categories of mariculture activities (i.e., seaweed and finfish mariculture) that are not currently authorized by NWP 48; (2) to divide the NWP that authorizes utility line activities (NWP 12) into three separate NWPs that address the differences in how different utility line projects are constructed, the substances they convey, and the different standards and best management practices that help ensure those NWPs authorize only those activities that have no more than minimal adverse environmental effects; (3) a new NWP which would authorize discharges of dredged or fill material into jurisdictional waters for the construction, expansion, and maintenance of water reuse and reclamation facilities; and (4) to remove the 300 linear foot limit for losses of stream bed from 10 NWPs (NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52). The Corps requested comment on these and all other aspects of the proposal.

## C. Overview of This Final Rule

This final rule replaces 12 of the existing NWPs that were published in the January 6, 2017, final rule (82 FR 1860), specifically: NWP 12 (oil or natural gas pipeline activities; NWP 21 (surface coal mining activities); NWP 29 (residential developments); NWP 39 (commercial and institutional developments); NWP 40 (agricultural activities); NWP 42 (recreational facilities); NWP 43 (stormwater management facilities); NWP 44 (mining activities); NWP 48 (commercial shellfish mariculture activities); NWP 50 (underground coal mining activities); NWP 51 (land-based renewable energy generation facilities); and NWP 52 (water-based renewable energy generation pilot projects). This final rule issues four new NWPs: NWP 55 (seaweed mariculture activities); NWP 56 (finfish mariculture activities); NWP 57 (electric utility line and telecommunications activities); and NWP 58 (utility line activities for water and other substances).

For the 16 NWPs included in this final rule, the Corps is also reissuing the general conditions and definitions, with some changes. The Corps is not reissuing or modifying the remaining 40 NWPs included in the 2020 Proposal or taking any action on the proposed new NWP E at this time. The general conditions and definitions published in the January 6, 2017, final rule (82 FR 1860) continue to apply to the 40 existing 2017 NWPs that continue to remain in effect after the final rule for the 16 reissued and new NWPs goes into effect on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

The 16 permits being finalized in this rule include permits proposed partly in response to E.O. 13783, Promoting Energy Independence and Economic Growth, and E.O. 13921, Promoting American Seafood Competitiveness and Economic Growth. The Corps is also reissuing NWPs 12 and 48 partly to address issues raised in two federal district court decisions: United States District Court for the District of Montana Great Falls Division's decision in Northern Plains Resource Council, et al., v. U.S. Army Corps of Engineers, et al., (Case No. CV 19-44-GF-BMM) and the United States District Court, Western District of Washington at Seattle's decision in the Coalition to Protect Puget Sound Habitat v. U.S. Army Corps of Engineers et al. (Case No. C16-0950RSL) and Center for Food Safety v. U.S. Army Corps of Engineers et al. (Case No. C17-1209RSL).

D. Status of Existing Permits

When the Corps modifies existing NWPs, the modified NWPs replace the prior versions of those NWPs so that there are not two sets of NWPs in effect at the same time. Having two sets of NWPs in effect at the same time creates regulatory uncertainty if each set of those NWPs has different limits, requirements, and conditions because permittees may be unclear as to which

limits, requirements, and conditions apply to their authorized activities. In addition, differences in NWP limits, requirements, and conditions between two sets of NWPs can create challenges for district engineers in terms of enforcement and compliance efforts.

The Corps is modifying the expiration date for the 12 existing NWPs (i.e., NWPs 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52) that are issued in this final rule to [INSERT DATE 59 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The expiration date for the 12 existing NWPs and the 4 new NWPs issued in this final rule is five years after the date those NWPs go into effect. Activities authorized by the 2017 NWPs currently remain authorized by those NWPs until March 18, 2022. Under 33 CFR 330.6(a)(3)(ii), if the NWP is reissued without modification or the activity complies with any subsequent modification of the NWP authorization, the NWP verification letter (i.e., the written confirmation from the district engineer that the proposed activity is authorized by an NWP) should include a statement that the verification will remain valid for a period of time specified in the verification letter. The specified period of time is usually the expiration date of the NWP. In other words, for the 2017 NWPs, if the previously verified activity continues to qualify for NWP authorization under any of the 12 NWPs issued in this final rule, that verification letter continues to be in effect until March 18, 2022, unless the district engineer specified a different expiration date in the NWP verification letter. For most activities authorized by the 2017 NWPs, where the district engineer issued an NWP verification letter, the verification letter identified March 18, 2022, as the expiration date. As long as the verified NWP activities continue to comply with the terms and conditions of the 12 existing NWPs issued in this final rule, those activities continue to be authorized

by the applicable NWP(s) until March 18, 2022, unless a district engineer modifies, suspends, or revokes a specific NWP authorization.

Under 33 CFR 330.6(b), Corps Headquarters may modify, reissue, or revoke the NWPs at any time. Activities that were authorized by the 2017 NWPs, but no longer qualify for authorization under any of the 12 existing NWPs that are reissued in this final rule, continue to be authorized by the 2017 NWP(s) for 12 months as long as those activities have commenced (i.e., are under construction) or are under contract to commence in reliance upon an NWP prior to the date on which the NWP expires. That authorization is contingent on the activity being completed within twelve months of the date of an NWP's expiration, modification, or revocation, unless discretionary authority has been exercised by a division or district engineer on a case-by-case basis to modify, suspend, or revoke the authorization in accordance with 33 CFR 330.4(e) and 33 CFR 330.5(c) or (d). This provision applies to activities that were previously verified by the district engineer as qualifying for NWP authorization, but no longer qualify for NWP authorization under the modified or reissued NWP.

The 16 NWPs issued in this final rule go into effect on [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The 2017 versions of the 12 NWPs reissued in this final rule expire on [INSERT DATE 59 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The 12 existing NWPs and 4 new NWPs issued in this final rule expire five years after [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

E. 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 (DA) 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 the NWP(s) requested by the project proponent, as long as the proposed activity complies with all applicable terms and conditions, including any applicable regional conditions imposed by the division engineer. All NWPs have the same general requirements: that the authorized activities may only cause no more than minimal individual and cumulative adverse environmental effects. Therefore, if the proposed activity complies with the terms and all applicable conditions of the NWP the applicant wants to use, then the district engineer should issue the NWP verification unless 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 an 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 an NWP. Some project proponents submit permit applications without specifying the type of authorization they are seeking. In such cases, the district engineer will review those applications and determine if the proposed activity qualifies for NWP authorization or another form of DA authorization, such as a regional general permit (see 33 CFR 330.1(f)).

In response to a PCN or a voluntary NWP verification request, the district engineer reviews the information submitted by the prospective permittee. If the district engineer determines that the activity complies with the terms and conditions of the NWP, 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 activity to be authorized under the NWP will result in no more than 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 NWP 49, 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 NWP 49, 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.

F. Executive Order 13783, Promoting Energy Independence and Economic Growth

Section 2(a) of E.O. 13783 requires federal agencies to review their existing regulations that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear resources. For the Corps, the NWPs authorize activities

associated with the development or use of domestically produced energy resources. In response to E.O. 13783, Office of the Assistant Secretary of the Army (Civil Works) issued a report that reviewed 12 NWPs that authorize activities associated with the development or use of domestically produced energy resources. That report included recommendations for changes that could be made to nine NWPs to support the objectives of E.O. 13783.

The Office of the Assistant Secretary of the Army (Civil Works) issued its report on October 25, 2017, and the November 28, 2017, issue of the Federal Register (82 FR 56192) published a notice of availability for that report. Section 2(g) of E.O. 13783 states that agencies should, as soon as practicable and as appropriate and consistent with law, publish for notice and comment proposed rules that would implement the recommendations in their reports. Section 2(g) further states that agencies shall endeavor to coordinate the regulatory reforms identified in their reports with their activities undertaken in compliance with E.O. 13771, "Reducing Regulation and Controlling Regulatory Costs."

G. Executive Order 13777, Enforcing the Regulatory Reform Agenda

On February 24, 2017, the President signed E.O. 13777, "Enforcing the Regulatory Reform Agenda," which required agencies to evaluate existing regulations and make recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable law. The E.O. specified that agencies must attempt to identify regulations that eliminate jobs or inhibit job creation; are outdated, unnecessary, or ineffective; impose costs that exceed benefits; create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; or meet other criteria identified in that Executive Order. Pursuant to this E.O., in the July 20, 2017, issue of the Federal Register (82 FR 33470) the Corps published a notice seeking public input from

state, local, and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations on its existing regulations that may be appropriate for repeal, replacement, or modification. Some of the changes to the NWPs in this proposal are intended to address some of the comments received in response to the July 20, 2017, Federal Register notice. Comments received in response to the July 20, 2017, Federal Register notice can be viewed at www.regulations.gov in docket number COE-2017-0004.

H. Executive Order 13921, Promoting American Seafood Competitiveness and Economic Growth

On May 7, 2020, the President signed Executive Order 13921 on Promoting American Seafood Competitiveness and Economic Growth. Section 6(b) of the E.O., "Removing Barriers to Aquaculture Permitting," requires the Secretary of the Army, acting through the Assistant Secretary of the Army for Civil Works, to "develop and propose for public comment, as appropriate and consistent with applicable law," NWPs authorizing finfish aquaculture activities and seaweed aquaculture activities in marine and coastal waters, including ocean waters beyond the territorial sea within the exclusive economic zone of the United States. Section 6(b) of the E.O. also requires the Secretary of the Army, acting through the Assistant Secretary of the Army for Civil Works, to "develop and propose for public comment, as appropriate and consistent with applicable law," a proposed NWP authorizing multi-species aquaculture activities in marine and coastal waters, including ocean waters beyond the territorial sea within the exclusive economic zone of the United States. Section 6(b) of the E.O. also requires the Secretary of the Army, acting through the Assistant Secretary of the Army for Civil Works to "assess whether to develop" NWPs for finfish aquaculture activities and seaweed aquaculture activities in other waters of the United States.

Section 6(b) also requires the Secretary of the Army, acting through the Assistant Secretary of the Army for Civil Works, to assess whether to develop a United States Army Corps of Engineers NWP authorizing multi-species aquaculture activities in other waters of the United States.

Instead of proposing a new, separate NWP for authorizing structures in coastal waters and federal waters on the outer continental shelf for multi-species aquaculture activities, the Corps proposed to include provisions allowing additional species to be cultivated with seaweed mariculture activities authorized under proposed new NWP A and finfish mariculture activities authorized under proposed new NWP B. In addition, the Corps invited public comment on whether a separate NWP should be issued to authorize structures or work regulated by the Corps for multi-species mariculture activities.

As required by the Executive Order, the Corps proposed to issue two new NWPs: NWP A to authorize seaweed mariculture activities in navigable waters of the United States, including federal waters on the outer continental shelf, and NWP B to authorize finfish mariculture activities in these waters. Based on the reasons set out in the final rule, the Corps has decided to issue these two permits. These new NWPs authorize structures and work in navigable waters of the United States under Section 10 of the Rivers and Harbors Act of 1899. These new NWPs also authorize seaweed and finfish mariculture structures attached to the seabed on the outer continental shelf. Section 4(f) of the Outer Continental Shelf Lands Act of 1953 as amended (43 U.S.C. 1333(e)), extended the Corps' Rivers and Harbors Act of 1899 section 10 permitting authority to artificial islands, installations, and other devices located on the seabed, to the seaward limit of the outer continental shelf (see 33 CFR 320.2(b)). On the outer continental shelf, the seaweed and finfish mariculture structures may be

anchored to the seabed, and thus require section 10 authorization as devices located on the seabed. Each of these NWPs includes a provision on multi-trophic species mariculture activities in marine and coastal waters, including federal waters on the outer continental shelf. This provision for multi-trophic species mariculture gives flexibility to these NWPs to allow mariculture operators to propagate additional species, such as mussels, on their seaweed or finfish mariculture structures. Including this provision was an alternative to developing a separate NWP for multi-trophic species mariculture activities, and provides NWP authorization that is responsive to the E.O. The Corps recognizes that some mariculture operators may choose to produce seaweeds or finfish exclusively. As discussed in this final rule, the Corps issued proposed new NWP A as NWP 55 and issued proposed new NWP B as NWP 56.

I. 2018 Legislative Outline for Rebuilding Infrastructure in America

On February 12, 2018, the Administration issued its "Legislative Outline for Rebuilding Infrastructure in America." In Part 3 (Infrastructure Permitting Improvement), Principle I.C.1 recommends reforms for eliminating redundancy, duplication, and inconsistency in the application of clean water provisions. One of the recommended reforms was to make statutory changes to authorize Federal agencies to select and use NWPs without additional review by the Corps. Principle I.C.1 recommends allowing Federal agencies to move forward on NWP projects without submitting PCNs to the Corps. That principle also states that removing PCN requirements for Federal agencies would allow the Corps to focus on projects that do not qualify for NWPs, such as activities that require individual permits that have greater environmental impacts.

Consistent with the recommendation included in the Legislative Outline, in the 2020 Proposal the Corps invited comment on whether it can use its existing

authority to create specific procedures or conditions by which Federal agencies that want to use NWPs for regulated activities would not need to submit PCNs, consistent with applicable law. The Corps specified that, under such a mechanism, the Corps would retain under its authority for district engineers to modify, suspend, or revoke NWP authorizations (see 33 CFR 330.5(d)), and the right to take action to address situations where the Federal agency incorrectly determined that the NWP terms and conditions were met.

The Corps sought public comment on whether to exempt federal agencies from PCN requirements under the theory that federal agencies may employ staff who are environmental experts and who already review these projects before submitting PCNs to the Corps to determine whether they meet the criteria for the applicable NWP. These environmental staff are responsible for ensuring that the agencies' proposed activities comply with applicable federal laws, regulations, and policies, as well as relevant Executive Orders. In the proposed rule the Corps stated that it understands that non-federal permittees that want to use the NWPs often hire consultants to help them secure NWP authorization in compliance with applicable federal laws, regulations, and policies and that these consultants may have similar expertise to staff at federal agencies. These consultants may provide general services to assist in securing NWP authorizations on behalf of their clients, or they may specialize in complying with specific laws and regulations, such as Section 7 of the Endangered Species Act, Section 106 of the National Historic Preservation Act, and the Essential Fish Habitat provisions of the Magnuson-Stevens Act. Non-federal permittees are not bound to comply with Executive Orders.

Consistent with this legislative principle, the Corps requested comment on whether to modify the NWPs that require PCNs to limit the PCN requirement to

non-federal permittees. The Corps requested that commenters provide their views on whether they support or oppose having different PCN requirements for Federal and non-Federal permittees, with supporting information to explain their views. After reviewing and considering public comments on this proposal, the Corps has determined not to finalize any change to PCN requirements for federal permittees.

## II. Discussion of Public Comments

### A. Overview

In response to the 2020 Proposal, the Corps received more than 22,700 comment letters, of which approximately 22,330 were form letters pertaining to the proposed removal of the 300 linear foot limit for losses of stream bed, the proposed changes to NWPs 21, 49, and 50, or the proposed reissuance of NWP 12. In addition to the various form letters, the Corps received a few 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-2020-0002) for this rulemaking action. The Corps reviewed and fully considered all comments received in response to the 2020 Proposal.

### B. Responses to General Comments

Many commenters expressed general support for the proposed rule, as well as the NWP program as a whole, and many commenters stated opposition to the proposed changes to the NWPs or the use of NWPs to authorize certain activities. Many commenters said that the NWP program should be discontinued. Many commenters objected to reissuing the NWPs ahead of schedule, stating that early reissuance of the NWPs presents an unnecessary burden and cost to the agency and the public. Many commenters stated that the proposed NWPs do not comply with the Clean Water Act, the National Environmental Policy Act, the

Endangered Species Act, the National Historic Preservation Act, the Magnuson Stevens Act, and other federal laws. Many commenters said that the NWP program is pushing species closer to extinction.

The NWP program is an important component of the Corps Regulatory Program because it provides an efficient means of authorizing activities that result in no more than minimal individual and cumulative adverse environmental effects so that the Corps can devote more of its resources for evaluating proposed activities that require Department of the Army (DA) authorization that have the potential to cause more substantial adverse environmental effects. The grandfathering provisions in the Corps' NWP regulations at 33 CFR 330.6(a)(3)(ii) and 330.6(b) and as described in Section I.D, Status of Existing Permits, provide mechanisms to reduce regulatory burdens when the Corps modifies or reissues the NWPs to replace existing NWPs. The NWPs are issued in compliance with the Clean Water Act, the National Environmental Policy Act, the Endangered Species Act, the National Historic Preservation Act, the Magnuson Stevens Act, and other applicable federal laws.

Several commenters said that the proposal is not compliant with the regulations that govern NWPs. Several commenters stated that every NWP authorization should be announced through a public notice. Several commenters said that the Corps does not have the authority to enforce state conditions. One commenter stated that each NWP should include a state-level review prior to verification. One commenter asserted that the proposal violates the authority of individual states to resolve noncompliance with water quality standard permits. One commenter stated that the Corps should ensure compliance with Safe Water Drinking Act when verifying NWP eligibility. One commenter said that the proposed rule conflicts with efforts to update state general permits.

The 16 NWPs issued in this final rule comply with the Corps' NWP regulations at 33 CFR part 330. The NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects, so it is not necessary to issue public notices to announce the tens of thousands of NWP verification letters Corps districts issue each year. The Corps acknowledges that it does not have the authority to enforce conditions provided by states, except for those conditions added to the NWPs by water quality certifications by certifying authorities and Coastal Zone Management Act consistency concurrences issued by states, that are within the Corps' legal authority to enforce. States can take actions to enforce their own water quality requirements, including permits issued under Section 402 of the Clean Water Act. The Corps does not have the legal authority to enforce the Safe Water Drinking Act. The issuance or reissuance of the NWPs is independent of the issuance of general permits by states, or the issuance of state programmatic general permits by Corps districts.

Several commenters said that the proposed rule did not allow sufficient time for adequate review by states and tribes. Several commenters requested additional time to review the proposed NWPs. One commenter said that the comment period should be extended by 180 days. One commenter stated that Corps divisions and districts should not solicit comments on proposed regional conditions concurrently with the public comment period of the NWP reissuance. Many commenters said that the Corps should have a lead district for every state.

For the 2020 Proposal, the Corps provided a 60-day comment period, which is same duration the Corps has used for past rulemaking actions involving the issuance, reissuance, and/or modification of the NWPs. The Corps sent response letters to entities that made timely requests for extensions of the

comment period for the 2020 Proposal. In the 2020 Proposal, the Corps did not propose a large number or substantial changes to the NWPs. Soliciting public comment on proposed regional conditions concurrently with the proposed issuance or reissuance of the NWPs is consistent with the Corps' NWP regulations at 33 CFR 330.5(b)(2)(ii). The Corps has a designated a lead district for each state; these districts have been identified since 2004. As discussed in Section I.A., the Corps issued a Director's Policy Memorandum on May 15, 2018, that further clarified its policy for designating a lead district for activities that require Department of the Army permits that cross district or state boundaries.

One commenter stated that the Corps is required under Section 404(e) of the Clean Water Act to hold a public hearing, which it cannot meaningfully accomplish given the pandemic. One commenter said the NWPs should not allow losses of up to 1/2-acre of waters of the United States in areas that have already been heavily impacted and should not be used in areas where critical and essential habitat exists for species that are federally threatened or endangered species.

The Corps declined to hold a public hearing on the proposed NWPs because it determined that a public hearing was unlikely to provide additional information that would inform the Corps' decision on whether to issue these NWPs. Under the Corps' regulations at 33 CFR 327.4(b), requests for public hearing under this paragraph shall be granted, unless the Corps determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by holding a public hearing. The Corps received approximately 22,700 comments on the proposed rule, and it is unlikely that any statements provided during a public hearing would raise issues that are different that the issues or

concerns discussed in the written comments received in response to the 2020 Proposal.

The NWPs can be used in any area of the United States, except where the NWPs have been revoked by division engineers on a regional basis (e.g., to use a programmatic general permit instead of the NWPs) or suspended or revoked by district engineers on a case-by-case basis. The NWPs can be used in a variety of areas ranging from environmental settings that have been heavily impacted by human activities to environmental settings that have been shaped by fewer or less severe impacts caused by human activities. For those NWPs with a 1/2-acre limit for losses of waters of the United States (e.g., NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52), PCNs are required for all proposed activities (except for maintenance activities under NWP 43 and losses of less than 1/10-acre of waters of the United States for NWP 51), which gives district engineers the opportunity to review proposed activities in their current environmental setting and determine whether those activities will result in no more than minimal individual and cumulative adverse environmental effects.

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.” The 5-year cycle for reissuing the NWPs provides sufficient time to make necessary changes to the NWPs to ensure that 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. Many commenters said that the Corps has not done any meaningful analysis of the cumulative effects from NWPs. 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. Many commenters said that Corps should fund an independent evaluation of its methodology for assessing cumulative impacts. One commenter said that the proposal should be based on peer-reviewed scientific analysis. One commenter stated that the proposal should include a

scientific support document. One commenter said that NWPs should only authorize activities with predictable environmental effects and outcomes.

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.

For the issuance or reissuance of these NWPs, the Corps has conducted the required cumulative effects analyses. In the national decision document for each NWP issued or reissued in this final rule, the Corps evaluated the cumulative impacts that are anticipated to occur during the 5-year period the NWPs are expected to be in effect. The cumulative impacts are evaluated against the current environmental setting or baseline, in accordance with typical practices for conducting environmental impact analyses. The Corps' public interest review regulations at 33 CFR 320.4(a)(1) and the Corps' general permit regulations at 33 CFR 322.2(f) and 323.2(h) require consideration of cumulative effects for the issuance of permits.

For those NWPs that authorize discharges of dredged or fill material into waters of the United States, the Corps complies with the U.S. EPA's regulations at 40 CFR 230.7(b)(3) for assessing cumulative impacts for the issuance of general permits. Section 230.7(b)(3) requires the permitting authority (e.g., the Corps) to predict cumulative effects by evaluating the number of individual discharge activities likely to be regulated under a general permit until its expiration, including repetitions of individual discharge activities at a single location. In its cumulative effects analyses for the issuance or reissuance of an NWP, the Corps goes further than estimating the number of times an NWP may

be used to authorize activities during the 5-year period it is expected to be in effect by estimating the acreage of impacts and the acreage of compensatory mitigation required by district engineers during that 5-year period. In its analysis of the effects or impacts of the proposed issuance or reissuance of the NWPs under the Council of Environmental Quality's current NEPA regulations at 40 CFR 1508.1(g), the Corps also estimates the impacts that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action during the 5-year period the NWP is expected to be in effect.

These analyses of effects and their associated estimates of authorized activities, authorized impacts to jurisdictional waters and wetlands, and compensatory mitigation required by district engineers, include NWP activities that require PCNs and NWP activities that do not require PCNs. The Corps disagrees that an independent evaluation of these approaches to cumulative effects is necessary, or that a peer-reviewed scientific analysis or a scientific support document should be prepared. The Corps follows existing federal regulations for assessing cumulative effects. In its evaluations of individual and cumulative adverse environmental effects of activities authorized by NWPs, the Corps considers reasonably foreseeable effects or impacts, especially those effects or impacts that are directly or indirectly caused by the activity authorized under the Corps' permitting authorities under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act.

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. Section 404(e) of the Clean Water Act does not specify how broad or narrow a category of activity must be in order to be covered by a general permit. Therefore, that section of the Clean Water Act gives the Corps the discretion to identify categories of activities for the issuance of NWPs. The Corps interprets broadly the requirement for general permits to authorize categories of activities that are similar in nature, 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 no more than minimal adverse environmental effects.

While the Corps recognizes that many NWP activities may be 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 may be part of those larger overall projects but that still does not bring those larger upland features into the Corps' jurisdiction.

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 proposed to be undertaken by non-federal permittees that might affect those listed species or their designated critical habitat (or proposed species or

proposed critical habitat), or that occur in their designated or proposed critical habitat. If a proposed NWP activity may adversely affect essential fish habitat, the district engineer will conduct essential fish habitat consultation with the NMFS. District engineers have the discretion to require compensatory mitigation to offset stream losses caused by NWP activities. After conducting ESA section 7 consultation or essential fish habitat consultation, the district engineer may determine that stream compensatory mitigation is necessary to ensure that the NWP activity results in no more than minimal individual and cumulative adverse environmental effects. A division engineer has the authority to modify, suspend, or revoke one or more NWPs in a geographic region if he or she determines that the use of that NWP or NWPs will result in more than minimal cumulative adverse environmental effects.

One commenter said the NWPs should not authorize activities that result in adverse environmental impacts. One commenter stated that the terms and conditions of the NWPs should not be changed to be less protective of the environment. 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. The Corps has adopted terms and conditions for the NWPs to be sufficiently

protective of the aquatic environment while allowing activities that result in no more than minimal adverse environmental effects to be conducted.

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, not to general 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 fills in jurisdictional waters and wetlands authorized by general permits and individual permits are less than 1/10-acre (see Figure 5.1 in the Regulatory Impact Analysis for this final rule, which is available in the www.regulations.gov docket (COE-2020-0002)). The 16 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) for Section 10 of the Rivers and Harbors Act of 1899. 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 district engineer also applies the 10 criteria listed in paragraph 2 of Section D, District Engineer's Decision. 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.

Several commenters said that the proposed NWPs are not sufficiently protective of freshwater mussels. One commenter stated that the NWPs should be modified to provide additional protections to wilderness areas. Several commenters identified specific areas of the country where they were concerned that the use of the NWPs would authorize activities with adverse environmental impacts. Many commenters said that the NWPs have increased coastal communities' vulnerability to future flood events by accelerating wetland alteration following hurricanes. One commenter stated that the NWPs should be revoked in areas included under the Safe Drinking Water Act, such as public water systems source water areas. One commenter said that all NWPs should be subject to an acreage limit of 1/10-acre.

Impacts to freshwater mussels that are listed as endangered or threatened under the ESA are addressed through general condition 18 and the subsequent ESA section 7 consultations that occur when district engineers review PCNs and determine that a proposed NWP activity may affect listed mussels. Where there

are concerns about the use of NWPs in wilderness areas and other specific waterbodies or geographic areas of the United States, division engineers can add regional conditions to the NWPs to restrict or prohibit their use in those areas. The Corps does not have the legal authority to address the vulnerability of coastal communities to future flood events or the loss of wetlands in coastal areas due to erosion, subsidence, and sea level rise. Public water systems source water areas are generally watersheds, and the Corps does not have the authority to regulate activities in uplands in these watersheds that may affect water supplies for communities. For those NWP activities that require PCNs, district engineers can consider effects to water supplies caused by regulated activities, as one of the Corps' public interest review factors (i.e., water supply and conservation at 33 CFR 320.4(m)) that can be a basis for exercising discretionary authority. The Corps believes that the 1/2-acre limit for the NWPs, the PCN review process, and the ability of division engineers to modify, suspend, or revoke the NWPs on a regional or case-specific basis is sufficient for ensuring that the NWPs that have the 1/2-acre limit authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects.

One commenter stated that implementing NWPs under the Navigable Waters Protection Rule (NWPR) will result in more than minimal impacts and not account for areas that were jurisdictional but are not under current rule. Many commenters said that the NWPs should include language clarifying that not all ditches constructed in adjacent wetlands are jurisdictional. Many commenters stated that the discussion of wetland jurisdiction in the NWPs should mirror that in the NWPR. Many commenters asserted that there are inconsistencies between the proposed NWPs and the NWPR. Several commenters said that the

terminology in the NWPs should be consistent with the NWPR, especially the terms "stream," "tributary," and “ephemeral.”

The NWPs are used to authorize activities in waters and wetlands that are jurisdictional under the Corps’ permitting authorities: Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. If a project proponent wants to discharge dredged or fill material into a waterbody that is not subject to Clean Water Act jurisdiction under the NWPR, then DA authorization under an NWP or any other type of Corps permit is not required for that proposed discharge. The Corps declines to add language to this final rule regarding the jurisdictional status of ditches under the Clean Water Act because that jurisdictional status is more appropriately addressed through application of the provisions of the NWPR at 33 CFR part 328. Many of the NWPs can be used to authorize discharges of dredged or fill material into numerous wetland types that are subject to Clean Water Act jurisdiction under the NWPR. There are no inconsistencies between the proposed NWPs and the NWPR. The NWPs can be used to authorize specific activities in waters and wetlands that are subject to Clean Water Act jurisdiction under the NWPR. Some of the NWPs specifically authorize discharges of dredged or fill material into streams, so the Corps declines to replace the term “stream” with “tributary.” Under the NWPR, ephemeral features, including ephemeral streams are excluded from Clean Water Act jurisdiction.

One commenter requested that the Corps issue a new NWP with no PCN requirements that authorizes emergency projects such as repair of significant leaks from canals, tunnels, and other features, culvert repair and replacement, critical pump plant repairs, and small scale urgent natural disaster mitigation projects. One commenter suggested that the Corps issue a new NWP to

authorize natural disaster mitigation projects (e.g., fire or flood repairs or mitigation projects) with an acreage limit of 1/10-acre. One commenter stated that the Corps should issue a new NWP to authorize aggregate mining activities, instead of NWP 44. One commenter said that the Corps should prioritize NWP verifications for time-sensitive maintenance and emergency work. One commenter stated that the proposal should include a list of typically exempted activities, such as ditch maintenance. One commenter said that that the NWPs should include a general condition to limit the spread of invasive/noxious species.

The Corps declines to issue a new NWP to authorize the repair of leaks from canals, tunnels, and other features because NWP 3 can be used to authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States to repair leaking structures or fills. The Corps also declines to issue a new NWP to authorize natural disaster mitigation projects. Some of these activities are already authorized by NWP 37, emergency watershed protection and rehabilitation activities. Some of these activities can also be authorized through the Corps' emergency permitting procedures at 33 CFR 325.2(e)(4). Nationwide permit 44 authorizes aggregate mining activities, so it is not necessary to issue another NWP to authorize those activities. District engineers currently have the authority to prioritize authorization of time-sensitive maintenance and emergency work, including the use of the emergency permitting procedures at 33 CFR 325.2(e)(4). Certain NWPs include notes that point to exemptions that may be related to authorized activities. The Corps declines to add a general condition to the NWPs to require permittees to take actions to limit the spread of invasive or noxious species because such a condition would not be reasonably enforceable and invasive or noxious species can spread through natural mechanisms outside the

control of permittees. The Corps' regulations at 33 CFR 325.4(a) requires permit conditions to be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable.

(1) Status of Existing Permits

In response to the 2020 Proposal, the Corps received comments concerning the status of existing NWP authorizations and how the issuance of the final rule may affect those existing authorizations. The Corps also invited public comment on changing the expiration date for the 2017 NWPs to avoid having two sets of NWPs in effect at the same time.

Many commenters stated that current NWPs should expire on their original expiration date (i.e., March 18, 2022). Several commenters expressed support for the 2017 NWPs expiring the day before the new NWPs become effective in order to provide certainty and continuity without imposing burdens on permittees, provided that all activities authorized by the 2017 NWPs remain approved regardless of whether those activities meet the requirements of the new NWPs. These commenters also wanted to avoid having differing sets of NWPs in effect at the same time.

Many commenters stated that the Corps proposed grandfathering procedure would cause uncertainty and disruption to those who are relying on the expiration date of the 2017 NWPs and the 12-month grandfathering period. A few commenters said that the grandfathering process and applicability was unclear. One commenter stated that previously verified activities should be allowed to continue under the 2017 NWPs unless the new NWPs are more restrictive. One commenter stated that if the NWPs issued in the final rule replaces the 2017 NWPs and the NWPs issued in the final rule go into effect before the 2017 NWPs were originally scheduled to expire on March 18, 2022,

the Corps should notify all permittees who submitted PCNs or received NWP verification letters under the 2017 NWPs.

The Corps acknowledges that that these changes to the NWPs may cause uncertainty and disruption for some project proponents who have received NWP verifications from the Corps. However, the Corps believes this disruption will be limited because the activities affected by the changes to the 12 existing NWPs are likely to continue to qualify for NWP authorization. Further, project proponents can work with Corps districts to efficiently obtain NWP verifications under the reissued NWPs. The information previously submitted to Corps districts via PCNs can be used to provide NWP verifications for many of the activities that will be authorized by the new NWPs for different types of utility line activities that were previously authorized by NWP 12. It is impractical to require the Corps districts to reach out to all permittees who received NWP verifications under the 2017 NWPs that are reissued in this final rule because of the number of verified activities. Once an NWP verification has been provided there is no obligation for a permittee to undertake the work that has been permitted; therefore, there it is impractical for the Corps to follow-up on every verification to ascertain if the work has been completed and/or whether the project proponent still intends to proceed with the activity authorized under the NWP.

One commenter asked what would happen to activities approved under the 2017 NWPs that would start construction prior to March 18, 2022, but after the implementation dated of the new NWPs. One commenter stated that activities that no longer qualify under the new NWPs but were verified under the 2017 NWPs should have 18 months to complete the authorized activity. One commenter questioned whether projects verified under the 2017 NWPs would

still be valid as verified or would they be in non-compliance and require re-authorization either by NWP or by individual permit.

If a project proponent received an NWP verification under one of the 2017 NWPs, and the activity continues to be authorized by one of the existing NWPs that was reissued, that activity continues to be authorized by the 2017 NWP until it expires on March 18, 2022, unless the district engineer specified a different expiration date in the NWP verification letter (see 33 CFR 330.6(a)(3)(ii)). In contrast to the grandfathering provision at 33 CFR 330.6(b), the grandfathering provided by section 330.6(a)(3)(ii) is not dependent on when the project proponent commences construction. If the activity is not authorized by the reissued NWP, then the project proponent has 12 months to complete the authorized activity after the 16 final NWPs go into effect as long as the project proponent has commenced construction or is under contract to commence construction before the new expiration date for the twelve 2017 NWPs that are reissued in this final rule (see 33 CFR 330.6(b)). The Corps' regulations at 33 CFR 330.6(b) specify a 12-month grandfathering period for activities that no longer qualify for authorization under the reissued NWP if the activity has commenced or is under contract to commence prior to the expiration of the NWP. To change that 12-month period to 18 months would require rulemaking to amend the regulation. The validity of the prior NWP authorization would depend on whether the activity continues to be authorized by any of the 16 NWPs issued in this final rule, and whether any of the grandfathering provisions in 33 CFR 330.6 apply.

One commenter said that based on section 330.6(b) permittees should have until March 18, 2023 to complete projects authorized under the 2017 NWPs as long as they are under construction or contract to commence construction.

One commenter stated that special emphasis should be placed on NWP 12 if it is split into three NWPs, to ensure that activities previously authorized under the 2017 NWP 12 continue to be permitted through the date specified in the verification letter. One commenter stated that the Corps should allow for a reasonable transition between existing activities authorized by an NWP and the new NWPs, for up to one year.

As discussed above, electric utility line and telecommunications activities and utility line activities for water and other substances continue to be authorized by the 2017 NWP 12 for up to 12 months as long as the project proponent has commenced construction or is under contract to commence construction before NWPs 57 and 58 go into effect. Given the anticipated effective date of this final rule, the 12-month grandfathering provision is likely to end close to March 18, 2022. The Corps believes that the current regulations provide a reasonable transition from the 2017 NWPs to the 16 NWPs issued in this final rule.

(2) Pre-construction Notification Requirements

A few commenters stated they are supportive of the reduction of the number of PCN thresholds under various NWPs. A few commenters said they are supportive of the removal of the 300 linear foot PCN threshold. Many commenters stated that they are opposed to reducing the number of PCN thresholds for the NWPs because they believe these PCN thresholds are necessary to ensure that the activities authorized by these NWPs have no more than minimal adverse environmental effects. A few commenters said that the lack of PCNs does not meet the national no-net-loss of aquatic resources goal because these losses are not being mitigated. A few commenters stated their opposition to the removal of the 300 linear foot PCN thresholds. Several

commenters said that they are opposed to federal agencies not having to submit PCNs because it is contrary to the Clean Water Act.

The changes to the PCN thresholds for the NWPs are discussed in the sections of the final rule that apply to each NWP. With the removal of the 300 linear foot limit for losses of stream bed, the Corps has also removed the ability of district engineers to waive that 300 linear foot limit on a case-by-case basis after reviewing PCNs. Activities can be authorized by NWPs with no compensatory mitigation requirements as long as those activities result in no more than minimal individual and cumulative adverse environmental effects. In FY 2018, approximately 11 percent of activities verified by district engineers as qualifying for NWP authorization required compensatory mitigation. There is no requirement in law or regulation for no net loss of aquatic resources. The requirement for what can be authorized by an NWP is that established by Section 404(e) of the Clean Water Act requiring activities authorized by NWPs to cause only minimal individual and cumulative adverse environmental effects. As discussed in Section II.D, the Corps is retaining PCN requirements for federal agencies that use the NWPs to authorize their activities.

A few commenters said that PCNs should be required for all NWP activities to ensure the authorized activities are not affecting the environment adversely and to ensure the permittee is avoiding and minimizing impacts to the maximum extent practicable. One commenter stated that a PCN should be required to ensure compliance with Section 106 of the National Historic Preservation Act. One commenter said that the timing of the review process for a PCN is not identified in the proposed rule for any of the NWPs.

The Corps establishes PCN thresholds for those NWP activities that have the potential to cause more than minimal adverse environmental effects, to

provide activity-specific review and allow district engineers to exercise discretionary authority and require individual permits for activities that will have more than minimal adverse environmental effects. General condition 20 establishes PCN requirements for proposed NWP activities that have the potential to cause effects to historic properties that are undertaken by non-federal permittees. The timing of the PCN review process is provided in general condition 32.

One commenter stated that the Corps undertakes many actions under its permitting authorities for which the tribes and villages are not notified. One commenter asked how the Corps ensures no more than minimal adverse environmental effects if a default NWP authorization occurs after 45 days has passed after the district engineer receives a PCN. One commenter asked for clarification as to how the Corps ensures compliance for activities that do not require PCNs. One commenter requested that Corps Headquarters clarify to each of the Corps districts that it is up to the permittee to determine whether a PCN is required or not.

In conjunction with the rulemaking process for the issuance of these NWPs, Corps districts have been conducting consultation and coordination with tribes to identify regional conditions and coordination procedures to ensure compliance with general condition 17, concerning tribal rights. Activities that qualify for the default authorization that occurs 45-days after the district engineer receives a complete PCN must comply with all conditions of the NWP, including the general conditions and any applicable regional conditions imposed by the division engineer. The permittee is responsible for reading the NWPs and all of their conditions to determine whether he or she is required to submit a PCN before proceeding with an authorized activity.

One commenter said that for linear projects that are considered “single and complete,” where some crossings do not require PCNs, the permittee should not have to divulge the non-PCN crossing information to the Corps because the permittee is not required to provide the same level of documentation for non-PCN crossings, and the project proponent should be free to move forward with the non-PCN crossings. One commenter encouraged the Corps to implement a nationwide tracking and monitoring system for NWPs with PCN requirements to share information with cooperating resource agencies so that informed decisions can be made regarding changes to the NWP program.

The information on the non-PCN crossings associated with a linear project is necessary so that the district engineer can consider all crossings of waters of the United States that require DA authorization when making his or her determination that the proposed NWP activities will result in no more than minimal cumulative adverse environmental effects. The information required by paragraphs (b)(4)(i) and (ii) of general condition 32 does not change these non-PCN crossings into those requiring PCNs. The Corps tracks all NWP verifications issued for activities that require PCNs and for activities reported to Corps districts through voluntary PCNs where the permittee seeks written verification even though he or she is not required to do so.

(3) Climate Change

Many commenters said that the Corps should consider climate change during the reissuance of these NWPs. One commenter stated that the Corps failed to analyze climate change, the risk of which will be exacerbated by the issuance of the NWPs. Some of these commenters stated that the Corps should consider increased energy consumption as a foreseeable indirect effect of the Corps’ decisions for these NWPs. Several commenters asserted that the

proposed changes to the NWPs will have significant impacts on the environment, including climate change. One commenter said that the cumulative impacts of stream and wetland losses from NWP activities must be considered in the context of the changing climate. Several commenters stated that the proposed NWPs help support the nation's investment of its infrastructure, including changes to infrastructure to address global climate change.

The Corps has considered climate change during the reissuance of the NWPs, and each of the national decision documents includes a discussion of climate change. Although some activities authorized by various NWPs may be associated with energy production, distribution, and use, the Corps does not have the authority to regulate or control the production, distribution, or combustion of hydrocarbons and other materials are sources of carbon dioxide and other greenhouse gases that contribute to global climate change. Permittees may use equipment during the construction of the NWP activity that emits carbon dioxide and other greenhouse gases, but those emissions occur during the construction period for the authorized activity and have an insignificant contribution to cumulative greenhouse gas emissions in the region. The activities authorized by NWPs may result in permanent or temporary impacts to wetlands and streams, and the discharges of dredged or fill material into waters of the United States and structures and work in navigable waters of the United States are only a subset of the variety of human activities that change the quantity and quality of wetlands, streams, and other aquatic resources. Those other human activities are discussed in section 4.0 of the national decision documents for these NWPs. Some activities authorized by the NWPs, such as utility line activities, bank stabilization activities, living shorelines, and aquatic resource restoration activities contribute to adaptation to climate change.

C. Comments on Proposed Actions Under Executive Order 13921, Promoting American Seafood Competitiveness and Economic Growth

In response to the 2020 Proposal, the Corps received comments on its proposed actions under Executive Order 13921, Promoting American Seafood Competitiveness and Economic Growth. The comments on proposed NWPs A and B for seaweed mariculture activities and finfish mariculture activities, respectively, are discussed in Section II.G of this final rule. In response to the section of the 2020 Proposal on E.O. 13921, the Corps received a few comments on aquaculture in other waters of the United States, but those commenters seemed to think that the mariculture NWPs might also authorize aquaculture activities in those other waters (e.g., freshwater lakes, ponds, and wetlands). The new NWPs 55 (seaweed mariculture activities) and 56 (finfish mariculture activities) limit those activities to estuarine and marine waters. These new NWPs also authorize multi-trophic mariculture activities.

D. Comments on the 2018 Legislative Outline for Rebuilding Infrastructure in America

In the 2020 Proposal, the Corps requested comment on whether to modify the NWPs that require PCNs to limit the PCN requirement to non-federal permittees. The Corps requested that commenters provide their views on whether they support or oppose having different PCN requirements for Federal and non-Federal permittees, with supporting information to explain their views.

After considering the comments received in response to the proposal based on the 2018 Legislative Outline for Rebuilding Infrastructure in America, for the final NWPs the Corps decided to continue to subject both federal permittees and non-federal permittees to the same PCN requirements. Overall, the comments received in response to this aspect of the proposed rule did not

support a reasoned and defensible rational for establishing different PCN requirements for federal and non-federal entities that use the NWPs to authorized activities that require DA authorization under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. The comments the Corps received did not provide a substantive basis for establishing different PCN requirements for federal permittees and non-federal permittees, or establishing that federal permittees generally have a better record than non-federal permittees for complying with the NWPs and complying with related laws such as the Endangered Species Act and the National Historic Preservation Act. While the Corps would retain its enforcement authorities under the proposal, continuing to require federal agencies to submit PCNs is a more efficient means of ensuring that the NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects.

Many commenters opposed the proposal to remove PCN requirements for federal permittees that want to use the NWPs to authorize their activities, because it would apply different PCN requirements and standards to federal versus non-federal permittees. Some of these commenters said this change may result in inadvertent violations. Some of these commenters stated that applying different PCN requirements for federal and non-federal permittees has no rational basis, and PCN requirements should be based on the regulated activity, not who undertakes the regulated activity.

After reviewing the comments received in response to this aspect of the proposal, the Corps agrees that there is no substantive basis for establishing different PCN requirements for federal and non-federal permittees. The Corps is thus retaining the existing PCN requirements for federal permittees.

Many commenters questioned whether federal agencies employ environmental experts qualified to review the projects before submitting the PCNs to the Corps and ensure that those federal agencies comply with applicable laws, regulations, and policies. Some these commenters said that expertise is inconsistent in terms of presence and depth among different federal agencies. They stated that staff at Corps districts are the best equipped with the technical knowledge and familiarity to administer the program and provide compliance oversight.

The Corps agrees that knowledge regarding environmental laws and regulations, and experience in preparing environmental documentation to demonstrate compliance with environmental laws, varies among people as a whole, and is not dependent on whether they work for a federal government agency. As discussed in the 2020 Proposal, many non-federal permittees seek the assistance of environmental consultants to help them obtaining DA authorization through the NWP authorization process.

Many commenters pointed out that PCNs allow the NWP program to meet the goal of no more than minimal individual and cumulative adverse impacts to the environment. Many of them said that exempting activities undertaken by federal agencies would reduce the ability of the Corps to track the cumulative effects of the NWP program. Many commenters expressed concerns with the Corps not assessing compensatory mitigation for federal permittees. They said there would be no mechanism for oversight and assurance that mitigation is completed and legally binding. Some of these commenters stated that federal permittees would have no incentive to avoid and minimize impacts and it is a clear conflict of interest for federal agencies, as they are incentivized to ensure their projects are permitted with as little cost as possible.

The Corps is continuing to require PCNs from federal permittees, so there will be no change in the number of PCNs. District engineers will still review PCNs and require compensatory mitigation and other forms of mitigation when necessary to ensure that NWP activities result in no more than minimal individual and cumulative adverse environmental effects.

Regarding the proposed definition of non-federal permittee, several commenters asked about the circumstances under which a non-federal permittee would be considered a federal permittee, and whether federal funding or some other federal nexus involving a local partner would be a factor. Some commenters inquired whether a state or local agency who has been delegated NEPA authority be considered a non-federal permittee. Several commenters said that there would need to be a clearer definition to help identify federal permittees who would no longer have to submit PCNs for proposed NWP activities. Because the Corps is retaining PCN requirements for federal agencies, it declines to speculate on how it would have implemented the proposal.

Several commenters stated that delegation of the section 404 permitting program to another federal agency is not likely to be legally permissible and might expose the Corps to litigation. Some of these commenters said that case law suggests that such delegation of a federal agency's statutory authority is not allowed, especially in the absence of memorandum of agreement between agencies. Not requiring PCNs from federal permittees for NWP activities is not be a delegation of the section 404 permitting program. The Corps continues to implement the NWP program and take actions necessary ensure that NWP activities comply with the terms and conditions of those authorizations, including potential actions identified in its enforcement regulations at 33 part CFR 326.

Several commenters did not support the inclusion of state departments of transportation (DOTs) that have been assigned NEPA responsibilities in the category of federal permittees that would not have to submit PCNs for proposed NWP activities. Some of these commenters said that state DOTs may forgo internal mitigation programs if PCNs were no longer required and district engineers would not have the ability to impose mitigation requirements on NWP activities through conditions added to the NWP authorization. Some commenters said that long-term linear transportation projects are some of the biggest contributors of turbidity in the nation's waterbodies and can have permanent impacts to streams and wetlands. Some DOTs already have funding agreements with the Corps in most states to provide supplemental staff that are required to implement impartial decision-making and are overseen and reviewed by non-funded regulators to ensure transparency and fairness. A few commenters said that if these critical safeguards be removed, DOTs will not be impartial or unbiased, and could undermine the environmental protections provided by the PCN process. Since the Corps is not changing the PCN requirements for federal permittees, it declines to speculate on how it would have implemented the proposed definition of "non-federal permittee" and other aspects of the proposal.

A few commenters stated that removing PCN requirements for federal permittees could limit the ability of states to ensure that state water quality standards are being met under Section 401 of the Clean Water Act. If PCNs are not required, the regulatory scope of water quality protection shifts from pre-impact permitting review to more resource intensive field compliance, creating a burden on the regulatory entities responsible for protection of water quality. Pre-construction notifications ensure that NWP activities are consistent with water

quality standards, water quality management plans/continuing planning process, total daily maximum loads, and anti-degradation policy.

The PCN requirements do not affect the requirements of Section 401 of the Clean Water Act. If a certifying agency does not issue water quality certification for the issuance of an NWP that does not require pre-construction notification, the project proponent is still required to obtain an activity-specific water quality certification or waiver for the proposed discharge.

A few commenters stated that the further an agency's focus is from natural resource management, the input from state fish and wildlife agencies is more critical. These commenters said that the participation of state natural resource agencies in the PCN review process helps ensure potential impacts to state trust resources are considered, and ensures public trust property is not taken without compensation. The Corps does not coordinate PCNs with state natural resource agencies, except for a few exceptions. Those exceptions are identified in paragraph (d) of general condition 32.

Several commenters pointed out that both federal and state projects are causes of some of the nation's largest wetland losses. These commenters said that if PCN requirements are removed, there will be no way to assess the impacts of these large-scale projects and it would result in huge aquatic resource losses. Several commenters stated that few federal agencies have the level of experience in working with and consulting tribes and said that PCNs should continue to be required in order to provide communication between the potentially impacted tribe, the Corps, and the federal agency regarding any potential impacts to tribal lands and resources. Since the Corps is retaining PCN requirements for federal permittees, these concerns have been addressed.

A commenter said that the preamble to the proposed rule explains that the PCN process also provides a database to inform renewal of NWPs. A couple of commenters stating that the Corps' assumption that non-federal entities, such as private entities, non-profits and even state governments do not possess the same or higher expertise than the federal government is arbitrary and unfair. One commenter stated that there has been an erosion of positions within agencies along with the required expertise for such environmental reviews. Since the Corps is retaining PCN requirements for federal permittees, there is no need to speculate on how it would have implemented the proposal.

A couple of commenters said that Section 313 of the Clean Water Act states in no uncertain terms that all federal agencies "shall be subject to, and comply with, all federal, state, interstate, and local requirements respecting the control and abatement of water pollution in the same manner, and to the same extent, as any nongovernmental entity." A couple of commenters stated that removal of the PCN requirements for federal permittees would make it difficult for states to identify violations and impossible for the Corps to ensure that the conditions of the permits are being property implemented, especially since recent changes to the EPA's regulations for Clean Water Act Section 401 water quality certifications, which preclude certifying authorities from monitoring and enforcing conditions of permitted activities. Since the Corps is retaining PCN requirements for federal permittees, there is no need to respond to these comments.

One commenter requested clarification regarding use of the phrase "NEPA responsibility for all federal highway project in the state", and asked whether the Corps intended to only provide federal permittee status to those NEPA assignment states who accept all federal highway projects in the state. One commenter stated that state transportation agencies would gain efficiency

by elimination of PCNs for many small projects. A few commenters supported the proposal and believe it will streamline review and approval of permitting while allowing the Corps to focus on individual permitting needs. Several commenters supported the proposed definition of “non-federal permittee” including the inclusion of state DOTs. The Corps is not adopting the proposed definition of “non-federal permittee” so it is not necessary to address the comments on the proposed definition.

One commenter supports the PCN process and encourages the Corps to work with state agencies for additional options such as reducing comment periods to reduce overall time constraints associated with Corps permitting. Several commenters suggested that there should be a certification process through which individuals receive training by the Corps and demonstrate that they have sufficient knowledge to preserve the intent of the NWPs. They said the Corps should develop a set of criteria that each entity needs to meet to demonstrate proficiency to allow the entity to be exempt from submitting PCNs for proposed NWP activities.

The Corps does not solicit comments from state agencies on proposed NWP activities, except for certain NWP activities identified in paragraph (d) of general condition 32. The Corps does support the development of a certification process for potential users of the NWPs. Certain NWPs do not require the submission of PCNs but for those that do, district engineers will continue to review and render decisions on those actions.

One commenter suggested that the Corps exempt private companies that are undertaking projects in conjunction with, or in response to, federal projects. One commenter stated that the Corps should clarify whether states, or entities acting with or on behalf of states, would be exempt from the requirement to

submit PCNs when operating under the Surface Transportation Block Grant Program, which allows states to implement road projects and other projects using federal money with some amount of regulatory oversight by the Federal Highways Administration. A couple commenters suggested that if the Corps does not require PCNs for activities undertaken federal permittees, the PCN requirements for all applicants could be included as regional conditions to the NWPs. The Corps is retaining the PCN requirements for federal permittees, therefore it declines to speculate on how it would have implemented the proposal.

One commenter suggested modifying the PCN exemption to only encompass federal, state, or local agencies that have established their credentials for application of the NWP program. One commenter suggested an exemption from PCN requirements for federal permittees when pre-construction notification is required solely as a result of federal consultation thresholds noted in the NWP general conditions. One commenter suggested there would be a benefit in including a statement clarifying that state transportation agencies with NEPA delegation are the federal leads in terms of ESA Section 7 and NHPA 106 compliance. One commenter stated that most DOTs strive for consistency and implement NEPA requirements on all projects, which ensures compliance with federal regulations and allows previously non-federal aid projects to become federal aid projects when additional federal funds become available. One commenter suggested that if this proposal is enacted, the Corps should provide specific standards for professional qualifications similar to 36 CFR Part 61, Appendix A. The Corps is retaining the PCN requirements for federal permittees, so it declines to speculate on how it would implement the proposal.

One commenter stated that to the extent there is a perception of delay caused through federal administrative shortfalls and backlogs, a greater level of funding for Corps staff and offices would be a better investment in reducing perceived delays. This commenter said that exchanging one federal staff funding shortfall for another agency with less expertise would not produce a net gain in permitting efficiency while complying with the duty to authorize only those impacts that will have minimal adverse effects on the environment. One commenter suggested that the Corps evaluate whether a PCN requirement should be based on qualifications rather than the federal status of a permittee. This commenter said that an audit process could be implemented to verify past and continued quality of the applicant's work. One commenter suggested the Corps focus on how to improve staff training and the mechanics of the PCN process so that it is completed in a reliable, transparent, and effective manner within the designated time frames. The Corps is retaining the PCN requirements for federal permittees, so these concerns have been addressed.

E. Comments on 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. Since it can be difficult for the Corps to draft national NWPs in such a way that they account for regional differences, an important mechanism for ensuring compliance with these requirements is regional conditions imposed by division engineers to address local environmental concerns. Effective regional conditions help protect local aquatic ecosystems and other resources and help ensure that the NWPs

authorize only those activities that result in no more than minimal individual and cumulative adverse effects on the environment and are not contrary to the public interest.

Corps regional conditions are added to the NWPs by division engineers in accordance with the procedures at 33 CFR 330.5(c). Water quality certification (WQC) and Coastal Zone Management Act (CZMA) consistency concurrence regional conditions are also added to the NWPs if an appropriate certifying authority issues a water quality certification or CZMA consistency concurrence with special conditions prior to the finalization of the issued, reissued, or modified NWPs.

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 lessen 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.

The Corps' regulations for establishing WQC regional conditions for the NWPs are located at 33 CFR 330.4(c)(2). If, prior to the issuance or reissuance of NWPs, a state, authorized tribe, or EPA issues a Clean Water Act section 401 water quality certification with conditions, the division engineer will make those water quality certification conditions regional conditions for the applicable NWPs, unless he or she determines that a specific condition in a water quality certification issued for the issuance of an NWP does not comply with 40 CFR 121.7(d)(2). If the district engineer makes such a determination, then he or she will consider that condition waived under 40 CFR 121.9(b) after written notice is provided to EPA and the certifying authority consistent with 40 CFR 121.9(c). For

more information on compliance with Section 401 of the CWA, refer to Section III.G.

For CZMA consistency concurrences issued by a state for the issuance of an NWP, if the division engineer determines those CZMA concurrence conditions do not comply with 33 CFR 325.4, then the conditioned CZMA consistency certification will be considered an objection, and the project proponent will need to request an activity-specific CZMA consistency concurrence from the state (see 15 CFR 930.31(d)) under subpart D of 15 CFR part 930.

Corps regional conditions may be added to NWPs by division engineers after a public notice and comment process and coordination with appropriate federal, state, and local agencies, as well as tribes. After Corps Headquarters publishes in the Federal Register the proposal to issue, reissue, or modify NWPs, all district engineers issue local public notices to advertise the availability of the proposed rule in the Federal Register and to solicit public comment on proposed regional conditions and/or proposed revocations of NWP authorizations for specific geographic areas, classes of activities, or classes of waters (see 33 CFR 330.5(b)(1)(ii)).

As discussed above, regional conditions are an important tool for taking into account regional differences in aquatic resources and their local importance and for ensuring that the NWPs comply with the requirements of Section 404(e) of the Clean Water Act, especially the requirement that activities authorized by NWPs may only result in no more than minimal individual and cumulative adverse environmental effects. Regional conditions are modifications of the NWPs that are made by division engineers. Regional conditions can only further condition or restrict the applicability of an NWP (see 33 CFR 330.1(d)). Under 33 CFR 330.5(c)(1)(i), the first step of the Corps' regional conditioning is for district

engineers to issue public notices announcing proposed regional conditions, and to solicit public comment on those proposed regional conditions, usually for a 45-day comment period. Those public notices also solicit suggestions from interested agencies and the public on additional regional conditions that they believe are necessary to ensure that the NWPs authorize only those activities that have no more than minimal adverse environmental effects. The district public notices are generally issued shortly after Corps Headquarters publishes the proposed NWPs in the Federal Register.

After the public comment period ends for the district public notices, the Corps district evaluates the comments and begins preparing the supplemental documents required by 33 CFR 330.5(c)(1)(iii) for each NWP. Each supplemental document will evaluate a specific NWP on a regional basis (e.g., by Corps district geographic area of responsibility or by state) and discuss the need for regional conditions for that NWP. Each supplemental document will also include a statement by the division engineer that will certify that the NWP, with approved regional conditions, will authorize only those activities that will have no more than minimal individual and cumulative adverse environmental effects. The supplemental documents may cover a Corps district, especially in cases where the geographic area of responsibility for the Corps district covers an entire state. The supplemental documents may cover a state when there is more than one Corps district in the state, and the lead Corps district for that state is responsible for preparing the supplemental documents. If more than one Corps district operates in a state, the lead district is responsible for preparing the supplemental documents and coordinating with the other Corps districts. The supplemental documents include an evaluation of public and agency comments, with responses to those comments, to show that the views of potentially affected

parties were fully considered (33 CFR 330.5(c)(1)(ii)). The supplemental document also includes a statement of findings demonstrating how substantive comments were considered. After the supplemental documents are drafted by the district, they are sent to the division engineer for review along with the district's recommendations for regional conditions. The division engineer may approve the supplemental documents or request changes to those supplemental documents, including changes to the regional conditions recommended by the district.

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

Under the current regulations, Corps Headquarters does not have a formal role in the development and approval of Corps' regional conditions by division engineers. However, Corps Headquarters provides templates for the supplemental documents required by §330.5(c)(1)(iii), to promote consistency in those supplemental documents. If requested by district and division offices, Corps Headquarters also provides advice on appropriate Corps regional conditions for the NWPs. The Corps is a highly decentralized organization, with

most of the authority for administering the regulatory program delegated to the 38 district engineers and 8 division engineers (see 33 CFR 320.1(a)(2)). District engineers are responsible for the day-to-day implementation of the Corps Regulatory Program, including the evaluation of applications for individual permits, evaluating PCNs for proposed NWP activities, evaluating notifications for activities authorized by regional general permits, responding to requests for approved and preliminary jurisdictional determinations, conducting compliance and enforcement actions, and other tasks. Division engineers are responsible for overseeing implementation of the Regulatory Program by their districts, and making permit decisions referred to them by district engineers under the circumstances identified in 33 CFR 325.9(c). Under that section of the Corps' regulations, a division engineer can refer certain permit applications to the Chief of Engineers for a decision. Other than making permit decisions under the circumstances listed in §325.9(c), Corps Headquarters is responsible for development of regulations, guidance, and policies.

When a state, authorized tribe, or EPA issues a WQC for the issuance of an NWP and that WQC includes conditions, those conditions become conditions of the NWP authorization, unless one or more conditions is waived because they do not meet the criteria at 40 CFR 121.7(d)(2). The processes for states, approved tribes, and EPA to issue WQCs for the issuance of the NWPs, are separate from the Corps' regional conditioning process under 33 CFR 330.5(c), and are governed by state, tribal, or EPA, regulations. The Corps' current regulations for water quality certification for the NWPs are found at 33 CFR 330.4(c), and those regulations provide a process for WQC conditions becoming conditions of the NWPs when WQCs are issued for the NWPs before the NWPs are issued by Corps Headquarters.

When a state issues a general CZMA consistency concurrence with conditions for an NWP, those conditions become CZMA regional conditions if, after recommendation by the district engineer, the division engineer determines those conditions are acceptable under 33 CFR 330.4(d)(2). The processes for states to issue general CZMA consistency concurrences for the NWPs, are separate from the Corps' regional conditioning process under 33 CFR 330.5(c), and are governed by Department of Commerce regulations.

When the final WQCs and CZMA consistency concurrences are issued , District and division engineers will review those WQCs and CZMA consistency concurrences and determine which conditions become conditions for the final NWPs. Division engineers will then finalize any Corps regional conditions. After division engineers finalize Corps regional conditions, Corps districts will issue public notices announcing the final regional conditions and the final WQCs and CZMA consistency concurrences for the issuance of the NWPs. The Corps will post copies of the district public notices announcing the final Corps regional conditions and final WQC/CZMA conditions in the regulations.gov docket (docket number COE-2020-0002), under "Supporting and Related Material."

At present, districts manage their own processes for soliciting public comment on their regional conditions. In general, they make solicitations of public comment available on their own website and do not always make the comments they receive publicly available. To further improve the nationwide transparency of the regional conditioning process, the Corps is considering revising the regulations governing the regional conditioning process at 33 CFR 330.5(c). Specifically, the Corps is considering whether to require the districts to post and solicit public comment on notices proposing regional conditions in separate dockets at www.regulations.gov. Even though such changes were outside the

scope of this action, the Corps solicited public comment on whether to implement this or a similar requirement relating to the regional conditioning process and any factors we should consider in a future rulemaking. While the comments relate to matters that were outside the scope of this action, the Corps appreciates the helpful suggestions it received from the public. The Corps will consider them as we continue to examine whether changes may be necessary to the regulations governing the regional conditioning process.

Several commenters said that regional conditions are excessive and/or unnecessary. Several commenters requested that Corps Headquarters review and concur with regional conditions before they are finalized. A few commenters said that regional conditions may be appropriate in some cases in specific areas of the country. A few commenters said that rationale and justification for regional conditions should be made available to the public. A few commenters recommended that Corps Headquarters provide detailed guidance to district offices regarding how to develop regional conditions. A few commenters said that Corps districts are inconsistent on how they create regional conditions. A couple of commenters said that current regional conditions should not change. One commenter said that regional conditions should be specific to watersheds or ecoregions and not differ between districts.

The Corps believes that regional conditions are necessary to tailor the NWPs on a regional basis to ensure that the NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects. Under the Corps' current regulations at 33 CFR 330.5(c), division engineers have the authority to add regional conditions to the NWPs and Corps Headquarters has no role in that approval process. The supplemental documents division engineers prepare for adding regional conditions to the

NWPs require consideration of the comments received on the district's public notices on the proposed regional conditions and a statement of findings showing how substantive comments were considered by the division engineer (see 33 CFR 330.5(c)(1)(iii)). Regional conditions do not need to be consistent across districts, among divisions, or nationally because they are intended to address specific regional issues or concerns for the aquatic environment or any of the Corps' public interest review factors. If regional conditions are specific to watersheds, differences in regional conditions among districts are inevitable because different watersheds are likely to have different resource concerns and different factors affecting what adverse environmental effects might be considered more than minimal.

One commenter stated that Corps districts should be able to develop and identify appropriate regional conditions. One commenter said that the proposed changes to regional conditions will remove coordination processes with state partners. One commenter remarked that the proposed changes will result in a disproportionate impact to floodplains and flood-prone areas. One commenter said that the regional conditions for NWPs 12, C, and D should be the same in each region. One commenter stated that there is inconsistency between whether or not Corps districts consider oil and gas natural pipelines as utility lines in regional conditions.

Corps districts identify regional conditions, and make recommendations to division engineers. The approval authority for regional conditions lies with the division engineer (see 33 CFR 330.5(c)). Regional conditions can provide for coordination with state partners, and that coordination may be removed as regional conditions are considered for a new set of NWPs. The Corps does not have the authority to regulate floodplains and flood-prone areas per se. The

Corps has the authority to regulate discharges of dredged or fill material into waters of the United States, and those waters and proposed discharges may be located in floodplains or flood-prone areas. Having identical regional conditions for NWPs that authorize utility line activities would be contrary to the intent of regional conditions, which is to address regional differences in aquatic resources and ensure that the NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects. Oil and natural gas pipelines are a type of utility line and regional conditions are intended to address specific resource concerns.

One commenter said that regional conditions should include programmatic compliance with other federal laws. One commenter stated that regional conditions should be used to require in-kind mitigation and adopt impact and mitigation thresholds or associated methodologies. One commenter said that regional conditions should be developed to provide additional protection for species of concern and cultural/historical sites. One commenter asserted that regional conditions should be developed to require tribal consultation for every permit. One commenter said that regional conditions should prohibit work during spawning period for fish of cultural concern or which would jeopardize wild rice beds.

Regional conditions may be helpful in ensuing programmatic compliance with other federal laws. Regional conditions can also be used to specify mitigation requirements for the NWPs. Regional conditions can help provide protection for listed species, historic properties, and cultural resources, often by adding PCN requirements to help ensure that required consultations for those resources are undertaken. Decisions on whether and how to consult with tribes on proposed NWP activities are made on a case-by-case basis by district

engineers. Regional conditions may add time-of-year restrictions on authorized activities to ensure that those activities have no more than minimal adverse effects on fish spawning or rice beds

Several commenters requested greater transparency in the process of establishing regional conditions, saying that public notices, rationales for regional conditions, and comments received on proposed regional conditions should be available on separate dockets at www.regulations.gov. Several commenters requested revisions to governing regulations to require posting of any proposed additions of, changes to, or revocations of regional conditions in separate dockets on www.regulations.gov. Several commenters requested that the Corps create and maintain a single, national website where all proposed and final regional conditions can be viewed. The Corps will consider these comments when it prepares the next rulemaking for the issuance of NWPs.

A few commenters said that public notice processes for regional conditions should be consistent between districts. A few commenters stated that districts are inconsistent and limit comment by requiring subscriptions to respective mailing lists rather than publishing notices in the Federal Register or on www.regulations.gov. One commenter said that public notices for regional conditions should be published in the Federal Register. Two commenters asked for the same level of written justification for adoption of regional conditions that is required to reissue or modify the NWPs. One commenter said that publication of these documents on separate webpages or dockets is redundant and unnecessary. One commenter stated that that comments received on regional conditions should be posted to a webpage. One commenter stated that the Corps analyses for regional conditions do not satisfy statutory requirements. Two

commenters said that it is difficult to find public notices or regional conditions on district webpages.

The public notice process for regional conditions is consistent among all Corps districts, because the public notice process is described in the Corps' regulations at 33 CFR 330.5(c)(1). The current regulations governing the regional conditioning process relies on public notices, and does not include provisions requiring the publication of notices in the Federal Register. During the next rulemaking process for the NWPs, the Corps will decide whether to use www.regulations.gov for managing and posting public comments received on proposed regional conditions. Each Corps district is responsible for managing its own web pages, and regional conditions apply to a particular Corps district, so it is appropriate for Corps districts to post public notices for regional conditions proposed for their districts on their web pages.

F. Comments on Proposed Removal of the 300 Linear Foot Limit for Losses of Stream Bed

In the proposed rule, the Corps proposed to remove the 300 linear foot for losses of stream bed from NWPs 21 (Surface Coal Mining Activities), 29 (Residential Developments), 39 (Commercial and Institutional Developments), 40 (Agricultural Activities), 42 (Recreational Facilities), 43 (Stormwater Management Facilities), 44 (Mining Activities), 50 (Underground Coal Mining Activities), 51 (Land-Based Renewable Energy Generation Facilities), and 52 (Water-Based Renewable Energy Generation Pilot Projects). All of these NWPs have a 1/2-acre limit for losses of non-tidal waters of the United States, including non-tidal wetlands and non-tidal streams. With the exception of NWPs 43 and 51, these NWPs require pre-construction notification for all activities. Nationwide permit 43 does not require PCNs for maintenance of existing stormwater management

facilities, as long as those maintenance activities are limited to restoring the original design capacities of the stormwater management facility or pollutant reduction green infrastructure feature. Nationwide permit 51 does not require PCNs for activities that result in the loss of 1/10-acre or less of waters of the United States. Therefore, district engineers will review all proposed activities for these on a case-by-case basis, except for the NWP 43 and 51 activities identified above. When reviewing these PCNs, district engineers apply the 10 criteria in paragraph 2 of Section D, District Engineer's Decision, to determine whether the proposed activities will result in no more than minimal individual and cumulative adverse environmental effects.

In the proposed rule, the Corps presented a number of reasons for these proposed changes to NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. The Corps' rationale comprises four categories of considerations: (1) the Corps employs several tools in the NWP Program to ensure that NWP activities result only in no more than minimal individual and cumulative adverse environmental effects; (2) removing the 300 linear foot limit would provide consistency across the numeric limits used by the NWP Program for all categories of non-tidal waters of the United States (i.e., jurisdictional wetlands, streams, ponds, and other non-tidal waters); (3) it would further the objective of the NWP Program stated in 33 CFR 330.1(b) (i.e., to authorize with little, if any, delay or paperwork certain activities having minimal impacts), by providing equivalent quantitative limits for jurisdictional wetlands, streams, and other types of non-tidal jurisdictional waters, and NWP authorization for losses of jurisdictional stream bed that have no more than minimal individual and cumulative adverse environmental effects; and (4) using acres or square feet (i.e., an area-based metric) instead of linear feet is a more accurate approach to quantifying losses of

stream bed and also serves as a better surrogate for losses of stream functions when a functional assessment method is not available or practical to use.

After reviewing the comments received in response to the proposed rule, for the reasons discussed below the Corps has decided to remove the 300 linear foot limit for losses of stream bed from the 10 NWPs listed above. The comments received in response to the proposed rule are summarized below. The Corps' responses to those comments are also provided along with the comment summaries.

Retaining the 1/2-acre limit for losses of non-tidal jurisdictional waters and wetlands in these 10 NWPs while removing the 300 linear foot limit for losses of stream bed will help further Congressional intent with respect to Section 404(e) of the Clean Water Act when that provision was enacted into law in 1977. Section 404(e) authorizes the Corps to issue, after notice and opportunity for public hearing, general permits on a state, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Corps determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Section 404(e) does not prescribe any particular approaches for ensuring that activities authorized by general permits result in no more than minimal individual and cumulative adverse environmental effects, thus the Corps developed the PCN process and provided division and district engineers with the authority to modify, suspend, or revoke NWP authorizations on a regional or activity-specific basis after the NWPs are issued by Corps Headquarters. General permits provide a process for authorizing, with minimal paperwork and delays, activities that have no more than minimal individual and cumulative adverse environmental effects.

General permits are an important tool for the Corps managing its personnel and workload so that it can focus its efforts on evaluating permit applications for proposed activities that have the potential to cause more than minimal adverse environmental effects.

Removing the 300 linear foot limit for losses of stream bed under these 10 NWPs provides equivalent quantitative limits for all categories of non-tidal jurisdictional waters, including non-tidal "tributaries," “lakes, ponds, and impoundments of jurisdictional waters,” and “adjacent wetlands” (see 33 CFR 328.3(a)). These non-tidal waters will continue to be subjected to the 1/2-acre limit for losses of non-tidal waters. Except for NWPs 43 and 51, these NWPs require PCNs for all authorized activities, and district engineers will review these PCNs to determine which activities can be authorized by an NWP and which activities should require individual permits. When reviewing a PCN, the district engineer has the authority to exercise discretionary authority to modify, suspend, or revoke the NWP authorization (see 33 CFR 330.1(d)). When a district engineer reviews a PCN, and if she or he determines that the proposed activity would have more than minimal individual or cumulative net adverse effects on the environment or otherwise may be contrary to the public interest, he or she will either modify the NWP authorization to reduce or eliminate those adverse effects, or instruct the prospective permittee to apply for a regional general permit or an individual permit (§330.1(d)). To determine whether a proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects, the district engineer will apply the 10 criteria in paragraph 2 of Section D, District Engineer’s decision.

Those ten criteria for making minimal adverse environmental effects determinations are:

(1) the direct and indirect effects caused by the NWP activity;

(2) the cumulative adverse environmental effects caused by activities authorized by an NWP and whether those cumulative adverse environmental effects are no more than minimal;

(3) the environmental setting in the vicinity of the NWP activity;

(4) the type of resource that will be affected by the NWP activity;

(5) the functions provided by the aquatic resources that will be affected by the NWP activity;

(6) the degree or magnitude to which the aquatic resources perform those functions;

(7) the extent that aquatic resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss);

(8) the duration of the adverse effects (temporary or permanent);

(9) the importance of the aquatic resource functions to the region (e.g., watershed or ecoregion); and

(10) mitigation required by the district engineer.

If an appropriate functional assessment method is available and practicable to use, that assessment method may be used by the district engineer to help determine whether the proposed activity will result in no more than minimal adverse environmental effects.

The removal of the 300 linear foot limit for losses of stream bed will help increase administrative efficiency by providing a mechanism to authorize, through the NWP Program activities that result in the loss of greater than 300 linear feet of jurisdictional stream bed, but less than 1/2-acre of non-tidal jurisdictional waters. Under the 2017 NWPs, filling or excavating more than 300 linear feet of a perennial stream bed requires an individual permit even under

circumstances where the loss of the stream bed would result in no more than minimal individual and cumulative adverse environmental effects. Under this final rule, district engineers would review PCNs for proposed losses of jurisdictional stream bed (plus any other losses of non-tidal waters of the United States) that are less than 1/2-acre and determine whether those proposed activities can be authorized by one of these 10 NWPs. If, for a particular PCN, the district engineer determines that the individual and cumulative adverse environmental effects would be more than minimal, he or she will exercise discretionary authority and require an individual permit. This approach provides administrative efficiency by providing a mechanism for district engineers to distinguish which proposed activities should be authorized by an NWP versus which activities should require individual permits with a public notice and comment process and activity-specific evaluations under NEPA, the public interest review, and the Clean Water Act section 404(b)(1) Guidelines.

This approach also adds efficiency in terms of reducing processing times and paperwork for proposed activities that have no more than minimal adverse environmental effects and that are likely to generate few, if any, public or agency comments in response to a public notice for an individual permit application. When more activities that result in no more than minimal adverse environmental effects can be authorized by an NWP, there can be more staff and other resources for Corps districts to devote to undertaking other tasks, such as the review and approval of mitigation banks and in-lieu fee programs and overseeing their operation, conducting compliance actions to ensure that authorized activities are being conducted in accordance with the terms and conditions of their DA authorizations, and conducting approved and preliminary jurisdictional

determinations that help project proponents plan and design their proposed projects to avoid and minimize impacts to jurisdictional waters and wetlands.

Another benefit of removing the 300 linear foot limit for losses of jurisdictional stream bed and shifting the quantification of losses of jurisdictional stream bed towards the 1/2-acre limit for losses of non-tidal waters of the United States is more accurate accounting of the impacts of activities authorized by these 10 NWPs. The discharges of dredged or fill material authorized by these NWPs occur over an area of a river or stream bed and also may include impacts to other aquatic resources such as wetlands or open water areas (e.g., lakes or ponds). The discharge to a river or stream has a length and a width, and the width can vary depending on the physical characteristics of the impact area, the type of activity being conducted (e.g., bank stabilization, channel excavation, channel realignment), and other factors. To be regulated under Section 404 of the Clean Water Act, a discharge of dredged material involves any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States that is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation (see 33 CFR 323.2(d)(1)(iii)). A regulated discharge of fill material involves the addition of fill material into waters of the United States that has the effect of either replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States (see 33 CFR 323.3(e) and (f)). The direct impacts of these activities are most accurately quantified on an area basis, not a linear basis, to inform a district engineer's decision on whether a proposed activity should be or is authorized by an NWP and to track cumulative impacts.

Accurate quantification of stream bed losses authorized by an NWP is an important component of determining whether a proposed NWP activity will result in no more than minimal individual adverse environmental effects. (See item 1 above from paragraph 2 of Section D, District Engineer's Decision: understanding "the direct and indirect effects caused by the NWP activity.") Accurate quantification of stream bed losses is also important for tracking cumulative impacts of activities authorized by an NWP, both on a national and regional basis, and for determining whether a particular NWP activity will contribute to more than minimal cumulative adverse environmental effects. (See item 2 of paragraph 2 of the District Engineer's Decision: "the cumulative adverse environmental effects caused by activities authorized by an NWP and whether those cumulative adverse environmental effects are no more than minimal.")

As discussed in the 2020 Proposal (85 FR 57316), discharges of dredged or fill material into jurisdictional streams can cause losses of stream bed along only a portion of the stream bed (e.g., bank stabilization projects that involve discharging fill along the edge of the stream, with no fill in the rest of the stream bed) or across the entire stream bed (e.g., excavating the stream bed to mine aggregates) along a stream reach. A wide variety of activities involving filling or excavating stream bed may be authorized by these NWPs, such as bank stabilization, channel realignment, culvert installation or replacement, stream channel restoration, the installation of grade control structures (e.g., rock), fills for footings for bridges, livestock crossings, utility line crossings, and temporary fills for construction and access. Quantifying losses of stream bed in linear feet does not distinguish between filling or excavation activities that occur only in a portion of the stream bed along an ordinary high water mark versus filling or excavation

activities that occur in the entire stream bed, from ordinary high water mark to ordinary high water mark.

Accurate quantification of losses of stream bed and losses of other types of jurisdictional waters and wetlands is also important for monitoring and evaluating the cumulative adverse environmental effects caused by NWP activities. In response to the 2020 Proposal, numerous commenters criticized the Corps' assessment of cumulative effects for the NWPs. An essential step in conducting a cumulative effects analysis for an NWP is estimating how many times that NWP may be used during the period the NWP is in effect, the quantity of jurisdictional waters and wetlands that may be lost or directly altered by the activities authorized by that NWP, whether those losses or alterations are permanent or temporary, and what, if any compensatory mitigation is being used to offset those losses. The Corps provides those estimates in its national decision documents, and those estimates are more robust if they use a common metric, so that it is possible to calculate total losses and offsets during the period the NWP is in effect.

Division engineers have discretionary authority to modify, suspend, or revoke NWP authorizations on a regional basis (33 CFR 330.5(c)) to help ensure that the NWPs are only used to authorize activities that have no more than minimal individual and cumulative adverse environmental effects. For example, if a Corps district determines, in a particular watershed, county, Corps district, or other geographic region, that cumulative losses of stream bed authorized by NWPs may be approaching a level that might exceed the "no more than minimal cumulative adverse environmental effects" threshold, the Corps district can request that the division engineer modify, suspend, or revoke the relevant NWP authorizations in that region. The division engineer can add regional conditions to

the appropriate NWPs to restrict or prohibit their use in particular categories of waters, or suspend or revoke the NWP authorization so that those NWP(s) can no longer be used to authorize regulated activities in that geographic region. The division engineer's authority to modify, suspend, or revoke NWP authorizations on a regional basis can also be used to sort out which activities can be authorized by an NWP versus which activities should require individual permits.

District engineers have discretionary authority to modify, suspend, or revoke NWP authorizations on a case-specific basis (see 33 CFR 330.5(d)) to help ensure that NWPs are only used to authorize specific activities that have no more than minimal individual and cumulative adverse environmental effects. A district engineer can add conditions to an NWP authorization to reduce potential adverse environmental effects that might be caused by a proposed NWP activity, such as mitigation requirements to avoid or minimize direct and indirect effects caused by that activity. One example is a time of year restriction to prevent discharges of dredged or fill material from occurring during spawning seasons for fish or other aquatic organisms. Another example of a permit conditions to help reduce adverse environmental effects caused by an NWP activity might be to require the use of certain best management practices. A district engineer might also add permit conditions to the NWP authorization to require compensatory mitigation to offset losses of waters of the United States caused by the NWP activity.

As the Corps implements this final rule, it will continue to rely on these administrative tools that have long been used with these 10 NWPs to help ensure that authorized activities will result in no more than minimal individual and cumulative adverse environmental effects. Those tools are the 1/2-acre limit for losses of non-tidal waters of the United States, the pre-construction notification

requirements and associated activity-specific review by district engineers, the regional conditions that can be added by division engineers, and the activity-specific conditions that can be added by district engineers when reviewing individual PCNs.

The proposal was made in accordance with the recommendations in the report issued by the Office of the Assistant Secretary of the Army (Civil Works) in response to E.O. 13783 on ways to streamline the NWPs. In the proposed rule, the Corps invited public comment on the proposal to remove the 300 linear foot limit and to rely on the 1/2-acre limit, the PCN process, the proposed modification of the “mitigation” general condition (general condition 23), and other tools to comply with the statutory and regulatory requirement that activities authorized by an NWP must result in no more than minimal individual and cumulative adverse environmental effects. The Corps also invited comment on whether there are situations where quantifying losses of stream bed in linear feet might more accurately represents the actual amount of stream bed filled or excavated as a result of an NWP activity and would result in more defensible determinations on whether a proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects. In the proposed rule, the Corps asked commenters to provide information that would help illustrate or explain how and under what circumstance using a linear foot measure to quantify losses of stream bed would be more accurate than using square feet or acres to quantify the amount of authorized impacts.

The Corps also invited comment on the legal, regulatory, policy, or scientific bases for imposing different numeric limits on jurisdictional stream bed losses versus losses of non-tidal jurisdictional wetlands or other types of non-tidal jurisdictional waters. Commenters were encouraged to provide supporting

information in the form of citations to laws, regulations, and policies, and the scientific literature, because substantive information would be valuable in assisting the Corps in preparing the final NWPs.

The Corps also requested comment on an alternative hybrid approach to establishing consistent quantitative limits for losses of stream bed authorized by NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. Under the proposed hybrid approach, losses of stream bed would continue to be quantified in linear feet as long as the activities authorized by these NWPs would result only in the loss of stream bed. There would be linear foot limits for losses of stream bed by stream order identified using the Strahler (1957) method, and the mean stream widths identified by Downing et al. (2012). If a proposed NWP activity would result in the loss of jurisdictional stream bed plus other types of waters of the United States, such as non-tidal jurisdictional wetlands, the losses of waters of the United States would be quantified in acres and subjected to the 1/2-acre limit. In the preamble to the proposed rule, the Corps provided a table for the hybrid approach (see 85 FR 57321). A critical component of effectively applying the hybrid approach is identifying the correct stream order for the stream segment that is proposed to be filled or excavated as a result of the proposed NWP activity. In this hybrid approach, the linear foot limits would only apply to losses of stream bed. If a proposed NWP activity would result in a combination of losses of jurisdictional stream bed and other types of waters of the United States, such as non-tidal jurisdictional wetlands, then the 1/2-acre limit would apply to the combined losses of stream bed and non-tidal wetlands, to keep those losses below 1/2-acre.

In conjunction with the proposal to remove the 300 linear foot limit for losses of stream bed, the Corps proposed to remove the provisions in these

NWPs regarding the ability of district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed when the applicant submits a PCN and requests a waiver of that 300 linear foot limit. On April 21, 2020, EPA and the Department of the Army published a final rule to define “waters of the United States” entitled the Navigable Waters Protection Rule (85 FR 22250). On June 22, 2020, the Navigable Waters Protection Rule became effective in all states and jurisdictions except for the State of Colorado due to a federal district court-issued stay in that state. The rule revised the definition of “waters of the United States” at 33 CFR 328.3 such that ephemeral features, including ephemeral streams, are categorically excluded from jurisdiction under the Clean Water Act (see 33 CFR 328.3(b)(3)). Therefore, there would be no need to request waivers for losses of ephemeral stream bed (regardless of length) since NWP authorization (or any other form of DA authorization) will not be needed to authorize discharges of dredge or fill material into ephemeral streams. See Section III.C, for more discussion on the potential impact of the Navigable Water Protection Rule on the NWPs.

In addition, the Corps proposed to remove the agency coordination process for seeking input from federal and state agencies on whether the district engineer should grant the waiver of the 300 linear foot limit requested by an applicant for an NWP verification. Removing the waiver provision may reduce costs to permittees by reducing the amount of time the district engineer needs to make her or his decision. For example, the district engineer would not have to wait up to 25 days (see paragraph (d)(3) of the “pre-construction notification” general condition (GC 32) to make the decision on whether to issue the NWP verification. Removal of the agency coordination for these activities is also likely to reduce administrative costs to the Corps, by reducing the amount of staff time

needed to send copies of PCNs to the agencies and summarizing and responding to agency comments. Removal of the waiver provision and associated agency coordination would also free up additional time for Corps staff to review other PCNs, other permit applications, and other regulatory actions such as jurisdictional determinations and compliance activities. As mentioned above, under the Navigable Waters Protection Rule, ephemeral streams are not "waters of the United States." See 33 CFR 328.3(b)(3). Therefore, it should be noted that this would likely reduce the current number of waivers and required interagency coordination process from state and federal agencies, since the current waivers apply only to certain intermittent streams.

Many commenters opposed the removal of the 300 linear foot limit for losses of stream bed. Many commenters supported the proposed change, stating that calculating losses of stream bed in acres is a more accurate measure of those losses since acreage takes both the length and width of the stream channel into account when determining the amount of stream bed filled or excavated by an NWP activity. Several commenters in favor of the proposed change expressed concern with how this change would affect mitigation banks and credit calculations for future and past permits. Several commenters believed this change would continue to ensure that the activities authorized by these NWPs would result in no more than minimal impacts.

As discussed above, the Corps is removing the 300 linear foot limit for losses of stream bed from NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 for the reasons discussed in this final rule to increase the efficiency of the NWP program, utilize a metric that more accurately reflects the amount of impact, and to allow NWP authorization of losses of stream bed where district engineers determine that those losses would have no more than minimal adverse

environmental effects after reviewing PCNs. Quantifying losses of stream bed in acres or square feet will be more accurate, provide a more substantial and defensible basis for decision-making by district engineers on PCNs for these activities, and provide more accurate data for the Corps to track cumulative impacts of the activities authorized by these NWPs. The removal of the 300 linear foot limit will not affect the ability of district engineers to require compensatory mitigation or other forms of mitigation for losses of stream bed. In addition, it should not have a substantial effect on mitigation banks that have already been approved and mitigation banks that may be approved in the future. Depending on how existing mitigation banks quantify the credits they produce, there may have to be some technical changes in how credit transactions occur between mitigation bank sponsors and permittees, to determine the appropriate number of stream credits that are needed to offset a permitted loss of stream bed.

A few commenters supported the removal of the 300 linear foot limit because the district engineer retains the ability to exercise discretionary authority to require individual permits if the adverse environmental effects caused by a proposed activity would be more than minimal. These commenters also said they support the removal of the 300 linear foot limit as long as Corps divisions and districts can continue to develop and use regional conditions in districts that have specific resource concerns.

The PCN process is an administrative tool that helps ensure that activities authorized by NWPs cause no more than minimal individual and cumulative adverse environmental effects, by providing activity-specific review of these activities by district engineers before they are authorized by an NWP. The 1/2-acre limit is another tool that helps ensure that activities authorized by these

NWPs have no more than minimal adverse environmental effects. In geographic areas where there are concerns about cumulative losses of headwater streams and the functions they provide, division engineers can add regional conditions to these NWPs to reduce the acreage limit from 1/2-acre to a lower acreage limit, such as 1/4-acre or 1/10-acre. In addition, division engineers can add regional conditions to these NWPs to lower the threshold for requiring stream compensatory mitigation from 3/100-acre to a different acreage threshold.

Many commenters expressed concerns with removing the 300-linear foot limit on loss of stream bed for these NWPs, stating that this change would allow much larger impacts to smaller stream channels since they typically have smaller widths and therefore a permittee could impact a much longer length of stream before reaching the 1/2-acre limit. Many commenters said that a linear foot measurement was more appropriate for calculating stream impacts and losses than an acreage-based system because streams are fundamentally linear features in the landscape. Many commenters stated that the Corps has not provided any scientific rational or reasoning behind this change and even the scientific studies cited by the Corps were not interpreted appropriately.

As discussed above, the Corps will rely on other, existing protective mechanisms within the NWPs to ensure that the activities authorized by these NWPs will result in no more than minimal individual and cumulative adverse environmental effects. Those tools include the 1/2-acre limit, the PCN requirements for these NWPs, and the ability of division and district engineers to further condition or restrict the applicability of an NWP in situations where they have concerns for the aquatic environment under the Clean Water Act section 404(b)(1) Guidelines or for any factor of the public interest (see 33 CFR 330.1(d)). While rivers and streams have a strong linear component, they also

vary substantially in width. Discharges of dredged or fill material into waters of the United States that cause losses of waters of United States through the filling or excavation of stream beds occur over an area, and using acres or square feet to quantify losses of stream bed is more informative to determinations of minimal effects and accurate in data accounting than using linear feet. The potential losses of stream functions, and whether those losses are more than minimal, can be addressed through the PCN review process. When determining whether a proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects, district engineers will apply the 10 criteria in paragraph 2 of Section D, District Engineer's Decision. Decisions regarding quantitative limits for the NWPs are administrative decisions because the legal threshold for general permits ("no more than minimal individual and cumulative adverse environmental effects") is a subjective threshold. Applying this subjective threshold to complex ecological systems requires a district engineer to exercise his or her judgment as to whether that threshold is crossed for particular NWP activity.

Another tool that the Corps added to this final rule to help ensure that the activities authorized by these NWPs will result in no more than minimal individual and cumulative adverse environmental effects is the addition of a 3/100-acre threshold for stream compensatory mitigation in paragraph (d) of the mitigation general condition (general condition 23). The 1/10-acre wetland mitigation threshold in general condition 23 has been effective in providing incentives for project proponents to reduce wetland losses well below the 1/2-acre limit to avoid the costs of providing wetland compensatory mitigation. As shown in figure 5.1 of the Regulatory Impact Analysis for this final rule, more than 80 percent of losses of waters of the United States verified by district engineers in fiscal year 2018 as

qualifying for NWP authorization were less than 1/10-acre. The losses of waters of the United States in figure 5.1 include losses of stream bed, which were quantified in acres. The Corps anticipates that the 3/100-acre stream compensatory mitigation threshold will also be an effective incentive to permittees to reduce losses of stream bed to avoid the costs of providing stream compensatory mitigation to offset losses of greater than 3/100-acre of stream bed. For NWP activities that require PCNs, district engineers continue to have discretion to require stream compensatory mitigation for losses of stream bed above or below the 3/100-acre threshold in paragraph (d) of general condition 23.

Several commenters also questioned the Corps' use of the study by Downing et al. (2012), which examined stream channels all over the world, stating that stream channels may be narrower in the United States (citing an average width in the United States of 2.6 feet). Several commenters stated support of a hybrid approach in lieu of an acreage calculation, but were concerned about the variability of stream order classifications and the availability of tools to Corps districts to implement that approach in an effective and defensible manner. One of these commenters noted that LiDAR is not available in all areas of the country. Many commenters opposed the proposed 'hybrid approach' in the preamble in which stream impact limits would vary by stream order by applying a mean stream width. Some of these commenters asserted that a linear foot metric is still likely a more accurate and easier method since determining stream order is highly varied along with determining a stream width.

The Corps acknowledges that the study by Downing et al. (2012) does not fully represent the variability in stream dimensions. One of the purposes of using the information in that study was to demonstrate how a linear foot limit for losses of stream bed results in disparate differences in the amount of stream bed that

can be filled or excavated under an NWP depending on where an affected stream reach is located in a tributary network (i.e., a headwater stream versus a stream segment located further downstream in a watershed). In a study of headwater streams in North America and New Zealand, using field surveys of headwater streams instead of the published data and satellite imagery used by Downing et al. (2012), Allen et al. (2018) found a typical width of 1.05 feet for headwater streams. The Corps agrees that the hybrid approach proposed in the preamble to the 2020 Proposal would not be an efficient or effective approach to establishing quantitative limits for these 10 NWPs. There is not sufficiently accurate mapping of headwater streams in the United States to implement such a hybrid approach, and the hybrid approach would not take into account regional variability in stream geomorphology. The Corps does not agree that a linear foot metric is easier or more accurate than an acreage-based metric. The area of stream bed filled or excavated as a result of an NWP activity is already calculated by the Corps to record impacts to aquatic resources, and it represents the amount of stream bed lost as a result the discharges of dredged or fill material regulated under Section 404 of the Clean Water Act.

Many commenters also questioned how stream width was to be measured (ordinary high water mark to ordinary high water mark versus stream bed/bottom) which could also produce variability in how an acreage limit would be applied. Many commenters recognized that the measures for small and large streams should be different but until a more appropriate metric is developed, acreage should not be used in lieu of linear feet since it would be inappropriate to adopt a measure that better represents larger stream systems while the overwhelming majority of impacts occur to smaller streams and are therefore better represented for the time being by a linear foot measurement.

Stream width should be measured from ordinary high water mark to ordinary high water mark, perpendicular to the longitudinal direction of the stream channel. That is consistent with the definition of “stream bed” in Section F of the NWPs. Commenters did not suggest a more accurate method for quantifying impacts to small and large streams in their comments. Establishing different metrics for small versus large streams also presents challenges in terms of consistently determining what constitutes a small stream versus a large stream, which has the potential for being an arbitrary distinction and would add another layer of complexity to the NWP program.

Many commenters noted that smaller stream channels provide important ecological functions and values and they provided numerous references to scientific studies that document the importance of these stream channels as linear systems in the landscape. Some of these commenters said impacts to small stream channels were more severe and/or permanent (e.g., complete losses by filling entire stream reaches) and noted that small streams are more susceptible to fragmentation impacts, are harder to restore/mitigate, and have compounding effects to downstream waters when impacts are cumulative and more than minimal. Many commenters noted that, in general, disproportionate impacts already occur to these smaller order stream channels because it is easier from an engineering standpoint and ultimately less costly to impact them versus larger order stream channels, and that removing the 300 linear foot limit would provide even less incentive to avoid and minimize impacts to these important resources.

The ecological functions of smaller stream channels are to be considered by district engineers when they review PCNs for proposed activities involving filling or excavating stream beds. When evaluating PCNs, district engineers

consider the 10 criteria in paragraph 2 or Section D, District Engineer's Decision. Those criteria include: 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, and the importance of the aquatic resource functions to the region. Division engineers can add regional conditions to the NWPs to impose lower acreage limits or other restrictions to address concerns about potential losses of smaller stream channels and the functions they provide, including cumulative impacts to those smaller stream channels. The Corps acknowledges that, because of their size, smaller stream channels may be more susceptible to proposed development activities and other activities involving discharges of dredged or fill material into waters of the United States. Project proponents are less likely to fill larger stream channels because of the water that flows towards those larger stream channels, but other activities such as bank stabilization, excavation activities in the stream bed, and realigning stream channels may be authorized by these NWPs. Removing the 300 linear foot limit and relying on the 1/2-acre limit and PCN review process to identify activities that require individual permits helps the Corps implement its permit program more effectively, to efficiently authorize activities with no more than minimal adverse environmental effects via NWP, and focusing more of its resources on evaluating individual permit applications for activities that are likely have more substantial environmental impacts.

Many commenters said that this change would allow more than minimal impacts because of the disproportionate length of impacts to headwater streams

that would be allowed now under the NWP program, which is said to be counter to and inconsistent with the goal and purpose of the NWP program. Many commenters questioned how the Corps could reconcile and justify this change based on the long-standing history of the 300-linear foot limit for losses of stream bed in the NWP program. Many commenters stated that individual permits should be required for proposed impacts to more than 300 linear feet of stream bed, to allow for the public and federal, state, and local resource agencies to comment on proposals to fill or excavate several thousand feet of stream bed.

The Corps will be relying on other, existing protective mechanisms within the NWPs to ensure that these NWPs authorize only those activities that have no more than minimal adverse environmental effects. The NWP program has changed over time as new information is considered and alternative ways of implementing the program are identified to further the program's objective of regulating, "with little, if any, delay or paperwork certain activities having minimal impacts" (33 CFR 330.1(b)). The removal of the 300 linear foot limit, continued application of the 1/2-acre limit, plus the ability of division and district engineers to exercise their discretionary authority to modify, suspend, or revoke NWP authorizations on a regional or case-by-case basis, respectively, will ensure that activities that would cause more than minimal adverse environmental effects will be evaluated through the individual permit process.

Many commenters expressed concern about other changes within this proposal, when combined with the removal of the 300 linear feet limit would eliminate agency coordination with federal and state resource agencies under paragraph (d) of general condition 32. One commenter said that when reviewing the number of individual permits issued versus activities authorized under NWPs that even with what the commenter considers the more stringent 300-linear foot

limit in place there is no justifiable need for reducing regulatory burden since the number of individual permits is so small compared to NWP verifications and this change would likely not result in any significant decrease in number of individual permits or regulatory burden.

For the 10 NWPs that had the 300 linear foot limit for losses of stream bed, the agency coordination process in paragraph (d) of general condition 32 was limited to requests for waivers of the 300 linear foot limit for losses of intermittent and ephemeral stream bed. Ephemeral streams are not waters of the United States (see 33 CFR 328.3(b)(3)) and therefore not subject to jurisdiction under Section 404 of the Clean Water Act. In its Regulatory Impact Analyses for the proposed and final rules, the Corps acknowledges that the removal of the 300 linear foot limit is likely to result in a modest increase in NWP authorizations (174 per year), and a commensurate decrease in the number of activities that require individual permits. However, a modest reduction in the number of individual permits that must be processed each year can help improve administration of the Corps Regulatory Program and allow the Corps to devote more time and resources to working with project proponents to reduce the environmental impacts of activities that have the potential to result in more substantial impacts to jurisdictional wetlands and waters.

Many commenters said that the proposed 1/10-acre mitigation threshold for losses of stream bed was not an adequate tool for ensuring no more than minimal adverse environmental effects based on the disproportionately large amount of impacts to smaller headwater streams that would need to occur before compensatory mitigation was required. Many commenters expressed concern about the potential for increased likelihood for out-of-kind mitigation being provided to offset headwater stream impacts if mitigation is based on an acreage

or other area-based metric for losses of stream bed. These commenters said that out-of-kind mitigation would likely increase because it would be the only option available to permittees due to fewer stream credits being generated and available as mitigation bankers and other mitigation providers adapt to this change and the uncertainty in the market that this change might create.

The comments received on the proposed 1/10-acre threshold for stream mitigation are discussed in the section of this preamble that discusses the comments received on general condition 23. In response to those comments, the Corps reduced the threshold for stream mitigation from 1/10-acre to 3/100-acre. As explained in the discussion of general condition 23 below, this change in the stream mitigation threshold aligns with current practice for stream mitigation requirements in the NWP program, and the recommendations for the stream mitigation threshold provided by commenters. The Corps uses a watershed approach for compensatory mitigation (see 33 CFR 332.3(c)). The goal of a watershed approach is to maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites (see 33 CFR 332.3(c)(1)). A watershed approach considers how the types and locations of compensatory mitigation projects will provide the desired aquatic resource functions, and will continue to function over time in a changing landscape (33 CFR 332.3(c)(2)(i)), and may involve the use of out-of-kind mitigation.

Under a watershed approach, other approaches to stream restoration may be used to generate stream credits besides headwater stream channel reconfiguration projects. These other approaches may include process-based stream restoration activities such as dam removal, culvert replacements, levee setbacks or removals, riparian area restoration, allowing beavers to construct

dams to aggrade incised channels, or installing structures that mimic beaver dams to aggrade incised channels (Beechie et al. 2010) to generate compensatory mitigation credits for activities authorized by these NWPs. The use of beaver dams or structures to aggrade incised stream channels may result in wetland/stream complexes for which an area-based credit metric may be more appropriate than a linear foot-based metric. Focusing on restoring stream functions can be more ecologically successful in improving stream functions than form-based restoration approaches such as channel reconfiguration that have had questionable success in restoring degraded streams (Palmer et al. 2014). The stream credits generated by channel reconfiguration projects in headwater streams can be quantified in linear feet or acres, because the Corps' compensatory mitigation regulations do not mandate a specific approach for quantifying stream credits. Section 332.8(o)(1) states that the principal units for credits and debits are acres, linear feet, functional assessment units, or other suitable metrics of particular resource types. The preamble to the 2008 mitigation rule states that "district engineers retain the discretion to quantify stream impacts and required compensatory mitigation in terms of area or other appropriate units of measure" (73 FR 19633).

The Corps received many comments and questions about how these changes would likely negatively affect long-standing stream mitigation accounting and the mitigation banking industry in general. These commenters said that a linear foot metric has always been used for stream assessment methodologies and the basis for mitigation accounting systems, and many commenters stated that changing this metric would be unnecessarily burdensome and costly to stream restoration professionals and likely result in fewer stream restoration projects. One commenter stated that the proposed change would not increase

mitigation opportunities in larger or higher order stream channels as proposed since the restoration of larger streams is more complex than smaller streams and is dependent on many variables to include funding availability, site selection, engineering and design considerations, mitigation requirements associated with the project, market incentives, and the inability to control future impacts in the headwaters which can jeopardize the larger stream restoration project.

As stated in the previous paragraphs, the Corps' regulations do not require use of a linear foot metric for stream assessment methodologies or for quantifying stream impacts or compensatory mitigation credits. The removal of the 300 linear foot limit for losses of stream bed and the changes to general condition 23 are likely to benefit the mitigation banking industry by providing more opportunities for stream restoration projects that can generate stream credits to offset losses of stream bed authorized by the NWPs and other types of DA permits. The Corps acknowledges that some efforts will need to be made to address differences in accounting systems, but mitigation providers including mitigation bank sponsors and in-lieu fee program sponsors should be able to estimate the amount of stream credits quantified in linear feet that are needed to offset an specific acreage of stream bed lost as the result of an NWP activity. The district engineer can assist in these determinations to ensure that the amount of stream mitigation credits is roughly proportional to the authorized losses of stream bed.

Several commenters said that establishing a stream compensatory mitigation threshold of 1/10-acre would allow approximately 1,675 linear feet of a first order stream channel with a 2.6-foot wide channel to be impacted under these NWPs before any compensatory mitigation would be required, which does

not meet the Corps' mandated goal of no net loss to aquatic resources and would cause more than minimal effects to these aquatic resources.

In response to public comment, the Corps has modified paragraph (d) of general condition 23 to change the proposed 1/10-acre threshold for stream mitigation to 3/100-acre to make the threshold more consistent with current practice and the recommendations made by commenters. The reasons for changing the proposed 1/10-acre stream mitigation threshold to 3/100-acre are provided in the discussion of general condition 23 below. There is no mandated goal of no net less to aquatic resources in any law or regulation that applies to the Corps' NWP Program. Compensatory mitigation, including stream compensatory mitigation, is required for NWP activities on a case-by-case basis to ensure that the authorized activities result in no more than minimal adverse environmental effects. District engineers determine when compensatory mitigation is required for NWP activities. In prior versions of the NWPs, the Corps had no threshold for requiring compensatory mitigation for losses of stream bed, so those commenters were referring to district practices. Corps districts determined on an activity-specific basis when stream mitigation is necessary for specific NWP activities.

One commenter asserted that based on ORM2 data analyzed for stream channel impacts, that the proposed 1/10-acre stream compensatory mitigation threshold would result in the loss of an additional 130,000 linear feet of headwater streams in which no mitigation would be provided. Several commenters expressed concerns about how this change would affect current mitigation banks that were in the process of being approved and inquired whether all previously executed mitigation banking instruments would need modification to continue to operate and sell credits to permittees. One

commenter said that the proper regulatory tool to rectify the disparity between stream impacts versus stream mitigation would be the 2008 mitigation rule and requiring higher mitigation ratios and not revision of these NWPs.

The 2017 NWPs and prior NWPs had no threshold for requiring stream mitigation for NWP activities. The proposed addition of the 1/10-acre stream mitigation threshold in paragraph (d) of general condition 23 is a new threshold. That threshold has been reduced to 3/100-acre in response to many commenters that provided calculations to support the reduction. Many commenters did not take into account the ability of district engineers to require stream compensatory mitigation for losses of stream bed less than the acreage threshold specified in paragraph (d) of general condition 23. This is similar in practice to the 1/10-acre wetland mitigation threshold in paragraph (c) of general condition 23, where district engineers also have had the authority to require wetland compensatory mitigation for wetland losses less than 1/10-acre.

Several commenters recommended delaying these changes to allow for more time to study potential effects and one commenter requested that due to the potential for significant environmental effects, an environmental impact statement should be prepared for this propose change. One commenter said that the Corps already converts stream loss/impacts to acreage in their Regulatory Program database (ORM2) for accounting purposes and asked would the change from linear feet to acreage even be needed in the first place. Several commenters said that the current 300-linear foot threshold was too high and should be even further reduced.

The Corps is only removing a quantitative limit from these 10 NWPs, and is not changing stream compensatory mitigation requirements aside from establishing an acreage threshold in paragraph (d) of general condition 23 that is

generally consistent with current agency practice. Under the waiver provision in the 2017 version of these 10 NWPs, district engineers could waive the 300 linear foot limit for losses of intermittent and ephemeral stream beds, but the loss of stream bed could not exceed 1/2-acre. Therefore, it has been a long-standing practice in the NWP program to quantify of losses of stream bed in acres. The removal of the 300 linear foot limit and the change to general condition 23 does not require an environmental impact statement. As one commenter recognized, the Corps tracks losses of stream bed in its ORM2 database in acres.

Several commenters seemed to misunderstand the PCN requirements of these NWPs and believed that the proposed changes implied that no notification would be required for any losses of waters of the United States less than 1/10-acre for any of these NWPs and that the 1/10-acre mitigation threshold was the same as the PCN threshold. This misunderstanding resulted in many comments concerned about the Corps not even knowing what impacts are occurring if PCN thresholds are not triggering activity-specific review of these activities by district engineers, and stated that this change would allow activities with more than minimal adverse environmental effects to occur. Several commenters said that the rulemaking process for the NWPs in cases where the Corps does not review PCNs the authorization is automatically issued in some cases with no mitigation proposed. These commenters stated that not requiring PCNs could cause more than minimal impacts.

The 1/10-acre stream mitigation threshold proposed in paragraph (d) of general condition 23 is not the same as the 1/10-acre PCN threshold in NWP 51. If activities are authorized by NWPs without the requirement to submit PCNs, then compensatory mitigation is not required for those NWP activities, because compensatory mitigation requirements must be imposed by district engineers by

adding conditions to the NWP authorization. However, it should be noted that all activities authorized by these 10 NWPs require PCNs, except for certain activities authorized by NWPs 43 and 51. Nationwide permit 43 does not require PCNs for the maintenance of stormwater management facilities. Nationwide permit 51 does not require PCNs for the loss of 1/10-acre or less of waters of the United States.

Many commenters said that the removal of the 300 linear foot limit would result in a loss of critical habitat for many aquatic species listed under the Endangered Species Act which have cultural and economic importance to tribes. One commenter stated that the removal of the 300 linear foot limit could result in long reaches of streams channels upstream of tribal lands being developed which could cause, without any notification to the affected tribes, downstream changes to tribal lands in terms of stream flow, water quality, subsistence of water use, or cultural water use. Several commenters asked how the tools that the Corps mentioned in the proposed rule as safeguards, such as the PCN review process, regional conditions, activity-specific permit conditions, and use of discretionary authority, prevent more than minimal adverse environmental effects. Several commenters oppose the proposed removal of the 300 linear foot limit because it could essentially be a 'tipping point' for a headwater stream system, and that there would be no way to recover the functions and values lost to that system because of approval of large impacts to streams.

The removal of the 300 linear foot limit does not affect how compliance with Section 7 of the ESA is conducted for the NWPs. If the district engineer reviews a PCN for a proposed activity authorized by NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, or 52, and determines that activity may affect listed species or designated critical habitat, she or he will conduct section 7 consultation with the

U.S. FWS or NMFS as appropriate. Activities authorized by these NWPs must also comply with general condition 17, tribal rights. During the rulemaking process for these NWPs, Corps districts have been consulting or coordinating with tribes to identify regional conditions and coordination procedures to help ensure compliance with general condition 17. As discussed in the proposed rule, the PCN review process, regional conditions, and activity-specific conditions have been used successfully for years to ensure that activities authorized by the NWPs result in no more than minimal adverse environmental effects. Tipping points are difficult to identify, and if they can be identified, they are likely to vary from watershed to watershed.

One commenter said that headwater streams warrant more protection because of their relative importance in providing habitat, hydrologic, and water quality benefits to downstream waters, and said that replacing a linear metric with an area-based metric will reduce protection of headwater streams. This commenter stated that most nutrient and hydrologic inputs to streams occur along the borders of riparian zones and streams, so impacts to streams should be quantified in linear feet. In addition, this commenter noted that the longer total stream length and higher nitrogen removal efficiency of lower order streams is the main reason stream length is so important to water quality and why headwater streams are much more important to water quality functions in stream networks than are higher order streams. This commenter said that headwater streams are being lost at high rates, and that more losses of these streams will result in increases of eutrophication of downstream waters, more downstream flooding, and more transportation of pollutants to downstream waters. This commenter stated that using area as a quantitative limit for both headwater streams and higher order rivers will decrease protection and diminish the

ecological importance of headwater streams. This commenter concluded that the current linear foot limit is appropriate for streams because they are linear systems that interact with their landscapes along linear borders.

The Corps believes that an appropriate level of protection can be provided to headwater streams through the 1/2-acre limit, the PCN process, and the ability of division and district engineers to modify, suspend, or revoke NWP authorizations on a regional or case-by-case basis, respectively. When reviewing PCNs, district engineers will apply the 10 criteria identified in paragraph 2 of Section D, District Engineer's Decision. In regions where there are concerns that the use of the NWPs may result in more than minimal cumulative adverse effects to headwater streams and the functions they provide, division engineers can add regional conditions to these NWPs to establish an acreage limit lower than 1/2-acre or revoke one or more of these NWPs. Headwater streams are not provided any special status under the Corps' regulations or the U.S. EPA's Clean Water Act Section 404(b)(1) Guidelines. The only streams that are special aquatic sites under the 404(b)(1) Guidelines are riffle and pool complexes (see 40 CFR 230.45), and many headwater streams are not riffle and pool complexes.

For the reasons provided above, the Corps has removed the 300 linear foot limit from NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52.

G. Response to Comments on Specific Nationwide Permits

(1) NWP 12. Oil or Natural Gas Pipeline Activities.

The Corps proposed to modify this NWP to limit it to oil or natural gas pipeline activities, and issue two new NWPs to authorize electric utility line and telecommunications activities (proposed new NWP C, now designated as NWP 57) and utility line activities for water and other substances (proposed new NWP D, now designated as NWP 58). The Corps also invited public comment on

national construction standards and best management practices that could be incorporated into the text of NWP 12 to help ensure that this NWP authorizes only those activities (i.e., discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States) that result in no more than minimal individual and cumulative adverse environmental effects.

General Comments

Some commenters expressed their support for dividing NWP 12 into three separate NWPs while some commenters objected to that aspect of the proposed rule. Many commenters stated that the Corps should reissue NWP 12 in its current form. One commenter said that the 2017 NWP 12 contains sufficient PCN thresholds and conditions to provide appropriate environmental protections. One commenter objected to the proposed modifications to NWP 12 made in response to E.O. 13783, Promoting Energy Independence and Economic Growth, stating that these changes would make it easier for oil and gas pipeline activities to occur at the expense of the environment. Several commenters said that the Corps should limit the number of activities authorized by this NWP because continuing to authorize these activities contributes to cumulative effects to natural resources.

After reviewing the comments received in response to proposed NWPs 12, C, and D, the Corps is finalizing and issuing these NWPs. Nationwide permit 12 authorizes oil or natural gas pipeline activities, NWP 57 authorizes electric utility line and telecommunications activities, and NWP 58 authorizes utility line activities for water and other substances. These NWPs are issued to fulfill the objective of the NWP program, which is to authorize, with little, if any, delay or paperwork certain activities having no more than minimal impacts (33 CFR

330.1(b)). The proposed modifications to NWP 12 were made, in part, to respond to the direction provided by E.O. 13738, which is to revise existing regulations that “unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.” In this NWP, the Corps has retained the terms and conditions that are necessary to ensure that the activities authorized by this NWP result in no more than minimal individual and cumulative adverse environmental effects. The Corps acknowledges that the use of the NWPs to authorize activities during the 5-year period the NWP is in effect results in some cumulative adverse environmental effects, but the limits, PCN requirements, general conditions, and the ability of division and district engineers to modify, suspend, and revoke NWP authorizations all help to ensure that this NWP causes no more than minimal cumulative adverse environmental effects at the national, regional, and site scales.

A few commenters stated that the proposed NWP 12 would result in reduced opportunities for the Corps and for the public to evaluate the impacts of oil and natural gas pipeline activities on water resources and the environment in general. One of these commenters said that the Corps should provide additional opportunities for public involvement. One commenter stated that public participation opportunities during the NWP permitting process are sufficient; and expanding the existing requirements at the district level would cause unwarranted delays in permitting. One commenter suggested that the Corps should notify the public of proposed NWP 12 activities. A few commenters said that pipelines can cause significant direct and indirect impacts to fish and wildlife habitat and water quality associated with an increase in watershed runoff.

The public is provided an opportunity to comment on the Corps' proposal to issue, reissue, or modify an NWP when Corps Headquarters publishes its proposed rule in the Federal Register to start the public comment period. However, after an NWP is issued, there is no public comment process for specific NWP activities. If, for a proposed oil or natural gas pipeline activity, the district engineer exercises discretionary authority and requires an individual permit for that activity, the public will have an opportunity to provide comments in response to the public notice issued by the Corps district. When reviewing PCNs for proposed oil or natural gas pipeline activities, district engineers consider the potential direct and indirect impacts on fish and wildlife habitat and water quality, as well as other public interest review factors identified in 33 CFR 320.4(a)(1).

One commenter said that natural gas pipeline activities authorized by NWP 12 comply with industry standards that are protective of the environment and public safety. One commenter stated that pipelines provide a safe, reliable, efficient, and cost-effective way to move bulk liquids, particularly over long distances, and that the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration concurs with that statement. The Corps acknowledges these comments.

One commenter said that while oil or natural gas pipelines may be regulated by other agencies, the Corps is not relieved of its obligation to conduct a NEPA analysis for leaks or spills. A few commenters stated that the Corps must consider in its NEPA review the impacts that could result from authorizing a pipeline that would carry toxic material, including leaks or spills, and that the draft decision document doesn't take the required "hard look".

In the national decision document for the issuance of this NWP, the Corps discusses leaks or spills that may occur during the construction and/or operation

of oil or natural gas pipelines. The Corps does not have the authority to take actions to prevent or control potential leaks or spills that may occur during the construction or operation of oil or natural gas pipelines. Since the Corps does not regulate the release of oil, natural gas, or products derived from oil or natural gas, it is not required to perform a detailed analysis of the effects of those possible future leaks or spills because those leaks or spills are not an effect of the Corps' proposed action (see the definition of "effects or impacts" at 40 CFR 1508.1(g)).

One commenter stated that pipeline abandonment issues in NWP 12 should be treated consistently across the districts and recommended that the NWP 12 terms should provide this consistency. A few commenters said that NWP 12 should continue to authorize emergency installation, replacement or repair of utility lines. One commenter requested that the Corps clarify the types of time-sensitive activities, including integrity digs, that are authorized under NWPs 12 and 3. One commenter requested clarification of the scope of maintenance activities under NWP 12. One commenter said that the Corps should facilitate the construction, repair, and/or replacement of climate resilient underground linear infrastructure to support climate adaptive and resilient energy systems through the issuance of general permits.

Corps districts have discretion to determine on a case-by-case basis how to address pipeline abandonment activities. Nationwide permit 12 can be used to authorize emergency installation, replacement or repair of utility lines. The reduction of the number of PCN thresholds for this NWP may facilitate the implementation of these emergency activities by reducing delays in securing NWP authorization. The Corps does not believe that it is necessary add text to the NWP to specifically address integrity digs, because discharges of dredged or

fill material into waters of the United States for integrity digs can be considered part of maintenance, which is included in the first sentence of this NWP. The activities authorized by this NWP can contribute to the construction, repair, and/or replacement of climate resilient underground linear infrastructure to support climate adaptive and resilient energy systems.

One commenter stated that the Corps should ensure that activities authorized by NWP 12 do not commence construction in uplands in protected critical habitats until the ESA section 7 consultation process has been completed. A few commenters indicated concern that cumulative impacts are not adequately considered in the decision document for NWP 12. A few commenters asserted that the scope of the cumulative impacts has proven to be more than minimal. One of these commenters stated that the draft decision document for NWP 12 already acknowledges that the cumulative impacts are more than minimal. A few commenters said that the Corps should consider the cumulative upstream and downstream impacts of its actions regarding oil and natural gas pipelines, including climate impacts. A few commenters expressed concern for potential effects on drinking water and aquifers. One commenter expressed a general concern for waterways affected by NWP 12 activities.

The Corps does not have the authority to prevent project proponents from conducting activities in uplands before they receive NWP verifications from district engineers in response to PCNs. The national decision documents issued by Corps Headquarters address cumulative impacts in accordance with the Clean Water Act Section 404(b)(1) Guidelines at 40 CFR 230.7 for the issuance of general permits. The Council on Environmental Quality's NEPA regulation at 40 CFR 1508.1(g)(3) repealed the 1978 definition of "cumulative impact," so under the current NEPA regulations the cumulative effects analysis for an NWP

is similar to the approach the Corps uses under 40 CFR 230.7(b)(3): estimating the number of times the NWP is anticipated to be used during the 5-year period it will be in effect, the authorized impacts to jurisdictional waters and wetlands, and the compensatory mitigation required to offset losses of jurisdictional waters and wetlands. Those impacts, and the compensatory mitigation, are evaluated against the current environmental setting (i.e., the affected environment), which includes the past and present effects of human activities and natural events that have shaped the current environmental setting. The Corps does not have the authority to regulate the operation of any oil or natural gas pipeline, or the emissions that result from combustion of oil or natural gas, or from the industrial processes that derive other products from oil or natural gas. Therefore, under the current NEPA regulations, the Corps is not required to evaluate those upstream and downstream impacts, including potential impacts on the planet's climate. The national decision document for this NWP considers effects on water supply and conservation as part of the public interest review. When reviewing PCNs, district engineers will evaluate the effects of proposed NWP activities on waterways.

Activities Authorized by NWP 12

One commenter said that the first sentence of NWP 12 should be revised as follows: "Activities required for the construction, replacement, maintenance, repair and removal of oil, natural gas and gaseous fuel pipelines and 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." The Corps declines to make this change because it is covered by the definition of "oil or natural gas pipeline" provided in the second paragraph of this NWP.

Oil or natural gas pipelines. One commenter stated that if the Corps moves forward with limiting NWP 12 to oil or natural gas pipeline activities, it should also delete the phrase “including outfall and intake structures” because oil and natural gas pipelines and distribution systems do not contain water outfall or water intake pipe structures. The Corps has made this change to the second paragraph of this NWP.

A few commenters said that the terms “oil”, “gas”, and “natural gas”, and “petrochemicals” are vague and overbroad for the purposes of determining compliance with the proposed NWPs and can have various meanings, and that any proposed changes should be subjected to notice and comment procedures. A few commenters stated that terms associated with the proposed NWP 12 that require clarification include "utility lines," since pipeline activities authorized by NWP 12 might be both pipelines and utility lines; "other substances," because gas and petrochemicals can be found in many types of infrastructure and industrial products; and "gas" and "natural gas," because liquified petroleum gas is not a natural gas.

The Corps has made changes to the definition of “oil or natural gas pipeline” to take into account the wide variety of products that may be derived from oil or natural gas and transported in these pipelines. In response to comments received in response to the 2020 Proposal, and to provide additional clarity on the types of products that may be transported by oil or natural gas pipelines versus utility line activities that may be authorized by NWP 58, the Corps has replaced the term “petrochemical products” with the phrase “products derived from oil or natural gas, such as gasoline, jet fuel, diesel fuel. heating oil,

petrochemical feedstocks, waxes, lubricating oils, and asphalt." The revised definition was developed using information from the U.S. Energy Administration.[2]

A few commenters said that the proposed definition of "oil or natural gas pipeline" for the proposed NWP 12 is inadequate and inconsistent with the definitions in the Oil Pollution Act. One commenter suggested the Corps add "and derivatives" after 'petrochemical products' for clarity. One commenter suggested removal of the phrase "for any purpose" from the proposed definition of "oil or natural gas pipeline" because it creates uncertainty about what activities may actually be authorized by the NWP.

The Corps developed its own definition because this NWP also authorizes regulated activities associated with natural gas pipelines and products derived from oil or natural gas. The Corps has deleted "for any purpose" because NWP 12 is now limited to oil or natural gas pipeline activities.

One commenter stated that the existing NWP 12 uses the category "utility lines" which is still used in proposed NWPs C and D, but the proposed NWP 12 uses the new term "oil and natural gas pipelines" which causes conflicting redundancies with various aspects of the proposed NWPs 12, C, and D. One commenter said that many of natural gas pipe construction and repair projects that will need NWP authorization involve pipelines that will be used to transport geologic natural gas as well as other lower carbon gaseous fuels such as renewable natural gas, hydrogen, and power-to-gas methanated hydrogen. This commenter said that to avoid confusion and streamline the process for these projects, the Corps should not split off any buried pipe-based utility lines into the proposed new NWP D. One commenter remarked that the Corps should clarify

[2] https://www.eia.gov/energyexplained/oil-and-petroleum-products/ (accessed November 4, 2020).

that NWP 12 is available for underground pipelines and utility lines whether they carry geologic natural gas or a blend with lower-carbon gaseous fuels.

Nationwide permits 12, 57, 58 authorize activities for different types of utility lines, so there will be some redundancies because of similarities among these different types of utility lines, but there are also some differences, which result in different text in each of these NWPs. Nationwide permit 12 authorizes oil or natural gas pipeline activities that may carry different types of natural gas. Nationwide permit 58 can be used to authorize pipeline activities that require DA authorization and are used to convey hydrogen, methanated hydrogen, or carbon dioxide.

Oil or natural gas pipeline substations. One commenter said that the paragraph on substations in the proposed NWP 12 should be revised to state that it authorizes construction, maintenance, replacement or expansion work in a non-tidal jurisdictional water for an oil or natural gas or gaseous fuel custody transfer station, boosting station, compression station or metering and/or pressure regulating station. One commenter said that if the Corps issues proposed new NWP C, then the references to “substations” should be removed from NWP 12 and replaced with boosting or compressor stations and natural gas metering and pressure regulating station. This commenter also recommended revising the fourth paragraph in the proposed NWP 12 to state that it authorizes construction, maintenance, replacement or expansion work in a non-tidal jurisdictional water for an oil or natural gas or gaseous fuel custody transfer station, boosting station, compression station or metering and/or pressure regulating station. One commenter noted that the term “natural gas pipeline substation” is used in the proposed language for the proposed NWP 12 and

requested clarification regarding how above-ground natural gas facilities including district regulators and gate stations fit into NWP 12.

The Corps has modified this paragraph to provide examples of substations associated with oil or natural gas pipelines. This NWP can be used to authorize discharges of dredged or fill material into waters of the United States for above-ground natural gas facilities including district regulators and gate stations.

Access roads. One commenter said that only temporary access roads should be authorized by NWP 12, and that permanent access roads are more appropriately authorized under NWP 14. The Corps disagrees, and is retaining the NWP authorization for permanent access roads, because access roads are associated with utility lines are not usually available for public use.

One commenter said that the proposal to add the word “over” to activities that are routed in or under navigable waters subject to Section 10 of the Rivers and Harbors Act of 1899 is unnecessary as structures routed over section 10 waters would be considered bridges and be regulated under Section 9 of the Rivers and Harbors Act of 1899. The Corps has modified the second sentence of the seventh paragraph of this NWP by adding the word “may” because there may be circumstances where section 10 authorization is required for oil or natural gas pipelines routed over navigable waters of the United States.

A few commenters stated that the Corps does not have jurisdiction over inadvertent returns, leaks, or spills. One commenter said that NWP 12 should continue to authorize the remediation of inadvertent returns of fluids during drilling operations without additional changes. A few commenters stated that the Corps has not sufficiently evaluated the risks, impacts, and mitigation measures associated with inadvertent returns of drilling fluid. A few commenters expressed appreciation for the clarification in the decision document that the Corps’

jurisdiction is limited to authorizing temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids through sub-soil fissures or fractures that might occur during horizontal directional drilling.

The Corps does not have jurisdiction over inadvertent returns, leaks, or spills that may occur during horizontal directional drilling to install or replace oil or natural gas pipelines. The eighth paragraph of this NWP authorizes, to the extent that DA authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing oil or natural gas pipelines. The purpose of this paragraph is to provide authorization for regulated activities that are necessary to remediate inadvertent returns of drilling fluids to reduce adverse environmental effects that might be caused by releases of drilling fluids to the surrounding environment.

One commenter expressed support for retaining the clarification that NWP 12 authorizes temporary mats for moving equipment. A few commenters said that the Corps should stop considering temporary mats/panels as a regulated activity or clarify that they are not to be considered as a “loss of waters” for the purposes of PCN requirements because of their temporary effects. One commenter requested clarification that activities resulting in the loss of greater than 1/10-acre of waters of the United States require a PCN to the Corps, but temporary discharges do not count toward that 1/10-acre PCN threshold.

The determination as to whether the use of timber mats in waters of the United States for oil or natural gas pipeline activities constitutes a discharge of dredged or fill material into waters of the United States should be made by district engineers after evaluating site-specific and activity-specific circumstances. Any

discharge of dredged or fill material into waters of the United States that results in a loss of greater than 1/10-acre of waters of the United States requires pre-construction notification. As explained in the definition of “loss of waters of the United States,” waters of the United States temporarily filled, flooded, excavated, or drained, but restored pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States.

One commenter said there is inconsistency in the text of NWP 12 because it states that there must be no change in pre-construction contours of waters of the United States, but NWP 12 also authorizes losses of waters of the United States. This commenter recommended revising the text of NWP 12 to state that “there must be no change in pre-construction contours which results in permanent loss of waters of the United States.” One commenter stated that the Corps should adopt a strict interpretation of the amount of “temporary fill” authorized by this NWP for the purposes of assessing cumulative impacts and should also consider the timing and duration of temporary fills, including temporary mats. This commenter indicated that permitted temporary fills generally occur in stages and not all at the same time.

Some activities authorized by NWP 12 (e.g., the construction of substations and permanent access roads) result in permanent fills while other authorized activities, such as the placement of temporary fills, require restoration to pre-construction elevations. Temporary fills do not contribute to cumulative impacts because they are removed upon completion of the work and the permittee is required to restore the affected area to pre-construction elevations. The Corps acknowledges that temporary fills may occur during different stages of

construction, maintenance, repair, or removal of an oil or natural gas pipeline activity.

Pre-Construction Notification Thresholds

Many commenters opposed reducing the number of PCN thresholds in this NWP. Several commenters suggested that reducing the PCN requirement would result in the NWP authorizing activities that have more than minimal adverse environmental effects, including cumulative effects. Many of these commenters suggested retaining the existing PCN thresholds. One of these commenters requested further clarification regarding which activities would no longer require PCNs. A few of these commenters stated that maintaining the status quo creates greater regulatory certainty to the industry. Many commenters said that reducing the PCN thresholds for this NWP undermines the Corps' ability to ensure that authorized activities NWPs will result in no more than minimal individual and cumulative adverse environmental effects, and reduces the opportunity for the Corps to require individual permits when adverse environmental effects would be more than minimal. One commenter remarked that the proposed reduction in PCN thresholds would cause increased harm to rivers, streams, and wetlands.

The Corps proposed to retain those PCN thresholds associated with NWP 12 activities that result in losses of waters of the United States or have potential effects on navigation. To reduce regulatory burdens in response to E.O. 13783, the Corps proposed to remove a number of PCN thresholds because of the requirement in the NWP to restore temporary impacts to pre-construction elevations or because they are already addressed by another PCN threshold. If a proposed NWP 12 activity does not trigger any of the three PCN thresholds in the text of the NWP, or a PCN threshold in the text of one of the NWP general

conditions (e.g., general condition 18, endangered species and general condition 20, historic properties), then pre-construction notification is not required for the proposed activity unless a division engineer has imposed a regional condition to require PCNs in a particular geographic region. Division engineers can add regional conditions to add PCN thresholds that were removed from the text of NWP 12, if he or she determines the PCN threshold is necessary to ensure that the NWP authorizes only those activities that have no more than minimal adverse environmental effects. Adverse effects to rivers, streams, and wetlands are generally caused by the discharges of dredged or fill material or structures or work authorized by this NWP, not by the presence or absence of a PCN threshold.

Many commenters expressed support for proposed reduction in PCN thresholds for NWP 12 and the associated reduced administrative burden that reduction would provide. One commenter voiced support for the reduction in PCN requirements as it would reduce the potential for infrastructure litigation and encourage private investment. One commenter stated that PCN thresholds should be removed when they are duplicative or burdensome. One commenter said that if the PCN requirements to be removed are truly redundant it would pose no additional burden on the regulated public.

The Corps acknowledges these comments, and the Corps' intent with these changes is to reduce burdens on the regulated public and focus the PCN thresholds on those activities that have some potential to cause more than minimal adverse environmental effects. For these activities, district engineers should be given the opportunity to evaluate these activities on a case-by-case basis.

Many commenters stated that the PCN process incentivizes permittees to avoid, minimize, and compensate for impacts to aquatic resources in order to reduce permitting delays. Some of these commenters said that the reduced PCN requirements would result in violations to general condition 23, mitigation. One commenter stated that the remaining PCN thresholds and the other NWP 12 terms and conditions reasonably limit the adverse environmental effects of the activities authorized by NWP 12. One commenter said that the Corps should encourage the districts to refrain from adding PCN thresholds to this NWP, specifically through regional conditions. A few commenters expressed concern that the reduction of PCN thresholds will likely be subject to litigation. One commenter suggested that any resulting litigation could cause uncertainties for the industries that rely on the NWP program.

The NWPs provide incentives for project proponents to reduce impacts to waters of the United States to obtain DA authorization in less time than is required under the individual permit process. Reducing the number of PCNs does not violate general condition 23. The NWPs authorize activities that have no more than minimal individual and cumulative adverse environmental effects, and it is not necessary to require compensatory mitigation for every NWP activity. The PCN thresholds themselves do not limit adverse environmental effects; the adverse environmental effects caused by regulated activities authorized by an NWP are limited by the constraints in the text of the NWP (e.g., the 1/2-acre limit, requirements to restore temporary impacts to pre-construction elevations) and in the NWP general conditions. Division engineers have the authority to add regional conditions to replace the PCN thresholds that were in prior versions of NWP 12, if those division engineers determine that adding those PCN thresholds is necessary to ensure that the NWP only authorizes those activities that result in

no more than minimal individual and cumulative adverse environmental effects. While potential litigation risk is a consideration when contemplating changes, other factors such as administrative efficiency, reduction of regulatory burdens, and other approaches for maintaining environmental protections are other considerations that the Corps considers as well.

A few commenters stated that the proposed reduction in PCN thresholds could expedite permit processing time and preclude a thorough review by the Corps. One commenter said that reducing the number of PCN thresholds would allow for the potential for spills near stream beds. One commenter opposed the simplified PCN requirements, stating that the proposal does not improve inter-agency coordination or reduce impacts on the environment. One commenter said that PCNs should be required for all NWP 12 activities. One commenter stated that the Corps fails to show how compliance with Clean Water Act Section 404(e) would be achieved without a process to track all NWP activities.

The reduction in PCN thresholds allows Corps districts to shift their resources towards evaluating proposed activities that require DA authorization that have the potential for greater adverse environmental effects. Reducing the number of PCN thresholds will not alter the potential for spills to occur near stream beds because spills are accidents and not planned activities that the Corps would evaluate as part of a PCN. The reduction in the number of PCN thresholds in NWP 12 does not alter any agency coordination procedures because agency coordination is not required for any NWP 12 activities. It is not necessary to require PCNs for all NWP 12 activities, because many of the activities authorized by NWP 12 result in only temporary impacts to aquatic resources. The Corps does not have to track all NWP activities to comply with Section 404(e) of the Clean Water Act. Since the inception of the NWP program

in 1977, many of the NWPs have not require pre-construction notification, thus the changes that are being finalized are not a departure from the Corps practice or procedures.

A few commenters said that reducing the PCN requirement does not comply with the Corps' mandate under ESA section 7 to ensure consultation occurs when necessary. One commenter said that PCN should be required for all maintenance activities in waters of the United States, especially if the waters contain ESA-listed species. A few commenters opposed reducing the number of PCN thresholds for NWP 12 because the PCN process allows state natural resource agencies to provide expertise in determining the effect of projects on state resources, affected species, and their habitat. A few commenters stated the reduced number of PCN thresholds would not comply with the NHPA. One commenter said that the proposed reduction in PCN thresholds could have potential impacts to cultural resources and affect the protection of historic properties. Several commenters said that the proposed reduction of PCN thresholds poses risks of significant impacts to tribal rights and treaty-reserved resources.

General condition 18 addresses compliance with section 7 of the ESA. Under paragraph (c) of general condition 18, 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 even if a PCN is not otherwise required. This includes maintenance activities that might affect listed species or designated critical habitat. None of the activities authorized by NWP 12 require coordination with state natural resource agencies, and the PCN thresholds that have been removed from NWP 12 did not require that coordination.

General condition 20 addresses compliance with section 106 of the NHPA. Under paragraph (c) of general condition 20, 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 even if a PCN is not otherwise required. The reduction in PCN thresholds for NWP 12 does not change the PCN requirement in general condition 20. During the process for issuing these NWPs, Corps districts have been consulting or coordinating with tribes to identify regional conditions or coordination procedures to ensure that activities authorized by NWP 12 and other NWPs do not have substantial adverse effects on tribal rights and, as appropriate, treaty reserved resources. Division engineers can add PCN requirements to address tribal concerns as appropriate.

One commenter objected to the lack of a PCN threshold based on pipeline diameter. One commenter requested that the Corps provide additional information regarding the outcomes of PCN reviews under the current NWPs and an explanation for how environmental protection would be maintained without the PCN review process. One commenter stated that the Corps should clearly identify the information required by all applicants to support the analysis of temporal and cumulative impacts and recommended separate analyses for all impacts to waters of the United States within the total impact limitation of 1/2-acre.

Pre-construction notification thresholds are established for activities that have the potential to result in more than minimal adverse environmental effects, and pipeline diameter has not been demonstrated to have potential to be a useful

PCN threshold. During their reviews of PCNs, district engineers document their conclusions as to whether the proposed activity will result in no more than minimal adverse environmental effects, or whether it is necessary to exercise discretionary authority and require an individual permit for the proposed activity. This documentation includes the district engineer's consideration of cumulative effects.

In the paragraphs below, the Corps discusses each of the five PCN thresholds it proposed to remove to simplify the PCN requirements for this NWP. The Corps discusses the comments received and provides responses to those comments. In the paragraphs that follow, the Corps uses the term "utility line" because it proposed the same PCN thresholds for NWP 12 and proposed new NWPs C and D (now designated as NWPs 57 and 58, respectively in this final rule). Also discussed below is the Corps' proposal to add a new PCN threshold to NWP 12 for new oil or natural gas pipelines greater than 250 miles in length.

(i) <u>The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way</u>. Many commenters said that allowing mechanized land clearing through forested wetlands without requiring PCNs will cause more than minimal adverse environmental effects and recommended that this PCN threshold requirement be retained. Many commenters said that PCNs should be required for mechanized land clearing associated with NWP 12 to prevent the loss of wetland resources, functions and services, including water quality, erosion control, and flood mitigation. A few commenters suggested a maximum acreage for forest clearing activities without a PCN associated with NWP 12. One commenter stated that the PCN threshold should be modified to require PCNs for "loss or permanent conversion."

If construction of an oil or natural gas pipeline involves mechanized land clearing in a forested wetland for the right-of-way for that pipeline, the installation of the pipeline must cause no change in pre-construction contours of waters of the United States. Any temporary fills must be removed upon completion of construction, and the affected areas restored to pre-construction elevations. If there are any permanent fills associated with the mechanized land clearing of a forested wetland, and the loss of waters of the United States is greater than 1/10 acre, a PCN is required. In areas where temporary fills occur, the wetlands in the right-of-way will remain, although there may be a conversion in wetland type. Those wetlands will continue to perform wetland functions, including hydrologic functions, biogeochemical cycling, and habitat functions, but there may be some changes to those functions and the degree to which the wetlands perform those functions. Division engineers can impose regional conditions to require PCNs for mechanized land-clearing in a forested wetland, and they can add regional conditions to impose an acreage limit on impacts resulting from mechanized land-clearing of forested wetlands.

Many commenters said that PCNs should be required for mechanized land clearing in forested wetlands to allow district engineers to consider avoidance, minimization, and the need for compensatory mitigation, as compliance with the 404(b)(1) guidelines, and further recommended retention of this PCN threshold. One of these commenters stated that temporary impacts should also be considered. Many commenters expressed concern that mechanized land clearing in forested wetlands would result in the long-term and/or permanent conversion of these areas to emergent and scrub-shrub wetlands, and further indicated that these scrub-shrub and emergent wetlands do not provide the same degree of ecological functions and services or provide the

same values. Several of these commenters asserted that this conversion in wetland type causes more than minimal adverse effects to the environment.

Paragraph (a) of general condition 23 requires project proponents to design and construct their NWP activities to avoid and minimize temporary and permanent adverse effects to waters of the United States to the maximum extent practicable at the project site (i.e., on site). Division engineers can add regional conditions to this NWP to require PCNs and compensatory mitigation for mechanized land-clearing of forested wetlands. Activities that are authorized by NWPs do not require activity-specific evaluation under the 404(b)(1) Guidelines (see 40 CFR 230.5(b)). Emergent and scrub-shrub wetlands perform valued wetland functions, even though those functions differ to some degree from the functions performed by forested wetlands.

A few commenters stated that clearing of forested wetlands can impact wetland hydrology and soils through rutting and soil compaction by machinery. Many commenters stated that a review of pre- and post-construction hydrogeomorphic method assessments demonstrates significant permanent impacts to forested wetlands resulting from mechanized land clearing and temporary discharges. Several commenters said that forested wetlands along the Gulf Coast provide vital stopover areas for migratory birds and that the proposed removal of this PCN threshold would be most profound along the Gulf Coast where pipelines are regularly constructed through forested wetlands.

The text of this NWP that applies to the construction of the pipeline requires that there is no change in pre-construction contours of waters of the United States. If there are permanent impacts to certain features of these forested wetlands, those impacts are caused by the activities authorized by NWP 12, not the presence or absence of any PCN threshold. Soil compaction can be

caused by a variety of activities other than discharges of dredged or fill material. If the activity results in a loss of greater than 1/10-acre of waters of the United States, then the project proponent is required to submit a PCN. For those Corps districts in the Gulf Coast, division engineers add regional conditions to require PCNs for mechanized land-clearing activities in forested wetlands.

Several commenters said that the Corps does not cite any sources for stating that mechanized land clearing in forested wetlands usually results in only temporary impacts. A few commenters stated that the Corps has not provided any scientific rationale demonstrating that loss of forested wetland would not result in more than minimal adverse environmental effects. A few commenters said that the consensus in the scientific literature contradicts the Corps' assertion, with multiple studies and practices indicating that mechanized clearing results in irreversible and permanent alteration of forested wetland's functions. One commenter cited paragraph (i) of general condition 23 which allows district engineers to require mitigation for the permanent conversion of wetland types to offset losses of specific functions. One commenter said that the functions of forested wetlands have been estimated by the Corps to have a value of $10,401 per acre per year. A few commenters stated that mechanized land clearing can result in sediment disturbance and potential water quality impacts in wetland areas. A few commenters stated that removing the PCN requirement for mechanized land clearing in forested wetlands would make NWP 12 vulnerable to litigation.

The text of NWP 12 requires temporary impacts to be restored after the pipeline is constructed. If the construction of the pipeline results in the loss of greater than 1/10-acre of waters of the United States, then the project proponent is required to submit a PCN to the Corps. The removal of the PCN threshold is

an administrative decision to improve regulatory efficiency, reduce redundancy, and focus the district engineer's evaluation efforts on proposed activities that have the potential to result in more than minimal adverse environmental effects. If mechanized land-clearing causes irreversible and permanent alteration of forested wetland's functions, it is because of the physical effects of the discharge of dredged or fill material into waters of the United States and the periodic maintenance in the pipeline right-of-way that causes those changes in wetland functions. The Corps regulates the former, but does not regulate the mowing and cutting of vegetation to maintain the plant community in the pipeline right-of-way as herbaceous vegetation or scrub-shrub vegetation. Paragraph (i) of general condition 23 is retained in these NWPs, so for those NWP 12 activities that require PCNs, district engineers can require compensatory mitigation to offset permanent losses of certain wetland functions.

One commenter stated that impacts to forested wetlands are permanent or semi-permanent and should not be considered temporary. One commenter suggested the cumulative effects of forested wetland conversion cannot be tracked without a PCN requirement. One commenter stated that the removal of the PCN for mechanized land clearing in forested wetlands is a change with implications for market growth of the ecological restoration industry. One commenter stated that mechanized land clearing can increase non-point source pollution in a water of the United States and can increase nutrient loading in first and second order streams. One commenter said that mechanized land clearing in forested wetlands is associated with an increase in the spread of invasive species.

Forested wetlands that have been converted to herbaceous or scrub-shrub wetlands continue to function as wetlands. Therefore, from a wetland

perspective, the impacts caused by the below-ground installation of the pipeline are temporary as long as temporary fills are removed and the affected area is restored to pre-construction elevations. Although the wetland type has changed as a result of the activity , district engineers can require compensatory mitigation to offset losses of specific wetland functions for those NWP 12 activities that require PCNs. If the permittee wants to conduct mechanized land clearing of a forested wetland for an oil or natural gas pipeline right-of-way, he or she must restore the disturbed soils so that there is no change in pre-construction contours of waters of the United States in that right-of-way. If there will be permanent changes in pre-construction contours in waters of the United States, and the area of those permanent changes will exceed 1/10-acre, then a PCN is required. Permanent adverse effects can be addressed through the PCN review process. Where appropriate to ensure minimal adverse effects on the environment in a particular region, division engineers can add regional conditions to require PCNs for mechanized land clearing in a forested wetland right-of-way.

(ii) <u>The utility line in waters of the United States, excluding overhead lines, exceeds 500 feet</u>. One commenter stated that the 500 linear foot PCN threshold should be maintained since the 1/10-acre threshold only covers losses of waters of the United States and retaining it would allow the district engineer to evaluate the site-specific conditions and make an informed decision. One commenter said that removal of the 500 linear foot PCN threshold limits the Corps ability to review projects that will affect habitat, ecosystems, and the environment on tribal lands and within tribal usual and accustomed areas that cross state lines and international borders and further indicated that this would constitute a violation of the United States and trust and responsibility and obligation to protect treaty resources.

The 1/10-acre PCN threshold for losses of waters of the United States provides an opportunity for district engineers to evaluate site-specific conditions and determine whether the proposed oil or natural gas pipeline activities are authorized by NWP 12. The 1/10-acre PCN threshold also provides district engineers with the opportunity to assess potential effects on habitat, ecosystems, environmental conditions on tribal lands, and tribal usual and accustomed areas. District engineers can work with tribes to develop coordination procedures to help protect treaty resources. In addition, activities authorized by NWP 12 must comply with general condition 17, tribal rights.

One commenter said that if this PCN threshold is removed, the Corps cannot evaluate the impacts of temporary losses or determine if specific restoration or mitigation measures are necessary, or if an individual permit would be necessary. One commenter said that the proposal to remove the 500 linear foot PCN threshold should be coterminous with other section 404 permitting requirements, but since this justification does not apply in all situations it is inappropriate. An example cited by this commenter is utility lines directionally drilled under wetlands.

Temporary impacts should not normally require PCNs because the aquatic resources and the functions they provide should recover after the temporary fills are removed and the affected area restored to pre-construction elevations. The removal of the 500 linear foot PCN threshold improves the Corps' efficiency in administering the section 404 program. Further, it is consistent with section 404 permitting requirements, because the Corps determines which activities should require PCNs to trigger review on a case-by-case basis.

(iii) <u>The utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to or along the stream bed that is within that</u>

jurisdictional area. One commenter stated that installing pipelines that run parallel to a watercourse can have significant impacts on hydrogeomorphology of the watercourse and lead to substantial erosion and degradation. A few commenters recommended retention of the requirement for a PCN when the proposed activity would run parallel to and within a stream bed, citing the potential for those activities to downgrade aquatic resource functions.

As discussed in the 2020 Proposal (85 FR 57326), the Corps proposed to remove this PCN threshold because the text of NWP 12 requires restoration of these temporary impacts. The third paragraph of NWP 12 addresses the requirements for trenching and backfilling underground oil or natural gas pipelines to ensure those impacts are temporary and do not result in a loss of waters of the United States. The ninth paragraph of NWP 12 also addresses the requirements for restoring temporary fills, so that those fills do not result in losses of jurisdictional waters and wetlands. Further, in Corps districts where the construction of oil or natural gas pipelines in jurisdictional waters and wetlands parallel to a stream channel have the potential to cause more than minimal individual and cumulative adverse environmental effects, division engineers may add regional conditions to NWP 12 to require PCNs for these activities.

(iv) Permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 linear feet. Several commenters said that the PCN requirement for permanent access roads should be retained to ensure NWP 12 activities not authorize more than minimal adverse effects. One commenter opposed the removal of the PCN threshold for associated access roads and culvert-related activities so that district engineers can evaluate potential impacts to fish passage.

The PCN threshold for losses of greater than 1/10-acre of waters of the United States applies to permanent access roads, and that PCN threshold is sufficient for providing district engineers with the opportunity to review those activities to determine if they qualify for NWP authorization. The Corps is removing this PCN threshold for above-grade permanent access roads because it is redundant with the 1/10-acre PCN threshold. Concerns about potential impacts to fish passage are addressed by NWP general condition 2. General condition 2 states that no NWP 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. Furthermore, general condition 2 requires all permanent and temporary crossings of waterbodies to be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species.

(v) Permanent access roads are constructed in waters of the United States with impervious materials. A few commenters suggested a maximum length for impervious surfaces without a PCN associated with NWP 12. The current PCN requirement for losses of waters of the United States greater than 1/10-acre is sufficient to trigger activity-specific review for permanent access roads constructed with impervious materials, to allow district engineers to determine whether a particular proposed access road will result in no more than minimal adverse environmental effects.

Proposed addition of a PCN threshold for new oil or natural gas pipeline activities greater than 250 miles in length.

Many commenters objected to the proposed PCN threshold for new oil or natural gas pipelines that are greater than 250 miles in length, stating that it is

arbitrary and capricious, and indicated that there is no reasonable basis for the 250-mile threshold. One commenter expressed support for the addition of the 250-mile pipeline length PCN requirement. One of the commenters said that this PCN threshold is inconsistent with other PCN thresholds. Many commenters objected to removing the current PCN thresholds and replacing them with the 250-mile PCN threshold. One commenter expressed support for the proposal to require that PCNs include information on all discharges associated with a pipeline, including those that would not otherwise require a PCN. One commenter stated that the phrase "associated with an overall project" was unclear and undefined.

As discussed in the 2020 Proposal, this PCN threshold is being added for new oil or natural gas pipelines to provide district engineers the opportunity to review all crossings of waters of the United States for new long-distance oil or natural gas pipelines to ensure that the activities authorized by NWP 12 will result in no more than minimal individual and cumulative adverse environmental effects (see 85 FR 57327). Given the concerns expressed by numerous commenters regarding the potential cumulative adverse environmental effects that may be caused by NWP 12 activities, this is not an arbitrary or capricious addition to the PCN requirements for NWP 12. This new PCN threshold is not a replacement for the PCN thresholds the Corps is removing from NWP 12. It is a new PCN threshold to address stakeholder concerns about cumulative effects. The phrase “associated with an overall project” refers to the entire oil or natural gas pipeline that is greater than 250 miles in length.

Several commenters supported a scope or length-based PCN threshold but suggested that the Corps adopt more protective PCN thresholds in place of the proposed 250-mile threshold. One of these commenters said that significant

cumulative environmental impacts are likely to occur at a much lower length. One of these commenters suggested changing the distance in this PCN threshold to 25 miles, while commenter another suggested 75 miles, and a third commenter suggested a 5-mile threshold. One commenter said that the Corps should require PCNs for any proposed oil or natural gas pipeline activity resulting in five or more crossings.

The Corps believes that this new PCN threshold, plus the other two PCN thresholds in NWP 12 (i.e., activities requiring section 10 authorization, and discharges resulting in the loss of greater than 1/10-acre of waters of the United States), are sufficiently protective of the aquatic environment by providing information to district engineers to conduct case-specific reviews of proposed NWP 12 activities that have the potential to result in more than minimal individual and cumulative adverse environmental effects. In furtherance of the Corps' review of cumulative effects, paragraph (b)(4) of NWP general condition 32 requires PCNs for proposed NWP activities for linear projects to include and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The Corps finds that a length of 250 miles is both a good indicator of potential cumulative effects of an oil or natural gas pipeline while minimizing the potential for inconsistent implementation of the PCN requirement across districts. Although the Corps agrees that using a threshold of five or more crossings is based on a numerical impact, it could be more challenging to implement since there may be proposed oil or natural gas pipeline activities where there are five or more crossings and none of those crossings require PCNs.

One commenter suggested replacing the PCN threshold for new oil or natural pipeline activities with lengths of greater than 250 miles with a PCN requirement for oil or natural gas pipeline activities that cross state or district boundaries. Several commenters objected to the proposed 250-mile PCN threshold, but some of these commenters said that the acreage PCN threshold is sufficient to ensure no more than minimal adverse environmental effects. A few commenters remarked that the length of a pipeline is not a predictor of its crossings of waters of the United States or environmental impacts and that this PCN threshold has no link to the Corps' regulatory authority. A few commenters stated that the 250-mile PCN threshold is inconsistent with the other proposed utility line activity permits as they do not contain that PCN threshold. One commenter objected to the 250-mile PCN threshold because it is limited to new oil or natural gas pipelines (i.e., the material to be transported after the pipeline is constructed).

As discussed above, the purpose of this new PCN threshold is to provide information to district engineers to facilitate their review of the cumulative effects that may be caused by new long-distance oil or natural gas pipelines that have waterbody crossings that require NWP 12 authorization. These new long-distance oil or natural gas pipelines may be constructed within a single state or Corps district. The Corps agrees that the number of aquatic resources and their distribution in the landscape is variable, and therefore the number of crossings of waters of the United States is similarly variable. However, the Corps finds that a length of 250 miles is both a good indicator of potential cumulative effects of an oil or natural gas pipeline while minimizing the potential for inconsistent implementation of the PCN requirement across districts. In addition, some oil or natural gas pipeline crossings may not require DA authorization because they

are installed through horizontal directional drilling, do not involve a waterbody subject to Section 10 of the Rivers and Harbors Act, and do not involve discharges of dredged or fill material into waters of the United States. The Corps does not believe that this PCN threshold is necessary for new NWPs 57 and 58 because long-distance electric utility lines are often constructed as overhead utility lines and utility lines for water and other substances (e.g., potable water, wastewater, sewage) are often constructed to serve local communities and thus are likely to be shorter in overall length.

One commenter stated that the Corps' Regulatory Impact Analysis for the proposed rule is flawed because it assumes the new 250-mile PCN requirement would result in no additional PCNs. One commenter said that if the Corps does move forward with a 250-mile PCN threshold for new oil or natural gas pipeline activities that applicants be allowed to provide the PCNs based on desktop data as some areas may not be accessible for field surveys if the project is in the development stage. One commenter stated that the 250-mile PCN threshold would result in the majority of pipeline projects being constructed without review and would result in damage to historic properties. One commenter said that the 250-mile threshold has no scientific or technical basis.

The new 250-mile PCN requirement is unlikely to require more PCNs for NWP 12 activities because the likelihood of a new oil or natural gas pipeline greater than 250 miles in length not having any crossings of waters of the United States that require PCNs under the other PCN thresholds is extremely small. In addition, the requirement to provide in the PCN the locations and proposed impacts for all crossings of waters of the United States that require DA authorization, including those crossings authorized by an NWP would not otherwise require preconstruction notification, does not trigger a requirement for

the project proponent to submit full PCNs for those other non-PCN crossings of waters of the United States. This portion of the new PCN requirement is nearly identical to an existing requirement in paragraphs (b)(4)(i) and (ii) of general condition 32. Paragraph (b)(4)(i) requires the project proponent to include in the PCN any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require DA authorization but do not require pre-construction notification.

Furthermore, paragraph (b)(4)(ii) of general condition 32 currently requires project proponents to include in PCNs for linear projects where one or more single and complete crossings require pre-construction notification, the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those waters and wetlands. This quantification also must include those single and complete crossings authorized by an NWP not requiring PCNs. The only additional information required by the 250-mile PCN threshold is the location of all non-PCN crossings. The Regulatory Impact Analysis for this final rule has been updated to identify this new PCN threshold as a change. The lack of discussion of the proposed 250-mile PCN threshold in the Regulatory Impact Analysis for the proposed rule was an error. When a project proponent develops a proposal for a new oil or natural gas pipeline, some degree of environmental analysis and review is needed to determine whether there are any crossings of waters of the United States that require DA authorization, and whether any of those crossings require PCNs. The new PCN threshold should not impose any additional burdens on the regulated public. New oil or natural gas pipelines must comply with general condition 20 for historic properties as do all activities authorized by an NWP.

One commenter objected to the proposed 250-mile PCN threshold, and limiting it to the installation of new oil or natural gas pipelines (versus conducting repair or maintenance activities) along the majority of the distance of the overall project length, stating that a PCN requirement should be triggered even if short distances of the pipeline are being replaced. A few commenters stated that the proposed 250-mile PCN threshold is counter to, and could undermine, the Corps' longstanding definition of a single and complete linear project, and would allow district engineers to require individual permits because of the length of pipeline and cumulative impacts regardless of the independent utility of the separate and distant crossings.

The maintenance of existing oil or natural gas pipelines is likely to have fewer adverse environmental effects than the construction of new oil or natural gas pipelines, because those maintenance activities occur to existing pipelines for which some degree of adverse environmental effects has already occurred and a current environmental setting that includes the existing pipeline. The 250-mile PCN threshold does not undermine the Corps' definition of single and complete linear project because each separate and distant crossing of waters of the United States can continue to be authorized by an NWP. If one crossing of waters of the United States for an oil or natural gas pipeline requires an individual permit, then 33 CFR 330.6(d) applies and the district engineer will determine which activities require individual permits and which activities can be authorized by an NWP. Section 330.6(d) of the Corps' NWP regulations, as well as Note 2 of NWP 12, remain in effect. Section 330.6(d) and Note 2 maintain the Corps' long-standing process regarding the use of NWPs and individual permits to authorize linear projects such as oil or natural gas pipelines.

One commenter stated that the 250-mile PCN threshold would discourage pipeline developers from avoiding and minimizing impacts to waters of the United States, and from planning longer routes to avoid sensitive resources. One commenter said that the 250-mile PCN threshold will add an unnecessary layer of uncertainty and litigation risk. One commenter stated that a 250-mile PCN threshold would authorize potentially significant pipeline activities without any district or division review. One commenter stated that oil or natural gas pipelines greater than 250 miles in length are so large they are bound to cause more than minimal effects and should not be approved under an NWP. One commenter stated that the length of the utility line should not be used as a PCN threshold; environmental conditions and impacts should be used instead.

Regardless of the addition of the 250-mile PCN threshold, pipeline developers are still required to comply with paragraph (a) of NWP general condition 23, which requires project proponents to avoid and minimize losses of waters of the United States on the project site, including permanent and temporary losses of those resources. The purpose of the new PCN threshold is to add a mechanism to provide information for the district engineer's cumulative effects determination and the district engineer's decision on whether to issue NWP verifications for the proposed crossings of waters of the United States. The information on all of the crossings will inform whether or not the cumulative adverse environmental effects of all crossings are or are not more than minimal. This PCN threshold also provides the district engineer to require an individual permit for the proposed oil or natural gas pipeline activities when he or she determines the cumulative adverse environmental effects of the proposed crossings of waters of the United States are more than minimal. This may help reduce litigation risk. The 250-mile PCN threshold provides information for the

district engineer's review, who also uses information on current environmental conditions and potential impacts of the proposed NWP activities to determine whether NWP authorization is appropriate for these NWP 12 activities. Division engineers do not have a role in reviewing NWP PCNs.

Other Provisions of NWP 12

One commenter said that Note 2 should be reissued with no changes, as it clarifies concepts such as "single and complete project," "single and complete non-linear project," "independent utility," and the interaction of the NWPs with individual permits. The Corps has reissued Note 2 with no changes. Note 2 differs from the 250-mile PCN threshold in that an individual permit is required for the proposed oil or natural gas pipeline if one or more crossings of waters of the United States does not qualify for NWP authorization. Under the 250-mile PCN threshold, an individual permit is required if the district engineer determines the cumulative adverse environmental effects of all crossings of waters of the United States that require DA authorization will result in more than minimal cumulative adverse environmental effects.

A few commenters objected to authorizing separate and distant crossings as single and complete projects. These commenters believe that the practice causes more than minimal cumulative adverse effects. A few commenters expressed opposition to allowing multiple "single and complete" project authorizations of the same pipeline to be authorized by the NWP 12, stating that it would be more appropriate to consider the entire pipeline as a single and complete project. One of these commenters said that more individual permits should be required for these activities.

The authorization of separate and distant crossings of waters of the United States as single and complete projects for the purposes of NWP authorization is

a long-standing practice consistent with the Corps' regulations at 33 CFR 330.2(i).

One commenter expressed concern with the cumulative effects analyses for multiple single and complete crossings and the inability to account for NWP activities that do not require PCNs. One commenter said that the proposed reissuance of NWP 12 is arbitrary and capricious and in violation of the Clean Water Act because it allows unlawful piecemealing of large pipelines and other linear projects to avoid individual permit review. One commenter stated that an entire pipeline project should be subject to NEPA review, including a cumulative review of all impacts to waters of the United States.

Paragraph (b)(4) of NWP general condition 32 requires project proponents to include in PCNs any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require DA authorization but do not require pre-construction notification. This information is used by district engineers to determine whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects.

Activities authorized by NWP 12 are not subject to additional NEPA review, because Corps Headquarters fulfills the requirements of NEPA when it finalizes the national decision document for the issuance or reissuance of the NWP. The national decision document includes an assessment of effects of the Corps proposed action (i.e., the issuance or reissuance of the NWPs) in accordance with the Council on Environmental Quality's definition of "effects or impacts" at 40 CFR 1508.1(g) in their NEPA regulations. This analysis of effects or impacts under NEPA includes the projected use of the NWP over the 5-year

period it is expected to be in effect. For an NWP that authorizes discharges of dredged or fill material into waters of the United States, the national decision document also includes a cumulative impact analysis conducted in accordance with 40 CFR 230.7(b)(3).

One commenter stated that acreage limits and thresholds should remain constant with separate consideration at each single and complete crossing of waters of the United States authorized by NWP 12. One commenter said that each crossing should require a separate permit. One commenter expressed concern that the phrase “separate and distant” is not defined and would not prevent a pipeline from being used multiple times in close proximity and/or on the same waterbody under NWP 12. Another commenter said that no additional definition of “separate and distant” is necessary. One commenter stated that the Corps should impose an overall limit on cumulative effects allowed for a project with multiple “single and complete” crossings.

Nationwide permit 12 has a 1/2-acre limit for each single and complete project. As discussed above, and in 33 CFR 330.2(i), each separate and distant crossing of waters of the United States may qualify for a separate NWP authorization. The Corps declines to define the phrase “separate and distant” because what constitutes separate and distant crossings can vary across the country because of differences in the distribution of waters and wetlands in the landscape, local hydrologic conditions, local geologic conditions, and other factors. What constitutes separate and distant crossings is more appropriately determined by district engineers on a case-by-case basis. When reviewing a PCN, the district engineer considers the cumulative effects of all crossings of waters of the United States for the oil or natural gas pipeline activity, and applies the 10 criteria listed in paragraph 2 of Section D, District Engineer’s Decision.

One commenter said that Note 4 should refer to the General Bridge Act of 1946 instead of Section 9 of the Rivers and Harbors Act of 1899. The Corps has made this change to Note 4.

With respect to Note 5 of this NWP, a few commenters requested that the Corps provide clarification and examples of exempted utility line activities under Section 404(f) of the Clean Water Act. One commenter suggested that the Corps provide examples of utility line activities that do not qualify for the exemption. In accordance with the 1989 Memorandum of Agreement Between the Department of the Army and the U.S. EPA Concerning the Determination of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the Clean Water Act, the U.S. EPA has the authority to determine which activities are eligible for the Clean Water Act section 404(f) exemptions.

Comments on Proposal to Issue Separate NWPs for Different Utility Line Sectors

Many commenters expressed support for dividing oil and natural gas pipeline activities from other types of utility line activities. Several commenters acknowledged that the three types of utility lines are of varying sizes and lengths, constructed with different methods, and have different relative impacts to streams and wetlands. One commenter said that the proposed division of NWP 12 into three separate NWPs ensures that the activities authorized by these NWPs are substantially similar in nature and will further ensure that each of the NWPs will have no more than minimal adverse effects on the environment. One commenter stated that permitting utility line activities through three separate NWPs helps reduce litigation risk for some types of utility line activities.

The Corps acknowledges that issuing three separate NWPs for different types of utility lines helps ensure that the categories of activities authorized by these NWP are substantially similar in nature and that they will result in no more

than minimal individual and cumulative adverse environmental effects. The issuance of three NWPs for different categories of utility line activities may also help reduce regulatory uncertainty for electric utility line operators, telecommunications companies, state, tribal, and local water authorities, and other entities that construct, maintain, and operate these utility lines. It may also provide diversity and stability to the NWP program and allow Corps districts to continue to authorize categories of utility line activities by an NWP in the event that one of the three NWPs is invalidated or stayed by a federal court. Most of the past litigation on NWP 12 has been for oil or natural gas pipelines, not electric and telecommunications lines or utility lines that convey potable water, wastewater, sewage and other such substances. Issuing separate NWPs for electric utility line and telecommunications activities and for utility lines for water and other substances will help provide some degree of regulatory certainty for the entities that construct and maintain those types of utility lines. These separate NWPs will also benefit the people who rely on electric utility lines and telecommunication lines and utility lines for water and other substances to deliver energy, information, entertainment, potable water, and other goods and services. The public will also benefit from the removal of sewage and wastewater to protect public health and the environment.

A few commenters requested that if NWP 12 is divided that the Corps be clear that all provisions relating to substations, foundations, and access roads, and as well as provisions on inadvertent returns of drilling fluids, temporary structures and fills (including use of temporary mats), and accompanying notes, remain with the same legal effect and with no additional restrictions. The Corps has written these three NWPs in a consistent manner to provide a similar framework for authorizing regulated activities associated with utility lines, utility

line substations, access roads, actions to remediate inadvertent returns, and the authorization of temporary impacts for construction and other activities.

One commenter suggested that the Corps issue separate NWPs for utility lines based on the distinction as to whether they are overhead utility lines, such as electric and telecommunication lines, or underground utility lines. One commenter requested that the Corps change the proposed NWP 12 to authorize "underground pipeline or utility line related activities." Several commenters said that buried linear utility lines have substantially similar environmental effects on waters of the United States. One commenter indicated there is variability and no reasonable justification for dividing the NWPs based on above-ground and below-ground activity types. A few commenters said that the construction of oil, natural gas, water, and other utilities typically require more ground and vegetation disturbance than the construction methods for electrical utility lines. These commenters also stated that electrical utility lines have more flexibility to avoid aquatic resources, and that discharges of dredged or fill material associated with electric utility lines typically have a smaller footprint than they do for other in-ground utility lines. One commenter said that the Corps should keep all buried, underground utility lines in NWP 12, rather than create a new NWP for utility line activities for water and other substances, because best management practices for protecting waters from trenching or boring for pipes are similar in nature regardless of the product to be carried in the pipe.

After reviewing the public comments, the Corps determined that issuing separate NWPs for oil or natural gas pipeline activities, electric utility line and telecommunications activities, and utility line activities for water and other substances would be the best approach for reducing regulatory uncertainty for different utility line sectors.

One commenter suggested that the Corps further distinguish between natural gas and petroleum liquids in recognition of the differences in environmental consequences of potential leaks. One commenter recommended that the Corps further distinguish between large interstate natural gas pipelines and smaller intrastate natural pipelines and service lines.

The Corps does not have the authority to address the environmental consequences of leaks from oil or natural gas pipelines. Those environmental consequences are more appropriately addressed by federal, state, and local government agencies that have the legal authority to require operators of oil or natural gas pipelines to take actions in response to leaks.

Many commenters objected to the proposed separation of NWP 12 into three NWPs and requested that the 2017 NWP 12 be retained in its historic form. Many of these commenters said that the Corps should focus its concerns on the environmental impacts of the authorized activities rather than the type of material transported by various utility lines. Several commenters objected to the proposed division of the NWP 12 activities indicating that it would cause additional complications to permitting utility line activities rather than streamlining the process. One commenter remarked that there are no substantive differences between the three proposed NWPs and therefore issuing separate NWPs is unnecessary. Several commenters said that issuing three separate utility line NWPs will increase litigation risk and uncertainty for the regulated public.

As discussed above, the Corps believes that separating NWP 12 into three different NWPs to authorize utility line activities for different utility line sectors will help enhance regulatory certainty for utility line sectors that are not a frequent target for litigation because of the lower degree of concern about the potential direct and indirect environmental impacts of the substances those utility

line sectors carry (e.g., electricity, potable water, wastewater). As with any change in the NWP program, prospective permittees will experience some challenges associated with those changes, but over time they will adjust to those changes and can realize the benefits of those changes. Prior versions of NWP 12 have been subjected to litigation, so the issuance of three separate NWPs for utility line activities is likely to pose no greater litigation risk than prior versions of NWP 12.

One commenter said that the Corps only analyzed differences but not similarities among these different types of utility lines. A few commenters said that the proposed division of NWP 12 activities is an abrupt and unjustified departure from the long-standing view that utility lines are activities that are substantially similar. One of these commenters said that the proposed change is a departure from the NWPs that were first promulgated in 1977. A few commenters said that a general permit should encompass activities that are similar in nature consistent with Section 404(e) of the Clean Water Act.

When proposing to issue new NWPs for activities that were authorized by a previous NWP, discussing the differences among those NWPs and the associated categories of activities is an important part of explaining the proposed action. The changes are being proposed through the normal rulemaking process, and are being made in response to events that have raised concerns about potential increases in regulatory uncertainty for specific categories of regulated entities. When the NWPs were first issued in 1977, there were 15 NWPs. When the NWPs were last issued in December 2016, there were 52 NWPs. The number of NWPs has increased substantially over time in response to changes in the Corps Regulatory Program, litigation, studies, and other factors. The three utility line NWPs being issued in this final rule represent categories that are

similar in nature (i.e., oil/natural gas; electricity, including communications carried by electricity; and water, wastewater, sewage, stormwater, and other substances). Section 404(e) of the Clean Water Act does not specify how broad or narrow categories of activities authorized by NWPs and other general permits must be. The Corps has substantial discretion to identify categories of activities that are appropriate for NWPs and other general permits.

One commenter noted that the Corps' response to public comments for the 2017 NWPs rejected the idea that utility line activities are not substantially similar, stating that the Corps explained that the agency interprets the 'categories of activities that are similar in nature' requirement broadly to keep the NWP program manageable in terms of the number of NWPs. A few commenters said that the history of the NWPs indicates that there is no prior precedent in past NWP rulemaking for arbitrarily dividing NWPs that are intended to cover categories of activities that are similar in nature. One of these commenters further indicated that the mining NWPs (21, 44, 49, and 50) and the development NWPs (29 and 39) are not analogous as their development came about differently, indicating that they largely had to do with the end of NWP 26.

As discussed above, Section 404(e) of the Clean Water Act gives the Corps substantial discretion in how broad or narrow to define categories of activities for general permit authorization. The proposal to issue three separate NWPs for utility line activities instead of reissuing NWP to authorize all utility line activities was made, in part, in response to concerns about regulatory uncertainty for various utility line sectors. The proposal is also an opportunity to tailor the NWPs so that they will authorize activities that have no more than minimal individual and cumulative adverse environmental effects by making targeted changes to the text of each of these NWPs, as appropriate.

This proposal is consistent with prior NWP rulemaking efforts, in which the Corps issued new NWPs to authorize categories of activities with numerous similarities in the text of the NWP, including acreage limits and other limits, PCN thresholds, and categories of waters in which those NWPs may be used to authorize discharges of dredged or fill material into waters of the United States. For example, in 2007 the Corps issued two new NWPs to authorize discharges of dredged or fill material into waters of the United States for coal mining activities (see 72 FR 11092). The Corps issued NWP 49 for coal remining activities and NWP 50 for underground coal mining activities. These two coal mining NWPs were issued even though the Corps had issued and reissued NWP 21 for surface coal mining activities over time since NWP 21 was first issued in 1982 (47 FR 31794).

In 2000, the Corps issued five new NWPs and modified six existing NWPs to replace NWP 26, which authorized discharges of dredged or fill material into headwaters and isolated waters (65 FR 12818). Four of the new NWPs (NWP 39 for residential, commercial, and institutional developments; NWP 40 for agricultural activities; NWP 42 for recreational facilities; and NWP 43 for stormwater management facilities) authorized discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. Each of these NWPs had a 1/2-acre limit for losses of non-tidal waters of the United States. The categories of activities established for these four NWPs were based on the operational purposes they served, which the Corps does not have the authority to regulate. Those operational purposes included providing places for people to live, work, learn, and produce goods and services (NWP 39); agriculture activities, including farm buildings (NWP 40);

recreational facilities and associated features (NWP 42); and stormwater management facilities (NWP 43).

Similar to these NWPs, the three NWPs the Corps is issuing to authorize various sectors of utility line activities are differentiated by the substances those utility lines carry, despite the Corps' lack of authority to regulate the substances being conveyed by those utility lines. If Congress had intended the categories of general permits issued under Section 404(e) of the Clean Water Act to be based on the activity the Corps regulates (i.e., discharges of dredged or fill material into waters of the United States), it would not have written the text of section 404(e) to refer to "any category of activity involving discharges of dredged or fill material." The text of section 404(e) clearly allows the Corps to issue any number of NWPs that authorize discharges of dredged or fill material into waters of the United States. Furthermore, those categories can be based on how the authorized activity will be used after the project proponent has completed the construction activities associated with the discharges of dredged or fill material into waters of the United States, and how people will use the completed activities even though the Corps generally has no authority to regulate how the constructed facilities are operated. These principles apply to the three NWPs the Corps is issuing for these three utility line sectors.

One commenter said that the proposed changes to NWP 12 and the proposed issuance of separate NWPs for other types of utility lines are not consistent with congressional intent to reduce administrative burdens and the Administration's policy on infrastructure development and maintenance. This commenter cited Executive Order 13777, "Enforcing the Regulatory Reform Agenda" (February 24, 2017), Executive Order 13783, "Promoting Energy

Independence and Economic Growth" (March 28, 2017), and the 2018 "Legislative Outline for Rebuilding Infrastructure in America."

The Corps believes that this issuance of these three NWPs (NWPs 12, 57, and 58) are consistent with priorities for infrastructure development because they will help reduce regulatory uncertainty and burdens on the regulated public. The issuance of these NWPs will not cause any increases in the number of activities authorized by an NWP or the number of activities requiring individual permits. The three NWPs are consistent in general structure, but they have some differences because of the different types of substances those utility lines convey and how those utility lines are designed and constructed.

Several commenters stated that the proposed division of NWP 12 activities into separate NWPs discourages the beneficial and common practice of joint trenching and the use of utility corridors where various types of utilities are co-located, and further indicated that these features should be permissible under NWP 12 as a single and complete project. Several commenters said that the proposal to issue three separate NWPs would increase costs and delays associated with energy infrastructure projects. A few commenters stated that the division of NWP 12 into three NWPs would increase the number of permits needed by some applicants. One commenter cited NWP general condition 28 as a reason not to divide NWP 12 into three different NWPs for different types of utility lines.

The issuance of these three NWPs will not discourage joint trenching and the use of utility corridors for multiple utility lines. For example, if a project proponent proposes to construct a water line next to an oil or natural gas pipeline, the provisions of NWP general condition 28, use of multiple NWPs, would apply. For each crossing of a separate and distant waterbody, both NWP

58 and 12 could be used, as long as the loss of waters of the United States at each single and complete project does not exceed 1/2-acre. The issuance of these three NWPs will not cause increased costs and delays for energy infrastructure projects, except for a relatively brief period of time as the transition from the 2017 NWPs to the 2021 NWPs occurs. The Corps acknowledges that there will be some increases in the number of permits that project proponents will need to obtain, but those permits will generally be used concurrently, and consistent with general condition 28. The use of multiple NWPs to authorize single and complete projects is a longstanding practice in the NWP program.

A few commenters said that the when the Corps considers whether to make changes to an established and well-functioning NWP program, it should be conscious of how changes to the framework for permitting utility lines will affect the investment community, and in turn the country's ability to continue to deliver competitively-priced energy from diverse sources to U.S. consumers and other end-users, and to further domestic energy independence. A few commenters remarked that pipeline and other infrastructure operators need regulatory certainty to build, maintain, and upgrade pipelines and other utility infrastructure. One commenter expressed support for the Corps' efforts to improve the NWP program, but cautioned the Corps to avoid changes that could introduce inefficiencies. A few commenters said that the proposed division of NWP 12 into three separate NWPs would likely introduce unnecessary strain on agency resources, delays in the permit reviews, regulatory inconsistency in the permitting process. One commenter objected to dividing the NWP 12 into three separate NWPs because they are very similar and can be more easily tracked and understood as one category.

The Corps acknowledges that there will be some challenges and opportunities with these changes to the NWP program, but it should also be noted that the NWP program changes each time the Corps goes through the rulemaking process to issue or reissue the NWPs and that adjustments need to be made under the new NWPs. The issuance of NWP 57 will help support renewable energy generation facilities and the transfer of electricity from those generation facilities to residential, commercial, industrial, and other users. The NWPs will continue to provide regulatory certainty for pipelines and other types of utility lines. None of these three NWPs require agency coordination, so other federal agencies should not be adversely affected by the splitting of NWP 12 into three separate NWPs.

One commenter said that if the Corps were to move forward with the division of the NWP 12 activities it must take into consideration the differences between distribution and transmission pipelines as the physical characteristics of the pipelines inherent in these different uses may have a larger effect on waters of the United States than the material being transported. A few commenters suggested that if NWP 12 were reissued without change, over time the use of NWP 12 would shift from oil and gas pipelines to other utility sectors to account for new investment in more secure and resilient utility systems, and that a two-year period is an inadequate sampling for this decision making effort.

The Corps does not agree that is necessary to address differences between distribution and transmission pipelines. These NWPs authorize utility lines of various sizes, and the Corps focuses its analysis of potential adverse environmental effects or impacts that are caused by the activities that are directly related to the Corps' regulatory authority (i.e., discharges of dredged or fill material into waters of the United States regulated under Section 404 of the

Clean Water Act and structures and work in navigable waters of the United States regulated under Section 10 of the Rivers and Harbors Act of 1899). The Corps does not believe it is useful to engage in speculation about potential future trends in the number of oil or natural gas pipelines versus the number of electric utility lines and telecommunications lines versus the number of utility lines carrying water and other substances. The Corps estimated the potential permitting changes using data on NWP verifications issued between March 19, 2017, and March 19, 2019, which provides a robust sample size.

One commenter said that that, according to the Congressional Research Service, the Corps does not have a centralized database or other information on the number of individual permits it issues for pipeline and utility line projects, nor does it have a database on the utility line activities that are authorized by NWP 12, and that any attempt by the Corps to draw out a reasoned, data-driven basis for dividing NWP 12 into three separate NWPs is premature at this time.

The Corps does have a centralized database that tracks NWP verifications issued, regional general permit verifications issued, and individual permits issued, including the types of activities authorized by those general permits and individual permits. From that data, the Corps was able to estimate the number of NWP activities that were likely associated with oil or natural gas pipelines, electric and telecommunications lines, and utility lines for water and other substances.

One commenter stated that dividing the NWP 12 would add complexity to ESA and NHPA compliance. One commenter said that the Corps appropriately recognizes that the techniques used to construct water and electric utility lines have fewer impacts to waters of the United States than other uses of NWP 12 involving transport of petrochemicals. The issuance of these three NWPs will not

add complexity to ESA or NHPA compliance because they must comply with the same NWP general conditions, including general condition 18, endangered species, and general condition 20, historic properties. A single compliance process under either law can serve multiple NWPs for those activities that may use NWP 12 and 58, for example.

A few commenters stated that there is no logical grouping to be found for dividing the proposed NWP activities based on pipe diameter, size, and any associated ground disturbances. A few commenters said that the Corps' information on diameter and pipeline lengths are based upon incomplete generalizations that do not withstand scrutiny. One commenter stated that justification for dividing NWP 12 cannot be based upon the diameter of the pipeline or conduit. One commenter remarked that the size of the pipe may determine a minimum width of a trench but that some smaller pipelines may require larger trenches depending on the circumstance and that this is not a valid criterion for separating the NWPs. One commenter said that the Corps failed to make a persuasive case that length of a utility line would be a determining factor when considering ground disturbances and division of the NWP activities. One commenter said that with respect to the Corps' jurisdiction under Section 10 of the Rivers and Harbors Act of 1899, it is the presence of a pipeline that affects navigation, not the substance it contains.

The discussion in the preamble to the 2020 Proposal regarding the differences among the three utility line sectors that were the basis for the modified NWP 12 and the proposed new NWP C and D was intended to demonstrate that there are some differences among those sectors. The final NWPs are based on sectors, not construction techniques or sizes of the utility lines. The text of the three NWPs makes no references to the diameters or length

of the utility lines. The Corps agrees that for utility lines that cross navigable waters of the United States and require section 10 authorization, the Corps focuses its evaluation on potential effects on navigation, not the substance being conveyed by the utility line.

A few commenters said that the Corps' jurisdiction as related to these NWPs is limited to its statutory authorities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. One commenter expressed concern that the proposed issuance of separate NWPs could lead the Corps to consider factors outside of its statutory authority. A few commenters stated that consideration of the type of substances that can be conveyed by a utility constitutes overreach of the Corps' statutory jurisdiction. These commenters went on to reference statements from the Corps that it does not regulate the operation of oil and natural gas pipelines, but that the Corps regulates discharges of dredged or fill material into waters of the United States associated with their construction.

The Corps recognizes that under these three NWPs the Corps' statutory authority is limited to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. However, for these three NWPs and many of the other NWPs, the categories of activities authorized by those NWPs relate to how the constructed activities will be used (e.g., residences for NWP 29, recreational facilities for NWP 42, land-based renewable energy generation for NWP 51), even though the Corps does not have the authority to regulate the operation of the constructed structure or fill. As discussed above, the text of section 404(e) recognizes that the Secretary could issue any number of general permits, including NWPs, for any number of categories of activities involving discharges of dredged or fill material into waters of the United States.

A few commenters said that the terms used to describe the applicability of NWP 12 cause ambiguous situations with respect to which substances would qualify as oil, gas, or petrochemicals and to which NWP would apply. These commenters also indicated confusion associated with common situations where petrochemical products are added to non-petroleum products prior to transport and generally suggested the source of the material to be transported has little or no bearing on the methods for construction, maintenance, repair or replacement of the pipeline on the best management practices needed to protect waters of the United States.

The Corps has attempted to provide more clarity regarding the differentiation of utility line sectors that would fall under NWPs 12, 57, or 58. The Corps recognizes that there may be situations where a prospective permittee may be unsure which NWP applies. The prospective permittee could coordinate with the appropriate Corps district to get assistance in identify which NWP would be most appropriate for a particular project. If the project proponent is contemplating constructing different types of utility lines for a particular project, multiple NWPs could be used as long as the project proponent complies with NWP general condition 28, which addresses use of multiple NWPs for a single and complete project.

General Comments on Best Management Practices.

A few commenters supported the incorporation of specific best management practices (BMPs) for the utility line NWPs. A few commenters said that adding additional BMPs or standards to this NWP would result in redundant requirements to manage on these projects without providing additional benefits. A few commenters said that division engineers can tailor standards to meet region-specific needs and issue additional regional conditions with their

discretionary authority. One commenter stated that the BMPs for protecting water features during trenching, boring, or sleeving construction methods for installing, replacing, or maintaining pipes at stream or wetland crossings are similar in nature, regardless of what product will travel in the pipeline once construction is completed. One commenter stated that the three categories of utility lines under proposed NWPs 12, C, and D, would authorize sufficiently similar activities and require the same or similar environmental provisions in order to meet the no more than minimal impacts requirement under section 404(e) of the Clean Water Act. One commenter said that because of the overarching federal regulatory regime, NWP 12 and its general conditions, regional conditions added by division engineers, and applicable state requirements there are no additional BMPs that could be practically or lawfully added to NWP 12.

The Corps agrees that there are no national best management practices to add to NWPs 12, 57, and 58. As discussed below, a few commenters submitted suggestions for best management practices. The Corps has considered those best management practices, and has concluded that best management practices are more appropriately addressed as regional conditions added to the NWPs by division engineers or activity-specific conditions added NWP authorizations by district engineers.

A few commenters said that imposing additional best management practice requirements would risk conflict or redundancy with other applicable regulations. A few commenters suggested that the if the Corps were to become aware of best management practices to add to NWP 12 then it should conduct a subsequent notice and comment procedure for these BMPs as none were specifically proposed. A few commenters indicated that a 60-day notice is inadequate for stakeholders and agencies to compile BMPs and best available

science for the invitation to comment. One commenter recommended that the Corps maintain the existing NWPs and instead conduct an extensive outreach campaign to stakeholders to determine BMPs for the utility line NWPs. One commenter said that when developing industry specific standards and BMPs, the duration and location of temporary fill impacts across a project site should be taken into consideration. One commenter requested that the Corps provide examples the types of construction methods for access roads that are considered to minimize adverse effects to waters of the United States as noted in several NWPs.

The Corps has decided not to add any best management practices to NWPs 12, 57, and 58. After reviewing the BMPs suggested by commenters, the Corps determined that the text of these NWPs already include some common BMPs, such as requiring the top 6 to 12 inches of the trench to normally be backfilled with topsoil from the trench, constructing the trench so that it does not drain waters of the United States through a French drain effect, or stabilizing exposed slopes and stream banks immediately after completion of construction of the stream crossing.

Comments on Best Management Practices for NWP 12.

One commenter said that impacts from work on natural gas pipelines and gas utility lines are minimal and temporary, and BMPs under the existing NWP 12 protect waters of the United States. One commenter stated that if the Corps decides to impose any BMPs on interstate natural gas pipelines they must not conflict with the FERC's Plan and Procedures. Several commenters stated that The U.S. Department of Transportation (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) Office of Pipeline Safety imposes stringent pipeline safety regulations under 49 CFR part 192 on natural gas interstate

transmission pipelines and gas utility intra-state natural gas transmission and distribution utility lines. One commenter stated that the 2017 NWP 12 provides adequate environmental protections under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899, and that no additional industry-specific standards or BMPs should be added to the NWPs as national enforceable terms. One commenter stated that pipeline rights-of-way should be maintained in herbaceous condition within 10-feet centered on the pipeline. One commenter stated that applicants should have to produce containment and clean up contingency plans as BMPs for all of the utility line permits. One commenter said that a trench should not be constructed or backfilled in a matter that would redirect shallow groundwater flow paths, to avoid altering vegetative communities or flow in streams downslope of the trenches. One commenter said that appropriate measures should be taken to maintain water quality conditions downstream of the site.

As discussed above, the Corps is not adding any BMPs to the text of NWPs 12, 57, and 58 that were not in the proposed texts of these NWPs.

Best management practices recommendations. One commenter said that a list of BMP manuals that support oil and gas pipeline development and maintenance activities in Appendix G of the document titled "Considering Best Practices for Managing Pipeline Permitting." Several of these documents are excellent resources for best management practices related to impacts to wetlands and streams. One commenter recommended the following BMPs for NWP 12:

- All excavations should be backfilled with the excavated material after installation of the appropriate structures.

- Side-cast spoil material from trench excavation should be placed on the side of the trench opposite streams and wetlands.
- Spoil material from trench excavation should be placed on the side of the trench to be reused as backfill with the A-horizon placed back in its original position.
- Excess spoil material must be removed to an approved upland disposal site.
- Stream banks at crossings must be restored after construction has been completed.
- Disturbed stream banks can be restored by planting woody vegetation and by using bioengineering techniques for stream bank stabilization.
- Right-of-ways through and adjacent to streams and through forested wetlands should be maintained in low growing, woody vegetation to minimize erosion and sedimentation. Maintenance of this right-of-way should be conducted with mowing rather than with chemicals to reduce the potential for contamination and negative impacts on aquatic resources.
- If chemicals are used, a 50-foot buffer on either side of the stream crossing should be established in order to retain the riparian vegetation while reducing the amount of chemical runoff into the aquatic environment.
- Any open trench must be temporarily fenced to reduce the likelihood of wildlife becoming trapped and must include a ramped section which would allow wildlife to escape.
- A full visual inspection of every open trench section must be made daily to identify any trapped wildlife in need of rescue.

One commenter provided an example list of industry BMPs, but indicated that should the Corps chose to incorporate them in the text of NWP 12 and the

other utility NWPs, it must understand that all BMPs are not appropriate to all circumstances. This commenter provided the following list of BMPs:

- Requiring, where appropriate, a plan to address the prevention, containment, and cleanup of sediment or other materials caused by inadvertent returns of drilling fluids.
- Requiring notification to the Corps and implementation of a remediation plan in the event of an inadvertent return of drilling fluids.
- Siting poles and tower foundations outside of surface waters where practicable.
- Visually marking waters of the United States near work areas.
- Using techniques that minimize rutting and damage to wetlands, such as installing mats prior to placing or driving equipment over wetlands or streams for temporary access or using wide-track equipment.
- Establishing stockpiling/work areas outside of surface waters.
- Construction monitoring during routine inspection and maintenance activities to avoid unauthorized discharges into surface waters.

A few commenters suggested modifying the text of NWP 12 to encourage the use of directional drilling. One commenter said that when horizontal directional drilling (HDD) is not possible, the flume method should be the required method for use of the NWP 12 over the dam-and-pump or open-cut stream crossing methods in order to minimize impacts to aquatic resources. One commenter suggested when HDD is used the permittee should erect sediment control measures between the drill site and nearby sensitive resources to prevent drilling mud releases from reaching sensitive resources, conduct regular on-site briefings for personnel to identify and locate sensitive resources, and maintain response equipment on-site or in an accessible location and in good working-

order. One commenter suggested that HDD contractors should be required to employ a full-time, qualified on-site mud engineer to continuously monitor the drilling fluid circulation and returns as a preventative measure.

The Corps declines to add text to NWPs 12, 57, and 58 to encourage horizontal directional drilling. The use of horizontal directional drilling is more appropriately determined on a case-by-case basis. The Corps lacks the authority to require HDD contractors to employ a full-time, qualified on-site mud engineer to monitor drilling fluid circulation and potential inadvertent returns of drilling fluid.

One commenter said that Congress did not intend the NWP program to be used to streamline the authorization of major infrastructure projects and that each water crossing for major pipeline projects that transport highly toxic and dangerous materials should require individual permit reviews. A few commenters stated that environmental impact statements should be required for oil or natural gas pipelines. One commenter said that a programmatic ESA consultation should be completed for this NWP. One commenter stated that the construction and operation of oil and gas pipelines pose significant risk to protected species and should require individual permits. Another commenter said that the Corps must determine the environmental safety of HDD at a particular location and associated mitigation measures. One commenter suggested a definition for "stand-alone project" to require that all the crossings within major watersheds are evaluated together as single and complete since the cumulative impacts would be to one system.

Section 404(e) of the Clean Water Act provides the Corps with the authority to issue NWPs to authorize categories of activities involving discharges of dredged or fill material into waters of the United States to streamline the authorization process for these activities, as long as they result in no more than

minimal individual and cumulative adverse environmental effects. Section 404(e) does not prohibit the issuance of general permits for utility lines and other infrastructure projects. As many commenters recognized, the Corps does not have the discretion to control the types of substances conveyed by oil or natural gas pipelines or other types of utility lines. Compliance with the Endangered Species Act is discussed in Section III.D of this final rule: Compliance with Relevant Statutes. The Corps declines to add a definition of “stand-alone project” because cumulative impacts are already evaluated by district engineers over appropriate geographic regions, such as watersheds, Corps districts, states, etc.

A few commenters stated that NWP 12 should be revised to consider the protection of tribal treaty rights. One commenter said that the Corps should conduct tribal consultation for the reissuance of the NWP 12. One commenter suggested the Corps adopt a policy of early consultation with Indian Tribes and other actors on these types of projects, above the timeline required by the NHPA section 106 process to allow the Corps to preemptively address concerns and avoid delays, litigation, and other increased costs. One commenter said that the draft NWP 12 decision document fails to address the high correlation of pipeline construction projects with rates of missing and murdered Indigenous women and children and indicated that the Corps had not consulted the tribes on the matter. One commenter stated that there are a variety of utility lines that have direct, indirect, and cumulative impacts on treaty reserved resources and that the proposed changes require additional review to fully understand the extent of potential resource impacts. One commenter requested the Corps continue to require PCNs in Washington State to adequately protect treaty resources.

Tribal treaty rights are addressed through NWP general condition 17 for all NWPs, including NWP 12. Consultation with tribes on the proposed NWPs is

discussed in Section V of this final rule (Administrative Requirements), in the section for E.O. 13175. The draft decision document does not discuss pipeline construction projects and missing and murdered people because that issue is more appropriately addressed by local, state, tribal, and federal law enforcement officials. Concerns about potential impacts to treaty resources in Washington State are more appropriately addressed through regional conditions, which can add PCN requirements to this NWP, where appropriate.

This NWP is reissued with the modifications discussed above.

(2) NWP 21. Surface Coal Mining Activities.

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed (discussed above in Section II.F), remove the reference to integrated permit processing procedures, and remove the requirement for the permittee to obtain written verification from the district engineer so that the 45-day PCN review period would apply to this NWP as it does to other NWPs with 1/2-acre limits for losses of waters of the United States. Comments received on the proposed removal of the 300 linear foot limit for losses of stream bed are summarized in Section II.F of this final rule, and in that section the Corps provided responses to those comments.

Many commenters opposed removing the provision that requires a written verification from the district engineer before commencing the authorized activity, instead of allowing a default authorization to occur if the Corps does not respond to a complete PCN within 45 days. Several commenters expressed support for the default authorization to occur if the district engineer does not respond to the PCN within 45 days. Many commenters opposed removal of the PCN requirements from this NWP. One commenter said that in order to further expedite permitting for a coal mining project, no PCNs should be required.

The Corps removed the requirement for the permittee to obtain written authorization before commencing the activity to be consistent with the other NWPs that have a 1/2-acre limit for discharges of dredged or fill material into non-tidal waters of the United States (e.g., NWPs 29, 39, 40, 42, 43, 44, 51, and 52). The Corps did not propose to remove any PCN requirements from this NWP. All activities authorized by this NWP require PCNs.

One commenter stated support for the language regarding integrated permitting processing procedure language. One commenter requested addition of text to the NWP stating that no work can begin until formally approved by the U.S. Department of Interior or the state, and final approval is not necessary before submitting a PCN to the district engineer. One commenter said that NWP 21 should be expanded to include a requirement for federal and state agency coordination when pitcher plant bog wetlands, bald cypress, and/or tupelo swamps are impacted. This commenter also stated that this NWP should not authorize discharges of dredged or fill material into these types of wetlands.

The Corps removed the language referencing integrated permit processing procedures, since those procedures have never been developed for this NWP since that text was added to the NWP in 2007 (see 72 FR 11184). Project proponents may be required to obtain separate authorizations from the Department of Interior's Office of Surface mining or the state, but those authorizations are a separate process from the Corps' NWP authorization process. Authorization by an NWP does not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law. (See item 2 in Section E, Further Information.) Division engineers can add regional conditions to this NWP to restrict or prohibit discharges of dredged or fill material into certain wetland types if those discharges are likely to result in more than

minimal individual and cumulative adverse environmental effects. District engineers can also exercise discretionary authority to modify, suspend, or revoke an NWP after reviewing the PCN, to ensure that the NWP authorizes only those activities that result in no more than minimal individual and cumulative adverse environmental effects.

Several commenters said that NWP 21 should be revoked because the adverse effects of surface coal mining on the environment are significant. One commenter objected to the removal of stream mitigation requirements. One commenter said that the applicant should be required to ensure that toxic substances are not released back into the water column through re-exposure from dredge activities. Several commenters said that the proposed changes to this NWP unlawfully put the interests of the regulated public above the Corps statutory mandate to protect the environment.

The activities authorized by this NWP cannot result in the loss of greater than 1/2-acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. In addition, all activities authorized by this NWP require PCNs. The 1/2-acre limit, the PCN requirements, and the ability of division and district engineers to modify, suspend, or revoke this NWP on a regional or activity-specific basis ensure that the activities authorized by this NWP result in no more than minimal adverse environmental effects. The Corps did not propose to remove any stream mitigation requirements from this NWP. Despite the changes to this NWP, these activities are reviewed by district engineers on a case-by-case basis since all activities require PCNs.

This NWP is reissued as proposed.

(3) NWP 29. Residential Developments.

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed. The Corps also proposed to remove the ability for district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed. Comments received on the proposed removal of the 300 linear foot limit for losses of stream bed are summarized in Section II.F of this final rule, and in that section the Corps provided responses to those comments.

One commenter said that this NWP should clarify that the acreage limits are applied cumulatively for both the original construction and any subsequent expansion of the development. One commenter stated that this NWP should not be issued to developments proposed in channel migration zones and floodplains where projects can directly and indirectly impact essential fish habitat, critical habitat, and habitats occupied by federally threatened or endangered species. One commenter said that as a result of climate change, residential developments have increased the public safety risk. One commenter asked if projects occurring in floodplains and authorized by this NWP are consistent with the 2008 biological opinion on the Federal Emergency Management Agency's National Flood Insurance Program.

This NWP includes a subdivision provision, which states that for residential subdivisions, the aggregate total loss of waters of the United States authorized by this NWP cannot exceed 1/2-acre, including any loss of waters of the United States associated with the development of individual subdivision lots. Activities authorized by this NWP must comply with general condition 10, fills within 100-year floodplains. If the district engineer reviews the PCN and determines that the proposed activity may adversely affect essential fish habitat, he or she will initiate essential fish habitat consultation with the NMFS. If the district engineer reviews the PCN and determines the proposed activity may

affect ESA-listed species or designated critical habitat, she or he will initiate section 7 consultation with the U.S. FWS and/or NMFS as appropriate (see general condition 18). Potential public safety risks associated with residential developments are more appropriately addressed by local or state land use planning and zoning agencies. The 2008 biological opinion on the Federal Emergency Management Agency's National Flood Insurance Program only applies to that program. It does not directly apply to the Corps' NWP program.

One commenter said that authorizing residential developments with golf courses results in devastating impacts on the environment through habitat loss and fragmentation, nutrient loading that causes algal blooms, and the use of pesticides/herbicides, which must be considered under an environmental impact statement, and therefore, should require an individual permit. One commenter stated that a 1/2-acre loss of waters of the United States is not minimal and that any loss over 1/10-acre should require compensatory mitigation. One commenter said that compensatory mitigation should be required for all unavoidable impacts to wetlands and streams authorized by this NWP. One commenter said that if the Corps does not require compensatory mitigation under NWP 29, the adverse environmental effects are more than minimal. One commenter said that the reliance on compensatory wetland mitigation often leads to a net loss of wetland functions and values and that NWPs like NWP 29 could lead to the loss of thousands of acres of wetlands.

The Corps regulates discharges of dredged or fill material into waters of the United States, and this NWP limits those discharges to non-tidal waters of the United States. If the proposed NWP 29 activity includes the construction of a golf course, the district engineer will review the PCN and determine whether the proposed activity qualifies for NWP authorization. The Corps does not have the

authority to regulate the use of pesticides or herbicides, and therefore is not required to consider the potential use of pesticides or herbicides when reviewing PCNs for proposed activities. Nutrient loading can be the result of non-point source pollution. Nutrient loading may also result from discharges of certain substances from point sources regulated under Section 402 of the Clean Water Act, which is administered by states with approved programs or the U.S. EPA. General condition 23 requires compensatory mitigation for all wetland losses greater than 1/10-acre that require PCNs, unless the district engineer determines that some other form of mitigation would be more environmentally appropriate. Wetland compensatory mitigation projects required for activities authorized by the NWPs must comply with the Corps' regulations at 33 CFR part 332, which require monitoring and other actions to ensure that the required compensatory mitigation offsets the permitted wetland losses.

One commenter said the array of wetland and water types that authorized under NWP 29 and lost are varied and that the Corps cannot determine environmental effects are minimal when they are speculative and unquantifiable. One commenter stated that the cumulative impacts of authorizing large residential driveways in waters of the United States threatens nearshore benthic habitat that is important to salmonids. One commenter said that it is unclear how permit authorizations are coordinated with local agencies to ensure the appropriate use of NWP 29 and that local protections should apply to the permit.

All activities authorized by this NWP require PCNs. Therefore, district engineers review all proposed activities and determine whether those activities qualify for NWP authorization. When reviewing PCNs, district engineers consider cumulative adverse environmental effects caused by activities authorized by an NWP and whether those cumulative adverse effects are no more than minimal

(see paragraph 2 of Section D, District Engineer's Decision). If the proposed NWP activity may affect ESA-listed species, including list salmon species, the district engineer conducts ESA section 7 consultation with the U.S. FWS or NMFS, as appropriate. Nationwide permit 29 authorizations are not coordinated with local agencies. As stated in Section E, Further Information, the NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.

This NWP is reissued as proposed.

(4) NWP 39. Commercial and Institutional Developments.

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed. The Corps also proposed to remove the ability for district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed. Comments received on the proposed removal of the 300 linear foot limit for losses of stream bed are summarized in Section II.F of this final rule, and in that section the Corps provided responses to those comments.

Several commenters recommended establishing tailored PCN thresholds for NWP that are similar to the PCN thresholds in NWP 12, NWP 14, and NWP 51, which only require PCN for losses of waters of the United States greater than 1/10-acre. Due to the current requirement for PCNs for all NWP 39 activities, this NWP is underutilized and increasing the PCN threshold to 1/10-acre would incentivize project proponents to reduce impacts. A couple of commenters said that compensatory mitigation should be required for all unavoidable impacts to streams, wetlands, and special aquatic sites authorized by NWP 39. One commenter stated that commercial developments have the potential to cause significant environmental harm through habitat loss and fragmentation and should be assessed in environmental impact statements and through

programmatic ESA section 7 consultations. One commenter said that commercial developments constructed in channel migration zones and floodplains, areas occupied or critical to salmon populations, should be required to obtain individual permits.

The Corps believes that this NWP should continue to require PCNs for all activities, so that district engineers can review all proposed commercial and institutional developments involving discharges of dredged or fill material into waters of the United States and determine which proposed activities can be authorized by NWP 39 and which proposed activities should require individual permits. The streamlined authorization process provided by NWP 39 continues to incentivize project proponents to reduce losses of waters of the United States to qualify for NWP authorization instead of having to obtain individual permits for those activities, and the increased time and paperwork needed to secure those individual permits. When evaluating PCNs, district engineers determine whether proposed NWP 39 activities should require compensatory mitigation or other forms of mitigation to ensure that those activities result in no more than minimal adverse environmental effects. Compensatory mitigation requirements are determined on a case-by-case basis by district engineers. If the district engineer determines a proposed NWP 39 activity will result in more than minimal adverse environmental effects after considering mitigation proposed by the permit applicant, he or she will exercise discretionary authority and require an individual permit for the proposed activity. During the individual permit process, the district engineer will determine whether NEPA compliance will be achieved through the preparation of an environmental impact statement or environmental assessment, unless the proposed activity qualifies for a categorical exclusion. The district engineer will also evaluate the PCN to determine if the proposed activity may

affect listed species or designated critical habitat, and thus require ESA section 7 consultation with the U.S. FWS or NMFS, as appropriate. Activities authorized by this NWP must comply with general condition 10, fills in 100-year floodplains.

This NWP is reissued as proposed.

(5) NWP 40. Agricultural Activities.

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed. The Corps also proposed to remove the ability for district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed. Comments received on the proposed removal of the 300 linear foot limit for losses of stream bed are summarized in Section II.F of this final rule, and in that section the Corps provided responses to those comments.

One commenter stated that losses of waters and wetlands up to 1/2-acre are not minimal. One commenter said that any impacts greater than 1/10-acre should require compensatory mitigation. Another commenter said that this NWP and other NWPs does not adequately address cumulative impacts and these activities should require individual permits. One commenter requested that the Corps require best management practices to prevent and reduce non-point source pollution associated with agricultural activities. One commenter said that all agricultural activities authorized by this NWP should go through an alternatives analysis for channelization or dam construction to support fish passage and healthy stream systems. One commenter stated that the authorization of some activities under this NWP, such as levees, is inconsistent with Federal Emergency Management Agency flood requirements or policies. One commenter said that allowing these impacts under current watershed conditions and salmon population status is excessive.

All activities authorized by this NWP require PCNs. District engineers will review each proposed activity and determine which activities will result in no more than minimal individual and cumulative adverse environmental effects and are authorized by this NWP and which activities do not qualify for NWP authorization and should require individual permits. During their reviews of PCNs, district engineers consider cumulative impacts caused by activities authorized by this NWP (see paragraph 2 of Section D, District Engineer's Decision). The Corps lacks the authority to require agricultural producers to implement best management practices to control non-point source pollution. The NWPs do not require alternatives analyses since they can only authorize activities that have no more than minimal adverse environmental effects. If a project proponent is considering channelizing a stream or constructing a dam, the district engineer will review the PCN and determine whether the proposed activity will result in no more than minimal adverse environmental effects. Activities authorized by this NWP must comply with general condition 10, fills in 100-year floodplains. The Corps does not have the discretion to enforce flood requirements or policies adopted by the Federal Emergency Management Agency. If the district engineer determines that a proposed NWP 40 activity may affect salmon listed under the ESA, he or she will conduct ESA section 7 consultation with the U.S. FWS or NMFS, as appropriate, before issuing an NWP verification letter.

This NWP is reissued as proposed.

(6) NWP 42. Recreational Facilities.

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed. The Corps also proposed to remove the ability for district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed. Comments received on the proposed removal of the 300

linear foot limit for losses of stream bed are summarized in Section II.F of this final rule, and in that section the Corps provided responses to those comments.

One commenter said that large recreational facilities (golf courses) or non-passive recreational facilities should require individual permits in non-tidal waters and stream channels, in channel migration zones, and waters used or in the historic range of listed species, or that directly or indirectly impact critical or essential fish habitat. Allowing these impacts under current watershed conditions and salmon population status is excessive.

This NWP requires PCNs for all proposed activities. District engineers will review all PCNs to determine whether the discharges of dredged or fill material into waters of the United States to construct or expand recreational facilities will result in no more than minimal adverse environmental effects. If the district engineer determines a proposed activity may affect ESA-listed species or designated critical habitat, she or he will conduct ESA section 7 consultation with the U.S. FWS or NMFS, as appropriate, prior to issuing the NWP verification or deciding whether to exercise discretionary authority to require an individual permit. If the district engineer reviews the PCN and determines the proposed activity may adversely affect essential fish habitat, he or she will conduct essential fish habitat consultation with the NMFS.

This NWP is reissued as proposed.

(7) NWP 43. Stormwater Management Facilities.

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed. The Corps also proposed to remove the ability for district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed. Comments received on the proposed removal of the 300 linear foot limit for losses of stream bed are summarized in Section II.F of this

final rule, and in that section the Corps provided responses to those comments. In the first paragraph of this NWP, the Corps also proposed to add the phrase "such as features needed" before "to meet reduction targets established under Total Maximum Daily Loads set under the Clean Water Act."

One commenter supported adding the phrase "such as features needed" to the first paragraph to clarify that green infrastructure type of features are not just to reduce total maximum daily loads. Several commenters said that this NWP should be reissued with no changes except for a clarifying provision related to green infrastructure as states and municipalities may require or allow green infrastructure projects to meet water quality criteria, designated uses, and compliance with post-construction stormwater requirements regardless of whether a total maximum daily load applies to the receiving water.

The Corps has added the phrase "such as features needed" to this NWP. The Corps agrees that states and municipalities may require, under their authorities, the construction and implementation of green infrastructure projects to meet water quality criteria, designated uses, and compliance with post-construction stormwater requirements. If the construction and maintenance of those green infrastructure projects involves discharges of dredged or fill material into waters of the United States, this NWP can be used to authorize those activities.

One commenter said that for new stormwater management facilities, best management practices are required as a general matter to prevent non-point source pollution during and after construction activities. One commenter stated that allowing the loss of 1/2-acre of non-tidal waters under current watershed conditions and salmon population status is excessive. This commenter said that these facilities should not be located in wetlands or intermittent or ephemeral

streams adjacent to perennial streams that are occupied by salmon, especially ESA-listed species. This commenter asserted that these actions should require individual permits when located in channel migration zones, or floodplains, wetlands, and essential fish habitat.

Measures undertaken to prevent non-point source pollution during and after construction activities may be required by state or local governments, or by other federal agencies. The Corps does not have the authority to regulate non-point source pollution that may reach waters and wetlands. Except for certain maintenance activities, all activities authorized by this NWP require pre-construction notification to the district engineer. For those activities that require PCNs, the district engineer will evaluate potential impacts to salmon, and if the salmon include ESA-listed species, the district engineer will determine if the proposed activity may affect listed salmon, and engage in ESA section 7 consultation with the U.S. FWS or NMFS as appropriate. Activities authorized by this NWP must comply with general condition 10, fills in 100-year floodplains. If, during the review of a PCN, the district engineer determines the proposed activity may adversely affect essential fish habitat, she or he will initiate essential fish habitat consultation with the NMFS.

This NWP is reissued as proposed.

(8) NWP 44. Mining Activities.

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed. The Corps also proposed to remove the ability for district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed. Comments received on the proposed removal of the 300 linear foot limit for losses of stream bed are summarized in Section II.F of this final rule, and in that section the Corps provided responses to those comments.

In addition, the Corps proposed to modify paragraph (b) of this NWP to apply the 1/2-acre limit to work in non-tidal navigable waters of the United States (i.e., section 10 waters).

One commenter said the Corps should not reissue NWP 44 because it is in violation of Section 404(e) of the Clean Water Act. A few commenters stated that NWP 44 poses a risk of significant direct and cumulative harm and these activities should be authorized by individual permits, not an NWP. One commenter recommended requiring applicants ensure that toxic substances are not released back into waters through re-exposure from dredging.

All activities authorized by this NWP require PCNs. District engineers will review PCNs for proposed activities to ensure that those activities will result in no more than minimal individual and cumulative adverse environmental effects, and therefore comply with section 404(e) of the Clean Water Act.

One commenter said that the Corps should allow use NWP 44 in tidal waters to reduce cost and time associated with obtaining individual permits. One commenter expressed support for including activities in non-tidal section 10 waters. One commenter stated that the addition of activities in non-tidal section 10 waters needs clarification. This commenter said this may be a new requirement that is not currently regulated and thus may impact industrial mineral mining.

Mining activities in tidal waters have potential for causing more than minimal individual and cumulative effects, and from a national perspective should be evaluated under the individual permit process. However, district engineers can develop and issue regional general permits to authorize mining activities in tidal waters in areas where these activities usually result in no more than minimal adverse environmental effects. The Corps is retaining the proposed clarification

in paragraph (b) of this NWP, with respect to the NWP authorizing work in non-tidal navigable waters of the United States (i.e., section 10 waters). The clarification regarding work in section 10 waters was added because the Corps' definition of "work" at 33 CFR 322.2(c) for the purposes of Section 10 of the Rivers and Harbors Act of 1899 includes "without limitation, any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States."

One commenter said that this NWP should not authorize activities in waters inhabited by salmon. A few commenters stated that the Corps must consider the numerous proposals for sulfide-ore copper mining in Minnesota and Wisconsin in light of unique lake-land system that is highly susceptible to mining caused pollution and degradation.

All activities authorized by this NWP require pre-construction notification. District engineers will review PCNs for proposed activities and determine whether they may affect ESA-listed species or designated critical habitat. If the district engineer determines a proposed NWP 44 activity may affect listed species or designated critical habitat, he or she will conduct ESA section 7 consultation with the U.S. FWS or NMFS as appropriate. Proposals for mining activities in Minnesota and Wisconsin are evaluated by the Corps' St. Paul District.

This NWP is reissued as proposed.

(9) NWP 48. Commercial Shellfish Mariculture Activities.

The Corps proposed a number of modifications to this NWP. The Corps proposed to change the title of this NWP from "Commercial Shellfish Aquaculture Activities" to "Commercial Shellfish Mariculture Activities" to more accurately reflect where these activities are conducted (i.e., coastal waters). The Corps also proposed to remove the 1/2-acre limit for new activities that have direct effects on

submerged aquatic vegetation in project areas that that have not been used for commercial shellfish aquaculture activities during the past 100 years. In addition to the proposed removal of that 1/2-acre limit, the Corps proposed to remove the definition of “new commercial shellfish aquaculture operation” that was adopted in 2017. Also, the Corps proposed to remove both PCN thresholds for this NWP, as well as the paragraph that identifies the additional information that permittees must submit with their NWP 48 PCNs.

The Corps changed the title of this NWP to “Commercial Shellfish Mariculture Activities” because the NWP only authorizes activities in coastal waters. Mariculture is the cultivation of organisms in marine and estuarine open water environments (NRC 2010). The term “aquaculture” refers to a broad spectrum of production of aquatic organisms. In the United States aquaculture activities encompass the production of marine and freshwater finfish, as well as shellfish (bivalve molluscs and crustaceans). Oysters, clams, mussels, and scallops are examples of bivalve molluscs (bivalves). Since aquaculture activities in the United States include both water-based and land-based activities, we use the term “mariculture” in NWPs 48, 55 (seaweed mariculture activities), and 56 (finfish mariculture activities) to make it clear that these NWPs only authorize activities in marine and estuarine waters.

In response to the October 10, 2019 decision of the United States District Court, Western District of Washington at Seattle in the *Coalition to Protect Puget Sound Habitat v. U.S. Army Corps of Engineers et al.* (Case No. C16-0950RSL) and *Center for Food Safety v. U.S. Army Corps of Engineers et al.* (Case No. C17-1209RSL), the Corps has made substantial revisions to the national decision document for NWP 48. The revisions addressed, to the extent appropriate, issues identified in the district court’s decision. A copy of the final

national decision document is available in the docket at www.regulations.gov (COE-2020-0002).

The national decision document for the 2021 NWP 48 provides a more thorough discussion of the direct and indirect impacts caused by commercial shellfish mariculture activities. The national decision document also uses a broader set of scientific literature to support that discussion of potential effects to various resources and the human environment. The national decision document does not focus solely on oyster mariculture; rather, it also discusses mariculture activities for other bivalve species, such as clams, mussels, and scallops. The national decision document presents a more detailed discussion of the potential impacts of commercial shellfish mariculture activities on aquatic vegetation other than seagrasses, benthic communities, fish, birds, water quality, and substrate characteristics.

The national decision document provides a more thorough discussion of how the Corps applies its two permitting authorities to commercial shellfish mariculture activities (i.e., Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act). It discusses the types of activities regulated under those authorities and their potential environmental consequences. In addition, the national decision document provides a more rigorous analysis to support a finding, at a national level, that the NWP would authorize only those commercial shellfish mariculture activities that have no more than minimal individual and cumulative adverse environmental effects. The national decision document explains that division engineers retain the authority to modify, suspend, or revoke NWP 48 on a regional basis (see 33 CFR 330.5(c)). It further discusses the authority of district engineers to modify, suspend, or revoke NWP 48 on a case-by-case basis (see 33 CFR 330.5(d)) if impacts of an activity

proposed for authorization using NWP 48 has more than a minimal adverse effect on the environment. A copy of the national decision document for the 2021 NWP 48 is available in the www.regulations.gov docket for this rulemaking action (docket number COE-2020-0002).

Commercial shellfish mariculture activities involve the production of bivalves such as oysters, mussels, clams, and scallops. These activities occur in marine and estuarine coastal waters of the United States. As discussed above, the Corps regulates commercial shellfish mariculture activities under two of its permitting authorities: Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. Under Section 10 of the Rivers and Harbors Act of 1899, the Corps regulates structures and work in navigable waters of the United States. Under Section 404 of the Clean Water Act, the Corps regulates discharges of dredged or fill material into waters of the United States.

Nationwide permit 48 authorizes structures or work in navigable waters of the United States for commercial shellfish mariculture activities when DA permits are required by Section 10 the Rivers and Harbors Act of 1899. The Corps' regulations for Section 10 of the Rivers and Harbors Act of 1899 in 33 CFR part 322 define the term "structure" as including, "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 obstacle or obstruction." [33 CFR 322.2(b)] Commercial shellfish mariculture activities usually involve structures such as cages, racks, nets, pilings, lines, trays, tubes, ropes, and bouchots (i.e., piles wrapped in rope for cultivating mussels) placed in navigable waters to cultivate bivalves.

Oysters may be cultivated using structures such as cages, trays, racks, bags, and lines. Oyster mariculture may be conducted through on-bottom or off-bottom techniques (NRC 2010). Clams are generally cultivated through on-bottom techniques because the commercially produced species are infaunal organisms that grow in the substrate of waterbodies (NRC 2010). Clam mariculture may involve the use of structures such as tubes and anti-predator netting. Mussels may be cultivated by attaching mussel brood stock or seed to ropes, which are suspended in the water column from a floating raft. Mussels may also be grown on ropes attached to pilings (bouchots) (McKindsey et al. 2011), or in cages, trays, or racks. Mussels may also be cultivated through on-bottom or off-bottom culture methods (NRC 2010). For example, mussels may be grown on ropes suspended in the water column from a raft, or via bottom culture. Scallops may be attached to ropes via monofilament lines tied through a small hole drilled into the shell (Robinson et al. 2016), a technique called “ear hanging.”

The installation and use of structures such as racks, cages, bags, lines, nets, and tubes, in navigable waters for commercial bivalve shellfish mariculture activities in navigable waters requires DA authorization under Section 10 of the Rivers and Harbors Act of 1899. Department of the Army authorization is required under Section 10 of the Rivers and Harbors Act of 1899 for all structures and/or work in or affecting navigable waters of the United States, except for activities identified in section 322.4 of the Corps’ section 10 regulations (see 33 CFR 322.3). The exceptions in section 322.4 are limited to: (a) activities that were commenced or completed shoreward of established federal harbor lines before May 27, 1970; and (b) wharves and piers construct in any waterbody, located entirely within one state where the waterbody is a navigable water of the United States solely on the basis of its historical use to transport interstate

commerce. None of these exceptions apply to structures or work for commercial shellfish mariculture activities. In the Corps' section 10 regulations, there is no de minimis exception from the requirement to obtain DA authorization for structures and work in navigable waters of the United States. Any structure or work that alters or obstructs navigable waters of the United States requires section 10 authorization from the Corps. With respect to structures used for shellfish mariculture activities, those structures require section 10 authorization because they alter navigable waters of the United States even though there might be circumstances where they might not obstruct navigation.

Commercial shellfish mariculture structures may be floating or suspended in navigable waters, placed on the bottom of the waterbody, or installed in the substrate of the waterbody. The placement of mariculture structures in the water column or on the bottom of a waterbody does not result in a discharge of dredged or fill material that is regulated under section 404 of the Clean Water Act. While the presence of these structures in a waterbody may alter water movement and cause sediment to fall out of suspension onto the bottom of the waterbody, that sediment deposition is not considered a discharge of dredged or fill material because those sediments were not discharged from a point source. In general, the placement of bivalve shellfish mariculture structures on the bottom of a navigable waterbody, or into the substrate of a navigable waterbody does not result in discharges of dredged or fill material into waters of the United States that are regulated under Section 404 of the Clean Water Act.

The Corps' section 10 regulations define the term "work" as including, "without limitation, any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States." [33 CFR 322.2(c)] Under this NWP, the section 10 authorization applies to discharges of

dredged or fill material into waters of the United States that are also navigable waters under Section 10 of the Rivers and Harbors Act of 1899. Commercial shellfish mariculture activities often involve work that requires authorization under Section 10 of the Rivers and Harbors Act, such as harvesting and bed preparation activities. Bed preparation activities may include tilling or harrowing activities, or the placement of shell or gravel to provide substrate suitable for the establishment and growth of bivalves via bottom culture.

Commercial shellfish mariculture activities that only require authorization under Section 10 of the Rivers and Harbors Act of 1899 are evaluated under the Corps' public interest review process at 33 CFR 320.4. The Clean Water Act Section 404(b)(1) Guidelines issued by the U.S. EPA do not apply to activities authorized by the Corps under its section 10 authority because those guidelines only apply to activities that require authorization under Section 404 of the Clean Water Act. The 404(b)(1) Guidelines do not apply to section 10 activities that may directly or indirectly impact special aquatic sites such as vegetated shallows (i.e., submerged aquatic vegetation).

Section 101(a)(2) of the Clean Water Act states that "it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." [33 USC 1251(a)(2)] In other words, one of the goals of the Clean Water Act is to promote water quality that supports the propagation of fish and shellfish, in addition to other uses of waters of the United States.

The Clean Water Act regulates discharges of pollutants into waters of the United States. See 33 USC 1311(a). Section 502(6) of the Clean Water Act defines the term "pollutant" as meaning "dredged spoil, solid waste, incinerator

residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." Section 502(12) of the Clean Water Act defines the terms "discharge of a pollutant" and "discharge of pollutants" as meaning: any addition of any pollutant to navigable waters from any point source, or any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

Point source discharges of pollutants are regulated under Sections 402 and 404 of the Clean Water Act. Under Section 402 of the Clean Water Act, the U.S. EPA authorized state agencies to regulate a variety of pollutants that may be discharged into waters of the United States via a point source. Under Section 404 of the Clean Water Act, the Corps regulates discharges of dredged or fill material into waters of the United States. Discharges of dredged or fill material into waters of the United States that require section 404 permits must comply with the Clean Water Act section 404(b)(1) Guidelines issued by the U.S. EPA at 40 CFR part 230.

The term "pollutant" does not include the placement of shellfish seed or bivalves at various stages of growth into jurisdictional waters, or the waste products (e.g., feces or pseudofeces, ammonium) excreted by bivalves. In *Association to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007 (9th Cir. 2002), the court concluded that Congress did not intend that living bivalves and the natural chemicals and particulate biological matter they release through normal physiological processes, or the shells that might be separated from living bivalves from time to time, be considered pollutants under the Clean Water Act. In other words, bivalve shells and natural waste products

excreted by living bivalves are not “biological materials” under the Clean Water Act’s definition of “pollutant” because shells and natural waste products come from the natural growth and development of bivalves and not from a transformative human process.

The EPA’s National Summary of State Information, water quality assessment and total maximum daily load (TMDL) information[3], provides information on the causes of impairment and probable sources of impairment for the Nation’s waters, including bays, estuaries, coastal shorelines, ocean waters, and near coastal waters where commercial shellfish mariculture activities may occur. Twenty-eight causes of impairment were identified for bays and estuaries. The top 10 causes of impairment for bays and estuaries are: polychlorinated biphenyls, nutrients, mercury, turbidity, dioxins, toxic organics, metals (other than mercury), pesticides, pathogens, and organic enrichment/oxygen depletion. For bays and estuaries, the top 10 sources of impairment for bay and estuaries are: legacy/historic pollutants, urban-related runoff/stormwater, unknown sources, atmospheric deposition, municipal discharges/sewage, unspecific non-point sources, other sources, natural/wildlife, agriculture, and industrial.

Coastal shorelines were impaired by 16 identified causes, the top 10 of which are: mercury, pathogens, turbidity, organic enrichment/oxygen depletion, pH/acidity/caustic conditions, nutrients, oil and grease, temperature, cause unknown – impaired biota, and algal growth. The top 10 sources of impairment of coastal shorelines are municipal discharges/sewage, urban-related runoff/stormwater, “unknown,” recreational boating and marinas, hydromodification, industrial, unspecified non-point source, agriculture, legacy/historic pollutants, and land application/waste sites/tanks.

---

[3] https://iaspub.epa.gov/waters10/attains_nation_cy.control (accessed November 27, 2020)

Ocean and near coastal waters were impaired by 17 identified causes, the top 10 of which are: mercury, organic enrichment/oxygen depletion, pathogens, metals (other than mercury), pesticides, turbidity, nuisance exotic species, total toxics, pH/acidity/caustic conditions, and polychlorinated biphenyls. The top 10 sources of impairment of ocean and near coastal waters are: atmospheric deposition, unknown sources, unspecified non-point sources, other sources, recreation and tourism (non-boating), recreational boating and marinas, urban-related runoff/stormwater, hydromodification, municipal discharges/sewage, and construction.

None of the top 10 sources of impairment of these categories of waters are directly related to commercial shellfish mariculture activities. Commercial shellfish mariculture activities require clean water to produce bivalve shellfish for human consumption. Further, the ability of bivalves to improve water quality is well understood and their presence in an aquatic ecosystem is considered to be beneficial (e.g., NRC 2010).

Mariculture activities can be classified as extensive or intensive. For extensive mariculture, young organisms are allowed to grow naturally using resources (food, inorganic nutrients) available in marine and estuarine waters until they are harvested (Diana et al. 2009). In intensive mariculture, the young organisms are provided feed to promote their growth before they are harvested. Bivalve shellfish mariculture and seaweed mariculture are examples of extensive mariculture, and for such activities there is no addition of materials (e.g., nutrients) through a point source that might trigger a permit requirement. However, in some cases a pesticide might be applied in waters where bivalve shellfish mariculture occurs (NRC 2010, Simenstad and Fresh 1995). The application of pesticides is not regulated by the Corps under Section 404 of the

Clean Water Act, but it may be regulated by EPA or approved states under Section 402 of the Clean Water Act. As discussed in the previous paragraph, the bivalves themselves that are seeded in the waterbody, or are added to the waterbody after a limited grow out period in a nursery facility located on-shore or elsewhere, does not trigger a permit requirement the Clean Water Act because those living organisms are not considered to be pollutants under the Act.

Nationwide permit 48 also authorizes discharges of dredged or fill material into waters of the United States. The Corps' regulations define "dredged material" as "material that is excavated or dredged from waters of the United States." [33 CFR 323.2(c)] The term "discharge of dredged material" is defined at 33 CFR 323.2(d)(1) as meaning "any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States." The term "discharge of dredged material" includes, but is not limited to: (1) the addition of dredged material to a specified discharge site located in waters of the United States; (2) the runoff or overflow from a contained land or water disposal area; and (3) any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation. [33 CFR 323.2(d)(1)] Some activities associated with commercial shellfish mariculture may result in a discharge of dredged material under the third instance identified above (i.e., redeposit of dredged material other than incidental fallback).

Some commercial shellfish mariculture activities involve mechanical or hydraulic harvesting techniques that may or may not result in discharges of dredged material that require authorization under Section 404 of the Clean Water Act. If the bivalve harvesting activity would result in only incidental fallback of

dredged material into the waterbody, a section 404 permit would not be required. (However, a section 10 permit would be required as “work” in navigable waters). A section 404 permit would be required for a mechanical or hydraulic harvesting activity if that activity results in a regulated discharge of dredged material by having more than incidental fallback. Some harvesting activities associated with commercial shellfish mariculture operations may result in the redeposit of dredged material other than incidental fallback within the waters of the United States. For example, dredge harvesting activities may remove sediment along with the bivalves. If the removed sediment is deposited back into the waterbody in a different location, and is more than incidental fallback, then the harvesting activity may be determined by the district engineer to result in a discharge of dredged material that requires section 404 authorization. On the other hand, if the sediment removed while harvesting the bivalves is redeposited in the same location, then it may be considered to be incidental fallback, and not require section 404 authorization.

The Corps’ regulations at 33 CFR 323.2(e)(1) define “fill material” as meaning “material placed in waters of the United States where the material has the effect of: (1) replacing any portion of a water of the United States with dry land; or (2) changing the bottom elevation of any portion of a water of the United States. Examples of fill material include: “rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.” [33 CFR 323.2(e)(2)] “Fill material” does not include trash or garbage (see 33 CFR 323.2(e)(3)). Discharges of trash or garbage may be regulated under other federal, state, or local laws and regulations. Fill material

does not include the placement or release of living organisms, such as bivalve larvae and juvenile bivalves, into waters of the United States.

The term “shellfish seeding” is defined in Section E of the NWPs as the “placement of shellfish seed and/or suitable substrate to increase shellfish production. Bivalve 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.” This definition was adopted in the NWPs in 2007 (see 72 FR 11197). Other materials may be used for bivalve shellfish seeding such as nets, bags, and ropes. Shellfish seed can be produced in a hatchery. Shellfish seed can also be produced in waterbodies where bivalve larvae can attach to appropriate materials, such as shell pieces, bags, or ropes.

Placing shellfish seed on the bottom of a waterbody is not a “discharge of fill material” and thus does not require a section 404 permit. Placing gravel or shell on the bottom of a waterbody to provide suitable substrate for bivalve larvae to attach to is considered to be a “discharge of fill material” and would require section 404 authorization. The shellfish themselves, either growing on the bottom of a waterbody or in nets, bags, or on ropes, are not considered to be “fill material” and do not require a section 404 permit to be emplaced, remain in place, or to be removed from a waterbody.

On-bottom bivalve shellfish mariculture activities may involve placing fill material such as shell or gravel to provide suitable substrate for bivalve larvae to attach to and grow on the bottom of the waterbody. These fill activities may require section 404 authorization. The placement of structures that are used for commercial shellfish mariculture activities, such as cages, bags, racks, tubes,

and netting, does not result in discharges of dredged or fill material into waters of the United States and therefore do not require authorization under Section 404 of the Clean Water Act. As discussed above, the placement of cages, bags, racks, tubes, lines, and netting and other structures in navigable waters of the United States for the purposes of commercial shellfish mariculture activities is regulated under Section 10 of the Rivers and Harbors Act of 1899 because they can be potential obstructions to navigation.

In the 2020 Proposal, the Corps proposed to remove the 1/2-acre limit for new commercial shellfish mariculture activities that directly affect submerged aquatic vegetation. The Corps also proposed to remove the definition of “new commercial shellfish mariculture activities.”

Many commenters said that the 1/2-acre limit for direct impacts to submerged aquatic vegetation for new commercial shellfish mariculture activities should be retained because removal of the 1/2-acre could cause significant and permanent losses of submerged aquatic vegetation. One commenter said that allowing new commercial shellfish mariculture activities to directly affect more than 1/2-acre of submerged aquatic vegetation would result in more than minimal adverse environmental effects. A couple of commenters stated that the removal of the 1/2-acre limit for impacts to submerged aquatic vegetation conflicts with submerged aquatic vegetation goals and restoration efforts in different states. These commenters said that many federal, state, and local agencies are working throughout the country to recover lost submerged aquatic vegetation habitat in support of water quality and ecosystem goals. Removal of the 1/2-acre limit would undermine the investments and progress made to date to recover these important habitats.

The Corps is removing the 1/2-acre limit for new commercial shellfish mariculture activities that directly affect submerged aquatic vegetation in the project area. In place of the 1/2-acre limit, the Corps is substituting a PCN requirement for new and existing commercial shellfish mariculture activities that directly affect more than 1/2-acre of submerged aquatic vegetation. This new PCN requirement accompanies the removal of the definition of “new commercial shellfish aquaculture operation” and will provide activity-specific review of all commercial shellfish mariculture activities that directly affect more than 1/2-acre of submerged aquatic vegetation. In response to a PCN, the district engineer can add conditions to the NWP authorization to require mitigation, such as best management practices or other mitigation measures, to ensure that the individual and cumulative adverse environmental effects are no more than minimal.

Under the 2017 NWP 48, the 1/2-acre limit only applied to new commercial shellfish mariculture activities. After a new commercial shellfish mariculture activities was authorized by the Corps, the 1/2-acre limit no longer applied to the existing commercial shellfish mariculture activity. In this regard, it was less protective than the NWP 48 in this final rule, which would apply a PCN requirement to existing operations seeking reauthorization. The removal of the 1/2-acre limit in this final rule does not affect the authority of other federal agencies or tribal, state, or local governments to adopt and implement protection programs for submerged aquatic vegetation under their authorities.

Submerged aquatic vegetation does not have any special status under the Corps’ regulations for implementing Section 10 of the Rivers and Harbors Act of 1899, which is the statute that applies to most commercial shellfish mariculture activities. Submerged aquatic vegetation is covered by a number of the Corps’ public interest review factors such as conservation, general environmental

conditions, fish and wildlife values, and wetlands. While vegetated shallows are special aquatic sites under the Clean Water Act Section 404(b)(1) Guidelines, the Guidelines do not prohibit discharges of dredged or fill material into vegetated shallows. A smaller proportion of commercial shellfish mariculture activities trigger the permit requirements of Section 404 of the Clean Water Act because many commercial shellfish mariculture activities do not involve discharges of dredged or fill material into waters of the United States. Impacts to submerged aquatic vegetation caused by commercial shellfish mariculture activities may also be addressed through Endangered Species Act Section 7 consultations for proposed NWP 48 activities that district engineers determine “may affect” listed species or designated critical habitat, including critical habitat for which submerged aquatic vegetation is a physical or biological feature. Impacts to submerged aquatic vegetation may also be addressed through the essential fish habitat consultation process when the district engineer determines a proposed NWP 48 activity may adversely affect essential fish habitat, which may include submerged aquatic vegetation beds.

Several commenters recommended that the Corps propose a revised threshold for seagrass impacts based on biological reference points. These commenters said that this is particularly important in regions where additional provisions to protect seagrasses are not in place and state laws do not impose additional restrictions on eelgrass. One commenter stated that the Corps seeks to remove an impact limitation that would otherwise incentivize responsible siting of mariculture operations and minimization of impacts to submerged aquatic vegetation.

The Corps declines to impose an additional threshold for seagrass impacts based on biological reference points because it would be impractical to

establish such biological reference points at a national level for activities requiring authorization under section 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act. The threshold to require a PCN for new and existing commercial mariculture operations that impact more than 1/2-acre of submerged aquatic vegetation is sufficient for the purposes of ensuring that a project will have no more than a minimal individual or cumulative adverse environmental impact. If a state decides not to take measures to regulate activities in submerged aquatic vegetation within its own waters, it does not create a legal or regulatory requirement for the Corps to address such situations. The requirements of NWP 48 will continue to provide incentives for commercial shellfish mariculture operators to plan and design their activities to qualify for NWP authorization. As discussed above there are other applicable laws that can address impacts to submerged aquatic vegetation in conjunction with the Corps' NWP authorization. In addition, where necessary based on the characteristics of the regional ecosystem, division engineers can add regional conditions to NWP 48 to help ensure that activities authorized by this NWP result in no more than minimal individual and cumulative adverse environmental effects.

Several commenters supported removing the 2017 definition of "new operation" as it is not relevant to a specific date or timeline. One commenter stated that the Corps has not been able to justify why one set of rules should apply to existing commercial shellfish mariculture operators and another set of rules should apply to everyone else, including new commercial shellfish mariculture operators. This commenter said that if there is a conservation justification for protecting eelgrass and other submerged aquatic vegetation, then limitations on impacts to submerged aquatic vegetation should apply to everyone. One commenter said that removal of this definition failed to identify

what it would be replaced with and stated that there needs a definition for new commercial shellfish mariculture activities but it must not conflict with tribal treaty reserved rights to take shellfish.

The Corps has removed the definition of “new commercial shellfish aquaculture operation” from this NWP. The new 1/2-acre PCN threshold will apply to both new and existing commercial shellfish mariculture activities. All activities authorized by NWP 48 must comply with general condition 17, tribal rights.

One commenter said that the removing the distinction for new operations, with the 1/2-acre limit, will result in more impacts. This commenter asserted that the Corps does little to justify the proposed removal of the 1/2-acre limit, given that it added this limit three years ago to ensure impacts from NWP 48 would be no more than minimal. One commenter recommended adding the following definition for an ongoing or existing activity: existing commercial shellfish aquaculture should be defined as the area under cultivation when NWP 48 was first issued in 2007 or where an operator can document that an area is part of a regular rotation of cultivation.

The 1/2-acre limit for new commercial shellfish mariculture activities was added to NWP 48 in 2012 (see 77 FR 10280). The 1/2-acre limit only applied to new commercial shellfish activities, and does not apply when those on-going activities are authorized when NWP 48 is reissued after the current NWP expires. There is no need to add a definition of on-going commercial shellfish mariculture activities, because both new and existing activities are treated the same under this reissued NWP.

One commenter stated that the Corps should identify a clear spatial delineation of what constitutes a waterbody to aid in decision-making and allow

the public to determine the scope of this action. One commenter noted that the provision for “project area” could be subject to two differing interpretations. First, it could refer to that area where some entity or agreement specifically authorizes the operator to conduct commercial shellfish aquaculture. Second, it could be read as being that area where a legally binding agreement establishes an enforceable property interest for the operator. This commenter recommended revising the term “project area” to read as follows: “The project area is an area in which the operator conducts commercial shellfish aquaculture activities, as authorized by a lease or permit or other legally binding agreement.”

The geographic scope for an NWP 48 activity is the project area, and the term project area is defined in the text of the NWP. The Corps did not change the definition of project area, and it covers both situations identified by the commenter. It is not necessary to and the Corps declines to define, at a national level, what constitutes a waterbody for the purposes of NWP 48. District engineers can identify the geographic extent of waterbodies for the purposes of NWP 48 activities.

In the 2020 Proposal, the Corps proposed to remove the pre-construction notification thresholds for this NWP because most of the direct and indirect impacts caused by the activities authorized by this NWP under its permitting authorities (i.e., Section 10 of the Rivers and Harbors Act of 1899 and, when applicable, Section of the Clean Water Act) are temporary impacts. As discussed in the proposed rule, NWP 48 activities may require PCNs because of the requirements of paragraph (c) of NWP general condition 18, endangered species. Under paragraph (c) of general condition 18, pre-construction notification is required for non-federal permittees when 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. In some areas of the country, commercial shellfish mariculture activities are located in waters inhabited by listed species and designated critical habitat. Division engineers may also add regional conditions to this NWP to require PCNs for some or all proposed NWP 48 activities.

Several commenters expressed concern of the removal of the PCN thresholds for new or existing shellfish mariculture activities. These commenters said the removal of the PCN thresholds will result in fewer chances to account for regional differences in submerged aquatic vegetation communities and it will make tracking of individual and cumulative environmental impacts more difficult. One commenter said that the Corps should require PCNs for all shellfish cultivation operations across the country and evaluate sediment enrichment at individual cultivation sites.

After evaluating the comments received in response to the proposed changes to the notification requirements of this NWP, the Corps determined that pre-construction notification should be required for proposed activities that directly affect more than 1/2-acre of submerged aquatic vegetation. The Corps has added a new PCN requirement to NWP 48 to require pre-construction notification for all NWP 48 activities that directly affect more than 1/2-acre of submerged aquatic vegetation. The new PCN threshold will provide district engineers the opportunity to review all new and existing commercial shellfish mariculture activities that directly affect more than 1/2-acre of submerged aquatic vegetation. The Corps does not agree that PCNs should be required for all shellfish mariculture activities because of potential impacts caused by temporary suspension of sediment during harvesting activities or discharges of dredged

material that may occur during dredge harvesting activities utilizing hydraulic dredging equipment. The impacts caused by the suspended sediment or discharged sediment are temporary because the sediment will settle to the bottom of the waterbody after a period of time. That period of time may depend on local currents and other factors but is generally understood to be relatively short (Newell et al. 1998) and not ecologically relevant, especially in shallow waters where wave actions frequently cause sediment to be suspended in the water column.

Direct effects of commercial shellfish mariculture activities on submerged aquatic vegetation include the placement of structures such as racks, bags, and cages on the bottom of a waterbody inhabited by submerged aquatic vegetation. Direct effects of commercial shellfish mariculture activities also include harvesting activities, including mechanical and hydraulic dredging and harvesting by hand. Shading of submerged aquatic vegetation by off-bottom bivalve mariculture structures, such as floating racks, bags, and cages, is an indirect effect that would not trigger this PCN requirement. Changes in water flows caused by the use of long lines for bivalve mariculture cultivation, where slowed water flows cause sediment to fall out of suspension and accumulate on the bottom of the waterbody is another example of a potential indirect effect that would not trigger this PCN requirement. These direct and indirect effects would be caused by structures or work regulated under Section 10 of the Rivers and Harbors Act of 1899.

Direct effects also include discharges of dredged or fill material on the bottom of a waterbody inhabited by submerged aquatic vegetation for on-bottom culture methods, such as the placement of shell or gravel to provide substrate for the bivalves to attach to and grow. Discharges of dredged or fill material into

waters of the United States may smother submerged aquatic vegetation, which is a direct effect of those activities. During harvesting activities that include regulated discharges of dredged or fill material, there are likely to be direct effects to submerged aquatic vegetation if those activities occur in seagrass beds. These direct effects would trigger the PCN requirement if they directly affect more than 1/2-acre of submerged aquatic vegetation An example of an indirect effect that might be caused by a discharge of dredged or fill material into waters of the United States for commercial shellfish mariculture activities might be a turbidity plume that reaches areas beyond the discharge site, as suspended sediment is transported by water currents away from that discharge site. This indirect effect would not trigger the PCN requirement.

This pre-construction notification requirement will provide district engineers the opportunity to evaluate each proposed activity that will directly affect more than 1/2-acre of submerged aquatic vegetation and determine whether that activity qualifies for NWP 48 authorization. In response to a pre-construction notification, the district engineer may require mitigation (e.g., on-site avoidance and minimization) to ensure that the authorized activity complies with the no more than minimal adverse environmental effects requirement for the NWPs (see paragraph (a) of NWP general condition 23, mitigation).

The Corps has removed the additional information requirements for PCNs from the text of NWP 48 because the information requirements of NWP general condition 32 cover the information needed for this new PCN requirement. The information requirements for NWP PCNs are listed in paragraph (b) of NWP general condition 32, pre-construction notification. Paragraph (b)(5) of NWP general condition 32 requires the PCN to include a delineation of wetlands, other

special aquatic sites (including vegetated shallows, or submerged aquatic vegetation), and other waters.

One commenter supported the removal of the PCN requirements because in many instances bivalve populations have been overharvested or in some cases attacked by diseases or poor water quality. This commenter said that regulation of these activities should not impede the ability to reinvigorate these species and growing them for food production. One commenter supported of removal of the PCN threshold for commercial shellfish mariculture for activities that include a species that has never been cultivated in the waterbody as long as the NWP continues to prohibit the cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody, and prohibit the cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990. One commenter said that state natural resource agencies should be notified for NWP 48 activities that seek to stock a species that has never been cultivated in a waterbody, and applicable state permits be obtained before the NWP 48 authorization becomes effective for a particular commercial shellfish mariculture activity.

The addition of the PCN requirement for commercial shellfish mariculture activities that directly affect more than 1/2-acre of submerged aquatic vegetation should not pose impediments on food production or efforts to reinvigorate these species in waters whether they have been overharvested. The Corps has also removed the PCN threshold for indigenous species that have never been cultivated in the waterbody. While the Corps has removed the PCN threshold, it has modified the NWP to prohibit the cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody. State natural resources agencies can reach out to Corps districts to request

coordination on proposals to cultivate indigenous species that have never been cultivated in the waterbody.

Several commenters stated the PCN requirements should not be removed because tribes require notice and collaboration with the Corps in order to protect their treaty fishing rights. These commenters said that even temporary impacts to eelgrass could result in consequences to tribe's treaty-reserved fish populations and the habitat they rely on. In addition, these commenters stated that removal of the PCN thresholds poses significant problems to assuring protection of salmon, nearshore habitat, and treaty shellfish gathering rights. One commenter recommended adding a PCN requirement for all activities within the U.S. v. Washington (Boldt) case area.

During the process for issuing and reissuing these NWPs, Corps districts have been consulting and coordinating with tribes. Corps districts and tribes can establish coordination procedures to help ensure that NWP 48 activities comply with general condition 17, tribal rights. Division engineers can also add regional conditions to this NWP, where appropriate based on the characteristics of the regional ecosystem, to ensure that the activities authorized by this NWP cause no more than minimal adverse environmental effects to specific resources, including tribal trust resources.

One commenter expressed support for the proposed reissuance of NWP 48. One commenter expressed support for the reissuance of NWP 48 because this NWP could significantly reduce the barriers to entry for emerging mariculture industries, and reduce the timeframes and costs associated with obtaining DA authorization for such activities. One commenter said that the conditions in the text of NWP 48 and NWP A should be consistent and preferably combined into one NWP for cultivating shellfish and seaweeds. One commenter stated that

small businesses are supportive of the proposed changes to NWP 48, but acknowledged that there may be unfavorable litigation outcomes if the changes are finalized. However, these businesses are concerned that small businesses nationwide could be subject to unfavorable litigation outcomes where the environmental analysis and justification for this rulemaking is not sound.

Nationwide permit 48 provides a streamlined authorization process for commercial shellfish mariculture activities that result in no more than minimal adverse environmental effects, and should help reduce regulatory burdens for the mariculture industry. The text of NWPs 48 and A (now designated as NWP 55) has some similarities, as well as some differences. Some of those differences are due to NWP 55 activities potentially occurring in a broader range of waters, including deeper coastal waters more distance from the shoreline and federal waters over the outer continental shelf. Commercial shellfish mariculture activities typically occur in coastal waters new the shoreline. The national decision document for this NWP has been revised to address the 2019 decision of the United States District Court, Western District of Washington at Seattle in the *Coalition to Protect Puget Sound Habitat v. U.S. Army Corps of Engineers et al.* (Case No. C16-0950RSL) and *Center for Food Safety v. U.S. Army Corps of Engineers et al.* (Case No. C17-1209RSL),

Several commenters stated that the Corps should not reissue NWP 48, and if the Corps decides to reissue NWP 48 it should improve its review of PCNs and require documentation of compliance with specific design and operational standards. A few commenters said that the Corps should not reissue NWP 48 as proposed for the same reasons that NWP was found by the United States District Court, Western District of Washington at Seattle to be in non-compliance with National Environmental Policy Act and the Clean Water Act. One commenter

said that regional general permits should be issued in Washington State, for specific water bodies and for particular types of shellfish aquaculture.

Nationwide permit 48 authorizes a variety of commercial shellfish mariculture activities under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act, and a number of different structures can be used to cultivate bivalve molluscs. Project proponents are responsible for designing their projects and for those activities that require pre-construction notification, district engineers evaluate the direct, indirect, and cumulative adverse environmental effects caused by the proposed NWP activity. In the national decision document, the Corps has revised its NEPA analysis and its Clean Water Act Section 404(b)(1) Guidelines analysis. Regional general permits can be issued by district engineers to authorize these activities. Regional general permits can be effective in addressing regional approaches to commercial shellfish mariculture activities and the potential adverse environmental effects those activities may cause.

One commenter noted that a lack of clarity in the proposed rule may lead to permitting delays and uncertainty, both of which have negative effects on small businesses. A couple commenters said that with regards to shellfish mariculture there needs to be more support from all levels of government to consider first and foremost a food production activity now and in the future to address our seafood deficit and food security for our nation. One commenter recommended that the Corps utilize information in Endangered Species Act and essential fish habitat consultation documents issued in Washington State to support the reissuance of NWP and address environmental issues of concern under the Clean Water Act, the Rivers and Harbors Act of 1899, and the National Environmental Policy Act.

The reissued NWP 48 will provide a streamlined authorization process for commercial shellfish mariculture activities that cause no more than minimal individual and cumulative adverse environmental effects. Commercial shellfish mariculture activities may also be regulated by tribal, state, and local governments. The consultation documents issued by the U.S. FWS and NMFS in Washington State are applicable only to Washington State, and this NWP authorizes commercial shellfish mariculture activities across the country.

One commenter observed that at the national level, Congress passed the National Aquaculture Act of 1980 in response to findings that the nation has potential for significant aquaculture growth, but that this growth is inhibited by many scientific, economic, legal, and production factors. In support of the proposed reissuance of NWP 48, one commenter cited the National Shellfish Initiative's goal of increasing populations of bivalve shellfish in our nation's coastal waters—including oysters, clams, and mussels—through commercial production and conservation activities. One commenter stated that the NWP 48 should require notification to the U.S. Coast Guard.

The reissuance of NWP 48 helps support the growth of the aquaculture industry in the United States by reducing regulatory burdens on growers and providing a streamlined authorization process under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. The activities authorized by this NWP will also help increase the numbers of bivalves in the Nation's coastal waters, and the ecological functions and services those bivalve molluscs provide, especially in coast waters where bivalve shellfish populations have significantly declined as a result of overharvesting. The project proponent is responsible for securing any licenses or permits from the U.S. Coast Guard, and

complying with U.S. Coast Guard requirements that may apply to structures used for commercial shellfish mariculture activities.

Several commenters supported changing the name of NWP 48 from "commercial shellfish aquaculture activities" to "commercial shellfish mariculture activities." One commenter suggested adding modifying terms to "aquaculture" such as "marine," "coastal marine," or "offshore" to improve specificity and clarity. One commenter suggested clarifying that the terms "mariculture" and "aquaculture" can be used interchangeably. A couple of commenters objected to changing "aquaculture" to "mariculture" in the title and text of NWP 48. They suggested using the term "marine aquaculture" to more closely align with the terms used by industry. One said that using the term "mariculture" may result in an unintended consequence of confusing or invalidating local and regional policy and regulations. One commenter stated the term "commercial shellfish aquaculture" is not defined and recommended defining that term in a manner that does not conflict with tribes' treaty-secured rights to take shellfish. One commenter stated that term "shellfish" is not explicitly defined, and recommended adding a definition to clarify whether that term includes lobsters and conches or only bivalves.

The Corps is retaining the use of the term "mariculture" in this NWP. Use of the term "mariculture" in NWP 48, as well as NWPs 55 and 56, will not invalidate any local or regional policies or regulations. The use of the term mariculture is intended to provide clarity, to ensure that project proponents do not attempt to use NWP 48 to authorize the production of other species considered to be "shellfish" (e.g., shrimp, crawfish) in land-based facilities and ponds. The term "mariculture" refers to the cultivation of species for food production, and should not interfere with a tribe's taking of shellfish from coastal waters. The

Corps has modified the first paragraph of this NWP to clarify that the term "shellfish" refers to bivalve molluscs such as oysters, clams, mussels, and scallops.

Several commenters said that the Corps' proposal fails to properly consider that the impacts authorized by NWP 48 violate the Clean Water Act and the Endangered Species Act. These commenters stated that the impacts of commercial shellfish mariculture activities should be evaluated through environmental impact statements and through formal programmatic ESA consultations. One commenter stated that the Corps has failed to provide adequate documentary support or substantive evidence for its conclusions that permit terms and conditions would be sufficient to ensure that environmental effects would be minimal and not significant. One commenter asserted that the proposed NWP 48 violates the Section 404(e) of the Clean Water Act because it allows unlimited impacts.

Activities authorized by NWP 48 must comply with general condition 18, endangered species. Some Corps districts have developed programmatic ESA section 7 consultations that cover commercial shellfish mariculture activities. Activities authorized by NWP 48 do not require additional NEPA compliance, since the Corps fulfills the requirements of NEPA when it issues its national decision document for the reissuance of that NWP, because that decision document includes and environmental assessment with a finding of no significant impact. Section 404(e) of the Clean Water Act does not require NWPs to have quantified acreage or other limits to ensure that authorized activities result in no more than minimal individual and cumulative adverse effects. Commenters have not provided any substantive evidence to support their opinions that all activities authorized by NWP 48 result in more than minimal adverse environmental effects

and should not be authorized by an NWP. The Corps has issued a number of NWPs that do not have quantitative limits, such as NWP 27 (Aquatic Habitat Restoration, Enhancement, and Establishment Activities), NWP 31 (Maintenance of Existing Flood Control Facilities), and NWP 38 (Cleanup of Hazardous and Toxic Waste).

Several commenters said that NWP 48 activities contribute to degradation of waters of the United States by adversely affecting water quality, eelgrass, salmon, birds, herring, and flatfish and causing adverse effects from the introduction of plastics. One commenter recommended prohibiting commercial shellfish mariculture activities in or near marine protected areas or sensitive areas, such as essential fish habitat. This commenter said that the NWP should prohibit the use of plastic equipment or inputs such as pesticides, herbicides, or pharmaceuticals. This commenter also said that NWP 48 activities should require extensive documentation of compliance with design and operation standards, with routine reporting. In addition, this commenter stated that permitted activities should incorporate more rigorous operation, emergency response, and pollution standards, with swift and severe consequences for non-compliance, including revocation of permits.

The potential environmental effects caused by commercial shellfish mariculture activities are discussed in the national decision document for NWP 48. The Corps acknowledges that commercial shellfish mariculture activities may have negative, positive, and neutral effects on various environmental components, including various species. It is generally understood that the presence of bivalves in an aquatic ecosystem is beneficial. Some commenters point out various adverse environmental effects caused by commercial shellfish mariculture activities, but other acknowledge the studies and observations that

identify beneficial environmental effects caused by commercial shellfish mariculture activities. If a proposed commercial shellfish mariculture activity may adversely affect essential fish habitat as a result of activity subject to the Corps' legal authority, the district engineer will conduct essential fish habitat consultation with the NMFS, and incorporate as appropriate, essential fish habitat conservation recommendations into the NWP authorization as permit conditions.

The Corps does not have the legal authority to regulate the use of pesticides, herbicides, or pharmaceuticals that may be associated with commercial shellfish mariculture activities. General condition 6 requires the use of suitable material for activities authorized by NWPs. Plastics materials may be used for commercial shellfish mariculture activities and it is the responsibility of the permittee to ensure that structures that may be made with plastics (e.g., tubes for geoducks, anti-predator netting) are properly maintained (see general condition 14). The Corps has no authority to regulate plastics that may wash away from a commercial shellfish mariculture activity. The Corps does not regulate the placement of trash or garbage into waters of the United States (see 33 CFR 323.2(e)(3)). Section 13 of the Rivers and Harbors Act of 1899 (i.e., the Refuse Act) has been superseded by Section 402 of the Clean Water Act (see 33 CFR 320.2(d)).

One commenter requested that the Corps change NWP 48 to remove any unintended competitive edge for wild harvest fisheries, both in terms of allowable gear and harvesting requirements. One commenter stated that they investigated direct and indirect effects of individual bottom cages on eelgrass, and found that at the current level of mariculture activity, short-term cultivation of oysters has a minimal effect on eelgrass growth, water quality, and sediment characteristics.

However, if the cultivation activity expands in terms of gear and/or individual operations, it may result in measurable effects.

The Corps lacks the authority to prevent competition between commercial shellfish mariculture operators and fishers that harvest wild populations of bivalves. The Corps appreciates the information regarding the direct and indirect effects of bottom cages for oyster mariculture on eelgrass. The Corps is finalizing a new PCN threshold for commercial shellfish mariculture activities directly affecting more than 1/2-acre of submerged aquatic vegetation to ensure the effects noted by the commenter are evaluated by district engineers.

One commenter said that commercial shellfish mariculture activities have minimal adverse impacts, and they can have beneficial effects on habitat and water quality, and there is an extensive scientific literature that supports the identification of these benefits. This commenter discussed the structured habitat provided by commercial shellfish mariculture activities that is used by numerous species for refuge, foraging, and predator avoidance, thereby increasing species richness, abundance, and biodiversity. This commenter also said that bivalves ingest and filter suspended materials in the water column, sequestering excess nutrients as protein in their tissue. This commenter also remarked that upon harvesting these bivalve molluscs, nutrients are removed from the marine ecosystem, which improves water quality. This commenter also noted that commercial shellfish mariculture activities can also help to transfer the load of suspended materials from the water column to the benthos through a phenomenon known as benthic-pelagic coupling. In addition, this commenter said that by providing structured habitat, improving water quality, and helping to transfer the load of suspended materials from the water column to the benthos, shellfish can help mitigate adverse impacts caused by several different types of

human activities and developments. This commenter stated that for these reasons, shellfish are increasingly being utilized in environmental restoration projects across the United States. The Corps acknowledges these comments on the beneficial effects of commercial shellfish mariculture activities on coastal waters. These beneficial effects have informed the Corps' decision to reissue NWP 48 as discussed because it will have no more than a minimal individual or cumulative adverse environmental effects.

One commenter said that impacts from geoduck farms are insignificant (no more than minimal) for: forage fish spawning areas; consumption of forage fish larvae; juvenile salmon; waves, currents, and sediment transport; microplastics; marine debris; impact to the benthic community; cumulative impacts; recreation and navigation; marine mammals; birds; farm preparation; predator protection netting; harvest activities; density, genetics, diseases, and parasites; and property values. This commenter remarked that the disturbances caused by commercial shellfish mariculture activities are within the range of natural variation experienced by benthic communities in Puget Sound. This commenter also stated that differences in the structure of mobile macrofauna communities between planted areas with geoduck tubes and nets and nearby reference beaches do not persist after the geoduck tubes and nets removed during the grow-out culture phase. In addition, this commenter said that nutrients released from a typical commercial geoduck operation are low and localized effects are likely to be negligible. Finally, this commenter stated that geoduck aquaculture practices do not make culture sites unsuitable for later colonization by eelgrass. The Corps acknowledges these comments on the beneficial effects of geoduck mariculture activities on coastal waters. These beneficial effects have informed the Corps' decision to reissue NWP 48 as discussed because it will

have no more than a minimal individual or cumulative adverse environmental effects.

One commenter said that commercial shellfish mariculture activities have minimal impacts on birds, including foraging, noise, and the potential for net entanglement. This commenter noted that birds forage within mariculture operations, and feed on organisms growing on mariculture equipment, and the shellfish being produced. This commenter stated that noise associated with commercial shellfish mariculture activities could result in temporary displacement of birds from the immediate area, but this is a temporary impact to overall bird populations. Lastly, this commenter asserted that while predator exclusion net entanglement is a possibility for birds, it is likely to be rare and unlikely to result in significant effects to marine bird and bald eagle populations utilizing these areas. The Corps acknowledges these comments on the effects of commercial shellfish mariculture activities on birds, which have informed the Corps' decision to reissue NWP 48 as discussed because it will have no more than a minimal individual or cumulative adverse environmental effects.

One commenter objected to a statement in the proposed rule regarding the placement of shell or gravel on the bottom of the waterbody for on-bottom cultivation of bivalves. The proposed rule stated that this is a permanent impact. This commenter said that the placement of gravel or shell on the bottom of the waterbody causes temporary changes, which is why shellfish farmers frequently need to place gravel or shell in the same area from time to time. According to this commenter, this temporary change has beneficial impacts to species presence and diversity, according to a programmatic biological opinion issued by the NMFS for commercial shellfish mariculture activities in Washington State. This commenter said that placement of shell or gravel on the bottom of the waterbody

shifts the benthic community from polychaetes to amphipods and copepods, which are important prey items for juvenile salmon. This commenter requested that the Corps correct or clarify this statement to recognize that the placement of shell or gravel causes temporary, localized changes to the marine environment, and these changes are beneficial.

If the commercial shellfish mariculture operator places shell or gravel on the bottom of the waterbody, and does not remove the shell or gravel, then it is a permanent impact. When an NWP authorizes a temporary impact, the structure or fill has to be removed after that structure or fill is no longer needed. For a temporarily filled area, after the fill is removed several NWPs require the project proponent to restore the affected area to pre-construction elevations. The Corps acknowledges that a permanent fill may have positive, negative, or neutral environmental effects. For example, the permanent fill may be dispersed by flowing water and transported in the waterbody so that it becomes part of the benthic habitat in that waterbody. That permanent fill may provide habitat for certain aquatic organisms.

Several commenters said they agreed that placing shellfish seed on the bottom of a waterbody is not a “discharge of fill material” and thus does not require a section 404 permit. Regardless of that whether the placement of shellfish seed is done for commercial aquaculture, habitat restoration, or fisheries enhancement, it should not require a section 404 permit unless there is significant placement of materials for reefs/ hummocks in quantities adequate to alter the depth profile and alter the bottom topography. Several commenters noted that while depositing shell with spat already attached is considered seed and regulated “work” under Section 10 of the Rivers and Harbors Act of 1899, the proposed NWP 48 is also defining this as fill regulated under Section 404 of the

Clean Water Act. They stated that requiring section 404 authorization is an additional unnecessary burden and these activities do not result in adverse environmental impacts and in actuality have positive impacts to water quality. This method is unlike a restoration project where oyster shell is deposited in large enough quantities to create reefs and foster a permanent non-transient population. This commenter requested that the Corps make a distinction between two different activities: sparsely placing shell on the bottom of the waterbody to catch larvae and hummock building and restoration efforts.

In the 2020 Proposal, the Corps did not state that shellfish seeding activities require authorization under Section 404 of the Clean Water Act. In addition, the Corps did not state that shellfish seeding requires authorization under Section 10 of the Rivers and Harbors Act of 1899. The placement of shell in a waterbody to construct reefs or hummocks for bivalves to settle on and grow requires Clean Water Act section 404 authorization because it raises the bottom elevation of the waterbody and is a discharge of fill material, as that term is defined at 33 CFR 323.2(e). That activity also requires authorization under Section 10 of the Rivers and Harbors Act of 1899 as a structure (e.g., a reef) under 33 CFR 322.2(b) or work under 33 CFR 322.2(c).

One commenter said that placing single shellfish seeds on beds without containment structures is not regulated under Section 10 of the Rivers and Harbors Act of 1899. This commenter asserted that this activity is not subject to regulation under section 10 because it does not involve the use of structures, nor does it constitute work that alters or modifies the navigable capacity of the waters. Juvenile clams bury a few inches into the sediment and are essentially imperceptible, and single-set oysters lie on the bottom of the substrate without meaningfully altering the elevation of the seabed. This commenter said that the

placement and grow-out of single set clams and oysters therefore does not require approval under Section 10 of the Rivers and Harbors Act of 1899. This commenter noted that section 10 authorization is required for activities that alter the bottom elevation of waters in a manner to impact their navigable capacity, and that shellfish seeding does not alter the bottom elevation.

In the proposed rule at 85 FR 57334, the Corps stated that on-bottom bivalve shellfish mariculture activities may involve placing fill material such as shell or gravel to provide suitable substrate for bivalve shellfish larvae to attach to and grow on the bottom of the waterbody and that these activities may require section 404 authorization. The proposed rule did not state that depositing shell with spat attached to the shell is considered fill material for the purposes of NWP 48. Discharging shell without bivalve larvae (i.e., spat) into a waterbody for the purposes of enhancing benthic habitat to attract bivalve shellfish larvae may require section 404 authorization if it meets the Corps' definition of "fill material" and "discharge of fill material" at 33 CFR 323.2(e) and (f). Under 33 CFR 323.2(f), the term "discharge of fill material" means the addition of fill material into waters of the United States. The term "discharge of fill material" does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (33 CFR 323.2(f)), so shellfish seeding is not considered a "discharge of fill material." If the placement of gravel or shell on the bottom of the waterbody to enhance the substrate of the waterbody to attract shellfish larvae is not removed upon completion of the shellfish cultivation activity, it is considered a permanent fill even though it may increase the habitat value for bivalves, crustaceans, and other aquatic organisms.

A few commenters said that predator nets, and low-profile cages to protect bottom planted seeds should not be considered navigation hazards subject to

permitting requirements unless they create a vertical profile of greater than 25% of the water depth. One commenter agreed with the Corps' statements in the proposed rule that most commercial shellfish mariculture activities do not involve discharges of dredged or fill material that require Clean Water Act section 404 authorization. This commenter noted that placing living bivalve shellfish (e.g., clam seed and oyster cultch) in the intertidal zone during bottom-culture activities and their natural by-products are not pollutants, citing the Association to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007 (9th Cir. 2002). One commenter stated that the proposal accurately states that some commercial bivalve shellfish mariculture activities are regulated under section 10 because they include structures such as racks, cages, bags, lines, nets, and tubes, when those structures are placed in navigable waters. This commenter also said that dredging, excavation, and filling activities would also require section 10 authorization, although these activities are relatively rare.

The placement of predator nets and low-profile cages in navigable waters of the United States requires authorization under Section 10 of the Rivers and Harbors Act because those nets and cages are considered structures under 33 CFR 322.2(b) and may be obstructions to navigation. The Corps maintains its views that most commercial shellfish mariculture activities are regulated solely under Section 10 of the Rivers and Harbors Act of 1899, and a relatively small percentage are also regulated under Section 404 of the Clean Water Act because they involve discharges of dredged or fill material into waters of the United States. The Corps agrees that the placement of living bivalves into waters of the United States does not result in a discharge of a pollutant that requires authorization under Section 404 of the Clean Water Act.

One commenter said that bivalve shellfish harvesting activities do not bring commercial shellfish farming within the regulatory reach of Clean Water Act Section 404. In order for there to be a discharge regulated under Section 404 of the Clean Water Act, there must be an addition of a pollutant to a water of the United States, and that the harvesting commercial shellfish does not involve an "addition" for purposes of the Clean Water Act section 404. This commenter also stated that harvesting shellfish constitutes a "net withdrawal" of material from the water, not an "addition." This commenter requested that the Corps clarify in the final rule that these commercial shellfish farming activities do not involve discharges of dredged or fill material and hence do not require Clean Water Act Section 404 authorization.

The Corps does not agree that all bivalve shellfish harvesting activities do not require authorization under Section 404 of the Clean Water Act. There may be circumstances where a bivalve shellfish harvesting activity results in a regulable discharge that requires section 404 authorization. Those circumstances depend on how the harvesting activity is conducted, and whether a particular harvesting activity results in an addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. District engineers apply the definitions of "dredged material" and "discharge of dredged material" at 33 CFR 323.2(c) and (d), respectively to determine whether a discharge requiring section 404 authorization has occurred. The Corps agrees that bivalve shellfish harvesting activities do not normally involve discharges of fill material, as that term is defined at 33 CFR 323.2(f).

One commenter said that aquaculture is not exempt from CWA permitting under Section 404(f) of the Clean Water Act. This commenter said that adding gravel or shell to bags also triggers a section 404 permit requirement even if the

bags themselves do not qualify as fill material. Even for activities that do not directly result in discharge of dredge or fill material, the Corps must document secondary effects, and has the authority to impose conditions reasonably related to the purpose of section 404 permits. Another commenter stated that established shellfish farms are exempt from regulation under the Clean Water Act's farming exemption, and that the reissued NWP 48 should state that established commercial shellfish farming activities do not require CWA Section 404 permits. This commenter said that even if some shellfish farming activities include discharges of dredged or fill material, established shellfish farms are exempt from regulation under section 404(f), which exempts normal farming activities from the requirement to obtain permits under Section 402 and 404 of the Act.

Whether shellfish mariculture qualifies for a section 404(f) exemption is beyond the scope of this rulemaking. The authority for determining whether a particular activity, such as commercial shellfish mariculture activities, is eligible for the Clean Water Act Section 404(f) exemptions lies with the U.S. EPA. See the 1989 Memorandum of Agreement Between the Department of the Army and the U.S. EPA Concerning the Determination of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the Clean Water Act.

One commenter stated that advanced authorization of the broad suite of commercial shellfish mariculture activities afforded by the NWP 48 is impracticable because the blanket authorization cannot take into account important details regarding local ecological conditions at the growing site and specific information about the shellfish cultivation techniques. This commenter recommended that initial authorization should be made on a case-by-case basis and should be subject to ongoing monitoring and periodic review.

Section 404(e) of the Clean Water Act does not specify how broadly or narrowly the Corps has to identify any category of activities for the issuance of a general permit, including the NWPs. Section 404(e) only requires that the activities in that category are similar in nature. Likewise, under the Corps' definition of general permit in its section 10 regulations at 33 CFR 322.2(f), there are no standards regarding how broad or narrow the category has to be. Therefore, the Corps has substantial discretion to determine the categories of activities to be authorized by the NWPs. Nationwide permits are issued by Corps Headquarters to authorize categories of activities across the country, and there is substantial variation in aquatic resources and the functions they provide, as well as the degree to which they perform those functions. Nationwide permits require pre-construction notification for certain activities so that district engineers can assess proposed activities in the context of local ecological conditions and make a case-by-case determination as to whether proposed activities qualify for NWP authorization.

Some commenters mentioned that the scientific literature cited in the proposed rule concerned studies of eelgrass located in Washington State. These commenters stated that despite its broad distribution along the Pacific and Atlantic coasts, eelgrass is a poor choice for a model species to develop a national standard from a regional dataset. One genus should not dictate policy on an entire suite of functionally, taxonomically, and geographically distinct species. These commenters went on to say that while the individual and cumulative impacts to eelgrass meadows in Washington may be temporary, it could be irreversible in areas where environmental conditions are more impaired and submerged aquatic vegetation meadows are declining in areas such as New

England, the mid-Atlantic coast, the East coast of Florida, the Gulf of Mexico, and California.

For the 2020 Proposal, the Corps considered scientific literature in coastal ecosystems located nationwide. The Corps also discussed submerged aquatic vegetation in general terms, and only made specific references to eelgrass when a particular study examined eelgrass. After the reissuance of NWP 48 in 2017, the Corps reviewed a broader range of scientific literature on the interactions between commercial bivalve shellfish mariculture activities and submerged aquatic vegetation, and found that while some permanent impacts to submerged aquatic vegetation may occur, the impacts are often temporary and submerged aquatic vegetation co-exists with bivalve mariculture activities. The Corps examined scientific literature from studies that occurred in other areas of the United States (e.g., Chesapeake Bay), not just Washington State.

One commenter recommended that the Corps require mitigation for impacts to submerged aquatic vegetation at a ratio of at least 1.2:1 (mitigation area to impact area). One commenter said that when the functional value of eelgrass and shellfish are combined, and the seascape matrix of habitats are considered, it is possible that a broader ecosystem perspective would find benefits from the presence of aquaculture. This commenter also stated that commercial shellfish farming activities have minimal negative to beneficial impacts on eelgrass and supports the Corps' proposal to reissue NWP 48. One commenter remarked that interactions between seagrasses and shellfish mariculture must separately be addressed during Endangered Species Act and Essential Fish Habitat consultations for authorizations for shellfish farming activities in Washington State.

Compensatory mitigation requirements for activities authorized by the NWPs are more appropriately determined by district engineers on a case-by-case basis after reviewing PCNs. If the district engineer reviews a PCN and determines the proposed activity will result in more than minimal adverse environmental effects, he or she will notify the applicant and provide an opportunity to the applicant to submit a mitigation proposal (see 33 CFR 330.1(e)(3)). If, after reviewing the mitigation proposal, the district engineer determines the adverse environmental effects of the proposed activity will be no more than minimal, she or he will issue an NWP verification with permit conditions that require implementation of the mitigation. The Corps acknowledges that, when viewed from a seascape perspective, a district engineer may determine that the proposed shellfish mariculture will provide ecological benefits that should be factored in the district engineer's decision regarding whether the proposed activity will result in no more than minimal adverse environmental effects. If the district engineer reviews a PCN for a proposed NWP 48 activity and determines the proposed activity may affect listed species or designated critical habitat, he or she will conduct ESA section 7 consultation with the U.S. FWS and/or NMFS and that section 7 consultation may address potential impacts to seagrasses. If the district engineer reviews a PCN for a proposed NWP 48 activity and determines the proposed activity may adversely affect essential fish habitat, he or she will conduct essential fish habitat consultation with the NMFS and the NMFS may provide the district engineer with essential fish habitat conservation recommendations that may address potential impacts to seagrasses.

Several commenters stated while shellfish mariculture can provide ecosystem services, some of which are similar to seagrasses and other benthic

communities, there is no meaningful effort to discuss the numerous studies regarding impacts of a variety of aquaculture practices on submerged aquatic vegetation. Allowing commercial shellfish activities in new areas that have extensive beds of submerged aquatic vegetation could impact critical habitat for ESA-listed species. A couple commenters stated that tribes in the Puget Sound region have a unique interest in assuring that both salmon and shellfish are allowed to flourish. Consultation between Corps districts, tribes, federal, and state agencies are the appropriate entities to determine how best to protect submerged aquatic vegetation. A couple of commenters said that submerged aquatic vegetation is a critical resource requiring protection and removal of that protection from NWP 48 could create conflicts with other federal or state agencies such as NOAA Fisheries. These commenters asserted that some states, recognizing the need to protect these high-quality habitats have prohibited the siting of new mariculture leases in areas where surveys indicate the presence submerged aquatic vegetation in any one of the past five years.

In the 2020 proposal and the draft decision document for NWP 48, the Corps provided a substantial discussion of the positive and negative impacts that commercial shellfish mariculture activities may have on seagrasses and other benthic organisms. Some of these impacts may be a result of activities under the Corps' legal authorities; however, bivalve shellfish mariculture activities may have impacts that are beyond the scope of the Corps' legal authorities. Under general condition 18, non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat (or species proposed for listing) might be affected or is in the vicinity of the activity, or if the activity is located in designated or proposed 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 (see paragraph (c) of general condition 18, endangered species). During the rulemaking process, district engineers have conducted consultation or coordination with tribes to identify regional conditions or coordination procedures that could be used to protect tribal trust resources and comply with general condition 17. Other federal agencies, as well as states, can develop regulations and policies to protect submerged aquatic vegetation under their authorities.

A couple of commenters stated that the Corps thinks it is important to protect submerged aquatic vegetation in other contexts, but not under NWP 48. These commenters said that the Clean Water Act regulations provide for protection of special aquatic sites, which include “vegetated shallows” and that submerged aquatic vegetation beds are considered vegetated shallows. One commenter said that while the Corps states that all activities and structures must avoid submerged aquatic vegetation, but it doesn’t apply that principle to commercial shellfish mariculture activities.

While the Clean Water Act Section 404(b)(1) Guidelines provide a greater degree of protection to vegetated shallows (submersed aquatic vegetation) as special aquatic sites compared to aquatic resources that are not special aquatic sites, the Guidelines do not prohibit discharges of dredged or fill material into vegetated shallows (i.e., submerged aquatic vegetation beds). The 404(b)(1) Guidelines only apply to discharges of dredged or fill material. They do not apply to activities authorized under Section 10 of the Rivers and Harbors Act of 1899.

One commenter stated that submerged aquatic vegetation beds provide numerous ecosystem services including improving water quality, providing nursery habitat for commercial and recreationally significant fish and invertebrates, buffering shorelines from erosion, and sequestering carbon.

Because of these additional functions performed by submerged aquatic vegetation, this commenter said that bivalve shellfish mariculture cages do not do any of these things and cannot be considered functionally equivalent habitat to submerged aquatic vegetation.

As discussed in the 2020 Proposal and the national decision document for NWP 48, it is the bivalves that perform a number of the same ecological functions as submerged aquatic vegetation, not the structures in which these bivalves are grown. However, commercial shellfish mariculture structures do provide structural habitat for a wide variety of aquatic organisms, including substrate for organisms to attach to, and some aquatic organisms feed on the attached organisms. Structures used for commercial shellfish mariculture activities can slow the movement of water, and help reduce erosion of nearby shorelines. These impacts would be considered during the review of a PCN for a new or existing shellfish mariculture activity.

One commenter noted that the argument that shellfish aquaculture activities only temporarily impact submerged aquatic vegetation is not accurate because leases issued for shellfish aquaculture vary in duration but are generally 5-20 years to ensure any investment in the enterprise is worthwhile. This commenter said that the word “temporary” is a highly relative and generally misleading descriptor.

It is not the duration of the lease for shellfish mariculture activities that determines whether commercial shellfish mariculture activities have temporary impacts on submerged aquatic vegetation. Commercial shellfish mariculture operators might not cultivate bivalve shellfish continuously during the period the lease is in effect. The operator may let some areas within a leased area to go fallow for a period of time, to reduce adverse effects to the benthic community.

The Corps agrees that the term “temporary” is a relative term, but disagrees that it is misleading. What constitutes a temporary impact depends in part on how much time it takes an organism or an ecosystem to recover from a disturbance, and how resilient and resistant the species or ecosystems are to disturbances. Coastal waters are highly dynamic environments subjected to periodic disturbances, both natural and man-made.

Several commenters concurred with the Corps’ view that commercial shellfish mariculture activities typically only has temporary impacts on submerged aquatic vegetation and these plants can sustain a healthy coexistence. A few commenters noted that mechanical harvesting has been found to not negatively impact native eelgrass and may even enhance it. One commenter stated that the positive ecosystem services (e.g., better water quality, habitat creation, and ecosystem studies) provided by bivalve shellfish mariculture activities outweigh the temporary nature of any perceived negative impacts. The habitat created by shellfish aquaculture increases species richness and diversity of both benthic and epibenthic organisms. This three-dimensional habitat is utilized by many commercially valuable species, such as Dungeness crab and flatfishes. The Corps acknowledges these comments. These beneficial effects have informed the Corps’ decision to reissue NWP 48 as discussed because it will have no more than a minimal individual or cumulative adverse environmental effects.

One commenter noted that farming methods such as bottom culture propagation tends to focus on the cultivation of larger older shellfish with large time intervals between harvests, which results in short term impacts at harvest with long periods for recovery and result in no permanent losses of submerged aquatic vegetation. This commenter said that the persistence of eelgrass along the coast demonstrates that shellfish mariculture and eelgrass can coexist and

have for over a century. Furthermore, commercial shellfish mariculture operators have long understood the best way to propagate eelgrass is to plant oysters, which creates optimal habitat allowing eelgrass to expand due to decreased current over the tide flats. This commenter also said that the bivalve shellfish, as filter feeders, remove large amounts of waterborne nutrients resulting in cleaner water which facilitates photosynthesis, expanding habitable ranges of eelgrass. The Corps acknowledges these comments. These beneficial effects have informed the Corps' decision to reissue NWP 48 as discussed because it will have no more than a minimal individual or cumulative adverse environmental effects.

Several commenters recommended revising the definition of mechanical harvest so that they are not classified as "dredge or fill" activities because it is too broad and lumps many methods together and lacks clarity. These commenters said that mechanical harvesting by dragging a metal basket along the tide flats to gently tumble harvestable oysters does not result in a discharge of dredge or fill material and should be exempt from section 404 jurisdiction. Furthermore, these commenters said that these activities do not create ditches, channels, or substantially redeposit excavated soil material and none of the harvest tools are designed to remove large quantities of material to improve the navigability of waters. These commenters said that the sediment that may be disturbed during harvest should be considered as incidental fallback under 33 CFR §323.2(d)(1).

Mechanical harvesting activities generally do not result in discharges of fill material, as that term is defined at 33 CFR 323.2(f). However, mechanical harvesting activities may result in discharges of dredged material, depending on how they are conducted. The term "discharge of dredged material" is defined at 33 CFR 323.2(d) to include the "addition of dredged material into, including

redeposit of dredged material other than incidental fallback within, the waters of the United States." Some mechanical harvesting activities may result in incidental fallback and not require section 404 authorization while other mechanical harvesting activities may result in additions of dredged material into waters of the United States that are not incidental fallback, and therefore require section 404 authorization. Mechanical and hydraulic harvesting activities that redeposit sediment in a different area of the bottom of the waterbody that the area from which the sediment was removed is considered a "discharge of dredged material" and therefore requires section 404 authorization. These discharges of dredged material into waters of the United States are authorized by NWP 48.

A commenter noted that in the statement "mechanical harvesting can include grading, tilling, and dredging the substrate of the waterbody" that the term "grading" does not describe shellfish culture methods. A couple of commenters suggested that shellfish mariculture harvest activities should be regulated like wild-harvest shellfisheries (e.g., as they are regulated in NWP 4). This commenter said that both wild and cultured shellfish are state-managed resources, with the exception of many tidelands in Washington, and should not require additional oversight and regulation by federal authorities. This commenter also stated that harvesting activities do not involve structures and do not impact navigation in a way that should trigger regulation under the Section 10 of the Rivers and Harbors Act of 1899.

Mechanical harvesting activities may move sediment in a waterbody in a manner that is not considered incidental fallback. These activities would require section 404 authorization under the Corps' definition of "discharge of dredged material." Nationwide permit 4 authorizes discharges of dredged or fill material associated with fish and wildlife harvesting, enhancement, and attraction devices

and activities, including clam and oyster digging. The Corps has jurisdictional authority in Washington State for activities regulated under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. Mechanical harvesting activities generally meet the definition of “work” at 33 CFR 322.2(c) for the purposes of Section 10 of the Rivers and Harbors Act of 1899, and are authorized by NWP 48.

One commenter requested that the Corps add a statement in the final rule that acknowledges that the accumulation of sediment around shellfish farming gear may be considered beneficial in certain environments, as well as provision of year-round durable, structured three-dimensional habitat. The Corps declines to add the requested statement because the potential benefits would need to be determined on a case-by-case basis, and the durability of those sediment accumulations is influenced because water movements that could cause that sediment to be re-suspended in the water column.

One commenter said that the Corps must comply with ESA Section 7 and the Magnuson-Stevens Act prior to issuing NWP 48. A few commenters stated that in all areas where submerged aquatic vegetation exists, it is designated essential fish habitat under the Magnuson-Stevens Fishery Conservation and Management Act. These commenters said that removal of the 1/2-acre limit for direct impacts to submerged aquatic vegetation fails to acknowledge submerged aquatic vegetation as essential fish habitat and the need for consultation with NMFS for activities that may adversely affect essential fish habitat. These commenters asserted that the Corps must consult on a nationwide programmatic basis because essential fish habitat is adversely affected by shellfish mariculture activities.

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. If a district engineer determines a proposed NWP 48 activity may adversely affect essential fish habitat, he or she will conduct EFH consultation with NMFS. Where there is a requirement to consult on EFH, consideration of direct impacts to submerged aquatic vegetation caused by new and existing commercial shellfish mariculture activities would occur regardless of the PCN threshold of 1/2-acre. In response to an EFH assessment prepared by the Corps, the NMFS may provide EFH conservation recommendations to address potential impacts to submerged aquatic vegetation. As discussed in Section III.D of this final rule, the Corps has prepared a biological assessment for this rulemaking activity and determined that the issuance of the NWPs has no effect on listed threatened and endangered species and designated critical habitat, as well as species proposed for listing and proposed designated critical habitat.

One commenter stated that significant changes to NWP 48 are not appropriate until the national decision document is finalized and deemed sufficient. This commenter said the draft decision document fails to satisfy the requirements of the National Environmental Policy Act and the Clean Water Act, and that it fails to properly acknowledge the impacts of mariculture on benthic

habitat, fish communities, birds, water quality and substrate characteristics. Several commenters stated that the proposed revisions to the national decision document for NWP 48 do not fairly represent the conclusions of authors of the cited literature, in some cases omitting relevant information and in others misrepresenting study results and conclusions.

The purpose of the national decision document is to provide information for the decision on whether to reissue NWP 48. The national decision document discusses the positive and negative impacts of commercial shellfish mariculture activities on benthic habitat, fish communities, birds, water quality and substrate characteristics. The Corps has considered this information and determined that NWP 48 will not have more than a minimal individual or cumulative adverse environmental effects.

One commenter said that the Corps describes no studies in its decision document to verify its claim that commercially-raised shellfish help improve water quality. One commenter noted that the Corps acknowledges throughout the environmental consequences, public interest, and 404(b)(1) Guidelines Analysis, some negative impacts, but then fails to assess them and instead focuses only on positive impacts. This commenter said that the impacts from mechanical and hydraulic dredging are barely mentioned, with no assessment of their harmful impacts to the same degree as the supposed benefits from shellfish aquaculture.

The Corps discusses, in numerous places, the water quality benefits of filter-feeding bivalves that are cultivated by commercial shellfish mariculture activities. The Corps acknowledges that commercial shellfish mariculture activities cause adverse and beneficial environmental effects. Throughout the draft and final national decision documents, the Corps discusses the negative and positive effects of harvesting activities.

One commenter identified errors in projected use and acreage impacted over the 5-year period NWP 48 is anticipated to be in effect. This commenter notes that the draft NWP 48 decision document states that the Corps estimates this permit will be used approximately 336 times per year on a national basis, resulting in impacts to approximately 13,360 acres of waters of the United States. It then states the Corps estimates that approximately 1,680 activities could be authorized over a five-year period until the NWP expires, resulting in impacts to approximately 40,080 acres. While 1,680 is five times the annual use figure (336), five times the annual acreage figure (13,360) is 66,800. One commenter requested that the Corps provide documentation on the number of permit request over the last 10 years that exceeded the 1/2-acre limit, and of those activities, how many ultimately received a permit through regional or individual permit process, and what conditions were applied to those applications. One commenter stated that the Corps claims to have no duty to use any quantitative data, but has issued NWP 48 since 2007 and should be able after all these years to provide some quantitative data about loss of seagrasses, natural habitats, etc. One commenter recommended that the Corps pursue a quantitative analysis of the environmental effects of shellfish mariculture for habitat alterations, climate change, invasive species, overharvesting and exploitation, and pollution.

Nationwide permit 48 authorizes structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for both existing (on-going) and new commercial shellfish mariculture activities. Many of the activities authorized by NWP 48 are on-going activities that require reauthorization each time the current NWP 48 expires and is replaced by a reissued NWP 48. Nationwide permits can be issued for period of no more than 5 years (see Section 404(e) of the Clean Water Act). The

acreage of projected impacts in the national decision document for NWP 48 includes many on-going commercial shellfish mariculture activities, many of which have been in operation for decades. These on-going commercial shellfish mariculture activities have been part of the current environmental setting for years, and it is the current environmental baseline against which the degree of severity of adverse environmental effects is assessed to determine eligibility for NWP authorization (i.e., whether the individual and cumulative adverse environmental effects caused by commercial shellfish mariculture activities during the 5-year period the NWP is in effect are no more than minimal).

The Corps has revised the national decision document to correct the errors in its estimates of potential use of this NWP and authorized impacts. However, it should be noted that these are estimates of projected use over the 5-year period the NWP is anticipated to be in effect. With respect to the removal of the 1/2-acre limit for direct impacts to submerged aquatic vegetation caused by new commercial shellfish mariculture activities, the Corps is only required to provide an estimate of the number of activities that might occur during the period this NWP is in effect. It is not necessary to provide data on how many commercial shellfish mariculture activities were authorized by regional general permits or individual permits.

The Council on Environmental Quality's NEPA regulations at 40 CFR parts 1500-1508 do not require quantitative analyses of potential environmental impacts. With respect to the 404(b)(1) Guidelines, 40 CFR 230.7(b)(3) requires cumulative effects to be analyzed by estimating the number of discharges expected to occur under the NWP while it is in effect. The environmental impacts of authorized activities during the period the NWP is in effect is dependent on the current environmental settings in which these activities will occur, and

quantitative data on those current environmental settings is not available. It should also be noted that context is important, because these activities are occurring in coastal waters that have been altered by human activities and natural processes for thousands of years, and continue to be impacted by coastal watershed land use, point source pollution, non-point source pollution, fishing activities, recreation, and other disturbances, not just commercial shellfish mariculture activities.

Several commenters stated it is unclear how mitigation can both be unnecessary and something the Corps is relying on to avoid cumulative impacts. Further, several commenters stated that the Corps relies heavily on mitigation at a district level, but fails to actually describe the possible effects (direct, indirect and cumulative) from shellfish aquaculture activities or how these unknown mitigation measures will actually avoid more than minimal adverse impacts. Any individual mitigation measures will only be attached if a permittee is required to submit a pre-construction notification, which will likely be few and far between.

For commercial shellfish mariculture activities, the Corps generally does not require compensatory mitigation because these activities do not cause losses of waters of the United States. Paragraph (a) of general condition 23 requires permittees to design their projects to avoid and minimize adverse effects, both temporary and permanent, to waters of the United State to the maximum extent practicable on the project site. Many of the NWP general conditions consist of mitigation measures to avoid and minimize impacts. When determining whether to require mitigation to ensure that a particular NWP activity results in no more than minimal individual and cumulative adverse environmental effects, the district engineer will consider the direct, indirect, and cumulative effects, as required by paragraph 2 of Section D, District Engineer’s Decision. If the district engineer

requires mitigation for an NWP activity, he or she will add conditions to the NWP authorization (see 33 CFR 330.1(e)(3)) that are directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable (see 33 CFR 325.4(a)).

One commenter stated that the Corps said that “standard and best management practices” can reduce impacts but fails to explain what these are and how they will mitigate impacts. One commenter said that the Corps claims commercially-reared bivalves improve water quality but fails to assess water quality impacts by deferring to district engineers and water quality certifications under Clean Water Act section 401, but impacts to water quality must be assessed before granting NWPs. One commenter said that the Corps fails to discuss the context and intensity factors that might indicate that this proposed NWP will have a “significant impact to the human environment” and thus requires an environmental impact statement.

As stated in the 2020 Proposal, species-specific or regional standards and best management practices for commercial shellfish mariculture activities may be appropriate as regional conditions approved by division engineers (see 85 FR 57331). In the national decision document, the Corps has discussed potential impacts to water quality as well as potential benefits to water quality that may result from commercial shellfish mariculture activities. In addition, the Corps has explained that cultivated bivalves are not considered a pollutant under the Clean Water Act. After considering the information in the national decision document for this NWP, including the potential benefits and detriments caused by commercial shellfish mariculture activities, there is no evidence that these activities cause a significant impact to the human environmental and thus no environmental impact statement is required.

One commenter stated the alternatives analysis is inadequate. The commenter asserts that the Corps lists the “no action” alternative but barely analyzes it, strangely concluding that it would somehow have more substantial adverse environmental consequences. The “national modification” alternative is not an alternative, but the proposed NWP 48 and the “regional modification” is also not an alternative because it includes no conditions or changes from the proposed NWP 48.

The national decision document discusses alternatives. In the Council on Environmental Quality’s NEPA regulations that were published in the Federal Register on July 16, 2020, the preamble to the final rule at 85 FR 43323 states that an agency does not need to include a detailed discussion of each alternative in an environmental assessment. In the national decision document, the Corps briefly discussed the environmental consequences of each alternative.

One commenter said that the Corps should impose monitoring requirements that would ensure that NWP terms and conditions, including those resulting from subsequent exercises in discretionary authority, would be adequately policed. In response, Corps districts can conduct compliance inspections for authorized activities, to ensure that those activities are conducted in accordance with any conditions added to the NWP authorization. The Corps district will take appropriate actions to address non-compliance with permit conditions.

Several commenters approved of the reiteration and clarification that the discharge of pesticides is regulated under Section 402 of the CWA and not Section 404. They suggested that the final rule clearly state that operators may be permitted to use pesticides to control agricultural pests and predators instead of just predators. One commenter said that the statement regarding commercial

shellfish mariculture operations using chemicals to control fouling organisms is incorrect because chemical use or the potential introduction of toxic materials is regulated by the Interstate Shellfish Sanitation Conference. One commenter said that commercial shellfish mariculture operators may use herbicides to control invasive, noxious weeds on commercial clam beds.

The Corps does not have the authority to control the use of pesticides, herbicides, and antifouling agents in commercial shellfish mariculture activities. Use of some of these chemicals may be regulated under other federal or state laws and regulations administered by other agencies.

One commenter said that while gear sometimes escapes from commercial shellfish farms despite growers' best efforts to ensure it remains secured, shellfish farmers do not discard equipment into the marine environment. This commenter requested that the Corps revise the national decision document to make it clear that growers are not discarding equipment, but equipment may wash away from the project site or move by other mechanisms. This commenter also said that NWP general condition 6 addresses the use of trash in the NWP program. One commenter said that the use of plastics gear for commercial shellfish mariculture activities adds plastic pollution to the ocean and beaches through plastic debris and this plastic can break down further into microplastics, which can impact wildlife, aesthetics, and food safety.

The Corps has revised the national decision document to clarify that some materials used for commercial shellfish mariculture activities may wash away from the project area. General condition 6 does not address trash or garbage that may be associated with commercial shellfish mariculture activities. General condition 6 prohibits the use of trash as fill material. Trash and garbage are not

considered fill material for the purposes of section 404 of the Clean Water Act (see 33 CFR 323.2(e)(3)).

This NWP is reissued with the modifications discussed above.

(10) NWP 50. Underground Coal Mining Activities.

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed, which is discussed above in Section II.F. The responses to comments on the proposal to remove the 300 linear foot limit are provided in Section II.F. In addition, the Corps proposed to the reference to integrated permit processing procedures and the requirement for written verification from the Corps before proceeding with the authorized activities.

Many commenters stated they are opposed to the default authorization if the Corps does not respond to the PCN submittal within 45 days. Numerous commenters said they support the automatic authorization if the Corps project manager does not respond to the complete PCN within 45 days. One commenter objected to the removal of PCN requirements. A few commenters said that in order to further expedite permitting for mining project, no PCN should be required for activities authorized by this NWP.

The Corps removed the requirement for the permittee to obtain written authorization before commencing the activity to be consistent with the other NWPs that have a 1/2-acre limit for discharges of dredged or fill material into non-tidal waters of the United States (e.g., NWPs 29, 39, 40, 42, 43, 44, 51, and 52). The Corps did not propose to remove any PCN requirements from this NWP. All activities authorized by this NWP require PCNs. The Corps is retaining the PCN requirements for this NWP to provide activity-specific review by district engineers to ensure that the activities authorized by this NWP result in no more than minimal individual and cumulative adverse environmental effects.

A few commenters said that the applicability of this NWP would be reduced if the applicant must now include coal preparation and processing activities outside of the underground mine site as a single and complete project under NWP 50. One commenter stated the Corps provided no justification for the deletion of the Note regarding the use of NWP 21, coupled with NWP 50, for coal preparation and processing activities outside of the underground mine. One commenter expressed support for the removal of the integrated permitting process language. One commenter stated that NWP should state that the project proponent cannot begin the authorized activity until the activity is formally approved by the Department of Interior's Office of Surface Mining or the state. Several commenters asserted the NWP 50 should be revoked because the effects of coal mining are significant to the environment and should be evaluated under an individual permit.

Even if the Note were not removed, single and complete underground coal mining activities with coal preparation and processing activities outside the underground mine site are subject to general condition 28, use of multiple NWPs. If NWP 50 and 21 are combined to authorize a single and complete project, the activity would be subject to the 1/2-acre limit. The Corps removed the language referencing integrated permit processing procedures, since those procedures have never been developed for this NWP since that text was added to the NWP in 2007 (see 72 FR 11184).

Project proponents may be required to obtain separate authorizations from the Department of Interior's Office of Surface mining or the state, but those authorizations are a separate process from the Corps' NWP authorization process. Authorization by an NWP does not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law. (See

item 2 in Section E, Further Information.) Division engineers can add regional conditions to this NWP to restrict or prohibit discharges of dredged or fill material into certain wetland types if those discharges are likely to result in more than minimal individual and cumulative adverse environmental effects. District engineers can also exercise discretionary authority to modify, suspend, or revoke an NWP after reviewing the PCN, to ensure that the NWP authorizes only those activities that result in no more than minimal individual and cumulative adverse environmental effects.

This NWP is reissued as proposed.

(11) NWP 51. Land-Based Renewable Energy Generation Facilities.

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed, which is discussed above in Section II.F. The responses to comments on the proposal to remove the 300 linear foot limit are provided in Section II.F.

One commenter expressed support for the PCN threshold for losses of greater than 1/10th-acre of waters of the United States and does not support requiring PCNs for all activities authorized by this NWP. One commenter said that these activities should be prohibited from channel migration zones and floodplains because they are likely to directly or indirectly affect critical habitat, essential fish habitat, and habitats occupied by listed species. This commenter stated that structures built in these zones are at heightened risk to flooding and future flood dynamics associated with climate change. This commenter also said that any impacts over 1/10-acre should require mitigation.

The Corps did not propose to change the 1/10-acre PCN threshold for this NWP that was adopted in the 2017 NWP 51. Activities authorized by this NWP must comply with general condition 10, fills in 100-year floodplains. If the district

engineer determines a proposed activity may adversely affect essential fish habitat, he or she will conduct essential fish habitat consultation with NMFS. If the district engineer determines the proposed activity may affect listed species or designated critical habitat, she or he will conduct ESA section 7 consultation with the U.S. FWS and/or NMFS. In accordance with general condition 23 and 33 CFR 330.1(e)(3), district engineers determine on a case-by-case basis whether specific activities authorized by this NWP should require compensatory mitigation or other forms of mitigation to ensure the authorized activities result in no more than minimal individual and cumulative adverse environmental effects.

One commenter recommended adding roads constructed to develop, maintain, and repair land-based renewable generation facilities to Note 1. One commenter stated that the NWP 51 makes reference to a distribution system as utility lines constructed to transfer the energy produced by a land-based renewable energy generation facility, but elsewhere in the proposed rule it refers to electrical lines as “transmission lines” which is an undefined term. Two commenters suggested revising Note 2 to state that NWPs C and 14 may be used to provide DA authorization for the construction, maintenance, repair, and removal or utility lines and/or road crossings. This commenter also said that the Corps should clarify that the applicant can specify which NWP it wants to use for utility lines and/or road crossings.

Note 1 only addresses electric utility lines used to transfer the electrical energy generated by these facilities to a distribution system, regional grid, or other facility. Transmission lines are part of electrical energy distribution systems to move the electricity from generation facilities to end users. Note 1 has been modified to specifically refer to electric utility lines because these land-based renewable energy generation facilities generate electrical energy. The Corps has

revised Note 1 to reference NWP 57, which authorizes electric utility line and telecommunications activities. Activities authorized by NWP 51 are non-linear projects, while electric utility lines used to transport the generated electrical energy to end users and others are linear projects that are more appropriately authorized by NWP 57. Roads that extend to and from the land-based renewable energy generation facility are also linear projects, and crossings of waters of the United States for these roads are more appropriately authorized by NWP 14.

This NWP is reissued with the modifications discussed above.

(12) NWP 52. Water-Based Renewable Energy Generation Pilot Projects.

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed, which is discussed above in Section II.F. The responses to comments on the proposal to remove the 300 linear foot limit are provided in Section II.F.

Many commenters said that the Corps should modify NWP 52 so that it is not limited to pilot projects, because this restriction limits project proponent's ability to utilize the NWP to facilitate the development of off-shore wind generation projects. These commenters said that the impacts are the same regardless of whether a water-based renewable energy generation project is a pilot project or a full-scale development project, and that the adverse environmental effects caused by these activities will be no more than minimal. A couple of commenters noted that as off-shore wind energy generation continues to grow it will become more crucial that these projects are able to obtain Corps authorization in a timely and efficient manner. A couple of commenters said that these projects should require individual permits and should not be authorized by an NWP.

The Corps believes that the construction of permanent water-based renewable energy generation facilities should be authorized by individual permits instead of an NWP because of the potential for permanent activities to result in more than minimal adverse environmental effects. District engineers can develop regional general permits to authorized permanent water-based renewable energy generation facilities.

One commenter stated that the 1/2-acre limit and the requirement for PCNs for all proposed activities should be retained. One commenter recommended changing the PCN threshold to require PCNs for losses of greater than 1/10-acre of waters of the United States. A couple of commenters said that Note 1 should be revised to reflect authorization of transmission lines by NWP C rather than NWP 12.

The Corps is retaining the 1/2-acre limit and the requirement that all authorized activities require PCNs. The Corps has revised Note 1 to reference electric utility lines and NWP 57, which authorizes electric utility line and telecommunications activities.

Several commenters stated that these activities should not be authorized western Washington State without tribal consent in areas with tribal treaty fishing rights. These commenters said that allowing floating solar panels up to 1/2-acre in size in navigable waters adds additional obstructions to tribal fisherman trying to exercise their fishing rights. One commenter stated that floating solar panels, if installed, need proper monitoring requirements with the ability to have the projects removed if the injuries to fish reach a certain threshold. One commenter said that pilot projects for experimental purposes should include a requirement for robust information gathering to inform decision makers of ecological impacts of these energy generating structures.

Division engineers can add regional conditions to this NWP to help ensure compliance with general condition 17, tribal rights. During this rulemaking process, Corps districts have been consulting and coordinating with tribes to identify regional conditions and coordination procedures to help ensure compliance with general condition 17. The Corps disagrees with imposing long-term information gathering requirements to monitor the ecological impacts that might be caused by these activities. The information in PCNs should be sufficient for district engineers to determine whether the adverse environmental effects caused by the authorized activities are no more than minimal.

This NWP is reissued with the modifications discussed above.

(13) NWP 55. Seaweed Mariculture Activities.

The Corps proposed this new NWP as NWP A, to authorize structures in navigable waters of the United States, including federal waters over the outer continental shelf, for seaweed mariculture activities. In the first sentence of this NWP, the Corps added “and estuarine” to make this NWP consistent with proposed new NWP B for finfish mariculture activities with respect to the waters in which these two NWPs may be used to authorize activities under Section 10 of the Rivers and Harbors Act of 1899. The omission of “and estuarine” in the proposed NWP A was a drafting error.

The Corps removed the phrase “and work” from this NWP because this NWP only authorizes structures, and this NWP does not authorize any of the operational aspects of seaweed mariculture activities. The operation of a seaweed mariculture facility does not constitute “work” as that term is defined at 33 CFR 322.2(c) for the purposes of Section 10 of the Rivers and Harbors Act of 1899. Section 322.2(c) defines “work” as “any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the

United States." After the seaweed mariculture structure is installed, subsequent operations to produce seaweed do not physically modify navigable waters of the United States in a manner that would be considered "work" under the Act

Several commenters expressed support for the issuance of new NWP A. One commenter suggested combining NWPs 48 and A into one NWP instead of issuing separate NWPs. One commenter said that issuing NWP A would reduce barriers to entry for seaweed mariculture activities. Another commenter supported the issuance of NWP A because kelp and seaweed are winter crops. and would help provide year-round revenue sources for coastal commercial communities. A few commenters expressed support for NWP A because growth of marine plants improves water quality and provides ecosystem services.

The Corps is keeping NWPs 48 and proposed new NWP A separate because NWP 48 activities occur primarily in nearshore waters and NWP A can be used to authorize activities in both nearshore waters and federal waters on the outer continental shelf. The Corps acknowledges the economic benefits of providing an NWP to authorize seaweed mariculture activities that result in no more than minimal adverse environmental effects, as well as the ecological benefits that may be provided by the cultivated seaweeds, such as water quality benefits through the assimilation of nutrients and habitat benefits for some aquatic species.

Several commenters said they support the inclusion of multi-trophic species production in NWP A. One commenter supported including multi-trophic species production as long as it is voluntary and not a requirement of the NWP. One commenter said that multi-trophic activities should not be authorized under an NWP until an industry standard has been established. A few commenters stated multi-trophic activities should be authorized under by individual permits to

provide an appropriate level of environmental review. One commenter said PCNs including that multi-trophic activities should be coordinated with states. A few commenters asserted that the text of NWP A should clarify that multi-trophic activities do not include finfish cultivation. One commenter stated that multi-trophic species mariculture could attract protected species and result in greater risk of entanglement. A few commenters said that the NWPs are appropriate only for activities with more predictable outcomes and should not be used for experimental industries.

The Corps has retained multi-tropic mariculture activities in this NWP, to provide authorization for mariculturists that want to grow seaweeds and bivalves on the same structures. Conducting multi-tropic mariculture activities is optional, and a grower can choose to only cultivate seaweeds. District engineers will review PCNs for proposed NWP A activities to ensure that those activities will result in no more than minimal individual and cumulative adverse environmental effects. If the district engineer reviews a PCN and determines that the adverse environmental effects will be more than minimal after considering any mitigation proposed by the applicant, he or she will exercise discretionary authority and require an individual permit. The Corps does not believe it is necessary to require coordination of proposed multi-tropic mariculture activities with states, but district engineers can informally coordinate PCNs with states if they believe it is appropriate to do so. If a mariculturist wants to grow finfish as part of a multi-trophic mariculture operation, she or he should use NWP B (which, as discussed below, is issued in this final rule as NWP 56), which authorizes multi-trophic mariculture activities involving finfish, seaweeds, and/or bivalves. There may be some risk of entanglement or other forms of adverse impact in lines used for seaweed mariculture activities, and that risk will be evaluated by district

engineers during the PCN review process. If the risk of entanglement applies to ESA-listed species, the district engineer will conduct ESA section 7 consultation with the U.S. FWS and/or NMFS as appropriate. Multi-trophic mariculture activities have been conducted for a number of years in other countries (Largo et al. 2016, Troell et al. 2009).

Several commenters said NWP A should not be issued because these activities will result in more than minimal individual or cumulative adverse environmental effects. Several commenters stated NWP A should not be issued because the long-term cumulative impacts are unknown. Many commenters expressed concern with the issuance of an NWP authorizing seaweed mariculture activities because of the relative unknown impacts and risks associated with these activities. One commenter said that the social, economic, and environmental impacts from seaweed mariculture are unknown. One commenter said that the cumulative impact from the varying scale of aquaculture systems cannot sufficiently be addressed under an NWP. Many commenters stated that there is not sufficient information available to inform whether NWP A would cause no more than minimal impacts. A few commenters said that the Corps has not demonstrated that NWP A complies with the Clean Water Act Section 404(b)(1) guidelines.

The Corps has issued this NWP after considering information on its relatively small, if not beneficial, impact on marine ecosystems and including mechanisms (e.g., PCNs required for all proposed activities) to ensure that it authorizes only those seaweed mariculture activities that result in minimal individual and cumulative adverse environmental effects. In response to a PCN, district engineers will apply the 10 criteria listed in paragraph 2 of Section D, District Engineer’s Decision to determine whether the proposed activity can be

authorized by NWP 55, with or without additional permit conditions. Division engineers may modify, suspend, or revoke this NWP on a regional basis in accordance with the procedures at 33 CFR 330.5(c). The Clean Water Act Section 404(b)(1) Guidelines do not apply to activities authorized by this NWP because it only authorizes structures or work in navigable waters of the United States under Section 10 of the Rivers and Harbors Act of 1899. It does not authorize activities under Section 404 of the Clean Water Act.

Several commenters said that NWP A would impact tribal rights and treaty protected fishing grounds. One commenter requested additional information and formal government-to-government consultation on proposed new NWP A. One commenter objected to the issuance of NWP A because it does not include required mitigation measures. One commenter stated that mitigation measures should be considered for ESA-listed species and tribal cultural and fishing issues. One commenter suggested adding minimization measures to NWP A that are currently in place in states that are already practicing seaweed mariculture operations.

Activities authorized by NWP A must comply with general condition 17, tribal rights. During the rulemaking process for the issuance of this NWP, district engineers have been conducting consultation and coordination with tribes to identify regional conditions and coordination procedures to facilitate compliance with general condition 17. In response to a PCN, a district engineer can require mitigation measures to help ensure that the authorized activity results in only minimal individual and cumulative adverse environmental effects. During the development of this NWP, the Corps did not identify any mitigation measures that should be added to this NWP, other than the general conditions that apply to all NWPs. Mitigation measures for ESA-listed species are more appropriately

identified during the ESA section 7 consultation process. If states have developed mitigation measures for seaweed mariculture activities, division engineers can consider adding those mitigation measures as regional conditions to this NWP.

Several commenters said that NWP A should include a PCN requirement. One commenter expressed support for requiring PCNs for new seaweed mariculture operations. One commenter said that PCNs should not be required if existing permitted bivalve shellfish farms want to add seaweed into their operations. One commenter stated that the U.S. Coast Guard be notified before issuing an NWP A verification. One commenter recommended requiring the PCN to include information identifying the proposed location of operations to review competing stakeholder uses. One commenter said that all PCNs for these activities must identify all gear specifications, production duration, stocking and harvesting times, and gear modifications related to avoiding or mitigating protected species interactions. Many commenters stated that PCNs for NWP A activities should require documentation of compliance with specific design and operational standards. One commenter said PCNs required for these activities should include information the performance of anchoring systems during severe weather events to minimize damage or loss. One commenter said that PCNs for these activities should state which commercial fisheries activities (wild or mariculture) might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the proposed activities.

Proposed new NWP A requires PCNs for all proposed activities. Project proponents may be required to notify the U.S. Coast Guard or comply with U.S. Coast Guard requirements for marking or lighting these structures. It is not the responsibility of the Corps to notify the U.S. Coast Guard of these activities.

Some Corps districts have developed local coordination procedures with the U.S. Coast Guard. Paragraph (b)(2) of general condition 32 requires the PCN to include the location of the proposed activity. The Corps does not have the authority to regulate production duration and stocking and harvesting times. If the project proponent wants to modify the seaweed mariculture structures that are regulated under Section 10 of the Rivers and Harbors Act of 1899, he or she must notify the district engineer to request a modification of the NWP verification. Corps district regulatory staff do not have the legal authority or technical expertise to evaluate design or operational standards, or the structural integrity of the seaweed mariculture structures. It is the responsibility of the permittee to properly design the seaweed mariculture structures and ensure that they are properly maintained in accordance with general condition 14, proper maintenance. The Corps declines to require the PCN to identify which commercial fisheries species might be affected by the proposed seaweed mariculture activity because impacts to EFH are already considered when district engineers review PCNs and conduct EFH consultation with NMFS when they determine proposed NWP activities may adversely affect EFH.

Many commenters said that seaweed mariculture activities should require individual permits. Several of these commenters stated that individual permits for these activities are appropriate because the public notice process would allow ample coordination with the affected public. A few commenters said that there is insufficient industry standardization within mariculture systems to issue an NWP for these activities and these activities should require individual permits. A few commenters said that individual permits should be required for these activities to allow proper environmental review and coordination with state natural resource agencies.

The Corps believes that there are seaweed mariculture activities requiring authorization under Section 10 of the Rivers and Harbors Act of 1899 that will cause only minimal individual and cumulative environmental effects (see 33 CFR 322.2(f)) and are appropriate for authorization by NWP. If a district engineer reviews a PCN for a proposed seaweed mariculture activity and determines that the adverse environmental effects will be more than minimal after considering mitigation proposed by the applicant, he or she will exercise discretionary authority and require and individual permit for the proposed activity. In addition, division engineers have the authority to modify, suspend, or revoke this NWP on a regional basis in response to concerns for the aquatic environment or for any factor of the public interest (see 33 CFR 330.1(d)). The development of industry standards is not a prerequisite for NWP authorization, and many activities that have long been authorized NWP do not have any industry standards.

A few commenters stated that NWP A should require agency coordination under paragraph (d) of NWP general condition 32. One commenter said that NWP A PCNs should be coordinated with federal and state natural resource agencies of adjacent states and that applicable state permits must be obtained prior to the Corps issuing an NWP verification for seaweed mariculture activities. Many commenters said that seaweed mariculture activities should be coordinated with state resource agencies and the public.

The activities authorized by this NWP may require consultation or coordination with the U.S. FWS or NMFS. Consultation with the U.S. FWS and/or NMFS is required for proposed activities that the district engineer determines “may affect” listed species or designated critical habitat. Essential fish habitat consultation with the NMFS is required for any proposed activity that the district engineer determines “may adversely affect” essential fish habitat. Corps districts

may develop informal coordination procedures with state resource agencies. Activities authorized by NWPs do not involve coordination with the public. Coordination with the public is only require for activities authorized by standard individual permits.

One commenter said that seaweed mariculture activities authorized by NWP A should be limited to small scale projects. One commenter recommended adding a 1/2-acre limit to this NWP. One commenter stated that seaweed mariculture facilities for biofuels production are in the range of over 1,000 hectares and issuing an NWP to authorize seaweed mariculture activities at that scale would not sufficiently consider the environmental risks. One commenter said that the necessary spatial arrays required for seaweed mariculture would cause conflicts from multiple existing offshore uses.

The Corps does not agree that this NWP should be limited to small-scale project or activities less than 1/2-acre in size. If a project proponent submits a PCN for a large-scale seaweed mariculture activity, and the district engineer determines the proposed activity 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 the proposed activity. During the evaluation of the PCN, the district engineer will evaluate potential conflicts in resource uses, in accordance with the public interest review factors identified in 33 CFR 320.4(a).

Many commenters stated that the seaweed species to be grown should be the same indigenous genetic stock as found in the waters of the proposed seaweed mariculture activity. One commenter said that the terms and conditions of the proposed NWP address the introduction of non-native species but not the role that mariculture may play in the role of further spreading invasive or aquatic

nuisance species. One commenter stated that NWP A should impose rigorous operation emergency response standards. One commenter stated that NWP A should have clear requirements for removing derelict structures.

The Corps has modified this NWP to state that it prohibits the cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 or the cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody. Invasive or aquatic nuisance species can spread or be introduced into new areas through a variety of mechanisms, and the Corps does not have the authority to prevent the spread or introduction of those species through those other mechanisms. General condition 13 requires, to the maximum extent practicable, the removal of temporary structures from navigable waters after their use has been discontinued. For permanent structures, the Corps has added a provision to this NWP to require the permittee to remove these structures from navigable waters of the United States when those structures will no longer be used for finfish mariculture activities or multi-trophic mariculture activities.

One commenter recommended requiring the siting of NWP A activities at least 200 meters away from corals, seagrass beds, mangroves, critical habitat, and migration pathways. A few commenters asserted that seaweed mariculture activities are known to impair water quality, and special aquatic sites such as coral, seagrass, and mangroves are especially susceptible to water quality impacts. A few commenters said that seaweed mariculture facilities should not be permitted near sensitive habitat areas or near marine protected areas. One Commenter remarked that seaweed mariculture activities could result in economic impacts to the region where these activities are located by interfering with commercial and recreational fishing activities. One commenter said that

operations of seaweed mariculture activities could result in aesthetic impacts to the region. One commenter expressed concerns with potential impacts on navigation and public uses of the waterbody that may be caused by seaweed mariculture activities. One commenter stated that seaweed mariculture facilities should be distant from areas used by the public. One commenter said that NWP A should be revised to recognize that some state boundaries may extend beyond three nautical miles from shore.

Based on the characteristics of regional ecosystems, division engineers can add regional conditions to this NWP to site NWP A activities specific distances from aquatic resources or areas that may warrant additional protection, such as corals, seagrass beds, mangroves, critical habitat, and migration pathways. Seaweed mariculture activities cultivate macroalgae that take up nitrogen and phosphorous and other nutrients from the water column and generally are understood to improve water quality. Organic matter may be sloughed off of the cultivated seaweeds, which can provide nutrients for benthic communities. The seaweed grown at seaweed mariculture facilities can provide economic benefits such as biofuels, food ingredients, and pharmaceuticals. When reviewing PCNs, district engineers will evaluate potential conflicts in use of navigable waters, such as fishing, recreational, and military uses, as well as potential impacts to aesthetics in the project area. Activities authorized by this NWP must comply with general condition 1, navigation. Navigable waters are available for a variety of public uses, as well as various types of activities authorized for private use. Activities authorized for private use often involve structures that require DA authorization under Section 10 of the Rivers and Harbors Act of 1899, which may include structures for seaweed mariculture

activities. The variability in state boundaries for the purposes of identifying the territorial seas does not warrant any specific changes to NWP 55.

One commenter stated that shellfish farming activities are known to spread pathogens and the proposed NWP would not sufficiently address environmental concerns for offshore systems. A few commenters said seaweed mariculture facilities should not be permitted to use pesticides, herbicides, or pharmaceuticals. One commenter said that existing shellfish mariculture facilities permitted under NWP 48 should continue to be authorized under NWP 48 rather than authorized by NWP A. One commenter stated it would be more appropriate if seaweed was included under NWP 48 because bivalves are typically the primary cultivated species.

The Corps does not have the authority to take actions to control the spread of pathogens. Pathogens can spread through a variety of mechanisms in open systems such as oceans and estuaries. In addition, the Corps does not have the authority to regulate the use of pesticides, herbicides, and pharmaceuticals that might be used in seaweed mariculture activities. In this final rule, the Corps has issued separate NWPs for commercial shellfish mariculture activities and seaweed mariculture activities. Under NWP A bivalves can be grown with seaweeds are part of a multi-tropic mariculture activity.

A few commenters said that proposed new NWP A would have impacts on ESA-listed species and designated critical habitat. One commenter stated that ESA Section 7 consultation should be mandatory for all seaweed mariculture projects. One commenter said that incidental take permits under the ESA should be obtained before district engineers issue NWP verifications for these activities. A few commenters said that NWP A activities should have severe consequences for non-compliance, including revocation of the NWP authorization.

Activities authorized by this NWP must comply with general condition 18, endangered species. District engineers will review PCNs for proposed seaweed mariculture activities and if the district engineer determines the proposed activity may affect listed species or designated critical habitat, he or she will conduct ESA section 7 consultation with the U.S. FWS or NMFS as appropriate. If the district engineer initiates section 7 consultation with the U.S. FWS or NMFS, the NWP verification cannot be issued until that consultation is completed. District engineers will also take appropriate actions to address non-compliance with the conditions in NWP A.

Proposed new NWP A is issued as NWP 55, with the modifications discussed above.

(14) NWP 56. Finfish Mariculture Activities.

The Corps proposed this new NWP as NWP B, to authorize structures and work in navigable waters of the United States, including federal waters over the outer continental shelf, for finfish mariculture activities.

The Corps removed the phrase “and work” from this NWP because this NWP only authorizes structures, and this NWP does not authorize any of the operational aspects of finfish mariculture activities. The operation of a finfish mariculture facility does not constitute “work” as that term is defined at 33 CFR 322.2(c) for the purposes of Section 10 of the Rivers and Harbors Act of 1899. Section 322.2(c) defines “work” as “any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States.” After the finfish mariculture structure is installed, subsequent operations to produce finfish do not physically modify navigable waters of the United States in a manner that would be considered “work” under the Act

Some commenters supported the issuance of this NWP and some commenters opposed issuance of this NWP. A couple of commenters said that this NWP does not authorize activities that are similar in nature. Many commenters said that finfish mariculture activities should require individual permits to give the public an opportunity to review proposed activities. One commenter stated that finfish mariculture activities could result in significant cumulative impacts on marine wildlife and the environment, which cannot be properly assessed and mitigated. One said that finfish mariculture activities in estuarine waters should require individual permits because of the high risk of water quality impacts, animal escapes, and habitat damage.

This NWP authorizes structures in navigable waters of the United States for finfish mariculture activities. A category of activities for an NWP is based on the general characteristics and uses of the permitted activity. A category of activities is not based on potential configurations of the regulated activities, or the size of those activities. Concerns about the size of authorized activities and potential adverse environmental effects can be addressed in part by addition quantitative limits on the NWP. The Corps believes there are finfish mariculture activities that can result in no more than minimal individual and cumulative adverse environmental effects and are appropriate for NWP authorization. In addition, the NWP regulations at 33 CFR part 330 include numerous provisions that allow district engineers to exercise discretionary authority to require individual permits for activities when the determine those activities will cause more than minimal adverse environmental effects. Division engineers have the authority to modify, suspend, or revoke an NWP on a regional basis (see 33 CFR 330.5(c)). District engineers have the authority to modify, suspend, or revoke an NWP authorization on a case-by-case basis (see 33 CFR 330.5(d)). The

potential individual and cumulative adverse environmental effects caused by finfish mariculture activities will be assessed by district engineers when they review PCNs for proposed activities. For some of the adverse environmental effects identified by commenters, the Corps lacks the authority to regulate the particular activities that are the cause of those effects.

Several commenters recommended the development and implementation of project-specific permit conditions to ensure that authorized activities will have no more than minimal individual or cumulative adverse environmental effects. Several commenters requested that NWP B include conditions limiting the amount of feed, pesticides, herbicides, pharmaceuticals that can be released in project waters. A couple of commenters suggested NWP B require specific design and operation standards, including depth and current velocity guidelines for net pen siting class size. A commenter said that the geographic variability of aquatic environments and their ecological functions would be problematic when characterizing project impacts of finfish mariculture activities on a national scale.

Project-specific conditions are more appropriately identified by district engineers when they review PCNs for proposed NWP B activities. If a proposed activity is authorized by NWP B, the district engineer will add appropriate conditions to the NWP authorization to help ensure that the adverse environmental effects are no more than minimal, individually and cumulatively. Permit conditions must be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable (see 33 CFR 325.4(a)). Potential permit conditions addressing finfish mariculture operations, such as amount of feed, pesticides, herbicides, pharmaceuticals that can be released in project waters are beyond the scope of the Corps' legal authority, because the Corps does not have the authority

regulate discharges of feed, pesticides, herbicides, and pharmaceuticals into navigable waters, including federal waters on the outer continental shelf. District engineers will review PCNs for proposed NWP B activities, which will include information on the design and size of the proposed structures. During the evaluation of PCNs, district engineers consider the current environmental setting and the ecological functions currently being provided by aquatic resources in the vicinity of the proposed activity.

A couple of commenters said that notification to the U.S. Coast Guard should be required for all proposed finfish mariculture projects to ensure that structures are not placed within restricted zones, shipping safety fairways, federal channels, traffic separation schemes or within U.S. EPA- or Corps- designated open water dredged material disposal areas. The Corps believes it is the project proponent's responsibility to notify the U.S. Coast Guard of the proposed activity, if such notification is required by law or regulations.

One commenter stated that the availability of an NWP for finfish mariculture activities could be beneficial in promoting the business of finfish mariculture in areas where it is currently difficult to gain approval. The commenter added that growing seasons should be extended to allow for more jobs and tax revenue. One commenter suggested adopting location specific terms (freshwater, marine, offshore) and dropping the term "activity" and instead use "practice"

The Corps proposed this NWP to provide authorization under Section 10 of the Rivers and Harbors Act of 1899 for structures used for finfish mariculture activities. Project proponents may be required to obtain other federal, state, and local authorizations required by law or regulation. This NWP does not have any limitations related to growing seasons. The Corps believes it has provided

sufficient specificity regarding which types of waters this NWP can be used in (i.e., marine and estuarine waters), including the use of term “mariculture” instead of the broader term “aquaculture.” The Corps’ authorization is limited to the installation of structures in navigable waters of the United States, which is why the term “activity” is used. The Corps does not regulate the operation of the finfish mariculture facility during the production of finfish, and the activities associated with production activities such as feeding, handling, and administering antibiotics, therapeutics, and other chemicals.

Regarding multi-trophic mariculture projects, one commenter stated that the activity is still considered experimental, with potential for adverse environmental impacts and a lack of proven success at commercial sales, and would therefore not be suitable for authorization under a NWP which should only be utilized for projects with predictable outcomes. The Corps understands that multi-trophic mariculture activities have been practiced in other countries (Largo et al. 2016, Troell et al. 2009), so it is not an experimental approach. It is intended to cultivate different tropic levels to help reduce nutrient loads to surrounding waters.

Many commenters stated that applicants should be required to clarify the species to be farmed as well as provide information on broodstock source and quantity. Several commenters said that PCNs should include project-specific details regarding configuration, structures, techniques, proposed production quantities, densities, spacing, and containment systems. One commenter recommended that the PCN include a decommissioning plan.

The Corps has added text to this NWP to prohibit the cultivation of aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 and the cultivation of nonindigenous species unless that

species has been previously cultivated in the waterbody. The Corps only regulates the structures used for finfish mariculture activities, and their configuration in the waterbody. The Corps does not have the authority to regulate the techniques used to produce finfish, or how many finfish are produced over a specific period of time. If the project proponent wants to cease using the authorized structures for finfish mariculture activities, those structures must be removed. General condition 13 requires, to the maximum extent practicable, the removal of temporary structures from navigable waters after their use has been discontinued. For permanent structures, the Corps has added a provision to this NWP to require the permittee to remove these structures from navigable waters of the United States when those structures will no longer be used for finfish mariculture activities or multi-trophic mariculture activities.

A few commenters said that all finfish mariculture activities should require PCNs so that district engineers can evaluate consistency with environmental standards, impacts to navigation, commerce, fishing, and other resource use conflicts. One commenter suggested that the applicant should be required to disclose in the PCN the intended use of acoustic deterrent devices. Many commenters suggested that a higher level of detail should be required for finfish mariculture activity PCNs. A few commenters said the PCN should include a site analysis incorporating available spatial information including depth, wave climate, current velocity, substrate type, and proximity to any hard-bottom habitats. A couple of commenters stated that applicants should be required to provide detailed site maps, indicating the project location in relation to ecologically important marine/estuarine areas. One commenter said that applicants should be required to disclose the proposed activity's proximity to other mariculture or commercial fishing operations.

All activities authorized by this NWP require PCNs. The Corps does not have the authority to regulate the use of acoustic deterrent devices, so it would be inappropriate to require disclosure of the use of such devices in PCNs for proposed NWP B activities. The information requirements for PCNs in paragraph (b) of general condition 32 are intended to provide the information necessary for the district engineer to determine whether a proposed activity qualifies for NWP authorization without an excessive amount of paperwork. The Corps declines to require the suggested information for NWP B PCNs because it is not needed to assist the district engineer in the determination of NWP eligibility.

A few commenters said that the PCN should include a detailed statement on avoidance and minimization measures regarding the following impacts: attraction and entanglement of wild fish, sharks, mammals, and seabirds; effects of chemicals, antifoulants, feed, and waste on water quality, habitat, and marine life; physical effects of all structures on habitat and marine life; displacement, disruption and risks to existing fishing activities; economic impacts to fishing industries; and spatial conflicts with other ocean users. A few commenters said that the applicant should be required to provide prevention, monitoring, and response plans that address escapement of cultured adults, progeny, and gametes; release of antimicrobials; disease transmission to wild stocks; release of nutrients; chemical pollution; structural failures; entanglement of fishing gear and marine species; small vessel strikes; and marine debris.

The Corps does not agree that the suggested information is necessary for PCNs for proposed NWP B activities to assist in the district engineer's determination regarding whether the proposed activity regulated by the Corps (i.e., the placement of structures in navigable waters of the United States for finfish mariculture activities) is expected to result in no more than minimal

individual and cumulative adverse environmental effects. Much of the suggested information relates to operational aspects of finfish mariculture operations, which the Corps does not have the authority to regulate or control.

One commenter stated that under NWP review, there is potential for an applicant to begin work within 45-days of submitting a PCN, even if the permittee has not received a written response from the district engineer. The commenter said that the 45-day default authorization should not occur and that the proposed activity cannot proceed until the district engineer issues a written verification.

After the Corps district receives a PCN, the prospective permittee cannot begin the activity until either: (1) he or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or (2) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer (see paragraph (a) of general condition 32). If the permittee was required to notify the Corps pursuant to general condition 18 that listed species or designated critical habitat (or species proposed for listing) might be affected or are in the vicinity of the activity, the permittee cannot begin the activity until receiving written notification from the Corps that there is ''no effect'' on listed species or that any consultation required under Section 7 of the Endangered Species Act has been completed. The Corps declines to add a provision to NWP B to require the project proponent to receive written authorization from the Corps prior to commencing the authorized activity.

A couple of commenters expressed concern that structure placement within estuarine habitats may result in reduced current, velocity, altering circulation patterns, and consequently changing substrate characteristics. One

commenter stated that the addition of artificial structures and moorings, and changes to seabed alter topography and hydrodynamics. Some commenters voiced concerns regarding the use of NWPs for emerging finfish mariculture activities, due to potential impacts on water quality, habitat, and wild species, requesting that activities in the area be reviewed through the individual permit process.

The Corps acknowledges that structures placed in navigable waters may reduce water velocities to some degree and alter sediment transport and coastal erosion and deposition processes. District engineers will review proposed NWP B activities and determine whether it minimizes the impacts where practicable pursuant to general condition 23. Division and district engineers have discretionary authority to modify, suspend, or revoke NWP authorizations to further condition or restrict the applicability of an NWP when they have concerns for any factor of the public interest (see 33 CFR 330.1(d)).

Many commenters said that construction of finfish mariculture operations should be prohibited within a specific proximity to marine protected areas, submerged aquatic vegetation, reef communities, habitats with significant important to existing aquatic communities, migration pathways, at specific water depths, and those areas subject to chronic oxygen and nitrogen depletion. A few commenters stated that finfish mariculture activities should be prohibited from areas identified as being prone to hypoxia or otherwise ecologically sensitive. Several commenters said that increases in finfish mariculture projects would have the potential to damage the commercial fishing industry by either decreasing the need for wild fishing or by causing adverse impacts to the health and habitat of wild fished species. One commenter stated that finfish mariculture

could have the potential to adversely impact local economies by pushing out responsible, small-scale seafood producers and crop growers.

Several commenters expressed concern with spatial conflicts, specifically with fishing, fishery research cruises, and long-term ocean monitoring stations which occupy much of state and federal waters. Additional potential conflicts identified by commenters included gear entanglement, displacement from traditional fishing areas, navigational safety, and income loss. Many commenters raised concerns about project siting requirements, with one commenter suggesting that the Corps should be required to perform a spatial siting analysis prior to issuance of an NWP verification to ensure the proposed activity does not interfere with existing fisheries operations, research projects, or affect federal marine protected areas, and essential fish habitat.

Impacts regarding navigation are localized and therefore it is more efficient for district engineers to evaluate potential impacts in their review of PCNs. Finfish mariculture operators have, absent any potential exceptions, the same rights to use navigable waters as other users such as fishers, recreational users, researchers, and commercial users as long as they obtain all required federal, state, and local authorizations. In addition to the authorization under Section 10 of the Rivers and Harbors Act of 1899, finfish mariculture operators may be required to obtain other federal, state, or local authorizations. The Corps does not have the authority to conduct spatial planning for finfish mariculture activities. If the district engineer determines a proposed NWP B activity may adversely affect essential fish habitat, he or she will conduct essential fish habitat consultation with NMFS. Activities in marine protected areas may be require authorizations from the federal or state agency that has management responsibilities for those areas.

A couple of commenters stated that structures could cause interference with access to treaty protected fishing grounds for tribal fisherman. Several commenters said that these activities could impact recreational activities by closing off areas of navigable waters that would otherwise be used for boating, fishing, tourism, and other water-related activities. A few commenters stated that finfish mariculture activities would close off or privatize areas currently used by the commercial fishing industry. One commenter stated that finfish mariculture activities could have the potential to adversely impact local economies by pushing out responsible, small-scale seafood producers and crop growers.

Activities authorized by NWP B must comply with general condition 17, tribal rights. District engineers will review PCNs for proposed NWP B activities and assess potential impacts to navigation, including boating, fishing, tourism, and other water-related activities that use those navigable waters. There are a variety of activities (e.g., piers, port facilities, marine hydrokinetic devices) authorized by the Corps in navigable waters under its section 10 authorities that preclude or restrict use by others. The potential economic impacts of finfish mariculture activities on local businesses and residents is outside the Corps' control and responsibility.

A couple of commenters said that finfish mariculture activities should raise farmed species that live in or adjacent to the body of water, to minimize the introduction of disease from species relocated from other regions. Another commenter suggested using only species native to the ecosystem where the finfish mariculture activity is located. One commenter requested the establishment of exclusion zones, using assessments that consider not just the immediate area, but potential impacts to nearby waters as well. One commenter said that by requiring siting of finfish mariculture outside of known migratory

pathways, predation from wild species may be minimized, entanglements may be reduced, and potential fish spills from net/cage damage by predatory species may also be reduced. One commenter suggested siting finfish mariculture activities in deep, open waters to minimize the effects of nutrient and sediment dispersal from the project site, which may cause increases in nitrogen and phosphorous levels, as well as increases in phytoplankton and algae. Several commenters said that finfish mariculture activities should not be authorized in estuarine waters to minimize adverse effects to water quality. A few commenters stated that the PCN review process does not provide for adequate planning and would eliminate project-specific public notice and comment period that would facilitate responsible site selection.

The Corps does not have the authority to specify which species are cultivated at a finfish mariculture structure authorized by the Corps under section 10 of the Rivers and Harbors Act of 1899. In addition, the Corps does not have the authority to establish mariculture exclusion zones in navigable waters. Siting requirements on finfish mariculture activities may be imposed by other federal, state, or local government agencies.

Many commenters expressed concerns regarding potential impacts to existing habitat, specifically coral reef systems, mangroves, and submerged aquatic vegetation that could be caused by increases in nutrient and sediment dispersal from the finfish mariculture operation. One commenter said that net pen structures and their associated anchoring systems have the potential to increase available habitat, supporting biodiversity, similar to engineered artificial reefs. In addition, this commenter said that the structures would prevent trawling of the benthic ecosystem within the footprint of the facility, further protecting species.

When reviewing PCNs for proposed NWP B activities, district engineers will evaluate potential impacts on habitats in the vicinity of the proposed finfish mariculture structures. The Corps acknowledges that finfish mariculture structures can provide structural habitat that benefits some aquatic species, as well as providing some refuge from predators and fishers.

Several commenters expressed concerned with the potential entanglement of wild fish and marine mammal species, stating that NWP review would not allow for adequate evaluation for potential impacts. One commenter discussed the potential for illegal extermination of predator species such as sea lions by operators of finfish mariculture facilities. A few commenters raised concerns regarding the use of acoustic deterrent devices, which they said are not consistently useful and have been known to cause deleterious impacts to non-target species. Other commenters stated that these activities would have the potential to attract and concentrate predators, which may lead to entanglements or vessel strikes. One commenter said that risks and impacts to protected species are minimized by existing federal requirements for operations, including the use of improved technologies and regular maintenance, such as line-tightening, which has been shown to prevent accidental entanglement. A few commenters stated that this NWP must prohibit gear types known to cause harm to marine species. One commenter said that finfish mariculture structures should be removed from waters during peak seasons for protected species.

If the district engineer determines that a proposed finfish mariculture activities may affect listed species or designated critical habitat, he or she will conduct ESA section 7 consultation with the U.S. FWS and/or NMFS. The operator of the finfish mariculture facility may also need to obtain authorization under the Marine Mammal Protection Act. The ESA section 7 consultation may

result in permit conditions added to the NWP authorization to minimize the risk of entanglement of listed species. The Corps does not have the authority to regulate the management of predator species at a finfish mariculture facility, or the use of acoustic deterrent devices. The use of acoustic deterrent devices would be addressed through the ESA section 7 consultation process and/or the Marine Mammal Protection Act authorization process, if applicable.

One commenter said that finfish mariculture operations should only be stocked with eggs, larvae, or juveniles from pen-raised lineages, in order to avoid the need for wild capture. Another commenter stated that the cultivated species should have the same indigenous genetic stock as individuals of the species in the waters where the proposed finfish mariculture activity is located. The Corps does not have the authority to impose requirements on the stocking of finfish mariculture facilities, or which genetic stocks are cultivated.

Many commenters stated concerns with the potential for accidental fish escapements by individual species because the introduction of non-native species may spread pathogens and parasites to wild species, increase competition to at-risk communities, and cause genetic degradation among existing fish populations. Several commenters discussed the 2017 escape of over 200,000 non-native Atlantic salmon in the Puget Sound as a result of finfish mariculture operations, with some commenters requesting that these activities require individual permits, and other commenters stating that regional conditions should be implemented to ensure structural integrity of facility structure and prevent escape recurrences. One commenter said that although the Corps lacks the authority to regulate finfish escapes, it can require structures installed in navigable waters to be constructed to a standard where escape risks can be mitigated. One commenter stated that applicants should be required to report

escape events to the Corps and that the Corps should maintain a database to monitor events and better prevent them in the future. A few commenters said that a universal standard should be developed that specifies requirements for the proposed finfish mariculture facilities and related features that would meet challenges posed by severe weather, and prevent potential escapements.

The Corps does not have legal authority to regulate the potential escapement of cultivated finfish. The Corps acknowledges that finfish mariculture activities have the potential to facilitate the spread of pathogens and parasites, but the Corps does not have the authority to regulate or control those occurrences. General condition 14 requires proper maintenance of authorized structures and fills. The project proponent is responsible for designing and constructing the finfish mariculture structures so that they have an appropriate degree of structural integrity. Since the Corps does not have the authority to address potential fish escapes, there would be no useful purpose served by requiring the operator to report escapes to the Corps, or for the Corps to maintain a database to track escape events.

One commenter said that all mariculture operations should be considered point sources under the Clean Water Act and be required to obtain discharge permits. This commenter also said that routine disease testing and other water quality monitoring should also be mandated. One stated that effects to water quality within the local environment from other sources would have the potential to cause impacts to cultured species and subsequently economic returns of the finfish farm, suggesting that maintenance of the facility would be in the best interest of the operation and thus encourages management operations that support the local environment. Some commenters said that finfish mariculture activities can cause changes to benthic community composition beneath and

adjacent to structures because of excess feed, feces, and antifoulant accumulation. A couple of commenters stated that finfish mariculture projects should be held to the same regional water quality standard as offshore seafood processors. Several commenters expressed concern with the ingredients utilized in fish feed, which one commenter said often contains toxic heavy metals like cadmium and zinc and recommended that feed formulation and efficiencies be standardized and managed in order to lessen adverse environmental impacts. Another commenter suggested that finfish mariculture operators should be required to publish reports with the complete traceability of all mariculture feed products. One commenter asserted that permittees be required to provide proof that the finfish mariculture operations would not contribute to hypoxia in receiving waters.

Some finfish mariculture operations may require authorization under Section 402 of the Clean Water Act for discharges from finfish mariculture operations. Section 402 of the Clean Water Act is administered by the U.S. EPA or states with approved programs. The Corps lacks the authority to require disease testing and water quality monitoring. Water quality monitoring may be required by states in estuaries and the territorial seas. The Corps acknowledges that finfish mariculture activities can have effects on benthic communities. The Corps does not have the authority to regulate the production of finfish after the mariculture facility is constructed.

Several commenters expressed concerns about the potential effects of the use of antimicrobials, pesticides, and anti-foulants, and the introduction of excess feed and fish waste in project waters. These commenters stated that use of these materials could lead to degradation of water quality, risking public health, and increase organic nutrient loads leading to eutrophication, causing widespread

damage to wildlife. A few commenters said that industrial finfish mariculture operations may cause adverse impacts to public health, as the antibiotics, pesticides, and other chemicals that are heavily used to prevent disease and parasites in farmed species could accumulate in fish tissues to be consumed by the public. One commenter stated that these issues have influenced other countries like Canada, Argentina and Denmark, to move away from industrial finfish mariculture.

The Corps does not have the authority to regulate the use of antimicrobials, antibiotics, pesticides, anti-foulants and other chemicals, how feed is provided to the cultivated finfish, or the composition of that feed and its potential effects on water quality. Water quality concerns may be addressed through state or federal water quality standards under the Clean Water Act, or state laws.

A couple of commenters said that ESA section 7 consultation should be mandatory for all proposed finfish activities and that all applicants should be required to obtain an incidental take permits for potential effects to listed species. One commenter stated that NOAA would be the appropriate agency to provide expertise in reviewing and assigning specific permit terms in regard to site selection, conflicts between aquaculture projects, marine resources, other ocean users, and wild-capture fisheries. A couple of commenters said that individual finfish mariculture projects should be coordinated with state natural resource agencies to identify regional and site-specific concerns, needs analyses, and project-specific conditions.

All activities authorized by this NWP require PCNs. If the district engineer reviews a PCNs and determines that any proposed activity may affect listed species or designated critical habitat, he or she will conduct ESA section 7 with

the U.S. FWS and/or NMFS as appropriate. Incidental take permits are issued under Section 10(a)(1)(B) of the ESA, not section 7(a)(2). The Corps declines to add a provision to this NWP requiring coordination with state natural resource agency, whose legal authorities are highly variable and generally do not apply in federal waters.

One commenter questioned the Corps' reliance on general condition 23 to minimize project impacts. Another commenter said that all NWP B applicants should be required to provide a mitigation plan. Several commenters voiced concern over the risk for breakage of anchored mooring systems for finfish mariculture structures during significant weather events, which increases risks to navigational safety and marine debris. Additional concerns regarding marine debris were voiced by another commenter, who suggested that operators may dispose of solid waste into waters rather than through appropriate methods. One commenter recommended requiring agency coordination for proposed NWP B activities under paragraph (d) of general condition 32.

General condition 23 provides the mitigation requirements for the NWPs. District engineers can require the project proponent to submit a mitigation plan if, after reviewing a PCN, the district engineer determines that mitigation is necessary to ensure the authorized activity will cause no more than minimal individual and cumulative adverse environmental effects. The project proponent is responsible for designing and constructing the finfish mariculture facility so that it complies with applicable engineering standards, and will maintain structural integrity within the appropriate parameters of sea and weather conditions, and potential predatory behavior by large vertebrates. The Corps does not believe that agency coordination under paragraph (d) of this NWP is necessary for these activities.

One commenter asserted that the draft decision document for NWP B did not meet NEPA requirements, stated that it lacked adequate discussion on purpose and need, which the public needs for consideration of the scope of reasonable alternatives. One commenter said that an environmental impact statement should be required for approval of NWP B, claiming that the Corps failed to adequately discuss how potentially significant impacts will be mitigated below the level of significance in the draft decision document. One commenter stated the Corps failed to address potential adverse cumulative impacts at a regional level where specific locations recently identified by NOAA are more likely to be impacted.

The national decision document for this NWP was revised to address the requirements for environmental assessments in the Council on Environmental Quality's NEPA regulations that were published in the Federal Register as a final rule on July 16, 2020 (85 FR 43304). A section on purpose and need was added to the national decision document. The Corps made a finding of no significant impact. Therefore, an environmental impact statement is not required for the issuance of this NWP. The national decision document considers the cumulative effects expected to occur as this NWP is used during the 5-year period it is anticipated to be in effect, and it is a national analysis since the geographic scope of the national decision document is the United States. Division engineers consider cumulative effects of NWP activities on a regional basis.

One commenter stated that the minimal effect determination is conclusory, as no quantitative impact limits, general conditions, or regional conditions have been specified and the impact section did not provide discussion on any foreseeable or unknown impacts. One commenter said that the Corps' minimal effects determination should provide estimates for the anticipated size of

mariculture operations to be permitted under NWP B and potential impacts of those operations based on known impacts of net pen finfish mariculture.

The Corps did not provide a minimal effects determination in the draft national decision document, so the commenter cannot say that it is conclusory. The NWPs are not required to have quantitative impact limits, and the proposed NWP general conditions were provided in the proposed rule. The regional conditions have not been finalized by division engineers. The draft decision document discusses reasonably foreseeable impacts. The Corps is not required to consider speculative impacts. The Corps did provide estimates of the impacts that may occur during the 5-year period this NWP is anticipated to be in effect.

Proposed NWP B is issued as NWP 56, with the modifications discussed above.

(15) NWP 57. Electric Utility Line and Telecommunications Activities.

The Corps proposed this new NWP as NWP C, to authorize discharges of dredged or fill material into waters of the United States, and structures and work in navigable waters of the United States, for electric utility line and telecommunications activities.

Many commenters expressed support for the proposal to issue a separate NWP for electric utility line and telecommunications activities. They said that the creation of this new NWP for electric utilities represents a tailored approach to regulated industries and effectively addresses differences in how the various types of utilities are constructed, installed, maintained, and removed. Many commenters supported retaining the basic structure of the 2017 NWP 12 for proposed new NWP C, as well as continuing the longstanding definition of “single and complete” project, providing authorization for temporary structures, fills, and work, and imposing the same acreage limits. One commenter supports the

Corps' proposal to include the list of structures and fills in NWP C, including utility lines, substations, foundations for towers poles and anchors, access roads, temporary structures, fill, and work for remediation of drilling fluid returns from horizontal directional drilling, and temporary structures, fill, and work including temporary mats for utility line and telecommunications activities.

The Corps is issuing NWP C to authorize discharges of dredged or fill material into waters of the United States and structures and work in navigable waters of the United States for electric utility line and telecommunications activities. For the text of NWP C, the Corps has retained a structure similar to the structure of NWPs 12 and D, and there are some differences in the specific text of NWPs 12, C, and D to address differences in utility line sectors. The Corps is also retaining the regulatory approach for authorizing single and complete linear projects, where each separate and distant crossing of waters of the United States may be covered by its own NWP authorization. The corps is also retaining the 1/2-acre limit for each separate and distant crossing of waters of the United States and for the construction, maintenance, or expansion of substations for electric utility and telecommunications lines. The Corps is also including the authorization of temporary structures and fills, as well as DA authorization for remediation activities requiring DA authorization that may be needed to address inadvertent returns of drilling fluids, consistent with NWPs 12 and D.

Many commenters stated that they expect court challenges to oil and gas pipeline activities to continue, and therefore support the issuance of a separate NWP for electric utility line and telecommunications activities. By creating a separate NWP for these activities, it is the hope of these commenters that these electric infrastructure activities will not be disrupted by future NWP 12 litigation.

The Corps acknowledges that the issuance of NWP C can help reduce regulatory uncertainty for entities that construct and maintain electric utility lines and telecommunications lines. Past litigation on NWP 12, especially for oil or natural gas pipelines, has caused concerns about the availability of NWP authorization for electric utility lines and telecommunication lines and their ability to serve people living in the United States.

Several commenters noted that proposed NWP C is important as the scale of electrical energy generation from renewable energy sources increases. These commenters said there will be a need for additional electric transmission facilities to convey the electricity from the generation facilities to the end users. Several commenters stated that proposed NWP C will satisfy Section 404(e) of the Clean Water Act by authorizing activities that have no more than minimal adverse environmental effects, while continuing to allow for timely and efficient authorization of these activities. These commenters said that the techniques used to construct, maintain, and repair most electric transmission lines generally result in fewer impacts to waters of the United States compared to the techniques used to construct other types of utility lines. Several commenters requested that the Corps not issue proposed NWP C, stating that the activities authorized by this NWP would cause significant adverse impacts in violation of Section 404(e) of the Clean Water Act. These commenters said individual permits should be required for these activities.

The Corps also appreciates the potential for new NWP C to support electric energy generation from renewable energy generation facilities, including activities authorized by NWPs 51 and 52. The Corps believes that the conditions for NWP C, including the reviews of PCNs for certain activities authorized by NWP C and the ability of division and district engineers to modify, suspend, and

revoke NWP C authorizations, will help ensure that activities authorized by NWP C result in no more than minimal individual and cumulative adverse environmental effects.

A few commenters noted that the issuance of NWP C would allow the Corps to incorporate industry-specific standards, appropriate regional conditions, and best management practices tailored to each utility line NWP. A few commenters said that proposed NWP C is important because the process of applying for and obtaining an individual permit is time consuming, expensive, and subject to regulatory uncertainty. These commenters said that increased costs and burdens that result from the individual permitting process can affect not only the members, but the amount of costs that are passed on to consumers and indirectly borne by the rural public. One commenter stated that the availability of NWPs authorizing the construction, maintenance, repair, and removal of utility lines and associated facilities is essential to the expansion of necessary infrastructure to remote areas in the United States.

In this final rule, the Corps discusses suggestions for best management practices and national standards that commenters provided in response to the 2020 Proposal. The Corps acknowledges that the issuance of NWP C will further the objective of the NWP program, which is to regulate with little, if any, delay or paperwork certain activities having minimal impacts (33 CFR 330.1(d).

One commenter stated that fiber optic lines should be specifically added to the definition of electric utility line and telecommunication line. One commenter recommended retaining the following provision in proposed NWP C: “there must be no change in pre-construction contours of waters of the United States.” One commenter said that the integrity of power lines in their service area could be severely compromised if vegetation management must be stopped while they

obtain individual permits for this necessary and routine activity. Vegetation along electric utility rights of way must be maintained to prevent trees or other vegetation from bringing down power lines and, during dry conditions, preventing power lines from contributing to wildfires.

The Corps has added fiber optic lines to the definition of electric utility line and telecommunication line. The requirement that NWP C activities associated with the construction, maintenance, repair, and removal of electric utility lines and telecommunications lines result in no change in pre-construction contours in waters of the United States do not compromise vegetation management because most vegetation management is conducted above the soil surface. In situations where vegetation management involves the removal of plants and their roots, the project proponent can regrade the soil surface so that there are no changes in pre-construction contours of waters of the United States, including jurisdictional wetlands. The Corps acknowledges that vegetation management is important for safe, reliable operation of electric utility lines and telecommunications lines, and for managing fire risks. However, the Corps does not have the legal authority to require vegetation management activities to manage fire risks. State and local governments may possess that authority.

A few commenters recommended removal of the following sentence from the preamble to the proposed rule: “The wooden poles used for overhead electric transmission lines can be up to 27 inches in diameter, and these poles are usually inserted into the soil surface by digging a hole, with some soil disturbance in the vicinity of the installed pole.” These commenters said that utility poles are specified based on class and height, not diameter. In addition, these commenters noted that round treated wood utility poles can be greater than 27 inches in diameter. Lastly, these commenters said that treated wood utility poles can be

provided not only as “round poles”, but also as “laminated rectangular poles.” These commenters recommended adding the following sentence to the final rule: “The wooden poles used for overhead electric transmission lines can be up to 40 inches in diameter or up to 90 inches on any side for rectangular poles.”

The Corps cannot remove sentences from documents that have already been published in the Federal Register, and it sees no need to remove this text because it only served as background information for the proposed rule, including the proposal to issue three separate NWPs for different sectors of utility line activities. The Corps acknowledges that this sentence is incomplete, and appreciates the additional clarification provided by the commenter.

A few commenters noted that, although the preamble recognizes the wide array of structure types for utility lines, the language of proposed NWP C appears to assume a limited design configuration for structures to support aerial transmission lines. These commenters said that the requirement for separate footings for each tower leg incorrectly suggests that such lines only utilize lattice tower type structures with multiple legs per structure, which is not the case. Therefore, these commenters recommended that the Corps eliminate this language from the final NWP C to accurately reflect the wide array of structure types that are used to support aerial utility and telecommunication lines. One commenter recommended revising the text as follows: “This NWP authorizes the construction or maintenance of foundations for overhead electric utility line or telecommunication line structures, towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary."

The text of NWP C provides substantial flexibility in authorizing discharges of dredged or fill material into waters of the United States associated with the installation of structures used to support aerial transmission lines. The text of the

NWP acknowledges that single poles may be used for overhead transmission lines, and there is flexibility for authorizing discharges of dredged or fill material into waters of the United States for footings that support other types of structures used for aerial transmission lines, including lattice tower types structures. For foundations for overhead electric utility line or telecommunication line towers, poles, and anchors, the Corps is retaining the text of the NWP as proposed.

One commenter supports the Corps' proposal to use the 1/2-acre limit in proposed NWP C. One commenter stated that it remains unclear when associated facilities are authorized by multiple NWPs, whether the 1/2-acre limit will be applied to multiple NWPs or if only one NWP will be selected to authorize the associated facilities.

The Corps has retained the 1/2-acre limit for losses of waters of the United States for each single and complete project authorized by NWP C. General condition 28 addresses the use of multiple NWPs to authorize a single and complete project and that general condition applies to utility line crossings that may involve different types of utility lines authorized by NWPs 12, C, and/or D, where the acreage limit for each single and complete project continues to be 1/2-acre.

One commenter objected to the inclusion of substation facilities in this NWP, because substations can usually be constructed in uplands. One commenter said the proposed text for foundations for overhead electric utility line or telecommunications lines towers, poles, and anchors should be revised.

The Corps is retaining substations in this NWP because there are likely circumstances where it is not feasible or practicable to site a substation in uplands. This NWP provides DA authorization for discharges of dredged or fill material into waters of the United States for the construction, maintenance, or

expansion of electric utility line and telecommunications substations as long as the loss of waters of the United States does not exceed 1/2-acre.

One commenter stated that the Corps should end the practice of considering timber and other mats used for temporary access and construction as resulting in discharges of dredged or fill material into waters of the United States and as part of the filled area for the PCN thresholds. Some Corps districts count matting toward the PCN threshold for permittees, requiring permittees to submit a PCN if the discharge will result in the loss of greater than 1/10-acre of waters of the United States.

The Corps believes that the decision on whether timber mats or mats constructed of other materials that are used during construction, maintenance, repair, or removal of electric utility lines and telecommunication lines result in discharges of dredged or fill material into waters of the United States and thus require DA authorization is more appropriately made by district engineers on a case-by-case basis. Such decisions should be made by district engineers after considering the definitions of “discharge of dredged material” and “discharge of fill material” at 33 CFR 323.2(d) and (f). The use of temporary matting does not constitute a “loss of waters of the United States” or count towards the 1/10-acre PCN threshold for losses of waters of the United States as long as the timber matting is removed after completion of the authorized work and the affected area restored to pre-construction elevations.

A few commenters stated that applicants should have to produce containment and clean up contingency plans as a best management practice to address inadvertent returns of drilling fluids during horizontal directional drilling activities. The Corps does not have the authority to require project proponents to develop containment and contingency plans for horizontal directional drilling

activities that do not involve discharges of dredged or fill material into waters of the United State or cross navigable waters and require section 10 authorization. The NWP authorizes regulated activities that may be necessary to remediate inadvertent returns of drilling fluids to provide timely responses to such events and help reduce potential adverse effects to the aquatic environment that may occur as a result of these inadvertent returns.

Several commenters supported the two PCN thresholds for proposed NWP C. They stated that limiting the PCN requirements for this NWP to these two PCN thresholds will reduce burdens on the regulated public, simplify NWP C, eliminate redundancy, and focus the PCN requirements on activities that have a substantive potential to result in more than minimal adverse environmental effects. One commenter stated that the proposed PCN requirements add an administrative burden to the Corps and reduce certainty for projects. Many commenters opposed having only two PCN thresholds and requested that NWP C have the same seven PCN thresholds as the 2017 NWP 12.

In the 2020 Proposal the Corps proposed two PCN thresholds for this NWP: (1) for activities that require section 10 authorization, and (2) for discharges that result in the loss of greater than 1/10-acre of waters of the United States. In response to the proposed rule, the Corps received comments recommending the addition of other PCN thresholds that were removed from NWP. For summaries of the comments on the five PCN thresholds that were in the 2017 NWP 12 but removed from the 2021 NWP 12, and the Corps' responses to those comments, interested persons should read the section in this final rule on the reissuance of NWP 12.

One commenter supported the proposal to require PCNs for losses of greater than 1/10-acre of waters of the United States. One commenter

recommended requiring PCNs for mechanized land clearing of forested wetlands in the electric utility line right-of-way where greater than 1/10-acre of forested wetland is subjected to mechanized land clearing, instead of requiring PCNs for any amount of mechanized land clearing in forested wetlands. One commenter asked why activities that result in changes in pre-construction contours, but do not result in permanent losses of waters of the United States cannot be permitted by NWP C while activities that do not result in a change to pre-construction contours, but result in up to 1/10-acre of permanent loss of waters of the United States can be permitted by this NWP.

The Corps did not propose to require PCNs for discharges of dredged or fill material into waters of the United States associated with mechanized land clearing of forested wetlands in the utility line right of way. If, for a proposed electric utility line or telecommunications line, the applicant proposes to conduct mechanized land clearing of forested wetlands in the right-of-way for the electric utility line or telecommunications line, a PCN is required if the project proponent will be unable to restore the disturbed wetlands to pre-construction elevations and the activity involves a discharge of dredged or fill material that results in the loss of greater than 1/10-acre of waters of the United States. Nationwide permit C authorizes discharges of dredged or fill material into waters of the United States that result in permanent losses of waters the United States, as long as that loss does not exceed 1/2-acre for each single and complete project.

One commenter opposed the requirement to submit a PCN for activities that require authorization under Section 10 of the Rivers and Harbors Act, regardless of the amount of loss. The Corps has retained this PCN threshold so that district engineers have the opportunity to review these activities and ensure

that the authorized activities cause no more than minimal adverse effects to navigation.

Several commenters objected to allowing multiple segments of the same pipeline to qualify for NWP authorization, stating it is a violation of Section 404(e) of the Clean Water Act, the National Environmental Policy Act, the Endangered Species Act, and other legal requirements for rigorous and transparent environmental reviews and safeguards. A few commenters noted that while electric and telecommunication lines do not pose the same risks of spills and leaks as oil and gas pipelines, they still allow for greater than minimal impacts by authorizing large electric lines and telecommunications lines under the guise of "single and complete projects."

Considering separate and distant crossings of waters of the United States to be linear projects that can be authorized by separate NWPs is a long-standing practice that has been codified in the Corps regulations at 33 CFR 330.2(i) since 1991 (see 56 FR 59110). This practice does not violate Section 404(e) of the Clean Water Act, NEPA, or the ESA. The Corps complies with NEPA when it issues the national decision document for the issuance of an NWP, because that decision document includes an environmental assessment. Activities authorized by NWP C and other NWPs must comply with general condition 18, endangered species. The Corps acknowledges that some spills or leaks may occur from equipment associated with electric utility lines and telecommunications lines, including equipment at substations, but the Corps does not have the authority to regulate such spills or leaks.

A few commenters stated that is that it is unclear how the Corps will evaluate what constitutes a "project" under these NWPs for the purposes of determining whether a project exceeds the 1/2-acre limit or results in a loss of

more than 1/10-acre in order to trigger the requirement for an individual permit. A few commenters requested additional details regarding what measures will be used to ensure that projects under these NWPs are not improperly divided into smaller sections to avoid an individual permit requirement. Several commenters state that the “single and complete project” concept should not apply to the installation of new electric utility line and telecommunication activities. Some commenters said a new electric utility line or telecommunications line should be subject to analysis under NEPA for the entire project, including a cumulative review of all temporary and permanent impacts to waters of the United States from the utility line crossings, access roads, substations, temporary work pads, etc.

The Corps has long-standing practice and experience evaluating single and complete projects when applying the 1/2-acre limit and the 1/10-acre PCN threshold for losses of waters of the United States. District engineers have the discretion to determine which regulated activities constitute “single and complete linear projects” and “single and complete non-linear projects” in accordance with the Corps’ regulations and the definitions in Section F of these NWPs. When an NWP C activity requires a PCN, paragraph (b)(4)(i) of general condition 32 requires the applicant to include in the PCN 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. Furthermore, paragraph (b)(4)(ii) of general condition 32 requires the applicant to include in the PCN the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other

special aquatic sites, and other waters (including those single and complete crossings authorized by NWPs but do not require PCNs). The district engineer uses this information to evaluate the cumulative adverse environmental effects of the proposed linear project. Activities authorized by NWP do not require additional NEPA compliance, because the Corps satisfies the requirements of NEPA when it issues the national decision documents for the NWPs.

One commenter stated that a PCN should be required for any new or expanded electric utility line project, and there needs to be an overall limit in acreage of waters of the United States lost as a result of activities authorized by this NWP. A few commenters said that proposed NWP C should include the 250-mile PCN threshold proposed for NWP 12. These commenters asserted that not adding the 250-mile PCN threshold allows for very large projects to be built without a PCN and, therefore, bypass other federal requirements that are triggered by the section 404 process such as the requirements of Section 7 of the Endangered Species Act and Section 106 of the National Historic Preservation Act. One commenter asked whether temporary impacts and impacts that involve conversion from one wetland type to another (e.g. forested wetland to herbaceous) are counted as part of the 1/10-acre PCN notification threshold. These commenters recommended revising the definition of “loss of waters of the United States” to include permanent conversion of wetland types.

The Corps does not agree that PCNs should be required for any expansion of electric utility line projects. The information required by paragraphs (b)(4)(i) and (ii) of general condition 32 provides the Corps with information similar to the 250-mile PCN threshold that was added to NWP 12, but the Corps does not believe that the 250-mile PCN threshold is necessary for NWP C because it authorizes projects with typically smaller footprints of discharges of

dredged or fill material. Activities authorized by NWP C must comply with general condition 18, endangered species, and general condition 20, historic properties. Temporary impacts are not considered a “loss of waters of the United States.” A permanent conversion of wetland type is generally not considered a “loss of waters of the United States” because the affected area is still a wetland, and vegetation management activities such as cutting and mowing vegetation or using herbicides are not regulated by the Corps under its permitting authorities.

One commenter stated that Corps districts should maintain consistency with the number of thresholds that trigger the need for a PCNs expressed in the proposed rule. This commenter noted that some Corps districts have already proposed regional conditions that will undercut the changes in the proposed rule. This commenter said that differences in PCN thresholds across Corps districts could complicate NWP C by increasing confusion and inefficiencies.

Division engineers have the authority to approve regional conditions for this NWP based on the characteristics and other factors regarding the ecosystems in their respective regions, including regional conditions that add PCN thresholds. Division engineers can add regional conditions to replace PCN thresholds that were removed from an NWP, if the division engineer determines that PCN threshold is necessary to ensure that the activity has no more than minimal or cumulative adverse environmental effects. Regional conditions are an important mechanism for tailoring the NWP program to address specific resource concerns in a particular geographic area.

Several commenters opposed including Note 2 in NWP C. These commenters said that Note 2 is inconsistent with the requirements of Section 404(e) of the Clean Water Act and that it would allow activities that have more than minimal adverse environmental effects to proceed. One commenter said

that proposed Note 2 would explicitly allow the cobbling together of multiple NWPs to authorize high impact pipelines and associated infrastructure that have greater potential for harmful spills, leaks, and the discharges that accompany them. As discussed above in response to comments on the Corps' definition of "single and complete project" at 33 CFR 330.2(i), Note 2 is consist with that regulation and this long-standing practice.

One commenter recommended clarifying and rephrasing the following sentence found in Note 3: "Aerial electric utility lines or telecommunication 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). The Corps believes that no additional clarification is necessary for Note 3 because it only points to a specific provision of the Corps' regulations to serve as a reminder to project proponents that want to construct electric utility lines or telecommunications lines over navigable waters of the United States.

A few commenters recommended including the term "and other temporary structures" in the text of Note 4. These commenters suggested changing Note 4 to state that access roads and other temporary structures such as work pads, temporary utility poles, and pulling and tension pads, used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Note 4 specifically addresses access roads, and the Corps believes it would be inappropriate to address other temporary structures in this note. Temporary structures are addressed in a separate paragraph in the text of NWP C.

A few commenters recommended that if the Corps includes specific best management practices (BMPs) in the final NWP C, it should indicate that the BMPs should be implemented "where appropriate and practical" and recognize

that implementation of certain BMPs may not be required in all circumstances. These commenters noted that there are a wide range of minimization, avoidance, and management measures deployed to reduce impacts to aquatic environments, some are unique to the electric and telecommunication utility lines. However, it would be difficult to include many of these BMPs as national requirements for all uses of NWP C because their implementation, while frequent, is site-specific and may not be feasible or useful for minimizing impacts in all scenarios. A few commenters stated that the Corps should not adopt additional national BMPs or other restrictions, and said that such practices should be addressed at the regional level and tailored to local environments, which will allow for greater flexibility. A few commenters said that adding additional BMPs or standards to this NWP would result in redundant requirements to manage on these projects without providing additional benefits.

The Corps agrees that BMPs should be implemented where appropriate and practical, and that it would be more appropriate and efficient to add BMPs to this NWP either through regional conditions added to the NWP by division engineers or activity-specific conditions added to the NWP by district engineers. During its review of the suggested BMPs, the Corps determined that many of these BMPs that are appropriate to apply nationwide would not be appropriate for the NWP at a national level, but they may be appropriate on a region level. The proposed text of NWP includes some BMPs (e.g., requiring no changes in preconstruction contours of waters of the United States, requiring the top 6 to 12 inches of the trench in wetlands to normally be backfilled with topsoil from the trench, removal of temporary fills upon completion of the work).

Many commenters said that the placement of temporary matting in jurisdictional wetlands should continue to be a BMP for proposed NWP C

activities to minimize adverse environmental effects. Several commenters recommend requiring the use of low-ground pressure equipment, such as heavy equipment that has been specially designed to spread the weight of the equipment over a larger area, which helps avoid permanent impacts by reducing compaction of wetland soils. One commenter said that use of wattles (i.e., erosion and sediment control devices used to minimize erosion on construction sites) is a general accepted practice to reduce water flow velocities and prevent sediment from flowing into jurisdictional waters. The Corps believes these BMPs are more appropriately applied on a case-by-case or regional basis, in consideration of the characteristics of the affected ecosystems, instead of a national basis.

One commenter stated that the Corps should continue to clearly outline performance criteria within jurisdictional areas because it provides the flexibility needed to facilitate the improvement and development of construction practices that could better protect aquatic resources. One commenter recommended adding a requirement that directional drilling under waters of the United States should be a national standard. One commenter suggested the addition of a BMP to require district engineers to distribute relevant PCNs to state agencies involved in the regulatory oversight or environmental review of projects authorized by the new NWP C. With this NWP, the Corps outlines certain performance criteria (e.g., removal of temporary fills, uses of temporary mats) within jurisdictional waters. The Corps believes the recommended BMPs are applied more appropriately and effectively on a case-by-case or regional basis instead of a national basis.

One commenter suggested a BMP where the project proponent tries to cut only vegetation that exceeds a height of 12 feet and allows all low-growing trees

and shrubs to remain in place. This commenter said that a benefit of this BMP is that it allows roots to remain in place providing soil stabilization in and around jurisdictional waters. One commenter noted that non-mechanized clearing is preferred consistent with the Corps' regulations at 33 CFR 323.2(d) along with hand clearing, low ground pressure equipment and mats, to minimize and avoid additional impacts to the jurisdictional water or wetland beyond conversion are significantly minimized or avoided. The Corps believes the recommended BMPs are applied more appropriately and effectively on a case-by-case or regional basis instead of a national basis.

One commenter said that vibratory plowing is preferred over trenching methods for burying both distribution and fiber optic lines because vibratory plowing under most conditions does not create incidental addition of material. One commenter recommended requiring that material resulting from trench excavation may be temporarily side cast into waters of the United States for very short periods of time well within the limitation of three months, and is not placed in such a manner that it is dispersed by currents or other forces. In addition, this commenter suggested requiring side-cast material to be protected so it does not discharge offsite or into jurisdictional waters during rainfall events. The Corps believes the recommended BMPs are applied more appropriately and effectively on a case-by-case or regional basis instead of a national basis.

One commenter remarked that while burying utilities is an important climate adaptation strategy to address wildfire impacts, such activities should be undertaken in an ecologically responsible fashion, and recommended prohibiting NWP C activities within or under coastal zone waters and wetlands. The Corps does not agree that NWP C activities should be prohibited in coastal zone waters and wetlands.

A few commenters provided the following list of various practices its members implement to help ensure that electric utility line construction and maintenance activities will have no more than minimal adverse environmental impacts:

- Avoiding surface waters when embedding structures (footings, poles, etc.), stockpiling materials, and setting up work areas. Locating poles and tower foundations outside of surface waters to the extent practicable. Where practicable, poles or structures are sited in uplands so that the infrastructure “spans” and thereby avoids the aquatic environment.
- When it is not possible to span an aquatic environment, poles or structures are installed in a manner to maintain conductor clearance consistent with North American Electric Reliability Corporation (“NERC”) and other guidelines to ensure safe and reliable operation.
- Installing mats before placing or driving equipment over wetlands or streams.
- Constructing roads with pervious materials and limiting width and elevation, so long as access is safe.
- Relying on low water crossings and appropriately sized culverts.
- Designing site plans to address the prevention, containment, and cleanup of sediment or other materials caused by the inadvertent returns of drilling fluids when installing electric utility lines under streams or other waters via directional drilling.
- Locating stockpile and work areas outside of surface waters.
- Performing frequent inspections of environmental and safety measures and construction activities.

- Marking waters of the United States near work areas with flagging or perimeter fencing
- Deploying mats prior to driving over or placing heavy equipment on wetlands.
- Installing stormwater BMPs to prevent erosion of hillsides adjacent to construction areas.
- Where practicable, trench material is side casted onto uplands or onto filter cloth, mats, or some other semi-permeable surface in vegetated wetlands.
- Site plans are designed to address the prevention, containment, and cleanup of sediment or other materials caused by the inadvertent returns of drilling fluids when installing electric utility lines under streams or other waters via directional drilling. In the event of an inadvertent return of drilling fluids, the agency is notified, and the remediation plan is implemented.
- Where permanent access is not required, avoidance measures are deployed to minimize impacts to jurisdictional waters to the maximum extent possible.
- Where permanent roads are required, they are typically limited in width and elevation to the minimum necessary for safe access and constructed with pervious materials.
- Stockpiles and work areas are generally established outside of surface waters.
- Timber mats are typically installed prior to placing or driving equipment over wetlands or streams.

- Frequent inspections of environmental and safety measures and construction activities are performed. Monitoring during and after construction to avoid unauthorized discharges to surface waters.
- Construction personnel, contractors, and personnel who operate and maintain the electric utility and telecommunication lines are trained to understand and comply with permit requirements and conditions.

Several commenters suggested the following BMPs for proposed NWP C based on Avian Powerline Interaction Committee documents. Their recommended BMPs include:

- Avian Protection Plan (APP) Guidelines
- Suggested Practices for Avian Protection on Power Lines
- Reducing Avian Collisions with Power Lines: State of the Art in 2012
- Region 6 Guidance for Minimizing Effects from Power Line Projects Within the Whooping Crane Migration Corridor (available at https://puc.sd.gov/commission/dockets/electric/2019/el19-003/memo.pdf)

The Corps believes the recommended BMPs are applied more appropriately and effectively on a case-by-case or regional basis instead of a national basis. The Corps has been administering NWP 12 since it was first issued in 1977 without extensive BMPs at the national level and has found that the current approach with the BMPs that are already in the text of the utility line NWPs (i.e., NWPs 12, 57, and 58) is effective.

A few commenters stated that the proposed NWP C will allow for increased impacts to rivers and wetlands. One commenter said that mechanized land clearing in forested and scrub-shrub wetlands for utility line installation should not be authorized under NWP C and that individual permits should be

required for those activities. One commenter said that individual permits should be used to authorize the entire electric utility line project when one crossing does not meet the limits for NWP C. One commenters states that it is not clear how temporal and cumulative impacts will be considered when evaluating facilities proposed to be authorized by NWP C or by multiple NWPs. A few commenters recommend that the Corps adopt a policy of early consultation with Indian tribes and other actors on these types of projects, above the timeline required by the NHPA section 106 process. One commenter recommended that the Corps require prior consent on projects impacting tribes.

The proposed NWP C will not result in increased impacts to rivers and wetlands because it has the same limits as the NWP 12 that was issued in 2017 and in several prior reissuances of the NWPs. The activities authorized by this NWP must comply with 33 CFR 330.6(d), which addresses the use of NWPs with individual permits. During the PCN review process, district engineers evaluate the individual and cumulative effects of the activities authorized by an NWP (see paragraph 2 of Section D, District Engineer's Decision). For Corps districts consult with tribes when necessary for activities authorized by this NWP and other NWPs. Issuance of an NWP verification by a district engineer does not require prior consent from tribes.

Several commenters expressed concern about the impacts that electric utility lines may have on migratory avian populations from collisions with power lines. These commenters said that the Corps needs to analyze the potential harm to bird populations from its permitting of utility lines pursuant to this proposed NWP. These commenters said that national programmatic ESA section 7 consultation should be initiated for the issuance of this NWP, to allow the Services to work with the Corps to establish national BMPs. Another commenter

stated that the Corps should consider voluntarily performing ESA Section 7 consultation on the issuance of this NWP to provide regulatory certainty.

The national decision document has been revised to discuss potential impacts of electric utility lines on migratory birds. General condition 19 addresses compliance with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. That general condition states that the permittee is responsible for ensuring that the activity authorized by an NWP complies with both of these acts, and that the permittee is responsible for contacting the appropriate office of the U.S. FWS to determine whether any incidental take permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act. Compliance with the ESA for this rulemaking is discussed in Section III.D of this final rule.

One commenter emphasized that safety must remain paramount when constructing, maintaining, repairing, and replacing above-ground and below-ground electrical utility lines. The commenter suggested that the Corps reference safety standards as a means of ensuring that electric utility activities are conducted safely. One commenter said that the proposal also describes the two methods by which underground electric transmission cables are installed: trenching and backfilling or horizontal directional drilling. This commenter remarked that members may also utilize conventional boring to install electric utility lines, and asked that the Corps acknowledge that conventional boring is another method used for installation of underground electric transmission cables.

The Corps does not have the authority to require and enforce safety standards that apply to the construction, maintenance, repair, and replacement of above-ground and below-ground electrical utility lines. Safety standards and requirements may be imposed by other federal agencies, or state and local

government agencies. This NWP authorizes activities that may involve directional boring, as long as those activities involve discharges of dredged or fill material into waters of the United States or cross navigable waters of the United States.

Proposed new NWP C is issued as NWP 57, with the modifications discussed above.

(16) NWP 58. Utility Line Activities for Water and Other Substances.

The Corps proposed this new NWP as NWP D, to discharges of dredged or fill material into waters of the United States, and structures and work in navigable waters of the United States, for utility line activities for water and other substances, such as potable water, sewage, stormwater, and wastewater.

Several commenters stated that they support the issuance of new NWP D for water, wastewater, and stormwater utility lines because of the national legal uncertainty of oil and gas pipeline projects. Many commenters said they support the issuance of NWP D because it streamlines the permitting process, clarifies the PCN requirements, separates activities based on the utility types, and ensures the activities will cause no more than minimal adverse environmental effects. Several commenters stated they were opposed to the issuance of NWP D and recommend withdrawing NWP D because it authorizes activities that cause significant adverse impacts, and these activities should require individual permits. These commenters stated, that at a minimum, additional PCN requirements should be added to the proposed NWP.

The activities authorized by NWP D will generally result in no more than minimal individual and cumulative adverse environmental impacts, and certain activities require pre-construction notification to the district engineer. District engineers will review PCNs for proposed NWP D activities, and may add permit conditions, including mitigation requirements, to the NWP authorization to help

ensure that the authorized activities cause no more than minimal adverse environmental effects. District engineers can also exercise discretionary authority and suspend or revoke the NWP authorization for proposed activities that will result in more than minimal adverse environmental effects. The Corps believes that the two PCN thresholds in proposed NWP D will provide district engineers with the opportunity to review utility line activities for water and other substances that have the potential to cause more than minimal adverse environmental effects.

Several commenters expressed opposition to allowing multiple segments as “single and complete projects” of the same pipeline qualify for NWP authorization because it violates the Clean Water Act’s minimal impact limitation, the National Environmental Policy Act, the Endangered Species Act, and other legal requirements for rigorous and transparent environmental reviews and safeguards. In addition, several of these commenters stated the authorizing multiple segments as single and complete projects does not capture cumulative effects.

The use of NWPs to authorize separate and distant crossings of waters of the United States for utility lines and roads as single and complete has been in the Corps’ NWP regulations at 33 CFR 330.2(i) since 1991. The National Environmental Policy Act is a procedural statute that does not prohibit any specific regulatory approaches or mandate specific outcomes. Activities authorized by NWP D must comply with general condition 18, endangered species. The requirements of paragraph (b)(4) of general 32 help ensure that district engineers have information regarding the crossings of waters of the United States that require PCNs or do not require PCNs, so that the cumulative adverse environmental effects can be assessed during the review process.

Several commenters stated opposition to the removal of the five PCN requirements from the 2017 NWP 12 because they believe the Corps will no longer receive notice of activities that cause more than minimal adverse effects, nor will other federal and state natural resource agencies be able to review and provide comments. Many commenters opposed the removal of the non-PCN requirements for right-of-way mechanized land clearing through forested wetlands because this activity causes fragmentation and a loss/conversion of wetland type and associated functions. The commenters requested addition of a requirement for the submittal of a PCN for land clearing associated with utility line rights-of-way within wetlands so that the Corps and interested stakeholders can ensure impacts are appropriately avoided and mitigated. A few commenters stated that the 500 linear foot PCN threshold from the 2017 NWP 12 should be added to NWP D. One commenter said that the PCN requirement for temporary access roads should be retained. One commenter stated that a PCN should be required when the proposed activities would run parallel with a stream bed.

The removal of the five PCN thresholds from NWP 12 are discussed in the preamble discussion of NWP 12 and the same reasoning applies to the removal of these PCNs from NWP 58. That preamble discussion includes responses to comments, and that discussion will not be repeated in this section of the preamble. The Corps declines to add the suggested PCN thresholds because this NWP requires restoration of temporary fills to pre-construction elevations. If utility line activities associated with the suggested PCN thresholds result in a permanent impact that causes the loss of greater than 1/10-acre of waters of the United States, then PCNs are required.

A few commenters said there needs to be an overall acreage limit on authorized impacts for this NWP, including a maximum acreage for non-PCN

forest clearing activities, and a maximum length of impervious surface roads before a PCN is required. One commenter stated that the Corps needs to provide sound, scientific evidence that the removal or omission of any of the PCN thresholds from the 2017 NWP 12 would not harm river, stream, or wetland hydrologic functions.

The activities authorized by this NWP are subject to a 1/2-acre limit for each single and complete project. There was no PCN requirement for temporary access roads in the 2017 NWP 12 and the Corps continues to believe that it is not necessary to ensure no more than a minimal individual or cumulative adverse environmental effects. Pre-construction notification thresholds are established for proposed activities requiring DA authorization that have the potential to cause more than minimal adverse environmental effects. Pre-construction notifications are informed by science and the Corps experience in administering the NWP program. In this instance, the Corps has determined it can remove the respective PCN requirements without risking more than a minimal individual or cumulative adverse environmental effects.

Some commenters said that the reduction of the PCN thresholds will simplify NWP D and would not cause a negative impact on the environment. One commenter asserted that permanent access roads should be authorized under NWP 14, not NWP D. One commenter recommended adding a requirement for horizontal directional drilling under waters of the United States, as a national standard under NWP D. One commenter recommended adding a provision to NWP D requiring containment and clean up contingency plans.

The Corps declines to add a requirement for the use of horizontal directional drilling because that technique is not always practical or feasible for utility lines that convey water and other substances. The use of horizontal

directional drilling is more appropriately determined on a case-by-case basis after considering the characteristics of the proposed utility line activity, including site characteristics. The Corps does not have the authority to require containment and cleanup contingency plans for the construction, expansion, maintenance, or repair of utility line activities for water and other substances.

One commenter stated that the Corps should define a “stand-alone project” as a utility line project that includes all crossing within a major watershed as evaluated together as single and complete, since the cumulative impacts are to one system. The commenter said that an alternative approach would be to require a cumulative analysis for all proposed NWP D activities. Several commenters requested clarification of the status of ongoing, non-oil and gas utility projects verified under the 2017 NWP 12, specifically whether they will continue to be authorized under the 2017 NWP 12 until the March 18, 2022 expiration date, or if they will need to be reverified.

The Corps declines to add a definition of “stand-alone project” to this NWP. When reviewing PCNs for proposed NWP activities, district engineers evaluate the crossings of waters of the United States that require PCNs and the information provided on other crossings in accordance with paragraph (b)(4) of general condition 32. They will determine whether the proposed utility line for water and other substances will result in no more than minimal individual and cumulative adverse environmental effects. The grandfathering provisions for these NWPs, including the transition from 2017 NWP 12 to the 2021 NWP 12 and new NWPs 57 and 58, is discussed in Section I.D. of this final rule.

A few commenters requested that the Corps broaden the definition of the term “utility line” so that it includes other types of man-made conveyances, such as canals and other linear conveyances that are subject to Clean Water Act

section 404 jurisdiction and can transport water. One commenter requested the addition of specific waterline ancillary facilities including, but not limited to pump plants, siphons, and tunnels to the text of this NWP. One commenter said that the Corps should clarify whether this NWP authorizes utility line activities that convey substances that are unclear as to whether they included in the definition of “oil or natural gas pipeline” in NWP 12, such as hydrogen and power-to-gas (i.e., hydrogen combined with carbon dioxide to create methane, or renewable natural gas). One commenter recommended further defining the term “other substances” in this NWP.

The Corps declines to add canals and ditches to the activities authorized by this NWP. Canals and ditches can be authorized by other NWPs, if the construction of those ditches involves discharges of dredged or fill material into waters of the United States or structures or work under Section 10 of the Rivers and Harbors Act of 1899. Substations for utility lines for water and other substances can include pump plants and siphons. Tunnels may be authorized if they a considered utility lines. Utility lines constructed to convey hydrogen or carbon dioxide can authorized by NWP D, but utility line activities constructed to convey renewable natural gas should be authorized by NWP 12. In general, “other substances” includes substances not conveyed by utility lines authorized by NWPs 12 and 57. The Corps has added “products derived from oil or natural gas” to be consistent with the definition of “oil or natural gas pipeline” in NWP 12, and to clarify that regulated activities associated with pipelines that carry substances derived from oil or natural gas should be authorized by NWP 12, not NWP D.

One commenter said that Note 4 should refer to the General Bridge Act of 1946 instead of Section 9 of the Rivers and Harbors Act of 1899. The Corps has made this change to Note 4.

One commenter requested clarification on how temporal and cumulative impacts will be considered when evaluating activities authorized by NWP D. This commenter recommended conducting a separate analysis for temporal and cumulative impacts on streams, wetlands, and other waters. A few commenters recommended changing the provision condition that states “there must be no change in pre-construction contours of waters of the United States” to “there must be no change in pre-construction contours which results in permanent losses of waters of the United States.” One commenter requested clarification on the measures the Corps will take to ensure that the activities authorized by NWP D are not improperly divided into smaller sections to avoid an individual permit.

Temporal and cumulative impacts will be evaluated using the 10 criteria identified in paragraph 2 of Section D, District Engineer’s Decision. The Corps declines to change the text regarding the requirement for no changes in pre-construction contours, because that has been a BMP that has helped ensure that most utility line activities result in temporary impacts. The Corps applies the definitions of “single and complete linear project” to NWP D activities and to other NWPs that authorize utility lines to determine which activities can be authorized by an NWP and which activities require individual permits. The Corps also implements 33 CFR 330.6(d), which addresses the use of individual permits with NWPs.

Several commenters stated that BMPs should be site-specific and imposed as special conditions, if necessary, and not standardized in the text of NWP D. One commenter said that the inclusion of standards and BMPs would

likely impede the objective of the NWP program by causing delays and increasing paperwork. This commenter asserted that attempting to establish national standards could cause conflicting requirements between the NWP and Clean Water Act Section 401.

The Corps agrees that most BMPs are site-specific and should be identified for specific utility line activities. Best management practices may also vary by region and by aquatic resource type. Best management practices that are necessary to ensure that activities authorized by NWP D have no more than minimal adverse environmental effects are more appropriately identified by district engineers and required through activity-specific conditions added to the NWP authorization or through the section 401 water quality certification process.

One commenter said that the Corps should adopt a policy of early consultation with the tribes and other interested parties for these types of projects over and above the NHPA section 106 process to avoid litigation, and other costly delays. This commenter also requested the Corps require consent on projects impacting tribes. One commenter recommended evaluating the direct, indirect, and cumulative effects on treaty reserved resources, including anadromous salmonids and their habitat to fully understand the potential extent of resource impacts.

The Corps consults with tribes when necessary to ensure that activities authorized by an NWP comply with general condition 17, tribal rights. As part of this rulemaking, Corps districts have consulted and coordinated with tribes to identify regional conditions and coordination processes to ensure protect tribal rights, as well as tribal trust resources. Activities authorized by NWPs do not require prior consent from tribes.

One commenter said that the Corps should end the practice of counting temporary impacts associated with matting for moving heavy machinery over a wetland, as a loss of greater than 1/10-acre, which triggers a requirement to submit a PCN. One commenter stated the Corps districts should maintain consistency with the PCN thresholds and should not be allowed to add regional conditions to this NWP that undercuts the reduction in PCN thresholds in this NWP. This commenter said that regional conditions cause confusion and inefficiencies, especially if the linear infrastructure crosses into multiple Corps districts.

The determination regarding whether the use of matting during utility line activities authorized by NWP D causes a loss of waters of the United States that may require a PCN is more appropriately made by district engineers on a case-by-case basis. Division engineers can add regional conditions to this NWP that replace PCN thresholds that were removed, if they determine those PCN thresholds are necessary to ensure that this NWP authorizes only those activities that have no more than minimal adverse environmental effects. Regional conditions are intended to address regional differences in aquatic resource functions, so there may be some inconsistency that must be dealt with, especially for utility lines that run through multiple states or Corps districts.

One commenter said that water mains are known to exceed the non-oil and gas pipeline diameters, identified in the preamble as 3 to 24 inches, as they may be 6 feet or wider. This commenter stated the Corps did not provide a robust analysis of the lengths of the various utility line, nor did they provide the total national mileage for these lines, as they could be quite long and have similar types of impacts as oil or gas pipelines. A few commenters recommended removing natural gas pipelines (i.e. residential lines), hydrogen transport lines for

clean energy solutions, and local, intrastate utility lines operated as an independent municipally-owned distribution system from NWP 12, because they are typically similar or smaller in size with respect to materials, location, installation footprint, and constructed along with water and wastewater pipelines.

The intent of the preamble discussion in the 2020 Proposal regarding the proposal to issue separate NWPs for oil or natural gas pipelines, electric utility lines and telecommunications lines, and utility lines for water and other substances was to illustrate some of the differences among those utility line sectors. The discussion of pipeline diameters has no relevance to the text of these NWPs, or to the conditions that apply to those NWPs. Utility line activities authorized by NWP D can be used to convey hydrogen, and for local distribution of water, sewage, wastewater, and other substances.

One commenter expressed concerns regarding the proposed issuance of NWP D to authorize utility line activities that carry wastewater. This commenter stated that distribution systems for wastewater reuse applications should be assumed to carry highly toxic and potentially hazardous substances that would degrade soils and groundwater if leaked or spilled. One commenter said that allowing activities under NWP D within or under coastal zone waters and wetlands will impermissibly degrade water quality, which is inconsistent with Section 404(e) of the Clean Water Act. One commenter stated that the NWP should be modified to require access roads to be built in accordance with local or state standards.

Prior versions of NWP 12 have authorized utility line activities that carry wastewater, so this is not a new issue for the NWP program. General condition 14 requires proper maintenance of activities authorized by NWPs, so utility lines carrying wastewater should minimize the potential for leaks and spills. The Corps

does not have the authority to regulate leaks or spills from utility lines. Leaks and spills are more appropriately addressed through federal, state, and local laws that are administered by other federal agencies, or state or local government agencies. This NWP can be used to authorize utility line activities for water and other substances in coastal zones. Local and state governments are responsible for ensuring that access roads are constructed in accordance with their standards.

Proposed NWP D is issued as NWP 58 with the modification discussed above.

H. Responses to Comments on the Nationwide Permit General Conditions

GC 1. Navigation. The Corps did not propose any changes to this general condition. The Corps did not receive any comments on this general condition. The general condition is adopted as proposed.

GC 2. Aquatic Life Movements. The Corps did not propose any changes to this general condition. One commenter noted that some project proponents bury the bottom portion of larger culverts to allow fish passage and create a natural bottom for habitat. One commenter expressed support for the Corps' retention of the existing definition given the wide variability of geomorphic and hydrologic settings in which NWP activities are conducted. One commenter stated that the Corps' preference for bottomless culverts, one-barrel culverts, or bridges should be explained. Another commenter said that in the absence of special concerns, such as endangered species, there should not be a preference for bottomless culverts. One commenter remarked that the text of this general condition is insufficient without specific monitoring and enforcement protocols to ensure that effects of NWP activities on aquatic life movements are no more than minimal.

The Corps acknowledges that burying the bottom portion of a larger culvert and creating a natural bottom for habitat is an acceptable approach for complying with this general condition. The Corps appreciates the commenter's support for providing flexibility in this general condition for addressing variations in the geomorphic and hydrologic settings in which NWP activities are conducted. The preference for bottomless culverts is based on the ability of bottomless culverts to facilitate the continuity of aquatic life movements, including during low-flow conditions. The general condition does not mandate the use of bottomless culverts. Bottomless culverts can be beneficial to a wide variety of aquatic species, not just endangered or threatened species. Bottomless culverts can provide connectivity for a wide variety of species, including aquatic species that provide important ecosystem functions and services, and aquatic species that have economic and recreational value. District engineers retain the authority to conduct compliance inspections to ensure that permittees comply with this general condition. In most circumstances, compliance monitoring is sufficient to determine compliance with this general condition, instead of requiring monitoring and data collection over a period of time.

The general condition is adopted as proposed.

GC 3. Spawning Areas. The Corps did not propose any changes to this general condition. One commenter expressed support for the Corps' reissuance of this general condition without changes. The Corps appreciates the support for the reissuance of this general condition. The general condition is adopted as proposed.

GC 4. Migratory Bird Breeding Areas. The Corps did not propose any changes to this general condition. The Corps did not receive any comments on this general condition. The general condition is adopted as proposed.

GC 5. Shellfish Beds. The Corps did not propose any changes to this general condition. The Corps did not receive any comments on this general condition. The general condition is adopted as proposed.

GC 6. Suitable Material. The Corps did not propose any changes to this general condition. One commenter stated that the condition should be refined to align with state water quality standards, specifically relative to nutrients and nutrient loading. Concerns about compliance with applicable state water quality standards or requirements are more appropriately addressed through the water quality certification requirements for proposed discharges of dredged or fill material into waters of the United States. The general condition is adopted as proposed.

GC 7. Water Supply Intakes. The Corps did not propose any changes to this general condition. One commenter expressed support with reissuance of the GC without change. The Corps acknowledges this commenters support for the reissuance of this general condition. The general condition is adopted as proposed.

GC 8. Adverse Effects from Impoundments. The Corps did not propose any changes to this general condition. The Corps did not receive any comments on this general condition. The general condition is adopted as proposed.

GC 9. Management of Water Flows. The Corps did not propose any changes to this general condition. The Corps did not receive any comments on this general condition. The general condition is adopted as proposed.

GC 10. Fills Within 100-Year Floodplains. The Corps did not propose any changes to this general condition.

A few commenters stated that the Corps should prohibit the use of NWPs and many other activities in 100-year floodplains and high-risk hurricane

evacuation zones because of increasing risks of climate change and sea level rise. One commenter stated that the Corps' requirement in the condition to comply with FEMA-approved state or local floodplain management requirements is insufficient to ensure that authorized activities have no more than minimal adverse environmental effects and comply with the Clean Water Act, the Endangered Species Act, and the National Environmental Policy Act. One commenter said that "high impact" NWPs should be prohibited from use in floodplains and that individual permits should be required for those activities. this commenter also stated that this general condition should be revised to prohibit the use of certain NWPs to authorize discharges of dredged or fill material into waters of the United States that result in permanent above-grade fills in mapped 100-year floodplains or floodways, in order to comply with Executive Order 11988, Floodplain Management.

The Corps does not have the authority to regulate activities in 100-year floodplains or high-risk hurricane evacuation zones, except for discharges of dredged or fill material into waters of the United States that may be located within those floodplains or evacuation zones. The primary responsibility for determining zoning and land use matters, including development activities in 100-year floodplains and high-risk hurricane evacuation zones, lies with state, local and tribal governments (see 33 CFR 320.4(j)(2)). This general condition is consistent with the item 2 of Section E, Further Information, which states that the NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law. State and local governments are the entities that have primary responsibility for regulating land uses within floodplains and other areas.

Under the discretionary authority provision at 33 CFR 330.1(d) and other provisions of the NWP regulations at 33 CFR part 330, division and district engineers can further condition or restrict the applicability of an NWP for cases where they have concerns for the aquatic environment under the Clean Water Act section 404(b)(1) Guidelines or for any factor of the public interest. There are two public interest review factors related to floodplains in the Corps' public interest review regulations at 33 CFR 320.4(a)(1) that could be used as a basis for exercising discretionary authority: floodplain values and flood hazards.

Nationwide permit activities, including discharges of dredged or fill material into waters of the United States within floodplains, comply with the Endangered Species Act through the requirements of NWP general condition 18. The National Environmental Policy Act is a procedural statute, and does not mandate any substantive floodplain management requirements. The Corps complies with NEPA requirements when it prepares the national decision documents for the issuance, reissuance, or modification of NWPs, and discusses potential impacts to flood hazards and floodplain values in its public interest review evaluation. The proposed NWPs, including general condition 10, are consistent with E.O. 11988, Floodplain Management, with respect to the Corps' authority to regulate specific activities that may occur in floodplains (i.e., discharges of dredged or fill material into waters of the United State). In each national decision document for the final NWPs, the Corps considered potential impacts to floodplain values and flood hazards.

The general condition is adopted as proposed.

GC 11. Equipment. The Corps did not propose any changes to this general condition. One commenter expressed support for reissuance of the

general condition with no change. The Corps appreciates this commenter's support for the reissuance of this general condition without change.

The general condition is adopted as proposed.

GC 12. Soil Erosion and Sediment Controls. The Corps did not propose any changes to this general condition. One commenter stated that the condition should be modified to reference specific erosion control standards or specifications that must be followed, particularly for projects that exceed an acre of land disturbance. Specific soil erosion and sediment control requirements vary among state and local governments and other entities, and are more appropriately determined on a case-by-case basis for specific NWP activities. Therefore, it would be inappropriate to establish national standards for erosion control.

The general condition is adopted as proposed.

GC 13. Removal of Temporary Structures and Fills. The Corps proposed to modify this general condition to apply to temporary structures. A few commenters expressed support for the addition of temporary structures to this general condition. A few commenters objected to the addition of temporary structures to this general condition, stating that their removal may cause more harm than leaving them in place because temporary structures are not all alike. One commenter requested a definition of "temporary." In contrast, another commenter supported leaving the definition of "temporary" to the district engineer's discretion. One commenter requested that the Corps add preamble language to the final rule that states that the removal of structures should occur after they have fulfilled their intended purpose. This commenter further stated that the project proponent should determine when the structure has fulfilled its intended purpose.

What constitutes a temporary structure should be determined on a case-by-case basis. Therefore, the Corps declines to define “temporary” for the purposes of this general condition. The Corps has changed the text of this general condition as it relates to temporary structures. The general condition now states that temporary structures must be removed, to the maximum extent practicable, after their use has been discontinued. The Corps recognizes that it might not be feasible to completely remove the structure after its use has been discontinued. For example, it might not be feasible to remove an entire piling from navigable waters after it is no longer needed, but the project proponent could remove that portion of the piling that extends above the bottom of the waterbody so that it no longer is an obstruction at the water surface. The Corps also acknowledges that attempting to remove a temporary structure in its entirety has the potential to cause more substantial adverse environmental effects than leaving a portion of the structure in place.

The general condition is adopted with the modifications discussed above.

GC 14. Proper Maintenance. The Corps did not propose any changes to this general condition. No comments were received. The general condition is adopted as proposed.

GC 15. Single and Complete Project. The Corps did not propose any changes to this general condition. One commenter expressed support for reissuance of this general condition with no change. The general condition is adopted as proposed.

GC 16. Wild and Scenic Rivers. The Corps did not propose any changes to this general condition. No comments were received on this general condition.

The general condition is adopted as proposed.

GC 17. Tribal Rights. The Corps proposed to modify this general condition to restore the text that was in the general condition for the 2012 NWPs and prior NWPs to eliminate any confusion about the applicable standards that apply when considering potential impacts to tribal treaty rights when consulting with tribes, and when determining the applicability of an NWP for a proposed activity. The proposed changes to this general condition are also intended to clarify that the identification of a potential effect to a tribal right does not mean that a district engineer must exercise his or her discretionary authority to require an individual permit for a proposed activity. The proposed changes to this general condition were also intended to avoid any confusion between tribal consultation policies, tribal rights, and the requirements of the Corps' permitting authorities.

Many commenters objected to the proposed changes to general condition 17 and many commenters expressed support for the proposed change. Many commenters stated that the 2017 general condition's use of the "no more than minimal effects on" standard is clearer than the "impair" standard the Corps proposes to revert to because the "no more than minimal adverse effects" standard used throughout the NWPs. One commenter stated that "impair" is a clearer standard. Many commenters asserted that use of "no more than minimal effect" threshold in the general condition is consistent with Section 404(e) of the Clean Water Act and would not be confusing to retain in the general condition. Several commenters remarked that a minimal effect determination is well established in guidance and regulation and use of the word "impair" provides no additional clarity.

The Corps is returning the text of this general condition to the text that was in the 2012 NWPs and prior NWPs to eliminate any confusion about the applicable standards that apply when considering potential impacts to tribal treaty

rights when consulting with tribes, and when determining the applicability of an NWP for a proposed activity. By using the word ‘‘impair’’ instead of “no more than minimal adverse effects on” the general condition will be clearer that the NWPs do not change existing tribal trust duties of the Corps, or the rights of tribes. Rather, the proposed changes to the general condition will serve as a guide to users when undertaking tribal consultations regarding the application of an NWP to a particular activity, and when developing protocols regarding tribal notification that build upon the existing Department of Defense, Army, and Corps tribal consultation policies. The Clean Water Act section 404(e) requirement that no activity authorized by an NWP may cause more than minimal adverse effects remains applicable in the context of potential effects to tribal rights, resources, or lands.

Many commenters said that the change in language would result in less protection for tribal rights and resources and is inconsistent with the Corps’ trust obligations. Many commenters stated that the Corps provides no rationale for the proposed change considering its rationale for changing the language in 2017. A few commenters stated that tribes should receive copies of PCNs for all activities that occur on tribal lands or off-reservation areas where treaty rights are exercised. One commenter stated that the tribes should be allowed to make the “no more than minimal effect” determination.

The change in the text of this general condition will not result in less protection for tribal rights and resources. The rationale for the proposed change was provided in the preamble to the 2020 Proposal (see 85 FR 57350). The 1998 Department of Defense American Indian and Alaska Native Policy continues to apply to the NWPs and other DA permits. The district engineer is authorized to

determine whether a proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects.

Many commenters said they are opposed to removing “tribal lands” and its definition from the suite of protected resources. Many commenters expressed opposition to removing “protected tribal resources” and its definition from the suite of protected resources. Many commenters stated that the proposed wording would only protect tribal treaty rights and not all tribal rights. A few commenters suggested that the definition of tribal rights be moved to the text of general condition 17. One commenter said that the change in general condition 17 would not affect the Corps’ tribal trust responsibilities. One commenter recommended that the Corps delete unnecessary definitions and should only retain definitions for “tribal rights” and “tribal lands” as they pertain to general condition 17.

Protection of tribal lands will continue through the implementation of the 1998 Department of Defense American Indian and Alaska Native Policy. “Protected tribal resources” is an ambiguous term and removal of that term from the general condition will result in a clearer, more enforceable general condition with less risk of disputes and litigation concerning whether particular resources are protected tribal resources. The Corps is retaining the definition of “tribal rights” in the “Definitions” section of these NWPs (Section F). The Corps is also retaining the definition of “tribal lands” in Section F of the NWPs.

Many commenters said that “identification of a potential effect to a tribal right does not mean that a district engineer must exercise his or her discretionary authority to require an individual permit for a proposed activity,” is contrary to statutory authority and the Corps’ trust obligations. One commenter encouraged the Corps to engage prospective applicants for projects that have a greater potential to affect tribal rights in an optional pre-application meeting with the

tribes prior to submittal of an NWP verification request. One commenter said that the general condition should include a statement requiring the Corps to conduct meaningful consultation with potentially impacted tribes in accordance with tribal protocols.

District engineers have the final decision-making authority as to whether a proposed NWP activity that requires DA authorization qualifies for NWP authorization. District engineers can coordinate with tribes to help make these decisions, including whether a proposed NWP activity complies with general condition 17. If a district engineer holds a pre-application meeting with a project proponent, he or she has the discretion to invite tribal representatives to attend the meeting. When conducting government-to-government consultation with tribes, district engineers endeavor to conduct meaningful consultation with tribes.

One commenter suggested revising general condition 17 to read as follows: “No NWP activity may cause more than minimal adverse effects to tribal rights, including treaty rights, protected tribal resources such as ceded territory, any sacred/cultural site/landscape or tribal lands, as determined by any concerned tribe(s).” Another commenter recommended revising this general condition to read as follows: “No activity or its operation may cause adverse effects on tribal rights (including, but not limited to, reserved water rights and treaty rights), protected tribal resources, or tribal lands.” As discussed above, the Corps is adopting the proposed text of general condition 17.

Several commenters said that the change in language does not support the Corps’ rationale for the NWPs in light E.O. 13783, “Promoting Energy Independence and Economic Growth.” A few commenters stated that the change in language would violate E.O. 13175. One commenter suggested that the condition should include a statement requiring the project proponent to obtain

consent from potentially impacted tribes for the NWP activity. One commenter requested a definition of “impair.” One commenter suggested that the Corps provide an approved list of tribal entities. One commenter suggested that the Corps provide guidance and processes relative to consultation and timelines.

General condition 17 was not discussed in the report issued by the Office of the Assistant Secretary of the Army (Civil Works) in response to E.O. 13783. This change in the text of general condition 17 does not violate E.O. 13175. The Corps continues to consult with tribes on proposed NWP activities when such consultation is warranted. The district engineer determines whether a proposed activity requiring DA authorization qualifies for NWP authorization, and consent from potentially impacted tribes is not required for that determination. The Corps does not believe it is necessary to develop an approved list of tribal entities. Corps districts are aware of the tribes they may need to consult with. The Bureau of Indian Affairs may be the appropriate entity to develop and maintain such a list. The Corps Regulatory Program follows a number of existing Department of Defense, Army, and Corps tribal consultation policies. Information on these tribal consultation policies are available at: https://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/ .

This general condition is adopted as proposed.

GC 18. Endangered Species. The Corps proposed to modify this general condition to make changes to be consistent with the U.S. Fish and Wildlife Service’s (FWS) and National Marine Fisheries Service’s (NMFS) Endangered Species Act (ESA) section 7 consultation regulations that were published in the Federal Register on August 27, 2019 (84 FR 44976). Those regulations amended the definition of “effects of the action” at 50 CFR 402.02 by removing the term “indirect effects.”

Several commenters supported the proposed changes to ensure that general condition 18 aligns with the current ESA implementing regulations at 50 CFR part 402. A few commenters suggested that the Corps incorporate the new ESA section 7 regulation definitions directly into the general condition rather than by referencing provisions in the Code of Federal Regulations. These commenters also suggested adding a definition for “action area” to the text of the general condition.

The Corps believes that it is more appropriate to reference the current ESA section 7 regulations in the general condition rather than copying the text of the applicable provisions into the general condition itself. During the process of determining whether a proposed NWP activity “may affect” listed species or critical habitat, the Corps will utilize the definition of “action area” at 50 CFR 402.02 and there is no need to provide the definition of that term in the text of general condition 18.

Several commenters objected to the removal of “direct effects” and “indirect effects” definitions from the general condition and asserted that ESA section 7 consultation compliance will not be achieved without the analysis of the effects and/or would cause significant adverse impacts to endangered species. One commenter expressed opposition to the proposed change to general condition 18 because he or she is opposed to the 2019 amendments to the U.S. FWS’s and NMFS’s ESA section 7 regulations. One commenter stated that the Corps must seek concurrence from the U.S. FWS or NMFS for any “no effect” determination.

The terms “direct effect” and “indirect effect” are no longer used in 50 CFR part 402. When the district engineer evaluates a PCN for a proposed NWP activity to determine whether the proposed activity “may affect” listed species or

critical habitat, he or she applies the definition of “effects of the action” at 50 CFR 402.02, as well as the U.S. FWS’s and NMFS’s regulations for identifying activities that are reasonably certain to occur (50 CFR 402.17(a)) and identifying the consequences caused by the proposed action (50 CFR 402.17(b)). The ESA section 7 consultation handbook issued by the U.S. FWS and NMFS in 1998 states that a federal agency is not required to obtain written concurrence from the U.S. FWS or NMFS for its “no effect” determinations.

One commenter stated that clarification is needed as to what is meant by non-Federal permittees that require pre-construction notification under paragraph (c) of this general condition. A few commenters said that the general condition only requires project proponents to submit a PCN if a proposed activity might affect a species or its critical habitat, which ignores the Corps responsibility to conference on species proposed for listing. These commenters suggested revising this general condition to include proposed species. Several commenters requested clarification of the term “in the vicinity” in paragraph (c) of this general condition. One commenter said that the Corps inappropriately relies on information contained in the PCN to make its effect determinations and must independently verify the potential for a listed species to be affected.

Generally speaking, a non-federal permittee is a permittee that is not a federal agency. There may be limited circumstances where a non-federal agency might be considered as having ESA section 7 obligations similar to those of a federal agency. For example, the Federal Highway Administration may assign a state Department of Transportation the responsibility for complying with non-NEPA environmental statutes such as the ESA.

The Corps has modified paragraph (c) of this general condition to be consistent with 33 CFR 330.4(f)(2), which states non-federal permittees shall

notify the district engineer if any Federally listed (or proposed for listing) endangered or threatened species or critical habitat might be affected or is in the vicinity of the project. The Corps also added “critical habitat proposed for such designation” to paragraph (c). These changes are necessary for species proposed for listing and critical habitat proposed for such designation because section 7(a)(4) of the ESA requires agencies to confer with the U.S. FWS or NMFS on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4 of the ESA or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. The Corps has modified the first sentence of paragraph (c) as follows: “Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat (or species proposed for listing or critical habitat proposed for such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation, 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.” The Corps has added “species proposed for listing” and “critical habitat proposed for such designation” where appropriate in other sentences in this paragraph.

When reviewing a PCN for a proposed NWP activity that might affect species proposed for listing or critical habitat proposed for such designation, or is located in critical habitat proposed for such designation, the district engineer will evaluate the effects of the proposed NWP activity on the species proposed for listing or the critical habitat proposed for designation. If the district engineer determines that the proposed NWP activity is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse

modification of proposed critical habitat, he or she will initiate a conference with the U.S. FWS and/or NMFS in accordance with 50 CFR 402.10. If the district engineer determines that a conference is necessary, he or she will notify the non-federal applicant within 45 days of receipt of a complete PCN. The activity is not authorized by NWP until the district engineer has notified the project proponent that the requirements of ESA section 7 have been satisfied

The Corps added “or conference” to the second to last sentence of paragraph (c) to address situations where the district engineer conducts an ESA section 7 conference with the U.S. FWS or NMFS for a proposed NWP activity that may affect a species proposed for listing or proposed critical habitat. The Corps also modified paragraph (d) of this general condition to state that as a result of a conference with the U.S. FWS or NMFS the district engineer may add species-specific permit conditions to the NWPs.

The Corps is adding “or critical habitat proposed for such designation” to this general condition to ensure that these NWPs do not authorize any activities that are likely to result in the destruction or adverse modification of proposed critical habitat. The general condition already prohibits the use of NWPs for any activity that is likely to jeopardize the continued existence of species proposed for listing. The prior exclusion of proposed critical habitat was an administrative oversight.

The term “in the vicinity” for the purposes of paragraph (c) of this general condition cannot be defined at a national level. What constitutes “in the vicinity” can vary substantially by species, environmental setting, the medium in which the species lives (e.g., water, air, or in the ground), and other factors. When reviewing a PCN, the district engineer makes an independent determination of whether the proposed activity “may affect” listed species or designated critical

habitat and thus requires ESA section 7 consultation. The district engineer relies in part on information in the PCN, but he or she will also utilize other information, including local knowledge of the area, and the species and the habitats in which the listed species lives in.

One commenter said general condition 18 should require PCNs for activities authorized by NWPs 3, 12, 13, 14, 21, 39, 44 and 48. One commenter stated that the Corps must not rely solely on permittees submitting PCNs to comply with its ESA obligations. One commenter suggested revising the general condition to state that the ESA section 7 consultation for an NWP activity will cover the entire project, to clarify that the entire action area must be examined and not just the activities on lands under the Corps' jurisdiction.

All activities authorized by NWPs 21, 39, and 44 require PCNs to district engineers. The district engineers will review those proposed activities and determine whether ESA section 7 consultation is required. Activities authorized by NWPs 3, 12, 13, 14, and 48 require PCNs under specific circumstances, and district engineers will review those PCNs to identify proposed activities that "may affect" listed species or designated critical habitat. For those activities that do not require PCNs under the text of those general permits, paragraph (c) applies when the project proponent is a non-federal permittee. 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, then the project proponent is required to submit a PCN so that the district engineer can determine whether the proposed activity "may affect" listed species or designated critical habitat. When determining the scope of the ESA section 7 consultation, the district engineer applies the U.S. FWS's and NMFS's

regulations at 50 CFR part 402, including the definitions of “action area” and “effects of the action.”

One commenter recommended that the Corps adhere to the 45-day review time to determine whether a proposed NWP activity “may affect” or will have “no effect” on listed species. Alternatively, this commenter suggested that the review period not exceed 90 days under any circumstances. One commenter expressed support for the use of regional programmatic ESA section 7 consultations to satisfy the requirements of general condition 18.

Paragraph (c) of general condition 18 already requires the district engineer to notify the non-federal applicant within 45 days of receipt of a complete PCN whether the proposed activity will have “no effect” in listed species or designated critical habitat or where it “may affect” listed species or designated critical habitat and require section 7 consultation with the U.S. FWS and/or NMFS. If the district engineer has to conduct section 7 consultation with the U.S. FWS or NMFS, the consultation process may take longer than 90 days. Formal section 7 consultations conclude within 90 days after initiation unless the timeframe is extended in accordance with the section 7 regulations at 50 CFR 402.14(e). For informal consultations, the U.S. FWS and NMFS are required to provide written concurrence or non-concurrence with the federal agency's “may affect, not likely to adversely affect” determination within 60 days, unless an extension occurs (see 50 CFR 402.13(c)(2)). The Corps cannot issue the NWP verification until the section 7 consultation is completed and the applicant cannot proceed without receiving a verification from the Corps as provided for in paragraph (a)(2) of general condition 32 because compliance with ESA cannot be waived. The Corps will continue to utilize regional programmatic consultations for the NWPs,

and work with the U.S. FWS and NMFS to develop new regional programmatic consultations.

One commenter suggested changing paragraph (g) of general condition 18 to advise project proponents to only use the U.S. FWS's IPaC website at (http://ww.fws.gov/ipac) because other websites are usually outdated. This commenter also recommended requiring project proponents to append the IPaC output document to their consultation package. One commenter requested that the text of the general condition be modified to include specific instructions on the process for ESA Section 7 consultation where the Corps has limited regulatory authority, such linear projects where the Corps' jurisdiction is limited to crossings of jurisdictional waters and the crossings are separated by upland areas.

Project proponents should be allowed to use whatever information that can help them determine whether the PCN threshold in paragraph (c) of general condition 18 is triggered. The U.S. FWS's IPaC tool is just one tool that might provide useful information to prospective permittees. There may be other tools, such as databases and web sites managed by state and local governments and non-governmental organizations that may be helpful in determining whether a proposed NWP activity might affect listed species, if listed species are in the vicinity of a proposed activity, or if the activity is located in designated critical habitat. This includes listed species under the jurisdiction of the NMFS, which are not included in IPaC. The Corps does not believe that there should be a requirement to the output from IPaC in the PCN because not all listed species are included in that information system.

For linear projects, such as various types of utility line activities authorized by NWPs 12, 57, and 58, the Corps applies the ESA section 7 regulations at 50 CFR part 402, including the definition of "effects of the action" and other

provisions in determining whether a proposed NWP activity “may affect” listed species or designated critical habitat, and for initiating ESA section 7 consultation for those proposed activities where the district engineer makes a “may affect” determination. If ESA section 7 consultation is required for activities authorized by NWPs 12, 57, and 58, the Corps and U.S. FWS and/or NMFS work together on a comprehensive review of the overall project in accordance with the definition of “effects of the action” and other provisions of 50 CFR part 402, including the 2019 amendments the U.S FWS and NMFS made to those regulations (see 84 FR 44976). For ESA section 7 purposes where the Corps has a limited regulatory role under the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899, the Corps, with the assistance of the permit applicant, can provide the U.S. FWS or NMFS with a biological assessment that evaluates the larger project as a whole but that clearly distinguishes between areas and effects subject to the Corps’ jurisdiction and areas and effects outside of its jurisdiction. If the proposed activity requires formal ESA section 7 consultation, the U.S. FWS and NMFS can issue an incidental take statement for a biological opinion where, in accordance with ESA section 7(b)(4)(iv) they can assign responsibility of specific terms and conditions of the incidental take statement to the Corps, the applicant, or both taking into account their respective roles, authorities, and responsibilities (see 84 FR 44977).

A few commenters said that it is likely activities are occurring that are not in compliance with general condition 18 because the Corps does not require PCNs for all activities. One commenter stated, with regard to ESA-listed species, PCNs should not only include the immediate area, rather the entire area impacted by NWP activities, which must be consulted on programmatically with the U.S. FWS. This commenter provided an example of studies have shown that

pollutants and sediments can impact critically imperiled mussels up to 10 river miles from the impact location and said that ESA section 7 consultations should include the evaluation of 10 river miles of potential effects from the NWP impact location and analyses of cumulative effects as well.

In order to obtain NWP authorizations, project proponents must comply with all terms and conditions of the NWPs (see 33 CFR 330.1(c)), including general condition 18. If a project proponent does not comply with the requirements of general condition 18, including the PCN requirements in paragraph (c) of that general condition, the activity is not authorized by an NWP. When determining whether a proposed NWP activity may affect listed species or designated critical habitat, the district engineer applies the regulations issued by the U.S. FWS and NMFS at 50 CFR part 402, including the definition of "effects of the action" and other provisions the determine the scope of the ESA section 7 consultation and analysis of effects or consequences

This general condition is adopted with the modifications discussed above.

GC 19. Migratory Birds and Bald and Golden Eagles. The Corps proposed to revise the wording of this general condition to clarify that members of the regulated public should determine for themselves, with the assistance of the U.S. Fish and Wildlife Service, what "take" permits, if any, they might require under the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act. This General Condition makes clear that Project Proponents are responsible for complying with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act, including obtaining any ''take'' permits that may be required under the U.S. Fish and Wildlife Service's regulations issued under those statutes.

Several commenters expressed support for making no changes to this general condition. One commenter noted that even though the Solicitor's Opinion

has been vacated, the Corps should move text from the preamble to the general condition if reforms to the Migratory Bird Treaty Act are finalized by the administration before the final NWPs are issued. One commenter said that applicants should be encouraged to coordinate with wildlife agencies. Several commenters stated that reference to the Solicitor's Opinion in the preamble should be stricken because it was recently vacated by a federal district court.

The text of the general condition is sufficient to address the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act without moving text from the preamble of the proposed rule to the general condition. Project proponents can coordinate their proposed projects with federal and state wildlife agencies. There is no need to strike the text that was in the preamble to the 2020 Proposal because it was background used to solicit public comment, and it was current at the time the proposal was published in the Federal Register.

This general condition is adopted as proposed.

GC 20. Historic Properties. The Corps proposed to modify paragraph (c) of this general condition to state that the district engineer's identification efforts for historic properties shall be commensurate with potential impacts. The Corps also proposed to modify paragraph (d) of this general condition to inform non-federal permittees that if pre-construction notification is required under paragraph (c) of this general condition, then he or she shall not begin the NWP activity until the district engineer has determined the proposed activity has no potential to cause effects to historic properties or has completed NHPA section 106 consultation. Paragraph (d) requires the district engineer to notify the non-federal applicant within 45 days of receipt of a complete PCN whether NHPA section 106 consultation is required.

Several commenters expressed support for the proposed changes to this general condition. A few commenters suggested adding language to the general condition to require disclosure of the qualifications of the person who would make an effect determination for the purposes of Section 106 of the National Historic Preservation Act (NHPA). That individual would need to satisfy the Secretary of the Interior's Standards for Professional Qualifications in Archaeology and Historic Preservation.

The Corps does not believe it would be appropriate to add text to this general condition to require disclosure of the qualifications of people making effects determinations for the purposes of section 106 of the NHPA. Effect determinations may be made by a variety of agency officials, including Corps district staff.

Many commenters stated that this general condition does not comply with the NHPA and does not satisfy the Corps Section 106 obligations with regards to the NWPs as it unlawfully delegates its Section 106 responsibilities to non-federal permittees and establishes a review process that is not consistent with the Advisory Council on Historic Preservation's (ACHP's) regulations at 36 CFR part 800. A few commenters said that this general condition should not reference Appendix C to 33 CFR part 325, because Appendix C has been determined by the federal courts, the ACHP, and other federal agencies to be unlawful. One commenter expressed support for the Corps' reliance on Appendix C and its interim guidance, stating that they are generally consistent with the ACHP's regulations.

This general condition does not delegate the Corps' section 106 responsibilities to permit applicants. The responsibility for making effect determinations under section 106 of the NHPA for NWP activities falls to the

district engineer. For non-federal permittees, paragraph (c) of general condition 20 requires the submission of a PCN for a proposed activity that might have the potential to cause effects to historic properties. The Corps' regulations for complying with section 106 of the NHPA are found at Appendix C to 33 CFR part 325. Appendix C remains in effect as a counterpart regulation to 36 CFR part 800, and no federal court has invalidated Appendix C.

A few commenters objected to this general condition, saying that it encourages applicants to consult with State Historic Preservation Officers (SHPOs), Tribal Historic Preservation Officers (THPOs) and tribes. These commenters said that the Corps cannot delegate its tribal consultation obligations to applicants. One commenter stated that the proposed changes to general condition 20 will impact Native American cultural resources.

Paragraph (c) of this general condition encourages permit applicants to seek assistance from SHPOs, THPOs, and designated tribal representatives to help ensure compliance with this general condition. Seeking assistance is not equivalent to conducting consultation. Section 106 consultation remains the responsibility of the Corps. The requirements of general condition 20, plus the changes being made in this final rule, will ensure that section 106 consultation occurs for NWP activities that have potential to cause effects to Native American cultural resources that meet the definition of "historic property" in Section F, Definitions.

Several commenters said that the proposed change to paragraph (c), which states that the district engineer's identification efforts for historic properties shall be commensurate with potential impacts, should be further revised for clarity. A few commenters expressed opposition to this proposed change to paragraph (c) and requested that it be removed in the final rule. Several

commenters stated that the text in paragraph (c) should make clear that the evaluation is only associated with the extent of the Corps' jurisdiction. One commenter said that the proposed change gives the Corps justification to decline to identify certain historic properties if the district engineer determines that the property or properties will not be impacted by the proposed activity. A few commenters opined that the Corps fails to evaluate areas outside its jurisdiction, particularly with linear projects, with is contrary to current regulations.

The change to paragraph (c) regarding the district engineer's identification efforts for historic properties is consistent with the ACHP's regulations at 36 CFR 800.4(b)(1) regarding the level of identification efforts. Section 800.4(b)(1) states that the federal agency should take into account the "magnitude and nature of the undertaking and the degree of federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects." When evaluating an NWP PCN, the district engineer will identify the permit area in accordance with the criteria in paragraph 1(d) of Appendix C to 33 CFR part 325. The Corps will evaluate direct and indirect effects caused by the proposed NWP activity. If an historic property is not directly or indirectly affected by the proposed NWP activity, the Corps does not have the authority to prevent effects to historic properties caused by activities outside of its control and responsibility.

One commenter recommended that the Corps adhere to the 45-day review time or as an alternative change paragraph (c) of this general condition so that the district engineer's review of the PCN does not exceed 90 days. One commenter stated that language requiring an applicant to continue to wait beyond 45 days if they have not heard back from the Corps creates the potential for an indefinite delay. This commenter suggested adding a requirement for the

district to establish a deadline for notifying the applicant on whether NHPA section 106 consultation is required.

Paragraph (d) of general condition 20 states that for non-federal permittees, the district engineer will notify the prospective permittee within 45 days of receipt of a complete PCN whether NHPA section 106 consultation is required. The section 106 consultation process may take longer than 45 days. The NWP verification cannot be issued and the project applicant cannot proceed with the proposed activities under Corps jurisdiction until the section 106 consultation process has been completed.

A few commenters said that Corps districts often override the permittees' determination as to whether a PCN is required for a proposed activity under paragraph (c). One commenter recommended modifying or revising paragraph (a) of general condition 20 in a manner consistent with paragraph (a) of general condition 18 to focus on the threshold that triggers the requirement for section 106 consultation, rather than determinations made by district engineers once a PCN is submitted. One commenter recommended timely review of scopes of work and requested that the Corps make final determinations regarding scopes of review and not allow any revisions to those determinations.

For an NWP activity, it is ultimately the district engineer's responsibility to determine compliance with section 106 of the NHPA. As additional information is revealed during the review of a PCN or during section 106 consultation, it may be necessary to change the scope of review to ensure compliance with the requirements of section 106 of the NHPA. The Corps has modified paragraph (a) of this general condition to state that "no activity is authorized under any NWP which 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 National Historic Preservation Act (NHPA) have been satisfied."

One commenter said that clarification is needed on who are the non-federal permittees that need to submit PCNs under paragraph (c). One commenter remarked that the terms "might have the potential to cause" and "potentially eligible" are vague terms and that Corps districts are applying these requirements inconsistently and more expansively than appropriate. One commenter said that the "might have the potential" standard is a higher threshold than the threshold set forth in the ACHP's regulations at 36 CFR part 800.

As a general matter, a non-federal permittee is a permittee that is not a federal agency. There may be limited circumstances where a non-federal agency might be considered as having NHPA section 106 obligations similar to those of a federal agency. For example, the Federal Highway Administration may assign a state Department of Transportation the responsibility for complying with non-NEPA environmental statutes such as the NHPA. The purpose of the "might have the potential to cause effects" threshold in paragraph (c) of this general condition is to require submittal of PCNs for proposed NWP activities that might have a possibility of causing effects to historic properties, so that the district engineer can determine whether section 106 consultation is required for a proposed NWP activity. "Potentially eligible" is another threshold that is intended to provide an opportunity for further review to determine whether a historic property is present. These thresholds cannot be precisely defined, and involve some degree of subjectivity.

One commenter stated that paragraph (b) of this general condition improperly designates other federal agencies as the lead with respect to Section 106 without their agreement. This commenter further noted that this might be

problematic given the proposal not to require PCNs from federal permittees for proposed activities that might have the potential to cause effects to historic properties.

Other federal agencies have their own obligations to comply with section 106 of the NHPA. If a proposed NWP activity being undertaken by another federal agency requires a PCN, paragraph (b) of this general condition requires the federal permittee to submit appropriate documentation demonstrating compliance with the requirements of section 106. After reviewing that documentation, the district engineer may notify the federal permittee that additional section 106 consultation may be necessary. Non-federal and federal permittees have different thresholds under this general condition because their responsibilities under section 106 are different.

This general condition is adopted with the modifications discussed above.

GC 21. Discovery of Previously Unknown Remains and Artifacts. The Corps did not propose any changes to this general condition. One commenter recommended reissuance of the general condition with no additional restrictive provisions.

This general condition is adopted as proposed.

GC 22. Designated Critical Resource Waters. The Corps did not propose any changes to this general condition. One commenter recommended revising this general condition to include state designated critical resource waters rather than deferring to Corps district engineers to designate certain waters at a later date. One commenter recommended adding proposed new NWPs C and D to the list of NWPs in paragraph (a) of this general condition. This commenter also suggested adding proposed new NWPs A and B to the list of NWPs in paragraph (b) of this general condition. Two commenters said that if the Corps removes the

PCN requirements for federal permittees, federal agencies should still be required to submit PCNs for proposed activities in designated critical resource waters.

After providing notice and an opportunity for public comment, the Corps is continuing to require the long-standing practice of allowing district engineers to add specific waters to this general condition. States that want waters of particular environmental or ecological significance to be subjected to this general condition should provide their recommendations to the appropriate district engineer for consideration. Since NWP 12 has been in paragraph (a) of this general condition since it was first adopted in 2000 (65 FR 12872), for consistency the Corps has added new NWPs 57 and 58 to this general condition. New NWPs 55 (seaweed mariculture activities) and 56 (finfish mariculture activities) require PCNs for all activities, so it is unnecessary to add these NWPs to the list of NWPs in paragraph (b) of this general condition. In addition, the Corps is retaining PCN requirements for federal permittees.

This general condition is adopted with the modifications discussed above.

GC 23. Mitigation. The Corps proposed to modify paragraph (d) of this general condition to establish a threshold for requiring compensatory mitigation for losses of stream bed that is similar to the threshold for wetlands in paragraph (c) of this general condition. The Corps proposed to add a 1/10-acre threshold for requiring compensatory mitigation for losses of stream beds that require pre-construction notification, unless the district engineer determines on a case-by-case basis that compensatory mitigation should not be required because other forms of mitigation would be more environmentally appropriate and issues an activity-specific waiver of this requirement.

A few commenters expressed support for the changes to this general condition. One commenter objected to the proposed changes and recommended that this general condition be reissued with no changes. One commenter stated that compensatory mitigation should not be required when compensatory mitigation is required by other federal or state laws, rules, or regulations. Another commenter said that the Corps should focus on improving consistency between districts on when compensatory mitigation is required for NWP activities.

Changes to this general condition are necessary to address the removal of the 300 linear foot limit for losses of stream bed under NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. District engineers impose compensatory mitigation requirements on specific activities authorized by NWPs to ensure that those activities result in no more than minimal individual and cumulative adverse environmental effects. If a proposed NWP activity is regulated by another federal agency or a state, tribal, or local agency, and that agency requires compensatory mitigation for that proposed activity, the district engineer may consider those compensatory mitigation requirements before determining whether additional compensatory mitigation is required for that activity. The Corps should not be imposing duplicative compensatory mitigation requirements when the resource concerns are already being addressed by another federal, tribal, state, or local agency. The Corps believes that federal and state regulatory programs should complement rather than duplicate one another (see 33 CFR 320.1(a)(5). Since aquatic resources can vary substantially across the country, different Corps districts may establish different compensatory mitigation requirements.

One commenter disagreed that project proponents design projects to minimize losses of waters of the United States to qualify for NWP authorizations to avoid the cost of providing compensatory mitigation to offset the authorized

losses. One commenter said that other forms of mitigation used for NWP activities should include best management practices, minimization measures, activities that result in improvement of wetland and stream habitat, and actions that improve water quality. Another commenter disagreed that best management practices and other forms of mitigation are more environmentally preferable forms of mitigation, and that best management practices should be implemented during the design, construction, and operations stages of a project.

The data the Corps collects on the impacts to waters of the United States authorized by the NWPs shows that 82 percent of verified impacts authorized by NWPs in 2018 are less than 1/10-acre (see Figure 5.1 of the Regulatory Impact Analysis for this final rule). During 2018, only 5% of the verified impacts authorized by NWPs resulted in impacts to 0.25 acre to 0.5 acre. For those NWPs that have a qualitative limit in acres, a 1/2-acre limit is the most common acreage limit. The small percentage of verified NWP activities that impact between 0.25 and 0.5 acre compared to the much larger percentage of verified NWP activities that impact less than 1/10-acre demonstrates the reduction of impacts (i.e., minimization) that is incentivized by general condition 23. District engineers determine the compensatory mitigation requirements for specific NWP activities, and can require forms of mitigation other than compensatory mitigation to ensure that the authorized NWP activity results in no more than minimal individual and cumulative adverse environmental effects. The use of other forms of mitigation is consistent with the watershed approach to compensatory mitigation described in the Corps' regulations at 33 CFR 332.3(c). The use of best management practices and other forms of mitigation may be effective at reducing adverse environmental effects so that compensatory mitigation is not

necessary to ensure that an NWP activity results in only minimal individual and cumulative adverse environmental effects.

A couple of commenters said that compensatory mitigation cannot legally be used to make minimal adverse effects determinations and that Section 404(e) of the Clean Water Act does not state that mitigation will be considered to ensure activities would cause only minimal adverse environmental effects. These commenters objected to the use of compensatory mitigation to allow more impacts to waters and wetlands. One commenter stated that the Corps has not provided any scientific or factual evidence to conclude that compensatory mitigation helps ensure that NWP activities do not result in more than minimal adverse environmental effects. A couple of commenters said that compensatory mitigation does not adequately or fully replace wetland or stream bed losses. Several commenters said they do not support the use of mitigation as a means to allow more impacts and justify findings of no more than minimal adverse environmental effects.

The use of compensatory mitigation and other forms of mitigation to ensure that activities authorized by an NWP result in no more than minimal individual and cumulative adverse environmental effects is codified in the Corps' NWP regulations at 33 CFR 330.1(e)(3). Section 404(e) of the Clean Water Act does not prescribe how the Corps is to ensure that the categories of activities authorized by general permits such as the NWPs will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Therefore, the Corps has discretion on how to comply with the requirement in the statute. Wetlands can be restored to improve the degree of ecological functions they provide (e.g., NRC 2001), to offset wetland losses authorized by the NWPs and other types of DA

permits. Streams can also be restored to increase the degree of ecological functions they provide (e.g., Wohl et al. 2015), which can also be used to offset losses of stream functions caused by activities authorized by NWPs and other types of DA permits.

One commenter stated that this general condition should require compensatory mitigation for all losses of wetlands, special aquatic sites, and stream beds authorized by an NWP, not just those losses exceeding 1/10-acre that require PCNs. One commenter said that current compensatory mitigation requirements only replace, not improve, aquatic resources, and to protect tribal treaty rights, the Corps should require improvements of aquatic resources to ensure the successful recovery of salmon.

Compensatory mitigation and other forms of mitigation are only required by district engineers when it is necessary to ensure that NWP activities result in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.1(e)(3)) , and the Corps has determined that 1/10-acre is an appropriate threshold with respect to wetland mitigation. Compensatory mitigation can be provided through the restoration, enhancement, establishment, and protection of aquatic resources to offset losses of those functions caused by activities authorized by the NWPs and other types of DA permits. A compensatory mitigation credit is a unit of measure (e.g., a functional or areal measure or other suitable metric) representing the accrual or attainment of aquatic functions at a compensatory mitigation site (see 33 CFR 332.2). Compensatory mitigation required for NWP activities can help improve aquatic resources that may assist in the successful recovery of salmon.

One commenter said the Corps relies too heavily on mitigation banks and in-lieu fee programs to provide compensatory mitigation despite a large body of

scientific evidence that concluded that wetland banks are ineffective and poorly monitored. A couple of commenters stated that mitigation banks and in-lieu fee programs do not replace lost functions and values at impact sites. One commenter said that the Corps relies on unrealized mitigation requirements to allow significant environmental harm to occur under the NWP program and that previous reports from the National Research Council and the Government Accountability Office have shown that mitigation under the NWP program has not proven successful and therefore, does not compensate for lost wetlands.

Regulations for the establishment and use of mitigation banks and in-lieu fee programs to provide compensatory mitigation for activities authorized by the NWPs and other forms of DA authorization were issued by the Corps in 2008 (see 73 FR 19594). The 2008 rule establishes establish performance standards and criteria for the use of permittee-responsible compensatory mitigation, mitigation banks, and in-lieu programs to improve the quality and success of compensatory mitigation projects for activities authorized by Department of the Army permits. The 2008 mitigation rule incorporated many of the recommendations made by the National Research Council in its 2001 titled “Compensating for Wetland Losses Under the Clean Water Act” to improve the ecological outcomes of wetland compensatory mitigation projects. The 2005 Government Accountability Office report titled “Wetlands Protection: Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure That Compensatory Mitigation Is Occurring” also included recommendations for improving the Corps’ oversight and outcomes of compensatory mitigation projects performed by permittees, mitigation banks, and in-lieu-fee program sponsors, and the Corps incorporated those recommendations in the 2008 mitigation rule.

One commenter said the NWP program should not be used to authorize activities that requiring compensatory mitigation and that project proponents should have to apply for individual permits for activities requiring compensatory mitigation. One commenter stated that using mitigation to reduce impacts below a threshold of significance violates the National Environmental Policy Act.

The use of compensatory mitigation for NWP activities is an important tool for authorizing activities that have no more than minimal individual and cumulative adverse environmental effects by NWP. Requiring individual permits for any NWP activity that requires compensatory mitigation would not provide any additional environmental protection because the ecological outcomes of compensatory mitigation projects is more dependent on site selection, planning, and implementation, as well as monitoring and adaptive management to address deficiencies in the compensatory mitigation project that impede the ecological success of that project. The type of DA authorization used to authorize a regulated activity is not linked to the ecological outcomes of compensatory mitigation projects. Under the Council on Environmental Quality's regulations for implementing the National Environmental Policy Act, mitigation can be used to reduce project impacts so that they are not significant (see 40 CFR 1501.6(c)).

A couple commenters recommended that an economic analysis be performed to evaluate the economic effects of the proposed changes to this general condition, to assess the costs of the additional time and resources needed to overhaul stream credit programs, evaluate losses to mitigation providers and contractors, and the capacity to determine if the Corps can reasonably implement the proposed changes.

The changes to this general condition do not require an overhaul of stream credit programs. Compensatory mitigation credits, including stream

credits, can be quantified in acres, linear feet, functional assessment units, or other suitable metrics of particular resource types (see 33 CFR 332.8(o)(1)). The preamble to the 2008 mitigation rule states that district engineers retain the discretion to quantify stream impacts and required compensatory mitigation in terms of area or other appropriate units of measure (see 73 FR 19633). This discretion also applies to the issuance of the NWPs by Corps Headquarters, to determine appropriate units of measure for efficient administration of the NWP program. Existing inventories of stream credits can be used to provide compensatory mitigation for losses of stream bed authorized by these NWPs. For those current inventories of stream credits quantified in linear feet or other linear metrics, the permittee and mitigation provider can engage in discussions to determine how many linear feet of stream credits are roughly proportional to the area of stream bed filled or excavated as a result of an activity authorized by an NWP. Each mitigation bank and in-lieu fee project has an approved mitigation plan, and that mitigation plan can be used to estimate how many linear feet of stream credits might be used to offset a specified number of acres or square feet filled or excavated as a result of an NWP activity. Over the years, there have been numerous changes to the Corps Regulatory Program, and each of those changes require some adjustment by Corps personnel, permit applicants, consultants, contractors, mitigation providers, and other people.

One commenter recommended NWPs and/or regional conditions authorizing the use of compensatory mitigation, mitigation banks, and/or in-lieu fee programs be withdrawn. One commenter said that this general condition should be modified to state that out-of-kind mitigation is prohibited for losses of designated critical resource waters identified in general condition 22.

Division engineers can add regional conditions to the NWPs to establish lower thresholds for stream compensatory mitigation, and for the use of mitigation banks, in-lieu fee programs, and permittee-responsible mitigation for activities authorized by NWPs. Out-of-kind mitigation may be beneficial to designated critical resource waters. Therefore, the Corps declines to make the recommended change to general conditions 22 or 23.

Several commenters said that this general condition should be modified to require applicants to take all practicable steps to avoid and minimize effects to waters of the United States. One commenter stated that avoidance and minimization of waters of the United States during the planning and siting phases of project development are not appreciated or considered by regulatory agencies.

Paragraph (a) of general condition 23 already requires the NWP activity to be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site). A description of the mitigation measures being undertaken by the project proponent, including avoidance and minimization on the project site, in the PCN can assist the district engineer in his or her decision whether the proposed activity qualifies for NWP authorization.

One commenter expressed support for allowing the district engineer to waive compensatory mitigation requirements for wetland losses if she or he makes an activity-specific determination that other forms of mitigation would be environmentally preferable. One commenter requested the Corps identify, at a national level, the minimum amount of compensatory mitigation required to offset resource losses. Several commenters said that compensatory mitigation should be required consistently for all NWPs with areal and linear thresholds.

The Corps has retained the ability of district engineers to waive compensatory mitigation requirements for wetland losses when they determine that the proposed activity, without wetland compensatory mitigation, will result in no more than minimal individual and cumulative adverse environmental effect. Compensatory mitigation decisions are made on a case-by-case basis by district engineers, so it would be inappropriate to establish national minimums for compensatory mitigation requirements, or for all NWPs that have quantitative limits.

One commenter stated that paragraph (c) should be modified to allow for protection, restoration, or enhancement of areas next to wetlands as compensatory mitigation, similar to the proposed language in paragraph (d). A couple of commenters said that a one-for-one impact-to-compensation ratio only works if all compensatory mitigation efforts are successfully implemented and the Corps monitors and enforces compensatory mitigation requirements. These commenters recommended modifying this general condition to clarify how the ecological outcomes of compensatory mitigation projects would be improved and how the Corps would ensure that no-net-loss of aquatic resources is achieved.

The Corps' compensatory mitigation regulations at 33 CFR 332.3(i) allow district engineers to require the restoration, establishment, enhancement, and preservation, as well as the maintenance, of riparian areas and/or buffers around aquatic resources where necessary to ensure the long-term viability of those resources. This provision also applies to all types of DA permits, including the NWPs. There is no need to explicitly state this information in the text of the general condition. The Corps' compensatory mitigation regulations requires monitoring of compensatory mitigation projects, and for district engineers to take action to ensure that compensatory mitigation projects achieve their objectives

and offset the losses of waters of the United States. Adaptive management may be required to ensure that those compensatory mitigation objectives are met. The ecological outcomes of compensatory mitigation projects are more appropriately addressed on a case-by-case basis, through compliance efforts by district engineers.

A couple commenters supported the continued use of a 1/10-acre threshold for requiring compensatory mitigation and said that the threshold has been effective in encouraging avoidance and minimization of adverse effects to wetlands. Several commenters said that a one-for-one impact-to-compensation ratio should be required to compensate for all wetland losses to ensure no-net-loss, not just those losses that exceed 1/10-acre. Several commenters remarked that the proposed 1/10-acre threshold to require compensatory mitigation for losses of wetlands and stream bed does not achieve a goal of no-net-loss of aquatic resources. One commenter said no-net-loss should not be applied to areas that have been previously and heavily modified.

The Corps is retaining the 1/10-acre threshold for wetland compensatory mitigation in paragraph (c) of this general condition based on its experience administering the program. There is no requirement in Section 404 or the Clean Water Act, the Corps' regulations at 33 CFR parts 320 to 332, or the U.S. EPA's 404(b)(1) Guidelines for no net loss of wetlands or other types of aquatic resources. For all DA permits, including the NWPs, compensatory mitigation requirements are determined on a case-by-case basis. Compensatory mitigation may be required by district engineers to ensure that an activity that requires authorization under section 404 of the Clean Water Act and/or sections 9 or 10 of the Rivers and Harbors Act of 1899 is not contrary to the public interest (see 33 CFR 332.1(d)). Compensatory mitigation for unavoidable impacts may be

required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines (see 33 CFR 332.1(c)(3)).

One commenter said that paragraph (c) of this general condition should be modified to allow mitigation bank credits to be used at a one-for-one ratio rather than performing a functional analysis. A commenter stated that 1/10th-acre may be too restrictive of a compensatory mitigation threshold in some Corps districts or watersheds and compensatory mitigation may not be required to achieve no more than minimal adverse environmental effects for certain NWP activities. Another commenter suggested the applicant be required to provide documentation of credit availability or credit reservation if proposing to satisfy compensatory mitigation requirements with credits from a mitigation bank. One commenter said that this general condition should be modified to state that mitigation bank credits are preferred where practicable, and to elucidate that mitigation banks are not practicable in the State of Alaska.

Paragraph (c) of this general condition does not require the use of a functional analysis to determine whether mitigation bank credits can be used to provide compensatory mitigation for an NWP activity. District engineers have the discretion to waive the compensatory mitigation requirement for losses of greater than 1/10-acre of wetlands, or to require another form of mitigation to ensure that the NWP activity results in no more than minimal individual and cumulative adverse environmental effects. If the district engineer determines that compensatory mitigation is required for a proposed NWP activity, the applicant can propose to use mitigation bank credits or in-lieu fee program credits to fulfill the compensatory mitigation requirement. The district engineer can require the applicant to provide a statement of credit availability, so that the applicant does not have to prepare a mitigation proposal for a permittee-responsible mitigation

project. The framework for evaluating compensatory mitigation options, that is the use of mitigation bank credits, in-lieu fee program credits, or permittee-responsible mitigation, is provided in the Corps' regulations at 33 CFR 332.3(b). Mitigation banks can be practicable in the State of Alaska.

One commenter requested clarification on PCN and compensatory mitigation requirements for NWP activities involving mechanized land clearing in forested wetlands for utility line rights-of-way since paragraph (i) of general condition 23 states that compensatory mitigation may be required for activities that convert a forested or scrub-shrub wetland to an herbaceous wetland. A commenter said that compensatory mitigation should be provided on-site or in the sub-basin where impacts occur.

Consistent with paragraph (i) of this general condition, if a proposed NWP activity involves mechanized land clearing in a forested wetland, and it requires a PCN, the district engineer can require compensatory mitigation to ensure the proposed activity result in no more than minimal individual and cumulative adverse environmental effects. For an NWP activity that requires compensatory mitigation, the district engineer will determine whether on-site or off-site compensatory mitigation is required, and the appropriate geographic scale for consideration of off-site compensatory mitigation options.

One commenter said that general condition 23 should clearly state whether compensatory mitigation would or would not be required for wetland and stream bed losses for NWP activities that do not require PCNs. One commenter recommended that compensatory mitigation be provided for all losses of wetland or stream bed that exceed 1/10-acre, not just those losses requiring PCNs. A few commenters stated that compensatory mitigation for wetland and stream bed losses should be required at ratios greater than one-for-one to account for

temporal loss and the difficulty of replacing wetlands and stream bed, and to ensure that habitat is recovered at a greater degree than it is being lost. One commenter said that there is no basis for wetlands and streams to have the same 1/10-acre compensatory mitigation threshold.

For those NWP activities that do not require PCNs, compensatory mitigation is not required because the district engineer is not notified of those activities and cannot add permit conditions to the NWP authorization in accordance with 33 CFR 332.3(k). The district engineer determines the appropriate amount of compensatory mitigation in accordance with the Corps' regulations at 33 CFR 332.3(f). As discussed below, in response to comments received on the proposed rule, the Corps is changing the threshold in paragraph (d) of this general condition from 1/10-acre to 3/100-acre.

A few commenters stated that compensatory mitigation should only be required for the losses of jurisdictional wetlands and streams and compensatory mitigation should not be required for losses of ephemeral stream bed or losses of other non-jurisdictional waters. Several commenters said that compensatory mitigation should only be required for permanent impacts and that temporary impacts should not be counted in the 1/10-acre threshold. One commenter suggested that this general condition should be modified to clarify if the 1/10-acre threshold would be applied individually or cumulatively in cases where both stream bed and wetlands would be lost. Several commenters said the 1/10-acre threshold in paragraphs (c) and (d) should be applied cumulatively so that any combination of wetland and stream losses exceeding 1/10-acre would require compensatory mitigation.

Since ephemeral streams are excluded from Clean Water Act jurisdiction, (see 33 CFR 328.3(b)(3)), NWP authorization is not applicable to ephemeral

streams. Compensatory mitigation is not required for losses of ephemeral stream bed, or for losses of any other non-jurisdictional waters. The 1/10-acre and 3/100-acre thresholds in paragraphs (c) and (d) of this general condition apply to losses of waters of the United States, as that term is defined in Section F of the NWPs (Definitions). These thresholds apply to single and complete projects authorized by the NWPs.

Several commenters said it is important to maintain the Corps' flexibility as proposed to allow district engineers to determine that other forms of mitigation are appropriate or to waive mitigation requirements for specific NWP activities. Several commenters objected to allowing district engineers to waive compensatory mitigation requirements. One commenter said that if federal agencies are not required to submit PCNs, those agencies would not have to provide compensatory mitigation for wetland or stream bed losses that exceed 1/10-acre because the 1/10-acre threshold proposed in paragraphs (c) and (d) only applies to NWP activities that require PCNs. Several commenters said that paragraphs (c) and (d) should be modified to state that advanced mitigation is preferred.

The general condition retains flexibility for district engineers to determine the appropriate mitigation for a particular NWP activity to ensure that the activity causes no more than minimal individual and cumulative adverse environmental effects. After the district engineer reviews a PCN, he or she may determine that no mitigation is necessary for the proposed activity to be authorized by an NWP. For these 16 final NWPs, federal agencies are subjected to the same PCN requirements as non-federal permittees. They are also subject to the mitigation requirements in this general condition. Advance compensatory mitigation can be

used to satisfy compensatory mitigation requirements added to NWP authorizations by district engineers.

One commenter voiced support for the addition of a 1/10-acre threshold for requiring compensatory mitigation for losses of stream beds that require pre-construction notification. Another commenter expressed support for the addition of a compensatory mitigation threshold for stream bed losses represented in either linear feet or acres. One commenter stated that compensatory mitigation for stream bed losses should result in net gains in area or functions. A few commenters said that headwater streams are fundamentally different and offer different services than non-tidal wetlands and therefore should not be regulated the same. Additionally, minimal adverse environmental effects are different for distinct aquatic resources. One commenter opposed the elimination of “other open waters” from paragraph (d) and said it would create uncertainty for when compensatory mitigation would be required for losses of other open waters. A couple commenters said that reducing compensatory mitigation requirements also reduces the incentive to minimize impacts.

Stream compensatory mitigation projects are expected to result in increases in stream functions, since the purpose of compensatory mitigation is to offset unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved. Stream compensatory mitigation projects produce credits that represent the accrual or attainment of stream functions at a compensatory mitigation site, consistent with the definition of “credit” in the Corps’ regulations at 33 CFR 332.2. While headwater streams exhibit some differences in structure and function than downstream streams in a tributary network, when those headwater streams are considered waters of the United States, they are subjected to the same

regulatory requirements as other waters of the United States. Headwater streams have no special status under the Clean Water Act or its implementing regulations, including the 404(b)(1) Guidelines issued by the U.S. EPA. The only streams that are special aquatic sites under the 404(b)(1) Guidelines are riffle and pool complexes (see subpart E of 40 CFR part 230). When reviewing a PCN for a proposed activity that may cause the loss of headwater stream bed, the district engineer will consider the functions being performed by the headwater streams. The Corps proposed to redesignate paragraph (d) of the 2017 general condition 23 as paragraph (e) of the 2021 general condition 23, so it did not propose to remove “other open waters” from the paragraph that discusses the use of riparian areas next to open waters as compensatory mitigation for NWP activities. The Corps did not propose to reduce any compensatory mitigation requirements.

Several commenters stated the 1/10-acre stream compensatory mitigation threshold is too broad to apply nationally. One commenter recommended establishing thresholds for requiring compensatory mitigation for stream bed losses through regional conditions instead of general condition 23 to account for the regional variability of streams across the United States. Several commenters stated that implementation of a 1/10-acre threshold for stream compensatory mitigation does not achieve a goal of no-net-loss of aquatic resources. A couple commenters said that paragraph (d) allows for incremental losses of stream bed, which is contrary to the Corps’ no-net-loss objective and is inconsistent with restoring habitat necessary to provide sustainable fish populations. One commenter stated that reductions in the amount of required mitigation to compensate for headwater stream losses would have large impacts on downstream waters, including large rivers. One commenter said that

implementing a 1/10-acre threshold for requiring compensatory mitigation for stream bed losses would increase the regulatory burden on downstream applicants due to declining water quality.

Since the NWPs authorize activities across the country, paragraph (d) of this general condition establishes a national threshold for stream compensatory mitigation, but there is flexibility in the general condition to allow district engineers to make activity-specific determinations on whether stream compensatory mitigation should be required for activities that result in the loss of stream bed. Division engineers can add regional conditions to the NWPs to establish a lower threshold for requiring stream compensatory mitigation. As discussed above, there is no requirement for no net loss of stream bed in the Clean Water Act or the Corps' regulations for implementing the Clean Water Act. Previous versions of this general condition in prior NWP rulemakings did not have a threshold for compensatory mitigation for losses of stream bed. A stream compensatory mitigation threshold was added to this general condition to provide an additional mechanism to help ensure that activities authorized by the 10 NWPs from which the 300 linear foot limit for losses of stream bed was removed result in no more than minimal individual and cumulative adverse environmental effects. Similar to the 1/10-acre wetland compensatory mitigation threshold, this compensatory mitigation threshold for stream bed losses is expected to provide incentives for project proponents to design their projects to minimize losses of stream bed, and help sustain downstream functions and water quality.

One commenter said that stream compensatory mitigation should only be required for new impacts associated with the maintenance or replacement of previously authorized structures. Another commenter stated that given the difficulties to achieve successful stream mitigation, requiring compensatory

mitigation for stream bed losses greater than 1/10-acre will be unrealistic in areas where permittee-responsible mitigation is the only option available. A few commenters suggested that thresholds reflect what would be required to ensure activities result in only minimal adverse environmental effects. Many commenters said that the 1/10-acre threshold for requiring compensatory mitigation for stream bed losses is too large for headwater streams.

District engineers will determine on a case-by-case basis whether to require compensatory mitigation for losses of stream bed authorized by NWPs. When determining whether to require compensatory mitigation, the district engineer will also consider practicability, including whether permittee-responsible mitigation is likely to be ecologically successful in offsetting the permitted impacts. As discussed below, the Corps has changed the 1/10-acre threshold to 3/100-acre to account for stream size.

One commenter said the compensatory mitigation requirement for losses of stream bed greater than 1/10-acre reduces the flexibility of the district engineer in making compensatory mitigation decisions. A few commenters objected to including a threshold for compensatory mitigation for the loss of stream bed, stating that it may result in unnecessary additional mitigation requirements and would not reduce burdens on the regulated public. Several commenters said the 1/10-acre threshold for compensatory mitigation for stream bed losses or the district engineer's determination to waive compensatory mitigation requirements would individually and cumulatively would directly or indirectly result in more than minimal adverse environmental effects.

The text of this general condition is written to provide district engineers with substantial flexibility in determining whether compensatory mitigation is required for NWP activities and what the required compensatory mitigation

should be for a particular NWP activity. Corps districts have been requiring stream compensatory mitigation for a number of years, so the changes to this general condition will not impose additional burdens on the regulated public. If the district engineer determines, after reviewing a PCN, that stream compensatory mitigation is not necessary to ensure that the NWP activity result in no more than minimal adverse environmental effects, he or she will not require stream compensatory mitigation for that activity.

Many commenters suggested requiring compensatory mitigation for stream bed losses of 300 linear feet or more instead of the proposed 1/10-acre threshold. One commenter said that a linear foot threshold is more appropriate than acreage and recommended revising paragraph (d) to require compensatory mitigation for stream bed losses greater than 100 linear feet. One commenter recommended revising paragraph (d) to require compensatory mitigation for stream bed losses greater than 150 linear feet. One commenter recommended changing paragraph (d) to require compensatory mitigation for stream bed losses of 1/10-acre or 300 linear feet. Many commenters said that the proposed 1/10-acre stream mitigation threshold would result in more impacts with less compensatory mitigation being required. One commenter suggested using a scaled approach for establishing a stream compensatory mitigation threshold, such as a length threshold of five times the bankfull width or five times the width between ordinary high water marks. This commenter said a scaled approach would better account for variations in headwater streams and large rivers, compared to a 1/10-acre threshold.

After evaluating the comments received in response to the proposed modification of general condition 23, the Corps is changing the threshold for stream compensatory mitigation in paragraph (d) from 1/10-acre to 3/100-acre.

This is consistent with the stream compensatory mitigation threshold established in some Corps districts under the 2017 NWPs and the compensatory mitigation threshold recommended by several commenters. For the 2017 NWPs, a number of Corps districts have regional conditions requiring compensatory mitigation for losses of greater than 300 linear feet of stream bed. This is consistent with the recommendation for a 300 linear foot threshold made by many commenters in response to this proposed rule. The 3/100-acre threshold in paragraph (d) was calculated by estimating the average width of stream fills (4 feet) authorized by the 2017 NWPs under the 10 NWPs and multiplying that figure by 300 linear feet. The average width of stream filling or excavation was calculated from ORM2 data for NWP verifications issued between March 19, 2017, and March 19, 2019, for those NWP verifications where the average width of the stream fill or excavation was recorded by Corps district staff. The 3/100-acre threshold is anticipated to result in similar stream compensatory mitigation requirements for the NWPs in this final rule compared to the 2017 NWPs, and therefore is generally consistent with current agency practice. A scaled approach for establishing a stream compensatory mitigation threshold would add another level of complexity to a permit program that is intended to regulate, with little delay or paperwork, activities that result in minimal adverse environmental effects.

A few commenters said the 1/10-acre threshold for stream losses requiring compensatory mitigation is not scientifically supported or lacks supporting analysis. A couple commenters said they do not agree with the change in threshold from linear feet of impact to acres for requiring compensatory mitigation for losses of stream beds that require PCNs. A few commenters stated that the use of stream length rather than acreage has been used in many programs as a basis for determining mitigation credits to

compensate for the loss of stream bed, and that the 1/10-acre threshold would create uncertainty and additional costs for applicants, the public, mitigation banks, and in-lieu fee programs. One commenter said that if the threshold for requiring stream compensatory mitigation is going to be changed from linear feet to acres, the acreage should include all of the affected area on the valley bottom, not just the area between ordinary high water marks of a river or stream.

The establishment of the 3/100-acre threshold for stream compensatory mitigation for NWP activities is an administrative decision to facilitate consistent implementation across districts. It is intended to be a conservative threshold based on the complexities of riverine systems, the substantial variation in riverine systems across the country, and the subjectivity inherent in the threshold for the NWPs (i.e., no more than minimal individual and cumulative adverse environmental effects). The use of acres to quantify stream compensatory mitigation is consistent with the Corps' compensatory mitigation regulations at 33 CFR 332.8(o)(1), which does not mandate the use of a particular metric for quantifying stream compensatory mitigation credits. It would be inappropriate to use the area of a valley bottom, since the Corps only has jurisdiction over certain categories of waters and wetlands, and valley bottoms may consist of a substantial proportion of upland area or other features that are outside of the Corps' jurisdiction.

Several commenters said the change to an area-based approach would not provide accounting consistency and would result in dual accounting systems for credits and debits generated under both linear feet and acreage-based scenarios and it would create inconsistencies, and would create confusion over how to handle sold versus proposed credits. One commenter expressed concern that ecological values of mitigation credits would not carry over in the conversion

from linear feet to acres, creating the potential for activities to result in more than minimal individual and cumulative adverse environmental effects.

There is no requirement in the Corps' regulations to quantify stream compensatory mitigation credits in linear feet. Compensatory mitigation credits, including stream credits, can be quantified in acres, linear feet, functional assessment units, or other suitable metrics of particular resource types (33 CFR 332.8(o)(1)). This final rule does not affect prior credit transactions for previously authorized NWP activities where the permittee secured stream compensatory mitigation credits from mitigation bank or in-lieu fee program sponsors. This final rule only applies to activities authorized by these NWP after they go into effect. The Corps acknowledges that a period of adjustment will be required, and that different agencies may require the use of different metrics to quantify losses of stream bed and stream compensatory mitigation credits. The ecological values of mitigation credits from the accrual or attainment of aquatic functions at a compensatory mitigation site (see the definition of "credit" at 33 CFR 332.2). Quantifying stream mitigation credits in acres or linear feet is a surrogate for the increases in stream functions expected to result from a stream compensatory mitigation project, when there is no method available to assess the specific functional gains through a rapid ecological assessment method or other method.

The amount of compensatory mitigation required for an NWP activity has to be sufficient to replace lost aquatic resource functions (see 33 CFR 332.3(f)(1)), and the mitigation provider can use his or her judgment or the approved mitigation plans to determine how many stream credits quantified in linear feet are needed to offset a particular acreage of stream bed that is filled or excavated as a result of an NWP activity. It is important to note that the mitigation industry provides a service to permittees, as an option to fulfill the compensatory

mitigation requirements in NWP authorization and other forms of DA authorizations. The Corps is making these changes for administrative efficiency, to provide NWP authorization for more activities that result in no more than minimal individual and cumulative adverse effects. The 300 linear foot limit for losses of stream bed in the 2017 NWPs and prior NWPs required the Corps to process individual permits for activities that likely would have otherwise qualified for NWP authorization. In the 2007 NWPs, general condition 23 was modified to state that district engineers could require stream compensatory mitigation for losses of stream bed, but there was no acreage threshold as there was for wetland losses. In paragraph (d) of this general condition, the Corps has established a 3/100-acre threshold for stream compensatory mitigation. District engineers can require compensatory mitigation for losses of less than 3/100-acre of stream bed, and they can require compensatory mitigation for losses of up to 1/2-acre of stream bed.

One commenter said mitigation banks and in-lieu fee programs would be negatively affected because less compensatory mitigation would be required for the loss of stream beds. A few commenters said they have reservations about the implementation of a compensatory mitigation threshold for losses of stream bed and that there may not be bank or in-lieu fee program credits available.

The removal of the 300 linear foot limit for losses of stream bed from NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 and the changes to this general condition will not result in less compensatory mitigation being required for losses of stream bed authorized by NWPs. By providing equivalent quantitative limits for all non-tidal jurisdictional waters and wetlands in these 10 NWPs (i.e., the 1/2-acre limit), there will likely be more NWP activities for which district engineers require compensatory mitigation. As discussed above, the Corps has changed

the threshold from 1/10-acre to 3/100-acre to require stream compensatory mitigation that is more aligned with current practices and the recommendations of many commenters. The existing stream credits can be used for NWP activities, even though the authorized impacts will be quantified in acres.

Several commenters supported the flexibility of the district engineer to allow other forms of mitigation as determined appropriate and to waive compensatory mitigation requirements after an activity specific determination that other forms of mitigation would be environmentally preferable. Several commenters said that increased impacts and allowing the district engineer to waive compensatory mitigation requirements would be counterproductive to the success of salmon recovery efforts, and therefore would not be protective of tribal treaty rights. Several commenters said the district engineer should be able to consider other site-specific activities required by other regulatory programs, such as mine site reclamation to considered as mitigation for activities affecting stream beds. One commenter stated that requiring a compensatory mitigation decision by the district engineer could delay issuance of a permit and to modify paragraph (d) to allow the district engineer or designee to waive the compensatory mitigation requirement. One commenter expressed concern that allowing the district engineer to waive compensatory mitigation requirements could allow for up to 1/2-acre of stream bed loss which would result in adverse environmental impacts.

The removal of the 300 linear foot limit from the NWPs (while retaining the1/2-acre limit, PCN process, and other tools to ensure no more than minimal adverse environmental effects) and the changes to general condition 23 will allow district engineers to authorize certain activities by NWP and require compensatory mitigation when necessary. It will provide more flexibility in the

NWP and allow district engineers to devote more staff and other resources to proposed activities that have the potential for more substantial adverse environmental effects. These changes will not impair salmon recovery efforts, and for those proposed NWP activities that the district engineer determines “may affect” listed salmon species, additional protection to those listed species will be provided through the ESA section 7 process.

The flexibility in general condition 23 allows district engineers to consider mitigation and other site-specific activities required by other agencies, such as mine reclamation, when determining whether to require compensatory mitigation for NWP activities. District engineers are required to make compensatory mitigation decisions within the 45-day review period for NWP PCNs. The district engineer has the decision-making authority for whether compensatory mitigation is required for an NWP activity.

One commenter said the Corps should develop clear expectations and performance standards for the types of other mitigation that could be utilized to compensate for stream bed losses. One commenter suggested modifying paragraph (d) to list acceptable alternatives to compensatory mitigation. One commenter expressed support for compensatory mitigation requirements could be fulfilled through restoration or enhancement of riparian areas next to streams. Several commenters said that riparian restoration or enhancement results in out-of-kind mitigation since they do not always replace lost stream functions. One commenter suggested the proposed paragraph (d) be modified to state that riparian restoration or enhancement may only satisfy compensatory mitigation requirements when other in-kind mitigation options are unavailable or are not practicable.

Ecological performance standards for stream compensatory mitigation projects are determined by district engineers when they review and approve mitigation plans. Permit applicants may propose potential alternatives to compensatory to district engineers, who will determine whether that alternative mitigation is appropriate and likely to be effective in reducing adverse environmental effects so that it is not necessary to require compensatory mitigation. While the restoration or enhancement of riparian areas might not replace all stream functions, they can help improve some stream functions and help reduce nutrient and pollutant loads to streams. District engineers will determine on a case-by-case basis whether the restoration or enhancement of riparian areas is appropriate and practicable compensatory mitigation for an NWP activity.

One commenter said that the general condition should be modified to require the applicant to provide project specifications addressing the Natural Stream Channel Design Techniques and Review Checklist, developed by the U.S. EPA and U.S. FWS. One commenter said there currently are no national or regional tools developed by the Corps to guide compensatory mitigation for stream bed losses. One commenter stated the Corps and U.S. EPA are currently collaborating on a peer-reviewed study analyzing the environmental and policy consequences of stream restoration metrics. This commenter recommended not modifying the NWPs until they are scheduled to expire in 2022 to allow for the results of the study to be completed and the results to be considered. One commenter said general condition 23 should be incorporated into every applicable NWP rather than referring to the loss of 300 linear feet in each NWP.

District engineers evaluate stream compensatory mitigation proposals and should be provided the flexibility to consider a variety of potential stream

restoration or rehabilitation approaches. This includes river and stream restoration approaches, such as dam removals, culvert replacements, and other process-based methods that may be more ecologically effective than natural channel design in improving stream functions (e.g., Palmer et al. 2014). The Corps is removing the 300 linear foot limit for losses of stream bed from 10 NWPs and modifying general condition 23 for more efficient administration of the NWP program. The study on stream metrics may have some utility in future rulemakings and the development of guidance, but it is not necessary to delay this rulemaking to wait for that study to be completed. General condition 23 applies to all NWPs.

Several commenters supported the proposed changes to paragraph (e). Several commenters said that paragraph (e) of general condition 23 should be modified to eliminate the district engineer's ability to allow riparian area compensatory mitigation for wetland losses. One commenter suggested modifying paragraph (e) to allow the planting of adapted seed mixes that may contain non-native species and to allow for the replacement of existing vegetation when restoring riparian areas. One commenter said the proposed condition should be modified to state that use of native vegetation is preferred, rather than required, and to allow for consideration of regionally appropriate vegetation. A few commenters expressed opposition to the proposed changes the changes to paragraph (e) and expressed concerns that allowing non-native species would result in negative environmental effects. One commenter said they were concerned that allowing non-native species in the restored areas could negate the prevention, control, and management of non-native species performed by other government agencies, non-government organizations, and citizens and could introduce a source for spread among those activities.

The restoration and enhancement of riparian areas may be used to offset wetland losses as another form of mitigation that could be more environmentally appropriate, since riparian areas perform a number of functions that are also performed by wetlands (NRC 1995, NRC 2002). There may be a number of seed mixes that are acceptable for revegetating riparian areas. Paragraph (e) contains flexibility because it states that native species should be planted; it does not require native species to be planted. As discussed in the proposed rule, non-native species can have positive, negative, or neutral effects on ecosystems and the functions they perform. Compensatory mitigation requirements, including long-term management activities, must be practicable (see 33 CFR 332.3(a)(1)). For a particular compensatory mitigation site, the district engineer may determine that the management of invasive or non-native species is not practicable cause of site or watershed conditions, the degree to which the invasive or non-native species is established in the region, and other factors. If other government agencies and non-governmental organizations want to undertake efforts to control invasive or non-native species, they can do that under their authorities or mission statements.

Several commenters said there is no support for allowing narrow riparian areas of 25-50 feet wide on each side of the stream that would support habitat needed by federally threatened or endangered salmon. Buffers of 100 feet or more are needed. One commenter said that riparian area restoration and enhancement requirements (e.g. minimum riparian width, historical and existing site conditions) should be addressed regionally rather than included in paragraph (e). One commenter said that restoring or enhancing riparian areas does not achieve no-net-loss of the stream bed.

The recommended riparian area width of 25-50 feet was established in the NWP program in 2000 (65 FR 12833) because riparian areas of that width can provide important aquatic habitat functions and water quality benefits. The establishment of wider riparian areas for listed species be more appropriately addressed through the ESA section 7 consultation process. Division and district engineers can establish regional requirements for riparian areas. The purpose of restoring and enhancing riparian areas is to help improve stream functions and water quality. The improved functions are expected to occur in nearby stream bed and in downstream waters.

One commenter recommended modifying paragraph (f)(4) of this general condition to state that if permittee-responsible mitigation is the proposed compensatory mitigation option, and the proposed compensatory mitigation site is located on land in which another federal agency holds an easement, the district engineer will coordinate with that federal agency to determine if proposed compensatory mitigation project is compatible with the terms of the easement. The Corps added the suggested text to paragraph (f)(4) of general condition 23.

This general condition is adopted with the modifications discussed above.

GC 24. Safety of Impoundment Structures. The Corps did not propose any changes to this general condition. One commenter recommended adding "federal" to this general condition because some federal agencies may have established federal dam safety criteria. The Corps added "federal" to the text of this general condition so that district engineers can require non-federal applicants to demonstrate that the structures comply with established federal dam safety criteria.

This general condition is adopted as with the modification discussed above.

GC 25. Water Quality. The Corps proposed to modify this general condition to articulate that if the state, authorized tribe, or EPA (i.e., the certifying authority under section 401 of the Clean Water Act) issued a water quality certification (WQC) for the issuance of an NWP, and the permittee cannot comply with all of the conditions in that water quality certification, he or she must submit a certification request to the certifying authority that satisfies the requirements of 40 CFR 121.5(b) for a water quality certification or waiver for the activity involving a specific discharge to be authorized by the NWP.

One commenter expressed general support for the proposed changes to general condition 25. Several commenters supported the proposed changes clarifying that applicants need to request certification from the certifying authority for specific discharges when he or she cannot comply with all of the conditions in the WQC for the NWP. One commenter said that general condition 25 should be clarified to state that WQCs must be consistent with 33 CFR 325.4 and 40 CFR 121.7(d), and that any WQC condition not within the established scope of the certification, may not be included as a regional condition.

The proposed changes have been incorporated into this general condition. The Corps has added text to this general condition to state that if the certifying authority issues a water quality certification for the proposed discharge authorized by a specific NWP activity, the permittee must submit a copy of the certification to the district engineer. Furthermore, the general condition states that if certification is required for a specific discharge, the discharge is not authorized by an NWP until the district engineer has notified the permittee that the water quality certification requirement has been satisfied.

When water quality certification is required for a specific discharge authorized by an NWP, and the Corps has completed its review of the PCN and

has determined that the activity is authorized by an NWP as long as water quality certification is issued or waived for that discharge, the district engineer will send a provisional notification to the permittee. The provisional notification will inform the project proponent that the activity will be authorized by an NWP once water quality certification for the proposed discharge is obtained or waived. If water quality certification is issued for the proposed discharge, the district engineer will conduct coordination that may be required under Section 401(a)(2) of the Clean Water Act. After that process, the district engineer will issue the NWP verification letter with the water quality certification. The district engineer may add conditions to the NWP authorization to ensure the authorized activity results in no more than minimal individual and cumulative adverse environmental effects. The district engineer will also add to the NWP authorization conditions in the water quality certification that are not waived pursuant to 40 CFR 121.9(b).

The Corps divided the text of this general condition into three paragraphs to make the general condition easier to read. This general condition is adopted with the modifications discussed above.

GC 26. Coastal Zone Management. The Corps proposed to modify this general condition to say that if the state issued a general Coastal Zone Management Act (CZMA) consistency concurrence for the NWP, and the permittee cannot comply with all conditions of that general concurrence, then he or she must obtain an individual CZMA consistency concurrence or presumption of concurrence from the state in order for the activity to be authorized by an NWP.

Several commenters expressed support for the change, stating that it provided clarification of the consistency concurrence process and additional flexibility. The commenters further noted that the proposed language makes it

clear that the permittee is expected to fully comply with all the conditions of the general concurrence or seek an individual CZMA consistency concurrence or presumption of concurrence from the state coastal program.

To qualify for NWP authorization, the proposed activity must comply with all of the NWP's terms and conditions (see 33 CFR 330.1(c)). The Corps will consider unauthorized any activity requiring Corps authorization if that activity is under construction or completed and does not comply with all of the terms and conditions of an NWP. This includes any conditions added to the NWP authorization through a categorical or individual CZMA consistency concurrence. If the applicant cannot comply with all of the conditions in the general CZMA consistency concurrence, then in order to comply with the requirements of the CZMA, she or he would need to apply to the state for an individual CZMA consistency concurrence, or obtain a presumption of concurrence. The inability to comply with all conditions of a general CZMA consistency concurrence does not preclude the use of the NWP to authorize the permitted activities; such circumstances would be considered a denial without prejudice until the project proponent obtains an individual CZMA consistency concurrence or a presumption of concurrence.

When CZMA consistency concurrence is required for a specific activity authorized by an NWP, and the Corps has completed its review of the PCN and has determined that the activity is authorized by an NWP as long as CZMA consistency concurrence is issued or a presumption of concurrence occurs for the activity, the district engineer will send a provisional notification to the permittee. The provisional notification will inform the project proponent that the activity will be authorized by an NWP once CZMA consistency concurrence for the proposed activity is obtained or a presumption of concurrence occurs. The

district engineer may add conditions to the NWP authorization to ensure the authorized activity results in no more than minimal individual and cumulative adverse environmental effects.

The general condition is adopted as proposed.

GC 27. Regional and Case-By-Case Conditions. The Corps did not propose any changes to this general condition. No comments were received. The general condition is adopted as proposed.

GC 28. Use of Multiple Nationwide Permits. The Corps proposed changes to this general condition to address the use of more than one NWP to authorize a single and complete project, when two of those NWPs have different acreage limits. The proposed changes were intended to ensure that use of an NWP with a higher acreage limit could not circumvent the lower acreage limit for another NWP, when the two NWPs are combined to authorize a single and complete project.

A few commenters expressed support for the change and said that it clarified language regarding the use of multiple NWPs for a single and complete project. Several commenters recommended making no changes to this general condition, and retaining the general condition language from the 2017 NWPs. One commenter suggested that the NWP numbers used in the example in the text of the general condition should match the NWP numbers used in the example in the preamble to the proposed rule, specifically by using NWP 39 rather than NWP 29. One commenter said that no more than two NWPs should be used to authorize a single and complete project. One commenter stated that the use of multiple NWPs to authorize a single and complete project should not cumulatively exceed the threshold of the highest limit.

In the example in the text of this general condition, the Corps has replaced NWP 29 with 39 to make the example clearer. Nationwide permit 29 has a subdivision provision that adds an additional layer of complexity, so it would be simpler to use NWP 39 in the example since that NWP has no subdivision provision. There may circumstances in which more than three NWPs may be appropriate for authorizing a single and complete project. One commenter stated that the use of multiple NWPs to authorize a single and complete project should not cumulatively exceed the threshold of the highest limit. The general condition does limit the acreage loss of waters of the United States to the highest specified acreage limit, but it does not allow the acreage limit of an NWP with a lower acreage limit to be exceeded.

One commenter stated that the proposed language would limit use of NWPs with no acreage limit, such as NWP 3 in combination with other NWPs, where it may be desirable to allow additional work beyond a specified acreage to occur as it would promote re-use and rehabilitation of existing structures rather than construction of new structures. One commenter recommended that the Corps provide clarification regarding how temporary and cumulative impacts would be addressed when more than one NWP is used to authorize a single and complete project.

The text in paragraph (a) of this general condition will limit the use of NWPs with no acreage limits, as it has since this text was incorporated into this general condition in 2000 (47 FR 12896). The general condition applies to losses of waters of the United States, as that term is defined in Section F of the NWPs. It does not include temporary impacts. Cumulative impacts are addressed separately during the district engineer’s review of the PCN, in accordance with paragraph 2 of Section D, District Engineer’s Decision.

Several commenters stated that the Corps must prohibit the use of multiple NWPs and NWPs with other general or individual permits as the Corps is not assessing the cumulative impacts. A few commenters stated that the proposed change may result in a greater loss of waters, and expressed concern that allowing two NWPs with different specified acreage limits to be used would result in larger impacts than allowed by each individual NWP. A few commenters said that allowing the use of more than one NWP to authorize a single and complete project will result in more than minimal individual and cumulative adverse environmental effects. One commenter suggested that the Corps eliminate the use of multiple NWPs to authorize individual segments of linear projects.

The Corps considers cumulative impacts when it evaluates PCNs for proposed NWP activities (see paragraph 2 of Section D, District Engineer's Decision). General condition 28 does not address the use of NWPs with individual permits; it only addresses the use of multiple NWPs to authorize a single and complete project. The use of NWPs with individual permits is addressed in the Corps' NWP regulations at 33 CFR 330.6(d). The modification of this general condition is specifically intended to prohibit the circumvention of the specified acreage limits of the NWPs, so that the loss of waters of the United States under a particular NWP is not exceeded.

Not allowing any deviation from the specified acreage limits of the NWPs used to authorize a single and complete project will help ensure that authorized activities will result in no more than minimal individual and cumulative adverse environmental effects. This general condition does not apply to the long-standing practice of allowing each separate and distant crossing of waters of the United States for a linear project to be considered a separate NWP authorization. This

general condition does apply to circumstances where a linear project may involve two separate utility lines (e.g., an electric utility line authorized by NWP 57 and a water line authorized NWP 58) both cross a waterbody. In this situation, the 1/2-acre limit would apply to the cumulative loss of waters of the United States caused by the electric line and water line crossing of that waterbody.

The general condition is adopted with the modifications discussed above.

GC 29. Transfer of Nationwide Permit Verifications. The Corps did not propose any changes to this general condition. No comments were received. The general condition is adopted as proposed.

GC 30. Compliance Certification. The Corps did not propose any changes to this NWP. No comments were received. The general condition is adopted as proposed.

GC 31. Activities Affecting Structures or Works Built by the United States. The Corps proposed to modify this general condition to be consistent with the current Engineer Circular (EC) for processing requests to alter Corps Civil Works Projects pursuant to 33 U.S.C. 408 (EC 1165-2-220, issued on September 10, 2018). Under the current EC, Corps districts are required to conduct section 10 and section 404 permit evaluations and requests for 408 permissions in a coordinated and concurrent manner.

One commenter supported the proposed changes to this general condition. One commenter stated that a PCN should not be required for a Section 408 review or permission if the underlying NWP activity does not otherwise require a PCN. One commenter said that the proposed text raises concerns about timely processing of NWPs.

Pre-construction notifications are required for proposed NWP activities that also require Section 408 permissions so that the appropriate coordination

can occur between district staff involved in the NWP authorization and Section 408 permission processes. The Corps acknowledges that it may take longer for NWP verification letters to be issued by the district engineer, because the NWP verification cannot be issued before the Section 408 permission process is completed.

The general condition is adopted as proposed.

GC 32. Pre-Construction Notification. The Corps proposed several modifications to this general condition to provide consistency with proposed changes to the NWPs and to clarify pre-construction notification requirements. The Corps proposed to change paragraph (a)(2) of this general condition by removing the following sentence: “Also, work cannot begin under NWPs 21, 49, or 50 until the permittee has received written approval from the Corps.” This proposed change will conform to one of the changes we are proposing for these three NWPs, which is to remove the term requiring the permittee to obtain a written verification from the district engineer before commencing the regulated activities in waters of the United States. As discussed above, the Corps proposed to make NWPs 21, 49, and 50 consistent with the other NWPs that require pre-construction notification, where the project proponent can proceed with the authorized work if the district engineer does not respond to the PCN within 45 days (see 33 CFR 330.1(e)(1)).

Many commenters expressed concern with the 45-day clock and the default authorization of PCNs and questioned whether this was a sufficient review period. Many commenters stated that the Corps should hold districts accountable regarding when the 45-day PCN review period starts and limit information requests to a single request. These commenters further stated that some Corps districts make numerous information requests to reset the 45-day

review period or request additional information not listed in the text of the general condition. One commenter suggested that the Corps provide more direction/guidance to districts on the ability to use sketches (rather than engineered drawings). A few commenters said that no additional information requirements should be added to the PCN process that would further complicate or burden the process. One commenter recommended that district engineer use their discretionary authority to expedite certain time-sensitive maintenance and inspection projects associated with key energy infrastructure projects.

Forty-five days is sufficient time for district engineers to review PCNs and determine whether proposed activities qualify for NWP authorization or whether discretionary authority should be exercised to require individual permits. Exceptions to the 45-day review period when district engineers have to complete ESA section 7 consultation, NHPH section 106 consultations, or other required consultations. District engineers are supposed to make only one request for additional information to make PCNs complete. District engineers can make additional requests only when the project proponent has not submitted the requested information to the district engineer. A complete PCN only requires the information listed in general condition 32, plus the text of the NWP itself if the “Notification” provision includes additional information requirements. The sketches submitted with a PCN have to be sufficiently detailed to help a district engineer understand the proposed activity, but it does not have to be an engineering drawing or a comparably detailed drawing. The Corps has not added any more information requirements beyond what was proposed in the 2020 Proposal. The Corps does not agree that general condition 32 should be modified to state that a district engineer has discretionary authority to expedite

certain time-sensitive maintenance and inspection activities. District engineers already have the discretion to manage their workload.

The Corps also proposed to modify paragraph (b)(4) of this general condition by dividing it into subparagraphs to clarify different requirements of a complete PCN: the description of the proposed NWP and associated information (subparagraph (b)(4)(i)); the quantities of anticipated losses of waters, wetlands, and other special aquatic sites for linear projects (subparagraph (b)(4)(ii)); and the inclusion of sketches with the PCN (subparagraph (b)(4)(iii)). In subparagraph (b)(4)(i), the Corps also proposed to add "(including the same NWP for activities that do not require PCNs)" after "any other NWP(s)" to clarify that the PCN must identify non-PCN NWPs that are used to authorize any part of the proposed project or related activity, including separate and distant crossings of waters and wetlands for linear projects. In subparagraph (b)(4)(ii), the Corps proposed to clarify the information requirements for linear projects, and state that these information requirements do not trigger a PCN requirement for those crossings authorized by an NWP that do not require PCNs. The Corps also proposed to modify this subparagraph to state that this information will be used by the district engineer to evaluate the cumulative adverse environmental effects of the proposed linear project.

A few commenters expressed support for the proposed changes, particularly the clarification that a PCN must identify non-PCN NWPs used to authorize other aspects of projects, including linear projects. The Corps has incorporated the proposed changes into paragraph (b)(4).

In the first sentence of paragraph (b)(5), the Corps proposed to remove the phrase "and perennial, intermittent, and ephemeral streams," and replace it with "streams." If there are streams on the project site, then the PCN must

include a delineation of those streams. In addition, the Corps proposed to modify paragraph (b)(5) to be consistent with its proposal to remove the 300 linear foot limit for losses of stream bed in NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52, and rely on the 1/2-acre limit, PCN review process, and the ability of division and district engineers, based on regional or local conditions, to modify, suspend, or revoke NWP authorizations on a regional or case-by-case basis, respectively, to comply with the requirement that NWPs may only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects. The delineation of streams on the project site will be used to calculate the area of stream bed is proposed to be filled or excavated and thus results in a loss of stream bed. The area of jurisdictional stream bed filled or excavated would be applied to the 1/2-acre limit for these NWPs, to determine whether the loss of stream bed plus the losses of any other non-tidal jurisdictional waters and wetlands exceeds the 1/2-acre limit.

A few commenters stated that the Corps should add the word "jurisdictional" to "streams" in paragraph (b)(5). One commenter recommended that the Corps clarify that paragraph (b)(5) only applies to jurisdictional waters. One commenter stated that the use of the word "ephemeral" in paragraph (b)(5) is inconsistent with the Navigable Waters Protection Rule and recommended omitting the term from the general condition. One commenter opposed the addition of "streams" in paragraph (b)(6) and requiring PCNs for stream losses in excess of 1/10-acre, since the removal of the 300-foot limit only applies to 10 NWPs.

The Corps declines to add the word "jurisdictional" to modify the word "stream" or other types of waters listed in paragraph (b)(5) because an approved jurisdictional determination is not required for an NWP PCN. If the project

proponent did not obtain an approved jurisdictional determination for the project site prior to submitting the PCN, for the purposes of evaluating the PCN the district engineer will presume the wetlands, streams, and other waters on the project site are subject to Clean Water Act jurisdiction. The Corps has removed the word “ephemeral” from paragraph (b)(5). Paragraph (b)(6) does not impose any additional PCN requirements for losses of stream bed. The first sentence of paragraph (b)(6) has been revised as follows to incorporate the mitigation thresholds in general condition 23: “If the proposed activity will result in the loss of greater than 1/10-acre of wetlands or 3/100-acre of stream bed 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.”

The Corps proposed to modify paragraph (c) to state that the PCN should be submitted using Form ENG 6082 that was approved earlier this year. Form ENG 6082 should be used instead of ENG 4345, which is the standard individual permit application form. Block 18 of Form ENG 6082 has a space for the project proponent to identify the specific NWP(s) she or he wants to use to authorize the proposed activity. Therefore, the Corps proposed to remove the text of paragraph (c) that stated that a completed ENG 4345 must clearly indicated that it is an NWP PCN and must include all of the information required by subparagraphs (b)(1) through (10) of this general condition.

One commenter stated that paragraph (c), which references the use of ENG 6082, should be altered to include allowance for states that have a joint application process. The ENG Form 6082 has been approved for purposes of the

Paperwork Reduction Act, but joint state-federal forms have not been approved. Therefore, the Corps declines to make this suggested change.

Because of the proposal to remove the 300 linear foot limit for losses of stream bed in NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52, as well as the associated waiver provision for losses of intermittent and ephemeral stream bed, the Corps proposed to modify paragraph (d)(2) of the agency coordination provisions of this general condition. The Corps proposed to remove the requirement for agency coordination for 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.

Several commenters objected to the removal of the agency coordination process with the removal of the 300 linear foot limit for loss of stream bed. One commenter stated that removal of the agency coordination process resulting from the removal of PCN requirements may lead to the Corps being the only entity involved in the review of potential source water (i.e. drinking water) impacts. One commenter stated that the PCN requirement is a benefit for state agency coordination, which assists the applicant and regulatory agencies in permit streamlining.

The Corps has removed the agency coordination provisions for waivers for losses of greater than 300 linear feet of intermittent or ephemeral stream bed for activities authorized by NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. The NWPs do not require district engineers to coordinate proposed activities that may affect source waters or drinking water supplies. Pre-construction notifications are required for certain NWP activities, and coordination with state agencies is only required for specific activities identified in paragraph (d) of this general condition.

This general condition is adopted with the modifications discussed above.

I. Discussion of Proposed Modifications to Section D, District Engineer's Decision

In paragraph 1 of Section D, the Corps proposed to remove provisions that refer to potential waivers of the 300 linear foot limit for losses of stream bed authorized by NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. The Corps proposed this change to be consistent with our proposal to remove the 300 linear foot limit and the waiver provision from those NWPs. In the second sentence of paragraph 4, the Corps proposed to remove "or to evaluate PCNs for activities authorized by NWPs 21, 49, and 50" because we are proposing to remove the requirement that permittees obtain written verification from the district engineer before these activities are authorized. Pre-construction notifications for activities authorized by NWPs 21 and 50 will be subject to the same timeframes as other NWP activities that require PCNs, because the Corps removed the provision from these NWPs that required the permittee to obtain written verification from the Corps before commencing the authorized activity. This includes the ability for the permittee to presume that her or his project qualifies for the NWP unless she or he is otherwise notified by the district engineer within a 45-day period (see 33 CFR 330.1(e)(1)), or Endangered Species Act Section 7 consultation and/or National Historic Preservation Act Section 106 consultation needs to be completed for non-federal permittees to comply with the requirements of general conditions 18 and 20.

One commenter said the Corps should only use functional assessments that have been developed, peer reviewed, and subject to public and stakeholder comment at the regional level, and that the Corps not unilaterally revise the tools or substitute alternative methodologies only when the Corps prefers. The Corps determines which functional assessments are appropriate for use in evaluating NWP PCNs and other applications for DA authorization. The Corps does not

require functional assessments to be peer reviewed, but acknowledges that peer review can help improve functional assessments to better assess aquatic resource functions. The Corps has modified the first sentence of paragraph 3 of this section to be consistent with the wetland and stream mitigation thresholds in general condition 23. That sentence has been changed to read: “If the proposed activity requires a PCN and will result in the loss of greater than 1/10-acre of wetlands or 3/100-acre of stream bed, the prospective permittee should submit a mitigation proposal with the PCN.

J. Discussion of Proposed Modifications to Section F, Definitions

In the 2020 Proposal, the Corps proposed changes to some of the NWP definitions and the Corps proposed to remove some definitions. Several commenters stated that the definitions in Section F should match the definitions used in the Navigable Waters Protection Rule and in other regulations. A few commenters suggested retaining the definitions for intermittent stream and ephemeral stream. One commenter suggested repeating all “geographic definitions” in the NWP definitions. One commenter requested definitions for levee, berm and dike. One commenter asked that the Corps differentiate between “top of bank,” “ordinary high water mark” and “bankfull elevation.” One commenter expressed concern with the proposed removal of definitions for “protected tribal resources,” “ephemeral streams” and “intermittent streams.”

As discussed in the proposed rule, the Corps proposed to modify the definitions of “ordinary high water mark” and “perennial stream” to be consistent with the Navigable Waters Protection Rule at 33 CFR 328.3(c)(7) and 33 CFR 328.3(c)(8). The Corps is removing the definitions of intermittent stream and ephemeral stream because they are no longer used in the text of the NWPs. The Corps does not believe it is necessary to copy the entire definition of “waters of

the United States" into the NWPs because that definition is available at 33 CFR 328.3. The Corps declines to add definitions of the terms "levee," "berm," "dike," and "top of bank." The Corps does not see a need to differentiate or define the terms "top of bank" or "bankfull elevation" because those terms are not used in the NWPs. The definition of "protected tribal resources" has been removed because that phrase is no longer in the text of general condition 17, tribal rights. The term "protected tribal resources" continues to be applied through the Corps' implementation of the 1998 Department of Defense American Indian and Alaska Native Policy.

One commenter stated that unless a definition of "water of the United States" is included or referenced all waterbodies should be defined within the NWPs to avoid confusion. One commenter requested a definition of "adjacent wetlands" that is consistent across all regulations. One commenter suggested adding a definition of "oil and gas pipeline." One commenter supported retention of the definitions for "single and complete linear project," "single and complete non-linear project" and "independent utility." One commenter suggested adding a definition of "stream" to differentiate between linear wetlands and streams for compensatory mitigation purposes.

The phrase "waters of the United States" is defined at 33 CFR part 328.3. The term "adjacent wetlands" is defined at 33 CFR 328.3(c)(1)). The term "oil or natural gas pipeline" is defined in the text of NWP 12. The Corps declines to add a definition of "stream" because the NWPs include a definition of "stream bed.'

Best management practices (BMPs). The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Compensatory mitigation. The Corps did not propose any changes to this definition. The Corps did not receive any comments. The definition is adopted as proposed.

Currently serviceable. The Corps did not propose any changes to this definition. One commenter stated that the proposed definition includes the unclear phrase “some maintenance” and requested clarification. The Corps declines to clarify the phrase “some maintenance” because it is subject to application on a case-by-case basis.

The definition is adopted as proposed.

Direct effects. The Corps did not propose any changes to this definition and did not receive any comments. The definition is adopted as proposed.

Discharge. The Corps did not propose any changes to this definition. One commenter said that the proposed definition includes the word being defined in its definition and suggested edit of the definition replacing the word discharge in the definition with “addition”, “release”, or “placement.” The Corps declines to make the suggested changes because the Corps regulates discharges of dredged or fill material and those terms are more comprehensively defined in 33 CFR 323.2.

The definition is adopted as proposed.

Ecological reference. The Corps did not propose any changes to this definition. The Corps We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Enhancement. The Corps did not propose any changes to this definition. The Corps We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Ephemeral stream. The Corps proposed to remove the definition of "ephemeral stream" in conjunction with the proposal to remove the 300 linear foot limit for losses of stream bed and the ability of district engineers to waive that 300 linear foot limit for losses of ephemeral stream bed on a case-by-case basis. It should also be noted that ephemeral features, including ephemeral streams, are excluded from the definition of "waters of the United States" at 33 CFR 328.3(b)(3). Section 328.3 of the Corps' regulations defines "waters of the United States" for the purposes of the Clean Water Act.

A few commenters stated that the definition of "ephemeral stream" should be retained given the importance of stream categorization in jurisdiction and thus whether an NWP is necessary. One commenter stated that the definition should be retained to differentiate ephemeral streams from intermittent and perennial streams. One commenter supported the removal of the definition given proposed elimination of the 300 linear foot limit from the NWPs and the exclusion of ephemeral streams from jurisdiction under the Navigable Waters Protection Rule. One commenter expressed opposition to the definition's removal based on opposition to removal of the 300 linear foot limit from the NWPs. One commenter stated that the term should be retained because a cumulative impacts analysis may include a determination of flow through ephemeral and intermittent streams.

The Corps is removing this definition as proposed because, in accordance with the Navigable Waters Protection Rule, ephemeral features, including ephemeral streams, are categorically excluded from the definition of "waters of the United States" under the Clean Water Act (see 33 CFR 328.3(b)(3)).

Establishment (creation). The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

High Tide Line. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Historic property. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Independent utility. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Indirect effects. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Intermittent stream. The Corps proposed to remove the definition of "intermittent stream," in conjunction with the proposal to remove the 300 linear foot limit for losses of stream bed which obviated the need to reference a waiver for losses of an intermittent stream bed.

One commenter supported the removal of the definition given proposed elimination of the 300 linear foot limit from the NWPs and the exclusion of ephemeral streams from jurisdiction under the Navigable Waters Protection Rule. One commenter objected to the removal of the definition of intermittent streams since they are in the Navigable Waters Protection Rule. One commenter opposed the definition's removal based on opposition to removal of the 300 linear foot limit from the NWPs. One commenter stated that the term should be retained because a cumulative impacts analysis may include a determination of flow through ephemeral and intermittent streams.

The Corps is removing this definition as proposed because this term is no longer used in the text of the NWPs.

Loss of waters of the United States. The Corps proposed to rearrange the sentences in this definition so that the sentence that defines the loss of stream bed is moved to become the second sentence of this definition. In addition, the Corps proposed to modify this sentence to state that the stream bed would have to be permanently adversely affected, to be consistent with the first sentence of this definition. For consistency with the proposal to remove the 300 linear foot limit for losses of stream bed from 21, 29, 39, 40, 42, 43, 44, 51, and 52, and rely on the 1/2-acre limit and other tools to comply with the statutory requirement that the NWPs only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects, the Corps proposed to remove “linear feet” from the third sentence of this definition. This would provide consistency among the various types of waters when applying the fourth sentence of this definition, which states that the acreage 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.

One commenter stated that the Corps should not remove the words “linear feet” from the definition because of opposition to removing a method of calculating stream loss relative to compensatory mitigation. One commenter expressed support for the changes as it makes clear that loss is limited to stream beds permanently adversely impacted. One commenter said that removal of linear feet from the definition would result in more than minimal adverse environmental effects. One commenter stated that conversion of forested wetlands to other wetland types should be included in the definition of permanent

adverse effects which is included in the “loss of waters of the United States” definition.

The Corps has removed the 300 linear foot limit for losses of stream bed from NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. Therefore, the Corps is removing “linear feet” from this definition. The Corps declines to include the conversion of forested wetlands to other wetland types in the definition of “loss of waters of the United States” because those areas remain wetlands and they continue to provide wetland functions.

This definition is adopted as proposed.

Navigable waters. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Non-tidal wetland. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Open water. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Ordinary high water mark. The Corps proposed to modify this definition to be consistent with the definition in the Navigable Waters Protection Rule defining “waters of the United States” (see 33 CFR 328.3(c)(7)). One commenter said that the definition includes only a discussion of the stream bed and omits reference to the bank contrary to the definition in other Clean Water Act rules and regulations. The lateral extent of Clean Water Act jurisdiction ends at the ordinary high water mark, not the bank, if no adjacent wetlands are present. See 33 CFR 328.4(c).

The definition is adopted as proposed.

Perennial stream. The Corps proposed to modify the definition of "perennial stream" to be consistent with the definition of "perennial" in the Navigable Waters Protection Rule defining "waters of the United States" (see 33 CFR 328.3(c)(8)).

One commenter stated support for the proposed change because of the elimination of the 300 linear foot limit for losses of stream bed and changes made to the definition in the Navigable Waters Protection Rule. One commenter said that the previous definition was clearer in instances when perennial streams are diverted underground. One commenter stated that the definition does not match the definition in the Navigable Waters Protection Rule, and recommended changing the definition to match that definition.

The Navigable Waters Protection Rule at 33 CFR 328.3(c)(8) defines the term "perennial" not "perennial stream." The Corps used the definition of "perennial" at 33 CFR 328.3(c)(8) to modify the NWP definition of "perennial steam."

The definition is adopted as proposed.

Practicable. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Pre-construction notification. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Preservation. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Protected tribal resources. Because of the proposed changes to NWP general condition 17, tribal rights, the Corps proposed to remove this definition from the NWPs since this term is not in the text of the proposed general condition. The term “protected tribal resources” does not appear elsewhere in the text of NWPs, general conditions, or definitions, or in Section D, “District Engineer’s Decision.”

A few commenters opposed the removal of the definition because they opposed changing the text of general condition 17. A few commenters said that that removal of the definition and the change to general condition 17 will result in substantial impacts to tribal waters, treaty, trust and cultural resources. One commenter suggested adding the definition to general condition 17.

The Corps is removing this definition as proposed because it is no longer used in the text of the NWPs or the general conditions.

Re-establishment. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Rehabilitation. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Restoration. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Riffle and pool complex. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Riparian areas. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Shellfish seeding. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Single and complete linear project. The Corps did not propose any changes to this definition.

Many commenters stated support for retaining the definition given longstanding presence in regulation, practice by the Corps and upholding in court cases. Several commenters stated that the definition violates the Clean Water Act Section 404(e) minimal impact limitation, the National Environmental Policy Act the Endangered Species Act and other statutes and regulations. A few commenters stated that the definition recognizes "that discharges of dredged or fill material along a utility line, with narrow crossings of separate and distant waters, will typically have minimal effects both on the individual waters crossed and cumulatively on watersheds." One commenter supported continued use of the definition but said that it is vague and has led to inconsistent application among districts, particularly relative to multiple crossings of a single water with multiple channels. One commenter stated that the definition is inconsistently applied and should be revised to require or strongly promote the concept of "multiple" single and complete linear projects. One commenter requested clarification of the definition to allow a determination of permit requirements and compensatory mitigation by the permittee.

The definition is consistent with the Corps' regulations at 33 CFR 330.2(i), which was promulgated in 1991, and with long-standing practice for authorizing

linear projects by NWP. This definition does not violate the Clean Water Act, the National Environmental Policy Act, or the Endangered Species Act. It is based on a regulation that was promulgated in accordance with the Administrative Procedure Act. District engineers have discretion in applying this definition, and in identifying separate and distant crossings of waters of the United States. Only the district engineer has the authority to require compensatory mitigation for activities authorized by NWPs. The permit applicant is responsible for submitting a mitigation plan to the district engineer for consideration.

The definition is adopted as proposed.

Single and complete non-linear project. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stormwater management. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stormwater management facilities. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stream bed. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stream channelization. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Structure. The Corps did not propose any changes to this definition. One commenter suggested that the definition be altered to be consistent with

language used in proposed new NWP C. Specifically, the commenter, proposes replacing the example of “power transmission line” with “utility line” so it includes other types of lines. The Corps declines to make the suggested change to this definition because it covers a wide variety of structures that may be authorized by NWPs.

The definition is adopted as proposed.

Tidal wetland. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Tribal lands. The Corps did not propose any changes to this definition. One commenter stated that the definition of tribal Lands used by the U.S. EPA and the Corps’ definition is different and suggested that they be revised to be consistent. This definition was adopted from the 1998 Department of Defense American Indian and Alaska Native Policy, so the Corps is retaining that definition.

The definition is adopted as proposed.

Tribal rights. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Vegetated shallows. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Waterbody. The Corps did not propose any changes to this definition. Several commenters said that the term “waterbody” can be confused with “water body,” which describes both jurisdictional and non-jurisdictional features, for example as used in the Navigable Waters Protection Rule. The commenter

suggested deletion of “waterbody” and instead use of “waters of the United States” to avoid confusion. One commenter recommended removal of the last sentence of this definition. The Corps declines to make the suggested changes, except for the removal of the last sentence, because this term is used through the NWPs. The definition of “waters of the United States” at 33 CFR 328.3 is used to identify waterbodies, including adjacent wetlands.

The definition is adopted as proposed.

## III. Compliance with Relevant Statutes

### A. National Environmental Policy Act Compliance

The Corps has 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-2020-0002) as Supporting and Related Materials for this final rule. Before the 2021 NWPs go into effect, division engineers will issue supplemental documents to evaluate environmental effects on a regional basis (e.g., a state or Corps district) and to determine whether regional conditions are necessary to ensure that the NWPs will result in no more

than minimal individual and cumulative adverse environmental effects on a regional basis. The supplemental documents are prepared by Corps districts, but must be approved and issued by the appropriate division engineer, since the NWP regulations at 33 CFR 330.5(c) state that the division engineer has the authority to modify, suspend, or revoke NWP authorizations in a specific geographic area within his or her division. For some Corps districts, their geographic area of responsibility covers an entire state. For other Corps districts, their geographic area of responsibility may be based on watershed boundaries. For some states, there may be more than one Corps district responsible for implementing the Corps regulatory program, including the NWP program. In states with more than one Corps district, there is a lead Corps district responsible for preparing the supplemental 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.

The Corps solicited comments on the draft national decision documents, and any comments received were considered when preparing the final decision documents for the NWPs.

Before the final NWPs go into effect, division engineers will issue supplemental documents to evaluate environmental effects on a regional basis (e.g., state or Corps district). The supplemental documents are prepared by Corps districts, but must be approved and formally 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 for any specific geographic area within his or her division. For some Corps districts, their geographic area of responsibility covers an entire state. For other states, there is more than one Corps district responsible for implementing the Corps Regulatory Program, including the NWP program. In those states, there is a lead Corps district responsible for preparing the supplemental documents for all of the NWPs. The supplemental documents will discuss regional conditions imposed by division engineers to protect the aquatic environment 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 under the Corps' public interest review occurs at three levels: national, regional, and the verification stage. Each national NWP decision document includes a national-scale cumulative effects analysis under the Corps' public interest review. Each supplemental document has a cumulative effects analysis under the Corps' public interest review conducted for a region, which is usually a state or Corps district. When a district engineer issues a verification letter in response to a PCN or a voluntary request for a NWP verification, the district engineer prepares a brief decision document. That decision document explains whether the proposed NWP activity, after considering permit conditions such as mitigation requirements, will result in no more than minimal individual and cumulative adverse environmental effects.

If the NWP is not suspended or revoked in a state or a Corps district, the supplemental document includes a certification that the use of the NWP in that district, with any applicable regional conditions, will result in no more than minimal cumulative adverse environmental effects.

After the NWPs are issued or reissued and go into effect, district engineers will monitor the use of these NWPs on a regional basis (e.g., within a watershed, county, state, Corps district or other appropriate geographic area), to ensure that the use of a particular NWP is not resulting in more than minimal cumulative adverse environmental effects. The Corps staff that evaluate NWP PCNs that are required by the text of the NWP or by NWP general conditions or regional conditions imposed by division engineers, or voluntarily submitted to the Corps district by project proponents to receive written NWP verifications, often work in a particular geographic area and have an understanding of the activities that have been authorized by NWPs, regional general permits, and individual permits over time, as well as the current environmental setting for that geographic area. If the Corps district staff believe that the use of an NWP in that geographic region may be approaching a threshold above which the cumulative adverse environmental effects for that category of activities may be more than minimal, the district engineer may either make a recommendation to the division engineer to modify, suspend, or revoke the NWP authorization in that geographic region in accordance with the procedures in 33 CFR 330.5(c). Alternatively, under the procedures at 33 CFR 330.5(d), the district engineer may also modify, suspend, or revoke NWP authorizations on a case-by-case basis to ensure that the NWP does not authorize activities that result in more than minimal cumulative adverse environmental effects.

A few commenters said that the Council on Environmental Quality's amended NEPA regulations are currently being litigated, and that the Corps should continue to apply the 1978 regulations. Several commenters stated that an environmental assessment would conclude that a finding of no significant impact cannot be achieved for the NWPs, and therefore, an environmental

impact statement must be prepared for the issuance of the NWPs. Several commenters said that a reasonable range of actual alternatives must be evaluated, including a no action alternative, for each NWP. A few commenters said because NWPs are in effect for five years, the Corps should include reasonably foreseeable future actions. A few commenters stated the Corps decision documents fail to take a "hard look" at direct, indirect, and cumulative analysis required by NEPA, and that the Corps decision documents fail to consider or analyze relevant factors necessary to determine significance.

The Corps prepared NEPA components of the draft and final national decision documents in accordance with the Council on Environmental Quality's current NEPA regulations, published in the Federal Register on July 16, 2020 (85 FR 43304). The commenters objecting to the preparation of environmental assessments for the issuance of the NWPs do not provide any substantive information backing their claims that the issuance of the NWPs requires an environmental impact statement. The national decision document prepared for each NWP issued by this final rule discusses alternatives, consistent with CEQ's current NEPA regulations at 40 CFR 1501.5(c). The national decision documents examine the effects and impacts of the proposed action (i.e., the issuance of the NWP by Corps Headquarters) consistent with the definition of "effects or impacts" at 40 CFR 1508.1(g).

A few commenters said the decision documents somehow imply that the NWPs provide site-specific NEPA analysis, but that the Corps does not undertake any NEPA analysis at a project-specific level. One commenter stated that the Corps cannot defer its NEPA obligations to consider mitigation measures, public comments, or alternatives analysis to the regional or project level review because there is no guarantee any further NEPA analysis would

occur. Several commenters said the national decision documents do not provide an a NEPA-level cumulative effects analysis, and that the Corps cannot defer the analysis at a later stage of review.

The Corps did not defer any of its NEPA obligations during the preparation of the national decision documents for these NWPs. No further NEPA analysis is required for specific activities authorized by NWPs because the Corps fulfills the requirements of NEPA when it prepares an environmental assessment with a finding of no significant impact for each NWP's national decision document, to inform the decision whether to issue or reissue that NWP. The 2020 CEQ NEPA regulations altered how cumulative effects are considered under NEPA (see the definition of "effects or impacts" at 40 CFR 1508.1(g)). The Corps considered the effects of the proposed action in its national decision documents.

One commenter requested information on what type of NEPA assessment has been completed to determine the effects on aquatic resources as a result of the proposed changes, and what type of studies have been performed to show these changes will not result in more than minimal effects. One commenter stated the national decision documents do not provide a list of agencies or persons consulted in the development of the environmental assessment. One commenter said the national decision documents do not include tribal interests or treaty responsibilities.

The Corps' NEPA assessment is provided in the national decision document for each NWP. Further, the Corps considered public comments received on the 2020 Proposal and on the draft national decision documents. Tribal interests and treaty responsibilities are more appropriately addressed through consultations between Corps districts and tribes on matters related to the NWP program and its implementation.

B. 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. These NWPs authorize categories of activities that are similar in nature. The “similar in nature” requirement does not mean that activities authorized by an NWP must be identical to each other. We believe that the “categories of activities that are similar in nature” requirement in Clean Water Act section 404(e) is to be interpreted broadly, for practical implementation of this general permit program.

Nationwide permits, as well as other general permits, are intended to reduce administrative burdens on the Corps and the regulated public while maintaining environmental protection, by efficiently authorizing activities that have no more than minimal adverse environmental effects, consistent with Congressional intent expressed in the 1977 amendments to the Federal Water Pollution Control Act. The NWPs provide incentives for project proponents to minimize impacts to jurisdictional waters and wetlands to qualify for NWP authorization instead of having to apply for individual permits. Keeping the number of NWPs manageable is a key component for making the NWPs protective of the environment and streamlining the authorization process for those general categories of activities that have no more than minimal individual and cumulative adverse environmental effects.

The various terms and conditions of these NWPs, including the NWP regulations at 33 CFR 330.1(d) and 330.4(e), allow district engineers to exercise discretionary authority to modify, suspend, or revoke NWP authorizations or to require individual permits, and ensure compliance with section 404(e) of the Clean Water Act. For each NWP that may authorize discharges of dredged or fill material into waters of the United States, the national decision documents

prepared by Corps Headquarters include a 404(b)(1) Guidelines analysis. The supplemental documents prepared by division engineers will discuss regional circumstances to augment the 404(b)(1) Guidelines analyses in the national decision documents. These 404(b)(1) Guidelines analyses are conducted in accordance with 40 CFR part 230.7.

The 404(b)(1) Guidelines analyses in the national decision documents also include cumulative effects analyses done in accordance with 40 CFR 230.7(b) and 230.11(g). 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.

C. 2020 Revisions to the Definition of ''Waters of the United States'' (i.e., the Navigable Waters Protection Rule)

Corps general permits are not intended to make or imply a conclusion or determination regarding what water bodies are or are not subject to CWA jurisdiction. Instead, a Corps general permit merely states that, if a person complies with all of the terms and conditions of the general permit, that person's proposed discharges of dredged or fill material into the waterbody will be consistent with the CWA, on the ground that any such discharges either (1) are legally authorized under the CWA (to the extent that the waterbody is subject to CWA jurisdiction) or (2) are otherwise consistent with the CWA to the extent that the waterbody is not jurisdictional under the CWA. The Corps acknowledges that some members of the public may seek to comply with the conditions of a general permit even for water bodies that are not jurisdictional or may not be jurisdictional under the CWA. Such practice, though not required, is not unlawful. The Corps is not required to make a formal determination whether a particular wetland or

water is subject to jurisdiction under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act of 1899 before issuing an individual permit or a general permit verification. Many project proponents prefer the time savings that can occur when the Corps issues an individual permit or general permit verification without expending the time and resources needed to make a formal, definitive determination whether those wetlands and waters are in fact jurisdictional and thus regulated under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899.

On April 21, 2020, the U.S. Environmental Protection Agency (EPA) and the Department of the Army published the Navigable Waters Protection Rule, revising the definition of ‘‘waters of the United States” (85 FR 22250). Specifically, this final rule revises the Corps’ regulations at 33 CFR part 328.3, where the definition of “waters of the United States” is located for the purposes of implementing Section 404 of the Clean Water Act. On June 22, 2020, the Navigable Waters Protection Rule became effective in all states and jurisdictions except for the State of Colorado due to a federal district court-issued stay in that state (the case is currently under appeal). The rule has also been challenged in several other federal district courts.

Please note that some of the NWPs could authorize activities that involve the discharge of dredged or fill material into water bodies that are not subject to CWA jurisdiction, or that may not be subject to CWA jurisdiction. For example, a project proponent could proceed with an NWP activity that does not require submission of a PCN to the Corps in a non-jurisdictional water without getting a definitive determination from the Corps that the wetland or waterbody is not a water of the United States and thus not subject to CWA jurisdiction. As another example, if a proposed NWP activity requires pre-construction notification, the

district engineer could issue the NWP verification based on the delineation of wetlands, other special aquatic sites, and other waters provided with the PCN in accordance with paragraph (b)(5) of NWP general condition 32, without the Corps making any formal determination as to whether those wetlands, special aquatic sites, and other waters are "waters of the United States."

During the pendency of any litigation challenging the Navigable Waters Protection Rule, the NWPs will continue to authorize discharges of dredged or fill material in all water bodies that are subject to CWA jurisdiction, or that may be subject to CWA jurisdiction, at the time those discharges occur. Where a particular waterbody into which a person proposes to discharge dredged or fill material is subject to CWA jurisdiction, compliance with the terms and conditions of one or more NWPs, or an individual permit, will be necessary. An affected party has the opportunity to request an approved jurisdictional determination from the Corps if the affected party would like the Corps' formal determination on the jurisdictional status of a water or feature under the CWA.

D. Compliance with the Endangered Species Act

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). Those regulations and general condition 18 require non-federal permittees to submit PCNs for any activity that might affect listed species or designated critical habitat, as well as species proposed for listing and critical habitat proposed for such designation. When the district engineer evaluates a PCN, he or she determines whether the proposed NWP activity may affect listed species or designated critical habitat. 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). Since "might" has a lower probability of occurring, it is below the threshold (i.e., "may affect") that triggers the requirement for ESA section 7 consultation for a proposed Federal action. As discussed below, each year the Corps conducts thousands of ESA section 7 consultations with the FWS and NMFS for activities authorized by NWPs. In recent years, an average of more than 10,800 formal, informal, and programmatic ESA section 7 consultations are conducted each year between the Corps and the FWS and/or NMFS in response to NWP PCNs, including those activities that required PCNs under paragraph (c) of general condition 18 under the "might affect" threshold.

If the project proponent is required to submit a PCN and the proposed activity might affect listed species or designated critical habitat, species proposed for listing, or critical habitat proposed for such designation, the activity is not authorized by an NWP until either the district engineer makes a "no effect" determination or makes a "may affect" determination and completes formal or informal ESA section 7 consultation. The district engineer may also use a regional programmatic consultation to comply with the requirements of section 7 of the ESA.

When evaluating a PCN, where necessary and appropriate, the Corps district will either make a "no effect" determination or a "may affect" determination. If the district engineer makes a "may affect" determination, she or he will notify the non-federal project proponent and the activity is not authorized by the NWP until ESA Section 7 consultation has been completed. In making

these determinations, the district engineer will apply the definition of “effects of the action” in the FWS’s and NMFS’s ESA consultation regulations at 50 CFR 402.02. If the district engineer initiates section 7 consultation with the FWS and/or NMFS, that consultation will also consider ESA section 7 cumulative effects, in accordance with the definition of “cumulative effects” at 50 CFR 402.02. 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 an NWP. In such situations, it is an unauthorized activity and the Corps district will determine an appropriate course of action under its regulations at 33 CFR part 326 to respond to the unauthorized activity, if and when the Corps learns about that unauthorized activity.

Federal agencies, including state agencies (e.g., certain state Departments of Transportation) to which the Federal Highway Administration has assigned its responsibilities for ESA section 7 consultation pursuant to 23 U.S.C. 327(a)(2)(B), 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 where 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. For those NWPs that require pre-construction notification for proposed activities, the federal permittee is required to provide the district engineer with the appropriate documentation to demonstrate compliance with section 7 of the ESA. 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 proposed activity to fulfill both the federal agency's and the Corps' obligations to comply with the ESA.

The only activities that potentially could be immediately authorized by NWPs, assuming they meet all other applicable NWP conditions, are activities that would have "no effect" on listed species or designated critical habitat within the meaning of Section 7 of the ESA and its implementing regulations at 50 CFR part 402. Therefore, the issuance or reissuance of NWPs does not require ESA section 7 consultation because no activities authorized by any NWPs "may affect" listed species or critical habitat without first completing activity-specific ESA Section 7 consultations with the Services, as required by general condition 18 and 33 CFR 330.4(f). Regional programmatic ESA section 7 consultations may also be used by district engineers to satisfy the requirements of the NWPs in general condition 18 and 33 CFR 330.4(f) if a proposed NWP activity is covered by that regional programmatic consultation.

In the August 27, 2019, issue of the Federal Register (84 FR 44976) the FWS and NMFS published a final rule that amended their regulations for interagency cooperation under Section 7 of the ESA. That final rule went into effect on October 28, 2019. With respect to making effects determinations for proposed federal actions, such as activities authorized by NWPs, the FWS and NMFS made two important changes to 50 CFR part 402: (a) introducing the term ''consequences'' to help define what is an effect under ESA section 7, and (b) emphasizing that to be considered an "effect of the action" under section 7 consultation, the consequences caused by the action would not occur but for the proposed action and must be reasonably certain to occur (see 84 FR 44977). Further clarification of "activities that are reasonably certain to occur" and

“consequences caused by the proposed action” were provided by the FWS and NMFS in rule text added at 50 CFR 402.17(a) and (b), respectively.

Applying the 2019 amendments to the section 7 regulations to the NWP program, consequences to listed species and designated critical habitat caused by proposed NWP activities must be reasonably certain to occur. In the preamble to their final rule, the FWS and NMFS stated that for a “consequence of an activity to be considered reasonably certain to occur, the determination must be based on clear and substantial information” (see 84 FR 44977). The FWS and NMFS explained that “clear and substantial” means that there has to be a firm basis for supporting a conclusion that a consequence of a federal action is reasonably certain to occur. The determination that a consequence is reasonably certain to occur should not be based on speculation or conjecture, and the information used to make that determination should have a “degree of certitude” (see 84 FR 44977). The Corps will apply these considerations when evaluating pre-construction notifications for proposed NWP activities.

When the district engineer receives a pre-construction notification for a proposed NWP activity, he or she is responsible for applying the current definition of “effect of the action” to the proposed NWP activity and to determine the consequences caused by the proposed action and which activities are reasonably certain to occur. The district engineer determines whether the proposed NWP activity “may affect” listed species or designated critical habitat and initiates formal or informal section 7 consultation, unless she or he determines that the proposed NWP activity will have “no effect” on listed species or designated critical habitat. As a general rule, the district engineer documents his or her “no effect” determination in writing for every pre-construction notification that the district engineer receives and responds to.

The NWP program has been structured, through the requirements of NWP general condition 18 and 33 CFR 330.4(f), to focus ESA section 7 compliance at the activity-specific and regional levels. Each year, an average of more than 10,800 formal, informal, and regional programmatic ESA section 7 consultations are conducted by Corps districts with the FWS and/or NMFS in response to NWP PCNs for specific NWP activities (see below). Focusing ESA section 7 compliance at the activity-specific scale and regional programmatic scale is more efficient for the permittees, the Corps, and the FWS and NMFS, than doing so at the national level because of the similarities in ecosystem characteristics and associated listed species and critical habitat within a particular region.

For a proposed NWP activity that may affect listed species or designated critical habitat, a biological opinion with an incidental take statement is needed for the NWP activity to go forward unless the FWS or NMFS issued a written concurrence that the proposed NWP activity is not likely to adversely affect listed species or designated critical habitat. It is through activity-specific section 7 consultations and regional programmatic section 7 consultations between the Corps and the FWS and NMFS that effective protection of listed species and their designated critical habitat is achieved.

After applying the current ESA section 7 regulations at 50 CFR part 402 to the NWP rulemaking process, the Corps continues to believe that the issuance or reissuance of the NWPs has “no effect” on listed species or designated critical habitat, and that the ESA section 7 compliance is most effectively achieved by applying the requirements of general condition 18 and 33 CFR 330.4(f) to specific proposed NWP activities that are identified after the NWPs are issued and go into effect. Compliance with the requirements of ESA section 7 can also be achieved by district engineers applying appropriate formal or informal regional

programmatic ESA section 7 consultations that have been developed by Corps districts with regional offices of the FWS and NMFS.

Section 7 of the Endangered Species Act requires each federal agency to ensure, through consultation with the Services, that “any action authorized, funded, or carried out” by that agency “is not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitat.” (See 16 U.S.C. 1536(a)(2).) Accordingly, the Services’ section 7 regulations specify that an action agency must ensure that the action “it authorizes,” including authorization by permit, does not cause jeopardy or adverse modification. (See 50 CFR 402.01(a) and 402.02). Thus, in assessing application of ESA section 7 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 these 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 by a specific NWP. With respect to listed species and critical habitat, general condition 18 expressly prohibits any activity “which ‘may affect’ a listed species or designated critical habitat, unless section 7 consultation addressing the effects of the proposed activity has been completed.” General condition 18 also states that if an activity “might affect” a listed species or designated critical habitat (or a species proposed for listing or critical habitat proposed for such designation), a non-federal applicant must submit a PCN and “shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized.”

In addition, 33 CFR 330.4(f)(2) imposes a PCN requirement for proposed NWP activities by non-federal permittees where listed species (or species proposed for listing) or critical habitat might be affected or are in the vicinity of the proposed NWP activity. Section 330.4(f)(2) also prohibits those permittees from beginning the NWP activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. Permit applicants that are Federal agencies must and will follow their own requirements for complying with the ESA (see 33 CFR 330.4(f)(1)).

Thus, because no NWP can or does authorize an activity that may affect a listed species or critical habitat absent an activity-specific ESA section 7 consultation or applicable regional programmatic ESA section 7 consultation, and because any activity that may affect a listed species or critical habitat must undergo an activity-specific consultation or be in compliance with a regional programmatic ESA section 7 consultation before the district engineer can verify that the activity is authorized by an NWP, the issuance or reissuance of NWPs has “no effect” on listed species or critical habitat. Accordingly, the action being “authorized” by the Corps (i.e., the issuance or re-issuance of the NWPs themselves) has no effect on listed species or critical habitat.

To help ensure protection of listed species and critical habitat, general condition 18 and 33 CFR 330.4(f) establish a more stringent threshold than the threshold set forth in the Services’ ESA section 7 regulations for initiation of section 7 consultation. Specifically, while section 7 consultation must be initiated for any activity that “may affect” listed species or critical habitat, for non-federal permittees general condition 18 require submission of a PCN to the Corps if “any listed species (or species proposed for listing) 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" or critical habitat proposed for such designation, and prohibits work until "notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized." (See paragraph (c) of general condition 18.) The PCN must "include the name(s) of the endangered or threatened species (or species proposed for listing) that might be affected by the proposed work or that utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed work." (See paragraph (b)(7) of the "Pre-Construction Notification" general condition.) Paragraph (f) of general condition 18 notes that information on the location of listed species and their critical habitat can be obtained from the Services directly or from their web sites.

General condition 18 makes it clear to project proponents that an NWP does not authorize the "take" of an endangered or threatened species. Paragraph (e) of general condition 18 also states that a separate authorization (e.g., an ESA section 10 permit or a biological opinion with an "incidental take statement") is required to take a listed species. In addition, paragraph (a) of general condition 18 states that no activity is authorized by an NWP which is likely to "directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation" or "which will directly or indirectly destroy or adversely modify the critical habitat of such species." Such activities would require district engineers to exercise their discretionary authority and subject the proposed activity to the individual permit review process, because an activity that would jeopardize the continued existence of a listed species, or a species proposed for listing, or that would destroy or adversely modify the critical habitat of such species would not result in

no more than minimal adverse environmental effects and thus cannot be authorized by an NWP.

The Corps' NWP regulations at 33 CFR 330.1(c) state that an "activity is authorized under an NWP only if that activity and the permittee satisfy all of the NWP's terms and conditions." Thus, if a project proponent moves forward with an activity that "might affect" an ESA listed species without complying with the PCN or other requirements of general condition 18, the activity is not authorized under the CWA. In this case, the project proponent could be subject to enforcement action and penalties under the CWA. In addition, if the unauthorized activity results in a "take" of listed species as defined by the ESA and its implementing regulations, then he or she could be subject to penalties, enforcement actions, and other actions by the FWS or NMFS under section 11 of the ESA.

For listed species (and species proposed for listing) under the jurisdiction of the FWS, information on listed species that may be present in the vicinity of a proposed activity is available through the Information Planning and Consultation (IPaC) system,[4] an on-line project planning tool developed and maintained by the FWS.

During the process for developing regional conditions, Corps districts collaborate with FWS and/or NMFS regional or field offices to identify regional conditions that can provide additional assurance of compliance with general condition 18 and 33 CFR 330.4(f)(2). Such 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.

---

[4] https://ecos.fws.gov/ipac/

Corps districts will continue to consider through regional collaborations and 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.

Corps district office personnel meet with local representatives of the FWS and NMFS to establish or modify existing procedures, where necessary, to ensure that the Corps has the latest information regarding the existence and location of any threatened or endangered species or their critical habitat, including species proposed for listing or critical habitat proposed for such designation. Corps districts can also establish, through local procedures or other means, additional safeguards that ensure compliance with the ESA. Through formal ESA section 7 consultation, or through other coordination with the FWS and/or the NMFS, as appropriate, the Corps establishes procedures to ensure that NWP activities will not jeopardize any threatened and endangered species or result in the destruction or adverse modification of designated critical habitat. Such procedures may result in the development of regional conditions added to the NWP by the division engineer, or in activity-specific conditions to be added to an NWP authorization by the district engineer.

The Corps has prepared a biological assessment for this rulemaking action. The biological assessment concludes that the issuance or reissuance of NWPs has “no effect” on listed species and designated critical habitat and does not require ESA section 7 consultation. This conclusion was reached because no activities authorized by any NWPs “may affect” listed species or critical habitat

without first completing activity-specific ESA Section 7 consultations with the Services, as required by general condition 18 and 33 CFR 330.4(f).

Based on the fact that NWP issuance or reissuance of the NWPs is contingent upon any proposed NWP activity that “may affect” listed species or critical habitat undergoing an activity-specific or regional programmatic ESA section 7 consultation, there is no requirement that the Corps undertake consultation for the NWP program. The national programmatic consultations conducted in the past for the NWP program were voluntary consultations despite the inclusion of procedures to ensure consultation under Section 7 for proposed NWP activities that may affect listed species or designated critical habitat. Regional programmatic consultations can be conducted voluntarily by Corps districts and regional or local offices of the FWS and/or NMFS to tailor regional conditions and procedures to ensure the “might affect” threshold is implemented consistently and effectively.

Examples of regional programmatic consultations currently in effect, with the applicable Service the Corps consulted with, include: the Standard Local Operating Procedures for Endangered Species in Mississippi (2017 – FWS); the Endangered Species Act Section 7 Programmatic Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for Tidal Area Restoration Authorized, Funded, or Implemented by the Corps of Engineers, Federal Emergency Management Agency, and Federal Highways Administration, in Oregon and the Lower Columbia River (NMFS – 2018); the U.S. Anny Corps of Engineers Jacksonville District's Programmatic Biological Opinion (JAXBO) (NMFS – 2017); Missouri Bat Programmatic Informal Consultation Framework (FWS – 2019); Revised Programmatic Biological/Conference Opinion for bridge and culvert repair and

replacement projects affecting the Dwarf Wedgemussel, Tar River Spinymussel, Yellow Lance and Atlantic Pigtoe. Programmatic Conference Opinion (PCO) for Bridge and Culvert Replacement/Repairs/Rehabilitations in Eastern North Carolina, NCDOT Divisions 1-8 (FWS – 2018); and the Corps and NOAA Fisheries Greater Atlantic Regional Fisheries Office (GARFO) Not Likely to Adversely Affect Program Programmatic Consultation (NMFS – 2017).

The programmatic ESA section 7 consultations that the Corps conducted for the 2007 and 2012 NWPs were voluntary consultations. The voluntary programmatic consultation conducted with the NMFS for the 2012 NWPs resulted in a biological opinion issued on February 15, 2012, which was replaced by a new biological opinion issued on November 24, 2014. A new biological opinion was issued by NMFS after the proposed action was modified and triggered re-initiation of that programmatic consultation. The programmatic consultation on the 2012 NWPs with the FWS did not result in a biological opinion. For the 2017 NWPs, the Corps did not request a national programmatic consultation.

In the Corps Regulatory Program's automated information system (ORM), 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 evaluates approximately 35,000 NWP PCNs and requests for NWP verifications for activities that do not require PCNs, and provides written verifications for those activities when district engineers determine those activities

result in no more than minimal adverse environmental effects. During the evaluation process, district engineers assess potential impacts to listed species and critical habitat and conduct section 7 consultations whenever they determine proposed NWP activities “may affect” listed species or critical habitat. District engineers will exercise discretionary authority and require individual permits when proposed NWP activities will result in more than minimal adverse environmental effects.

Each year, the Corps conducts thousands of ESA section 7 consultations with the FWS and NMFS for activities authorized by NWPs. These section 7 consultations are tracked in ORM. In FY 2018 (October 1, 2017 to September 30, 2018), Corps districts conducted 640 formal consultations and 3,048 informal consultations under ESA section 7 for NWP PCNs. During that time period, the Corps also used regional programmatic consultations for 7,148 NWP PCNs to comply with ESA section 7. Therefore, each year an average of more than 10,800 formal, informal, and programmatic ESA section 7 consultations are conducted between the Corps and the FWS and/or NMFS in response to NWP PCNs, including those activities that required PCNs under paragraph (c) of general condition 18. For a linear project authorized by NWPs 12 or 14, where the district engineer determines that one or more crossings of waters of the United States that require Corps authorization “may affect” listed species or designated critical habitat, the district engineer initiates a single section 7 consultation with the FWS and/or NMFS for all of those crossings that he or she determines “may affect” listed species or designate critical habitat. The number of section 7 consultations provided above represents the number of NWP PCNs that required some form of ESA section 7 consultation, not the number of single and complete projects authorized by an NWP that may be included in a single

PCN. A single NWP PCN may include more than one single and complete project, especially if it is for a linear project such as a utility line or road with multiple separate and distant crossings of jurisdictional waters and wetlands from its point of origin to its terminal point.

During the process for reissuing the NWPs, Corps districts coordinated with regional and field offices of the FWS and NMFS to discuss whether new or modified regional conditions should be imposed on the NWPs to improve implementation of the “might effect” threshold and improve protection of listed species and designated critical habitat and ensure that the NWPs only authorize activities with no more than minimal individual and cumulative adverse environmental effects. Regional conditions must comply with the Corps’ regulations at 33 CFR 325.4 for adding permit conditions to DA authorizations. The Corps decides whether suggested regional conditions identified during this coordination are appropriate for the NWPs. During this coordination, other tools, such as additional regional programmatic consultations or standard local operating procedures, might be developed by the Corps, FWS, and NMFS to facilitate compliance with the ESA while streamlining the process for authorizing activities under the NWPs. Section 7 consultation on regional conditions occurs only when a Corps districts makes a “may affect” determination and initiates formal or informal section 7 consultation with the FWS and/or NMFS, depending on the species that may be affected. Otherwise, the Corps district coordinates the regional conditions with the FWS and/or NMFS. Regional conditions, standard local operating procedures, and regional programmatic consultations developed by the Corps, FWS, and NMFS are important tools for protecting listed species and critical habitat and helping to tailor the NWP program to address specific species, their habitats, and the stressors that affect those species.

The Corps received numerous comments regarding compliance with the Endangered Species Act for both the rulemaking process for issuing, reissuing, and modifying the NWPs by Corps Headquarters, and compliance for specific activities authorized by NWPs.

Many commenters expressed support for the Corps' current method of ESA compliance without need for a national programmatic section 7 consultation. These commenters said that the requirements of general condition 18 provide a sufficiently low threshold to trigger necessary ESA section 7 consultations for NWP activities. Many commenters said that there is no requirement for the Corps to consult under the ESA for the reissuance of the NWPs because the reissuance of the NWPs has no effect on listed species and consultation for each NWP activity occurs as necessary. One commenter suggested that the Corps voluntarily consult on reissuance of the NWPs to provide regulatory certainty to the business community, and said that this voluntary consultation should not delay issuance of a final rule. Many commenters expressed opposition to reissuing the NWPs without completing a national programmatic ESA section 7 consultation and addressing cumulative impacts to listed species. Several commenters stated that the Corps had failed to ensure that NWP activities are not likely to jeopardize the continued existence of listed species or adversely modify or destroy critical habitat, in violation of the ESA. A few commenters said that the Corps' programmatic "no effect" determination for the NWPs is in error because it is arbitrary and capricious, in violation of the ESA, and/or in violation of federal court decisions.

With this final rule, the Corps is continuing to implement its current approach to ESA section 7 compliance, through general condition 18 and 33 CFR 330.4(f). The Corps has determined that the issuance of this final rule will

have no effect on endangered or threatened species or critical habitat, completed a Biological Assessment to inform that conclusion, and therefore will not be submitting a request to the FWS and NMFS for a voluntary national programmatic ESA section 7 consultation. The Corps will continue to comply with the requirements of Section 7(a)(2) of the ESA through activity-specific and regional programmatic section 7 consultations conducted between district engineers and regional and field offices of the FWS and NMFS.

A few commenters stated that general 18 unlawfully delegates the Corps' ESA section 7 responsibilities to permittees. By requiring project proponents to submit PCNs if listed species "might be" affected, some commenters stated that the Corps unlawfully delegates the initial effect determination to the permittee. A few commenters said that the definition of agency "action" in the ESA which requires ESA section 7(b) consultation includes programmatic actions such as the Corps issuance of the NWPs. A few commenters said that formal programmatic consultation between the Corps and the Services is necessary to meet the requirements of the ESA, asserting that such consultation allows for consideration of the cumulative impacts of a program and guides implementation of the program by establishing criteria to avoid adverse effects. These commenters also said that project-specific consultation must then be undertaken for specific actions under the program, which is when incidental take is authorized. One commenter said that the Corps' programmatic "no effect" with reliance on project specific consultation for compliance with the ESA is in error as it does not address cumulative impacts to species. The commenter further stated that this is clear based on past court cases, a past national programmatic consultation with NMFS, and the Services' listing decisions and critical habitat

designations whereby they assess activities permitted by NWP as a cause of the listing or designation decision.

General condition 18 does not delegate the Corps' ESA section 7 responsibilities to permittees. Consultation under section 7(a)(2) of the ESA is only required when a federal agency determines that its proposed action may affect listed species or designated critical habitat. As explained in this section of the final rule, the "might affect" threshold in paragraph (c) of general condition 18 is lower than the "may affect" threshold for triggering a requirement for consultation with the FWS and/or NMFS. The district engineer, not the permit applicant, is responsible for making a "may effect" or "no effect" determination under ESA section 7. The non-federal permittee is responsible for complying with paragraph (c) of general condition 18 and submitting a PCN to the district engineer when a proposed NWP activity triggers one of the PCN thresholds in that paragraph.

As discussed above, the Corps evaluated the programmatic action of rulemaking to issue these NWPs and determined that the issuance or reissuance of the NWPs by Corps Headquarters has no effect on listed species or designated critical habitat; that evaluation is documented in a Biological Assessment that supports its no effect determination. Therefore, an ESA section 7(a)(2) consultation with the FWS and NMFS is not required on a national, programmatic level for the issuance or reissuance of the NWPs in this final rule. The Corps considered the effects of its proposed action (i.e., the issuance or reissuance of the NWPs through the rulemaking process), including the cumulative effects anticipated to be caused by that proposed action. Those cumulative impacts include the projected use of the NWPs during the 5-year period those NWPs are anticipated to be in effect, along with the estimated

impacts to jurisdictional waters and wetlands and other resources, and the estimated compensatory mitigation required by district engineers to offset the authorized impacts. When issuing or reissuing the NWPs, or determining whether specific activities are authorized by an NWP, the Corps considers the individual and cumulative adverse environmental effects caused by those activities, including adverse environmental effects to a variety of resources, including jurisdictional waters and wetlands and the species that inhabit those waters and wetlands.

With respect to cumulative effects under ESA section 7, the FWS and NMFS define “cumulative effects” as the “effects of future state or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation” (see 50 CFR 402.02). The Corps does not have the legal authority to regulate or control future state or private actions that do not involve activities that require DA authorization under Section 10 of the Rivers and Harbors Act of 1899 or Section 404 of the Clean Water Act. Therefore, the Corps does not have the authority or discretion to control cumulative effects to listed species or designated critical habitat that are caused by future state or private activities. Incidental take is addressed through activity-specific and regional programmatic formal ESA section 7 section consultations when district engineers determine proposed NWP activities may affect listed species or designated critical habitat.

Previous national ESA section 7 programmatic consultations on the NWPs were voluntary consultations. Even though some listing decisions by the FWS or NMFS may have identified activities that may require DA permits as one of the contributing factors to listing a particular species as endangered or threatened under the ESA, those listing decisions usually acknowledge that section 7

consultations will be conducted for proposed federal actions that may affect those species, including activities that require DA authorization under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. An example is the final rule issued by NMFS on June 28, 2005, for the final listing determinations for 16 evolutionary significant units of west coast salmon (see 70 FR 37195).

One commenter suggested that the Corps require PCNs for all NWPs to ensure that the Corps is consulting as necessary under the ESA and is able to accurately track and evaluate cumulative impacts. One commenter stated that there is no requirement for the Corps to consult under the ESA for the NWPs but believes the Corps needs to rebut the findings in the Montana district court case in the text of the rule for purposes of future litigation. One commenter said that the Corps' "no effect" determination and deferral of ESA consultation until the project is proposed is in alignment with recent changes to ESA implementing regulations at 50 CFR 402.17(a) and (b). Specifically, these commenters assert that the change to the ESA section 7 regulations require that "program actions that are reasonably certain to occur" and the potential consequences of proposed actions be based on "clear and substantial information." Information that, the commenter argues, is not available until the project and its location are proposed.

It is neither practical nor necessary to require PCNs for all activities authorized by NWPs to ensure compliance with section 7 the ESA. There are many activities authorized by the NWPs each year that have no effect on listed species or designated critical habitat, despite approximately 10,800 ESA section 7 consultations occurring annually. Listed species are not uniformly distributed across the United States and tend to be concentrated in specific geographic areas ("hotspots") (e.g., Evans et al. 2016), and there are areas in the country

with jurisdictional waters and wetlands that have no or few listed species where NWP activities proceed with no effects to listed species or critical habitat. In addition, requiring PCNs for all activities authorized by NWPs would nearly double the number of PCNs reviewed by Corps district each year. In Appendix A of the Regulatory Impact Analysis for the 2020 Proposal, the Corps estimates that nearly 32,000 NWP activities proceed without PCNs each year. The Regulatory Impact Analysis for the 2020 proposal is available in the www.regulations.gov docket for this rule (docket number COE-2020-0002). That increase in the Corps' workload could result in changes in the effectiveness and efficiency in the review of PCNs by district engineers, as well as their evaluations of other activities requiring DA authorization, including activities authorized by individual permits and regional general permits. The increase in the Corps' workload could also affect its ability to conduct enforcement and compliance actions. Finally, and as explained above, General Condition 18 addresses this commenter's concerns regarding PCN requirements.

The Corps agrees that its "no effect" determination for the issuance or reissuance of the NWPs complies with the ESA section 7 regulations at 50 CFR part 402, because section 7 consultation is not required when a federal agency determines its proposed action will have no effect on listed species or designated critical habitat. In the biological assessment prepared by the Corps for this rulemaking activity, the Corps presents a substantial amount of data to demonstrate the actions it takes to comply with section 7 of the ESA, including the number of formal and informal section 7 consultations it conducts with the FWS and NMFS and the number of regional programmatic consultations and other tools it has developed with the FWS and NMFS.

One commenter said that the when the Corps implements an incidental take statement as a condition in its NWP verification it must undertake a project specific NEPA analysis. One commenter stated that the incidental take statement must be applied to entire project and not just the areas over which the Corps has control and responsibility. If not, the project proponent must obtain an ESA section 10(a)(1)(B) permit from the Services to ensure compliance with the ESA. Absent this, general condition 18 has the potential to continuously violate the ESA.

When a district engineer adds conditions to an NWP authorization to comply with the ESA or other federal laws, including terms and conditions from reasonable and prudent measures identified in an incidental take statement in a biological opinion that apply to the activity authorized by an NWP, a project-specific NEPA analysis is not required. The Corps complies with the requirements of NEPA when it prepares environmental assessments in the national decision documents for the issuance or reissuance of the NWPs by Corps Headquarters. The activities to which an incidental take statement in a biological opinion issued by the FWS or NMFS applies is dependent on project-specific circumstances identified in that biological opinion. When the FWS or NMFS write an incidental take statement for a biological opinion, under section 7(b)(4)(iv) of the ESA they can assign responsibility of specific terms and conditions of the incidental take statement to the federal action agency (e.g., the Corps), the applicant, or both taking into account their respective roles, authorities, and responsibilities (see 84 FR 44977). Paragraph (f) of general condition 18 addresses ESA section 10(a)(1)(B) incidental take permits and their potential application for NWP activities.

The Corps has carefully considered and evaluated all comments that were provided regarding this issue. The Corps reaffirms that its “no effect” determination for the promulgation of the NWPs is correct and appropriate, for the reasons explained above.

E. Compliance with the Essential Fish Habitat Provisions of the Magnuson-Stevens Fishery Conservation and Management Act

The NWP Program’s compliance with the essential fish habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act will be achieved through EFH consultations between Corps districts and NMFS regional offices. This approach continues the EFH Conservation Recommendations provided by NMFS Headquarters to Corps Headquarters in 1999 for the NWP program. Corps districts that have EFH designated within their geographic areas of responsibility will coordinate with NMFS regional offices, to the extent necessary, to develop NWP regional conditions that conserve EFH and are consistent with the NMFS regional EFH Conservation Recommendations. Corps districts will conduct consultations in accordance with the EFH consultation regulations at 50 CFR 600.920.

One commenter said that consultation with NMFS needs to occur for all NWPs used in essential fish habitat. The Corps continues to implement the EFH Conservation Recommendation provided by NMFS in 1999. In those Corps districts where essential fish habitat has been designated, district engineers review PCNs for proposed NWP activities to determine whether those proposed activities may adversely affect essential fish habitat. If the district engineer determines a proposed NWP activity may adversely affect essential fish habitat,

she or he initiates EFH consultation with the NMFS. Division engineers can add PCN requirements via regional conditions to those NWPs that do not require PCNs for all activities to ensure that EFH consultation is conducted for proposed activities that may adversely affect EFH.

F. Compliance with Section 106 of the National Historic Preservation Act

The NWP regulations at 33 CFR 330.4(g) and the "Historic Properties" general condition (general condition 20), ensure that all activities authorized by NWPs comply with section 106 of the NHPA. The "Historic Properties" general condition 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 the "Historic Properties" general condition 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 an 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 an NWP until NHPA Section 106 consultation has been completed. If the non-federal project proponent does not comply with the "Historic Properties" general condition, and does not submit the required PCN, then the activity is not authorized by an NWP. In such situations, it is an unauthorized activity and the Corps district will determine an appropriate course of action to 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 an NWP without first completing activity-specific NHPA Section 106 consultations, as required by the "Historic Properties" general condition. Programmatic agreements (see 36 CFR 800.14(b)) may also be used to satisfy the requirements of the NWPs in the "Historic Properties" general condition 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, the "Historic Properties" general condition 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. The "Historic Properties" general condition also states that if an activity "might have the potential to cause effects" to any historic properties, a non-federal applicant must submit a PCN and "shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that consultation under Section 106 of the NHPA has been completed." Permit applicants that are Federal agencies should follow their own requirements for complying with section 106 of the NHPA (see 33 CFR 330.4(g)(1) and paragraph (b) of the "Historic Properties" general condition).

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 section 106 consultation (unless that activity is covered under a programmatic agreement) before the district engineer can verify that the activity

is authorized by an NWP, the issuance or reissuance of NWPs has “no potential to cause effects” on historic properties. Accordingly, the action being “authorized” by the Corps, which is the issuance or re-issuance of the NWPs by Corps Headquarters, has no potential to cause effects on historic properties.

To help ensure protection of historic properties, the “Historic Properties” general condition 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 the “Historic Properties” general condition 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.” The “Historic Properties” general condition 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 the “Historic Properties” general condition.) 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 the “Pre-Construction Notification” general condition.)

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 the “Historic Properties” general

condition and 33 CFR 330.4(g)(2) for NWP activities undertaken by non-federal permittees. Such regional conditions can add PCN requirements to one or more NWPs where historic properties occur. Corps districts will continue to consider through regional consultations, local initiatives, or other cooperative efforts and additional information and measures to ensure protection of historic properties, the requirements established by the "Historic Properties" general condition (which apply to all uses of all NWPs), and other provisions of the Corps regulations and guidance ensure full compliance with NHPA section 106.

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

One commenter stated the reissuance of the NWPs does not require Section 106 NHPA consultation, but specific activities may require section 106 consultation. One commenter said the Corps should programmatically address the potential adverse effects from undertakings permitted pursuant to the NWPs either by creating a national programmatic agreement or a division-specific programmatic agreement. One commenter stated that the Corps' position that effects to historic properties would be evaluated on an individual activity phase is not consistent with the 36 CFR Part 800 regulations. One commenter disagreed with the Corps' position that the issuance or reissuance of the NWPs has "no potential to cause effect" on historic properties and does not require compliance

with Section 106 of the NHPA. This commenter said that reliance on general conditions 20, 21, and 32 is not a substitute for appropriate compliance with section 106 in individual cases.

For most NWP activities, the need to conduct NHPA section 106 is determined on a case-by-case basis, as district engineers evaluate PCNs for proposed NWP activities, including PCNs submitted by non-federal permittees under paragraph (c) of general condition 20. The Corps believes that programmatic agreements for section 106 compliance are more appropriately developed at a regional level, between Corps districts and State Historic Preservation Officers and Tribal Historic Preservation Officers. The Advisory Council on Historic Preservation's regulations provide for section 106 consultation on a case-by-case basis, although it includes provisions for federal agency program alternatives, including alternative procedures and programmatic agreements (see 36 CFR 800.14). With respect to section 106 of the NHPA, the only activities immediately authorized by an NWP are those activities that have no potential to cause effects to historic properties. Paragraph (c) of general condition 20 requires non-federal permittees to submit PCNs for any proposed NWP activities that might have the potential to cause effects to historic properties. District engineers review these PCNs to determine whether NHPA section 106 consultation is required for a proposed NWP activity.

Several commenters stated that Appendix C to 33 CFR part 325 and the 2005 and 2007 interim guidance documents issued by the Corps does not constitute an acceptable federal agency program alternative under 36 CFR 800.14. One commenter said that the Corps does not have the authority under the Clean Water Act and the River and Harbors Act of 1899 to promulgate its own regulations for compliance with Section 106 of the National Historic

Preservation Act (i.e., Appendix C to 33 CFR part 325) rather than complying with 36 CFR Part 800.

The Corps continues to use Appendix C and the 2005 and 2007 interim guidance to comply with section 106 of the NHPA. Section 110(a)(2)(E)(i) of the NHPA states that federal agencies can develop their own procedures for complying with section 106 as long as those procedures are consistent with the regulations issued by the Advisory Council on Historic Preservation.

A few commenters stated the NWPs and the general conditions violate the NHPA by delegating the effects determination to non-federal permittees by allowing permittees to make a determination of effect for NWP activities that do not require PCNs. Several commenters said that general condition 20 is inconsistent with the 36 CFR Part 800 regulations. One commenter stated that general condition 20 does not provide a standard by which the permittee must determine a PCN is necessary because of potential effects to historic properties.

The NWPs and their general conditions do not delegate effects determinations under section 106 of the NHPA to non-federal permittees. Paragraph (c) of general condition 20 requires non-federal permittees to submit PCNs to district engineers for any proposed NWP activity that might have the potential to cause effects to historic properties. District engineers will review those PCNs and determine whether section 106 NHPA consultation is required for proposed NWP activities. The “might have the potential to cause effects” to any historic property is a standard to guide permittees as to when they need to submit PCNs so that district engineers can determine whether section 106 consultation is required for a proposed NWP activity.

A few commenters said that the Corps’ permit area (area of potential effects) for section 106 compliance should not be limited to the activity within

waters of the United States that requires DA authorization, and that the area of potential effects should encompass the entire project that requires the permit. One commenter stated that the Corps' limited permit area causes costly delays to the project proponent when section 106 disputes are triggered, and that by limiting the permit area, the Corps undertaking does not adequately consider direct or indirect effect on historic properties.

The Corps' permit area or area of potential effects is limited to those areas and activities where the Corps has control and responsibility to address effects to historic properties through its permitting authorities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. District engineers work with permit applicants and other consulting parties to resolve disagreements about permit areas for section 106 compliance. When evaluating PCNs, district engineers consider direct and indirect effects to historic properties.

A few commenters said that a federal agency must consult with the Advisory Council on Historic Preservation, State Historic Preservation Offices, Tribal Historic Preservation Officers, tribes, and Native Hawaiian organization, where applicable, when effects to historic properties cannot be fully determined, and said that if a PCN is not warranted, these groups are not provided an opportunity to comment. One commenter said that the Corps must afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking, and when no PCN is required for an NWP activity, there is no consultation on the undertaking.

Non-federal permit applicants are responsible for complying with general condition 20, including the requirement to submit PCNs for any proposed NWP activity that might have the potential to cause effects to historic properties, so that the district engineer can determine whether section 106 consultation is

required for proposed activity. If the district engineer determines section 106 consultation is necessary, she or he will identify consulting parties and initiate section 106 consultation with those consulting parties. District engineers provide the Advisory Council on Historic Preservation with a reasonable opportunity to comment when the Council enters the section 106 process in accordance with Appendix A to 36 CFR part 800.

G. Section 401 of the Clean Water Act

A water quality certification issued by a state, authorized tribe, or EPA, or a waiver thereof, is required by section 401 of the Clean Water Act, for an activity authorized by an NWP which may result in a discharge from a point source into waters of the United States. Water quality certifications may be granted without conditions, granted with conditions, denied, or waived for specific NWPs.

Nationwide permits 21, 29, 39, 40, 42, 43, and 50 would authorize activities that may result in discharges to waters of the United States and therefore section 401 water quality certification or waiver is required for those NWPs. Nationwide permits 12, 48, 51, 52, 57, and 58 would authorize various activities, some of which may result in a discharge to waters of the United States and require section 401 water quality certification or waiver, and others which may not. Nationwide permits 55, and 56 do not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States. In the case of NWP 8, it only authorizes activities seaward of the territorial seas where the Clean Water Act does not apply.

Prior to the issuance of the 16 NWPs, certifying authorities made their decisions on whether to issue, deny, or waive water quality certification (WQC) for the issuance of the NWPs. If a certifying authority issued water quality

certifications with conditions for the issuance of these NWPs, district engineers reviewed the conditions in those water quality certifications to determine whether they comply with the requirements in 40 CFR 121.7(d). If the district engineer determines that any condition in the water quality certification for the issuance of the NWPs does not comply with the requirements of 40 CFR 121.7(d), and is waived pursuant to 40 CFR 121.9(d), the district engineer will notify the certifying authority and the EPA Administrator in accordance with 40 CFR 121.9(c). The conditions in the water quality certification for the issuance of the NWP that comply with the requirements of 40 CFR 121.7(d) and are not waived become conditions of the NWP authorization in accordance with Section 401(d) of the Clean Water Act.

If a certifying agency denies WQC for the issuance of an NWP, then the proposed discharges are not authorized by that NWP unless and until a project proponent obtains WQC for the specific discharge from the certifying authority, or a waiver of WQC occurs.

In the 2020 Proposal, the Corps noted that EPA issued revisions to its regulations governing the Clean Water Act section 401 certification process on June 1, 2020. In the future, it may be necessary or appropriate for the Corps to revise its own section 401 regulations, including 33 CFR 330.4, in light of EPA's Clean Water Act Section 401 Certification Rule. The Corps invited comments from the public on whether and, if so, when the Corps should revise those regulations in light of the new EPA regulations.

In response to the proposed rule and the associated requests for water quality certification, many certifying authorities requested an extension of the 60-day reasonable period of time to review and certify the proposed NWPs. A few commenters said that many states cannot comply with the 60 days provided due

to public participation requirements, including public hearings. A few commenters stated that the 60-day review period is not sufficient time to review the proposed NWPs considering recent changes to EPA's regulations for Section 401 of the Clean Water Act and the issuance of the final Navigable Waters Protection Rule. One commenter voiced support for 60 days certifying their complete WQC decision for the proposed NWPs. One commenter stated that the 60-day reasonable period of time should be extended to 180 days to provide adequate time to review the proposed rule including the proposed NWPs. One commenter said that the abbreviated timeline undermines and limits state and tribal input. A few commenters said the Corps should request certification on the final NWPs. One commenter said that 60 days to act on the certification request is not consistent with the terms of a 1992 settlement agreement between the Pennsylvania Department of Environmental Resources and the Corps.

In light of the timeframe for issuing the final NWPs, the Corps did not grant extensions to the 60-day reasonable period of time for water quality certification. Section 401 of the Clean Water Act and EPA's regulations at 40 CFR 121.6 give the Corps the authority to establish the reasonable period of time. For this issuance of these NWPs, the Corps complied with EPA's final rule, which was published in the Federal Register on July 13, 2020, and went into effect on September 11, 2020. That final rule went into effect a few days before the proposed NWPs were published in the Federal Register for public comment. The Corps worked with the Commonwealth of Pennsylvania to address the 1992 settlement agreement.

Many commenters said that the reasonable period of time for certification of the NWPs should be extended until the final rule is issued. A few commenters stated that certifying the proposed NWPs prior to the NWPs being finalized is

problematic as there are significant proposed changes in the NWPs. Several commenters said that the procedure is outside of the normal standard practice of certifying the NWPs after the final NWPs are issued. Many commenters expressed concern and disagreement over reviewing and certifying the proposed NWPs at the same time. Several commenters said that water quality certification conditions could change if the final NWPs are modified from the proposed NWPs.

Section 401 of the Clean Water Act states that no permit shall be issued until water quality certification has been obtained or waived. Therefore, the water quality certification process must be completed before the final NWPs are issued. That process is consistent with the Corps' NWP regulations at 33 CFR 330.4(c)(1), which says that "water quality certification pursuant to section 401 of the Clean Water Act, or waiver thereof, is required prior to the issuance or reissuance of NWPs authorizing activities which may result in a discharge into waters of the United States." The water quality certification regulations issued by EPA this year also state that water quality certification requests are made for proposed general permits, not the final general permits. The regulations issued by EPA include no provisions for modifying water quality certifications after the certifying authority has acted on the federal agency's certification request. If the federal agency is planning to make changes to the general permit in response to public comments, those changes may trigger a requirement for a new certification before the federal agency can issue the final general permit (see 85 FR 42279).

A few commenters said that requesting state certification of the proposed NWPs does not recognize that there may be changes to the final NWPs based upon the public comments received. A few commenters stated that they should have the opportunity to fully evaluate the final version of the NWPs and modify

their water quality certifications as necessary. A few commenters expressed disagreement with the request to certify the proposed NWPs and requested the Corps provide a reasonable review time and issue the WQC on the final NWPs after any changes have been made after considering public comments. A few commenters said that water quality certifications may be issued conditionally and only valid if the final NWPs are not different than the proposed NWPs. A few commenters noted that the Corps' request to certify the proposed NWPs is a departure from past practice whereby states issue water quality certifications on the final NWPs before those NWPs go into effect.

As discussed above, certifying authorities must act on certification requests before the Corps can issue the final NWPs. The Corps acknowledges that the water quality certification process for the 2020 Proposal is a departure from past practice; however, it is consistent with section 401 and EPA's final certification regulation at 40 CFR part 121. In the 16 NWPs issued in this final rule, there were no substantive changes that trigger a requirement for the Corps to submit new certification requests for the NWPs.

A few commenters said that the separate review 60-day timeline for water quality certification and the 90-day timeline for CZMA consistency determinations bifurcates the review process and is unnecessarily cumbersome and suggested that a joint 90-day review period should be provided. The Corps established different review periods for water quality certification and CZMA consistency determinations because those are separate processes that are governed by distinctly different laws and regulations. Section 401 of the Clean Water Act gives the permitting authority the ability to establish the reasonable period of time for a certify authority to act on a request for water quality certification. The CZMA

consistency determination process is governed by regulations issued by the Department of Commerce at 15 CFR part 930.

Several commenters stated that subsequent changes from the proposed NWPs to the final NWPs may result in in missing or inappropriate conditions and leave the certifying agencies with no opportunity to remedy a deficient certification. One commenter said that changes between the proposed NWPs and the final NWPs may require certifying authorities to deny certification due to insufficient information. One commenter stated that denying water quality certification for all of the proposed NWPs would have significant implications for streamlining federal permitting of discharges authorized by the NWPs. One commenter said that should water quality certification for the issuance of the NWPs be denied, there will be additional burdens on permittees. One commenter said the Corps would need to request water quality certification on the final NWPs to have valid water quality certifications. One commenter said that some states operate under state general permits where NWPs are revoked. This commenter noted that the denied certifications for NWPs will raise conflicts and issues when state general permits are reissued.

As discussed above, water quality certification decisions by certifying authorities must be made before the Corps issues the final NWPs. Certifying authorities can deny water quality certifications if they believe they do not have sufficient information to issue water quality certification (see 40 CFR 121.7(e)(2)). The Corps acknowledges that denial of water quality certifications for the issuance of the NWPs creates burdens on the regulated public in terms of having to obtain water quality certifications or waivers for specific discharges authorized by NWPs. The issuance of the NWPs by Corps Headquarters is an independent process from the issuance of regional general permits by district engineers.

One commenter stated a website where all final WQC conditions are posted would be helpful. One commenter said the Corps should provide proposed water quality certification conditions for the NWPs and let the state agencies review those proposed conditions to make the certification process for the NWPs. One commenter stated that the Corps should not revise its water quality certification regulations.

After the final NWPs are issued and division engineers have approved the final regional conditions for the NWPs, Corps districts will issue public notices announcing the final regional conditions for the NWPs and the disposition of water quality certifications and CZMA consistency concurrences for the final NWPs. The Corps will post copies of these district public notices in the www.regulations.gov docket for this rulemaking action (docket number COE-2020-0002). It is the certifying authorities' responsibility to develop conditions for their water quality certifications for the issuance of the NWPs. The Corps will be revising the provisions in its regulations for water quality certification, to be consistent with EPA's new water quality certification regulations.

H. Section 307 of the Coastal Zone Management Act (CZMA)

Any state with a federally-approved CZMA program must concur with the Corps' determination that activities authorized by NWPs which are within, or will have reasonably foreseeable effects on any land or water uses or natural resources of, the state's coastal zone, are consistent with the CZMA program to the maximum extent practicable. Coastal Zone Management Act consistency concurrences may be issued without conditions, issued with conditions, or denied for specific NWPs.

Prior to the issuance of the 16 NWPs, states made their decisions on whether to concur with or object to the Corps' CZMA consistency determination

for the issuance of the NWPs. If a state issued a concurrence with conditions for the issuance of these NWPs, district engineers reviewed the conditions in those consistency concurrences to determine whether they comply with the Corps' regulations for permit conditions at 33 CFR 325.4. If a state objected to the Corps' CZMA consistency determination for the issuance of an NWP, then the activity is not authorized by that NWP unless and until a project proponent obtains a consistency concurrence from the state or a presumption of concurrence occurs.

The Corps' CZMA consistency determination only applied to NWP authorizations for activities that are within, or affect, any land, water uses or natural resources of a State's coastal zone. A state's coastal zone management plan may identify geographic areas in federal waters on the outer continental shelf, where activities that require federal permits conducted in those areas require consistency certification from the state because they affect any coastal use or resource. In its coastal zone management plan, the state may include an outer continental shelf plan. An outer continental shelf plan is a plan for "the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act" and regulations issued under that Act (see 15 CFR 930.73). Activities requiring federal permits that are not identified in the state's outer continental shelf plan are considered unlisted activities. If the state wants to review an unlisted activity under the CZMA, then it must notify the applicant and the federal permitting agency that it intends to review the proposed activity. Nationwide permit authorizations for activities that are not within or would not affect a state's coastal zone do not require the Corps' CZMA consistency determinations and thus are not contingent on a State's concurrence with the Corps' consistency determinations.

If a state objects to the Corps' CZMA consistency determination for an NWP, then the affected activities are not authorized by an NWP within that state until a project proponent obtains an individual CZMA consistency concurrence, or sufficient time (i.e., six months) passes after requesting a CZMA consistency concurrence for the applicant to make a presumption of consistency, as provided in 33 CFR 330.4(d)(6). However, when applicants request NWP verifications for activities that require individual consistency concurrences, and the Corps determines that those activities meet the terms and conditions of the NWP, in accordance with 33 CFR 330.6(a)(3)(iii) the Corps will issue provisional NWP verification letters. The provisional verification letter will contain general and regional conditions as well as any activity-specific conditions the Corps determines are necessary for the NWP authorization. The Corps will notify the applicant that he or she must obtain an activity-specific CZMA consistency concurrence or a presumption of concurrence before he or she is authorized to start work in waters of the United States. That is, NWP authorization will be contingent upon obtaining the necessary CZMA consistency concurrence from the state, or a presumption of concurrence. Anyone wanting to perform such activities where pre-construction notification to the Corps is not required has an affirmative responsibility to present a CZMA consistency determination to the appropriate state agency for concurrence. Upon concurrence with such CZMA consistency determinations by the state, the activity would be authorized by the NWP. This requirement is provided at 33 CFR 330.4(d).

In response to the 2020 proposal several commenters said that the Corps is providing a CZMA federal consistency determination for the proposed rule and is asking the states to concur with a federal action that is not final. These commenters said that if there are changes in the final NWPs, those changes may

result in missing or inappropriate conditions and leave states with no opportunity to remedy deficiencies. Several commenters stated that the Corps should have allowed comment on the proposed rule prior to initiating the federal consistency review process. A few commenters said there is a disconnect between the 60-days allowed for water quality certifications and the 90-days allowed for CZMA consistency reviews. One commenter requested an extension of time until mid-January 2021 for the state to complete its review and make its determinations.

The CZMA consistency concurrence process for the issuance of the NWPs must be completed before the final NWPs are issued. The Department of Commerce's CZMA regulations at 15 CFR 930.36(b)(1) state that the federal agency's consistency determination shall be provided to state agencies at least 90 days before final approval of the federal agency's activity unless both the federal agency and the state agency agree to an alternative notification schedule. Therefore, the CZMA consistency concurrence process must be completed before the Corps issues the final NWPs. If the Corps were to make substantial changes to the proposed NWPs, then the Corps would conduct supplemental coordination with the states. In these 16 final NWPs, the Corps did not make any substantial changes that would trigger supplemental coordination with states. The Corps acknowledges that under 15 CFR 930.41(a), it could have requested responses from state agencies within 60 days of receipt of the Corps' consistency determination and supporting information. Under 15 CFR 930.41(b), federal agencies are required to approve one extension period of 15 days or less, if the state agency requests an extension of time within the 60-day review period. The WQC and CZMA consistency concurrence review periods are different because they are governed by different regulations.

IV. Economic Impact

The NWPs are expected to increase the number of activities eligible for NWP authorization, and reduce the number of activities that require individual permits. The Corps estimates that the proposed NWPs will authorize an 209 activities each year that would have otherwise required an individual permit. While applying for a NWP may entail some burden (namely, in the form of a PCN, when applicable), by authorizing more activities by NWP, this proposal will reduce net burden for the regulated public. Specifically, increasing the number of activities that can be authorized by NWPs is expected to decrease compliance costs for permit applicants since, as discussed below, the compliance costs for obtaining NWP authorization are less than the compliance costs for obtaining individual permits. In addition, the NWPs can incentivize some project proponents to design their projects in such a way that they would qualify for a NWP thereby reducing impacts to jurisdictional waters and wetlands. In FY2018, the average time to receive an NWP verification was 45 days from the date the Corps district receives a complete PCN, compared to 264 days to receive a standard individual permit after receipt of a complete permit application (see table 1.2 of the regulatory impact analysis for this final rule, which is available in the www.regulations.gov docket (docket number COE-2020-0002)).

As discussed in the Regulatory Impact Analysis for this proposed rule, the Corps estimates that a permit applicant's compliance cost for obtaining NWP authorization in 2019$ ranges from $4,412 to $14,705 (Institute for Water Resources (2001)[5], adjusted for inflation using the GDP deflator approach). The Corps estimates that a permit applicant's compliance costs for obtaining an

[5] Institute for Water Resources (IWR). 2001. Cost analysis for the 2000 issuance and modification of nationwide permits. Institute for Water Resources (Alexandria, VA). 29 pp. plus appendices.

individual permit for a proposed activity impacting up to 3 acres of wetland ranges from $17,646 to $35,293 in 2019$. Considering how the proposed NWPs will increase the number of activities authorized by an NWP each year, the Corps estimates that the 16 final NWPs, when compared with the 2017 NWPs, will decrease compliance costs for the regulated public by approximately $3 million per year. The Corps invited comment on the assumptions and methodology used to calculate the compliance costs and burden in general associated with the NWP and received no comments.

| **Nationwide Permit(s)** | **Changes** | **Anticipated Impacts** |
|---|---|---|
| • NWP 21<br>• NWP 29<br>• NWP 39<br>• NWP 40<br>• NWP 42<br>• NWP 43<br>• NWP 44<br>• NWP 50<br>• NWP 51<br>• NWP 52 | Removed 300 linear foot limit for losses of stream bed and rely on 1/2-acre limit, pre-construction notification (PCN) review process, and other tools to comply with Clean Water Act Section 404(e) | Increase number of activities authorized by an NWP; decrease number of activities requiring individual permits. |
| • NWP 12<br>• NWP 57<br>• NWP 58 | Issued separate NWPs for oil or natural gas pipeline activities, electric utility line and telecommunications activities, and utility lines for water and other substances; reduced number of PCN thresholds | No change in number of NWP authorizations. |

| Nationwide Permit(s) | Changes | Anticipated Impacts |
|---|---|---|
| • NWP 21<br>• NWP 49<br>• NWP 50 | Removed requirement for written authorization before commencing authorized activity. | No change in number of NWP authorizations. |
| • NWP 48 | Changed PCN threshold to require PCNs for activities directly impacting more than 1/2-acre of submerged aquatic vegetation. Removed 1/2-acre limit for impacts to submerged aquatic vegetation. | Increased number of activities authorized by an NWP; decreased number of activities requiring individual permits. |
| • NWP 55 | Issued new NWP to authorize seaweed mariculture activities and multi-trophic mariculture activities | Increased number of activities authorized by an NWP; decreased number of activities requiring individual permits. |
| • NWP 56 | Issued new NWP to authorize finfish mariculture activities and multi-trophic mariculture activities | Increased number of activities authorized by an NWP; decreased number of activities requiring individual permits. |
| • General condition 17, tribal rights | Restored text of general condition in 2012 NWPs. | No change in number of NWP authorizations. |
| • General condition 18, endangered species | Revised to address 2019 changes to 50 CFR part 402. Clarified PCN requirements for species proposed for listing and proposed critical | No change in number of NWP authorizations. |

| Nationwide Permit(s) | Changes | Anticipated Impacts |
|---|---|---|
| | habitat to be consistent with 33 CFR 330.4(f)(2). | |
| • General condition 23, mitigation | Added 3/100-acre threshold for compensatory mitigation for losses of stream bed. | No change in number of NWP authorizations. |
| • General condition 25, water quality | Clarified that if NWP activity does not comply with conditions of a general water quality certification, an individual certification is required, unless a waiver occurs. Require permittee to provide district engineer with copy of water quality certification for individual discharge authorized by an NWP. | No change in number of NWP authorizations. |
| • General condition 26, coastal zone management | Clarified that if NWP activity does not comply with conditions of a general consistency concurrence, and individual consistency concurrence is required, unless presumption occurs | No change in number of NWP authorizations. |
| • General condition 28, use of multiple NWPs | Modified general condition to clarify application to NWPs with different numeric limits. | No change in number of NWP authorizations. |

| Nationwide Permit(s) | Changes | Anticipated Impacts |
|---|---|---|
| • General condition 32, pre-construction notification | Modified to encourage use of Form ENG 6082 for NWP pre-construction notifications | No change in number of NWP authorizations. |

Several commenters stated that the Corps' Regulatory Impact Analysis should include estimates of costs to the public due to losses of wetland and stream functions and losses of ecosystem services caused by activities authorized by NWPs. These commenters also said the Regulatory Impact Analysis should address flooding that is exacerbated by development in and around stream and wetland habitats. In addition, these commenters stated that the Regulatory Impact Analysis should evaluate the effect the proposed 1/10-acre threshold for stream mitigation in general condition 23 would have in terms of a reduction in stream compensatory mitigation for NWP activities, and increases in losses of headwater streams. These commenters also stated that the Corps should analyze the effects of removing the PCN threshold for mechanized land clearing of forested wetlands in oil or natural gas pipeline rights-of-way from NWP 12. Several commenters said the Regulatory Impact Analysis should also analyze the economic impacts of the 2020 Proposal on the ecological restoration industry. One commenter said that a cost-benefit analysis or reissuing the NWPs ahead of schedule should be performed.

The Regulatory Impact Analysis prepared by the Corps for this final rule was prepared in accordance with the Office of Management and Budget's (OMB) Circular A-4 and OMB's Memorandum M-17-21 for implementing E.O. 13771. The Regulatory Impact Analysis provides some general information on the value of ecosystem services provided by general categories of aquatic resources that

may be impacted by activities authorized by NWPs and thus result in some degree of loss of ecosystem services. Other activities authorized by NWPs (e.g., aquatic resource restoration and enhancement activities authorized by NWP 27 and the removal of low-head dams authorized by NWP 53) are generally expected to result in gains in some ecosystem services. Any consideration of ecosystem services lost as a result of activities authorized by NWPs must also take into account any gains in goods and services provided by activities authorized by NWPs or the operation of those activities, such as housing, food production, energy generation and transmission, transportation, public safety, providing potable water, removing sewage, etc. In the Regulatory Impact Analysis for this final rule, the Corps has added a general discussion of the goods and services that activities authorized by the NWPs provide for human well-being.

Increases in downstream flooding are usually caused by development activities (e.g., the construction of houses, commercial buildings, educational buildings, manufacturing buildings, roads, parking lots, etc.) that reduce the land area in a watershed where precipitation can infiltrate into the soil, and subsequently cause increases in surface runoff to downstream waters that increase the frequency and severity of flooding (NRC 2009). Upland development activities provide a significant contribution to these changes in watershed hydrology, because wetlands and streams occupy a relatively small percentage of land area in a watershed (e.g., Zedler and Kercher et al. 2005, Butman and Raymond 2011). State and local government agencies may require developers to construct stormwater management facilities and green infrastructure (e.g., rain gardens) to provide water storage and water infiltration within the watershed to reduce potential changes in downstream flooding.

Stream compensatory mitigation was added to the mitigation general condition for the NWPs in 2007 (see general condition 20 in the 2007 NWP final rule at 72 FR 11193). That general condition did not have an acreage-based or linear foot based threshold for stream mitigation. In the 2012 and 2017 final rules for the issuance and reissuance of the NWPs (77 FR 10184 and 82 FR 1860, respectively), there was no acreage-based or linear foot based threshold for stream mitigation. Under the 2007, 2012, and 2017 NWPs, district engineers determined on a case-by-case basis whether stream compensatory mitigation is required for an NWP activity. The 2020 Proposal is the first time the Corps proposed a threshold in the mitigation general condition for the NWPs for stream compensatory mitigation. In response to comments received on the 2020 Proposal, the Corps changed the proposed 1/10-acre stream mitigation threshold to 3/100-acre to be consistent with the current practices of numerous Corps districts for when they require stream compensatory mitigation for proposed NWP activities. Therefore, the changes to general condition 23 are not expected to reduce stream compensatory mitigation for NWP or have substantive economic impacts on the compensatory mitigation industry.

The removal of the PCN threshold in the 2017 NWP 12 for mechanized land clearing of a forested wetland in a utility line right-of-way will not eliminate compensatory mitigation requirements for those activities. If the impacts to forested wetlands caused by mechanized land clearing for an oil or natural gas pipeline right-of-way cannot be restored to pre-construction contours in waters of the United States, and there is a loss of greater than 1/10-acre of forested wetlands, then the project proponent is required to submit a PCN to the district engineer. The district engineer may require compensatory mitigation to offset those losses of waters of the United States. The district engineer may also

require compensatory mitigation to offset losses of specific wetland functions (see paragraph (i) of general condition 23).

The Corps does not believe it is necessary to prepare a cost-benefit analysis for reissuing the NWPs earlier than many of the users of the NWPs expected. One of the reasons the Corps is conducting this rulemaking is to address recent court decisions.

## V. Administrative Requirements

*Plain Language*

In compliance with the principles in the President's Memorandum of June 1, 1998, (63 FR 31885, June 10, 1998) regarding plain language, this preamble is written using plain language. In writing this final rule, the Corps 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. While different NWPs require that different information be included in a PCN, the Corps estimates that a PCN takes, on average, 11 hours to complete. The 16 final NWPs would decrease the total paperwork burden associated with this program because the Corps estimates that under this final rule 59 more PCNs would be required each year. This increase is due to the number of activities that would be authorized under the 16 NWPs that previously required individual permits, and the changes in the PCN thresholds for NWP 48 for commercial shellfish mariculture activities and the modified PCN thresholds for NWP 12 (oil and natural gas pipeline activities). The paperwork burden associated with the 16 final NWPs is expected to increase by approximately 99 hours per year from 160,677 hours to 160,776 hours.

The following table summarizes the projected changes in paperwork burden from the 2017 NWPs to the 16 NWPs issued in this final rule.

| | **Number of NWP PCNs per year** | **Number of NWP activities not requiring PCNs per year** | **Estimated changes in NWP PCNs per year** | **Estimated changes in number of authorized NWP activities** | **Estimated changes in number of Standard Individual Permits per year** |
|---|---|---|---|---|---|
| 2017 NWPs | 14,607 | 2,655 | | | |
| 16 NWPs | 14,616 | 2,855 | +591 | +209 | -209 |

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. For the Corps Regulatory Program under section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, the current OMB approval number for information collection requirements is maintained by the Corps of Engineers (OMB approval number 0710-0003).

*Executive Order 12866*

This action is a significant regulatory action under Executive Order 12866 (58 FR 51735, October 4, 1993) that was submitted to the Office of Management and Budget (OMB) for review.

*Executive Order 13771*

This final rule is considered an EO 13771 deregulatory action. Details on the estimated cost savings can be found in the rule's economic analysis.

*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. The Corps does 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 proposal.

*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 proposed 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 NWPs 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, Department of the Army (DA) permits are required for discharges of dredged or fill material into waters of the United States. Under section 10, DA permits are required for any structures or other work that affect the course, location, or condition of navigable waters of the United States. Small entities proposing to discharge dredged or fill material into waters of the United States and/or install structures or conduct work in navigable waters of the United States must obtain DA permits to conduct those activities, unless a particular activity is exempt from those permit requirements. Individual permits and general permits can be issued by the Corps to satisfy the permit requirements of these two statutes. 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 2017

NWPs are not modified or reissued, they will expire on March 18, 2022, and small entities and other project proponents would be required to obtain alternative forms of DA permits (i.e., standard permits, letters of permission, or regional general permits) for activities involving discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States. Regional general permits that authorize similar activities as the NWPs may be available in some geographic areas, but small entities conducting regulated activities outside those geographic areas would have to obtain individual permits for activities that require DA permits.

When compared with the compliance costs for individual permits, most of the terms and conditions of the NWPs are expected to result in decreases in the costs of complying with the permit requirements of sections 10 and 404. The anticipated decrease in compliance cost results from the lower cost of obtaining NWP authorization instead of standard permits. Unlike standard permits, NWPs authorize activities without the requirement for public notice and comment on each proposed activity.

Another requirement of section 404(e) of the Clean Water Act is that general permits, including NWPs, authorize only those activities that result in no more than minimal adverse environmental effects, individually and cumulatively. The terms and conditions of the NWPs, such as acreage limits and the mitigation measures in some of the NWP general conditions, are imposed to ensure that the NWPs authorize only those activities that result in no more than minimal adverse effects on the aquatic environment and other public interest review factors.

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 the proposed work will result in only minimal adverse effects on the aquatic environment and other public interest review factors. The terms and conditions of the revised NWPs will not impose substantially higher costs on small entities than those of the existing NWPs. If an NWP is not available to authorize a particular activity, then another form of DA authorization, such as an individual permit or a regional general permit authorization, must be secured. However, as noted above, the Corps estimates an increase in the number of activities than can be authorized through NWPs, because the Corps made some modifications to the NWPs to authorize additional activities. Because those activities required authorization through other forms of DA authorization (e.g., individual permits or regional general permits) the Corps expects a concurrent decrease in the numbers of individual permit and regional general permit authorizations required for these activities.

*Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under section 202 of the UMRA, 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.

The Corps has 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. The 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, the Corps has determined that the NWPs contain no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the issuance and modification of 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 proposed NWPs do not concern an environmental health or safety risk that the Corps has reason to believe may have a disproportionate effect on children.

*Executive Order 13175*

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 6, 2000), requires agencies to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” The phrase “policies that have tribal implications” is defined in the Executive Order to include regulations that have “substantial direct effects on one or more Tribes, on the relationship between the federal government and the Tribes, or on the distribution of power and responsibilities between the federal government and Tribes.”

The issuance of these 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, the Corps specifically requested comments from tribal officials on the proposed rule. Their comments were fully considered during the preparation of this final rule. Each Corps district conducted government-to-government consultation with tribes, to identify regional conditions, other local NWP modifications to protect aquatic resources of interest to tribes, and coordination procedures with tribes, as part of the Corps' responsibility to protect tribal trust resources and fulfill its tribal trust responsibilities.

Many commenters stated that they disagreed with the Corps' determination that the proposal to reissue and issue the NWPs would 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. Most of these commenters said that the Corps is required to consult and coordinate with the tribes on the proposed rule. Many commenters stated that meaningful consultation with tribes is not possible given the short time frames set by the administration, lack of information, and complications resulting from the COVID pandemic. One commenter stated that the Corps should extend its comment period 60 days or should withdraw its proposal to allow early tribal engagement.

While the NWPs are regulations, the Corps 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. In response to the proposed rule, the Corps received comments from 35 tribes and tribal

organizations. The Corps has 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 and tribal trust resources) 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 or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights. 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 mariculture activities have used NWP 48, and tribes that conduct aquatic habitat restoration activities have used NWP 27.

For 16 NWPs issued in this final rule, 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 tribes with opportunities to review proposed NWP activities and provide their views on whether those activities will cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. When a Corps district receives a 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.

For the 2020 Proposal, the Corps provided a 60-day public comment period, which is consistent with the length of the comment period provided for past NWP rulemaking efforts. After the comment period for the 2020 Proposal ended on November 16, 2020, there was some additional time for Corps districts to conduct consultation and coordination with tribes. For Corps district consultation and coordination with tribes, the Corps provided information similar to the information provided during past NWP rulemaking efforts. The Corps acknowledges that the pandemic complicated tribal consultation and coordination activities, but the rulemaking effort needed to be completed by the required time frame.

*Environmental Documentation*

A decision document has been prepared for each of the 16 NWPs being issued in this final rule. Each decision document includes an environmental assessment and public interest review determination. If an NWP authorizes discharges of dredged or fill material into waters of the United States, the decision document includes a 404(b)(1) Guidelines analysis. These decision documents are available at: www.regulations.gov (docket ID number COE-2020-0002). They are also available by contacting Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street, NW, Washington, DC 20314-1000.

*Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The Corps will submit a report containing the final 16 NWPs and other required information to the U.S. Senate, the U.S. House of Representatives, and the Government Accountability Office. A major rule cannot take effect until 60 days after it is published in the Federal Register. The 16 NWPs are not a "major rule" as defined by 5 U.S.C. 804(2), because they are not likely to result in: (1) an annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

*Executive Order 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 have any discriminatory effect or disproportionate negative impact on any community or group, and therefore are not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.

*Executive Order 13211*

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution or use of energy and has not otherwise been designated by the OIRA Administrator as a significant energy action.

## VI. References

A complete list of all references cited in this document is available on the Internet at http://www.regulations.gov in docket number COE–2020–0002 or upon request from the U.S. Army Corps of Engineers (see FOR FURTHER INFORMATION CONTACT).

## Authority

The Corps is reissuing 12 existing NWPs and issuing 4 new NWPs under the authority of 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. 401 et seq.).

William H. Graham,

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

12. Oil or Natural Gas Pipeline Activities

21. Surface Coal Mining Activities

29. Residential Developments

39. Commercial and Institutional Developments

40. Agricultural Activities

42. Recreational Facilities

43. Stormwater Management Facilities

44. Mining Activities

48. Commercial Shellfish Mariculture Activities

50. Underground Coal Mining Activities

51. Land-Based Renewable Energy Generation Facilities

52. Water-Based Renewable Energy Generation Pilot Projects

55. Seaweed Mariculture Activities

56. Finfish Mariculture Activities

57. Electric Utility Line and Telecommunications Activities

58. Utility Line Activities for Water and Other Substances

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 Birds and Bald and Golden Eagles

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

Establishment (creation)

High Tide Line

Historic property

Independent utility

Indirect effects

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

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

12. Oil or Natural Gas Pipeline Activities. Activities required for the construction, maintenance, repair, and removal of oil and natural gas pipelines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.

*Oil or natural gas pipelines*: This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of oil and natural gas pipelines. There must be no change in pre-construction contours of waters of the United States. An “oil or natural gas pipeline” is defined as any pipe or pipeline for the transportation of any form of oil or natural gas, including products derived from oil or natural gas, such as gasoline, jet fuel, diesel fuel. heating oil, petrochemical feedstocks, waxes, lubricating oils, and asphalt.

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

*Oil or natural gas pipeline substations*: This NWP authorizes the construction, maintenance, or expansion of substation facilities (e.g., oil or natural gas or gaseous fuel custody transfer stations, boosting stations, compression stations, metering stations, pressure regulating stations) associated with an oil or natural gas pipeline in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than 1/2-acre of

waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

*Foundations for above-ground oil or natural gas pipelines*: This NWP authorizes the construction or maintenance of foundations for above-ground oil or natural gas pipelines in all waters of the United States, provided the foundations are the minimum size necessary.

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

This NWP may authorize oil or natural gas pipelines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (see 33 CFR part 322). Oil or natural gas pipelines routed in, over, or under section 10 waters without a discharge of dredged or fill material may require a section 10 permit.

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

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) a section 10 permit is required; (2) the discharge will result in the loss of greater than 1/10-acre of waters of the United States; or (3) the proposed oil or natural gas pipeline activity

is associated with an overall project that is greater than 250 miles in length and the project purpose is to install new pipeline (vs. conduct repair or maintenance activities) along the majority of the distance of the overall project length. If the proposed oil or gas pipeline is greater than 250 miles in length, the pre-construction notification must include the locations and proposed impacts (in acres or other appropriate unit of measure) for all crossings of waters of the United States that require DA authorization, including those crossings authorized by an NWP would not otherwise require pre-construction notification. (See general condition 32.) (Authorities: Sections 10 and 404)

Note 1: Where the oil or natural gas pipeline is constructed, installed, or maintained 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 oil or natural gas pipeline to protect navigation.

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

Note 3: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the oil or natural gas pipeline must be removed upon completion of the work, in accordance with the requirements for temporary fills.

Note 4: Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, and may require a permit from the U.S. Coast Guard pursuant to the General Bridge Act of 1946. However, any discharges of dredged or fill material into waters of the United States associated with such oil or natural gas pipelines will require a section 404 permit (see NWP 15).

Note 5: This NWP authorizes oil or natural gas pipeline maintenance and repair activities that do not qualify for the Clean Water Act section 404(f) exemption for maintenance of currently serviceable fills or fill structures.

Note 6: For NWP 12 activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b)(4) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

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

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

(b) The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into tidal waters or non-tidal wetlands adjacent to tidal waters; and

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

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

29. Residential Developments. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development).

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

*Subdivisions*: For residential subdivisions, the aggregate total loss of waters of United States authorized by this NWP cannot exceed 1/2-acre. This

includes any loss of waters of the United States associated with development of individual subdivision lots.

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

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. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

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

Note: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the

PCN and NWP verification will be provided by the Corps to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

40. Agricultural Activities. Discharges of dredged or fill material into non-tidal waters of the United States for agricultural activities, including the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized land clearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities.

This NWP also authorizes the construction of farm ponds in non-tidal waters of the United States, excluding perennial streams, provided the farm pond is used solely for agricultural purposes. This NWP does not authorize the construction of aquaculture ponds.

This NWP also authorizes discharges of dredged or fill material into non-tidal jurisdictional waters of the United States to relocate existing serviceable drainage ditches constructed in non-tidal streams.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

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

Note: Some discharges of dredged or fill material into waters of the United States for agricultural activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4). This NWP authorizes the

construction of farm ponds that do not qualify for the Clean Water Act section 404(f)(1)(C) exemption because of the recapture provision at section 404(f)(2).

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. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

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

43. Stormwater Management Facilities. Discharges of dredged or fill material into non-tidal waters of the United States for the construction of stormwater management facilities, including stormwater detention basins and retention basins and other stormwater management facilities; the construction of water control structures, outfall structures and emergency spillways; the construction of 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, such as features needed to meet reduction targets established under Total Maximum Daily Loads set under the Clean Water Act.

This NWP authorizes, to the extent that a section 404 permit is required, discharges of dredged or fill material into non-tidal waters of the United States for the maintenance of stormwater management facilities, 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. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize discharges of dredged or fill material for the construction of new stormwater management facilities in perennial streams.

Notification: For discharges of dredged or fill material into non-tidal waters of the United States for the construction of new stormwater management facilities or 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 jurisdictional wetlands, the discharge must not cause the loss of greater than 1/2-acre of non-tidal jurisdictional wetlands;

(b) For mining activities involving discharges of dredged or fill material in non-tidal jurisdictional open waters (e.g., rivers, streams, lakes, and ponds) or work in non-tidal navigable waters of the United States (i.e., section 10 waters), the mined area, including permanent and temporary impacts due to discharges of dredged or fill material into jurisdictional waters, must not exceed 1/2-acre; and

(c) The acreage loss under paragraph (a) plus the acreage impact under paragraph (b) does not exceed 1/2-acre.

This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

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

48. Commercial Shellfish Mariculture Activities. Structures or work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States necessary for new and continuing commercial shellfish mariculture operations (i.e., the cultivation of bivalve molluscs such as oysters, mussels, clams, and scallops) in authorized project areas. For the purposes of this NWP, the project area is the area in which the operator is

authorized to conduct commercial shellfish mariculture activities, as identified through a lease or permit issued by an appropriate state or local government agency, a treaty, or any easement, lease, deed, contract, or other legally binding agreement that establishes an enforceable property interest for the operator.

This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures into navigable waters of the United States. This NWP also authorizes discharges of dredged or fill material into waters of the United States necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked.

This NWP does not authorize:

(a) The cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody;

(b) The cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990; or

(c) Attendant features such as docks, piers, boat ramps, stockpiles, or staging areas, or the deposition of shell material back into waters of the United States as waste.

Notification: The permittee must submit a pre-construction notification to the district engineer if the activity directly affects more than 1/2-acre of submerged aquatic vegetation. If the operator will be conducting commercial shellfish mariculture activities in multiple contiguous project areas, he or she can either submit one PCN for those contiguous project areas or submit a separate PCN for each project area. (See general condition 32.) (Authorities: Sections 10 and 404)

Note 1: 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."

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

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize coal preparation and processing activities outside of the mine site.

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

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

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity 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: Electric utility lines constructed to transfer the energy from the land-based renewable energy generation facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate single and complete linear project. Those electric utility lines may be authorized by NWP 57 or another Department of the Army authorization.

Note 2: If the only activities associated with the construction, expansion, or modification of a land-based renewable energy generation facility that require Department of the Army authorization are discharges of dredged or fill material into waters of the United States to construct, maintain, repair, and/or remove electric utility lines and/or road crossings, then NWP 57 and/or NWP 14 shall be

used if those activities meet the terms and conditions of NWPs 57 and 14, including any applicable regional conditions and any case-specific conditions imposed by the district engineer.

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

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

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

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

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

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

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

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

Note 1: Electric utility lines constructed to transfer the energy from the land-based collection facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and

distant crossing of a waterbody is eligible for treatment as a separate single and complete linear project. Those electric utility lines may be authorized by NWP 57 or another Department of the Army authorization.

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

Note 3: 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 by the Corps to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

55. Seaweed Mariculture Activities. Structures in marine and estuarine waters, including structures anchored to the seabed in waters overlying the outer continental shelf, for seaweed mariculture activities. This NWP also authorizes structures for bivalve shellfish mariculture if shellfish production is a component of an integrated multi-trophic mariculture system (e.g., the production of seaweed

and bivalve shellfish on the same structure or a nearby mariculture structure that is part of the single and complete project).

This NWP authorizes the installation of buoys, long-lines, floats, anchors, rafts, racks, and other similar structures into navigable waters of the United States. Rafts, racks and other floating structures must be securely anchored and clearly marked. To the maximum extent practicable, the permittee must remove these structures from navigable waters of the United States if they will no longer be used for seaweed mariculture activities or multi-trophic mariculture activities.

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

This NWP does not authorize:

(a) The cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 or the cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody; or

(b) Attendant features such as docks, piers, boat ramps, stockpiles, or staging areas.

Notification: The permittee must submit a pre-construction notification to the district engineer. (See general condition 32.)

In addition to the information required by paragraph (b) of general condition 32, the preconstruction notification must also include the following information: (1) a map showing the locations and dimensions of the structure(s);

(2) the name(s) of the species that will be cultivated during the period this NWP is in effect; and (3) general water depths in the project area(s) (a detailed survey is not required). No more than one pre-construction notification per structure or group of structures should be submitted for the seaweed mariculture operation during the effective period of this NWP. The pre-construction notification should describe all species and culture activities the operator expects to undertake during the effective period of this NWP. (Authority: Section 10)

Note 1: 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.”

56. Finfish Mariculture Activities. Structures in marine and estuarine waters, including structures anchored to the seabed in waters overlying the outer continental shelf, for finfish mariculture activities. This NWP also authorizes structures for bivalve shellfish mariculture and/or seaweed mariculture if the structures for bivalve shellfish and/or seaweed production are a component of an integrated multi-trophic mariculture structure (e.g., the production of bivalve shellfish or seaweed on the structure used for finfish mariculture, or a nearby mariculture structure that is part of the single and complete project).

This NWP authorizes the installation of cages, net pens, anchors, floats, buoys, and other similar structures into navigable waters of the United States. Net pens, cages, and other floating structures must be securely anchored and clearly marked. To the maximum extent practicable, the permittee must remove these structures from navigable waters of the United States if they will no longer be used for finfish mariculture activities or multi-trophic mariculture activities.

This NWP does not authorize the construction of land-based fish hatcheries or other attendant features.

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

This NWP does not authorize:

(a) The cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 or the cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody; or

(b) Attendant features such as docks, piers, boat ramps, stockpiles, or staging areas.

Notification: The permittee must submit a pre-construction notification to the district engineer. (See general condition 32.)

In addition to the information required by paragraph (b) of general condition 32, the pre-construction notification must also include the following information: (1) a map showing the locations and dimensions of the structure(s);

(2) the name(s) of the species that will be cultivated during the period this NWP is in effect; and (3) general water depths in the project area(s) (a detailed survey is not required). No more than one pre-construction notification per structure or group of structures should be submitted for the finfish mariculture operation during the effective period of this NWP. The pre-construction notification should describe all species and culture activities the operator expects to undertake during the effective period of this NWP. (Authority: Section 10)

Note 1: The permittee should notify the applicable U.S. Coast Guard office regarding the finfish mariculture activity.

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.”

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

*Electric utility lines and telecommunication lines*: This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated

with the construction, maintenance, or repair of electric utility lines and telecommunication lines. There must be no change in pre-construction contours of waters of the United States. An “electric utility line and telecommunication line” is defined as any cable, line, fiber optic line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and internet, radio, and television communication.

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

*Electric utility line and telecommunications substations*: This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with an electric utility line or telecommunication line in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than 1/2-acre of waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

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

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

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

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

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) a section 10 permit is required; or (2) the discharge will result in the loss of greater than 1/10-acre of

waters of the United States. (See general condition 32.) (Authorities: Sections 10 and 404)

Note 1: Where the electric utility line is constructed, installed, or maintained 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 electric utility line to protect navigation.

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

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

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

Note 5: This NWP authorizes electric utility line and telecommunication line maintenance and repair activities that do not qualify for the Clean Water Act

section 404(f) exemption for maintenance of currently serviceable fills or fill structures.

Note 6: For overhead electric utility lines and telecommunication lines authorized by this NWP, a copy of the PCN and NWP verification will be provided by the Corps to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

Note 7: For activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b)(4) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

58. Utility Line Activities for Water and Other Substances. Activities required for the construction, maintenance, repair, and removal of utility lines for water and other substances, excluding oil, natural gas, products derived from oil or natural gas, and electricity. Oil or natural gas pipeline activities or electric utility line and telecommunications activities may be authorized by NWPs 12 or 57, respectively. This NWP also authorizes associated utility line facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.

*Utility lines*: This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for

crossings of those waters associated with the construction, maintenance, or repair of utility lines for water and other substances, including outfall and intake structures. There must be no change in pre-construction contours of waters of the United States. A “utility line” is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose that is not oil, natural gas, or petrochemicals. Examples of activities authorized by this NWP include utility lines that convey water, sewage, stormwater, wastewater, brine, irrigation water, and industrial products that are not petrochemicals. The term “utility line” does not include activities that drain a water of the United States, such as drainage tile or french drains, but it does apply to pipes conveying drainage from another area.

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

*Utility line substations*: This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with a utility line in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than 1/2-acre of waters of the United States. This NWP does not

authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

*Foundations for above-ground utility lines*: This NWP authorizes the construction or maintenance of foundations for above-ground utility lines in all waters of the United States, provided the foundations are the minimum size necessary.

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

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

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

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) a section 10 permit is required; or (2) the discharge will result in the loss of greater than 1/10-acre of waters of the United States. (See general condition 32.) (Authorities: Sections 10 and 404)

Note 1: Where the utility line is constructed, installed, or maintained 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: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work, in accordance with the requirements for temporary fills.

Note 4: Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to the General Bridge Act of 1946. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit (see NWP 15).

Note 5: This NWP authorizes utility line maintenance and repair activities that do not qualify for the Clean Water Act section 404(f) exemption for maintenance of currently serviceable fills or fill structures.

Note 6: For activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s)

used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b)(4) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

C. Nationwide Permit General Conditions

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as applicable, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP. Every person who may wish to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR 330.1 through 330.6 apply to every NWP authorization. Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

1. Navigation. (a) No activity may cause more than a minimal adverse effect on navigation.

(b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the

permittee's expense on authorized facilities in navigable waters of the United States.

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

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

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

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

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

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

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

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

9. Management of Water Flows. To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization, storm water management activities, and temporary and permanent road crossings, except as provided below. The activity must be constructed to withstand expected high flows. 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 Structures and Fills. Temporary structures must be removed, to the maximum extent practicable, after their use has been discontinued. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

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

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

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

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

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

17. Tribal Rights. No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

18. Endangered Species. (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify designated critical habitat or critical habitat proposed for such designation. No activity is authorized under any NWP which “may affect” a listed species or critical habitat, unless ESA section 7 consultation addressing the consequences of the proposed activity on listed species or critical habitat has been completed. See 50 CFR 402.02 for the definition of “effects of the action” for the purposes of ESA section 7 consultation, as well as 50 CFR 402.17, which provides further explanation under ESA section 7 regarding “activities that are reasonably certain to occur” and “consequences caused by the proposed action.”

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA (see 33 CFR 330.4(f)(1)). If pre-construction notification is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under section 7 of the ESA.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated

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

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

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

(f) If the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed NWP activity, the non-federal 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 that an action authorized by an NWP complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting the appropriate local office of the U.S. Fish and Wildlife Service to determine what measures, if any, are necessary or appropriate to reduce adverse effects to migratory birds or eagles, including whether "incidental take" permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.

20. Historic Properties. (a) No activity is authorized under any NWP which may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)(1)). If pre-construction notification is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation

has been submitted. If the appropriate documentation is not submitted, then additional consultation under section 106 may be necessary. The respective federal agency is responsible for fulfilling its obligation to comply with section 106.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects 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 commensurate with potential impacts, which may include background research, consultation, oral history interviews, sample field investigation, and/or field survey. Based on the information submitted in the PCN and these identification efforts, the district engineer shall determine whether the proposed NWP activity has the potential to cause effects on 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.

(d) Where the non-Federal applicant has identified historic properties on which the proposed NWP activity might have the potential to cause effects and has so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that NHPA section 106 consultation has been completed. For non-federal permittees, the district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. If NHPA section 106 consultation is required, the district engineer will notify the non-Federal applicant that he or she cannot begin the activity until section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that section 110k of the NHPA (54 U.S.C. 306113) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP),

determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

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

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

engineer may also designate additional critical resource waters after notice and opportunity for public comment.

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, 52, 57 and 58 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

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

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

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

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

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 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) Compensatory mitigation at a minimum one-for-one ratio will be required for all losses of stream bed that exceed 3/100-acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. This compensatory mitigation requirement may be satisfied through the restoration or enhancement of riparian areas next to streams in accordance with paragraph (e) of this general condition. For losses of stream bed of 3/100-acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects. Compensatory mitigation for losses of streams should be provided, if practicable, through stream rehabilitation, enhancement, or preservation, 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. If restoring riparian areas involves planting vegetation, only native species should be planted. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to restore or maintain/protect a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or maintaining/protecting a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of minimization or compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

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

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

district engineer, the district engineer may approve the use of permittee-responsible mitigation.

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

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

(4) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)). If permittee-responsible mitigation is the proposed option, and the proposed compensatory mitigation site is located on land in which another federal agency holds an easement, the district engineer will coordinate with that federal agency to determine if proposed compensatory mitigation project is compatible with the terms of the easement.

(5) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan needs to address only the baseline conditions at the impact site and the number of credits to be provided (see 33 CFR 332.4(c)(1)(ii)).

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

(g) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of 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 or federal, dam safety criteria or have been designed by qualified persons. The district engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

25. Water Quality. (a) Where the certifying authority (state, authorized tribe, or EPA, as appropriate) has not previously certified compliance of an NWP with CWA section 401, a CWA section 401 water quality certification for the proposed discharge must be obtained or waived (see 33 CFR 330.4(c)). If the permittee cannot comply with all of the conditions of a water quality certification previously issued by certifying authority for the issuance of the NWP, then the permittee must obtain a water quality certification or waiver for the proposed discharge in order for the activity to be authorized by an NWP.

(b) If the NWP activity requires pre-construction notification and the certifying authority has not previously certified compliance of an NWP with CWA section 401, the proposed discharge is not authorized by an NWP until water quality certification is obtained or waived. If the certifying authority issues a water quality certification for the proposed discharge, the permittee must submit

a copy of the certification to the district engineer. The discharge is not authorized by an NWP until the district engineer has notified the permittee that the water quality certification requirement has been satisfied by the issuance of a water quality certification or a waiver.

(c) The district engineer or certifying authority may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

26. Coastal Zone Management. In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). If the permittee cannot comply with all of the conditions of a coastal zone management consistency concurrence previously issued by the state, then the permittee must obtain an individual coastal zone management consistency concurrence or presumption of concurrence in order for the activity to be authorized by an NWP. The district engineer or a state may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

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

28. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is authorized, subject to the following restrictions:

(a) If only one of the NWPs used to authorize the single and complete project has a specified acreage limit, the acreage loss of waters of the United States cannot 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.

(b) If one or more of the NWPs used to authorize the single and complete project has specified acreage limits, the acreage loss of waters of the United States authorized by those NWPs cannot exceed their respective specified acreage limits. For example, if a commercial development is constructed under NWP 39, and the single and complete project includes the filling of an upland ditch authorized by NWP 46, the maximum acreage loss of waters of the United States for the commercial development under NWP 39 cannot exceed 1/2-acre, and the total acreage loss of waters of United States due to the NWP 39 and 46 activities cannot exceed 1 acre.

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

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

_____

(Transferee)

_____

(Date)

30. Compliance Certification. Each permittee who receives an NWP verification letter from the Corps must provide a signed certification documenting completion of the authorized activity and implementation of any required compensatory mitigation. The 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 review by, or permission from, the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers (USACE) federally authorized Civil Works project (a "USACE project"), the prospective permittee must submit a pre-construction notification. See paragraph (b)(10) of general condition 32. An activity that requires section 408 permission and/or review is not authorized by an NWP until the appropriate Corps office issues the section 408 permission or completes its review to alter, occupy, or use the USACE project, and the district engineer issues a written NWP verification.

32. Pre-Construction Notification. (a) *Timing*. Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, if the PCN is determined to be incomplete, notify the prospective permittee within that 30 day period to request the additional information necessary to make the PCN complete. The request must specify the

information needed to make the PCN complete. As a general rule, district engineers will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity until either:

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

(2) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or 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. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin

the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

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

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

(2) Location of the proposed activity;

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

(4) (i) A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures.

(ii) For linear projects where one or more single and complete crossings require pre-construction notification, the PCN must include the quantity of

anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters (including those single and complete crossings authorized by an NWP but do not require PCNs). This information will be used by the district engineer to evaluate the cumulative adverse environmental effects of the proposed linear project, and does not change those non-PCN NWP activities into NWP PCNs.

(iii) Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (e.g., a conceptual plan), but do not need to be detailed engineering plans);

(5) The PCN must include a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial and intermittent 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 or 3/100-acre of stream bed 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 species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat (or critical habitat proposed for such designation), the PCN must include the name(s) of those endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed activity. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with the Endangered Species Act;

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

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

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

(c) *Form of Pre-Construction Notification*: The nationwide permit pre-construction notification form (Form ENG 6082) should be used for NWP PCNs. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals.

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

(2) Agency coordination is required for: (i) all NWP activities that require pre-construction notification and result in the loss of greater than 1/2-acre of waters of the United States; (ii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iii) NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.

(3) When agency coordination is required, the district engineer will immediately provide (e.g., via 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 that the net adverse environmental effects of the proposed activity are no more than minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(4) In cases 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 single and complete crossings of waters of the United States that require PCNs to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings of waters of the United States authorized by an NWP. If an applicant requests a waiver of an applicable limit, as provided for in NWPs 13, 36, or 54, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in only minimal individual and cumulative adverse environmental effects.

2. When making minimal adverse environmental effects determinations the district engineer will consider the direct and indirect effects caused by the

NWP activity. He or she will also consider the cumulative adverse environmental effects caused by activities authorized by an NWP and whether those cumulative adverse environmental effects are no more than minimal. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (e.g., watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional or condition assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse environmental effects determination. The district engineer may add 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 or 3/100-acre of stream bed, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for NWP activities with smaller impacts, or for impacts to other types of waters. 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 that the NWP activity results in no more than minimal adverse environmental effects. If the net adverse environmental effects of the NWP activity (after consideration of the mitigation proposal) are determined by the district engineer to be no more than minimal, the district engineer will provide a timely written response to the applicant. The response will state that the NWP activity can proceed under the terms and conditions of the NWP, including any activity-specific conditions added to the NWP authorization by the district engineer.

4. If the district engineer determines that the adverse environmental effects of the proposed 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), 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.

Establishment (creation): The manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area.

High Tide Line: The line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

Historic Property: Any prehistoric or historic district, site (including archaeological site), building, structure, or other object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria (36 CFR part 60).

Independent utility: A test to determine what constitutes a single and complete non-linear project in the Corps Regulatory Program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

Indirect effects: Effects that are caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.

Loss of waters of the United States: Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. The loss of stream bed includes the acres of stream bed that are permanently adversely affected by filling or excavation because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters or wetlands for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities that do not require Department of the Army authorization, such as activities eligible for exemptions under section

404(f) of the Clean Water Act, are not considered when calculating the loss of waters of the United States.

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: The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

Perennial stream: A perennial stream has surface water flowing continuously year-round during a typical year.

Practicable: Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Pre-construction notification: A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide

permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

Preservation: The removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

Re-establishment: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

Rehabilitation: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

Restoration: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in

aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a 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 jurisdictional stream remains a water of the United States.

Structure: An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

Tidal wetland: A tidal wetland is a jurisdictional wetland that is inundated by tidal waters. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line.

Tribal lands: Any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

Tribal rights: Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: For purposes of the NWPs, a waterbody is a “water of the United States.” If a wetland is adjacent to a waterbody determined to be a water of the United States, that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)).

[FR Doc. 2021-00102 Filed: 1/12/2021 8:45 am; Publication Date: 1/13/2021]