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DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Chapter II

[Docket Number: COE-2020-0002]

RIN 0710-AA84

Proposal to Reissue and Modify Nationwide Permits

AGENCY: Army Corps of Engineers, DoD.

ACTION: Notice of proposed rulemaking.

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 U.S. Army Corps of Engineers (Corps) is proposing to reissue its existing NWPs and associated general conditions and definitions, with some modifications. We are also proposing to issue five new NWPs. Two of those proposed new NWPs would authorize certain categories of mariculture activities (i.e., seaweed and finfish mariculture) that are not authorized by NWP 48. We are proposing to divide the current NWP that authorizes utility line activities (NWP 12) into three separate NWPs that address the differences in how different linear 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. Specifically, we are proposing to modify the current utility line NWP 12 to authorize only oil and natural gas pipeline activities. Two proposed new NWPs would authorize activities associated with the construction, maintenance, repair, and removal of electric utility lines/telecommunication lines and utility lines that convey water, sewage, and other substances. The fifth proposed new NWP would authorize discharges of dredged or fill material into jurisdictional waters for the construction, expansion, and maintenance of water reuse and reclamation facilities. We are proposing these modifications to simplify and clarify the NWPs, reduce burdens on the regulated public, and continue to comply with the statutory requirement that these NWPs authorize only activities with no more than minimal individual and cumulative adverse environmental effects. The Corps is requesting comment on all aspects of these proposed nationwide permits.

DATES: Submit comments on or before [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by docket number COE-2020-0002 and/or RIN 0710-AA84, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

E-mail: nationwidepermits2020@usace.army.mil. Include the docket number, COE-2020-0002, in the subject line of the message.

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

Hand Delivery / Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

Instructions: If submitting comments through the Federal eRulemaking Portal, direct your comments to docket number COE-2020-0002. All comments received will be included in the public docket without change and may be made available on-line at http://www.regulations.gov, including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through regulations.gov or e-mail. The regulations.gov web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail directly to the Corps without going through regulations.gov your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment we recommend that you include your name and other contact information in the body of your comment and with any compact disc you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

Docket: For access to the docket to read background documents or comments received, go to regulations.gov. All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

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/.

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List of Acronyms

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 Proposed Nationwide Permits and General Conditions

Nationwide Permits (NWPs)

1. Aids to Navigation
2. Structures in Artificial Canals
3. Maintenance
4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities
5. Scientific Measurement Devices
6. Survey Activities
7. Outfall Structures and Associated Intake Structures
8. Oil and Gas Structures on the Outer Continental Shelf
9. Structures in Fleeting and Anchorage Areas
10. Mooring Buoys

11. Temporary Recreational Structures
12. Oil or Natural Gas Pipeline Activities
13. Bank Stabilization
14. Linear Transportation Projects
15. U.S. Coast Guard Approved Bridges
16. Return Water From Upland Contained Disposal Areas
17. Hydropower Projects
18. Minor Discharges
19. Minor Dredging
20. Response Operations for Oil or Hazardous Substances
21. Surface Coal Mining Activities
22. Removal of Vessels
23. Approved Categorical Exclusions
24. Indian Tribe or State Administered Section 404 Programs
25. Structural Discharges
26. [Reserved]
27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities
28. Modifications of Existing Marinas
29. Residential Developments
30. Moist Soil Management for Wildlife
31. Maintenance of Existing Flood Control Facilities
32. Completed Enforcement Actions
33. Temporary Construction, Access, and Dewatering
34. Cranberry Production Activities
35. Maintenance Dredging of Existing Basins
36. Boat Ramps
37. Emergency Watershed Protection and Rehabilitation
38. Cleanup of Hazardous and Toxic Waste
39. Commercial and Institutional Developments
40. Agricultural Activities
41. Reshaping Existing Drainage Ditches
42. Recreational Facilities
43. Stormwater Management Facilities
44. Mining Activities
45. Repair of Uplands Damaged by Discrete Events
46. Discharges in Ditches
47. [Reserved]
48. Commercial Shellfish Mariculture Activities
49. Coal Remining Activities
50. Underground Coal Mining Activities
51. Land-Based Renewable Energy Generation Facilities
52. Water-Based Renewable Energy Generation Pilot Projects
53. Removal of Low-Head Dams
54. Living Shorelines

A. Seaweed Mariculture Activities
B. Finfish Mariculture Activities
C. Electric Utility Line and Telecommunications Activities
D. Utility Line Activities for Water and Other Substances
E. Water Reclamation and Reuse Facilities

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

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 that will result in no more than minimal individual and cumulative adverse environmental effects. Nationwide permits were first issued by the Corps in 1977 (42 FR 37122) to authorize categories of activities that have minimal adverse effects on the aquatic environment, and streamline the authorization process for those minor activities. After 1977, NWPs have been issued or reissued in 1982 (47 FR 31794), 1984 (49 FR 39478), 1986 (51 FR 41206), 1991 (56 FR 59110), 1995 (60 FR 38650), 1996 (61 FR 65874), 2000 (65 FR 12818), 2002 (67 FR 2020), 2007 (72 FR 11092), 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 that 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)). Nationwide permits 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.

There are currently 52 NWPs. These NWPs were published in the January 6, 2017, issue of the Federal Register (82 FR 1860) and are currently scheduled to expire on March 18, 2022. Under 33 CFR 330.5(b), anyone may, at any time, suggest to Corps Headquarters that they consider new NWPs or conditions for issuance, or changes to existing NWPs. Independent of receiving suggestions to

issue new NWPs or modify existing NWPs, Corps Headquarters has the authority to periodically review the NWPs and their conditions and initiate the process for proposing to modify, reissue, or revoke the NWPs (see 33 CFR 330.5(b) and 330.6(b)). While the Corps generally updates the nationwide permits every five years, there have been three times where the Corps issued or modified NWPs outside of the normal 5-year cycle. The first time occurred on October 5, 1984 (49 FR 39478) when the Corps modified four NWPs and issued one new NWP to comply with the requirements of a settlement agreement. The second time was on July 27, 1995 (60 FR 38650) when the Corps issued a new NWP for single family housing (NWP 29). The third instance occurred on March 9, 2000, (65 FR 12818) when the Corps issued five new NWPs and modified 6 existing NWPs to replace one of its existing NWPs (i.e., NWP 26, which authorized discharges into headwaters and isolated waters).

On March 28, 2017, the President signed Executive Order (E.O.) 13783, which directed heads of federal agencies to review existing regulations that potentially burden the development or use of domestically produced energy resources. On October 25, 2017, the Assistant Secretary of the Army (Civil Works) issued a report in response to E.O. 13783. That report identified nine NWPs that could be modified to reduce regulatory burdens on entities that develop or use domestically produced energy resources. A copy of the report is available in the docket for this proposed rule (docket number COE-2020-0002). Today's proposal includes potential modifications intended to provide additional consistency and clarity in the NWPs, including the NWPs identified in the E.O. 13783 report, and reduce burdens on the regulated public. This notice of proposed rulemaking initiates the rulemaking process to determine whether to modify these nine NWPs in accordance with the report's recommendations, and to modify a number of other NWPs. More information on the actions being proposed pursuant, in part, to E.O. 13783 can be found in Section I.B below.

In addition to revisions being considered in response to E.O. 13783, the Corps is proposing to reissue the remaining NWPs, so that all of the NWPs remain on the same 5-year approval cycle. The Corps is also proposing to issue five new NWPs discussed below.

In FY 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 that would otherwise require an individual permit under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 to reduce the adverse effects of those activities in order to qualify for NWP authorization. This reduction in adverse effects can reduce a project's impact on 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 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 automatically authorized by the NWP (see 33 CFR 330.1(e)(1)).

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 to modify, suspend, or revoke NWP authorizations on a regional basis to take into account regional differences among aquatic resources and 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 I.H for more information on the regional conditioning process.

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 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 NWP activity will have only 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 use of best management practices or compensatory mitigation requirements to offset authorized losses of jurisdictional waters and wetlands so that the net adverse environmental effects are no more than minimal. Any compensatory mitigation required for NWP activities must comply with the Corps' compensatory mitigation regulations at 33 CFR part 332. Review of a PCN may also result in the district engineer asserting discretionary authority to require an individual permit from the Corps for the proposed activity, if he or she determines, based on the information provided in the PCN and other available information, that adverse environmental effects will be more than minimal, or otherwise determines that "sufficient concerns for the environment or any other factor of the public interest so requires" consistent with 33 CFR 330.4(e)(2)).

During their reviews of PCNs, district engineers assess cumulative adverse environmental effects at an appropriate regional scale. The district engineer uses his or her discretion to determine the appropriate regional scale for evaluating cumulative effects. The appropriate regional scale for evaluating cumulative effects may be a waterbody, watershed, county, state, or a Corps district. 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 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. 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.

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. . Since the required NEPA cumulative effects and 404(b)(1) Guidelines cumulative effects analyses are conducted by Corps Headquarters in its decision documents for the issuance 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 NWP activity, 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 individual permit.

There may be activities authorized by NWPs that cross more than one Corps district or 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,

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

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. Proposed Actions Under E.O. 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, the Corps 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 Corps issued its report on October 25, 2017, and in 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.”

The following is a summary of the recommendations provided in the report the Corps issued in response to E.O. 13783:

- Retain the 1/2-acre limit for the NWPs identified in the report that currently have that limit (i.e., NWP 12 (utility line activities), NWP 21 (surface coal mining activities), NWP 39 (commercial and institutional developments), NWP 50 (underground coal mining activities), NWP 51 (land-based renewable energy generation projects), and NWP 52 (water-based renewable energy generation pilot projects).

- Remove the 300 linear foot limit for losses of stream bed and rely on the 1/2-acre limit and PCN requirements to ensure that activities authorized by these NWPs will result in no more than minimal adverse environmental effects. The 300 linear foot limit currently applies to the following NWPs identified in the report: NWP 21 (surface coal mining activities), NWP 39 (commercial and institutional developments), NWP 50 (underground coal mining activities), NWP 51 (land-based renewable energy projects), and NWP 52 (water-based renewable energy pilot projects).

- NWP 3 – Maintenance. Modify this NWP to authorize small amounts of riprap to protect those structures and fills, without a PCN requirement.

- NWP 12 – Utility Line Activities. Modify this NWP to simplify the pre-construction notification thresholds, by reducing the number of PCN thresholds from 7 to 2.

- NWP 17 – Hydropower Projects. Modify this NWP to change the generating capacity threshold in paragraph (a) from 5,000 kW to 10,000 kW to be consistent with the definition of "small hydroelectric power project" in 16 U.S.C. 2705(d).

- NWP 21 – Surface Coal Mining Activities. Remove the 300 linear foot limit for losses of stream bed. Remove the provision requiring the permittee to receive a written authorization from the Corps before commencing with the activity, to be consistent with the other NWPs requiring PCNs and allowing default authorizations to occur if the Corps district does not respond to the PCN within 45 days of receipt of a complete PCN.

- NWP 39 – Commercial and Institutional Developments. Modify this NWP to remove the 300 linear foot limit for losses of stream bed.

- NWP 49 – Coal Remining Activities. Remove the provision requiring the permittee to receive a written authorization from the Corps before commencing with the activity, to be consistent with the other NWPs requiring PCNs and allowing default authorizations to occur if the Corps district does not respond to the PCN within 45 days of receipt of a complete PCN.

- NWP 50 – Underground Coal Mining Activities. Remove the 300 linear foot limit for losses of stream bed. Remove the provision requiring the permittee to receive a written authorization from the Corps before commencing with the activity, to be consistent with the other NWPs requiring PCNs and allowing default authorizations to occur if the Corps

district does not respond to the PCN within 45 days of receipt of a complete PCN.

- NWP 51 – Land-Based Renewable Energy Generation Projects. Remove the 300 linear foot limit for losses of stream bed.

- NWP 52 – Water-Based Renewable Energy Generation Pilot Projects. Remove the 300 linear foot limit for losses of stream bed.

The Corps is proposing to implement all of the recommendations discussed above. These proposed changes are discussed in greater detail below.

C. Proposed Actions Under 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.

D. Proposed Actions Under 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. 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 is proposing 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 is soliciting public comment on whether a separate NWP should be issued to authorize structures or work regulated by the Corps for multi-species mariculture activities.

In this proposed rule, the Corps is proposing 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. These proposed new NWPs would authorize structures and work in navigable waters of the United States under Section 10 of the Rivers and Harbors Act of 1899. These proposed new NWPs would 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 proposed NWPs includes a provision on multi-trophic species mariculture activities in marine and coastal waters, including federal waters on the outer continental shelf. This proposed 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 proposed provision in NWPs A and B is an alternative to developing a separate NWP for multi-trophic species mariculture activities, and it would provide NWP authorization that is responsive to the E.O. The Corps recognizes that some mariculture operators may choose to produce seaweeds or finfish exclusively.

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.

In this proposal to issue and reissue NWPs, the Corps is not proposing to issue new NWPs for finfish aquaculture activities, algal aquaculture activities, or multi-species aquaculture activities in other waters of the United States (i.e., waters of the United States that are not subject to the ebb and flow of the tide) Examples of these other waters of the United States include lakes and ponds. The Corps is considering whether to develop one or more NWPs in the future to authorize aquaculture activities in these waters. To assist in our assessment, the Corps invites interested parties to submit comments on whether the Corps should propose new NWPs for freshwater aquaculture activities, including aquaculture for finfish (e.g., catfish) or algae in future revisions to the NWPs. The Corps also invites comments on whether it should propose new NWPs for aquaculture for other freshwater species, such as crawfish. These comments should be submitted to the docket for this proposed rule at www.regulatons.gov (docket number COE-2020-0002), or by email to nationwidepermits2020@usace.army.mil.

E. The 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 those reforms would be 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, the Corps is considering whether it can use its existing authority to create specific procedures or conditions by which Federal agencies that currently require a NWP would not need to submit a PCN, consistent with applicable law. 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)), the right to take action to address situations where the Federal agency incorrectly determined that the NWP terms and conditions were met.

The Corps is considering exempting Federal agencies from PCN 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. However, the Corps 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.

Federal agency environmental staff come from a diverse range of education and professional training, as do environmental consultants that work for the various industries and individuals that hire them for their expertise in securing individual permits, NWP verifications, and regional general permit verifications. Some companies that need to secure DA permits for their projects may also have in-house environmental experts whose responsibilities include ensuring compliance with applicable environmental laws. Some permit applicants may attempt to obtain DA permits without hiring a consultant. The Corps is not aware of any studies that have examined whether there are any substantial differences in proficiency between federal agency environmental staff and environmental consultants in achieving environmental compliance and securing DA permits. Such studies would be helpful in deciding whether to modify the NWPs to implement Principle I.C.1. If any commenters are aware of such studies, the Corps would like to receive citations for those studies or copies of the studies themselves, to assist with decision-making for the final NWPs.

Consistent with this legislative principle, we are seeking comment on whether to modify the NWPs that require pre-construction notification to limit the PCN requirement to non-federal permittees. We request 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. The NWPs that require PCNs, in addition to the NWPs identified in the E.O. 13783 report discussed above, are:

- NWP 7, Outfall Structures and Associated Intake Structures.
- NWP 8, Oil and Gas Structures on the Outer Continental Shelf.
- NWP 13, Bank Stabilization.

- NWP 18, Minor Discharges.
- NWP 31, Maintenance of Existing Flood Control Facilities.
- NWP 33, Temporary Construction, Access, and Dewatering.
- NWP 34, Cranberry Production Activities.
- NWP 36, Boat Ramps.
- NWP 37, Emergency Watershed Protection and Rehabilitation.
- NWP 38, Cleanup of Hazardous and Toxic Waste.
- NWP 45, Repair of Uplands Damaged by Discrete Events.
- NWP 46, Discharges in Ditches.
- NWP 53, Removal of Low-Head Dams.
- NWP 54, Living Shorelines.

If, after evaluating the comments received in response to this proposed rule, we decide to remove the PCN requirement for Federal permittees, it may be beneficial to add a definition of "non-federal permittee" to Section E, "Definitions." The phrase "non-federal permittee" would be added to the "Notification" provision of each NWP that requires pre-construction notification within the terms of the NWP. We are seeking comment on the following definition of "non-federal permittee":

> Non-federal permittee: Any person, organization (other than an agency or instrumentality of the United States federal government), or tribal, state, or local government agency that wants to use an NWP to conduct an activity that requires Department of the Army authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. State transportation agencies to which the Federal Highway Administration (FHWA), Federal Railway Administration (FRA), or Federal Transit Administration (FTA) has assigned its NEPA responsibilities pursuant to 23 U.S.C. 326 and 23 U.S.C. 327, or which are carrying out regulated activities for projects when FHWA, FRA, or FTA is the lead federal agency, are considered, for the purposes of the NWP Program, to be federal permittees with respect to those highway projects for which they have assigned NEPA responsibilities or for which FHWA is the lead federal agency.

This definition of "non-federal permittee" would exclude state departments of transportation that have been assigned the responsibility for complying with NEPA under 23 U.S.C. Sections 326 and 327 by the Federal Highways Administration (FHWA), Federal Railway Administration (FRA), or Federal Transit Administration (FTA) with respect to those projects for which they have assigned NEPA responsibilities only. This exclusion would have the effect of allowing those state agencies to be considered to be federal permittees for the purposes

of the PCN requirements for the NWPs for specific projects. In some instances FHWA may assign NEPA responsibility to the state for all federal highway projects in the state. In other instances the FHWA may assign NEPA responsibility to the state only for specific federal highway projects. The exclusion of the state agency from the PCN requirements would only apply to federal highway projects in those states for which FHWA has assigned the state NEPA responsibility for all federal highway projects in the state. In addition, with respect to compliance with other non-NEPA environmental statutes (e.g., Section 7 of the Endangered Species Act and Section 106 of the National Historic Preservation Act) the assignment of responsibility for compliance with those non-NEPA environmental statutes is at the discretion of FHWA. In other words, while a state Department of Transportation may have been assigned NEPA responsibility, the FHWA may not have assigned responsibility for ESA section 7 or NHPA section 106 compliance, and the prospective permittee (i.e. the state DOT) would therefore be considered a non-federal permittee with respect to paragraph (c) of general conditions 18 (endangered species) and 20 (historic properties).

If the NWPs are modified so that PCNs are no longer required for federal permittees, district engineers would still retain the authority to review any activity authorized by an NWP to determine whether that activity complies with the terms and conditions of the NWP (see 33 CFR 330.1(d)). In addition, under 33 CFR 326.4, district engineers may take reasonable measures to inspect permitted NWP activities to ensure that those activities comply with the terms and conditions of the NWPs. If federal permittees are no longer required to submit PCNs, district engineers would also still retain their authority to modify, suspend, or revoke NWP authorizations on a case-by-case basis by following the procedures in 33 CFR 330.5(d). District engineers would continue to exercise this discretionary authority to modify NWP authorizations when they find that proposed activities will have more than minimal individual and cumulative adverse environmental effects or otherwise may be contrary to the public interest (33 CFR 330.1(d)). Through their discretionary authority, district engineers may also instruct federal permittees to apply for individual permits if the NWP authorization cannot be modified to reduce or eliminate adverse environmental effects to qualify for NWP authorization.

If the NWPs are modified so that PCNs are no longer required for federal permittees, for the purposes of determining compliance with the requirement that NWPs can only authorize activities that result in no more than minimal individual and cumulative adverse environmental effects, the Corps would take into account the NWP activities undertaken by federal permittees without PCNs in the same manner as it takes into account other activities authorized by NWPs that do not require PCNs. Under 40 CFR 230.7(b)(3) of the 404(b)(1) Guidelines, the Corps is required to predict cumulative effects. This prediction of cumulative effects

includes the number of activities expected to be authorized by the NWP during the period it remains in effect. For NWP activities that do not require PCNs, this requires the Corps to estimate the number of times the NWP would be used during the period it remains in effect (usually 5 years). The Corps would also estimate the losses of waters of United States anticipated to occur during the period the NWP remains in effect. While some of the NWP activities conducted by federal permittees may include compensatory mitigation to offset losses of waters and wetlands, that compensatory mitigation would not be incorporated into the NWP authorization through legally-binding permit conditions in accordance with 33 CFR 332.3(k) because the Corps would not be reviewing and approving the compensatory mitigation plan for these non-PCN activities. Therefore, the Corps would not be estimating the amount of compensatory mitigation required for these activities because the Corps would not be imposing those compensatory mitigation requirements. The estimates developed for these non-PCN activities would help inform the Corps during the next NWP reissuance process, and in any interim decisions to modify, suspend, or revoke a particular NWP.

F. Process for Modifying and Reissuing the NWPs

The NWPs that were reissued on December 21, 2016, went into effect on March 19, 2017. Those NWPs expire on March 18, 2022. The process for modifying and reissuing the NWPs for the next five-year cycle starts with today's publication of the proposed NWPs in the Federal Register for a 60-day comment period and may include a public hearing. Requests for a public hearing must be submitted in writing to the address in the ADDRESSES section of this notice. These requests must explain the reason or reasons why a public hearing should be held. If the Corps determines that a public hearing or hearings would assist in making a decision on the proposed NWPs, general conditions, and definitions, a 30-day advance notice will be published in the Federal Register to advise interested parties of the date(s) and location(s) for the public hearing(s). Any announcement of public hearings would also be posted as a supporting document in docket number COE-2020-0002 at www.regulations.gov as well as the Corps Regulatory Program home page at http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits.aspx

Shortly after the publication of this Federal Register notice, Corps district offices will issue public notices to solicit comments on proposed Corps regional conditions. In their district public notices, consistent with 33 CFR 330.5(b)(2)(ii), district engineers may also propose to suspend or revoke some or all of these NWPs if they have issued, or are proposing to issue, regional general permits, programmatic general permits, or section 404 letters of permission for use instead of some or all of these NWPs. The comment period for these district

public notices will be 45 days. See Regional Conditioning of Nationwide Permits below for more information on this process.

After the publication of this Federal Register notice, Corps district offices will send letters to Clean Water Act Section 401 certifying authorities (i.e., states authorized tribes, and where appropriate, EPA) to request water quality certification (WQC) for those NWPs that may result in a discharge from a point source into waters of the United States. The certifying agencies will have 60 days to act on the certification request, consistent with the "reasonable period of time" established in the Corps' regulations for the purposes of Clean Water Act Section 401(a)(1) (see 33 CFR 330.4(c)(6) and 325.2(b)(1)(ii)).

We believe that 60 days is sufficient for certifying agencies to complete their WQC decisions for the proposed NWPs. The Corps' regulations at 33 CFR 330.4(c)(1) states that issuance of water quality certification, or a waiver, is required prior to the issuance or reissuance of NWPs authorizing activities which may result in a discharge into waters of the United States. Corps districts provide a 60-day period for certifying authorities to act on a certification request for NWPs (including reviewing any regional conditions being proposed by the districts). Under section 401(a)(2), a federal agency must notify the EPA Administrator after it receives a certification and application for a federal permit. The EPA Administrator then has 30 days to determine, at his or her discretion, whether a discharge from a certified project may affect the waters quality of a neighboring jurisdiction.

This process is consistent with current WQC procedures, where certifying authorities conduct their evaluations on a proposed federal permit, so that any necessary WQC conditions can be incorporated into the federal permit before it is issued. It is also consistent with the Clean Water Act Section 401 Certification Rule that was signed by EPA on June 1, 2020, and published in the Federal Register on July 13, 2020 (85 FR 42210).

After the publication of this Federal Register notice, Corps district offices will send letters with consistency determinations pursuant to the Coastal Zone Management Act to the state agencies responsible for coastal zone management. Each letter will request that the state agency review the Corps district's consistency determination and, if necessary, provide conditions based on specific enforceable coastal zone management policies that would allow the state agency to concur with the Corps district's consistency determination (see 15 CFR 930.31(d)). The state agency will have at least 90 days to review the Corps district's consistency determination unless the state agency and Corps agree to an alternative notification schedule (see 15 CFR 930.36(b)). This review period can be extended if the Corps and the state agency agree to an alternative notification schedule. If the state issues a consistency concurrence with

conditions, the division engineer will make those conditions regional conditions for the NWP in that state, unless he or she determines that the conditions do not comply with the provisions of 33 CFR 325.4 (see 33 CFR 330.4(d)(2)). If the division engineer determines the conditions identified by the state do not comply with the provisions of 33 CFR 325.4, project proponents who want to use those NWPs will need to obtain individual CZMA consistency concurrences or presumptions of concurrence.

During the period between the issuance of the final NWPs and their publication in the Federal Register, Corps districts will prepare supplemental documents and proposed regional conditions for approval by division engineers before the final NWPs go into effect. The supplemental documents address the environmental considerations related to the use of NWPs in a Corps district, state, or other geographic region. The supplemental documents will certify that the NWPs, with any regional conditions or geographic suspensions or revocations, will authorize only those activities that result in no more than minimal individual and cumulative adverse effects on the environment or any relevant public interest review factor. The Corps' public interest review factors are listed in 33 CFR 320.4(a)(1) and are discussed in more detail in subsequent paragraphs in section 320.4.

G. Status of Existing Permits

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 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 after the NWP is reissued or modified, 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 for those NWPs. As long as the verified NWP activities comply with the terms and conditions of the modified and reissued 2020 NWPs, those activities continue to be authorized by the applicable NWP(s) until March 18, 2022, unless the 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 previous set

of NWPs which have commenced (i.e., are under construction) or are under contract to commence in reliance upon an NWP will remain authorized provided the activity is 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.

To avoid having two sets of NWPs in effect at the same time and to comply with §330.6(b), we may change the expiration date of the 2017 NWPs if we issue the final NWPs after we consider the comments received in response to this proposed reissuance and modification of NWPs. We may change the expiration date of the 2017 NWPs so that they expire the day before the 2020 NWPs go into effect. We are soliciting comment on whether to change the expiration date of the 2017 NWPs to the day before the 2020 NWPs go into effect. The actual date will be specified when we issue the final NWPs because we are uncertain when the final NWPs will be issued and published in the Federal Register.

An activity completed under the authorization provided by a 2017 NWP continues to be authorized by that NWP (see 33 CFR 330.6(b)) regardless of whether the Corps finalizes the 2020 NWPs. If we change the expiration date for the 2017 NWPs, project proponents will have time to complete those activities under the terms and conditions of the 2017 NWPs (see 33 CFR section 330.6(b)). As discussed above, that amount of time is dependent on whether the activity qualifies for authorization under the reissued or modified NWP. If the activity qualifies for authorization under the reissued or modified NWP, the original NWP verification letter will continue to be valid under March 18, 2022, unless the district engineer identified a different expiration date in that verification letter. If the activity no longer qualifies for NWP authorization under the reissued or modified NWP, the project proponent would have 12 months to complete the authorized activity as long as that activity is under construction or under contract to commence construction before the reissued or modified NWP goes into effect. If the project proponent does not have the activity under construction or under contract to commence construction before the reissued or modified NWP goes into effect, he or she will need to seek another form of DA authorization. After that 12 month period, if those activities no longer qualify for NWP authorization because they do not meet the terms and conditions of the 2020 NWPs (including any regional conditions imposed by division engineers), the project proponent will need to obtain an individual permit, or seek authorization under a regional general permit, if such a general permit is available in the applicable Corps district and can be used to authorize the proposed activity.

H. 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 aquatic environment and are not contrary to the public interest.

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

Examples of Corps regional conditions include:

- Restricting the types of waters of the United States where the NWPs may be used (e.g., fens, bogs, bottomland hardwood forests, etc.) or prohibiting the use of some or all of the NWPs in those types of waters or in specific watersheds.
- Restricting or prohibiting the use of NWPs in an area covered by a Special Area Management Plan, where regional general permits are issued to authorize activities consistent with that plan that have only minimal adverse environmental effects.
- Revoking certain NWPs in a watershed or other type of geographic area (e.g., a state or county).
- Adding PCN requirements to NWPs to require notification for all activities or lowering PCN thresholds, in certain watersheds or other types of geographic areas, or in certain types of waters of the United States.

- Reducing NWP acreage limits in certain types of waters of the United States (e.g., streams) or specific waterbodies, or in specific watersheds or other types of geographic regions.
- Restricting activities authorized by NWPs to certain times of the year in a particular waterbody, to minimize the adverse effects of those activities on fish or shellfish spawning, wildlife nesting, or other ecologically cyclical events.
- Conditions necessary to facilitate compliance with the "Endangered Species" general condition, to appropriately enhance protection of listed species or critical habitat under the Endangered Species Act.
- Conditions necessary to facilitate compliance with the "Tribal Rights" general condition, to appropriately enhance protection of tribal trust resources, including natural and cultural resources and Indian lands.
- Conditions necessary for ensuring compliance with the "Historic Properties" general condition, to appropriately protect historic properties.
- Conditions necessary to ensure that NWP activities have no more than minimal adverse effects to Essential Fish Habitat.

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 those conditions do not comply with 33 CFR 325.4 (see 33 CFR 330.4(c)(2)). For more information on compliance with Section 401 of the CWA, refer to Section II.G.

If the division engineer determines those water quality certification conditions do not comply with 33 CFR 325.4, then the conditioned water quality certification will be considered denied, and the project proponent will need to request a water quality certification for the proposed discharge from the certifying authority. That certification request must satisfy the requirements of 40 CFR 121.5(b). The certifying authority may issue or deny water quality certification for an individual license or permit for an activity that "may result in a specific discharge or set of discharges into waters of the United States" (85 FR 42281). In its final rule, EPA does not define the term "individual license or permit" and because 40 CFR part 121 applies to all federal permits subject to Section 401 of

the Clean Water Act the term "individual license or permit" it is reasonable to infer that it refers to any type of federal permit that authorizes an activity that results in a discharge from a point source into waters of the United States. Therefore, applying the recently issued amendments to 40 CFR part 121 to the Corps Regulatory Program would mean that an individual permit or license in the section 401 context refers to any DA individual permit or general permit (including an NWP) that authorizes an activity that results in specific discharge into waters of the United States for a specific project.

A similar process applies to a CZMA consistency concurrence issued by a state for the issuance of an NWP (see 33 CFR 330.4(d)(2)). If the division engineer determines those CZMA concurrence conditions do not comply with 33 CFR 325.4, then the conditioned CZMA consistency certification will be considered an objection, 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, district engineers issue local public notices to advertise the availability of the proposed rule for comment 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)). Comments on proposed regional conditions should be sent to the Corps district that issued the public notice. The process for adding Corps regional conditions to the NWPs is described at 33 CFR 330.5(c). The regulations for the regional conditioning process were promulgated in 1991, with the proposed rule published in the Federal Register on April 10, 1991 (56 FR 14598) and the final rule published in the Federal Register on November 22, 1991 (56 FR 59110).

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 solicit public comment on those proposed regional conditions, usually for a 45-

day comment period. That public notice also solicits 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 issued shortly after Corps Headquarters publishes the proposed NWPs in the Federal Register for a 60-day comment period.

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

After the public comment period 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). Each supplemental document will evaluate the NWP on a regional basis (e.g., by Corps district geographic area of responsibility or by state) and discuss the need for 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. 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 announcing the final Corps regional conditions and when those regional conditions go into effect (see 33 CFR 330.5(c)(1)(v)). The district's public notice is posted on its web site. 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 role in the development and approval of Corps' regional conditions by division engineers. 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.

In response to our July 20, 2017, Federal Register notice (82 FR 33470) issued for E.O. 13777, "Enforcing the Regulatory Reform Agenda," we received numerous comments regarding regional conditioning of the NWPs. These comments are summarized below.

Several commenters stated that there should be greater uniformity in regional conditions for the NWPs, to provide consistent availability of NWPs across Corps districts. Most of these commenters implied that the desired consistency should be achieved at a national level to provide the same level of NWP availability across all Corps districts. One commenter acknowledged the need for regional conditions to tailor the NWP program to address local resources, but said that some of the regional conditions are too broad and unnecessarily restrict use of the NWPs. Another commenter indicated that there needs to be more consistency in regional conditions, especially for regional conditions that change NWP PCN requirements.

Since the purpose of regional conditions is to tailor the NWPs to account for regional differences in aquatic resource types, the functions they provide, and their value to the region so that the NWPs in a particular geographic area authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects, requiring consistency among regional conditions at a national level would be contrary to the purpose of regional conditions and would reduce the utility of the NWPs. In other words, the ability to add restrictions to one or more NWPs at a regional level to ensure that those activities result in no more than minimal individual and cumulative adverse environmental effects allows the national terms and conditions to be less restrictive, and thereby potentially appropriate, in other areas of the country. This ability to tailor the NWP program in specific areas of the country allows the NWPs to cover more activities than would be possible if the need for greater restrictions in one part of the country had to be applied to the nation as a whole. We agree that regional conditions should be written clearly and provide only the additional restrictions that are necessary to ensure that NWP activities in that region result only in minimal individual and cumulative adverse environmental effects, consistent with the requirements of Section 404(e) of the Clean Water Act.

Under the Corps' current regulations at 33 CFR 330.5(c), the authority to approve Corps regional conditions is assigned to division engineers. A division engineer can take steps to provide consistency in Corps regional conditions for the districts within his or her division. However, it should also be noted that the eight Corps divisions encompass large geographic regions and there can be substantial differences in aquatic resource types, functions, and values within a Corps division. For example, the Corps' Northwestern Division extends from the northwest coast to the Midwest, with oceanic and estuarine waters along the coasts of Oregon and Washington, to inland wetlands and rivers in Missouri and Nebraska. As another example, the Mississippi Valley Division extends from Louisiana, with its extensive coastal wetlands and bottomland hardwood forests to Minnesota, which has many lakes, bogs, marshes, and swamps. In addition, there are usually also substantial differences in other resources that are subject to regional conditions, to facilitate compliance with other applicable federal laws, such as Section 7 of the Endangered Species Act, the Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act, Section 106 of the National Historic Preservation Act, and the Wild and Scenic Rivers Act. The presence and ranges of endangered and threatened species, and the locations of designated critical habitat often vary substantially within a Corps division. Most coastal Corps districts have essential fish habitat in their geographic areas of responsibility, whereas inland districts do not. Therefore, because of the substantial variation of aquatic resources and other resources both nationally and within Corps divisions, consistency in regional conditions

necessary to ensure that NWPs only authorize activities that have no more than minimal adverse environmental effects cannot be practicably achieved at a national or division level without reducing the availability of NWPs in other areas.

Several commenters requested that the Corps establish a single, national website where all proposed and final regional conditions for the NWPs could be posted, to facilitate public review of the proposed regional conditions. This national website would help awareness of the final regional conditions and help project proponents plan their NWP activities. A few of these commenters also asked that this national website include proposed and final general WQC and general CZMA consistency concurrences for the NWPs.

In response to these comments, we will be posting copies of the district public notices soliciting input for proposed regional conditions in the www.regulations.gov docket for this rulemaking action (docket number COE-2020-0002), under Supporting and Related Material. In addition, when these NWPs are finalized, we will post copies of all district public notices announcing the final regional conditions in the www.regulations.gov docket for this rulemaking action, so that copies of all these district public notices are available in a single location. This docket is intended to provide a central location for interested parties to obtain information on the Corps regional conditions being proposed by Corps districts, and for states where there is a lead Corps district to provide consistency in Corps regional conditions within a state. Comments on proposed Corps regional conditions will still have to be sent to the Corps district identified in the public notice, not to Corps Headquarters.

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 publically available. To further improve the transparency on the regional conditioning process, 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.. We solicit public comment on whether to implement this or a similar requirement relating to the regional conditioning process and any factors we should consider.

When a state, authorized tribe, or EPA issues a WQC for the issuance of an NWP and that WQC includes conditions, those conditions become WQC regional conditions if, after recommendation by the district engineer, the division engineer determines that those conditions are acceptable under 33 CFR 330.4(c)(2). 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, approved tribes, and EPA to issue WQCs for the issuance of the NWPs, and 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 state, tribal, EPA, or Department of Commerce regulations. Individuals who are interested in providing comments specific to WQCs and CZMA consistency determinations for the issuance of NWPs should submit their comments directly to the appropriate state, authorized tribe, or EPA regional office. Because these processes are separate from the Corps' regional conditioning process, the public notices issued by states, authorized tribes, and EPA regions during the WQC and CZMA consistency determination processes will not be included in the national website for proposed and final Corps regional conditions for the NWPs.

When the final WQCs and CZMA consistency concurrences are issued and after the final NWPs are issued, division engineers will review those WQCs and CZMA consistency concurrences in accordance with 33 CFR 330.4(c)(2) and (d)(2), respectively, and determine which conditions are WQC/CZMA regional conditions for the final NWPs. Division engineers will also 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. We will post copies of the district public notices announcing the final Corps regional conditions and final WQC/CZMA regional conditions in the regulations.gov docket (docket number COE-2020-0002), under "Supporting and Related Material." after

A number of commenters said that the only regional conditions that should be approved by division engineers are those permit conditions that are truly necessary to ensure compliance with the statutory requirement that the NWPs may only authorize activities that result in no more than minimal individual and cumulative adverse environmental effects. One commenter said that excessive and unnecessary regional conditions conflict with the goal of the NWP Program to provide timely authorizations while protecting the Nation's aquatic resources. One commenter asserted that Corps Headquarters should provide further guidance on what is appropriate for NWP regional conditions. A few commenters recommended that Corps Headquarters establish a process that requires division engineers to secure Corps Headquarters concurrence before approving NWP regional conditions, and another commenter said that the approving authority for regional conditions should be Headquarters, not the division engineer. A couple of commenters suggested reducing the ability of division and district engineers to exercise discretionary authority to modify, suspend, or revoke the NWPs.

In response to the concerns about overly broad and numerous regional conditions being imposed on the NWPs, Corps Headquarters will encourage that

division engineers approve only those Corps' regional conditions that are necessary to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects. Regional conditions should not be an impediment to fulfilling 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(b).) Division engineers should carefully analyze all proposed Corps regional conditions, as well as additional Corps regional conditions suggested by other agencies and the public, and determine which of those Corps regional conditions are absolutely necessary to ensure that the NWPs in a particular region only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects.

If, during implementation of the NWPs, new information arises that warrants new or modified Corps regional conditions to comply with the no more than minimal adverse environmental effects requirement for NWPs, Corps division engineers may approve new or modified regional conditions after following the procedures in 33 CFR 330.5(c). This includes a public notice and comment process. Information on regional conditions and the suspension or revocation of one or more NWPs in a particular area can be obtained from the appropriate district engineer.

Regarding suggestions that the Corps establish a process that requires division engineers to secure Corps Headquarters concurrence before approving NWP regional conditions, implementing such an approach would require conducting rulemaking to amend the NWP regulations at 33 CFR part 330.Those regulations identify the division engineer as the approving authority for regional conditions. While revising those regulations is outside the scope of this action, the Corps is considering whether to update those regulations. Another commenter said that the approving authority for Corps regional conditions can seek the advice of Corps Headquarters on whether to approve Corps regional conditions, but securing concurrence from Corps Headquarters is not required by the current regulations.

With respect to the WQC/CZMA regional conditions, the Corps has to accept the conditions added to a general WQC by the certifying authority (see 40 CFR 121.7(d)) or added to a general CZMA consistency concurrence by the state agency (see 15 CFR 930.31(d)). unless the division engineer determines that any of those conditions do not comply with the provisions of 33 CFR 325.4 (see 33 CFR 330.4(c)(2) and (d)(2), respectively). Section 325.4 addresses conditions for individual permits and general permits. The WQC and CZMA reviews are separate and independent administrative review processes for the NWPs. Public comments on state, tribal, or EPA WQC conditions that could become WQC regional conditions under 33 CFR 330.4(c)(2) should be sent

directly to the appropriate certifying agency. Public comments on state CZMA consistency concurrence that could become CZMA regional conditions under 33 CFR 330.4(d)(2) should be sent directly to the state. The public should not send comments on proposed WQC/CZMA conditions to the Corps.

If the state, approved tribe, or EPA region issues a conditioned general WQC for the NWPs, the division engineer will review those conditions and make them WQC regional conditions unless he or she determines that those conditions do not comply with the provisions of 33 CFR 325.4 (see 33 CFR 330.4(c)(2)). If the division engineer determines that any of the WQC conditions do not comply with 33 CFR 325.4, he or she will consider WQC to be denied and any project proponent that wants to use the affected NWPs will need to obtain a WQCs or waiver for an activity that may result in a specific discharge or set of discharges that requires NWP authorization. To request WQC, the project proponent will need to submit a certification request that satisfies the requirements of 40 CFR 121.5(b) to the appropriate certifying authority.

If the state issues a conditioned CZMA consistency concurrence for the NWPs, the division engineer will review those conditions and make them CZMA regional conditions unless she or he determines that those conditions do not comply with 33 CFR 325.4 (see 33 CFR 330.4(d)(2)). If the division engineer determines that any of the CZMA general consistency concurrence conditions do not comply with 33 CFR 325.4, he or she will consider CZMA consistency concurrence to be denied and project proponents that want to use the affected NWPs will need to obtain individual CZMA consistency concurrences or presumptions of concurrence in accordance with the applicable procedures in subpart D of 15 CFR part 930 (see 15 CFR 930.31(d)).

After the division engineer reviews the final WQCs and general CZMA consistency concurrences issued by the appropriate authorities for the Corps' issuance of the NWPs, as well as compliance with §325.4 for any conditions added to those final determinations, each Corps district will issue a public notice that announces the availability of WQCs and, if applicable, general CZMA consistency concurrences for the issued NWPs. The public notice will also announce any final WQC/CZMA regional conditions. The final public notices will also announce the final status of water quality certifications and CZMA consistency determinations for the NWPs.

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

Through this proposed rule, the Corps is soliciting comments on whether rulemaking should be done to amend 33 CFR 330.5(c) to clarify and improve the regional conditioning process and what specific revisions the Corps should consider making. For example, are there actions that the Corps should take to improve transparency, clarity, and efficiency of regional conditions and the process by which they are established? Also, should copies of the final WQCs issued by states, tribes and EPA for the issuance of the NWPs, and final general CZMA consistency concurrences issued by states for the issuance of the NWPs also be posted in the www.regulations.gov docket for the issuance or reissuance of NWPs, along with the final Corps regional conditions? Are there other process improvements that the Corps should consider in regards to the regional conditioning process?

II. Summary of Proposal

In this proposed rule, the Corps proposes to reissue the 52 existing NWPs with some modifications and to issue five new NWPs. The new NWPs, if issued, would authorize seaweed mariculture activities, finfish mariculture activities, and electric utility line/telecommunications activities, utility line activities for water and other substances, and discharges associated with water reclamation and reuse facilities.

The proposal to issue two new NWPs for mariculture activities would complement the existing NWP on shellfish mariculture and provide NWP authorization for all three major sectors of mariculture in coastal waters: shellfish, seaweed, and finfish. The proposed NWP for finfish mariculture activities would apply only to offshore finfish mariculture operations in marine and estuarine waters. The proposed NWP for finfish mariculture activities would not authorize the construction of land-based finfish mariculture facilities such as ponds to produce carp and other finfish.

We are proposing to modify NWP 12, which has authorized various types of utility lines since 1977, to limit that NWP to oil and natural gas pipeline activities, and proposing to issue two new NWPs to authorize electric utility line and telecommunications activities and activities for other types of utility lines that are not covered by either the proposed modifications to NWP 12 or the proposed new NWP for electric utility line and telecommunications activities. For the proposed modification of NWP 12 and for the proposed two new NWPs for other types of utility lines, we are inviting comments on national best management practices that could be added as terms to any of these NWPs to help ensure that a particular type of utility line results in no more than minimal individual and cumulative adverse environmental effects. For example, there may be national best management practices used by the oil or natural gas pipeline industries that

could be added to the proposed NWP 12 to address relevant environmental or logistical questions specific to oil or natural gas pipelines, where those pipelines cross waters of the United States. There may be other national best management practices that apply solely to electric utility lines/telecommunications lines that would ensure that electric utility line and telecommunication line crossings of waters of the United States and electric/telecommunication substations constructed in waters of the United States cause no more than minimal adverse environmental effects.

We are proposing to authorize discharges of dredged or fill material into jurisdictional waters for the construction, expansion, and maintenance of water reuse and reclamation facilities. At present, many of these activities are already authorized by NWPs 39, 39, 40, and 42. However, we are proposing the new NWP since having the requirements in a single place may add needed clarity and simplify the application process. We are inviting comment on whether to issue an NWP to authorize discharges of dredged or fill material into waters of the United States for the construction and expansion of water reclamation and reuse facilities. Alternatively, we are inviting comment on whether we should continue to authorize those activities as attendant features of activities authorized by NWPs 29, 39, 40, and 42.

We are proposing to revise the text of some of the NWPs, general conditions, and definitions so that they are clearer and can be more easily understood by the regulated public, government personnel, and interested parties while retaining terms and conditions that help protect the aquatic environment. Making the text of the NWPs clearer and easier to understand will also facilitate compliance with these permits, which will benefit the aquatic environment. The NWP program allows the Corps to authorize activities with only minimal adverse environmental impacts in a timely manner. Thus, the Corps is able to better protect the aquatic environment by focusing its limited resources on more extensive evaluations through the individual permit process, to provide more rigorous evaluation of activities that have the potential for causing more severe adverse environmental effects.

Through the NWPs, the aquatic environment may also receive additional protection through regional conditions imposed by division engineers and activity-specific conditions added to NWPs by district engineers. These regional conditions and activity-specific conditions further minimize adverse environmental effects, because these conditions can only further restrict use of the NWPs. Nationwide permits also allow Corps district engineers to exercise, on a case-by-case basis, discretionary authority to require individual permits for proposed activities that may result in more than minimal individual and cumulative adverse environmental effects. Nationwide permits help protect the aquatic environment because they provide incentives to permit applicants to

reduce impacts to jurisdictional waters and wetlands to meet the restrictive requirements of the NWPs and receive authorization more quickly than they would through the individual permit process. Regional general permits issued by district engineers provide similar environmental protections and incentives to project proponents.

We are proposing to reissue the general conditions, with some modifications. We are soliciting comment on all changes to the nationwide permits, general conditions, and definitions discussed below. Minor grammatical changes, the removal of redundant language, and other small administrative changes are not discussed in the preamble below. Therefore, commenters should carefully read each proposed NWP, general condition, and definition in this notice.

A. Proposed Removal of the 300 Linear Foot Limit for Losses of Stream Bed

In accordance with the recommendations in the report we issued in response to E.O. 13783 on ways to streamline the NWPs, we are proposing to remove the 300 linear foot limit for losses of stream bed from the NWPs 21 (Surface Coal Mining Activities), 39 (Commercial and Institutional Developments), 50 (Underground Coal Mining Activities), 51 (Land-Based Renewable Energy Generation Facilities), and 52 (Water-Based Renewable Energy Generation Pilot Projects) and to instead rely on the 1/2-acre limit and PCN requirements to ensure that activities authorized by these NWPs result in no more than minimal adverse environmental effects. To provide consistency in the NWP Program, we are also proposing to remove the 300 linear foot limit for losses of stream bed from NWPs not mentioned in the report that also have that limit (i.e., NWPs 29 (Residential Developments), 40 (Agricultural Activities), 42 (Recreational Facilities), 43 (Stormwater Management Facilities), and 44 (Mining Activities)) and to similarly rely on the 1/2-acre limit and PCN requirements. The text of the proposed NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 are provided near the end of this proposed rule document, and the 300 linear foot limit has been removed from the text of these proposed NWPs.

In conjunction with the proposal to remove the 300 linear foot limit for losses of stream bed, we are also proposing 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 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 streams are categorically excluded from jurisdiction under the Clean Water Act. 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 II.C, for more discussion on the potential impact of the Navigable Water Protection Rule on the NWPs.

In addition, we are proposing 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 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." 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.

Under the current NWPs, the Corps uses a variety of approaches to quantify losses of stream beds and assessing impacts to those stream beds. Losses of stream bed can be quantified in acres or linear feet, and for some NWPs, discharges of dredged or fill material into stream beds may be quantified in cubic yards. For NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52, the loss of stream bed, plus any other losses of waters of the United States, cannot exceed 1/2-acre. Nationwide permits 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 also currently have 300 linear foot limits for losses of stream bed, and the district engineer has the authority to waive the 300 linear foot limit for losses of intermittent stream bed, when, after reviewing the PCN and conducting agency coordination under paragraph (d) of general condition 32, he or she issues a written determination that the NWP activity would result in no more than minimal individual and cumulative adverse environmental effects. The district engineer cannot issue a waiver authorizing the loss of greater than 1/2-acre of stream bed or other waters of the United States. Therefore, when determining whether to

issue a waiver of the 300 linear foot limit for losses of intermittent stream bed, the district engineer must also calculate the acreage of stream bed that would be lost as a result of the proposed NWP activity, to ensure that the loss of stream bed, plus any other losses of waters of the United States, does not exceed 1/2-acre.

Many of the NWPs have quantitative limits to constrain the quantity of waters of the United States that may be lost as a result of an NWP activity to help ensure that the authorized NWP activity results in no more than minimal individual and cumulative adverse environmental effects. Numeric limits provide predictability and transparency to the regulated public through clear limits for NWP activities. Proposed activities that exceed those limits require authorization by individual permits. The quantitative limits help prospective permittees plan and design regulated activities to qualify for NWP authorization. The numeric limits of NWPs are established at a national level to authorize most activities that are expected to result in adverse environmental effects that are no more than minimal, individually and cumulatively. Division engineers may add regional conditions to an NWP to reduce the quantitative limit or limits to ensure that use of that NWP in a particular geographic region results in activities that have no more than minimal individual and cumulative adverse environmental effects.

The numeric limits of NWPs may be quantified as acres, linear feet, or cubic yards. The appropriate unit of measure for a quantitative limit for an NWP is dependent on the type of activity being authorized by the NWP and the potential types of direct impacts authorized activities may have on jurisdictional waters and wetlands. For example, some NWP activities have quantitative limits based on acres, because the discharge of dredged or fill material into jurisdictional waters or wetlands is placed in those waters generally converts an aquatic area to dry land (e.g., for constructing a building pad or road, or growing crops). An area-based numeric limit may also be appropriate for NWP activities that raise the bottom elevation of the waterbody (e.g., to construct a boat ramp to safely launch boats). Some NWPs have cubic yard limits, such as NWP 19 for minor dredging activities, because the authorized activity removes a volume of sediment from a waterbody, and the area directly affected by the removal of a volume of material may vary depending on how that activity is conducted. Some NWPs have linear foot limits to constrain the length of the authorized activity along a shoreline or river bank (e.g., the 500 linear foot limit for bank stabilization activities authorized by NWP 13) or the encroachment of structures or fills into navigable waters (e.g., the 30 foot limit from the mean low water line in tidal waters for the construction of living shorelines authorized by NWP 54).

The severity of impacts to stream beds caused by discharges of dredged or fill material authorized by NWPs can be evaluated through the use of rapid assessment tools, such as functional or condition assessments. The Corps' regulations at 33 CFR 332.2 define "functions" as "the physical, chemical, and

biological processes that occur in ecosystems." A functional assessment evaluates the relative degree to which a stream or other aquatic resource performs various physical, chemical, and biological processes. A condition assessment evaluates the relative ability of a stream or other type of aquatic resource to support and maintain a community of organisms having a species composition, diversity, and functional organization comparable to reference aquatic resources in the region (see the definition of "condition" at 33 CFR 332.2). Functional or condition assessments generally use indicators that can be observed through site visits or remote sensing (Stein et al. 2009). Indicators are observable characteristics that correspond to identifiable variable conditions in a wetland, stream, or other aquatic resource type, or the surrounding landscape (Smith et al. 1995). Indicators have to be sensitive to changes in function or condition to provide meaningful results that can be used for management decisions, such as evaluating the severity of impacts to aquatic resources or determining improvements in aquatic resource function or condition for compensatory mitigation credits produced by mitigation banks, in-lieu fee projects, or permittee-responsible mitigation.

For functional assessments, indicators are used to estimate the degree to which a particular function is performed by an aquatic resource relative to reference aquatic resources in the region. Indicators are also used to evaluate aquatic resource condition, which is also assessed relative to reference aquatic resources in the region. The indicators used for functional or condition assessments are generally not dependent on a particular quantitative metric, such as acres or linear feet, since most indicators are physical attributes that can be readily identified through either field visits or remote sensing. These indicators are usually evaluated qualitatively when the rapid assessment tool is being used by Corps district staff or a consultant. Functional or condition assessments can be used by district engineers to assist in determining whether a proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects (see paragraph 2 of Section D, District Engineer's Decision).

Compensatory mitigation may be required to offset losses of waters of the United States authorized by DA permits, including the NWPs. The Corps' regulations at 33 CFR part 332 address compensatory mitigation requirements for DA permits, and how compensatory mitigation credits can be quantified. Section 332.3(f) addresses the amount of compensatory mitigation to be required for DA permits. Section 332.3(f)(1) states that the amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions. Paragraph (f)(1) of that section also says that when appropriate functional or condition assessment methods or other suitable metrics are available, these methods should be used where practicable to determine how much compensatory mitigation should be required for the

individual permit or general permit. If a functional or condition assessment or other suitable metric is not used, §332.3(f)(1) states that a minimum one-to-one acreage or linear foot compensation ratio must be used. Section 332.3(f) does not require any particular metric to be used for quantifying impacts to stream bed or quantifying compensatory mitigation credits produced by stream compensatory mitigation projects, if a functional or condition assessment is not used to quantify authorized impacts or required compensatory mitigation. In other words, the current rule text provides flexibility to district engineers to determine appropriate metrics for quantifying permitted impacts and compensatory mitigation requirements.

Sections 332.8(o)(1) and (2) of the Corps' compensatory mitigation regulations address units of measure and the use of assessment methods, respectively, for mitigation bank credits and in-lieu fee program credits, and the debits (impacts) those credits are intended to offset. The term "credit" is defined at 33 CFR 332.2 as "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." The term "debit" is defined at 33 CFR 332.2 as "a unit of measure (e.g., a functional or areal measure or other suitable metric) representing the loss of aquatic functions at an impact or project site." The definition of "credit" also states that the "measure of aquatic functions is based on the resources impacted by the authorized activity."

Furthermore, §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, and that functional assessment units or other suitable metrics may be linked to acres or linear feet. This section does not require the use of a particular metric or unit of measure for wetland or stream credits or debits. For streams, the preamble to the 2008 mitigation rule states that compensatory mitigation credits can be quantified using linear feet, area, or other appropriate units of measure (73 FR 19633) when functional or condition assessments are not available or are not practicable to use. Regarding the use of assessment tools to calculate credits and debits, section 332.8(o)(2) states that where practicable, an appropriate assessment method or other suitable metric must be used to assess and describe the aquatic resource types that will be restored, established, enhanced and/or preserved by the mitigation bank or in-lieu fee project. Section 332.8(o)(2) does not require the use of a particular assessment method or metric for wetlands, streams, or any other category of waters.

The quantitative limits for the NWPs and the methods and metrics used to quantify credits and debits for the purposes of compensatory mitigation serve different purposes. The quantitative limits for the NWPs provide a clear ceiling on the impacts authorized by an NWP; impacts that exceed the quantitative limits of

the NWPs usually require individual permits. Quantitative limits for the NWPs also provide predictability and transparency to the regulated public, are often used by project proponents to design their activities to quality for NWP authorization. The metrics used to quantify the values of compensatory mitigation credits and debits are used to ensure that the amount of compensatory mitigation credits required by the district engineer are sufficient to replace lost aquatic resource functions (33 CFR 332.3(f)(1)). In circumstances where an appropriate and practicable functional or condition assessment method cannot be used, or is unavailable for use, acres, linear feet, or other suitable metrics may be used to quantify compensatory mitigation credits, as a surrogate representing the accrual of aquatic resource functions at a compensatory mitigation project. The Corps' regulations at 33 CFR part 332 do not identify specific credit or debit metrics that must be used for specific categories of aquatic resources, such as wetlands, streams, or submerged aquatic vegetation beds. There is substantial flexibility in the regulations in determining appropriate metrics for credits or debits for specific categories of aquatic resources.

Functional or condition assessments may be used by district engineers to help determine whether proposed NWP activities will result in no more than minimal individual and cumulative adverse environmental effects (see paragraph 2 of Section D, District Engineer's Decision). However, there are no national assessment tools available that can be used in place of acreage or other quantitative limits for the NWPs. Assessment tools have to be developed on a regional basis because these tools need to be developed for a geographic area that is relatively homogenous in terms of geomorphology, soils, climate, geology, physiography, and other factors that can influence how wetlands, streams, or other categories of waters function (Smith et al. 2013), so that differences in aquatic functions or condition due to human activities rather than regional influences can be ascertained. There are insufficient numbers of regional functional or condition assessments to assist district engineers in determining whether proposed NWP activities will result in no more than minimal individual and cumulative adverse environmental effects. Therefore, the use of functional and condition assessments to help inform the district engineer's decision is on a limited case-by-case basis. For a national level program such as the Corps' NWP Program, quantitative limits such as the 1/2-acre limit are the only practicable, national-scale option for drawing a clear line between the activities that potentially qualify for NWP authorization and the activities that will require individual permits.

In this section, we present a number of reasons for these proposed changes to NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. Our rationale comprises six categories of considerations: (1) the Corps employs a number of tools in the NWP Program to ensure that NWP activities result only in no more than minimal individual and cumulative adverse environmental effects; (2) using

acres or square feet 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; (3) 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., wetlands, streams, ponds, and other non-tidal waters), and (4) 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 wetlands, streams, and other types of non-tidal waters, and NWP authorization for losses of stream bed that have no more than minimal individual and cumulative adverse environmental effects. These reasons are discussed in further detail below.

(1) Several tools are used to comply with the requirements of section 404(e) of the Clean Water Act. The first reason for our proposed changes is that 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. When Section 404 of the Federal Water Pollution Control Act (33 U.S.C. § 1344) was amended in 1977 to add section 404(e), the statutory text did not provide any direction on how general permits, including NWPs, are to achieve compliance with the requirement that general permits will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Therefore, section 404(e) gives the Corps substantial discretion in developing and implementing the NWPs and other general permits to comply with the requirements in that provision of the Clean Water Act. This discretion extends to the tools the Corps uses to ensure that the NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects.

The first NWPs were issued on July 19, 1977 (42 FR 37122), before the Clean Water Act was amended on December 27, 1977, to add section 404(e). During subsequent reissuances of the NWPs, the Corps developed a variety of tools to comply with the statutory requirement that NWPs may authorize only categories of activities that have no more than minimal individual and cumulative adverse environmental effects. Those tools included acreage and other numeric limits on the losses of waters of the United States that could be authorized by NWP, qualitative terms of the NWPs that limit the types of activities authorized by NWP or limit the types of waters in which the NWP could be used to authorize regulated activities, the pre-construction notification process, the requirements of the “Mitigation” general condition for the NWPs, the ability of division engineers to modify, suspend, or revoke NWPs on a regional basis (33 CFR 330.5(c)), and the ability of district engineers to modify, suspend, or revoke NWP authorizations for specific activities (33 CFR 330.5(d)).

An example of the numeric limits on losses of waters of the United States authorized by NWPs include the 1/2-acre limit in NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. We are proposing to retain this limit for these NWPs. Another example of a numeric limit is the volume of dredged or fill material that can be discharged into waters of the United States, such as the 25 cubic yard limit in NWP 18. An example of qualitative terms of the NWPs that limit the types of activities authorized by NWP is the term for NWP 10, which authorizes the installation of non-commercial, single-boat mooring buoys. An example of a qualitative term that limits the types of waters in which an NWP may be used to authorize regulated activities is the term in NWP 29 that prohibits the use of that NWP to authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

The PCN process is a critical tool, because it provides flexibility for district engineers to take into account the activity-specific impacts of the proposed activity and the effects those activities will have on the specific waters and wetlands affected by the NWP activity. It also allows the district engineer to take into account to what degree the waters and wetlands perform functions, such as hydrologic, biogeochemical cycling, and habitat functions, and to what degree those functions will be lost as a result of the regulated activity. If the district engineer reviews the proposed activity, and after considering mitigation proposed by the applicant determines that the proposed activity will have more than minimal adverse environmental effects, he or she will exercise discretionary authority and require an individual permit for that activity unless it can be authorized by a regional general permit. Except for NWP 51, all of the NWPs with the 300 linear foot limit for losses of stream bed require pre-construction notification for all authorized activities. Nationwide permit 51 requires pre-construction notification for losses of greater than 1/10-acre of waters of the United States.

The PCN process was first adopted in the NWP Program in 1982. A form of pre-construction notification was required for NWP 21, which authorized discharges of dredged or fill material into waters of the United States associated with surface coal mining activities (see 47 FR 31833). The project proponent could not proceed with the proposed discharges into waters of the United States until she or he obtained confirmation from the district engineer that the activity was authorized by NWP 21. The 1982 NWP 21 required the prospective permittee to obtain, before commencing the proposed activity, a determination from the district engineer that the proposed activity would have ”minimal individual and cumulative adverse effects on the environment.” This advance review would “afford the district engineer the opportunity to insure that the activity needing a Corps permit would have minimal impacts and thus qualify for the

nationwide permit." (See 47 FR 31799.) None of the other NWPs issued in 1982 had PCN requirements.

With subsequent reissuances of the NWPs, more NWPs required PCNs for some or all proposed activities. The first regulations for notification procedures for the NWP program were added to the Corps' regulations in 1984 (see 49 FR 39484), when the Corps added 33 CFR 330.7 to provide regulatory text for the pre-discharge notification procedures for NWP 7 (outfall structures and associated intake structures), NWP 17 (small hydropower projects), NWP 21 (surface coal mining activities), and NWP 26. (In the 1996 NWPs (see 61 FR 65909), the Corps changed the term "pre-discharge notification" to "pre-construction notification" because some NWPs require pre-construction notification for structures or work in navigable waters of the United States that require authorization under Section 10 of the Rivers and Harbors Act of 1899.) Nationwide permit 26 was issued in that final rule to authorize discharges of dredged or fill material into: (a) non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, located above the headwaters, and (b) non-tidal waters and adjacent wetlands that are not part of a tributary system to interstate waters or navigable waters. The notification procedures established in 1982 required the project proponent to wait 20 days for a response from the district or division engineer before proceeding with the proposed activity. The district engineer was required to review all pre-construction notifications, and could refer certain pre-construction notifications to the division engineer for review. The division engineer had the authority to exercise discretionary authority and require an individual permit for a proposed activity.

In the 1986 NWPs, the pre-construction notification requirement continued to apply to NWPs 7, 17, 21, and 26 (see 51 FR 41258). In the 1991 NWPs (56 FR 59110), the Corps amended its NWP regulations at 33 CFR part 330, including the procedures that applied to pre-construction notifications. The Corps also changed its regulations regarding discretionary authority, that is the division and district engineer's authorities to modify, suspend, or revoke NWP authorizations on a regional or activity-specific basis (see 33 CFR 330.1(d), 330.4(e), and 330.5(c) and (d)). The Corps retained the PCN requirements for NWPs 7, 17, 21, and 26. The Corps also added PCN requirements to the following existing and new NWPs: NWP 13 (bank stabilization), NWP 14 (road crossing), NWP 18 (minor discharges), NWP 22 (removal of vessels), NWP 33 (temporary construction, access, and dewatering), NWP 34 (cranberry production activities), NWP 37 (emergency watershed protection and rehabilitation), and NWP 38 (cleanup of hazardous and toxic waste). In the NWP regulations issued in 1991, the PCN review period was increased from 20 days to 30 days (33 CFR 330.1(e)(1), as published in the Federal Register on November 22, 1991 (56 FR 59135)).

In the 1996 NWPs, the PCN review period for NWP 26 was increased to 45-days (see paragraph (a)(3) of the 1996 "Notification" general condition (61 FR 65920)). The other NWPs that required PCNs for some or all proposed activities retained a 30-day review period for the district engineer's review of PCNs. For the 1996 NWPs, PCNs were required for the following new and existing NWPs: NWP 5 (scientific measuring devices), NWP 7 (outfall structures), NWP 8 (oil and gas structures), NWP 12 (utility line discharges), NWP 13 (bank stabilization), NWP 14 (road crossings), NWP 17 (hydropower projects), NWP 18 (minor discharges), NWP 21 (surface coal mining activities), NWP 22 (removal of vessels), NWP 26 (headwaters and isolated waters discharges), NWP 27 (wetland and riparian restoration and creation activities), NWP 29 (single family housing), NWP 31 (maintenance of existing flood control facilities), NWP 33 (temporary construction, access, and dewatering), NWP 34 (cranberry production activities), NWP 37 (emergency watershed protection and rehabilitation), NWP 38 (cleanup of hazardous and toxic waste), and NWP 40 (farm buildings).

In the 2000 NWPs, the PCN review period in the "Notification" general condition was increased to 45-days for all NWPs that required PCNs (see 65 FR 12894). In a final rule published in the Federal Register on January 29, 2013 (78 FR 5733), 33 CFR part 330, including section 330.1(e)(1), was amended to change the 30-day PCN review period to 45 days, consistent with the current NWPs and general condition 32 (pre-construction notification).

The 2002 NWPs (67 FR 2020), 2007 NWPs (72 FR 11092), 2012 NWPs (77 FR 10184), and 2017 NWPs (82 FR 1860) retained the 45-day PCN review period. Since the PCN process was added to the NWP program in 1982 and expanded to other new and existing NWPs during subsequent reissuances of the NWPs, it has been successful in helping to ensure that the NWPs comply with the requirements of Section 404(e) of the Clean Water Act, specifically that the NWP can authorize only those activities that result in no more than minimal individual and cumulative environmental effects. As the NWP program has expanded over the past 38 years, the PCN process has provided a mechanism where district engineers are given the opportunity to review certain proposed NWP activities before they take place, to determine whether the proposed activities will result in no more than minimal individual and cumulative adverse environmental effects. The PCN process also gives the district engineer the opportunity to add activity-specific conditions to the NWP authorization, including mitigation requirements, to comply with the "no more than minimal individual and cumulative adverse environmental effects" requirement. When a district engineer reviews a PCN for a proposed activity, and determines that the activity is likely to result in more than minimal adverse environmental effects after considering a mitigation proposal submitted by the applicant (see 33 CFR 330.1(e)(3), he or she may exercise discretionary authority and require an individual permit for the proposed activity. The PCN process provides flexibility in the NWP program by

requiring case-specific review of certain proposed activities, and authorizing those activities (with or without special conditions) instead of requiring individual permits. By using NWPs to authorize activities that have no more than minimal adverse effects, the Corps can focus a greater proportion of its finite resources on evaluating individual permit applications.

Under the current and past NWPs, the Corps has authorized tens of thousands of activities each year. Over the years, Corps districts have reviewed hundreds of thousands of NWP PCNs and issued hundreds of thousands of NWP verification letters in response to those PCNs. In litigation that has arisen from time to time challenging NWP verifications issued in response to PCNs, federal courts have generally upheld such verifications as consistent with the Clean Water Act and otherwise applicable law (e.g., Snoqualmie Valley Preservation v. USACE, 683 F.3d 1155 (9th Cir. 2012); Sierra Club v. Bostick, 787 F.3d 1043 (10th Cir. 2015); Sierra Club v. U.S. Army Corps of Engineers, 803 F.3d 31 (D.C. Cir. 2015)). The continued operation of the NWP Program, and its reliance on the PCN process over the past 38 years to ensure that activities authorized by NWPs result in no more than minimal individual and cumulative adverse environmental effects, demonstrates the importance and success of the PCN process as a tool to efficiently authorize activities that require authorization under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899.

The mitigation requirements in the NWPs are another tool to comply with the requirements of Section 404(e) of the Clean Water Act. During the PCN review process, district engineers will evaluate compliance with the mitigation requirements for the NWPs in the “Mitigation” general condition (general condition 23 in this proposal). Paragraph (a) of the “Mitigation” general condition 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). Under this general condition and 33 CFR 330.1(e)(3), the district engineer may require additional mitigation, including compensatory mitigation, so that the authorized work has no more than minimal individual and cumulative adverse environmental effects.

Regional conditions are another tool to ensure that activities authorized by NWPs result in no more than minimal individual and cumulative adverse environmental effects. Under 33 CFR 330.5(c), division engineers have the authority to assert discretionary authority to modify, suspend, or revoke NWP authorizations for a specific geographic area, class of activity, or class of waters within his or her division, including on a statewide basis. If the 300 linear foot limit for losses of stream bed is removed from these NWPs, division engineers can impose regional conditions to put a smaller acreage limit on losses of stream

bed, if such a lower limit is needed to satisfy the requirement that NWPs may authorize only activities that have no more than minimal individual and cumulative adverse environmental effects.

Activity-specific permit conditions may be imposed by district engineers during the review of an NWP PCN to comply with the no more than minimal adverse environmental effects requirements for the NWPs. Under 33 CFR 330.4(e)(2), a district engineer has the authority to exercise discretionary authority for a proposed NWP activity whenever he or she determines that the proposed activity would have more than minimal individual or cumulative adverse effects on the environment or otherwise may be contrary to the public interest. Prior to requiring another form of DA authorization for the proposed activity, the district engineer may provide the applicant with the opportunity to propose mitigation to reduce the adverse environmental effects so that they are no more than minimal. If such mitigation is necessary to qualify for NWP authorization, the district engineer will add conditions to the NWP authorization to require those mitigation measures, which may include compensatory mitigation, to ensure that the NWP activity results in no more than minimal individual and cumulative adverse environmental effects.

We are proposing to replace the 300 linear foot limit for losses of stream bed with a different tool to encourage minimization of losses of stream bed and comply with the requirements of section 404(e) of the Clean Water Act. Since 2007, the NWPs have had a 1/10-acre threshold for requiring wetland compensatory mitigation for NWP activities that require PCNs (see 72 FR 11195). This compensatory mitigation threshold has been an important tool for driving avoidance and minimization of wetland impacts.

The 1/10-acre threshold for requiring wetlands compensatory mitigation has been an effective tool for minimizing wetland losses authorized by NWPs. In the “Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources” published by the Corps’ Institute of Water Resources in 2015 (Report 2015-R-03), an analysis of the Corps’ permit data from 2010 to 2014 demonstrated that a substantial majority of fill impacts authorized by NWPs and other general permits were less than 1/10-acre in size (see Figure 5 of that report). These authorized fill impacts were for wetlands, streams, and other waters. Project proponents likely designed their projects to minimize losses of jurisdictional waters and wetlands to qualify for general permit authorization and avoid the cost of providing compensatory mitigation to offset the authorized losses. We believe that adding a compensatory mitigation requirement for losses of greater than 1/10-acre of stream bed can be equally effective in minimizing losses of stream bed under the NWP authorization process.

More recent (FY 2018) permit data demonstrate that this minimization has continued in the 2017 NWPs. According to Figure 5.1 of the draft Regulatory Impact Analysis, which is provided in the docket for this proposed rule (docket number COE-2020-0002) as supplementary information for this proposed rule, 82 percent of all of the verified NWP impacts involving discharges of dredged or fill material into waters of the United States were less than 1/10-acre.

To apply this mitigation tool to the NWPs, we are proposing to modify paragraph (d) of the "Mitigation" general condition to require compensatory mitigation for losses of greater than 1/10-acre of stream bed that require pre-construction notification. This proposed modification is similar to the wetland compensatory mitigation provision in paragraph (c) of the "Mitigation" general condition. Consistent with the current paragraph (c), which we are not proposing to change, the proposed modifications to paragraph (d) would give the district engineer the discretion to waive the requirement to provide compensatory mitigation for losses of greater than 1/10-acre of stream bed if she or he makes a written determination that some other form of mitigation would be more environmentally appropriate. The district engineer may also waive the compensatory mitigation requirement if he or she determines that the adverse environmental effects of the proposed activity are no more than minimal without compensatory mitigation, and issues an activity-specific waiver of the compensatory mitigation requirement. We believe the proposed addition of a 1/10-acre threshold for requiring stream compensatory mitigation will have a similar effect of encouraging minimization of stream bed impacts authorized by NWPs, including NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52.

(2) More accurate quantification of losses authorized by NWPs. Another reason for these proposed changes is that quantifying losses of stream bed in acres to count towards the 1/2-acre limit most accurately represents the amount of stream bed lost as a result of filling or excavation, and the subsequent functions that are expected to be lost. Using linear feet to quantify stream impacts and stream compensatory mitigation credits does not take into account the scale of the stream reach being impacted by an authorized activity or restored for compensatory mitigation (Doyle et al. 2015, Lave 2014). Accurately quantifying the amount of stream bed lost, and the degree to which those functions are lost (e.g., total versus partial loss, permanent versus temporary loss), informs the minimal adverse effects determinations made by district engineers.

Within a watershed, the sizes and channel morphologies (shapes) of river and stream channels throughout the tributary network vary significantly, from the headwaters to where the mouth of the river drains into the ocean, lake, or other body of water. As one moves from the headwaters to stream and river channels further down in the watershed, stream and river channels get progressively larger

to accommodate the increasing amount of water that is transported by the tributary network (Leopold 1994). Downing et al. (2012) examined the mean width of streams in various locations in the tributary network, using the Strahler (1957) classification system for stream order. A headwater stream at the top of the stream network is a 1st order stream under the Strahler (1957) classification system. The stream order number increases as tributaries join together further down in the watershed. For example, the Ohio River is an 8th order stream. The largest river in the United States, the Mississippi River, is a 10th order stream.

According to Downing et al. (2012), the mean width of a first order headwater stream is 6.3 feet. The mean width of a third order stream is 25 feet, and the mean width of a fifth order stream is 240 feet. An eighth order stream has a mean width of 1,688 feet and a tenth order stream has a mean width of 3,392 feet. Because of this substantial variation in stream width throughout a tributary network, using linear feet to quantify stream impacts does not accurately reflect the amount of stream bed filled, excavated, or otherwise directly affected by construction activities, dredging activities, and other activities that can physically alter river and stream beds, as well as their banks. If all rivers and streams had relatively uniform width, then linear feet could be an accurate method for quantifying stream bed impacts. For example, if the activities authorized by NWPs or other types of DA permits were limited to headwater streams, then linear feet could be an effective way to quantify stream bed impacts to inform permit decisions by district engineers. However, NWPs and other DA permits authorize activities throughout the stream network, and quantifying those impacts accurately is important for making permit decisions. In this section, we discuss our proposal to quantify losses of stream bed authorized by NWP in acres.

BenDor and others (2009) examined the spatial distribution of stream impacts authorized by DA permits in North Carolina. They found that stream impacts occurred throughout a watershed, but were concentrated in urban and suburban areas where development activities are occurring. In urban and suburban areas, stream impacts are not limited to headwater streams and they observed that the restoration of headwater streams was often used to provide compensatory mitigation to offset impacts to streams of various sizes (BenDor et al. 2009).

Losses of stream bed authorized by NWPs and other DA permits can occur in a proportion of the stream bed (e.g., bank stabilization where the loss of stream bed occurs near the bank while the remainder of the stream bed along the affected stream reach is not filled or excavated). Losses of stream bed authorized by NWPs and other DA permits can also occur to the entire stream bed within the affected stream reach, such as piping and filling the stream to create land to build upon. When the loss of stream bed is quantified using the

area of stream bed filled or excavated, the verified impacts reflect whether only a portion of the stream bed was filled or excavated, or whether the entire stream bed along that stream reach was filled or excavated. In contrast, when the loss of stream bed is quantified in linear feet, the verified impacts do not distinguish between partial or complete filling or excavation of the stream bed along the affected stream reach. The uncertainty associated with using linear feet to quantify losses of stream bed makes it more challenging for district engineers to make consistent, transparent, and defensible NWP verification decisions.

In Section D of the 2012 NWPs (see 77 FR 10287), District Engineer's Decision, we added a list of nine factors district engineers should consider when evaluating PCNs to determine whether a proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects. In the 2017 NWPs (see 82 FR 2005), we added a tenth factor for the district engineer to consider when making his or her decision for an NWP PCN. The ten factors in paragraph 2 of Section D, "District Engineer's Decision," 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 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.

In the "District Engineer's Decision" section of the NWPs, we also stated that if an appropriate functional 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.

Three of the 10 factors in paragraph 2 of the "District Engineer's Decision" section relate to the impacts the proposed NWP activity would have on aquatic resource functions: (1) the functions provided by the aquatic resources that will be affected by the NWP activity, (2) the degree or magnitude to which the aquatic

resources perform those functions, and (3) the extent that aquatic resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss). To assist in applying these factors, it is important to accurately quantify the proposed impacts, because the amount of aquatic resources affected by the proposed NWP activity is often used as a surrogate for the aquatic resource functions affected by that activity. In the absence of an appropriate functional or condition assessment for streams, the amount of stream bed filled or excavated can be a surrogate for the stream functions lost as a result of the permitted activity. It may not be practicable to apply a functional or condition assessment to a proposed NWP activity (if an appropriate functional or condition assessment is available) within the timeframes of the PCN review process.

Currently, NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 can be used to authorize discharges of dredged or fill material into all non-tidal rivers and streams throughout a watershed. For the reasons discussed in this section, and for effective and more defensible implementation of the NWP program, we believe that stream bed losses authorized by NWPs should be quantified in acres, not linear feet, when a functional or condition assessment is not available or not practicable to use.

Losses of stream bed authorized by NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 can occur along a couple of continuums: (1) the proportion of the river or stream reach is impacted by the NWP activity (e.g., from a small partial loss along a stream bank to a complete filling or excavation of the river or stream bed) and (2) the range of non-tidal river and stream sizes within a watershed. Quantifying losses of stream bed via linear feet does not provide any ability to differentiate the amount of stream bed lost along these two continuums.

With respect to the first continuum, some activities authorized by NWP may only fill or excavate stream bed next to the stream bank while the remaining stream bed along that stream reach is not filled or excavated. Other activities authorized by NWP may fill or excavate the entire stream bed along the affected stream reach. When only a portion of the stream bed is filled or excavated, the portion of the stream bed that is not filled or excavated can continue performing its physical, chemical, and biological processes. In situations where only a portion of the stream bed is filled, there will likely be only a partial loss of stream functions because the areas of stream bed near the authorized activity that have not been filled will continue to provide some degree of stream functions. For example, a bank stabilization activity along a river bank will fill only a portion of the stream bed up to the ordinary high water mark and the river will continue to flow past the stabilized bank, whereas filling the entire stream bed often results in a complete loss of stream functions. Using linear feet to quantify the impacts of these two different types of impacts does not distinguish between the substantially different effects on stream functions in the two different scenarios ,

whether those effects are no more than minimal and thus qualify for NWP authorization, or if the effects are more than minimal and require individual permits.

When assessing the impacts of NWP activities on rivers and streams, it is important to consider the relative extent of the filling or excavation of the stream bed. When using linear feet to quantify stream impacts, the filling or excavation of 100 feet of a small headwater stream has the same value as the filling or excavation of 100 feet of a larger stream in the middle of the stream network within watershed (e.g., a 4th order stream under the Strahler (1957) classification method), even though the actual amount of stream bed filled or excavated is substantially larger for the 4th order stream than for the headwater stream. Therefore, quantifying impacts in linear feet does not always accurately represent the actual amount of stream bed filled or excavated because it does not take into account the width of the stream bed filled or excavated. Furthermore, quantifying stream bed losses in linear feet is not an effective surrogate for quantifying the amount of stream functions lost because of a permitted activity. In-stream ecological functions occur over the area of stream bed present within a stream reach.

Regarding the second continuum, within a watershed, streams can vary substantially in size, depending on stream order under the Strahler (1957) classification system. In addition, stream reaches can vary in the functions they provide, depending on their location in the stream network or in the watershed and other factors. Headwater streams, mid-watershed streams, and lowland streams exhibit different structure, functions, and dynamics. Impacts to streams of different stream orders for the same amount of linear foot impact can have substantially different outcomes in terms of the acres or square feet of stream bed actually filled or excavated, and the amount of aquatic resource functions that may be lost as a result of the permitted activity. In general, headwater streams are 1st and 2nd order streams under the Strahler (1957) stream classification system. In their global examination of the abundance and size distribution of streams, Downing et al. (2012) found that the mean widths of 1st and 2nd order streams are 6.2 feet and 8.5 feet, respectively. Moving down a watershed from headwater streams to mid-watershed streams and lowland streams, mean stream width (and the size of the river or stream bed) increases substantially. According to Downing et al. (2012), a 3rd order stream has a mean width of 24.6 feet, a 4th order stream has a mean width of 90.2 feet, and a 5th order stream has a mean width of 238.5 feet.

For example, under the current 300 linear foot limit for losses of stream bed, the quantity of stream bed filled or excavated and the subsequent loss of stream functions is likely to vary substantially by stream order, if all other factors are considered equal. Using the mean stream widths found by Downing et al.

(2012), filling or excavating 300 linear feet of a 1st order headwater stream with an average width of 6 feet results in the loss of 1,800 square feet (0.04 acre) of stream bed and the associated functions it provides. For a typical 2nd order stream, which has an average width of 9 feet, filling or excavating 300 linear feet of that stream bed would result in the loss of 2,700 square feet (0.06 acre) of stream bed. Filling or excavating 300 linear feet of a 3rd order stream, which has an average width of 25 feet, would result in a loss of 7,500 square feet of stream bed (0.17 acre). Filling or excavating 300 linear feet of a 4th order mid-watershed stream with an average width of 90 feet results in the loss of 27,000 square feet (0.62 acre) of stream bed. (The latter example is provided for illustrative purposes even though it could not be authorized by any of these NWPs because the loss of waters of the United States would exceed 1/2-acre.)

These examples demonstrate the potentially large range of impacts to streams that can occur for a specific number of linear feet of stream bed impacted, compared with the number of square feet of stream bed impacted. In other words, there can be large differences in losses of stream bed that can result from filling or excavating 300 linear feet of stream bed in different stream orders within a stream network within a watershed. To more accurately quantify losses of stream bed authorized by NWPs and associated losses of stream functions, we are proposing to rely on the 1/2-acre limit and other tools described above to comply with the requirement that the NWPs may only authorize activities that have no more than minimal individual and cumulative adverse environmental effects. Therefore, using an acreage limit for losses of stream bed instead of a linear foot limit will more accurately quantify losses of stream bed, since a linear foot limit does not take into account the width of the stream bed.

In developing this proposal, we have also drawn upon information that has appeared in the scientific literature. A linear foot metric for quantifying stream impacts or stream compensatory mitigation does not properly take into account the scale or size of the affected stream reach (Lave et al. 2010) or act as an effective surrogate for the amount of stream functions performed within that stream reach. In situations where it is not practicable or feasible to assess or measure stream functions (e.g., minor activities authorized by NWPs general permits), using square feet to quantify the ability of a stream to perform ecological functions has a sounder scientific basis than using linear feet (Doyle et al. 2015).

In 33 CFR 332.2, the Corps defines “functional capacity” as “the degree to which an area of aquatic resource performs a specific function.” In other words, the amount of space occupied by a wetland, stream, or other aquatic resource, plus the degree to which that wetland, stream, or other aquatic resource performs certain functions, determine the amount of functions provided by the wetland, stream, or other aquatic resource. For example, if a wetland or stream

performs functions at an 80 percent level, a larger wetland or stream will contribute more functions to the watershed than a smaller wetland or stream. (The larger wetland or stream will have a higher functional capacity than the smaller wetland or stream, if both the larger and smaller wetland or stream perform functions at the same level.) For rivers and streams, a larger amount of stream bed provides more physical space for aquatic habitat, more substrate for biogeochemical cycling functions, and greater capacity for hydrologic functions. Therefore, actual amount of wetland, stream, or other type of aquatic resource impacted as a result of a proposed NWP activity is critical for determining whether that activity will result in no more than minimal individual and cumulative adverse environmental effects. Using linear feet to quantify impacts to streams does not provide an adequate surrogate for the functions lost as a result of a regulated activity because it does not accurately represent the physical space in which the hydrologic, biogeochemical, and habitat functions are being performed by that stream.

(3) Provide consistency in the numeric limits for these NWPs for all non-tidal waters of the United States. The proposed removal of the 300 linear foot limit for losses of stream bed would also provide more equivalency in protection for all non-tidal waters of the United States. Currently, under NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 losses of non-tidal wetlands and other non-tidal waters that are not streams are limited to 1/2-acre. In the 2017 NWPs, losses of stream bed are limited to 300 linear feet, unless the district engineer waives the 300 linear foot limit for losses of intermittent and ephemeral stream bed (as explained above, under the Navigable Waters Protection Rule ephemeral streams are no longer subject to Clean Water Act jurisdiction). Under the 300 linear foot limit, many streams in a stream network are subject to a more stringent quantitative limit than non-tidal wetlands, ponds, or lakes. For example, for a first order headwater stream with an average width of 6.2 feet (Downing et al. 2012), under the 300 linear foot limit 0.043 acre of stream bed can be filled or excavated. As another example, for a third order stream with an average width of 34.6 feet (Downing et al. 2012), under the 300 linear foot limit 0.238 acre of stream bed can be filled or excavated. Therefore, the 300 linear foot limit for losses of stream bed is more restrictive than the 1/2-acre limit for losses of non-tidal wetlands and other non-tidal waters, and decreases the utility of the NWPs for losses of stream bed that result in no more than minimal individual adverse environmental effects.

The Clean Water Act Section 404(b)(1) Guidelines at 40 CFR 230.1(d) states that from “a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines.” Under the 404(b)(1) Guidelines, special aquatic sites include sanctuaries and refuges (40 CFR 230.40), wetlands (§230.41), mud flats (§230.42), vegetated shallows

(§230.43), coral reefs (§230.44), and riffle and pool complexes (§230.45). The 404(b)(1) Guidelines do not rank special aquatic sites in order of importance, or provide differing degrees of protection to the various types of special aquatic sites. The evaluation process is the same for all special aquatic sites, which gives the district engineer or other permitting authority substantial discretion in determining whether a proposed discharge complies with the Guidelines. Other regulations for implementing Section 404 of the Clean Water Act do not grant special status to streams over other types of waters of the United States, such as lakes and ponds.

The 404(b)(1) Guidelines at 40 CFR 230.45 define "riffle and pool complexes" as:

> Steep gradient sections of streams are sometimes characterized by riffle and pool complexes. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a coarse substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. Pools are characterized by a slower stream velocity, a steaming flow, a smooth surface, and a finer substrate. Riffle and pool complexes are particularly valuable habitat for fish and wildlife.

Rivers and streams exhibit a variety of morphologies, and riffle and pool complexes are just one of several morphologies. Montgomery and Buffington (1997) developed a classification system for stream channel reach morphology in mountain watersheds. For alluvial stream channels, they identified five types of channel bed morphologies: cascade channels, step-pool channels, plane-bed channels, riffle-pool channels, and dune-ripple channels. Streams in mountain drainage basins also occur as colluvial channels and bedrock channels (Montgomery and Buffington 1997). Lowland rivers typically exhibit braided channel morphology (Chalov 2001). Lowland rivers may also have an anastomosing morphology, which consists of multiple river channels separated by islands that have been cut from the floodplain (Knighton and Nanson 1993).

Therefore, riffle and pool complexes are only a subset of the stream channel types typically found in a stream network within a watershed. Riffle and pool complexes occur in perennial stream channels that have bed material that is larger in grain size than coarse sand (Leopold 1994). According to Allan and Castillo (2007), riffle and pool complexes are usually found in unconfined stream channels with moderate to low gradients where the bed material is mostly gravel. Step-pool complexes are usually found in mountain areas where the stream bed material consists of boulders and large rocks, with a channel morphology of nearly vertical steps and short pools (Leopold 1994). Cascade channels, step-

pool channels, plane-bed channels, dune-ripple channels, colluvial channels, bedrock channels, braided rivers and streams, and anastomosing rivers are not special aquatic sites under the 404(b)(1) Guidelines, and are not subject to the more restrictive regulations that apply to special aquatic sites such as wetlands and riffle and pool complexes.

Section 230.1(d) of the 404(b)(1) Guidelines states that from a "national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines." Under the current NWPs, project proponents can discharge dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, that cause the loss of up to 1/2-acre of wetlands. Under the current limits of these NWPs, a project proponent can fill or excavate no more than 300 linear feet of perennial stream bed (which may or may not have riffle and pool complexes), which for headwater streams would usually be substantially less than 1/2-acre. When taking into account the regulatory approach in the 404(b)(1) Guidelines, and other regulations and policies for implementing Section 404 of the Clean Water Act, there does not seem to be a the legal, regulatory, or policy justification for a more restrictive numeric limit for losses of stream bed compared with other types of waters of the United States.

Headwater streams and rivers and larger streams perform important ecological roles in riverine systems. Examples of the ecological roles of headwater streams include: storing and transporting water, retaining and transforming nutrients and contaminants, collecting and transforming organic matter that supports the production of aquatic organisms such as invertebrates and fish, influencing water temperature, and providing habitats for various species of fish, amphibians, and invertebrates (Meyer and Wallace 2001). Large rivers and their floodplains support diverse biological communities through the complex and variable habitats that are developed and maintained by these systems (Sparks 1995), as well as populations of those species. Large rivers and their floodplains also provide biological linkages such as migration corridors, as well as conduits for the movement of water, sediment, nutrients, and contaminants (Sparks 1995).

From a functional perspective, streams, including headwater streams and higher order streams, perform the following categories of functions: system dynamics, hydrologic balance, sediment processes, and character, biological support, and chemical processes and pathways (Fischenich 2006). System dynamics includes stream evolution processes, succession of riparian plant communities, and energy management. Hydrologic balance involves surface water storage and surface/subsurface water exchange processes, and hydrodynamics. Sediment processes and character include sediment continuity

and the quality and quality of river and stream sediments. Biological support involves biological communities and processes, providing life cycle habitats, and trophic structures and processes. Chemical processes and pathways include water and soil quality as well as nutrient cycling (e.g., nitrogen). These basic stream functions were identified by a committee of scientists, engineers, and practitioners (Fischenich 2006), and apply to streams of all sizes. Headwater streams are linked to larger streams located in downstream tributaries through the transport of water, sediment, nutrients, and organic matter (Gomi et al. 2002).

How these various stream functions manifest themselves in particular stream reaches within the tributary network of a watershed can vary. In headwater streams, hydrologic, biological, and geomorphic processes are strongly influenced by interactions between surrounding lands and the stream channels (Gomi et al. 2002). Much of the water in headwater streams comes from lands adjacent to those streams, whereas most of the water flowing through downstream tributaries (i.e., higher order streams) comes from headwater streams and other lower order streams (NRC 2002). Rivers and larger streams downstream of the headwaters are affected by the water flows from headwater streams, as well as water flows from floodplains and riparian areas, and usually have larger water storage capacities than headwater streams (Gomi et al. 2002). In rivers and larger streams, flooding usually occurs more gradually and for longer durations compared with the more abrupt flooding of headwater streams (NRC 2002). Stream channels that have substantial floodplains perform hydrologic transport and storage functions differently than stream channels that little or no floodplain (Beechie et al. 2013). Headwater streams and rivers and streams downstream of headwaters differ in ecosystem productivity, with gross primary production and macroinvertebrate production increasing significantly as stream and river size increases (Finlay 2011). The greater ecosystem productivity in rivers and larger streams compared to headwater streams may also result in these rivers and larger streams having a higher capacity to support other ecosystems functions, including habitat for larger predators and nutrient uptake (Finlay 2011).

Denitrification in streams is dependent on the area of stream bed where benthic sediment can interact with the nitrogen-laden water flowing in the stream channel (Alexander et al. 2000). Nitrogen loss in streams decreases as the size of the stream channel increases (Alexander et al. 2000), because water depth is usually greater in larger streams and there is less interaction between the water column and the stream sediments where the denitrification processes occur. In forested areas, headwater streams areas receive detritus (e.g., leaf litter, stems) from the surrounding forest and store, transform, and transport the organic matter and nutrients to downstream stream reaches (Meyer and Wallace and 2001) where they are used by organisms that live in those downstream waters. Organic matter transport and storage processes are affected by the structure of

stream channels and the interactions between streams and their floodplains or riparian areas (Beechie et al. 2013). Organic matter is an important resource for streams because of its role in stream productivity.

In terms of biological processes, the community structure of aquatic organisms and the structure of food webs of larger, downstream tributaries are different from headwater streams, and they are subject to disturbance regimes that are somewhat dissimilar from those experienced by headwater streams (Gomi et al. 2002). In-stream biological processes are dependent on a number of factors, such as stream flow, the condition of the riparian area, and the diversity of in-stream habitats (Beechie et al. 2013). Larger streams also provide larger conduits for the movement of aquatic organisms and the transportation of sediment and nutrients (BenDor et al. 2009) through the stream network. In-stream habitat structure also varies from the headwaters to the mouth of the tributary system, from the step-pool stream morphology found in many headwater streams to braided, straight, or meandering lowland river channels (Beechie et al. 2013).

Considering the similarities and differences in functions provided by rivers and streams in various locations throughout the tributary network in a watershed, the relative importance of the various stream orders in a tributary network is subjective. Commenters are invited to provide information on whether there are bases in statute, regulation, science, or policy on placing greater importance or value on headwater streams to support more stringent quantitative limits on losses of stream bed authorized by NWP activities, or whether consistent quantitative limits should apply to all non-tidal waters and wetlands. An additional consideration that factors into a district engineer's decision for a proposed NWP activity is the degree of stream functions being provided by a particular stream reach, which can vary from a fairly high level of functioning to degraded. The degree of functionality is strongly dependent on land uses in the watershed (e.g., Allan 2004) and other factors. For example, as land use intensity in a watershed increases, the ability of streams to remove nitrogen from the water column decreases (Mulholland et al. 2008). The PCN review process takes these factors, and other factors, into account when district engineers decide whether proposed activities qualify for NWP authorization. The various factors considered by district engineers are listed in Section D of the NWPs, in the second paragraph.

The proposed changes to NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 are intended to provide equitable numeric limits for all non-tidal waters and wetlands, in a manner consistent with current laws, regulations, and policies, including the 404(b)(1) Guidelines. The PCN review process would continue to be used to ensure that activities authorized by NWPs would continue to satisfy the requirement that they result in no more than minimal individual and cumulative adverse environmental effects.

We are seeking comment on whether there is a legal, regulatory, policy, or scientific basis for imposing a more restrictive limit on losses of stream bed versus losses of non-tidal wetlands and other non-tidal waters. In addition, we are soliciting comment on whether there is a scientific, policy, regulatory, or legal basis for a more restrictive limit on losses of headwater stream bed versus losses of stream bed for the larger streams that are further down in the stream network of a watershed.

(4) Further the objective of the NWP Program in authorizing activities that have no more than minimal individual and cumulative adverse environmental effects. A fourth reason for these proposed modifications is that they would further streamline the NWP authorization process and advance the objective of the NWP Program, which is to authorize, with little, if any, delay or paperwork certain activities having minimal impacts (see 33 CFR 330.1(b)). The proposed 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 would provide NWP authorization for losses of stream bed and other non-tidal waters that are less than 1/2-acre, rather than requiring individual permits for losses of stream bed that are greater than 300 linear feet in length but less than 1/2-acre in size. Other tools, such as the 1/2-acre limit and the PCN process, would be used to ensure that these NWPs only authorize activities that result in no more than minimal individual and cumulative adverse environmental effects. For NWPs 21, 29, 39, 40, 42, 43, 44, 50, and 52, pre-construction notification is required for all authorized activities. For NWP 51, pre-construction notification is required for losses of greater than 1/10-acre of waters of the United States.

Removing the 300 linear foot limit and the waiver provision for losses of stream bed would make NWP authorization available for proposed activities that will result in the loss of 1/2-acre or less of stream bed and other non-tidal waters, as long as the district engineer determines after reviewing the PCN that the proposed activity would result in no more than minimal individual and cumulative adverse environmental effects. It could reduce the number of standard individual permits currently required to authorize losses of stream bed greater than 300 linear feet that also result in the loss of less than 1/2-acre of stream bed, in areas where regional general permits are not available to authorize such activities.

In addition, we are also proposing to remove the waiver provision from NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. Removal of the waiver provision may reduce costs to permittees, the Corps, and the federal and state agencies that participate in the agency coordination process in paragraph (d) of the “Pre-Construction Notification” general condition. In the 2017 versions of NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52, district engineers can waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed, if after reviewing

the PCN and conducting agency coordination under paragraph (d) of NWP general condition 32, the district engineer determines the individual and cumulative adverse environmental effects of the proposed activity will be no more than minimal. Under the 2020 final rule defining "waters of the United States," intermittent streams are still subject to Clean Water Act jurisdiction, so removal of the 300 linear foot limit for losses of intermittent stream bed and the waiver provision can provide cost savings to both permittes and the Corps. For permittees, removal of the waiver provision would reduce costs due to delays in receiving an NWP verification while the district engineer conducts agency coordination to determine if a waiver should be issued. For the Corps, administrative costs would be reduced because the Corps would no longer have to send copies of PCNs to the federal and state agencies that participate in the agency coordination process. The administrative costs for federal and state agencies would be reduced because they would not have to review PCNs that include requests for waiver of the 300 linear foot limit for losses of intermittent and ephemeral stream bed and write comments to send to the district engineer.

Request for comment. We welcome comments and suggestions 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, and other tools to comply with the statutory and regulatory requirement that activities authorized by NWP must result in no more than minimal individual and cumulative adverse environmental effects. We are also inviting comment on whether there are situations where quantifying losses of stream bed in linear feet 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. Such comments should include information that helps illustrate or explain how and under what circumstance using a linear foot measure to quantify losses of stream bed is more accurate than using square feet or acres to quantify the amount of authorized impacts.

We are also soliciting comment on the legal, regulatory, policy, or scientific bases for imposing different numeric limits on stream bed losses versus losses of non-tidal wetlands or other types of non-tidal waters. For example, commenters are invited to consider the regulatory approach in the current 404(b)(1) Guidelines, as well as other regulations and policies for implementing Section 404 of the Clean Water Act, to provide their views on whether there are legal, regulatory, and/or policy justifications for a more restrictive numeric limit for losses of stream bed compared with other types of waters of the United States. Commenters are 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.

We are also requesting 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 this 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 Stahler (1957) method, and the mean stream widths identified by Downing et al. (2012). If a proposed NWP activity would result in the loss of stream bed plus other types of waters of the United States, such as non-tidal wetlands, the losses of waters of the United States would be quantified in acres and subjected to the 1/2-acre limit. The following table presents the various limits for different stream orders and for other types of non-tidal waters of the United States.

Aquatic resource category	**Mean stream width (Downing et al. 2012)**	**Quantitative limit (includes 1/2-acre equivalent for losses of stream bed)**
Non-tidal wetlands	n/a	1/2-acre
Other non-tidal waters (e.g., lakes, ponds, ditches)	n/a	1/2-acre
1st order streams	6.3 feet	3,470 linear feet
2nd order streams	8.6 feet	2,540 linear feet
3rd order streams	24.8 feet	880 linear feet
4th order streams	90.8 feet	240 linear feet
5th order streams	240 feet	90 linear feet
6th order streams	641 feet	35 linear feet
A proposed NWP activity that would impact both stream bed and another aquatic resource category (e.g., non-tidal wetlands)	n/a	1/2-acre

A critical component of effectively applying this 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. The scale of the map used identify stream segments influences the stream order assigned to those stream segments (Gomi et al. 2002). The addition or exclusion of a small stream segment can substantially alter the stream orders identified for downstream stream segments (Leopold 1994), so complete and accurate

mapping would be needed to implement this hybrid approach for quantitative limits for these NWPs. Topographic maps drawn at 1:100,000 or 1:500,000 scales exclude more headwater and other smaller order streams than topographic maps that are drawn at a 1:24,000 scale (Meyer and Wallace 2001, Leopold 1994). Topographic maps drawn at 1:24,000 scale do not show a substantial proportion of perennial headwater streams (Leopold 1994) in the tributary network. In a study of stream mapping in the southeastern United States, only 14 to 20 percent of the stream network was mapped on 1:24,000 scale topographic maps (Hansen 2001). A study in Massachusetts showed that 1:25,000 metric scale topographic maps exclude over 27 percent of stream miles in a watershed (Brooks and Colburn 2011). Brooks and Coburn (2011) concluded that are significant and complex stream networks exist upslope of most mapped stream origins.

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 stream bed and other types of waters of the United States, such as non-tidal 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.The Corps invites public comment on this hybrid approach, and any suggestions on how it could be improved for clarity and consistent application.

B. Discussion of Additional Proposed Modifications to Existing Nationwide Permits

NWP 3. Maintenance. We are proposing to modify paragraph (a) of this NWP to authorize the repair, rehabilitation, or replacement of any currently serviceable structure or fill that did not require DA authorization at the time it was constructed. This proposed modification is intended to provide consistency with another NWP that authorizes maintenance activities, NWP 31 (Maintenance of Existing Flood Control Facilities). Nationwide permit 31 authorizes maintenance of existing flood control facilities that were constructed at a time when DA authorization was not required for that construction.

Prior versions of NWP 3 that were issued in 1982 (47 FR 31832) and 1986 (51 FR 41255) authorized the maintenance of any currently serviceable structure or fill that was constructed prior to the requirement for authorization. When NWP 3 was reissued in 1991 (56 FR 59141), this provision was removed without explanation. We are proposing to reinstate this provision in NWP 3 to authorize maintenance of these structures and fills, as long as they are currently serviceable. If they are not currently serviceable, then they would require a different form of DA authorization to reconstruct those structures and fills.

Under the current NWP 3, the repair, rehabilitation, or replacement of any currently serviceable structure or fill that was constructed before the permit requirements under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899 were established requires an individual permit unless the repair, rehabilitation, or replacement activity qualifies for authorization under another NWP or a regional general permit. These structures and fills have been in place for many years, and the other terms of paragraph (a) of this NWP will help ensure that the adverse environmental effects of these repair, rehabilitation, or replacement activities will be no more than minimal. This includes the requirement that the structures or fills be currently serviceable, and that only minor deviations in the configuration of the structure or fill are authorized.

In addition, we are proposing to modify the "Note" in NWP 3 to replace the phrase "previously authorized" with "currently serviceable" to be consistent with our proposal to modify paragraph (a) to authorize the repair, rehabilitation, or replacement of any currently serviceable structure or fill that did not require DA authorization at the time it was constructed. The currently serviceable structure or fill could have been previously authorized, authorized by 33 CFR 330.3, or did not require Corps authorization at the time it was constructed.

We are also proposing to modify paragraph (a) of this NWP to authorize the placement of new or additional riprap to protect the structure, provided the placement of riprap is the minimum necessary to protect the structure or to ensure the safety of the structure. This provision was last in the 2007 version of NWP 3 (see 72 FR 11181). It was removed from the 2012 NWP 3 (see 84 FR 1984). The placement of riprap to protect the structure or fill, or to comply with current construction codes or safety standards, could be authorized under the current text of NWP 3 as a minor deviation, but we are proposing to provide clarity and regulatory certainty to prospective permittees and other interested parties by adding an explicit provision to paragraph (a). We are proposing to restore, with minor changes to better fit the text into paragraph (a), the provision concerning the placement of riprap to protect the structure or ensure safety that was in the 2007 NWP 3. Adding small amounts of riprap to protect the existing structure should, in most circumstances result in no more than minimal individual and cumulative adverse environmental effects because that riprap will protect the structure from erosive forces that can damage the structure and move pieces of the structure into the waterway where it can adversely affect the waterbody. Adding small amounts of riprap will help improve the safety of the structure, an important consideration under the Corps' public interest review factors at 33 CFR 320.4.

NWP 12. Oil and Natural Gas Pipeline Activities. We are proposing to modify this NWP to limit it to oil and natural gas pipeline activities and to issue

two new NWPs to authorize electric utility line and telecommunications activities (proposed new NWP C) and other utility line activities that convey other substances, such as potable water, sewage, wastewater, stormwater, brine, or industrial products that are not petrochemicals (proposed new NWP D). Proposed NWPs C and D are discussed further below. We are also proposing to reduce the number of thresholds that trigger the need for a PCN from seven to two. Pre-construction notification will be required for all utility line activities that require authorization under section 10 of the Rivers and Harbors Act of 1899. Pre-construction notification will continue to be required for utility line activities that result in the loss of greater than 1/10-acre of waters of the United States.

We are proposing to modify NWP 12 to authorize only oil and natural gas pipeline activities. We are also proposing to issue two separate and new NWPs to authorize electric utility line and telecommunications activities (proposed new NWP C) and utility lines that convey substances other than oil or natural gas or electricity (proposed new NWP D). The intent of this proposal is to tailor these NWPs to more effectively address potential differences in how the different types of utility lines are constructed, maintained, and removed, and to potentially add industry-specific standards or best management practices that would be appropriate to add as national terms to the applicable NWP to help ensure that the NWP authorizes only those activities that will result in no more than minimal individual and cumulative adverse environmental effects. The “terms” of an NWP, as defined at 33 CFR 330.2(h), are “the limitations and provisions included in the description of the NWP itself.”

The majority of NWP 12 activities are for oil and natural gas pipeline activities. We examined a sample of NWP 12 verifications issued between March 19, 2017, and March 18, 2019, and found that 58 percent of the authorized activities were for oil and gas pipelines. Electric utility line and telecommunications activities accounted for 12 percent of the verified NWP 12 activities during that time period. Other utility line activities, such as water lines, sewer lines, pipes for conveying stormwater, wastewater, and brine, and other types of utility lines comprises the remaining 30 percent of the NWP 12 verifications issued.

Oil and natural gas pipelines can be constructed in-ground or above ground. Oil and natural gas pipelines can vary substantially in length and diameter. The main oil pipelines used to transport crude oil to different regions of the country are typically 8 to 24 inches in diameter, although the largest oil pipeline in the United States is the Trans-Alaska Pipeline System, with a 48-inch diameter.[2] Oil gathering lines can be smaller, usually ranging from 2 to 8 inches in diameter.

[2] https://pipeline101.org/How-Do-Pipelines-Work (accessed March 31, 2020)

Oil and natural gas pipelines, especially interstate transmission lines, can extend for long distances, with numerous crossings of waters of the United States that may be authorized by NWP 12. Oil and natural gas pipelines can run across states, or can be smaller local lines. In the United States, there are approximately 72,000 miles of crude oil pipelines.[3] For natural gas pipelines, there are over 300,000 miles of interstate and intrastate transmission pipelines in the United States, along with 2,100,000 miles of natural gas distribution pipelines.[4]

Natural gas pipelines can range in size from 6 to 48 inches[5] in diameter, with the size being dependent on their intended function. For example, the main transmission pipes for transporting natural gas are typically 16 to 48 inches in diameter, and the pipelines that branch off of the main transmission pipeline are usually 6 and 16 inches in diameter. The majority of interstate natural gas pipelines are between 24 and 36 inches in diameter. Rights of way for natural gas pipelines are generally up to 60 feet in width.[6]

The Corps is proposing to remove electric utility lines and telecommunication lines, as well as utility lines that convey water and other substances, from NWP 12 because of the differences between oil and natural gas pipelines, electric and telecommunication lines, and utility lines that carry water and other substances. Some of these differences are described in the following paragraphs.

Electric utility lines and telecommunication lines vary in size and length, and how they are constructed. Electric utility lines and telecommunication lines can be overhead transmission lines supported by towers or poles, or they can be buried underground. The footprints of the structures that support overhead electric lines, and the impacts of installing those structures, are fairly small, with the ground disturbance generally limited to the immediate vicinity of the structure, Overhead transmission line towers have footings that are usually 5 to 8 feet wide[7] and embedded into the soil surface, and their relatively small size results in small impacts to wetlands and types of other waters. The footings are generally several feet in size. The wooden poles used for overhead electric transmission lines can be up to 27 inches in diameter,[8] and these poles are usually inserted

[3] Ibid.
[4] https://pipeline101.com/Why-Do-We-Need-Pipelines/Natural-Gas-Pipelines (accessed April 1, 2020)
[5] http://naturalgas.org/naturalgas/transport/ (accessed March 31, 2020)
[6] https://www.nwnatural.com/business/safety/pipelinerightofway (accessed March 31, 2020)
[7] https://www.xcelenergy.com/staticfiles/xe/Corporate/Corporate%20PDFs/OverheadVsUnderground_FactSheet.pdf (accessed April 1, 2020)
[8] http://www.ldm.com/docs/dimensiontables_df_sp.pdf (accessed April 1, 2020)

into the soil surface by digging a hole, with some soil disturbance in the vicinity of the installed pole. Electric transmission cables can also be installed in the ground through trenching and backfilling, and through horizontal directional drilling. Electric transmission lines have relatively smaller diameters compared with those of oil or natural gas pipelines and other pipelines. For example, a 500-kV underground electric cable is usually had a diameter of 5.5 to 6 inches.[9] The installation of underground electric lines can more adverse environmental impacts than the construction of overhead electric transmission lines.[10]

In the United States, there are more than 360,000 miles of transmission lines (U.S. Department of Energy 2015, citing the North American Electric Reliability Corporation Electricity Supply and Demand Database at http://www.nerc.com/page.php?cid=4|38). From these transmission lines, other electric lines are constructed to transmit the electrical energy to users, such as commercial building and residences.

Utility lines for conveying potable water, water, sewage, stormwater, wastewater, brine, irrigation water, and industrial products that are not petrochemicals, are often limited to specific areas, where they serve cities, towns, and other communities, residential developments, commercial developments, These utility lines can be constructed below ground, by trenching and backfilling or by horizontal directional drilling. They can also be constructed above ground in some circumstances. Utility lines for transporting water, sewage, and other substances vary in diameter. Main pipelines for transporting potable water are often 24 inches in diameter, although some of these water lines can be larger (NRC 2006). Water lines used for both transmission and distribution are usually 16 to 20 inches in diameter (NRC 2006). Distribution water lines are typically 4 to 12 inches in diameter (NRC 2006). Sanitary sewer pipelines can range in size from 3 inches to a two feet in diameter.[11] The size of the trench for installing underground water, sewer, and other utility pipelines, as well as the disturbed areas next to the trench, likely varies with the size of the pipeline.

As suggested above, there are likely generally to be differences in the relative amounts of ground disturbance and other related activities, including impacts to wetlands and other waters, for oil and gas pipelines, electric transmission lines, and pipelines carrying water and other substances that suggest that there is potential for adding different terms to each of these three proposed NWPs to include national standards and best management practices to

[9] https://www.datcllc.com/learn/underground-transmission/ (accessed April 1, 2020)
[10] Ibid and https://www.xcelenergy.com/staticfiles/xe/Corporate/Corporate%20PDFs/OverheadVsUnderground_FactSheet.pdf (accessed April 1, 2020)
[11] https://www.engineeringtoolbox.com/sewer-pipes-capacity-d_478.html (accessed July 14, 2020)

help ensure that each of these NWPs authorizes only those activities that have no more than minimal adverse environmental effects.

For the proposed modification of NWP 12, we are soliciting comments and suggestions for national standards or best management practices for oil and natural gas pipeline activities that would be appropriate to add to this NWP, and within the Corps' legal authority to enforce as terms and conditions of an NWP authorization. Adding such national standards or best management practices may also address concerns expressed regarding Corps regional conditions added to the NWPs by division engineers that are discussed above in the preamble to this proposed rule. To summarize, a number of commenters have expressed concern about potential inconsistency in Corps regional conditions for the NWPs, and adding national standards and best management practices to the text of proposed NWP 12 has potential to provide additional environmental protection and promote consistency, regulatory certainty, transparency and predictability.

For the proposed modifications of NWP 12 and the proposed new NWPs C and D, we are proposing to retain the basic structure of the 2017 NWP 12, since many of the activities authorized by the 2017 NWP 12 could apply to any utility line, regardless of what substances it conveys. That basic structure would provide consistency and be familiar to potential users of the new NWP 12 and new NWPs C and D.

We are proposing to change the title of this NWP to "Oil or Natural Gas Pipeline Activities" to reflect the type of substances that can be conveyed by these utility lines. The title of this NWP refers to "activities" because the Corps does not regulate oil or natural gas pipelines per se. The Corps only regulates specific activities associated with oil or natural gas pipelines that are regulated under Section 404 of the Clean Water Act (i.e., discharges of dredged or fill material into waters of the United States) and Section 10 of the Rivers and Harbors Act of 1899 (i.e., structures or work in navigable waters of the United States).

We are proposing to modify the second paragraph of this NWP to replace the phrase "utility lines" with "oil or natural gas pipelines" to address the increased specificity of this NWP to oil or natural gas pipelines. We are also proposing to replace the definition of "utility line" with "oil or natural gas pipeline." The proposed definition of "oil or natural gas pipeline" reads as follows: "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 petrochemical products, for any purpose." Including petrochemical products in the proposed definition is intended to clarify that this NWP covers utility lines that convey chemicals isolated or derived from petroleum or natural gas.

We are proposing to retain the paragraph covering substations constructed in non-tidal waters of the United States because oil or natural gas substations are often necessary for an oil or natural gas pipeline. We are proposing to modify the fifth paragraph of this NWP to authorize foundations for above-ground oil or natural gas pipelines into all waters of the United States. In this paragraph, we are also proposing to remove references to "towers" since towers are generally constructed for overhead electric lines. We are proposing to retain the paragraph on access roads, since access roads may be necessary to construct or maintain oil or natural gas pipelines. In paragraph six, we are proposing to change the last sentence to state that oil or natural gas pipelines routed in, over, or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

We are proposing to retain the paragraph that 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. Horizontal directional drilling may be used to construct or replace oil or natural gas pipelines, and if inadvertent returns occur during these activities, this NWP can be used to authorize remediation activities so that they can occur in a timely manner to minimize adverse environmental effects that might be caused by these inadvertent returns. In addition, we are proposing to retain the paragraph that authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the oil or natural gas pipeline activity.

We are proposing to modify this NWP to reduce the number of PCN thresholds, to simplify the notification requirements of this NWP and reduce burdens on the regulated public. The proposed changes to the PCN requirements would retain those PCN thresholds that involve regulated activities that have a more substantive potential result in more than minimal adverse environmental effects and should be reviewed by the district engineer to determine whether those proposed activities qualify for NWP authorization or discretionary authority exercised to require an individual permit. In the paragraphs below, we summarize the history of the PCN requirements for NWP 12. We also discuss our rationales for removing specific PCN thresholds to simplify the PCN requirements for this NWP, and for proposed new NWPs C and D.

Nationwide permit 12 was first issued in 1977 (42 FR 37146, at 33 CFR 323.4-3(a)(1)). The original NWP 12 authorized discharges of dredged or fill material "placed as backfilling or bedding for utility line crossings provided there

is no change in pre-construction bottom contours." The 1977 NWP 12 also included a statement that a utility line in navigable waters of the United States would require separate authorization under Section 10 of the Rivers and Harbors Act of 1899. This NWP did not have any PCN requirements. The versions of NWP 12 issued in 1982 (47 FR 31833) and 1986 (51 FR 41255) authorized similar activities and did not have any PCN requirements. The 1991 NWP 12 (56 FR 59141) did not have any PCN requirements and the NWP was reissued with modifications to authorize associated outfall and intake structures. The 1991 NWP 12 excluded activities that drain a water of the United States, such as drainage tile. It also imposed requirements for temporary sidecasting of excavated material into waters of the United States, and for backfilling trenches.

When NWP 12 was reissued in 1996 (61 FR 65874), it was modified to authorize utility lines that required section 10 authorization and four PCN thresholds were added to that NWP. Pre-construction notification was required if the proposed NWP activity met any of these four criteria: (1) mechanized land-clearing in a forested wetland, (2) a section 10 permit is required for the utility line, (3) the utility line in waters of the United States exceeds 500 feet, or, (4) the utility line is placed within a jurisdictional area (i.e., a water of the United States), and it runs parallel to a streambed that is within that jurisdictional area.

The first PCN threshold was added in 1996 to provide district engineers an opportunity to review utility line activities that involve mechanized land-clearing of forested wetlands to determine whether those activities will result in no more than minimal adverse environmental effects (61 FR 65884) The second PCN threshold was added to ensure the navigable capacity of navigable waters of the United States (i.e., section 10 waters) will not be adversely affected by utility line activities that require section 10 authorization. The third and fourth PCN thresholds were also added to provide the district engineer to review proposed utility lines placed parallel to a stream bed or utility lines in waters of United States that exceed 500 linear feet (61 FR 65884).

In 2000, as part of its effort to replace NWP 26 with new and modified NWPs (see 65 FR 12818), NWP 12 was reissued with modifications to authorize discharges of dredged or fill material into waters of the United States to construct utility line substations, foundations for overhead utility line towers, poles, and anchors, and access roads to construct and maintain utility lines (65 FR 12887). These additional activities may have been authorized by NWP 26, and three PCN thresholds were added to the 2000 NWP 12. Those three new PCN thresholds were: (1) discharges associated with the construction of utility line substations that result in the loss of greater than 1/10-acre of waters of the United States; (2) permanent access roads constructed above grade in waters of the United States for a distance of more than 500 feet; and (3) permanent access roads constructed in waters of the United States with impervious materials.

These additional PCN thresholds were added to give district engineers the opportunity to review the proposed activities and determine whether they qualify for NWP authorization (65 FR 12845). These PCN thresholds were retained when NWP 12 was reissued in 2002 (67 FR 2080).

In the 2007 NWPs, the provision requiring the project proponent to submit a PCN if the proposed NWP 12 activity involves discharges associated with the construction of utility line substations that result in the loss of greater than 1/10-acre of waters of the United States was changed. The modified PCN threshold applies to all discharges of dredged or fill material into waters of the United States authorized by NWP 12 that result in the loss of greater than 1/10-acre of waters of the United States (see 72 FR 11183). These PCN thresholds were retained when NWP 12 was reissued in 2012 (77 FR 10272) and 2017 (82 FR 1986).

To simplify the PCN requirements for this NWP and focus the PCN requirements on activities that have a substantive potential to result in more than minimal adverse environmental effects, we are proposing to remove the following PCN thresholds: (1) utility line activities involving mechanized land clearing in a forested wetland for the utility line right-of-way; (2) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (3) the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area; (4) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; and (5) permanent access roads are constructed in waters of the United States with impervious materials. The reduction of the number of PCN thresholds in NWP 12 will reduce burdens on the regulated public, simplify the NWP, and eliminate redundancy. Since these PCN thresholds were adopted, there have been requirements added to NWP 12 that address the adverse environmental impacts that the PCN thresholds were trying to address, and those added requirements apply to all NWP 12 activities, including those activities that do not require PCNs. Those requirements are discussed below, including the reasons why removing the PCN thresholds will reduce redundancy with the requirements of NWP 12 that minimize adverse environmental effects of authorized activities.

In the paragraphs below, we discuss each of the five PCN thresholds and why we are proposing to remove that PCN threshold to simplify the PCN requirements and reduce redundancy. In the paragraphs that follow, we use the term “utility line” because we are proposing the same PCN thresholds for NWPs 12, C, and D.

(i) <u>The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way</u>. This PCN threshold was added to NWP 12 in 1996.

We are proposing to remove this PCN threshold because mechanized landclearing of forested wetlands in the utility line right of way usually results in temporary impacts to the wetlands and other waters as the trees are removed to clear a right-of-way for the utility line. Even though the trees are removed, the disturbed wetland will develop a new plant community, and because of the maintenance that is normally required for utility line rights-of-way to protect the utility line, the plant community will likely consist primarily of herbaceous plants and shrubs. If mechanized landclearing of forested wetlands in the utility line right-of-way results in the loss of greater than 1/10 acre of wetland, then the proposed activity would require a PCN. There is some soil disturbance during mechanized landclearing activities, but under the requirements of NWP 12 the disturbed soils must be restored to pre-construction elevations (see the ninth paragraph of the 2017 NWP 12). For mechanized landclearing, a section 404 permit is required if that soil disturbance meets the definition of "discharge of dredged material" at under 33 CFR 323.2(d).

Despite the removal of the trees, under the current requirements for NWP 12, the affected area should remain a wetland, even though the plant community will be managed so that it does not damage the utility line or adversely affect its operation and use. The cleared forested wetland is likely to develop into an herbaceous wetland or a scrub-shrub wetland, depending on the maintenance requirements for the utility line. Even with such a change in plant community structure, the affected wetlands will continue to provide habitat functions, since the habitat functions of forests differ somewhat from the habitat functions of herbaceous or scrub-shrub wetlands. Despite the change in general plant community structure, the wetland will still perform hydrologic functions (e.g., water storage) and biogeochemical cycling functions (e.g., nitrogen cycling).

In 2007 (see 72 FR 11183), the text of NWP 12 was modified by adding a paragraph that authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the utility line activity. The NWP also requires temporary fills to be removed in their entirety after construction of the utility line, and the affected areas returned to pre-construction elevations. NWP 12 also currently requires the areas affected by temporary fills to be revegetated, as appropriate. This provision applies to all NWP 12 activities, including those activities that do not require PCNs. This provision was retained in the 2012 NWP 12 (77 FR 10271) and the 2017 NWP 12 (82 FR 1985). The requirement that temporary fills, including temporary fills that are created as a result of mechanized land clearing of a forested wetland in the utility line right of way, must be restored to pre-construction elevations helps ensure that the wetlands in the utility line right-of-way remain wetlands, even if a different category of wetland. Those wetlands will continue to provide hydrologic functions, biogeochemical cycling functions, and habitat functions. For those NWP 12 activities that require PCNs under any of the other PCN thresholds, district

engineers can require mitigation for the change in wetland functions that may occur as a result of changing the wetland type from forested to herbaceous or scrub-shrub wetland (see paragraph (i) of the "mitigation" general condition (GC 23)).

(ii) The utility line in waters of the United States, excluding overhead lines, exceeds 500 feet. This PCN threshold was also added to NWP 12 in 1996 and applies to primarily to underground utility lines (e.g., utility lines installed by trenching and backfilling). This PCN threshold could apply to above-ground utility lines, if the installation of those above-ground utility lines involves discharges of dredged or fill material into waters of the United States. Some above-ground utility lines are constructed with footings that support the utility line a short distance above ground, but not to a height that would be considered an overhead utility line. Above-ground utility lines that involve only structures, with no associated discharge of dredged or fill material into waters of the United States, do not require DA authorization unless they trigger a DA permit requirement under Section 10 of the Rivers and Harbors Act of 1899. If section 10 authorization is required, then a PCN is required for the proposed activity under the first the PCN thresholds we are proposing to retain under proposed NWPs 12, C, and D.

For underground utility lines that are installed by trenching and backfilling, there are a couple of provisions in NWP 12 that will ensure that these activities will result in only temporary impacts to jurisdictional waters and wetlands. The first requirement is the third paragraph of the 2017 NWP 12:

> 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.

This provision requires the restoration of the affected jurisdictional waters and wetland, and prohibits below-ground utility line installations that would drain the wetland or other type of water. Therefore, this requirement helps to ensure that no permanent wetland losses occur as a result of these activities. Various iterations of this provision have been in NWP 12 since 1991.

For underground utility lines that are installed by horizontal directional drilling, there is no ground disturbance except at the entry and exit points for the drilling equipment. If the entry and/or exit points are in jurisdictional waters and wetlands, and the creation of the entry and exit points during construction result in discharges of dredged or fill material into waters of the United States, then a section 404 permit is required. The rest of the utility line will be below any wetlands or other waters that are on the surface, but the installation of the below-ground utility line itself does not trigger a requirement for a section 404 permit because it is below the surface and does not involve a discharge of dredged or fill material. The entry and exit points for the horizontal directional drilled utility line would have to be restored after construction is completed because of the other provisions of NWP 12. Under this PCN threshold, a utility line that is installed by horizontal directional drilling under jurisdictional waters and wetlands for a length of more than 500 linear feet would require a PCN, even though the construction of that utility line does not trigger a permit requirement under Section 404 of the Clean Water Act. This potential scenario is one reason why we are proposing to remove this PCN threshold, especially as horizontal directional drilling is increasing in use to avoid or minimize impacts to aquatic resources and other resources. We are also proposing to remove this PCN threshold for clarity, because there can be varying interpretations of whether a utility line constructed below wetlands or other types of waters via horizontal directional drilling is in waters of the United States.

The other provision of NWP 12 that helps ensure that wetland impacts caused by underground utility lines are temporary, and make this PCN threshold unnecessary is the ninth paragraph of the 2017 NWP 12, which we are proposing to retain in proposed NWPs 12, C, and D:

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

This provision was added to NWP 12 in 2007, after the PCN threshold was added in 1996. The NWP requires the affected wetlands and waters be restored by removing temporary fills in their entirety and returned to pre-construction elevations. Revegetation of the affected area may also occur, or the affected area can be allowed to revegetate through natural processes, such as plants that germinate and grow from the seed bank present in the soil and plant propagules colonizing the affected area from nearby plant communities.

We are proposing to remove this PCN threshold because of the requirements in the NWP to ensure that these impacts are temporary. We are also proposing to remove this provision to take away any ambiguity that may exist when applying this PCN threshold to utility lines constructed by horizontal directional drilling. We believe the other terms and conditions of this NWP will ensure that utility lines, excluding overhead utility lines, in waters of the United States for a distance of more than 500 linear feet have no more than minimal individual and cumulative adverse environmental effects.

(iii) The utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area. We are proposing to remove this PCN threshold for reasons similar to the reasons provided above, that is, the requirements of the third and ninth paragraphs of 2017 NWP 12 to restore these temporary impacts. The third paragraph addresses the requirements for trenching and backfilling underground utility lines to ensure those impacts are temporary and do not result in a loss of waters of the United States. The ninth paragraph also addresses the requirements for restoring temporary fills, so that those fills do not result in losses of jurisdictional waters and wetlands.

There may be utility lines constructed in stream beds, where the stream bed is excavated to create a trench, and after the utility line is placed in the trench, the trench is backfilled. This is a temporary impact, because the stream bed material that is excavated from the stream bed to create the trench is required by the NWP to be used for backfilling the trench. After the trench is backfilled, the stream flows will continue to transport sediment through normal stream fluvial geomorphic processes. Stream beds are dynamic and are constantly shifting, and the flowing water transports sediments of varying sizes downstream. Sediment transport may occur as bed load or suspended load (Leopold 1994). Bed load is sediment (usually larger sediment such as gravel or cobbles) that is transported downstream along the stream bed, and suspended load is sediment (usually fine sediment such as silt) that is transported in the water column.

Likewise, utility lines constructed parallel to a stream bed that are in jurisdictional waters are subject to the requirements in the third and ninth

paragraphs of NWP 12 to ensure that the impacts of constructing, maintaining, removing, or replacing those utility lines are temporary and no more than minimal.

Since this PCN threshold is addressed by the requirements to ensure that the impacts of utility line construction, maintenance, removal, or replacement in waters of the United States are temporary, we are proposing to remove this PCN threshold. The requirements in NWP 12 for trenching and backfilling, avoiding constructing french drains, removing temporary fills, and restoring areas affected by temporary fills, will ensure that those activities result in no more than minimal individual and cumulative adverse environmental effects.

(iv) Permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet. This PCN threshold is redundant with the requirement to submit a PCN for the loss of greater than 1/10-acre of waters of the United States. Access roads for electric utility lines and telecommunication lines have average widths that range from 12 feet to 20 feet, but may be up to 40 feet wide in some circumstances.[12] Access roads for oil or natural gas pipelines have average widths that range from 12 to 24 feet.[13]

A permanent access road with an average width of 12 feet constructed over 500 feet in jurisdictional wetlands will result in a loss of 0.14 acre of waters of the United States. Since the narrowest access road constructed over 500 linear feet would result in a loss of greater than 1/10 acre, this PCN threshold does not cover any activities that are not already covered by the PCN threshold that requires notification for losses of waters of the United States that exceed 1/10-acre. Therefore, this PCN threshold is redundant with the 1/10-acre PCN threshold and we are proposing to remove it.

(v) Permanent access roads are constructed in waters of the United States with impervious materials. This PCN threshold was added to NWP 12 in 2000 (65 FR 12888). The sixth paragraph of the 2017 NWP 12 addresses the requirements for access roads for utility lines, and we are proposing to retain this paragraph (with some minor changes to address differences among the various types of utility lines) in the proposed modifications to NWP 12 and in proposed new NWPs C and D. This paragraph imposing the following requirements for access roads:

> Access roads: This NWP authorizes the construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters

[12] https://www.aeptransmission.com/property-owners/access-roads.php (accessed April 1, 2020)
[13] https://www.blm.gov/sites/blm.gov/files/Chapter%204%20-%20Construction%20and%20Maintenance.pdf (accessed April 1, 2020)

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

Permanent access roads constructed in waters of the United States that will result in the loss of greater than 1/10-acre of waters of the United States require PCNs under the PCN threshold for losses of greater than 1/10-acre. For permanent access roads that would result in the loss of less than 1/10-acre of waters of the United States, the project proponent could choose to use NWP 14 to authorize that road crossing in waters of the United States without having to submit a PCN, as long as the waters of the United States are not wetlands or another type of special aquatic site.

This paragraph requires permittees to construct access roads, including access roads constructed with impervious materials, so that the length of the road minimizes any adverse effects on waters of the United States. These access roads must also be constructed as near as possible to pre-construction contours and elevations (e.g., at grade corduroy roads or geotextile/gravel roads). In addition, 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.

These requirements help minimize the adverse environmental effects that access roads constructed with impervious materials may have on waters of the United States. The requirement to construct access roads as near as possible to pre-construction contours and elevations minimizes adverse effects to surface hydrology, and preventing obstructions to water flowing over the soil surface that could impound water. This paragraph also requires the construction of bridges or culverts to help maintain surface flows. These requirements substantially reduce the potential for access roads constructed with impervious materials and causing the loss of less than 1/10-acre of waters of the United States to have more than minimal adverse environmental effects. Therefore, we are proposing to remove this PCN threshold. The requirement that NWPs can authorize only those activities that have no more than minimal individual and cumulative adverse

environmental effects can be achieved through the requirements in the text of this NWP, as well as the NWP general conditions.

We are proposing a new PCN threshold for NWP 12 for proposed oil or natural gas pipeline activities that are associated with an overall project that is greater than 250 miles in length, and the purpose of the overall project is to install new pipeline (vs. conduct repair or maintenance activities) along the majority of the distance of the overall project length). For these oil or natural gas pipeline activities, we are proposing to require the prospective permittee to include, in the pre-construction notification, the locations and proposed losses of waters of the United States for all crossings of waters of the United States that require DA authorization, including those crossings that would not require pre-construction notification. We are proposing to add this PCN threshold to provide the district engineer the opportunity to review all crossings of waters of the United States for 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. We invite public comment on the 250 mile threshold, and whether the threshold should be for a greater or lesser number of miles.

Division engineers continue to have the authority to modify this NWP to lower the PCN thresholds if they believe that lower PCN thresholds are necessary to give district engineers the opportunity to review proposed NWP 12 activities and make activity-specific determinations of NWP eligibility. Lower PCN thresholds established by division engineers may also give district engineers the ability to impose mitigation requirements on these activities if they have the potential to result in more than minimal individual and cumulative adverse environmental effects in a Corps district, watershed, or other geographic region.

Under this proposal, district engineers also retain their authority to modify, suspend, or revoke NWP 12 authorizations under a case-specific basis, in accordance with the procedures in 33 CFR 330.5(d). District engineers can exercise their discretionary authority to add conditions to the NWP 12 authorization to ensure that the authorized activities result in no more than minimal adverse environmental effects.

We are proposing to remove Note 3 that was in the 2017 NWP 12 because that note applied to aerial electric power transmission lines crossing navigable waters of the United States. It would have no applicability to oil or natural gas pipelines crossing navigable waters of the United States. We are also proposing to remove the 2017 NWP's Note 7 because sending a copy of the PCN and NWP verification to the Department of Defense Siting Clearinghouse

was intended to give the Siting Clearinghouse an opportunity to evaluate potential effects of overhead electric utility lines and telecommunication lines on military activities.

We are seeking comment on these proposed changes to the PCN thresholds for NWP 12, as well as modifying this NWP to limit it to oil or natural gas pipeline activities. Electric utility line and telecommunications activities in waters of the United States could be authorized by proposed new NWP C. Utility lines that convey potable water, sewage, storm water, wastewater, irrigation water, brine, and other substances that are not oil or natural gas or are not electricity, could be authorized by proposed new NWP D.

NWP 13. Bank stabilization activities. We are proposing to add a "Note" to this NWP to make prospective permittees aware of the availability of NWP 54 (Living Shorelines) to authorize the construction and maintenance of living shorelines to control shore erosion in coastal waters, including the Great Lakes. As defined in NWP 54, a living shoreline is an approach to bank stabilization that generally has the following characteristics: (1) it has a footprint that is made up mostly of native material; (2) it incorporates vegetation or other living, natural "soft" elements alone or in combination with some type of harder shoreline structure (e.g., oyster or mussel reefs or rock sills) for added protection and stability; (3) it should maintain the natural continuity of the land-water interface, and retain or enhance shoreline ecological processes; and (4) it must have a substantial biological component, either tidal or lacustrine fringe wetlands or oyster or mussel reef structures. This note may encourage prospective permittees to consider living shorelines as an alternative to other approaches to bank stabilization in coastal waters. This note is not intended to convey a preference for a particular approach to bank stabilization or a particular approach to project design.

NWP 14. Linear Transportation Projects. We are proposing to add "driveways" to the list of examples of the types of linear transportation projects authorized by this NWP, to clarify that the construction or expansion of driveways can be authorized by NWP 14. When we modified NWP 14 in 2000 to authorize some activities that were previously covered by NWP 26, the updated NWP authorized both public linear transportation projects and private linear transportation projects (see 65 FR 12888). When we reissued NWP 14 in 2002, we modified this NWP to remove the distinction between public and private linear transportation projects so that NWP 14 would simply authorize linear transportation projects (see 67 FR 2080-2081).

In 2000 (see 65 FR 12818), the Corps modified six of the NWPs issued in 1996 to replace NWP 26, but we did not reissue the remaining 32 NWPs that were issued in 1996. The 1996 NWPs were published in the Federal Register on

December 13, 1996, (61 FR 65874), and those NWPs expired on February 11, 2002. The NWPs modified in 2000 were NWP 3 (maintenance), NWP 7 (outfall structures and maintenance), NWP 12 (utility line activities), NWP 14 (linear transportation crossings), NWP 27 (stream and wetland restoration activities), and NWP 40 (agricultural activities), and those NWPs had a new expiration date of June 5, 2005. To keep all of the NWPs on the same 5-year cycle, in 2002 (see 67 FR 2020) the Corps reissued all of the existing NWPs, including the NWPs issued in 2000 to replace NWP 26, with an expiration date of March 19, 2007. The Corps changed the expiration date of NWPs 3, 12, 14, 27, 39, 40, 41, 42, 43, and 44 from June 5, 2005, to March 18, 2002.

Under the current definition of "single and complete linear project" (which we are proposing to reissue without change), 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." A driveway can be considered a linear transportation project at a smaller scale because it provides a means for a vehicle to get from a road (a point of origin) to a house, commercial building, or other structure (a terminal point). In past versions of this NWP, driveways were not explicitly identified as examples of linear transportation projects. The parenthetical in the first sentence of this NWP is not an exhaustive list, so we are seeking comment on whether to add driveways to the list of examples to provide clarity to district engineers and the regulated public.

NWP 17. Hydropower Projects. We are proposing to modify this NWP to authorize discharges of dredged or fill material into waters of the United States associated with hydropower projects with a generating capacity of less than 10,000 kilowatts (kW), to be consistent with the current definition of "small hydroelectric power project." This NWP currently authorizes hydropower projects having less than 5,000 kW of total generating capacity at existing reservoirs, where the project is licensed by the Federal Energy Regulatory Commission, or a licensing exemption granted by the Federal Energy Regulatory Commission. The Hydropower Regulatory Efficiency Act of 2013 (Public Law 113-23) changed the definition of "small hydroelectric power project" by raising the generating capacity limit for such projects from 5,000 kW to 10,000 kW. The proposed modification would make NWP 17 consistent with the current threshold for which the Federal Energy Regulatory Commission can issue a license or exemption for small hydroelectric power projects while still ensuring that projects have no more than minimal adverse environmental effects.

This NWP authorizes only discharges of dredged or fill material into waters of the United States to construct hydropower facilities that satisfy criteria (a) or (b) in the first paragraph of the NWP. The Federal Energy Regulatory Commission licenses the construction and operation of hydropower facilities. Section 10 permit requirements for non-federal hydropower development are met

through the Commission's licensing process, so separate authorization from the Corps under section 10 of the Rivers and Harbors Act of 1899 is not required.

For hydropower projects, the Corps' regulatory authority is limited to discharges of dredged or fill material into waters of the United States under Section 404 of the Clean Water Act. Discharges of dredged or fill material into waters of the United States may be necessary to install the small hydropower unit into the dam that stores water that is passed through the hydropower unit to generate electricity. The changes to the dam that involve discharges of dredged or fill material may be small, and the district engineer will review the PCN to determine if the proposed discharges will result in no more than minimal individual and cumulative adverse environmental effects.

NWP 19. Minor Dredging. We are proposing to modify this NWP to increase the limit for the amount of material dredged from navigable waters of the United States (i.e., waters subject to regulation under section 10 of the Rivers and Harbors Act of 1899) from 25 cubic yards to 50 cubic yards. Currently, this NWP does not authorize minor dredging activities that dredge or degrade through siltation coral reefs, sites that support submerged aquatic vegetation, anadromous fish spawning areas, or wetlands. This NWP also requires the dredged material to be deposited and retained in an area that has no waters of the United States, unless the district engineer approves, through a separate authorization such as an individual permit or regional general permit, the deposition of the dredged material into waters of the United States. With the current terms and conditions, including the current prohibitions against impacting coral reefs, sites that support submerged aquatic vegetation, anadromous fish spawning areas, and wetlands, we believe that with an increase in the cubic yard limit to 50 cubic yards, this NWP will continue to authorize only those dredging activities that have no more than minimal individual and cumulative adverse environmental effects. We would also like to solicit public comment on whether a different cubic yard limit, such as 30 or 100 cubic yards, would be more appropriate for this NWP.

Division engineers have the authority through 33 CFR 330.5(c) to add regional conditions to decrease the cubic yard limit for this NWP. District engineers have the authority to assert discretionary authority to decrease the cubic yard limit on a case-by-case basis, through the modification procedures at 33 CFR 330.5(d). We are soliciting comment on this proposed change in the cubic yard limit for NWP 19.

NWP 21. Surface Coal Mining Activities. In addition to proposing to modify this NWP by removing the 300 linear foot limit for losses of stream bed, we are also proposing to remove the requirement for all permittees to obtain written verification before proceeding with the authorized work in waters of the United

States. Removal of the requirement to obtain written verification prior to conducting the permitted activity would make this NWP consistent with the other NWPs that require PCNs and are authorized under 33 CFR 330.1(e)(1) if the district engineer does not respond to the PCN within 45 days of receipt of a complete PCN.

Nationwide permit 21 was first issued in 1982 to authorize discharges of dredged or fill material into waters of the United States associated with surface coal mining activities and to avoid duplication with the regulation of surface coal mining activities by the Department of the Interior under the Surface Mining Control and Reclamation Act of 1977 (45 FR 62735). From 1982 to 2012, NWP 21 had no acreage limit. In 2012, a 1/2-acre limit was added to NWP 21 for new surface coal mining activities (see 77 FR 10274), but that NWP also included a provision (paragraph (a) of the 2012 NWP 21) that allowed surface coal mining activities that were previously authorized by NWP 21 to have 5 additional years to complete the authorized work. Some surface coal mining activities authorized by NWP 21 impacted large acreages of jurisdictional waters and wetlands. For example, under grandfathering provision in paragraph (a) of the 2012 NWP 21, one surface coal mining activity that was previously authorized under the 2007 NWP 21 and authorized to continue under the 2012 NWP 21 impacted 182 acres of jurisdictional waters and wetlands. Another surface coal mining activity authorized under the grandfathering provision of the 2012 NWP 21 impacted 54 acres of jurisdictional waters and wetlands.

The 1982 NWP 21 included a requirement for the prospective permittee to give the district engineer an opportunity to review the proposed surface coal mining activity. The proposed activity would be authorized by NWP 21 if the district engineer determined that the individual and cumulative adverse effects on the environment from the structures, work, or discharges are minimal (47 FR 31833). This provision was the first pre-construction notification (PCN) requirement for an NWP, and it was also the origin of the requirement to receive written authorization from the district, thus requiring the district engineer to issue a determination that the proposed activity qualified for NWP authorization. In the 2002 reissuance of NWP 21, the NWP was modified to require that the district engineer issue his or her determination in writing (67 FR 2081). This requirement for a written verification was continued in the 2007 NWP 21 (72 FR 11184) and the 2012 NWP 21 (77 FR 10274).

Since the proposed NWP 21 retains the 1/2-acre limit that is in numerous other NWPs (e.g., NWPs 12, 29, 39, 40, 42, 43, 44, 50, 51, and 52), and it can no longer authorize surface coal mining activities that result in large acreages of impacted waters and wetlands, we are proposing to remove the requirement for written verifications in order to be consistent with the other NWPs that have the 1/2-acre limit, and eliminate an additional burden on the regulated public that is

not present in similar NWPs. The 45-day clock for the district engineer's review of PCNs at 33 CFR 330.1(e)(1), as well as the provision for the NWP authorization to be in effect if the district engineer does not respond to the PCN within that 45-day period, is an important tool to provide predictability to the regulated public and fulfill the objective of the NWP program. That objective is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts" (33 CFR 330.1(b)). For those commenters who oppose the removal of the requirement for a written verification from this NWP, we ask that they explain why discharges of dredged or fill material into waters of the United States associated with surface coal mining activities should be treated differently than other NWPs that also have a 1/2-acre limit and authorize discharges of dredged or fill material into similar types of waters.

In addition, we are proposing to remove the phrase "as part of an integrated permit processing procedure" from the first paragraph of this NWP. The Office of Surface Mining Reclamation and Enforcement has responsibility for authorizing surface coal mining activities only in Tennessee and Washington. Even though this provision has been in place since 2007, no integrated permit processing procedures have been developed for coal mining activities in these two states, and it is unlikely that such procedures will developed in the future. Therefore, we are proposing to remove this text from the NWP because it has no applicability. We are soliciting comments on whether integrated permit processing procedures for the activities authorized by this NWP may be developed in the future.

27. Aquatic Habitat Restoration, Enhancement, and Establishment Activities. We are proposing to change the second sentence of the second paragraph of this NWP to state that an ecological reference may be based on the characteristics of one or more intact aquatic habitats or riparian areas. The design and evaluation of ecosystem restoration, enhancement, or establishment projects may involve the use of more than one reference site.

In addition, we are proposing to modify this NWP by adding coral restoration or relocation activities to the list of examples of activities authorized by this NWP. In recent years, there has been increased interest in coral restoration or relocation activities, and these activities can result in increases in the ecological functions and services performed by corals and coral reefs in a region. Depending on how those activities are conducted, they may require DA authorization under section 10 of the Rivers and Harbors Act. They may also require DA authorization under section 404 of the Clean Water Act. In the "Notification" section of this NWP, we are proposing to add a new paragraph (2) to state that pre-construction notification is required for permittees that propose to conduct coral restoration or relocation activities in accordance with a binding agreement with the NMFS or any of its designated state cooperating agencies.

We are also proposing to add "releasing sediment from reservoirs to restore downstream habitat." Reservoirs may trap sediment, which may subsequently cause losses of sediment downstream of the reservoir and erosion and degradation of downstream habitat. The trapping of sediment by reservoirs also decreases their water storage capacity and the utility of those reservoirs in serving the water needs of the local population. Sediment supplies and transport regimes in rivers and streams are important factors for determining channel morphology and its ability to provide habitat for a variety of aquatic organisms, as well as water quality (Wohl et al. 2015). Effective management of sediment at reservoirs can help rectify the impacts that dams have on sediment transport processes. Sediments may be deliberately passed through reservoirs so that the sediment can be transported downstream to sustain or improve downstream habitats, while maintaining reservoir capacity (Kondolf et al. 2014). Depending on how sediments are passed through reservoirs, these reservoir sediment management activities may trigger a section 404 permit requirement. Regulatory Guidance Letter 05-04 (which was issued on August 19, 2005) discusses the circumstances under which discharges of sediments from or through a dam require DA authorization under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899.

The passing of sediments through a reservoir to restore downstream riverine habitat by sustaining sediment transport processes can result in a net increase in aquatic resource functions and services performed by the affected rivers and streams. In other words, managing reservoir operations by releasing sediment in a controlled manner can help reverse, to some degree, the degradation of riverine habitat caused by the trapping of sediment by the reservoir and erosion of downstream river reaches due to a diminished sediment supply. Therefore, we are soliciting comment on adding "releasing sediment from reservoirs to restore downstream habitat" to the list of examples of activities authorized by NWP 27 to provide general permit authorization when those activities result in no more than minimal individual and cumulative adverse environmental effects.

NWP 39. Commercial and Institutional Developments. As discussed above, we are proposing to remove the 300 linear foot limit for losses of stream bed. In the "Note," we are proposing to add the phrase "by the Corps" to make it clear that the Corps district, not the permittee, will send a copy of the NWP PCN and NWP verification to the Department of Defense Siting Clearinghouse.

NWP 41. Reshaping of Existing Drainage and Irrigation Ditches. We are proposing to modify this NWP by adding irrigation ditches. The current NWP authorizes the reshaping of existing drainage ditches to modify the cross-sectional configuration of currently serviceable drainage ditches constructed in

waters of the United States, for the purpose of improving water quality by regrading the drainage ditch with gentler slopes. These gentler slopes can reduce erosion, increase growth of vegetation, and increase uptake of nutrients and other substances by vegetation. Similar benefits to water quality may occur with irrigation ditches, so we are seeking comment on whether to modify this NWP to include irrigation ditches.

In the 2020 final rule defining waters of the United States, some ditches will continue to be subject to Clean Water Act jurisdiction as tributaries, provided they are waters under 33 CFR 328.3(a)(1) or (2), or were constructed in adjacent wetlands that are waters under §328.3(a)(4). Therefore, this NWP will continue to have some utility under the 2020 definition of "waters of the United States."

NWP 43. Stormwater Management Facilities. We are proposing to remove the 300 linear foot limit for losses of stream bed from this NWP and the ability of the district engineer to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed. To ensure that this NWP will only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects, we will rely on the 1/2-acre limit, the PCN review process, and the division and district engineers' authority under 33 CFR 330.5(c) and (d) respectively, to modify, suspend, or revoke NWP authorizations. This proposed modification is intended to provide consistency in NWP limits It is also intended to further streamline the NWP authorization process.

In addition, we are proposing to add the phrase "such as features needed" after "into waters," because green infrastructure constructed to reduce inputs of sediments, nutrients, and other pollutants into waters may be done for purposes other than meeting targets established under Total Daily Maximum Loads.

NWP 44. Mining Activities. We are proposing to modify paragraph (b) of this NWP to address work (e.g., dredging) in non-tidal navigable waters of United States subject to section 10 of the Rivers and Harbors Act of 1899. Dredging or other work in navigable waters could be used to mine aggregates from these waters, and may not result in a discharge of dredged or fill material. This proposed change would make the work regulated under section 10 subject to the 1/2-acre limit.

NWP 48. Commercial Shellfish Mariculture Activities. We are proposing a few modifications to this NWP. We are proposing 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). We are proposing to remove the 1/2-acre limit for impacts to submerged aquatic vegetation in project areas that that have not been used for commercial shellfish aquaculture activities during the past 100

years. Since we are proposing to remove that limit, we are also proposing to remove the definition of "new commercial shellfish aquaculture operation" that we adopted in 2017. In addition, we are also proposing to remove both PCN thresholds for this NWP, as well as the paragraph that identifies the additional information that permittees must submit with NWP 48 PCNs.

We are proposing to change 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). This proposed change would also provide consistency between NWP 48 and the two proposed new NWPs for activities associated with the production of seaweed and finfish in coastal waters and in federal waters on the outer continental shelf. 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, and mussels are examples of bivalve molluscs. Bivalve Since aquaculture activities in the United States include both water-based and land-based activities, we are proposing the use the term "mariculture" in the NWPs 48, A, and B to clarify 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), we have made substantial revisions to the draft national decision document for this proposed NWP. The draft revisions are intended to address the concerns identified in the district court's decision. A copy of the draft national decision document is available in the docket at www.regulations.gov (COE-2020-0002), and we seek public comment on that draft decision document.

The district court found that the national decision document did not satisfy the requirements of NEPA and the 404(b)(1) Guidelines. The district court said the national decision document should provide a more thorough discussion of the direct and indirect impacts of these activities, and use a broader set of scientific literature to support that discussion. It also said that the national decision document should not focus on only on oyster mariculture, but it should also discuss mariculture for other shellfish species, such as clams and mussels. More specifically, the district court said the national decision document should present 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 district court also stated that the national decision document should include a more rigorous analysis to support a finding that the NWP would authorize only

activities with no more than minimal individual and cumulative adverse environmental effects.

We are proposing to remove the 1/2-acre limit for impacts to submerged aquatic vegetation in project areas that that have not been used for commercial shellfish aquaculture activities during the past 100 years. Shellfish mariculture can have both positive and negative effects on marine and estuarine waters (NRC 2010, Tallis et al. 2009). We are proposing to remove the 1/2-acre limit because the impacts of commercial shellfish mariculture activities on submerged aquatic vegetation are often temporary, and these activities do not convert aquatic habitat to non-aquatic habitat or upland (i.e., they do not result in permanent losses of aquatic resources). While bivalve shellfish mariculture activities have impacts on estuaries, those impacts neither result in losses of estuarine habitat nor do they degrade water quality in a manner comparable to other human activities (Dumbauld et al. 2009). In addition, the 1/2-acre limit for impacts to submerged aquatic vegetation only has limited effect. If a proposed commercial shellfish mariculture activity would result in impacts to more than 1/2-acre of submerged aquatic vegetation, it can be authorized by an individual permit. After that individual permit expires, it would be considered an existing commercial shellfish mariculture activity that has occurred during the past 100 years and could be authorized by NWP 48.

According to Clewell and Aronson (2013), anthropogenic and natural disturbances to ecosystems can be placed in three categories: (1) stress with maintenance of ecosystem integrity; (2) moderate disturbance where the ecosystem can recover in time through natural processes; and (3) impairment, which may result in a more severe disturbance that may require human intervention (e.g., restoration) to prevent the ecosystem from changing into an alternative, perhaps less functional ecological state. For commercial shellfish mariculture activities, the impacts generally fall within the first two categories because shellfish mariculture activities do not cause a loss in ecosystem integrity or ecosystem components can recover over time after those impacts occur. In estuaries and coastal waters where commercial shellfish mariculture activities occur, bivalve molluscs such as oysters, mussels, and clams were overharvested over many years (Lotze et al. 2006), substantially changing the ecological structure, functions, and dynamics of coastal and estuarine waters such as the Chesapeake Bay and various estuaries on the west coast. The impacts from the overharvesting of bivalve molluscs in these waters falls under the third category of disturbances identified by Clewell and Aronson (2013). Bivalve shellfish mariculture activities can also be considered restorative actions (NRC 2010), by increasing the numbers of bivalve molluscs in coastal waters where they were depleted through overfishing and recognizing the ecosystem functions and services those bivalve molluscs provide.

Bivalve shellfish mariculture activities can have temporary and permanent impacts on the aquatic environment, including the species that inhabit coastal waters. These impacts are discussed in more detail below. The severity of the impacts, both negative and positive, can vary as a result of scale and location of the shellfish mariculture operation, the species being cultivated, the equipment and techniques used by the grower, and the hydrodynamic and physical characteristics of the mariculture site (NRC 2010). In its 2010 report titled "Ecosystem Concepts for Sustainable Bivalve Mariculture" the National Research Council (NRC) recommended that the impacts should be evaluated in a policy context that examines the relative costs and benefits of seafood production for human consumption and altering aquatic ecosystems.

The responses of seagrasses to disturbances caused by bivalve shellfish mariculture activities vary by regional environmental conditions and mariculture practices (Ferriss et al. 2019). Recovery of submerged aquatic vegetation after disturbance may be inhibited by poor habitat quality (e.g., poor water quality, temperature stress) or a lack of seagrass seeds (Orth et al. 2017). Seagrass recovery after disturbance also varies by species because of differences in life history patterns, with some species able to grow and reproduce more quickly than other species (Fonseca et al. 1998). Eelgrass recovery takes longer after mechanical harvesting methods, such as dredging, compared to hand harvesting methods (Ferriss et al. 2019). Seagrasses may be perennial or annuals, and seagrass beds are dynamic and change over time (Fonseca et al. 1998). Reproduction can occur via seeds or rhizomes. Some seagrass beds can persist for years, other beds change with the seasons, and other beds vary in step with the life history of the species. Patchy beds of submersed aquatic vegetation can be as ecologically valuable as large, dense seagrass beds (Fonseca et al. 1998). In a meta-analysis of studies that examined the effects of bivalve shellfish mariculture activities on eelgrass, Ferriss et al. (2019) concluded that the responses of eelgrass to bivalve mariculture are variable and dependent on eelgrass characteristics, how the bivalve molluscs are cultivated and harvested, and the region in which these activities are conducted.

Temporary impacts include temporary structures placed in navigable waters, such as bags, cages, trays, and racks; stakes; and long-lines that are supported by stakes or piles. Temporary impacts also include dredging, and the duration of those impacts can vary depending on the intensity and duration of dredging. Permanent impacts can include permanent structures such as piles that are installed in the waterbody to provide a permanent structure to attach equipment to, and shell or gravel that is discharged into the waterbody to provide suitable substrate for larval bivalve shellfish to attach to and grow. The species cultivated by mariculture activities also affect the aquatic environment and other species, for example by altering water quality through suspension feeding or competition for space. Those impacts can be positive, negative, or neutral, and

can vary the techniques used for bivalve shellfish mariculture activities. There is a substantial amount of scientific literature regarding the interactions between bivalve shellfish mariculture activities and submerged aquatic vegetation that has shown that the impacts of these activities on submerged aquatic vegetation are often temporary, some of which is discussed below.

Bivalve mariculture activities can disturb benthic plants and animals, modify biogeochemical processes, change water flows, alter substrate composition, and provide structures with hard habitat that attracts fish and invertebrates, which may include both native and non-native species (NRC 2010). Kellogg et al. (2018) did not find any significant negative impacts on benthic macroinvertebrate communities caused by oyster mariculture activities. Impacts to submerged aquatic vegetation caused by oyster cultivation activities can be reduced through by using cultivation techniques that result in fewer impacts or by reducing oyster planting densities (Tallis et al. 2009). Bivalve shellfish mariculture activities are similar to other food production activities, in that they involve trade-offs with the ecosystems being affected by those activities (Tallis et al. 2009), in order to provide food for people. Standards and best management practices can be implemented by growers to minimize the adverse environmental effects of commercial shellfish mariculture operations (NRC 2010). Standards and best management practices would be more appropriately developed for certain species or regions (Simenstad and Fresh 1995) because these standards and practices can vary in effectiveness for different species or groups of species. Species-specific or regional standards and best management practices may be appropriate as regional conditions approved by division engineers. Such standards and best management practices may added to DA permits as permit conditions if they satisfy the criteria for permit conditions at 33 CFR 325.4(a): that is they are necessary to satisfy legal requirements, and are directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable.

As an example, these standards and practices may be identified as a result of consultation under section 7 of the Endangered Species Act as was the case in Washington State when the Corps completed programmatic consultation on aquaculture activities in Washington State with the US Fish and Wildlife Service and the National Marine Fisheries Service in 2016. The comprehensive analysis completed by the Corps in its biological assessment and the Services analyses in their biological opinions, provided much information and each programmatic biological opinion contained numerous conditions to protect listed species and their designated critical habitat. Those conditions are included as special conditions in each verification of NWP 48 provided by the Corps to commercial shellfish growers.

As discussed above, shellfish mariculture activities have both positive and negative environmental effects, including effects on certain species that inhabit coastal waters. The severity of those impacts can vary by the mariculture method and location, as well as the intensity and duration of the operation (NRC 2010). Commercial shellfish mariculture techniques vary, and some species can be grown through a variety of techniques. Bivalve mariculture techniques include on-bottom and off-bottom culture methods, and some shellfish mariculture methods involve dredging whereas others do not. The adverse effects of dredging associated with bivalve shellfish mariculture activities, including harvesting, vary with intensity and duration of the dredging, as well as the type of substrate and which species are present in the area (NRC 2010). Both on-bottom and off-bottom bivalve mariculture techniques may involve the use of bags, racks, cages, and trays. The various bivalve mariculture methods can exhibit substantial differences in impacts to the aquatic environment, and to species that inhabit coastal waters. Commercial shellfish mariculture operations may use chemicals to control fouling organisms (NRC 2010). Operators may also use pesticides to control predators, but the discharge of pesticides into navigable waters is regulated under Section 402 of the Clean Water Act, not section 404.

On-bottom bivalve shellfish mariculture techniques include adding shell, gravel, or other material to create substrate for larval bivalve molluscs to attach to and grow until they are harvested, either by dredging or by hand. The shell, gravel, or other material may be deposited in a manner to create hummocks, or the material may be deposited so that it is relatively flat. On-bottom methods also involve placing cages, racks, and bags on the bottom of the waterbody. When the bivalves are ready to be harvested, the cages, racks, and bags are removed until they are ready to be used for the next growing cycle. In general, dredging is not used with bottom culture that uses cages, racks, and bags (NRC 2010). On-bottom culture using cages, racks, and bags usually does not involve substantial disturbance of the substrate. The placing of shell, gravel, or other material for bottom culture generally has longer lasting impacts compared with those stemming from the use of cages, racks, and bags. The deposited shell or gravel can bury submerged aquatic vegetation and other benthic organisms. Cages, racks, and bags can also cover submerged aquatic vegetation and other benthic organisms, but with a lesser degree of disturbance where recovery can occur more quickly than when dredging is used during mariculture operations. There may also be foot traffic in intertidal areas where bags and racks are used for bottom culture, to maintain those structures and to harvest the bivalve shellfish. The use of cages, bags, and racks can also alter water flow through the site, and well as sediment deposition (NRC 2010). The placement of bags in the intertidal zone may also reduce foraging habitat for shorebirds (NRC 2010), and those adverse effects may cease after the bags are removed. On-bottom culture is used for clam, including geoducks. Geoducks are cultivated in the intertidal zone in plastic tubes covered by a net to keep predators from eating the geoduck

(Dumbauld et al. 2009). Geoducks are harvested by jetting water into the substrate and pulling out the geoduck (NRC 2010).

Off-bottom bivalve shellfish mariculture techniques involve the use of floating containers, suspended containers, or lines. These methods are typically used in deeper waters (Dumbauld et al. 2009). The floating or suspended containers may be bags, cages, and racks that are supported in the water column. Off-bottom cultivation methods can shade submerged aquatic vegetation and other benthic organisms but they do not disturb the substrate. The shading impacts will cease after the floating or suspended containers are removed. They can also interfere with navigation. The suspended and floating containers can act as attractants for fish and large crustaceans (e.g., crabs), which may feed on the fouling (epibiotic) organisms that attach to the bags, cages, racks, and lines (NRC 2010). These off-bottom structures may also have positive and negative effects on birds, marine mammals, and marine turtles (NRC 2010), such as attracting prey species that those organisms can feed on or by posing a risk of entanglement and drowning. Long lines can be used to cultivate oysters and mussels, where the long line is supported by stakes, and other lines hang vertically in the water column that hold the seeds of the molluscs to be cultivated so that they can feed and grow (Dumbauld et al. 2009). Long-lines can alter the hydrodynamics in the vicinity of the mariculture operation, and increase sedimentation in the area (NRC 2010). This sedimentation and reduced wave energy may create habitat conditions that favor seagrassses (Ferriss et al. 2019), Turner et al. (2019) found that shellfish mariculture structures substantially reduced currents in the vicinity of the bivalve mariculture activities. After the long-lines are removed, the hydrodynamics and sedimentation is likely to quickly recover. When long-lines are used for bivalve mariculture, harvesting is usually done by hand (Dumbauld et al. 2009).

Structures used for shellfish mariculture activities can provide habitat for a wide variety of organisms, and serve as attractants for fish, mobile crustaceans, birds, and other organisms (e.g., Dumbauld et al. 2015, McKindsey et al. 2011, NRC 2010, D'Amours et al. 2008, Powers et al. 2007). Fouling organisms such as barnacles, tunicates, sponges, and bryozoans may establish and grow on these structures, and provide food for fish and motile crustaceans (Hosack et al. 2006), as well as birds NRC 2010,. They can also provide hiding places to avoid predators. Lines and nets used for commercial shellfish mariculture activities may pose a risk of entanglement for birds, marine mammals, and marine turtles (NRC 2010).

Shellfish mariculture techniques may involve dredging, and the duration and intensity of the impacts of dredging can vary by substrate type (NRC 2010). Submerged aquatic vegetation can recovery after being impacted by dredging for shellfish mariculture activities, and that recovery may take a few years or more

(Dumbauld et al. 2009). Eelgrass recovers after manual and mechanical harvesting of cultivated bivalve molluscs, but recovery generally takes longer when mechanical harvesting techniques are used (Ferriss et al. 2019). Manual harvesting methods include the use of hands, rakes, and hoes, whereas mechanical harvesting methods include the use of dredging, sediment liquefaction, dragging and digging (Ferriss et al. 2019). Commercial shellfish mariculture activities have been occurring in Washington State since the mid-1800s (Washington Sea Grant 2015), and eelgrass continues to persist in the waters of that state. Bivalve shellfish mariculture activities and submerged aquatic vegetation have existed next to each other for hundreds of years (Ferriss et al. 2019), which demonstrates the temporary nature of the impacts of these activities on seagrasses and the resilience of seagrasses to the periodic disturbances caused by these activities. On-bottom bivalve shellfish mariculture techniques that does not involve anti-predator measures generally results in increases in eelgrass growth, decreases in eelgrass density, and neutral effects on eelgrass biomass, reproduction, and structure, and these effects may be caused by competition for space (Ferriss et al. 2019). Off-bottom bivalve shellfish mariculture techniques generally result in negative effects on eelgrass density, reproduction, and percent cover, with neutral effects on eelgrass biomass and growth; the negative effects may be caused by shading from long-lines and suspended bags (Ferriss et al. 2019). Skinner et al. (2014) observed shading effects on eelgrass from suspended oyster bag culture in eastern Canada.

Compared with other techniques, bivalve shellfish mariculture activities that involve dredging can have more substantial impacts on estuaries and the organisms that inhabit those estuaries. Oysters can be harvested by hand or by using machines (Tallis et al. 2009). Mechanical harvesting can include grading, tilling, and dredging the substrate of the waterbody. Floating and bottom culture shellfish mariculture techniques that use lines, cages, bags, rafts, and racks do not require dredging of the substrate (NRC 2010). Recovery of areas disturbed by these floating and bottom culture shellfish mariculture techniques that do not involve dredging can occur rather quickly as long as there is minimal disturbance of the substrate. For example, shading impacts are quickly reversed after the bags, cages, racks, and long-lines are removed from the waterbody.

For commercial shellfish mariculture activities, the impacts of commercial shellfish mariculture activities at a project site can fall into two categories: (1) pulse disturbances, which are disturbances of relatively short duration caused by individual shellfish mariculture activities after which another ecosystem component (e.g., seagrass) could recover after a period of time, and (2) press disturbances, which are longer duration disturbances (e.g., permanent in-water structures) and have longer lasting effects on ecosystem components (Dumbauld et al. (2009)). In an evaluation of four oyster mariculture activities in the Chesapeake Bay, Kellogg et al. (2018) found few differences in water quality,

sediment quality, and macrofauna community structure within the mariculture sites and areas outside the mariculture sites. Small, low density oyster mariculture activities in moderately flushed waters caused only minimal impacts to water quality Turner et al. (2019). If commercial shellfish mariculture activities cease in an estuary inhabited by submerged aquatic vegetation, the submerged aquatic vegetation that was impacted by those commercial shellfish mariculture activities generally recover within a few years (Dumbauld et al. 2009). These situations occur when the grower is letting the bottom of the waterbody go fallow for a period of time or has decided to cease commercial shellfish mariculture operations altogether in that area. After disturbance, recovery of submerged aquatic vegetation may be through asexual reproduction (i.e., the spread of rhizomes) or sexual reproduction (i.e., the production of seeds and subsequent germination) (Wisehart et al. 2007). Both natural and human-induced disturbances, including bivalve shellfish mariculture and harvesting activities, stimulate sexual reproduction of submerged aquatic vegetation (NRC 2010). Tallis et al. (2009) observed that eelgrass exhibited higher growth rates in areas where shellfish were dredged or hand-picked from the bottom than eelgrass inhabiting areas where no bivalve shellfish harvesting was occurring. Therefore, submerged aquatic vegetation has the ability to recover fairly quickly after cultivated bivalve shellfish are removed.

Bivalve shellfish mariculture has been occurring in the United States for more than 100 years (NRC 2010), and submerged aquatic vegetation has continued to persist in waterbodies where there these activities are conducted. Submerged aquatic vegetation beds are dynamic, and often vary from year to year even in waters where water quality is high (Orth et al. 2006), so changes in submerged aquatic vegetation beds may result from anthropogenic and/or natural causes at various temporal and spatial scales. Dumbauld et al. (2009) concluded that eelgrass and shellfish mariculture have co-existed in west coast estuaries for decades. These west coast estuaries had substantial populations of native oysters, and after those native oysters were overharvested, they did not recover (Dumbauld et al. 2009) to historic population sizes. Tallis et al. (2009) concluded that there are trade-offs to be considered when evaluating shellfish mariculture activities and their impacts on submerged aquatic vegetation. When district engineers evaluate permit applications and general permit verification requests for commercial shellfish mariculture activities requiring DA authorization, they should consider the ecological functions and services provided by the cultivated bivalve molluscs and the ecological functions and services provided by submerged aquatic vegetation and other species inhabiting the affected waterbodies. That evaluation can occur during the public interest review for an individual permit or when determining whether to exercise discretionary authority for a proposed general permit activity.

If commercial shellfish mariculture activities occur within estuarine or marine waters inhabited by submerged aquatic vegetation, there will be competition between the shellfish and submerged aquatic vegetation for space, unless the shellfish mariculture activities can avoid areas inhabited by submerged aquatic vegetation. In west coast estuaries, eelgrass co-exist with shellfish on intertidal flats at the low densities practiced for shellfish mariculture (Dumbauld et al. 2009). Tallis et al. (2009) observed that eelgrass density decreased with increasing shellfish mariculture density because of competition for space. Introduced Pacific oysters now occupy areas that were historically extensive beds of native oysters (Dumbauld et al. 2009), so this competition for space has occurred under both natural conditions and mariculture operations. In the Chesapeake Bay, expanding oyster mariculture efforts can compete with submerged aquatic vegetation for space in shallow waters (Orth et al. 2017), but current oyster populations in that waterbody are approximately 1 percent of their historical level (using the early 1800s as a baseline) because of overfishing, habitat loss, and disease (Wilberg 2011). If shellfish mariculture activities cease temporarily (e.g., during fallow periods) or permanently (e.g., by terminating those activities), the submerged aquatic vegetation is likely to recover unless other stressors (e.g., increased turbidity) prevent submerged aquatic vegetation beds from re-establishing themselves.

The continued persistence of submerged aquatic vegetation in coastal waterbodies in which shellfish mariculture has been conducted for decades indicates that adverse impacts to seagrasses are temporary. In waterbodies inhabited by submerged aquatic vegetation where shellfish mariculture is conducted, seagrass is in dynamic equilibrium with the shellfish mariculture activities (Dumbauld et al. 2009). The amount of time it takes for submerged aquatic vegetation to recover from disturbances caused by shellfish mariculture activities varies by plant species, the extent of the disturbance, the intensity of the disturbance, the seasonal timing of disturbance, and sediment characteristics (NRC 2010). In their review of the effects of shellfish mariculture activities on seagrasses in estuaries on the west coast of the United States, Dumbauld et al. (2009) found that the amount of time it took eelgrass to recover to pre-disturbance levels varied from less than 2 years to more than 5 years. In estuaries on the west coast of the United States, shellfish mariculture activities have been undertaken for over a century and have not been found to cause estuarine waterbodies to change to an alternative state or exhibit a decreased ability to recover from disturbances (Dumbauld et al. 2009).

This NWP authorizes activities under 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. The Corps' section 10 regulations at 33 CFR 322.2(b) define "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." The Corps' section 10 regulations at 33 CFR 322.2(c) define "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."

Certain commercial bivalve shellfish mariculture activities involve structures regulated under section 10, such as racks, cages, bags, lines, nets, and tubes, when those structures are placed in navigable waters. Dredging activities for commercial shellfish mariculture activities, including dredging for harvesting and bed preparation, are regulated under section 10 as work. Placing fill material in navigable water, including shell or gravel to provide suitable substrate for bivalve shellfish larvae to attach to and grow, is also regulated under section 10 as "work." This is an on-bottom cultivation technique that can involve placing a relatively thin layer of shell, gravel, or other suitable material on the bottom of the waterbody, or placing that fill material to create mounds that reduce the likelihood of sedimentation that could smother bivalve shellfish larvae or older shellfish.

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. Those 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. 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.

This NWP also authorizes discharges of dredged or fill material into waters of the United States under Section 404 of the Clean Water Act, and some commercial bivalve shellfish mariculture activities involve discharges of dredged or fill material into these waters. The term "discharge of dredged material" is defined at 33 CFR 323.2(d) and the term "discharge of fill material" is defined at 33 CFR 323.2(f). Some commercial shellfish mariculture activities involve

mechanical or hydraulic harvesting techniques that may result in discharges of dredged material into jurisdictional waters and wetlands. As discussed above, 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. These fill activities may require section 404 authorization.

The Corps' regulations at 33 CFR 323.2(e) define the term "fill material" as "material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States." Examples of fill material regulated under section 404 include, but are not limited to: "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" (§323.2(e)(2)). Fill material does not include trash or garbage (§323.2(e)(3)).

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. 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.

We invite comment on the various techniques used for commercial shellfish mariculture activities and which specific permit requirements are triggered by each of those techniques. Commenters are encouraged to provide information in support of their views on which commercial shellfish mariculture techniques require DA authorization only under Section 10 of the Rivers and Harbors Act of 1899, under Section 404 of the Clean Water Act, or under both permitting authorities.

Neither the Clean Water Act nor the Clean Water Act Section 404(b)(1) Guidelines prohibit discharges of dredged or fill material or other types of impacts to submerged aquatic vegetation. Despite the status of submerged aquatic vegetation in the 404(b)(1) Guidelines as a special aquatic site (i.e., vegetated shallows under 40 CFR 230.43), the Guidelines do not prohibit discharges of dredged or fill material into special aquatic sites as long as a section 404 permit is issued by the Corps of Engineers or other permitting authority (e.g., a state or tribe that has approved by EPA to implement the section 404 permit program under section 404(g) of the Act). For activities authorized by the NWPs, the individual and cumulative adverse environmental effects caused by permitted impacts to submerged aquatic vegetation must be no more than minimal.

Submerged aquatic vegetation can also provide important nursery habitat for finfish and crustaceans (NRC 2010), including species that may be listed as endangered or threatened under the Endangered Species Act (ESA). For some species listed as endangered or threatened under the ESA, emergent and submerged aquatic vegetation has been determined to be a physical or biological feature essential to the conservation of the species. Under the “Endangered Species” general condition, if the district engineer determines the proposed NWP 48 activity may affect designated critical habitat, he or she will conduct ESA section 7 consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service, as appropriate. During the ESA section 7 consultation process, impacts to submerged aquatic vegetation may be addressed through conservation measures (i.e., measures to avoid, minimize, or offset impacts) identified through formal or informal consultation, or as terms and conditions of an incidental take statement in a biological opinion.

If a proposed NWP 48 activity may have adverse effects on essential fish habitat (EFH), which may include areas with submerged aquatic vegetation, the district engineer will initiate EFH consultation with the appropriate office of the National Marine Fisheries Service. Division engineers may add regional conditions to NWPs to require PCNs for proposed activities that have the potential to adversely affect EFH, so that the district engineer can initiate EFH consultation when he or she determines that a specific NWP activity may adversely affect EFH. Essential fish habitat may include submerged aquatic vegetation beds for the fish species in the region. Through this consultation process, the National Marine Fisheries Service may provide the district engineer with EFH Conservation Recommendations. The district engineer has the authority to add certain EFH Conservation Recommendations as permit conditions to the NWP authorization, when he or she determines such conditions are needed to ensure that the NWP activity results in no more than minimal adverse environmental effects.

When proposed NWP 48 activities require PCNs under paragraph (c) of general condition 18, impacts to submerged aquatic vegetation that is a physical or biological feature essential to the conservation of the species will be evaluated through the ESA section 7 process. If a district engineer determines that a proposed NWP 48 activity may adversely affect essential fish habitat, the district engineer will prepare an EFH assessment and initiate EFH consultation with the NMFS. Impacts to submerged aquatic vegetation that is a component of EFH may be addressed through EFH conservation recommendations that are adopted by the district engineer. We believe ESA section 7 consultations, EFH consultations under the Magnuson-Stevens Fishery Conservation and Management Act, and regional conditions imposed by division engineers to restrict or prohibit the use of NWP 48 are appropriate avenues to address impacts to submerged aquatic vegetation that may be caused by activities authorized by NWP 48.

We are proposing to remove the PCN threshold for commercial shellfish mariculture activities that include a species that has never been cultivated in the waterbody. The current PCN threshold addresses native species that have not been commercially cultivated in the waterbody. Shellfish mariculture provides an opportunity to increase populations of native shellfish in coastal waters in cases where those populations declined (NRC 2010) because of overharvesting or other stressors. In addition, NWP 48 currently prohibits: (1) the cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody, and (2) the cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990. These prohibitions will continue to help control one mechanism of intentional introductions of non-native species into coastal waters.

We are also proposing to remove the PCN requirement for any proposed commercial shellfish mariculture activity that occurs in a project area that has not been used for commercial shellfish mariculture activities in the past 100 years. If, in the final NWP, we remove the definition of "new commercial shellfish aquaculture operation," as well as the term that excludes new activities that directly affect more than 1/2-acre of submerged aquatic vegetation from the authorization provided by NWP 48, then this PCN threshold will no longer be necessary. The proposed removal of this PCN threshold would also be consistent with our view that commercial shellfish mariculture activities typically only have temporary impacts on submerged aquatic vegetation and that cultivated shellfish and submerged aquatic vegetation can sustain a healthy co-existence and provide estuarine and marine ecosystems with a variety of ecological functions and services, including habitat for a number of finfish and invertebrate species. We developed this view after reviewing a number of scientific studies of interactions between submerged aquatic vegetation and

shellfish mariculture operations, and a number of those studies are discussed in this preamble.

All NWP 48 activities conducted by non-federal permittees must comply with the requirements of 33 CFR 330.4(f)(2) and paragraph (c) of the "Endangered Species" general condition. The proposed removal of the PCN requirement from this NWP does not affect the PCN requirement for non-federal permittees established in §330.4(f)(2) and paragraph (c) of general condition 18. Section 330.4(f)(2) and paragraph (c) of the "Endangered Species" general condition require non-federal permittees to notify the district engineer if any federally-listed endangered or threatened species or designated critical habitat might be affected or is in the vicinity of the project. For a proposed NWP 48 activity that might affect listed species or designated critical habitat, the non-federal applicant is required to submit a PCN to the district engineer. The district engineer will evaluate the PCN and determine whether the proposed activity "may affect" listed species or designated critical habitat. If the district engineer makes a "may affect" determination, he or she will conduct formal or informal section 7 consultation, unless the proposed activity is covered by an existing regional programmatic section 7 consultation.

In regions where there are substantive concerns that proposed NWP 48 activities have the potential to result in more than minimal individual and cumulative adverse environmental effects, division engineers can impose regional conditions to require PCNs for some or all proposed NWP 48 activities in specified Corps districts.

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 objectives of the Clean Water Act is to promote water quality that supports the propagation of fish and shellfish. Bivalve molluscs cultivated through commercial shellfish mariculture activities help improve water quality through filter feeding, removing particulates and nutrients from the water column which can improve water clarity and reduce the potential for eutrophication (e.g., NRC 2010). Commercial shellfish mariculture activities can also provide structural habitat that can support populations of fish, large invertebrates such as crabs, and other animals (e.g., Dumbauld et al. 2015, Powers et al. 2007). In addition to producing food, mariculture can provide a variety of other ecosystem services, including other provisioning services, regulating services, habitat or supporting services, and cultural services (Alleway 2019). Agricultural ecosystems can provide a variety of ecological functions and services, in addition to food production (Power 2010), and bivalve shellfish mariculture is an example of an agricultural ecosystem in coastal waters.

Depending on how they are structured and managed, agricultural activities may provide ecological services or disservices, and trade-offs need to be considered by decision-makers and other entities (Power 2010), which may consist of growers, regulatory agencies, resource agencies, or other stakeholders.

Submerged aquatic vegetation and bivalve molluscs provide important ecological functions and services to estuarine waters (Dumbauld and McCoy 2015, NRC 2010). Seagrasses provide the following ecosystem functions and services: habitat for a variety of aquatic organisms, organic carbon production and export, nutrient cycling, sediment stabilization, enhanced biodiversity, and energy exchanges with adjacent habitats (Orth et al. 2017, Orth et al. 2006). Bivalve molluscs provide ecological functions and services such as water turbidity reduction through suspension feeding, biodeposition of organic material with plant nutrients, denitrification, carbon sequestration, providing structural habitat for a variety of fish, crustaceans, and epibiotic organisms, and habitat and shoreline stabilization (NRC 2010), as well as secondary production that contributes to energy exchanges among terrestrial and aquatic organisms. There is substantial overlap between the ecosystem functions and services provided by submerged aquatic vegetation and bivalve shellfish.

Bivalve shellfish mariculture activities can contribute to the restoration of aquatic ecosystems (NRC 2010), because the shellfish produced by these activities can provide ecological functions and services (e.g., water quality, habitat, and food production) that were diminished or eliminated in waterbodies as a result of overfishing historic stocks of bivalve shellfish. Oyster mariculture activities may not provide identical ecological functions and services and functions as natural oyster reefs, but cultivated oysters do provide some of these functions and services without substantial investment of public funds (Kellogg et al. 2018) that may be needed for restoration activities. In the Chesapeake Bay, oyster mariculture activities are a component of watershed management activities (Turner et al. 2019) because of their potential to help improve water quality. In the west coast of the United States, the extent of oyster grounds and oyster biomass is less than one percent of historic levels (Zu Ermgassen et al. 2012). In the Chesapeake Bay, oyster abundance decreased by more than 99 percent since the early 19th century (Wilberg et al. 2011). In a global assessment of seagrass losses over time, Waycott et al. (2009) estimated that the area of coastal waters occupied by seagrasses have declined by nearly 30 percent since the late 19th century. Lotze et al. (2006) estimated that estuarine and coastal waters have lost more than 65 percent of wetland and seagrass habitat, and more than 90 percent of important species, including oysters. Commercial shellfish mariculture can be an alternative means of providing a variety of ecosystem functions and services to coastal waters (NRC 2010), in areas where more traditional restoration approaches may not be practical or sufficient funding cannot be obtained (Alleway 2019). The ecological functions and services

performed by cultivated bivalve molluscs can also facilitate the establishment and persistence of submerged aquatic vegetation by improving water clarity and providing nutrients for seagrass growth and reproduction (NRC 2010).

Suspension feeding bivalve shellfish such as oysters and mussels and submerged aquatic vegetation both provide important ecological functions and services for estuarine ecosystems (e.g., NRC 2010). Bivalve shellfish mariculture activities can contribute to the restoration of aquatic ecosystems (NRC 2010), because the shellfish produced by these activities can provide ecological functions and services (e.g., water quality, habitat, and food production) that were diminished or eliminated in waterbodies as a result of overfishing historic stocks of bivalve shellfish. Commercial shellfish mariculture can be an alternative means of providing a variety of ecosystem functions and services to coastal waters, in areas where more traditional restoration approaches may not be practical or sufficient funding cannot be obtained (Alleway 2019).

In waterbodies inhabited by both submerged aquatic vegetation and shellfish, these organisms provide important ecological functions and services to estuarine ecosystems and to the people that live in the vicinity of those estuaries. Both submerged aquatic vegetation and bivalve shellfish are considered ecosystem engineers (Ruesink et al. 2005, Dumbauld et al. 2009) that have substantial impacts on the structure, functions, and dynamics of estuarine and marine ecosystems. While shellfish mariculture activities can disturb submerged aquatic vegetation beds, those activities can also increase production of submerged aquatic vegetation beds by reducing water turbidity, which allows submerged aquatic vegetation to establish and grow in deeper water, and by providing nutrients for their growth (NRC 2010). Bivalve shellfish mariculture activities can perform regulating services such as nutrient cycling, assimilation, and removal; habitat and supporting services including structural habitat for finfish and invertebrates, including fouling organisms that serve as food for other aquatic animals; and cultural services such as individual and community connections with the marine environment, as well as employment opportunities in distressed or geographically isolated communities (Alleway et al. 2019, NRC 2010). Gallardi (2014) found that shellfish mariculture modifies benthic habitat that supports increased numbers of crustaceans and some fish species.

Bivalve shellfish perform the same physiological functions (e.g., suspension feeding) regardless of whether they are naturally occurring (i.e., occupying estuarine and marine habitats through natural colonization or human seeding activities) or are being cultivated for commercial purposes. In other words, naturally occurring and cultivated shellfish perform virtually the same ecological functions and services and contribute to the overall ecological functions and services provided by the ecosystem or waterbody. Ecosystem services provided by filter-feeding bivalve molluscs include reduction of turbidity,

the fertilization of benthic habitats, reducing the adverse effects of eutrophication by consuming phytoplankton and facilitating denitrification, carbon sequestration, providing habitat for other marine and estuarine organisms, and stabilizing habitats and shorelines (NRC 2010). Shell growth that occurs in cultured and naturally occurring oysters, mussels, and other bivalve shellfish sequesters carbon (NRC 2010). Areas used for oyster mariculture generally support a more diverse community of benthic and epibenthic plants and animals than soft substrates that are inhabited primarily by burrowing invertebrates (Simenstad and Fresh 1995, Dumbauld et al. 2009). While seagrasses can provide nursery habitat for a variety of aquatic species, other structured habitats in coastal waters, such as oyster reefs, cobble reefs, and macroalgal beds can also provide nursery habitat for fish and crustaceans (Heck et al. 2003). Powell et al. (2007) found that netting used for on-bottom clam culture can provide nursery habitat for mobile invertebrates and juvenile fish.

Estuarine and marine ecosystems in which shellfish mariculture occur are dynamic, complex ecosystems subject to numerous types of natural and anthropogenic disturbances and are inhabited by a variety of species (e.g., NRC 2010, Simenstad and Fresh 1995). Submerged aquatic vegetation, bivalve molluscs, finfish, and other groups of species are all components of these complex ecosystems. Humans have been altering estuaries for millennia, by overexploitation of resources, habitat modifications, pollution, and other activities (Lotze et al. 2006). Commercial shellfish mariculture activities and seagrasses have coexisted for decades and centuries (Ferriss et al. 2109, Washington Sea Grant 2015). Overfishing of oysters over time is one mechanism that has been a driver for many changes to estuaries, since habitat destruction, pollution, eutrophication, invasive species, disease outbreaks, and climate change generally occurred after overfishing depleted populations of these species (Jackson et al. 2001). For example, in the Chesapeake Bay the oyster population has decreased to a level that 50 times less than the level it was in the early 1900s (Rothschild et al. 1994). Human activities have removed approximately 95 percent of important estuarine species (such as oysters), removed more than 65 percent of submerged aquatic vegetation, degraded water quality, destroyed habitat, and increased the rates of species invasions (Lotze et al. 2006). Submerged aquatic vegetation and wetlands have been lost or degraded from estuaries as a result of reclamation activities, eutrophication, habitat destruction, disease, and removal by people (Lotze et al. 2006). The filter-feeding performed by bivalve molluscs cultivated by mariculture activities can reduce turbidity in the water column to support the growth and persistence of submerged aquatic vegetation that provides nursery habitat for a number of species of fish, molluscs, and crustaceans that are important to commerce (NRC 2010).

Effects of shellfish mariculture on the environment can be positive or negative depending on the specific activity and environmental component being

evaluated (Gallardi 2014, NRC 2010). The individual effect of shellfish mariculture activities on the environment can be temporary or permanent, and can vary in intensity. Oysters and other filter-feeding bivalve molluscs produced through mariculture activities may help improve water quality and reduce the effects of eutrophication (Jackson et al. 2001).

When evaluating the cumulative effects of shellfish mariculture activities on estuarine and marine ecosystems, including submerged aquatic vegetation, several investigators have recommending conducting this evaluation at an ecosystem or landscape scale (e.g., NRC 2010, Simenstad and Fresh 1995, Dumbauld et al. 2015), rather than focusing on only the immediate site where the mariculture activities are occurring. Using an ecosystem or landscape scale approach for assessing the cumulative effects of shellfish mariculture activities helps take into account the highly dynamic nature of coastal waters, and the various ecological components of those waters (e.g. water quality, seagrasses, finfish species, and invertebrate species) and how they change over time and space as a result of natural and anthropogenic disturbances. A cumulative effects analysis would also provide context on the degree to which commercial shellfish mariculture activities, compared to other human activities such as urban, suburban, and agricultural land uses in coastal watersheds, forestry activities in coastal watersheds, shoreline alteration activities, and point and non-point sources of pollution, that contribute to cumulative effects that alter the structure, functions, and dynamics of coastal waters. An ecosystem or landscape approach for assessing the cumulative effects of shellfish mariculture activities would provide a better understanding of the scale and intensity of the effects of those mariculture activities on the structure functions, and dynamics of coastal waters (NRC 2010)., and assist the Corps in determining whether NWP 48 activities are resulting in no more than minimal cumulative adverse environmental effects. Further discussion of cumulative effects analysis is provided below.

The method and location of shellfish mariculture strongly influence what types of impacts will occur and the intensity of those impacts (NRC 2010). A small mariculture operation conducted in a large, well flushed coastal waterbody is likely to have impacts within the normal range of disturbances naturally occurring in that waterbody, but as shellfish mariculture operations get larger, more severe impacts may occur (NRC 2010). Those impacts may include direct competition for resources (e.g., space and food), the consumption of more eggs and larvae of other aquatic species, and the potential for oxygen depletion (anoxia) to occur there is not sufficient flushing to facilitate the removal of the feces produced by the cultivated shellfish (NRC 2010).

For activities authorized by NWPs, the Corps is required to consider the individual impacts caused by each NWP activity, as well as the cumulative

impacts of NWP activities. In addition to the environmental impacts caused by individual commercial shellfish mariculture activities, the Corps is required to consider the cumulative effects of those activities. The analysis of individual adverse environmental effects differs from the analysis of cumulative adverse environmental effects. The environmental impacts caused by an individual activity include the direct and indirect effects caused by that activity on particular resources. The direct and indirect environmental effects caused by an individual activity contribute to cumulative effects, if the affected resource(s) do not fully recover before another activity that is conducted at that location directly and indirectly affects the resource(s).

The environmental effects of proposed activities are evaluated by assessing the direct and indirect effects that those activities have on the current environmental setting (Canter 1996). Under CEQ's NEPA regulations, the current environmental setting is the "affected environment" (40 CFR 1502.15). In the FWS's and NMFS's regulations for ESA section 7 consultations for proposed federal actions, the current environmental setting is the "environmental baseline" (50 CFR 402.02). The Corps' regulations at 33 CFR parts 320 to 332 do not include a provision that explicitly defines the concept of the current environmental setting, but its NEPA regulations in Appendix B to 33 CFR part 325 refers to CEQ's definition of "affected environment." The Clean Water Act Section 404(b)(1) Guidelines require the permitting authority to determine the "potential short-term or long-term effects of a proposed discharge of dredged or fill material on the physical, chemical, and biological components of the aquatic environment" (see 40 CFR 230.11). As a general practice, section 230.11 is applied to the current physical, chemical, and biological components of the aquatic environment since the Guidelines do not indicate that an alternative interpretation should be applied.

The current environmental setting is the product of the cumulative effects of human activities that have occurred over many years, as well as the natural processes that have influenced, and continue to influence, the structure, functions, and dynamics of ecosystems. The current environmental setting can vary substantially in different areas of the country and in different waterbodies. The current environmental setting is dependent in part on the degree to which past and present human activities have altered aquatic and terrestrial resources in a particular geographic area over time. Since humans have altered aquatic and terrestrial environments in numerous, substantial ways for millennia (e.g., Evans and Davis 2018, Ellis 2015), the current environmental setting takes into account how human activities and changing biotic and abiotic conditions have modified aquatic and terrestrial resources. The marine and coastal waters in which commercial shellfish activities occur have been altered by numerous human activities over many years, and the various categories of activities are discussed in more detail below. Consistent with the environmental assessment

practices described above, the individual and cumulative adverse environmental effects of commercial shellfish mariculture activities in a particular waterbody should be evaluated in the context of the current environmental setting for that waterbody, including the lands that drain to that waterbody.

In order to effectively understand and manage ecosystems, it is necessary to take into account how people have reshaped aquatic and terrestrial resources over time (Ellis 2015). Effective management of ecosystems is dependent upon understanding how human activities can have direct, indirect, and cumulative effects on those ecosystems. The current state of an ecosystem (e.g., a wetland or an estuary) can range from "near natural" (i.e., minimally disturbed) to semi-natural to production systems such as agricultural lands to overexploited (i.e., severely impaired) (van Andel and Aronson 2012). Degradation occurs when an ecosystem is subjected to a prolonged disturbance (Clewell and Aronson 2013), and the degree of degradation can be dependent, in part, on the severity of disturbance. Degradation can also result from multiple disturbances over time: that is cumulative impacts. Other factors that affect an ecosystem's response to a disturbance are resistance and resilience.

For ecosystems, stability is the ability of an ecosystem to return its starting state after one or more disturbances cause a significant change in environmental conditions (van Andel et al. 2012). Resistance is the ability of an ecosystem to exhibit little or no change in structure or function when exposed to a disturbance (van Andel et al. 2012). Resilience is the ability of an ecosystem to regain its structural and functional characteristics in a relatively short amount of time after it has been exposed to a disturbance (van Andel et al. 2012). Human activities can change the resilience of ecosystems (Gunderson 2000). In some situations, resilience can be a positive attribute (e.g., the ability to withstand disturbances), and in other situations, resilience can be a negative attribute (e.g., when it is not possible to restore ecosystem because it has changed too much and is resistant to being restored) (Walker et al. 2004). The concept of ecological resilience presumes the existence of multiple stable states, and the ability of ecosystems to tolerate some degree of disturbance before transitioning to an alternative (different) stable state (Gunderson 2000). Resilience cannot be determined by examining only one scale (e.g., a project site); multiple scales (e.g., site, waterbody, watershed) must be considered because disturbances can occur at various scales (Walker et al. 2004). Diversity of functional groups and species within ecosystems is important for resilience (Folke et al. 2004), and management efforts that focus on single species such as seagrasses might not help sustain or improve resilience of an ecosystem.

Ecosystems can exist in multiple stable states, and the resilience and resistance of an ecosystem will influence whether it will transform into an alternative stable state (Gunderson 2000). A regime shift (i.e., a change from one

stable state to an alternative stable state) can occur when human activities reduce the resilience of an ecosystem, or functional groups of species within that ecosystem, or when there are changes in the magnitude, frequency, and duration of disturbances (Folke et al. 2004). Regime shifts can be caused by removal of species, pollution, land use changes, changes in environmental conditions, and altered disturbance regimes (Folke et al. 2004). A regime shift to an alternative stable state can be desirable or undesirable.

An example of a regime change in an estuary is a shift from an estuary with clear waters and benthic communities dominated by seagrasses, to an estuary with turbid waters dominated by phytoplankton that has insufficient light for seagrasses to grow and persist (Folke et al. 2004). Another example of a regime shift is where an increase in nutrients to a wetland (likely from many sources in the area draining to that wetland) causes a wetland's plant community from a diverse plant community dependent on low nutrient levels to a monotypic plant community dominated by an invasive species that can persist under the higher nutrient levels (Gunderson 2000).

Management activities can be undertaken to enhance resilience to reduce the risk of an undesirable regime change (Folke et al. 2000). In the two examples provided above, efforts to reduce nutrient inputs can help reduce the likelihood of a regime change caused by changes in nutrient inputs. The ecological functions and services provided by bivalve molluscs that are grown in coastal waters through commercial shellfish mariculture activities can contribute to the ecological resilience of estuarine and marine systems, for example by removing phytoplankton and nutrients that contribute to eutrophication.

Determining whether an ecosystem altered by human activities is degraded or in an alternative stable state depends on the perspective of the person making that judgment (Hobbs 2016). That judgment is dependent in part on the ecological functions and services currently being provided by the alternative stable state and the value local stakeholders place on those ecosystem functions and services. In other words, different people may have different views on the ecological state of a particular ecosystem (Hobbs 2016, Walker et al. 2004): some people may think it is degraded and other people may think it continues to provide important ecological functions and services. It is also important to understand that degradation falls along a continuum, ranging from minimally degraded to severely degraded, since all ecosystems have been directly or indirectly altered by human activities to some degree. Degraded ecosystems can continue to provide important ecological functions and services, although they may be different from what they provided historically.

As discussed above, the current environmental setting consists of ecosystems (e.g., estuaries, wetlands, rivers) that have been altered by various

human activities to different degrees over time. The present effects of past actions and the effects of actions occurring at the present time form the current environmental setting against which cumulative effects are evaluated (Clarke Murray et al. 2014, Stakhiv 1998). An important aspect of understanding the current environmental setting is understanding the cumulative effects that have occurred to those ecosystems over time, and to provide a basis of comparison for determining whether a federal agency's proposed action will result in an acceptable or unacceptable addition to cumulative effects.

The terms "cumulative effects" and "cumulative impacts" has been defined in various ways. For example, the National Research Council (NRC) (1986) defined "cumulative effects" as the on-going degradation of ecological systems caused by repeated perturbations or disturbances. MacDonald (2000) defines "cumulative effects" as the result of the combined effects of multiple activities that occur in a particular area that persist over time. Cumulative effects are caused by the interaction of multiple activities in a landscape unit, such as a watershed or ecoregion (Gosselink and Lee 1989).

Cumulative effects can accrue in a number of ways. Cumulative effects can occur when there are repetitive disturbances at a single site over time, and the resource is not able to fully recover between each disturbance. Cumulative effects can also occur as a result of multiple activities occurring in a geographic area over time. Cumulative effects can result from additive interactions or synergistic interactions (i.e., the combined effect is greater than the sum of the effects of individual activities) among disturbances (MacDonald 2000). Cumulative effects can also result from antagonistic interactions among disturbances (Crain et al. 2008).

Cumulative effects analysis requires an understanding of how various resources interact with each other within an appropriate landscape unit, such as a watershed (NRC 1986, Bedford and Preston 1988) or a waterbody. Cumulative effects analysis also requires understanding and acknowledgement of the complexity, natural variation, and uncertainty in ecosystems (Clark Murray 2014), as well as acknowledgement of our incomplete understanding of these resources. Different disturbances can have different degrees of influence on the resource being evaluated, and it is often difficult to identify which disturbances the cumulative effects analysis should focus on, and to determine the degree to which a particular type of disturbance contributes to cumulative effects (Halpern and Fujita 2013). Because of the complexity of cumulative effects and the larger geographic and time scales over which cumulative effects occur, it is difficult to identify specific linkages between a potential disturbance and a particular resource, especially for resources that respond to a variety of human activities and other disturbances (Gosselink and Lee 1989). In addition, disturbances that affect ecosystems and specific resources within those ecosystems also change

over space and time, making it difficult to identify relevant disturbances and their connections to the resource(s) being evaluated in the cumulative effects analysis, especially if those disturbances occur at distant locations (Halpern and Fujita 2013). An additional challenge for cumulative effects analysis is defining recovery rates for affected resources (MacDonald 2000), since recovery of a resource after a disturbance occurs can reduce contributions to cumulative effects. Recovery rates relate to the resilience of the resource(s) that are the focus of the cumulative effects analysis.

In marine and coastal waters, contributors to cumulative effects include human activities in the ocean, coastal areas, and watersheds that drain to those marine and coastal waters (Korpinen and Andersen 2016). In marine and coastal environments, human activities and other disturbances that affect resources in those waters can come from a variety of sources, including water-based activities (e.g., transportation, fishing, mariculture, power generation, and tourism) and land-based activities (e.g., urban and suburban development, agriculture, non-point source pollution, forestry activities, power generation, and mining activities) (Clark Murray et al. 2014).

Humans have been altering estuarine waters and coastal areas for millennia (Day et al. 2013), but those changes have rapidly accelerated over the past 150 to 300 years (Lotze et al. 2006). Coastal waters are affected by a wide variety of activities that contribute to cumulative effects to estuarine and marine ecosystems. The Millennium Ecosystem Assessment (MEA) (2005) identified five major categories of activities that affect coastal waters and wetlands and the ecological functions and services they provide: habitat alterations, climate change, invasive species, overharvesting and overexploitation, and pollution (e.g., nitrogen and phosphorous), which are driven indirectly by increases in population and economic development. More specific categories of activities that alter coastal waters and wetlands include activities that alter coastal forests, wetlands, and coral reef habitats for aquaculture; the construction of urban areas, industrial facilities, resorts, and port developments; dredging and reclamation activities; shore protection structures; infrastructure such as causeways and bridges; and various types of fishing activities (MEA 2005). Day et al. (2013) identified the following general categories of human activities that impact estuaries: physical alterations (e.g., habitat modifications and changes in hydrology and hydrodynamics), increases in inputs of nutrients and organic matter (enrichment), releases of toxins, and changes in biological communities as a result of harvesting activities and intentional and unintentional introductions of new species.

Robb (2014) identified a number of threats to estuaries and estuarine habitats, such as land-based activities in surrounding watersheds, such as development activities, agricultural activities, forestry activities, pollution,

freshwater diversions, shoreline stabilization, waterway impairments, and inputs of debris and litter. With respect to activities occurring directly in coastal waters, Robb (2014) identified the following threats: shoreline development, the construction and operation of port facilities, dredging, marine pollution, aquaculture activities, resource extraction activities, species introductions, and recreational activities. Adverse effects to coastal waters are caused by habitat modifications, point source pollution, non-point source pollution, changes to hydrology and hydrodynamics, exploitation of coastal resources, introduction of non-native species, global climate change, shoreline erosion, and pathogens and toxins (NRC 1994). Jackson et al. (2001) found that the earliest major human disturbances to coastal waters were overfishing species that live in those waters, followed in time by other human disturbances such as pollution, water quality degradation, physical habitat modifications, species introductions, and climate change. In North America, impacts to coastal waters due to overfishing occurred long before Europeans occupied coastal lands (Rick et al. 2016, Jackson et al. 2001). For estuaries, general drivers of ecosystem degradation are land use, exploitation (including overfishing of bivalve molluscs such as oysters), and human population growth (Jackson et al. 2001).

The geographic scope for a cumulative effects analysis should be determined by the spatial scale of the processes that most strongly influence the resource(s) being evaluated (MacDonald 2000). The temporal scope of a cumulative effects analysis should will encompass the past, present, and reasonably foreseeable future actions that may affect the resource(s) being evaluated (Clarke Murray et al. 2014, MacDonald 2000).

MacDonald (2000) presents a continuum of methods for evaluating cumulative effects, ranging from checklists to detailed models. Cumulative impact maps can be a useful tool for assessing the cumulative effects of human activities on marine ecosystem (Halpern and Fujita 2013). The Council on Environmental Quality (1997) identified several categories of methods for evaluating cumulative effects, including questionnaires, checklists, matrices, models, trends analyses, and the use of geographic information systems. The appropriate method is dependent on available information, the scope of the cumulative effects analysis, the resource(s) of concern and other factors.

Cumulative effects analyses must be, in many cases, qualitative analyses because of a lack of data on the resources being evaluated, the human activities that directly and indirectly affect those resources, and how those resources respond to disturbances caused by various human activities, such as the disturbances and threats to estuarine waters identified above. Data gaps are another important challenge, because information on ecosystem condition and the various stressors that affect ecosystem condition is often lacking or inadequate (Halpern and Fujita 2013). The lack of needed data is particularly

relevant for a national action such as the issuance of an NWP, because of the paucity of national quantitative data on the quality and quantity of aquatic resources, the various human activities that can contribute to cumulative effects to those aquatic resources, and the variability in how aquatic resources respond to disturbances caused by different human activities. For a national action, regional variability in aquatic resources and the ecological functions and services they provide presents additional challenges to performing cumulative effects analyses.

A qualitative analysis of cumulative effects is usually necessary because of incomplete understanding of the relevant ecosystem processes and how they are affected by the various stressors and disturbances that occur across space and time and contribute to cumulative effects (MacDonald 2000, Bedford and Preston 1988). Uncertainty is unavoidable in cumulative effects analysis, because of the complexity of the processes and interactions that need to be considered (Reid 1998). Because of the complexity of cumulative effects and the larger geographic and time scales at which they occur (e.g., past, present, and future activities in a waterbody or watershed) it is difficult to identify specific relationships where anthropogenic and natural disturbances affect the resource(s) being evaluated, especially for ecosystem components that respond to a variety of human activities and natural disturbances (Gosselink and Lee 1989). Predicting cumulative effects is difficult because of potential higher order interactions, such as the interactions between various stressors that contribute to cumulative effects, responses of species to a particular stressor may be dependent on context and influenced by other stressors, species may have different tolerances to specific stressors, and interactions among species may cause different stressor responses (Crain et al. 2008).

For the issuance of an NWP, Corps Headquarters prepares a national decision document that evaluates, in general terms, the individual impacts of NWP activities as well the cumulative environmental effects of those activities that are anticipated to occur during the period of up to five years during which an NWP is normally in effect. The analysis in the national decision document occurs at a national level, because the NWP authorizes activities across the country. In the NWP program, a division engineer has discretionary authority to modify, suspend, or revoke an NWP on a regional basis or for a class of waters when he or she determines that proposed NWP activities would result in more than minimal individual and cumulative adverse environmental effects in a particular geographic area or class of waters (33 CFR 330.4(e)(1)). A district engineer has discretionary authority to modify, suspend, or revoke an NWP authorization for a specific activity when she or he determines that the proposed NWP activity may result in more than minimal individual and cumulative adverse environmental effects (33 CFR 330.4(e)(2)).

The national decision document provides a general discussion of the potential impacts of individual NWP activities on the aquatic environment, including specific resource categories such as wetlands, fish and wildlife, and water quality. The national decision document also discusses how the NWP general conditions help avoid and minimize the adverse environmental effects to ensure that NWP activities will result in no more than minimal individual and cumulative adverse environmental effects. The national decision document does not include regional analyses or site-specific analyses because the national decision document is used to decide whether Corps Headquarters should issue the NWP. Regional analyses will be conducted by division engineers when they decide whether to exercise their discretionary authority to modify, suspend, or revoke NWP authorizations on a regional basis. Site-specific analyses are conducted by district engineers when they review pre-construction notifications or voluntary requests for NWP verifications, to determine whether proposed activities are authorized by NWP or whether additional conditions are needed to ensure NWP activities will result in no more than minimal individual and cumulative adverse environmental effects. The cumulative effects analyses conducted in the national decision document for the issuance of an NWP are discussed in more detail in the following paragraphs.

For the issuance of an NWP, in the environmental assessment within the national decision document, the Corps evaluates the “incremental impact” the NWP is anticipated to have during the five year period the NWP is expected to be in effect. In the national decision document, the national environmental baseline is described in the “affected environment” section (section 3.0). The affected environment is described using available national-scale information, including national assessments of the quantity and quality of aquatic resources in the United States and land uses within the United States. The environmental baseline is used to evaluate the significance of the effects of the proposed action, and whether an environmental impact statement is required to satisfy NEPA requirements.

There is no requirement in CEQ’s NEPA regulations for quantitative analyses of the impacts anticipated to be caused by a federal agency’s proposed action. Qualitative analyses may be sufficient to satisfy NEPA requirements for the evaluation of the effects of the proposed action.

For the purposes of the Clean Water Act Section 404(b)(1) Guidelines, EPA defines “cumulative impacts” as “the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material.” (See 40 CFR 230.11(g)(1).) The Guidelines require the permitting authority to predict cumulative effects in its 404(b)(1) Guidelines analysis for the issuance of a general permit by estimating “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." (See 40 CFR 230.7(b)(3).)

When the Corps prepares its 404(b)(1) Guidelines analysis in its national decision document for the issuance of an NWP that authorizes discharges of dredged or fill material into waters of the United States, it estimates the number of times that NWP may be used to authorize discharges of dredged or fill material into waters of the United States. The Corps also estimates the acreages of permitted impacts and compensatory mitigation requirements that may occur while the NWP is in effect (usually for a 5-year period), even though the Guidelines do not require those estimates. The estimated use of the NWP during the 5-year period the NWP is anticipated to be in effect is also considered (as well as other components of the 404(b)(1) Guidelines analysis) when the Corps determines whether the issuance of the NWP and its subsequent use while it is in effect will result in no more than minimal individual and cumulative adverse effects on the aquatic environment.

The 404(b)(1) Guidelines include an adaptability provision that recognizes that the level of documentation for determining compliance with the Guidelines should reflect the significance and complexity of the discharge activity (40 CFR 230.6(b)). That adaptability provision provides the Corps with discretion in terms of the information necessary for the 404(b)(1) Guidelines analysis for an NWP that can only authorize activities that have no more than minimal individual and cumulative adverse environmental effects. For individual activities authorized by NWPs (i.e., when the Corps district issues an NWP verification), the 404(b)(1) Guidelines analysis is not to be repeated (see 40 CFR 230.6(d)).

When assessing cumulative effects under the 404(b)(1) Guidelines, the current environmental setting (i.e., the environmental baseline) is a critical consideration, since it is used to determine the degree to which a particular NWP activity (or the total of NWP activities occurring during the 5-year period the NWP is in effect), is anticipated to add to cumulative effects to the environment. Since the NWPs are issued before any authorized activities can occur, it is by necessity a predictive evaluation. For the purposes of NEPA, the Corps evaluates whether the activities authorized by the NWP during that 5-year period are likely to result in an incremental contribution to cumulative effects that would, or would not, have a significant impact to the quality of the human environment and therefore would not require the preparation of an environmental impact statement. For the issuance of an NWP under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899, the Corps evaluates whether the activities authorized by the NWP during the 5-year period it is anticipated to be effect will have only minimal cumulative adverse effects on the current environmental setting.

The "no more than minimal" threshold for the NWPs is a subjective threshold that requires the consideration of numerous factors, 10 of which are listed in paragraph 2 of Section D, "District Engineer's Decision." The "no more than minimal adverse environmental effects" threshold cannot be quantified, because they are many factors to consider when making such determinations, and few of those factors can be quantified. For example, the environmental setting in the vicinity of the NWP activity cannot be quantified, and is usually understood in a qualitative manner. Considerations when evaluating this factor include, but are not limited to, whether the environmental setting consist of an urban or suburban area; whether the environmental setting is subjected to other land uses, such as agriculture, mining, recreation, or other activities; and whether the environmental setting is in a wilderness area or another area that has not been subjected to a substantial amount of land uses changes for human activities.

Since all ecosystems have been affected by human activities to some degree, in many cases the current environmental setting likely continues to provide some degree of ecological functions and services to local communities, even though it has changed over time, perhaps to a new stable state. The degree or magnitude to which aquatic resources perform ecological functions usually must be assessed through qualitative means, because the actual measurement of ecological functions requires repeated measurements over time to quantify ecosystem processes (Stein et al. 2009). Quantitative measurements of aquatic resource functions and services is usually beyond the resources available to Corps districts and permit applicants. The duration of the adverse effects (temporary or permanent), can be influenced by the resilience and resistance of the aquatic resource disturbances caused by NWP activities. There is also the uncertainty regarding the degree of change to the aquatic environment that will occur as a result of the individual and cumulative adverse environmental effects of NWP activities. For some ecosystems, passing a threshold can result in substantial changes to the ecosystem, and for other ecosystems those changes may be more subtle (Folke et al. 2004).

Uncertainty and unpredictability are inherent and unavoidable when managing ecosystems, as new situations arise and these ecosystems change because of management actions (Gunderson 2000). An adaptive management approach is needed to respond to this uncertainty and unpredictability (Gunderson 2000). The NWP program has tools available to address this uncertainty, such as the ability of division engineers to modify, suspend, or revoke NWP authorizations in a particular waterbody or region (see 33 CFR 330.5(c)) where new information indicates that the individual and cumulative adverse environmental effects caused by NWP activities may be becoming more than minimal.

Regime changes and tipping points are concepts in ecology that address thresholds of changes and the degree of those changes. Regime changes and tipping points generally relate to cumulative impacts because they are usually brought about by disturbances caused by multiple human activities over time. Regime changes may be expressed as gradual or sudden changes in ecosystem structure, functions, and dynamics. An alternative state brought about by a regime change may be desirable or undesirable, depending on whether the alternative state for an ecosystem continues to provide ecological functions and services (Folke et al. 2004). In ecology, a tipping point is a threshold whereby an ecosystem would abruptly shift from one ecological state to a substantially different ecological state (Moore 2018), with relatively large changes in ecosystem structure, functions, and dynamics. In the context of aquatic resources, examples of tipping points include eutrophication of waterbodies and the formation of dead zones in ocean waters (Moore 2018). Tipping points are difficult to predict (Moore 2018).

The ecological changes that occur after a tipping point or regiment change threshold is crossed can generally be considered relatively severe changes, rather than changes that are more than minimal. Regime changes and tipping points may be more indicative of environmental changes or impacts that are more than minimal. Regime changes and tipping points may not a useful tool for determining whether the individual and cumulative adverse environmental effects of NWP activities are “no more than minimal” or “more than minimal.” Therefore, the determination of whether NWP activities are resulting in only minimal individual and cumulative adverse environmental effects will have to continue to be made through decisions made through the judgment exercised by district engineers, division engineers, and Corps Headquarters.

We are inviting comment on the proposed changes to this NWP, including the proposed removal of the notification thresholds and the removal of the 1/2-acre limit for direct effects to submerged aquatic vegetation. Division engineers can impose regional conditions to ensure that activities authorized by this NWP will result in no more than minimal adverse environmental effects. District engineers can add activity-specific permit conditions to this NWP. District engineers can also issue regional general permits to authorize similar activities in their geographic area of responsibility.

NWP 49. Coal Remining Activities. We are proposing to modify this NWP by removing the requirement for all permittees to obtain written verification before proceeding with the authorized work in waters of the United States. Removal of the requirement to obtain written authorization from the district engineer prior to conducting the permitted activity would make this NWP consistent with the other NWPs that require PCNs and are authorized under 33 CFR 330.1(e)(1) if the

district engineer does not respond to the PCN within 45 days of receipt of a complete PCN. As with all other NWPs that have PCN requirements, 45 days should be a sufficient amount of time for a district engineer to review the PCN and determine whether the proposed activity qualifies for NWP authorization or whether discretionary authority should be exercised and an individual permit required because the proposed activity is unlikely to result in a net increase in aquatic resource functions.

When this NWP was originally issued in 2007 (72 FR 11191), the requirement for the permittee to receive written authorization from the district engineer before commencing the proposed activity was intended to provide consistency with NWP 21, which authorizes surface coal mining activities. The 2007 NWP 21 did not have any acreage limits (72 FR 11184).

In addition, we are proposing to remove the phrase "as part of an integrated permit processing procedure" from the first paragraph of this NWP. This provision was included in the NWP when it was first issued in 2007 (see 72 FR 11191). The Office of Surface Mining Reclamation and Enforcement within the Department of the Interior has responsibility for authorizing surface coal mining activities only in Tennessee and Washington. Even though this provision has been in place since 2007, no integrated permit processing procedures have been developed for coal mining activities in these two states, and it is unlikely that such procedures will developed in the future. Therefore, we are proposing to remove this text from the NWP because it has no applicability. We invite public comment on whether integrated permit processing procedures for the activities authorized by this NWP may be developed in the future.

NWP 50. Underground Coal Mining Activities. In addition to proposing to modify this NWP by removing the 300 linear foot limit for losses of stream bed, we are also proposing to remove the requirement for all permittees to obtain written verification before proceeding with the authorized work in waters of the United States. Removal of the requirement to obtain written verification prior to conducting the permitted activity would make this NWP consistent with the other NWPs that require PCNs and are authorized under 33 CFR 330.1(e)(1) if the district engineer does not respond to the PCN within 45 days of receipt of a complete PCN. As with the other NWPs that have a 1/2-acre limit and require pre-construction notification, 45 days should be a sufficient amount of time for a district engineer to review the PCN and determine whether the proposed activity qualifies for NWP authorization or whether discretionary authority should be exercised and an individual permit required because the district engineer determines the proposed activity may result in more than minimal individual and cumulative adverse environmental effects.

When this NWP was originally issued in 2007 (72 FR 11191), it did not have an acreage limit. The 2007 NWP 50 had a requirement for the permittee to receive written authorization from the district engineer before commencing the proposed activity. This provision was intended to provide consistency with NWP 21, which authorizes surface coal mining activities.

The 1/2-acre limit was added to NWP 50 in 2012 (see 77 FR 10281), so that it would be consistent with numerous other NWPs (e.g., NWPs 12, 21, 29, 39, 40, 42, 43, 44, 51, and 52). We are proposing to remove the requirement for written verifications to be consistent with the other NWPs that have the 1/2-acre limit, and eliminate an additional burden on the regulated public that is not present in similar NWPs. The 45-day clock for the district engineer's review of PCNs at 33 CFR 330.1(e)(1), as well as the provision for the NWP authorization to be in effect if the district engineer does not respond to the PCN within that 45-day period, is an important tool to provide predictability to the regulated public and fulfill the objective of the NWP program. That objective is to "regulate with little, if any, delay or paperwork certain activities having minimal impacts" (33 CFR 330.1(b)). For those commenters who oppose the removal of the requirement for a written verification from this NWP, we ask that they explain why discharges of dredged or fill material into waters of the United States associated with surface coal mining activities should be treated differently than other NWPs that also have a 1/2-acre limit and authorize discharges of dredged or fill material into similar types of waters.

In addition, we are proposing to remove the phrase "as part of an integrated permit processing procedure" from the first paragraph of this NWP. The Office of Surface Mining Reclamation and Enforcement only has responsibility for authorizing surface coal mining activities in Tennessee and Washington. Even though this provision has been in place since 2007, no integrated permit processing procedures have been developed for coal mining activities in these two states, and it is unlikely that such procedures will developed in the future. Therefore, we are proposing to remove this text from the NWP because it has no applicability. We are soliciting comments on whether integrated permit processing procedures for the activities authorized by this NWP may be developed in the future.

We are also proposing to remove the "Note" from this NWP because coal preparation and processing activities should be included in the single and complete NWP 50 activity, and any losses of waters of the United States caused by those activities should be counted towards the 1/2-acre limit rather than being separately authorized by NWP 21.

NWP 51. Land-Based Renewable Energy Generation Facilities. In Note 1, we are proposing to change the reference to NWP 12 NWP C, since we are

proposing to issue a new NWP for electric utility line and telecommunications activities (i.e., proposed new NWP C).

In Note 3, we are proposing to add the phrase "by the Corps" to make it clear that the Corps district, not the permittee, will send a copy of the NWP PCN and NWP verification to the Department of Defense Siting Clearinghouse.

NWP 52. Water-Based Renewable Energy Generation Pilot Projects. In Note 5, we are proposing to add the phrase "by the Corps" to make it clear that the Corps district, not the permittee, will send a copy of the NWP PCN and NWP verification to the Department of Defense Siting Clearinghouse.

C. Discussion of Proposed New Nationwide Permits

The Corps has heard from stakeholders that there may be aquaculture activities relating to growing seaweed and finfish that meet the statutory conditions of general permits but are not covered by NWP 48. After evaluating the issue, we believe that separate NWPs should be proposed for these activities. In addition, E.O. 13921 directed the Corps to develop, and propose for public comment, NWPs that authorize seaweed mariculture activities and finfish mariculture activities in marine and coastal waters, including federal waters on the outer continental shelf. We are also proposing to refer the aquaculture activities as mariculture activities to make it clear that the proposed NWPs would not authorize land-based finfish, shellfish, or seaweed farming activities. If the proposed NWPs are issued, then there would be NWP authorization available for the three main mariculture sectors: shellfish, seaweed, and finfish. These three NWPs would support industries that have potential to become a growing share in food production to satisfy human nutritional needs, while decreasing dependence on wild stocks of finfish, shellfish, and seaweeds to serve those needs (Lester et al. 2018, Duarte et al. 2009).

We are also seeking public comment on whether the Corps should issue a single NWP that authorizes both finfish and seaweed mariculture activities, as well as integrated multi-trophic mariculture activities.

A. Seaweed Mariculture Activities. We are proposing to issue a new NWP to authorize structures and work in marine waters, including structures anchored to the seabed in federal waters over the outer continental shelf, for seaweed mariculture activities. We are also proposing to include in the terms of this NWP multi-trophic mariculture activities, if the mariculture operator wants to cultivate other species, such as bivalve shellfish, with the seaweed. Multi-species mariculture activities are an ecosystem-based approach to mariculture, with the objective of providing environmental benefits by recycling waste nutrients from fish and other species through assimilation by species of commercial value that

consume those nutrients (e.g., seaweed, bivalve molluscs) (e.g., Troell et al. 2009, Soto et al. 2009). Stand-alone commercial shellfish mariculture activities can be authorized by NWP 48, but NWP 48 does not authorize seaweed mariculture activities. Seaweed mariculture activities currently require individual permits, except in Corps districts that have issued regional general permits that authorize seaweed mariculture activities.

Seaweed mariculture provisioning services include the production of food, medicines, texturizing agents, agar, and biofuel, and may also have positive effects on other fisheries, by providing habitat and nutrients (Alleway 2019). Seaweed produced through mariculture can be used to produce complex materials, pharmaceuticals, food ingredients, feed, and biofuels (Hasselström et al. 2018). Seaweeds such as red algae provide ingredients to produce processed food, including thickening agents such as agar and carrageenan (Waters et al. 2019). Seaweed mariculture can also benefit marine waters by improving water quality through uptake and metabolism of nitrogen and phosphorous and by providing habitat for fish and other aquatic organisms (Hasselström et al. 2018). Seaweeds can also be used to produce feed for finfish mariculture activities (Diana 2009). In addition, kelp and other seaweed have the potential to create nursery grounds for young fish and crustaceans and provide shelter from predation.

In waters that are declining in their ability to perform various ecological functions and services, including water quality, because of climate change and other factors, shellfish, finfish, and seaweed mariculture can restore or maintain ecological functions or services (Alleway 2019). Spatial planning can be used to site mariculture activities so that they can potentially optimize (maximize) the beneficial ecological services provided (Alleway 2019).

Seaweed mariculture activities are usually conducted through the use of floating racks or long-lines supported by stakes or floats. The floating racks or long-lines support kelps and other types of seaweed while they grow in the water column. Seaweed mariculture activities typically do not involve discharges of dredged or fill material into waters of the United States and normally do not require authorization under section 404 of the Clean Water Act. Therefore, we are proposing to issue this new NWP under the authority of section 10 of the Rivers and Harbors Act of 1899. We are seeking comment on whether seaweed mariculture activities may involve activities that may result in a discharge of dredged or fill material into waters of the United States, and thus require authorization under Section 404 of the Clean Water Act.

We are proposing to issue this NWP to authorize seaweed mariculture activities in the territorial seas (3 nautical miles from the coast) and in federal waters beyond the territorial seas that overlie the outer continental shelf. In

coastal waters subject to Section 10 of the Rivers and Harbors Act of 1899, the Corps regulates obstructions in navigable waters of the United States. Under section 4(f) of the Outer Continental Shelf Lands Act of 1953 as amended (43 U.S.C. 1333(e)), the authority of the Corps under Section 10 of the Rivers and Harbors Act of 1899 to prevent obstructions to navigation in navigable waters of the United States was extended to the seaward limit of the outer continental shelf for artificial islands, installations, and other devices located on the seabed. Therefore, under section 4(f) of the Outer Continental Shelf Lands Act of 1953, as amended, a section 10 permit is required for seaweed mariculture structures on the outer continental shelf that are anchored to the seabed. In recent years, there has been increased interest in conducting mariculture activities in federal waters on the outer continental shelf where there are fewer pollution sources and to avoid controversies concerning conflicting uses of coastal waters (NRC 2010), such as objections from waterfront property owners regarding aesthetic impacts, impacts on coastal navigation, and impacts on nearshore fishing activities.

We are proposing to add terms to this NWP to prevent conflicts with other uses of ocean waters, and to satisfy the requirement that NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects. We are proposing to require that structures in an anchorage area established by the U.S. Coast Guard comply with the requirements in 33 CFR 322.5(l)(2). We are also proposing to prohibit structures in established danger zones or restricted areas designated by the Corps 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. These proposed terms are similar to the terms we established for NWP 52, which was first issued in 2012 to authorize water-based renewable energy generation pilot projects, because there may be similar concerns regarding conflicting uses of these marine waters. We are also proposing to require PCNs for all activities authorized by this NWP to give district engineers the opportunity to review each proposed activity to determine whether any of these potential conflicts may arise and exercise discretionary authority if necessary.

Seaweed mariculture activities in federal waters on the outer continental shelf may require authorizations from other federal agencies. For example, seaweed mariculture operator may be required to obtain from the Department of the Interior's Bureau of Ocean Energy Management a Right of Use and Easement (RUE) if the proposed seaweed mariculture activity will utilize or tether to existing oil and gas facilities on the outer continental shelf. Consultation with the Department of Interior's Bureau of Safety and Environmental Enforcement may also be required for proposed seaweed mariculture activities on the outer continental shelf. Seaweed mariculture operators that propose to establish a private aid to navigation to mark the location of the seaweed mariculture activity

and ensure safe navigation in the vicinity of that activity may need to obtain authorization from the appropriate U.S. Coast Guard District.

We are proposing to require PCNs for all activities authorized by this NWP to allow district engineers to review each proposed activity, including potential adverse effects on navigation. We are also proposing to require PCNs to include the following information in addition to the information required by paragraph (b) of the "Pre-Construction Notification" general condition:

(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).

Items (1) and (3) will assist district engineers in evaluating potential impacts to navigation. The prospective permittee needs to submit only one PCN per structure or group of structures to be used for the seaweed mariculture operation during the effective period of this NWP. The PCN should also describe all species and culture activities the operator expects to undertake during the effective period of this NWP. If an operator intends to undertake unanticipated changes to the seaweed mariculture operation during the effective period of this NWP, and those changes require DA authorization, the operator must contact the district engineer to request a modification of the NWP verification.

District engineers will review PCNs for proposed seaweed mariculture activities to evaluate effects on the aquatic environment, navigation, and other public interest review factors. Section D of the NWPs describes the district engineer's evaluation process for PCNs, including determining whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. Division engineers can add regional conditions to this NWP to address specific environmental concerns and other public interest review factors at a regional level. District engineers can add activity-specific conditions to NWP verifications to ensure that a particular seaweed mariculture activity will result in no more than minimal individual and cumulative adverse environmental effects.

Seaweed mariculture activities may alter estuarine and marine habitats utilized by endangered or threatened species. Some of these habitats may have been determined to be designated critical habitat for listed species. If a proposed seaweed mariculture activity might affect listed species or critical habitat, then the project proponent is required to identify in the PCN which listed species might be affected by the proposed activity. The district engineer will evaluate the effects to listed species caused by the seaweed mariculture activity and determine if ESA section 7 consultation is required. If the district engineer

reviews the PCN and determines that the proposed seaweed mariculture activity will adversely affect essential fish habitat, he or she will conduct EFH consultation with the National Marine Fisheries Service.

In this proposed new NWP, we are also soliciting comment on whether to include the production of other species, including shellfish such as mussels or oysters, along with seaweed species as part of a multispecies mariculture activity. For example, both kelp and mussels may be grown from lines hanging from the same floating rack.

We are seeking comments on this proposed new NWP, including its terms and conditions. The proposed terms and conditions of this NWP, as well as the terms and conditions of the other NWPs we are proposing to issue or reissue, are provided at the end of this proposed rule document. In response to a PCN, the district engineer may impose activity-specific conditions on an NWP verification to ensure that the adverse environmental effects of the authorized activity are no more than minimal or exercise discretionary authority to require exercise discretionary authority to require an individual permit for the proposed activity.

B. Finfish Mariculture Activities. We are proposing to issue a new NWP to authorize structures and work in marine and estuarine waters for finfish mariculture activities, including structures anchored to the seabed in waters overlying the outer continental shelf. This NWP would not authorize land-based finfish mariculture activities, such as the construction of ponds or other facilities to produce finfish such as catfish, carp, or tilapia. To make it clear that this NWP is limited to finfish mariculture activities in marine waters, and does not authorize land-based finfish aquaculture activities, we are proposing to use the term "mariculture" in this NWP. Mariculture is the cultivation of organisms in marine and estuarine open water environments (NRC 2010). In addition, this proposed NWP also would not authorize the construction of land-based fish hatchery facilities or other attendant features. If the construction of such land-based facilities or attendant features requires DA authorization, those activities may qualify for authorization under NWP 39, which authorizes commercial and institutional developments.

According to the Food and Agriculture Organization (FAO) of the United Nations, in the United States finfish production accounts for 65 percent of total aquaculture.[14] The predominant marine finfish species currently being cultivated in the United States are Atlantic salmon and white sturgeon. There are preliminary efforts at using mariculture to produce other finfish species, such as Atlantic cod, longfin yellowtail, sixfinger threadfin, and cobia. The FAO identified

[14] http://www.fao.org/fishery/countrysector/naso_usa/en#tcN70085 (accessed 3/16/2020).

other species might be produced in the future through commercial finfish aquaculture efforts, including yellowfin tuna, sablefish, yellowtail amberjack, red drum, California flounder, summer flounder, and Florida pompano. In freshwater systems, channel catfish is the primary finfish species being cultivated. Other freshwater finfish species that are currently cultivated in the United States include cyprinids, rainbow trout, hybrid striped bass, and tilapia. This proposed new NWP would not authorize the cultivation of freshwater finfish species. Freshwater finfish aquaculture activities are often conducted in land-based facilities, the construction of which can have substantial impacts on wetlands and streams. Corps districts can develop regional general permits for such activities.

In this NWP, we are also proposing to authorize multi-trophic mariculture activities, if the mariculture operator wants to cultivate other species, such as molluscan shellfish or seaweed, with the finfish. Multi-species mariculture activities are an ecosystem-based approach to mariculture, with the objective of providing environmental benefits by recycling waste nutrients from the cultivated finfish and other fish in the vicinity other species, when other species of commercial value that consume those waste nutrients (e.g., seaweed, bivalve molluscs) (e.g., Price and Morris 2013, Troell et al. 2009, Soto et al. 2009).

Finfish mariculture activities in marine and estuarine waters are becoming a more important mechanism for producing finfish as source of protein to satisfy human nutritional needs (FAO 2018, Gentry et al. 2017). We are proposing to issue this NWP to authorize finfish mariculture activities in marine and estuarine coastal waters out to the limit of the territorial seas (3 nautical miles from the baseline) and in ocean waters beyond the territorial seas that overlie the outer continental shelf. In coastal waters, under section 10 of the Rivers and Harbors Act of 1899 the Corps regulates obstructions in navigable waters of the United States. For finfish mariculture activities, this can include cages and net pens. Under section 4(f) of the Outer Continental Shelf Lands Act of 1953 as amended (43 U.S.C. 1333(e)), the authority of the Corps to prevent obstructions to navigation in navigable waters of the United States was extended to artificial islands, installations, and other devices located on the seabed, to the seaward limit of the outer continental shelf. Department of the Army authorization is required under Section 10 of the Rivers and Harbors Act of 1899 for finfish mariculture structures on the outer continental shelf that are anchored to the seabed. Project proponents may propose mariculture activities in federal waters on the outer continental shelf to avoid nearshore pollution and conflicting uses of coastal waters, including objections from waterfront property owners based on aesthetic impacts (NRC 2010).

In addition to producing food, marine mariculture can provide a variety of ecosystem services, including other provisioning services, regulating services, habitat or supporting services, and cultural services (Alleway 2019). The specific

ecosystem services provided are dependent on the functional characteristics of the species being cultivated, the characteristics of the surrounding environment, design of the mariculture operation, and how those operations occur (Alleway 2019). Finfish mariculture operations can be sited, designed, and implemented to avoid or minimize certain adverse environmental effects (Price and Morris 2013). Mariculture structures may attract fish and invertebrates, including fouling species (which may be prey species), and may act as small reserves or protected areas, when fishing and other activities are prohibited in the areas being used for finfish mariculture (Alleway 2019).

The impacts of mariculture activities on the environment are strongly influenced by how they are operated, including which species are being produced, stocking density, how the fish are being fed, and location (Gentry et al. 2017). Spatial planning for mariculture activities in federal waters over the outer continental shelf can be an important tool for siting these facilities to manage impacts on the aquatic environment (Gentry et al. 2017). One potential benefit of mariculture is that it can help reduce the amount of land needed to produce food to support increasing human populations, by increasing the share of food produced in the ocean (Froehlich et al. 2018).

We are proposing to add terms to this NWP to prevent conflicts with other uses of ocean waters and ensure that the NWP authorizes only those activities that will result in no more than minimal individual and cumulative adverse environmental effects. We are proposing to require that structures in an anchorage area established by the U.S. Coast Guard comply with the requirements in 33 CFR 322.5(l)(2). We are also proposing to prohibit structures in established danger zones or restricted areas designated by the Corps 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. These proposed terms are similar to the terms we established for NWP 52, which was first issued in 2012 to authorize water-based renewable energy generation pilot projects, because there may be similar concerns regarding conflicting uses of these marine waters. We are also proposing to require PCNs for all activities authorized by this NWP to give district engineers the opportunity to review each proposed activity to determine whether any of these potential conflicts may arise and exercise discretionary authority if necessary.

Finfish mariculture activities may require authorization under Section 402 of the Clean Water Act for discharges of pollutants into navigable waters. These discharges may involve animal wastes, feeds, or chemicals. For purposes of the Clean Water Act (CWA), off-shore federal waters begin 3 miles from shore for all states. Section 402 of the CWA establishes the National Pollutant Discharge Elimination System (NPDES) and authorizes EPA (or states authorized by EPA)

to issue NPDES permits for point source discharges of pollutants into waters of the U.S., including the territorial seas. Only EPA issues NPDES for discharges into off-shore federal waters. The EPA's NPDES permit regulations also include specific provisions that apply to offshore mariculture activities. EPA regulations use the term "concentrated aquatic production facility" to describe offshore mariculture. A concentrated aquatic animal production facility is a "hatchery, fish farm, or other facility" which is designated by EPA in accordance with 40 CFR 122.24 or that meets the criteria in Appendix C to 40 CFR part 122. The EPA or authorized states may issue NPDES permits on an individual basis (i.e., for a single facility) or as a general permit that covers multiple operations with similar types of discharges, which may be within a specified geographic area. The process for a finfish mariculture operator to obtain an NPDES permit from the EPA or approved state is separate from the Corps' NWP authorization process.

Finfish mariculture activities in federal waters on the outer continental shelf may require authorizations from other federal agencies. For example, the finfish mariculture operator may be required to obtain from the Bureau of Ocean Energy Management a Right of Use and Easement (RUE) if the proposed finfish mariculture activity will utilize or tether to existing oil and gas facilities on the outer continental shelf. Consultation with the Department of Interior's Bureau of Safety and Environmental Enforcement may also be required for proposed finfish mariculture activities on the outer continental shelf. Finfish mariculture operators that want to establish a private aid to navigation to mark the location of the finfish mariculture activity and ensure safe navigation in the vicinity of that activity may need to obtain authorization from the appropriate U.S. Coast Guard District.

Finfish mariculture activities may alter estuarine and marine habitats utilized by endangered or threatened species. Some of these habitats may have been determined to be designated critical habitat for listed species. If a proposed finfish mariculture activity might affect listed species or critical habitat, then the project proponent is required to identify in the PCN which listed species might be affected by the proposed activity. The district engineer will evaluate the effects to listed species caused by the finfish mariculture activity and determine if ESA section 7 consultation is required. If the district engineer reviews the PCN and determines that the proposed finfish mariculture activity will adversely affect essential fish habitat, he or she will conduct EFH consultation with the National Marine Fisheries Service.

We are proposing to require PCNs for all activities authorized by this NWP to allow district engineers to review each proposed activity. We are also proposing to require PCNs to include the following information in addition to the information required by paragraph (b) of the "Pre-Construction Notification" general condition:

(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).

Items (1) and (3) will assist district engineers in evaluating potential impacts to navigation. The prospective permittee needs to submit only one PCN per structure or group of structures to be used for the finfish mariculture operation during the effective period of this NWP. The PCN should also describe all species and culture activities the operator expects to undertake during the effective period of this NWP. If an operator intends to undertake unanticipated changes to the finfish mariculture operation during the effective period of this NWP, and those changes require DA authorization, the operator must contact the district engineer to request a modification of the NWP verification.

District engineers will review PCNs for proposed finfish mariculture activities to evaluate effects on the aquatic environment, navigation, and other public interest review factors. District engineers will also review PCNs to evaluate potential effects on anchorage areas established by the U.S. Coast Guard, danger zones or restricted areas designated by the Corps through the procedures in 33 CFR part 334, federal navigation channels, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard, or EPA- or Corps-designated open water dredged material disposal areas. Section D of the NWPs describes the district engineer's evaluation process for PCNs, including determining whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. Division engineers can add regional conditions to this NWP to address specific environmental concerns and other public interest review factors at a regional level.

We are inviting comments on this proposed new NWP, including its terms and conditions. The proposed terms and conditions of this NWP, as well as the terms and conditions of the other NWPs we are proposing to issue or reissue, are provided at the end of this proposed rule document. In response to a PCN, the district engineer may impose activity-specific conditions on an NWP verification to ensure that the adverse environmental effects of the authorized activity are no more than minimal or exercise discretionary authority to require exercise discretionary authority to require an individual permit for the proposed activity.

C. Electric Utility Line and Telecommunications Activities. In the section of this preamble discussing the proposed changes to NWP 12, we discuss our proposal to modify NWP 12 to authorize oil or natural gas pipeline activities and to issue two new NWPs to authorize electric utility line and telecommunications

activities (proposed new NWP C) and other utility lines that convey substances not covered by proposed NWPs 12 and C, such as potable water, sewage, wastewater, stormwater, brine, and industrial products that are not petrochemical products (proposed new NWP D). To the extent that the scale of electrical energy generation from renewable energy sources (e.g., land-based renewable energy generation facilities authorized by NWP 51 that use solar and wind energy to generate electricity) increases, there will also be a need for additional electric transmission facilities to convey the electricity from the generation facilities to the end users.[15] The electric utility line and telecommunications activities in waters of the United States that would be authorized by proposed new NWP C could be used to authorize activities associated with these new electric production facilities.

We are proposing to issue a new NWP to authorize only electric utility line and telecommunications activities. The intent of this proposal is to tailor this NWP to more effectively address the potential adverse environmental effects that may be caused by these activities, and possibly add various national standards and best management practices that could be incorporated into the text of the NWP to help ensure that these activities result in only minimal individual and cumulative adverse environmental effects.

For this proposed NWP, we are soliciting comments and suggestions for national standards or best management practices for electric utility line and telecommunications activities that would be appropriate to add to this NWP, and within the Corps' legal authority to enforce as terms and conditions of an NWP authorization. Adding such national standards or best management practices may also address concerns expressed regarding Corps regional conditions added to the NWPs by division engineers that are discussed above in the preamble to this proposed rule. Concerns about inconsistency in Corps regional conditions for an NWP can be addressed by adding more terms and conditions to the NWPs to ensure the NWP authorizes only those activities that result in no more than minimal adverse environmental effects.

For proposed new NWP C, we are proposing to retain the basic structure of the 2017 NWP 12, since many of the activities authorized by the 2017 NWP 12 could apply to electric utility line and telecommunications activities. That basic structure would provide consistency and be familiar to potential users of the modified NWP 12 and proposed new NWPs C and D.

We are proposing to name this NWP to "Electric Utility Line and Telecommunications Activities" because these utility lines convey electricity. The electric utility lines and telecommunication lines covered by this NWP include

[15] U.S. Department of Energy, National Renewable Energy Laboratory https://www.nrel.gov/analysis/transmission-infrastructure.html (accessed April 3, 2020)

metal wires and fiber optic cables. The title of this proposed new NWP refers to "activities" because the Corps does not regulate electric utility lines and telecommunication lines per se. The Corps only regulates specific activities associated with electric utility line and telecommunication line construction, maintenance, repair, and removal activities that are regulated under Section 404 of the Clean Water Act (i.e., discharges of dredged or fill material into waters of the United States) and Section 10 of the Rivers and Harbors Act of 1899 (i.e., structures or work in navigable waters of the United States). We are proposing to define the term "electric utility line and telecommunication line" as "any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and internet, radio, and television communication."

This proposed NWP authorizes substations constructed in non-tidal waters of the United States because electric utility line and telecommunications substations are often necessary for an electric utility line or a telecommunication line. This proposed NWP also authorizes foundations for overhead electric utility line and telecommunication line towers, poles, and anchors because those features are necessary for most above-ground electric utility lines and telecommunications lines. The proposed NWP also authorizes access roads, with similar text as the access roads provision in NWP 12.

We are proposing to include a paragraph that 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 electric utility lines and telecommunications lines. Horizontal directional drilling may be used to construct or replace electric utility lines and telecommunications lines, and if inadvertent returns occur during these activities, this NWP can be used to authorize remediation activities so that they can occur in a timely manner to minimize adverse environmental effects that might be caused by these inadvertent returns. In addition, we are proposing to include a paragraph, similar to the paragraph in NWP 12 that authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the electric utility line or telecommunications activity.

With respect to the PCN requirements for this proposed NWP, we are proposing to require PCNs for proposed electric utility line and telecommunications activities that: (1) require a section 10 permit; or (2) that include discharge of dredged or fill material that will result in the loss of greater than 1/10-acre of waters of the United States.

In Note 7, we are proposing to add the phrase "by the Corps" to make it clear that the Corps district, not the permittee, will send a copy of the NWP PCN and NWP verification to the Department of Defense Siting Clearinghouse.

We are soliciting comments on this proposed new NWP. We are also seeking comments and suggestions for national standards and best management practices that may be added to the text of this NWP to help ensure that this NWP authorizes only those electric utility line and telecommunications activities that will cause no more than minimal individual and cumulative adverse environmental effects.

D. Utility Line Activities for Water and Other Substances. In conjunction with the proposal to modify NWP 12 to limit it to oil and natural gas pipeline activities, we are proposing to issue a new NWP to authorize utility line activities that convey water and other substances that are not covered by NWP 12 or the new proposed NWP C for electric utility line and telecommunications activities. This proposed new NWP would authorize utility lines that carry substances that are not oil, natural gas, petrochemicals, or electricity, such as potable water, sewage, stormwater, wastewater, brine, irrigation water, and industrial products that are not petrochemicals.

As discussed above in the sections of the preamble on proposed NWP 12 and proposed new NWP C, the intent of this proposal is to tailor these NWPs to more effectively address potential differences in how the different types of utility lines are constructed, maintained, repaired, and removed. We are proposing to add, if appropriate after considering the comments received in response to this proposed rule, industry-specific standards or best management practices that could serve as national terms in the text of the NWP to help ensure that it authorizes only those activities that will result in no more than minimal individual and cumulative adverse environmental effects. The "terms" of an NWP, as defined at 33 CFR 330.2(h), are "the limitations and provisions included in the description of the NWP itself."

For this proposed new NWP, we are soliciting comments and suggestions for national standards or best management practices for utility lines that convey water (including potable water), sewage, stormwater, wastewater, brine, irrigation water, and industrial products that are not petrochemicals. To be incorporated into the text of this NWP those standards would have to be within the Corps' legal authority to enforce as terms and conditions of an NWP authorization. Adding such national standards or best management practices may also reduce the need for Corps regional conditions, approved by division engineers, and promote consistency in the use of this NWP.

For this proposed new NWP, we have retained the basic structure of the 2017 NWP 12. Much of the text in this NWP is similar to the text of the 2017 NWP 12 since many of the activities authorized by this NWP apply to any utility line, regardless of what substances it conveys. Maintaining the basic structure from the 2017 NWP 12 may help provide consistency and be familiar to potential users of the new NWP. We are also including the proposed modifications to NWP 12 and the terms of the proposed new NWP C for electric utility line and telecommunications activities.

We are proposing to give this NWP the following title: "Utility line activities for water and other substances." We are proposing to define "utility line," for the purposes of this NWP, as "any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, that is not oil or natural gas." The title of this NWP refers to "activities" because the Corps does not regulate utility lines, including water and sewer lines and industrial pipelines, per se. The Corps only regulates specific activities associated with construction, maintenance, repair, and removal of these types of utility lines that are regulated under Section 404 of the Clean Water Act (i.e., discharges of dredged or fill material into waters of the United States) and Section 10 of the Rivers and Harbors Act of 1899 (i.e., structures or work in navigable waters of the United States).

In this NWP, we are proposing to include text from NWP 12 concerning trench excavation, temporary sidecasting, and backfilling, since these types of activities generally apply to all types of underground utility lines. The proposed paragraph for utility line substations would have the 1/2-acre limit for losses of non-tidal waters of the United States, and the prohibition against activities that result in the loss of non-tidal wetlands adjacent to tidal waters. We are also proposing to include the paragraph from NWP 12 that covers substations constructed in non-tidal waters of the United States because water lines, sewer lines, and other types of pipelines often require substations for their operation. These can include pumping stations or lifting stations. Pumping stations are used to move water and other substances through the utility line. Lift stations are used to move wastewater from lower elevations to higher elevations, and are needed in areas where the elevation of the source of the wastewater is not sufficient for gravity flow to occur, or when gravity conveyance requires greater excavation depths and high construction costs.[16]

We are proposing to include a paragraph authorizing foundations for above-ground utility lines that is similar to the paragraph that was in the 2017 NWP 12. The proposed paragraph would read as follows: "This NWP authorizes the construction or maintenance of foundations for above-ground utility lines in all

[16] https://www3.epa.gov/npdes/pubs/sewers-lift_station.pdf (accessed April 2, 2020)

waters of the United States, provided the foundations are the minimum size necessary." We are proposing to include the authorization of access roads, since access roads may be necessary to construct or maintain these utility lines. This proposed new NWP would also authorize utility lines routed in, over, or under section 10 waters without a discharge of dredged or fill material, but still require a section 10 permit.

We are proposing to include the paragraph from the 2017 NWP 12 that 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 utility lines. Horizontal directional drilling may be used to construct or replace utility lines, and if inadvertent returns occur during these activities, this NWP can be used to authorize remediation activities so that they can occur in a timely manner to minimize adverse environmental effects that might be caused by these inadvertent returns. In addition, we are proposing to retain the paragraph that authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the utility line activity.

Regarding pre-construction notification requirements for this proposed new NWP, we are proposing to require PCNs for proposed utility line activities that: (1) require a section 10 permit; or (2) that include discharge of dredged or fill material that will result in the loss of greater than 1/10-acre of waters of the United States.

We are proposing not to include Notes 3 and 7 from the 2017 NWP 12 in this new NWP. Note 3 addressed the applicable minimum clearances for aerial electric power transmission lines crossing navigable waters of the United States. Those minimum clearances do not apply to utility lines that convey water and other substances. Note 7 stated that 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. Since electric utility lines and telecommunications lines are the types of utility lines that the Department of Defense Siting Clearinghouse wants to review to determine whether there are potential effects on military activities, we are proposing to not include that note because the proposed NWP does not authorize electric utility lines or telecommunications lines.

We are inviting comments on this proposed new NWP. We are also seeking comments and suggestions for national standards and best management practices that may be added to the text of this NWP to help ensure that this NWP authorizes only those utility line activities that will cause no more than minimal individual and cumulative adverse environmental effects.

E. Water Reclamation and Reuse Facilities. We are proposing to issue a new NWP to authorize discharges of dredged or fill material into waters of the United States associated with the construction, expansion, and maintenance of water reclamation and reuse facilities, including vegetated areas enhanced to improve water infiltration and constructed wetlands to improve water quality. While some construction, expansion, and maintenance activities for water reclamation and reuse facilities may occur in uplands, or in waters and wetlands that are not subject to Clean Water Act jurisdiction, the construction, expansion, or maintenance of some water reclamation and reuse facilities, including engineered infrastructure (e.g., constructed features to collect and treat onsite-available waters) and ecological infrastructure (e.g., enhancement of vegetated areas to improve water infiltration or constructed wetlands to remove pollutants), may require DA authorization under Section 404 of the Clean Water Act because the construction, expansion, or maintenance of these facilities may involve discharges of dredged or fill material into waters of the United States.

Safe and reliable water supplies for human consumption, agriculture, business, industry, recreation, and healthy ecosystems are critical to our nation's communities and economy. Water reuse can improve the security, sustainability, and resilience of our nation's water resources. Increasing pressures on water resources has led to greater water scarcity and a growing demand for sufficient quantities of high-quality water. Many communities have initiated or are developing centralized systems for planned water reuse, including recycling of stormwater runoff and wastewater. Likewise, they are increasingly interested in decentralized systems that collect and treat onsite-available waters, such as greywater and rainwater for non-potable applications. Three general types of water reuse include: non-potable water reuse, indirect potable water reuse, and direct potable water reuse.

There are two main categories of water reuse: non-potable reuse and potable water reuse. For non-potable water reuse, water is captured, treated, and used for non-drinking purposes, such as toilet flushing, clothes washing, and irrigation. For indirect potable water reuse, water is treated with an environmental buffer and used for drinking water. For example, stormwater or wastewater is first directed to a municipal wastewater treatment plant for treatment. Once treated, it is then directed to an environmental buffer, such as a lake, river, or a groundwater aquifer that is used as a source drinking water. The water is then treated at a drinking water treatment plant and directed into the drinking water distribution system. With direct potable water reuse, water is treated and used for drinking water without an environmental buffer. For direct potable water reuse, stormwater or wastewater is directed to a municipal wastewater treatment plant and/or an advanced wastewater treatment facility for treatment. Once treated, it

is then directed to a drinking water treatment plant for further treatment or sent directly to a drinking water distribution system.

Municipal water reuse can help provide substantial increases in the amount of available water resources in the United States (NRC 2012), by reusing water that was previously discharged to marine or estuarine waters as wastewater. It also has potential applicability in inland areas of the United States. Water reclamation and reuse facilities may consist of engineered processes, or a combination of engineered features and ecological features (e.g., environmental buffers, constructed wetlands) (NRC 2012).

Central to all water reuse applications (non-potable and potable) is the requirement that any source water for potential reuse must meet all applicable "fit for purpose specifications" established by EPA or states. These specifications ensure that the quality of the reused water is demonstrated to meet relevant and applicable public health, environmental and other end use quality and quantity criteria. The Corps does not have any authority to enforce any "fit for purpose specifications" developed by EPA or states. In addition, the Corps does not have the authority to regulate discharges of water from municipal wastewater treatment plants into lakes, rivers, environmental buffers, or groundwater because such water discharges are not "discharges of dredged material" (defined at 33 CFR 323.2(d)) or "discharges of fill material" (defined at 33 CFR 323.2(f)) and are not subject to regulation under Section 404 of the Clean Water Act. These discharges may be regulated by EPA or approved states under Section 402 of the Clean Water Act.

Discharges of water from water reuse or reclamation facilities that involve underground injection may be subject to the Underground Injection Control program permit requirements under the Safe Drinking Water Act. Injection well requirements and their permitting authorities vary by geographic location and by the type of activities performed. The owner and operator of an injection well is responsible for determining and fulfilling all applicable requirements prior to commencing construction and injection operations. Additional information on the UIC program and a list of permitting authorities can be found at: https://www.epa.gov/uic. The Corps does not have any authority to regulate the operation of an injection well because that operation does not involve discharges of dredged or fill material into waters of the United States, so these activities are not addressed in the text of proposed new NWP E.

Because some water reclamation and reuse facilities may require engineered and ecological infrastructure that is constructed in waters of the United States through discharges of dredged or fill material, and thus require Clean Water Act Section 404 authorization, we are proposing to issue a new NWP. However, it should be noted that there are existing NWPs that can be used

to authorize discharges of dredged or fill material into waters of the United States for the construction, expansion, or maintenance of water reclamation and reuse facilities. Therefore, as discussed in more detail below, an alternative to issuing a new NWP to authorize discharges of dredged or fill material into waters of the United States for water reclamation and reuse facilities may be to provide clarification on which existing NWPs can be used to authorize discharges of dredged or fill material into waters of the United States for the construction, expansion, or maintenance of water reclamation and reuse facilities.

Under the current NWPs, certain activities that do not cause the loss of greater than 1/2-acre of waters of the United States associated with the construction, expansion, or maintenance of water reclamation and reuse facilities can be authorized by NWPs 29, 39, 40, and 42. For example, NWP 39 authorizes discharges of dredged or fill material into waters of the United States for the construction or expansion of commercial and institutional developments, including attendant features that are necessary for the use and maintenance of those commercial and institutional buildings. (An attendant feature is a feature that serves the development or other primary activity, such as supporting infrastructure or an amenity.) The text of NWP 39 provides the following examples of attendant features that could be authorized: roads, parking lots, garages, yards, utility lines, storm water management facilities, wastewater treatment facilities, and recreation facilities such as playgrounds and playing fields. Since the text of NWP 39 does not provide an exclusive list of examples of attendant features, attendant features for a commercial or institutional building may also include water reclamation and reuse facilities.

Certain other existing NWPs can currently be used to authorize discharges of dredged or fill material into waters of the United States for development activities or other activities that may include the construction, expansion, or maintenance of water reclamation and reuse facilities. These NWPs include those relating to residential developments (NWP 29), agricultural activities (NWP 40), and recreational facilities (NWP 42). Utility lines for water reclamation and reuse facilities may be authorized by the proposed modifications of NWP 12 or by proposed new NWPs C or D, depending on the specific characteristics of the utility lines.

The Corps is concerned that the current treatment of these water reclamation and reuse activities under the NWP program may not be obvious or may be confusing to the public. Accordingly, we are seeking comment on whether to issue a new NWP which would explicitly authorize discharges of dredged or fill material into waters of the United States for the construction, expansion, or maintenance of water reclamation and reuse facilities or, alternatively, to make it clear (whether within those four permits are elsewhere) that water reclamation and reuse facilities may be attendant features under these

NWPs and not create a new NWP. In particular, we are seeking comment on which of the two alternatives would provide greater clarity for permit applicants and other members of the public and would approach with be easier to implement and rely upon.

D. Discussion of Proposed Modifications to Nationwide Permit General Conditions

GC 13. Removal of Temporary Structures and Fills. In 2017, this general condition only applied to temporary fills. We are proposing to modify this general condition to apply to temporary structures. The proposed modification of this general condition would require that temporary structures be removed after they have fulfilled their intended purpose. If a temporary structure cannot be removed or the project proponent wants the structure to permanently remain in place, he or she can apply for an individual permit to authorize the permanent structure unless there is an applicable NWP or regional general permit that authorizes the permanent structure.

GC 17. Tribal Rights. In response to the Corps' July 20, 2017, Federal Register notice (82 FR 33470) issued by the Corps in response to E.O. 13777, some commenters recommended that either the Corps revert back to the general condition text that was in the 2012 NWPs (see 77 FR 10283) or issue a statement that the general condition text adopted in 2017 would not result in any changes in implementation of the NWPs. They expressed concern regarding how the "minimal adverse effects" standard would be applied to the full suite of tribal rights, and the potential for inconsistent application of that standard across Corps districts.

The text of general condition 17 for the 2017 NWPs is: "No NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands." In the "Definitions" section of the 2017 NWPs we also added definitions of the terms "protected tribal resources," "tribal lands," and "tribal rights" to assist in the implementation of the revised general condition. Before the issuance of the 2017 NWPs, general condition 17, tribal rights, was written as follows: "No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights." The 2012 text for general condition 17 was used for the 2007 NWPs (72 FR 11192), 2002 NWPs (67 FR 2089, where it was numbered as general condition 8), 2000 NWPs (65 FR 12893, as general condition 8), 1996 NWPs (61 FR 65920, as general condition 8), 1991 NWPs (56 FR 59145, as general condition 8). Similar wording of the text for this general condition was used in the 1986 NWPs at 33 CFR 330.5 (b)(10) (51 FR 41257): "That the construction or operation of the activity will not impair reserved tribal rights, including but not limited to, reserved water rights and treaty fishing and

hunting rights." This condition was not in the 1982 NWPs (see 33 CFR 330.5(b) at 47 FR 31834) or the 1977 NWPs (see 33 CFR 323.4-3(b) at 42 FR 37147).

In response to the concerns expressed above, we are proposing to modify this general condition to return 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. We revised this general condition in 2017 to define the tribal rights that must be considered by district engineers. While prior versions of the general condition were not limited by the examples of tribal rights they referenced, the 2017 revision replaced those examples with definitions that were intended to more explicitly cover the suite of tribal rights, including treaty rights, protected tribal resources, and tribal lands. The 2017 NWPs also defined those terms to aid users in applying the general condition.

The version of the general condition we are proposing today carries the current definition of "tribal rights" currently in the "Definitions" section of the NWPs (Section E), which was taken from the 1998 Department of Defense American Indian and Alaska Native Policy, without change. We are also proposing to retain the definition of "tribal lands" which is used in the "historic properties" general condition (GC 20). The definition of "tribal lands" was also adopted from the 1998 Department of Defense American Indian and Alaska Native Policy. The proposed text of general condition 17 does not include the term "protected tribal resources," so we are proposing to remove that definition from Section E of the NWPs.

The 2017 revision to the general condition also sought to clarify the general threshold for when district engineers would consult with tribes for NWP activities. This was done by relying on the phrase ''cause more than minimal adverse effects'', in order to be consistent with the threshold for general permits established by Section 404(e) of the Clean Water Act. As that standard already applies as a restriction for all general permit actions, we propose a revision that eliminates any redundancy and may avoid confusion in the future. By using the word "impair" 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 proposed changes to this general condition can also serve as a starting point for division engineers, tribes, and users of the NWPs to develop proposed regional conditions or activity-specific conditions

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 Clean Water Act 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. This clarification in the proposed changes to this general condition is intended only to avoid any confusion between tribal consultation policies, tribal rights, and Clean Water Act requirements.

GC 18. Endangered Species. We are proposing to modify this general condition to respond to the changes to 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."

In the 2017 NWPs, we added definitions of "direct effects" and "indirect effects" to paragraph (a) of general condition 18 to assist with compliance with this general condition (see 81 FR 35208). We used definitions from FWS and NMFS regulations and guidance to define these terms for general condition 18. Since the FWS and NMFS simplified the definition of the "effects of the action" in 2019 by collapsing the terms ''direct, ''indirect,'' "interrelated,'' and ''interdependent'' from the prior definition, we believe the definitions of "direct effects" and "indirect effects" should be removed from paragraph (a) of general condition 18. We are proposing to replace those definitions with text referring to 50 CFR 402.02 for the current definition of "effects of the action" for the purposes of ESA section 7 consultation. In addition, we are proposing to add a reference to 50 CFR 402.17, which provides additional regulatory text for implementing the definition of "effects of the action" by giving further explanation regarding "activities that are reasonably certain to occur" and "consequences caused by the proposed action." We invite public comment on how to address the FWS's and NMFS's changes to their definition of "effects of the action" to facilitate ESA section 7 compliance for activities that may be authorized by NWPs.

GC 19. Migratory Birds and Bald and Golden Eagles. We first adopted this general condition in the 2012 NWPs (see 77 FR 10249). This general condition was added to the NWPs to clarify that permittees are responsible for complying with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act, and for obtaining any ''take'' permits that may be required under the U.S. Fish and Wildlife Service's regulations issued under those two statutes. Under the current general condition, if a proposed NWP activity might result in a "take" of migratory birds or bald and golden eagles, then the project proponent may be responsible for obtaining "take" permits from the U.S. Fish and Wildlife Service,

which is responsible for administering the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. For the purposes of the Migratory Bird Treaty Act the term "take" is defined in 50 CFR 10.12 as meaning: "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect." For the purposes of the Bald and Golden Eagle Protection Act the term "take" is defined in 50 CFR 22.3 as meaning to: "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb."

On December 22, 2017, Solicitor's Opinion M-37050 was issued by the Department of the Interior. In that memorandum, the Office of the Solicitor concluded that Migratory Bird Treaty Act does not prohibit incidental take of migratory birds. According to that Solicitor's Opinion, the Migratory Bird Treaty Act is limited to affirmative actions that have as their purpose the taking or killing of migratory birds.

We note that the Bald and Golden Eagle Protection Act continues to make project proponents responsible for obtaining any ''take'' permits that may be required under the U.S. Fish and Wildlife Service's regulations issued under that statute. Consequently, we have revised the wording of this general condition, but left it in the NWP general conditions, as a helpful reminder to the regulated public that they should determine for themselves, with the assistance of the U.S. Fish and Wildlife Service, what take permits, if any, they might require.

GC 20. Historic Properties. We are proposing 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.

We are also proposing to modify paragraphs (c) and (d) of this general condition by moving the last sentence of paragraph (c) to paragraph (d). Under this proposal, paragraph (d) informs the non-federal applicant 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.

GC 23. Mitigation. We are proposing 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. We are proposing 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. Stream compensatory mitigation may be provided through mitigation banks, in-lieu fee programs, or permittee-responsible mitigation.

We are proposing to add this 1/10-acre threshold for requiring compensatory mitigation for losses of stream bed that require pre-construction notification to strengthen the mitigation requirements for those NWPs where we are proposing to remove the 300 linear foot limit for losses of stream bed. The mitigation requirements of the NWPs include paragraph (a) of this general condition, which requires permittees to design and construct NWP activities to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable on the project site (i.e., on-site). The mitigation requirements of the NWPs also include paragraphs (c) and (d) of general condition 23, which address compensatory mitigation requirements for NWP activities. We are proposing to apply the same 1/10-acre threshold for compensatory mitigation to offset losses of stream bed that has been applied to wetland losses since 2007 (see 72 FR 11193). We are also proposing to allow the district engineer to waive the requirement to provide compensatory mitigation for losses of greater than 1/10-acre of stream bed when he or she determines that other forms of mitigation, such as best management practices and other minimization measures, are more environmentally preferable forms of mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects.

The 1/10-acre threshold for requiring wetland compensatory mitigation for wetland losses authorized by NWP that require pre-construction notification has been an effective tool in minimizing losses of wetlands, and we anticipate that applying a similar approach to losses of stream bed will be equally effective at minimizing losses of stream bed. In FY 2018, 82% of the fills in waters of the United States verified by Corps districts as being authorized by NWP impacted 1/10-acre or less. Those verified impacts include both permanent and temporary impacts. We believe that imposing this 1/10-acre threshold for requiring compensatory mitigation for losses stream bed, plus the district engineer's review of pre-construction notifications, will minimize losses of stream bed despite removing the 300 linear foot limit. When a district engineer reviews a PCN, and he or she determines that additional avoidance and minimization are necessary to qualify for NWP authorization, the district engineer can require the applicant to propose mitigation so that the adverse environmental impacts would be no more than minimal (see 33 CFR 330.1(e)(3)).

We are soliciting comment on our proposal to add a 1/10-acre threshold for requiring compensatory mitigation for losses of stream bed authorized by

NWP that require compensatory mitigation. We are also seeking comment on including a provision similar to the provision for wetland compensatory mitigation, which would allow the district engineer to waive the compensatory mitigation requirement if she or he makes an activity-specific determination that other forms of mitigation would be environmentally preferable.

In paragraph (e) of this general condition, we are proposing to change the third sentence as follows: "If restoring or enhancing riparian areas involves planting vegetation, only native species should be planted." The original sentence stated that restored riparian areas should consist of native species. The restoration and enhancement of riparian areas as mitigation for NWP activities should not require continuous vegetation management, since continuous vegetation management is usually not practicable for dynamic ecosystems such as riparian areas. For initial actions to restore or enhance riparian areas that involve planting to re-establish or enhance the riparian plant community, native species should be planted. However, some of the initial plantings will die and be replaced by other plants through natural recruitment and ecosystem development processes. Some of the plants that colonize the riparian area may be non-native species, especially if non-native species are well established in the region (e.g., Shackelford et al. 2013, Prach et al. 2015, Van den Bosch and Matthews 2017) and cannot be practicably managed because they are likely recolonize the site through normal plant community development processes. Non-native riparian plant species can provide important contributions to the ecological structure and functions of riparian areas.

Compensatory mitigation requirements for NWP authorizations and other types of DA permits must be practicable (see 33 CFR 332.3(a)(1)). The practicability requirement applies to all aspects of compensatory mitigation, including the mitigation work plan (33 CFR 332.4(c)(7)) and any long-term management requirements (33 CFR 332.7(d)) imposed by the district engineer. In addition, compensatory mitigation projects should be self-sustaining once their ecological performance standards have been achieved (33 CFR 332.7(b)). A self-sustaining plant community will change over time, and the species composition of the compensatory mitigation project site is likely to reflect the species composition of similar habitat types in the region, which may include a mix of native and non-native species. The potential impacts of attempts to manage or eradicate non-native plant species should also be considered, such as the impacts of herbicides on native species and water quality (Shackelford et al. 2013) and the disturbances caused by physically removing non-native individuals that may create an opportunity for other non-native individuals to colonize that space (i.e., secondary invasion (Pearson et al. 2016)).

When the district engineer requires the restoration or enhancement of riparian area as compensatory mitigation for NWP activities, monitoring of the

compensatory mitigation is required under 33 CFR 332.6. Monitoring requirements, including the length of the monitoring period, is determined by the district engineer. The monitoring period must be a minimum of 5 years, unless the district engineer determines that the compensatory mitigation project has achieved its performance standards before that 5-year period ends (see 33 CFR 332.6(b). If the district engineer imposes a performance standard that limits the amount of non-native species inhabiting a compensatory mitigation site, during the monitoring period the district engineer can require the party responsible for the compensatory mitigation project to remove the non-native species that exceed the limit in that performance standard. After the monitoring period ends, the restored or enhanced riparian area can be allowed to go through normal plant community development processes, with the plant community likely changing in a manner similar to the other plant communities in the region.

GC 25. Water Quality. We are proposing 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 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 an application 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.

When Corps Headquarters issues, reissues, or modifies NWPs that may result in discharges into waters of the United States, certifying authorities have the opportunity to issue water quality certifications (WQCs) for those NWPs, or waive the requirement to obtain WQC. The certifying authority may also deny WQC for the issuance of the NWP, and require project proponents to obtain WQCs or waivers for case-specific NWP activities by submitting a certification request in accordance with 40 CFR 121.5(b).

In a WQC for the issuance of an NWP, the certifying authority may impose conditions in the WQC for the issuance of the NWP. The division engineer will review the conditions in the WQC and will make those conditions regional conditions on the NWP unless he or she determines that any of those conditions do not comply with the Corps' regulations regarding permit conditions at 33 CFR 325.4 (see 33 CFR 330.4(c)(2)). If the division engineer determines that the WQC conditions do not comply with 33 CFR 325.4, she or he will consider the conditioned WQC to be a denial of certification, and any prospective permittee that wants to use that NWP needs to submit an application to the certifying authority consistent with the requirements of 40 CFR 121.5(b) to obtain an WQC or waiver for the specific activity that may result in a discharge in order for the activity to be authorized by NWP.

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 WQC.

If the certifying authority adds conditions to a WQC for the issuance of a general permit and the division engineer accepts those conditions as regional conditions to the NWP in accordance with 33 CFR 330.4(c)(2), and the applicant cannot comply with all of the conditions in the WQC, then in order to comply with the requirements of Section 401 of the Clean Water Act, the applicant would need to apply to the certifying authority for a WQC for the specific discharge to be authorized by NWP activity, or obtain an activity-specific waiver. The inability to comply with all conditions of a WQC does not preclude the use of the NWP to authorize the regulated discharge into waters of the United States; such circumstances would be considered a denial of WQC until the project proponent obtains an activity-specific WQC or waiver for the discharge to be authorized by the NWP for the proposed project. Section 401 of the Clean Water Act does not give the certifying authority the ability to dictate what type of permit or license is issued by a federal agency. The certifying authority only has the authority to determine whether a proposed discharge into waters of the United States that would be permitted or licensed by a federal agency complies with applicable water quality requirements. . As stated in 33 CFR 330.4(c)(5), the district engineer will not require or process an individual permit application solely because WQC has been denied for that NWP. To comply with the requirements of Section 401 of the Clean Water Act, the applicant has the option of obtaining a WQC for that specific NWP activity, or a waiver, for the proposed activity.

GC 26. Coastal Zone Management. We are proposing 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 concurrency, 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 NWP.

When Corps Headquarters issues, reissues, or modifies NWPs that authorize activities that may have a reasonably foreseeable effect on any coastal use or resource, the state has the opportunity to issue a general CZMA consistency concurrence for those NWPs, or issue a presumption of concurrence. The state may impose conditions on that general CMZA consistency concurrence. The division engineer will review the conditions on the general CZMA consistency concurrence and will make those conditions regional conditions on the NWP unless he or she determines that any of those conditions

do not comply with the Corps' regulations regarding permit conditions at 33 CFR 325.4 (see 33 CFR 330.4(d)(2)). If the division engineer determines that the general CZMA consistency concurrence conditions do not comply with 33 CFR 325.4, she or he will consider CZMA consistency to be denied without prejudice. In those circumstances, any prospective permittee that wants to use that NWP to authorize activities within or outside the state's coastal zone that affect land or water uses or natural resources of the state's coastal zone needs to obtain an individual CZMA consistency concurrence or a presumption of concurrence in order for the activity to be authorized by NWP (see 15 CFR 930.31(d)).

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 certifying agency added conditions to a general CZMA consistency concurrence and the division engineer accepted those conditions as regional conditions to the NWP in accordance with 33 CFR 330.4(d)(2), and 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, the applicant 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. As stated in 33 CFR 330.4(d)(5), the district engineer will not require or process an individual permit application solely because CZMA consistency concurrence has not been granted for that NWP. To comply with the requirements of the CZMA, the applicant has the option of obtaining an individual CZMA consistency concurrence or a presumption of concurrence.

GC 28. Use of Multiple Nationwide Permits. General condition 28 address the use of more than one NWP to authorize a single and complete project. Under general condition 28, more than one NWP can be used to authorize a single and complete project, as long as the acreage loss of waters of the United States does not exceed the acreage limit of the NWP with the highest specified acreage limit. Under the current wording of this general condition, if two or more NWPs are proposed to be used to authorize a single and complete project, and two or more of those NWPs have specified acreages limits, the current wording of this general condition could result in situations where an NWP with a higher specified

acreage limit could be used to circumvent the limit of an NWP with a lower specified acreage limit. For example, if NWP 39 is combined with NWP 46 to authorize a single and complete project, under the current general condition the loss of waters of the United States to construct the commercial and institutional development could be greater 1/2-acre since NWP 46 has a specified acreage limit of 1-acre.

There are a few NWPs that have numeric acreage limits greater than 1/2-acre: NWP 46, which authorizes discharges of dredged or fill material into certain ditches constructed in uplands, NWP 32 for completed enforcement actions, and NWP 34, which authorizes discharges of dredged or fill material into waters of the United States for cranberry production activities. Nationwide permit 46 has an acreage limit of one acre. NWP 32 has a 1-acre limit for tidal waters and a 5-acre limit for non-tidal waters. Nationwide permit 34 has an acreage limit of 10 acres. There are also NWPs with specified acreage limits of less than 1/2-acre that could potentially be used with other NWPs with higher specified acreage limits to authorize single and complete projects: NWP 18, which has a 1/10-acre limit and NWP 14, which has a 1/3-acre for activities in tidal waters.

To prevent using NWPs with higher acreage limits to increase the acreage loss of waters of the United States for NWPs with lower specified acreage limits, we are proposing to modify this general condition to address two situations: (1) only one of the NWPs used to authorize a single and complete project has a specified acreage limit; and (2) two or more NWPs used to authorize the single and complete projects have different specified acreage limits. In the first situation, we are proposing minor changes to retain the approach that is currently in the general condition: that the loss of waters of the United States cannot exceed the specified acreage limit. To address the second situation, and ensure that an NWP with a higher specified acreage limit cannot be used to circumvent the acreage limit for another NWP and authorize a greater loss of waters of the United States than could be authorized if that second NWP were to be used to authorize an activity on its own, we are proposing to add text to the general condition to state that the activities authorized by the respective NWPs cannot exceed their specified acreage limits. We propose to include an example to help illustrate how proposed paragraph (b) of this general condition should be applied.

GC 31. Activities Affecting Structures or Works Built by the United States. Under the current Engineer Circular 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), Corps districts are required to conduct section 10 and section 404 permit evaluations and requests for 408 permissions in a coordinated and concurrent manner. Therefore, we are proposing to retain this general condition with minor modifications. Under Appendix G-4 of EC 1165-2-220, when proposed activities may impact the usefulness of a USACE Navigation

project and the scope of analysis for activities that require section 10 authorization and section 408 permission is identical, the Corps will review the proposed activities and may issue a single section 10 authorization that covers the section 408 activity. In the section 10 authorization, the Corps district will include any necessary section 408 conditions.

GC 32. Pre-Construction Notification. We are proposing several modifications to this general condition to provide consistency with proposed changes to the NWPs and to clarify pre-construction notification requirements.

We are proposing 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, we are proposing 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)).

We are proposing 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), we are proposing 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. For example, if the applicant is constructing a highway, and there are four separate and distant water crossings that may qualify for NWP 14 authorizations, and two of those crossings require PCNs and the other two do not require PCNs, then the PCN needs to state that the applicant is proposing to use NWP 14 to provide DA authorization for the non-PCN water crossings.

In subparagraph (b)(4)(ii), we are proposing 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 NWP that do not require PCNs. 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, including those single and complete crossings authorized by NWP but do not require PCNs. We are also proposing 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. The quantity of losses of wetlands, other special aquatic sites, and other waters that are caused by single and complete crossings authorized by non-PCN NWPs is being provided to the district engineer for informational purposes only to assist in her or his cumulative effects evaluation in accordance with Section D (District Engineer's Decision), and the district engineer should not process those non-PCN NWP activities as PCNs.

In the first sentence of paragraph (b)(5), we are proposing 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, we are proposing to modify paragraph (b)(5) to be consistent with our 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 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 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 waters and wetlands exceeds the 1/2-acre limit.

We are proposing 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, we are proposing 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.

Because of our 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, we are proposing to modify paragraph (d)(2) of the agency coordination provisions of this general condition. We are proposing 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. Under the 2017 NWPs, the project proponent could request a waiver of the 300 linear foot limit, in cases where intermittent or ephemeral stream bed would be filled or excavated by the proposed NWP activity. The district engineer would coordinate the PCN with federal and state agencies to solicit comments to help the district engineer determine whether a waiver should be granted. Under this proposal, agency coordination would still be required for all NWP activities that require PCNs and result in the loss of greater than 1/2-acre of waters of the United States; NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges into of dredged or fill material into special aquatic sites; and 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.

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

In paragraph 1 of Section D, we are proposing 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. We are proposing 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, we are proposing 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, 49, and 50 will be subject to the same timeframes as other NWP activities that require PCNs. 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 DE 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.

F. Discussion of Proposed Modifications to Section F, "Definitions"

Ephemeral stream and intermittent stream. We are proposing to remove the definitions of "ephemeral stream" and "intermittent stream," because we are proposing to remove the 300 linear foot limit and the ability of district engineers to waive that 300 linear foot limit on a case-by-case basis. Those two definitions would no longer be needed for the NWPs if the 300 linear foot limit is removed. The affected NWPs are: 21, 29, 39, 40, 42, 43, 44, 51, and 52. If the 300 linear foot limit for losses of stream bed and the waiver provision are removed in the

final NWPs, the terms "ephemeral stream" and "intermittent stream" would no longer appear in the text of the NWPs and would no longer be needed to implement those NWPs. It should also be noted that ephemeral streams are not considered to be "waters of the United States" under the 2020 amendments to 33 CFR part 328. Part 328 of the Corps' regulations defines "waters of the United States" for the purposes of the Clean Water Act.

Loss of waters of the United States. We are proposing 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, we are proposing 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 our 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, we are proposing to remove "linear feet" from the third sentence. 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.

Ordinary high water mark. We are proposing to modify the definition of "ordinary high water mark" to be consistent with the definition in the 2020 final rule defining "waters of the United States" at 33 CFR 328.3(c)(7).

Perennial stream. We are proposing to modify the definition of "perennial stream" to be consistent with the definition of "perennial" in the 2020 final rule defining "waters of the United States" at 33 CFR 328.3(c)(8).

We are proposing to retain the definition of "perennial stream" in the NWPs because it would still be included in the terms of NWPs 40 and 43 if the 300 linear foot limit for losses of stream bed and the waiver provision are removed. Nationwide permit 40 does not authorize the construction of farm ponds in perennial streams. Nationwide permit 43 does not authorize discharges of dredged or fill material for the construction of new stormwater management facilities in perennial streams.

The definitions of "perennial stream," "intermittent stream," and "ephemeral stream" were added to the NWPs in 2000 (see 65 FR 12818) because some terms and conditions of the 2000 NWPs applied to perennial, intermittent, or ephemeral streams. When the NWPs were reissued in 2002 (67 FR 2020), we added provisions to certain NWPs (i.e., NWPs 39, 40, 42, and 43)

that allowed district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed when the proposed NWP activities were determined by district engineers to result in no more than minimal individual and cumulative adverse environmental effects. The waiver provision did not apply to losses of perennial stream bed.

Protected tribal resources. Because of the proposed changes to NWP general condition 17, tribal rights, we are proposing 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."

III. Compliance with Relevant Statutes

A. National Environmental Policy Act Compliance

We have prepared a draft decision document for each proposed NWP. Each draft decision document contains an environmental assessment (EA). The EA includes the public interest review described in 33 CFR 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 draft decision document will also include analysis conducted pursuant to guidelines set out in accordance with 40 CFR 230.7 from the Clean Water Act section 404(b)(1) Guidelines. These decision documents evaluate the environmental effects of each NWP from a national perspective.

The draft decision documents for the proposed NWPs are available on the internet at: www.regulations.gov (docket ID number COE-2020-0002) as Supporting Documents. We are soliciting comments on these draft national decision documents, and any comments received will be considered when preparing the final decision documents for the NWPs.

After the NWPs are issued or reissued, 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 occurs at three levels: national, regional, and the verification stage. Each national NWP decision document includes a national-scale NEPA cumulative effects analysis. Each supplemental document has a NEPA cumulative effects analysis 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.

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

The proposed 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 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 final conclusion 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 water body 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 water body is subject to CWA jurisdiction) or (2) are otherwise consistent with the CWA to the extent that the water body is nor 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 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 regulated under those two authorities.

On April 21, 2020, the U.S. Environmental Protection Agency (EPA) and 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 (CWA). 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 court-issued stay in that state (the case is currently under appeal). The rule has also been challenged in several other district courts.

Please note that some of the proposed NWPs could authorize activities that involve the discharge of dredged or fill material into water bodies that are not 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 may be subject to CWA jurisdiction, at the time those discharges occur. Where a particular water body 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 Corps has determined that the NWP regulations at 33 CFR 330.4(f) and NWP general condition 18, endangered species, ensure that all activities authorized by NWPs comply with section 7 of the Endangered Species Act (ESA). 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. The Corps then evaluates the PCN and makes an effect determination for the proposed NWP activity for the purposes of ESA section 7. The Corps established the "might affect" threshold in 33 CFR 330.4(f)(2) and paragraph (c) of general condition 18 because it is more stringent than the "may affect" threshold for section 7 consultation in the U.S. Fish and Wildlife Service's (FWS) and National Marine Fisheries Service's (NMFS) ESA section 7 consultation regulations at 50 CFR part 402. The word "might" is defined as having "less probability or possibility" than the word "may" (Merriam-Webster's Collegiate Dictionary, 10th edition). 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.

If the project proponent is required to submit a PCN and the proposed activity might affect listed species or critical habitat, the activity is not authorized by NWP until either the Corps district makes a "no effect" determination or makes a "may affect" determination and completes formal or informal ESA section 7 consultation.

When evaluating a PCN, the Corps district will either make a "no effect" determination or a "may affect" determination. If the Corps district makes a "may

affect" determination, it will notify the non-federal applicant and the activity is not authorized by NWP until ESA Section 7 consultation has been completed. If the non-federal project proponent does not comply with 33 CFR 330.4(f)(2) and general condition 18, and does not submit the required PCN, then the activity is not authorized by NWP. In such situations, it is an unauthorized activity and the Corps district will determine an appropriate course of action under its regulations at 33 CFR part 326 to respond to the unauthorized activity.

Federal agencies, including state agencies (e.g., certain state Departments of Transportation) to which the Federal Highway Administration has assigned its responsibilities 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 when an NWP activity is part of a larger overall federal project or action. The federal agency's ESA section 7 compliance covers the NWP activity because it is undertaking the NWP activity and possibly other related activities that are part of a larger overall federal project or action. 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.

On October 15, 2012, the Chief Counsel for the Corps issued a letter to the FWS and NMFS (the Services) clarifying the Corps' legal position regarding compliance with section 7 of the ESA for the NWPs. That letter explained that the issuance or reissuance of the NWPs, as compliance with section 7 of the ESA is governed by NWP general condition 18 (which applies to every NWP and which relates to endangered and threatened species), and 33 CFR 330.4(f) results in "no effect" to listed species or critical habitat, and therefore the reissuance/issuance action itself does not require ESA section 7 consultation. Although the reissuance/issuance of the NWPs has no effect on listed species or their critical habitat and thus requires no ESA section 7 consultation, the terms and conditions of the NWPs, including general condition 18, and 33 CFR 330.4(f) ensure that ESA consultation will take place on an activity-specific basis wherever appropriate at the field level of the Corps, FWS, and NMFS. The principles discussed in the Corps' October 15, 2012, letter apply to this proposed issuance/reissuance of NWPs. Those principles are discussed in more detail below.

The only activities that are immediately authorized by NWPs are "no effect" activities under 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 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 May 11, 2015, issue of the Federal Register (80 FR 26832) the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) published a final rule that amended the incidental take statement provisions of the implementing regulations for ESA section 7 at 50 CFR part 402. That final rule went into effect on June 10, 2015. In that final rule, the FWS and NMFS defined two types of programmatic ESA section 7 consultations, and discussed the circumstances which providing an incidental take statement with a biological opinion for a programmatic section 7 consultation is appropriate. The two types of programmatic section 7 consultations are: framework programmatic actions and mixed programmatic actions.

A framework programmatic action is federal action that approves a framework for the development of future actions that are authorized, funded, or carried out at a later time. A mixed programmatic action is a federal action that approves action(s) that will not be subject to further section 7 consultation, and approves a framework for the development of future actions that are authorized, funded, or carried out at a later time. Definitions of "framework programmatic action" and "mixed programmatic action" are provided at 50 CFR 402.02. In the preamble to the 2015 final rule, the FWS and NMFS stated that action agencies can seek to engage in section 7 consultation on programmatic actions to gain efficiencies in the section 7 consultation process (80 FR 26836).

The 2015 amendments to 50 CFR part 402 also address the circumstances when incidental take statements will be provided in biological opinions for programmatic actions. In the final rule, the FWS and NMFS stated that since a framework programmatic action does not authorize any federal action to proceed, no take is anticipated to result from the framework programmatic action itself, and, therefore, the FWS and NMFS are not required to provide an incidental take statement in a biological opinion for a framework programmatic action (see 80 FR 26835). The FWS and NMFS acknowledged that adoption of a framework action by the federal action agency would not, by itself, result in any anticipated take of listed species (see 80 FR 26836). Therefore, the FWS and NMFS determined that it is appropriate not to provide an incidental take statement at the program level; any take that may occur when future actions are implemented under the framework action would be addressed

through activity-specific ESA section 7 consultations. For a national framework programmatic action, anticipated take from future actions could also be addressed through incidental take statements in regional programmatic section 7 consultations. In the preamble to the 2015 final rule, the FWS and NMFS identified the Corps' NWP program as an example of a framework action at a national scale that can address ESA section 7 consultation requirements at a later time as appropriate, as specific activities are authorized, funded, or carried out (see 80 FR 26835).

The FWS's and NMFS's regulations at 50 CFR 402.14(a) require each Federal agency to review its actions at the earliest possible time to determine whether a proposed action may affect listed species or critical habitat. This requirement applies to framework actions, including framework actions that occur at a national scale. If the Federal agency determines its proposed action may affect listed species or critical habitat, formal consultation is required unless the FWS and/or NMFS provide written concurrence that the proposed action is not likely to adversely affect any listed species or critical habitat. However, if the Federal agency determines that its proposed action, including any framework action, will have no effect on listed species or critical habitat, section 7 consultation is not required. The ESA section 7 consultation regulations at 50 CFR 402.14(a) state that the Director of FWS or NMFS may request a Federal agency to enter into consultation if he or she identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request. Section 402.14(a) provides a mechanism whereby the NMFS or FWS can provide their disagreement with a Federal agency's "no effect" determination for the purposes of ESA section 7 for a proposed Federal action, including a framework action.

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. When the Corps district receives a pre-construction notification for a proposed NWP activity, it is responsible for applying the 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 Corps district determines whether the proposed NWP activity "may affect" listed species or designated critical habitat and initiates formal or informal section 7 consultation unless it determines the proposed NWP activity will have "no effect" on listed species or designated critical habitat.

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 or 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 consequences 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.

The final rule issued by the FWS and NMFS on August 27, 2019 (84 FR 44976) also provided further discussion of programmatic ESA section 7 consultations, including framework programmatic actions. In the preamble to that final rule, the FWS and NMFS stated that ESA section 7 provides significant flexibility for Federal agency compliance with the ESA. Furthermore, the FWS and NMFS acknowledged that while federal action agencies have an obligation to consult on programs that are considered agency actions that may a affect listed species or critical habitat, "many types of programmatic consultation would be considered an optional form of section 7 compliance to, for example, address a collection of agency actions that would otherwise be subject to individual consultation." (See 84 FR 44996.)

As discussed in this proposed rule, the NWP program has been structured, through the requirements of NWP general condition 18 and 33 CFR 330.4(f) to focus ESA section 7 compliance at the activity-specific and regional scales. Each year, Corps districts initiate thousands of formal and informal ESA section 7 consultations for specific NWP activities (see below), and many Corps districts have worked with the FWS and NMFS to develop formal and informal regional programmatic consultations. 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 because it is at the activity-specific and regional scales that informal consultation written concurrences and

biological opinions with incidental take statements are completed for proposed NWP activities.

As stated in 50 CFR 402.14(i)(6), for a framework programmatic action, an incidental take statement is not required at the programmatic level, and any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate. 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 that effective protection of listed species and their designated critical habitat is achieved.

After applying the 2015 and 2019 amendments to 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 identified after the NWPs are issued and go into effect. Compliance with the requirements of ESA section 7 can also be achieved by 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.

ESA section 7 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 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 listed species and critical habitat, general

condition 18 expressly prohibits any activity "which 'may affect' a listed species or critical habitat, unless section 7 consultation addressing the effects of the proposed activity has been completed." General condition 18 also states that if an activity "might affect" a listed species or critical habitat, 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 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 should 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 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 designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat" and 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 that might be affected by the proposed work or that utilize the designated critical habitat 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 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 minimal adverse environmental effects and thus cannot be authorized by 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 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,[17] an on-line project planning tool developed and maintained by the FWS.

During the process for developing regional conditions, Corps districts coordinate or consult with FWS and/or NMFS regional or field offices to identify regional conditions 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. Corps districts will continue to consider through regional consultations, local initiatives, or other cooperative efforts additional information and measures to

[17] https://ecos.fws.gov/ipac/

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 offices 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. 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.

Based on the fact that NWP issuance or reissuance has no effect on listed species or critical habitat and any proposed NWP activity that “may affect” listed species or critical habitat will undergo an activity-specific ESA section 7 consultation, there is no requirement that the Corps undertake programmatic consultation for the NWP program. The national programmatic consultations conducted in the past for the NWP program were voluntary consultations. Regional programmatic consultation can be conducted by Corps districts and regional or local offices of the FWS and/or NMFS to provide further assurance against potential adverse effects on listed species or critical habitat, and assure other benefits to listed species or critical habitat, such as through the establishment of additional procedures, regional NWP conditions, activity-specific NWP conditions, or other safeguards that may be employed by Corps district offices based on further discussions between the Corps and the FWS and NMFS.

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 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, we 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 with 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 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 will coordinate 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 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 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 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.

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.

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 NWP until either the Corps district makes a "no potential to cause effects" determination or completes NHPA section 106 consultation.

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

proponent does not comply with the "Historic Properties" general condition, and does not submit the required PCN, then the activity is not authorized by NWP. In such situations, it is an unauthorized activity and the Corps district will determine an appropriate course of action to respond to the unauthorized activity.

The only activities that are immediately authorized by NWPs are "no potential to cause effect" activities under section 106 of the NHPA, its implementing regulations at 36 CFR part 800, and the Corps' "Revised Interim Guidance for Implementing Appendix C of 33 CFR part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800," dated April 25, 2005, and amended on January 31, 2007. Therefore, the issuance or reissuance of NWPs does not require NHPA section 106 consultation because no activities that might have the potential to cause effects to historic properties can be authorized by NWP without first completing activity-specific NHPA Section 106 consultations, as required by 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 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.

G. Compliance with 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 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.

We believe that, in general, the activities authorized by the NWPs will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States. The NWPs are conditioned to ensure that adverse environmental effects will be no more than minimal and address the types of activities that would be routinely authorized if evaluated under the individual permit process. We recognize that in some states or tribal lands there will be a need to conduct individual state or tribal review for some activities, to ensure compliance with the applicable provisions of sections 301, 302, 303, 306, and 307 of the CWA and other appropriate provisions of state/tribal law. Each Corps district will initiate discussions with their respective state(s), tribe(s), and EPA regional offices, as appropriate, to discuss issues of concern and identify regional approaches to address the scope of waters, activities, discharges, and PCN requirements, as appropriate, to resolve any issue, as necessary.

Shortly after the publication of this proposed rule in the Federal Register, Corps districts will send letters to certifying agencies (i.e., states, authorized tribes, or EPA region, as appropriate) to request water quality certification for these NWPs. The certifying authorities will have 60 days to issue, deny, or waive WQC for the proposed NWPs. Their WQC requests will include this Federal Register notice, and may also include their proposed Corps regional conditions.

After the 60-day period, Corps districts will send letters to the EPA Administrator to notify the Administrator of the proposed NWPs and the certifications issued by the certifying agency or agencies. It is EPA's role under section 401(a)(2) to consider whether the permit for which a WQC has been

granted or waived may cause potential impacts to waters within neighboring jurisdictions. The 401(a)(2) process is a separate action that occurs after the certifying authority has acted on a certification request. The statute provides EPA with 30 days to determine, in its discretion, whether the water quality of a neighboring jurisdiction may be affected by the certified permit. If the EPA determines the water quality of a neighboring jurisdiction may be affected by issuance of the certified general permit, the statute provides neighboring jurisdictions with 60 days to determine whether the discharge will violate its water quality requirements, object to the issuance of a license or permit, and request a public hearing. A federal agency may not issue the license or permit until the section 401(a)(2) process concludes.

If a certifying agency denies WQC for the issuance of an NWP, then the 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.

Please note that in some states the Corps has issued state programmatic general permits (SPGPs) or regional general permits (RGPs), and within those states some or all of the NWPs may be suspended or revoked by division engineers. Concurrent with today's proposal, district engineers may be proposing suspension or revocation of the NWPs in states where SPGPs or RGPs will be used in place of some or all of the NWPs.

We note that EPA recently 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. We invite comments from the public on whether and, if so, when the Corps should revise those regulations in light of the new EPA regulations. We will update this language, as appropriate, in the final NWPs.

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.

We believe that, in general, the activities authorized by the NWPs will be consistent with state CZMA programs/enforceable policies. The NWPs are

conditioned to ensure that adverse environmental effects will be no more than minimal and address the types of activities that would be routinely authorized if evaluated under the individual permit process. We recognize that in some states there will be a need to conduct individual state review for some activities, to ensure consistency with the state's CZMA program. Each Corps district will initiate discussions with their respective state(s) to discuss issues of concern and identify regional approaches to address the scope of waters, activities, discharges, and PCN requirements, as appropriate, to resolve these issues.

This Federal Register notice serves as the Corps' determination that the activities authorized by these NWPs are, to the maximum extent practicable, consistent with state CZMA programs. This determination is contingent upon the addition of state CZMA conditions and/or regional conditions, by the issuance by the state of an individual consistency concurrence, or when a presumption of concurrence occurs when the state does not act within six months after receiving a request for concurrence. States are requested to concur or object to the consistency determination for these NWPs following 33 CFR 330.4(d).

The Corps' CZMA consistency determination only applies 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 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).

IV. Economic Impact

The proposed 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 additional 255 activities each year. Subsequently, 255 fewer activities each year would require individual permits. By authorizing more activities by NWP, this proposal will reduce burden for the regulated public primarily in the form of compliance costs. The proposed changes would increase the number of categories of activities authorized by NWP, and subsequently reduce the number of activities that require individual permits. By increasing the number of activities that can be authorized by NWPs, the proposed changes would 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 provide incentives to project proponents to minimize impacts to jurisdictional waters and wetlands in exchange for receiving the required Department of the Army authorization in less time compared to the amount of time required to obtain individual permits. In 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 draft regulatory impact analysis for this proposed 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 2016$ ranges from $4,161 to $13,871 (Institute for Water

Resources (2001)[18], adjusted for inflation using the GDP deflator approach). The Corps estimates that a permit applicant's compliance costs for obtaining an individual permit for a proposed activity impacting up to 3 acres of wetland ranges from $16,646 to $33,391 in 2016$. Considering how the proposed NWPs will increase the number of activities authorized by NWP each year, the Corps estimates that the proposal, when compared with the 2017 NWPs, will decrease compliance costs for the regulated public by approximately $8 million per year. We solicit comment on the assumptions and methodology used to calculate the compliance costs and burden in general associated with the NWP. We are particularly interested in whether there is a more recent study estimating compliance cost than the Institute for Water Resources study cited above.

Nationwide Permit(s)	Proposed Changes	Anticipated Impacts
• NWP 21 • NWP 29 • NWP 39 • NWP 40 • NWP 42 • NWP 43 • NWP 44 • NWP 50 • NWP 51 • NWP 52	Remove 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 NWP; decrease number of activities requiring individual permits.
• NWP 3	Authorize maintenance of fills that were constructed prior to establishment of requirement for Clean Water Act section 404 authorization; clarify that NWP authorizes small amounts of riprap to protect structure or fill.	Increase number of activities authorized by NWP; decrease number of activities requiring individual permits.
• NWP 12 • NWP C • NWP D	Issue separate NWPs for oil or natural gas pipeline activities, electric utility line and telecommunications activities, and utility lines for water and other substances; reduce number of PCN thresholds	No change in number of NWP authorizations.
• NWP 14	Add "driveways" to examples of activities authorized by this NWP.	Increase number of activities authorized by NWP; decrease

[18] Institute for Water Resources (IWR). 2001. Cost analysis for the 2000 issuance and modification of nationwide permits. Institute for Water Resources (Alexandria, VA). 29 pp. plus appendices.

Nationwide Permit(s)	Proposed Changes	Anticipated Impacts
		number of activities requiring individual permits.
• NWP 19	Increase limit to 50 cubic yards.	Increase number of activities authorized by NWP; decrease number of activities requiring individual permits.
• NWP 21 • NWP 49 • NWP 50	Remove requirement for written authorization before commencing authorized activity.	No change in number of NWP authorizations.
• NWP 27	Add coral restoration and relocation. Add reservoir sediment management to provide continuity in sediment transport through reservoirs.	Increase number of activities authorized by NWP; decrease number of activities requiring individual permits.
• NWP 41	Add irrigation ditches.	Increase number of activities authorized by NWP; decrease number of activities requiring individual permits.
• NWP 48	Remove 1/2-acre limit for impacts to submerged aquatic vegetation and pre-construction notification thresholds	Increase number of activities authorized by NWP; decrease number of activities requiring individual permits.
• NWP A	Issue new NWP to authorize seaweed mariculture activities	Increase number of activities authorized by NWP; decrease number of activities requiring individual permits.
• NWP B	Issue new NWP to authorize finfish mariculture activities	Increase number of activities authorized by NWP; decrease number of activities requiring individual permits.
• NWP E	Issue new NWP to authorize discharges of dredged or fill material for water reclamation and reuse facilities	These activities may be authorized by existing NWPs, but additional clarification may be appropriate.
• General condition 17, tribal rights	Restore text of general condition in 2012 NWPs.	No change in number of NWP authorizations.
• General condition 18, endangered species	Revise to address 2019 changes to 50 CFR part 402.	No change in number of NWP authorizations.
• General condition 23, mitigation	Add 1/10-acre threshold for compensatory mitigation for losses of stream bed.	No change in number of NWP authorizations.
• General condition 25, water quality	Clarify that if NWP activity does not comply with conditions of a general water quality certification, an individual certification is	No change in number of NWP authorizations.

Nationwide Permit(s)	Proposed Changes	Anticipated Impacts
	required, unless a waiver occurs	
• General condition 26, coastal zone management	Clarify 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	Modify general condition to clarify application to NWPs with different numeric limits.	No change in number of NWP authorizations.
• General condition 32, pre-construction notification	Modify to encourage use of Form ENG 6082 for NWP pre-construction notifications	No change in number of NWP authorizations.

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. The use of "we" in this notice refers to the Corps. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

Paperwork Reduction Act

The paperwork burden associated with the NWP relates exclusively to the preparation of the PCN. 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 proposed NWPs would decrease the total paperwork burden associated with this program because the Corps estimates that under this proposal 221 fewer PCNs would be required each year. This reduction is due to the proposed removal of the PCN thresholds from NWP 48 for commercial shellfish mariculture activities and the proposed PCN thresholds for the proposed modifications for NWP 12 (oil and natural gas pipeline activities), proposed new NWP C (electric utility line and telecommunications activities), and proposed new NWP D (utility line activities for water and other substances). The paperwork burden associated with the proposed NWPs is expected to decrease by approximately 2,321 hours per year from 360,074 hours to 357,753 hours.

The following table summarizes the projected changes in paperwork burden from the 2017 NWPs to the proposed 2020 NWPs.

	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	32,734	31,920			
Proposed 2020 NWPs	32,523	32,386	-211	+255	-255

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 proposed rule is expected to be a deregulatory action under E.O. 13771.

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 proposed issuance and modification of NWPs does not have federalism implications. We do not

believe that the proposed 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. The proposed 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 proposed issuance and modification of NWPs on small entities, a small entity is defined as: (1) A small business based on Small Business Administration size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

The statues under which the Corps issues, reissues, or modifies nationwide permits are Section 404(e) of the Clean Water Act (33 U.S.C. 1344(e)) and section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403). Under section 404, 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 current 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 proposed 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 nationwide permits, authorize only those activities that result in no more than minimal adverse environmental effects, individually and cumulatively. The terms and conditions of the NWPs, such as acreage limits and mitigation measures, are imposed to ensure that the NWPs authorize only those activities that result in no more than minimal adverse effects on the aquatic environment and other public interest review factors.

After considering the economic impacts of the proposed nationwide permits 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, we expect a slight to moderate increase in the number of activities than can be authorized through NWPs, because we are proposing 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) we expect a concurrent decrease in the numbers of individual permit and regional general permit authorizations required for these activities.

We are interested in the potential impacts of the proposed NWPs on small entities and welcome comments on issues related to such impacts.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under section 202 of the UMRA, the agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "federal mandates" that may result in expenditures to state, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires the agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows an agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted. Before an agency establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed, under section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that the proposed 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 proposed 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 proposal is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reasons, we have determined that the proposed NWPs contain no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the proposed 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 proposed 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 we have reason to believe may have a disproportionate effect on children.

Executive Order 13175

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires agencies to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." The phrase "policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Tribes, on the relationship between the federal government and the Tribes, or on the distribution of power and responsibilities between the federal government and Tribes."

The proposal to issue NWPs does not have tribal implications. It is generally consistent with current agency practice and will not have substantial direct effects on tribal governments, on the relationship between the federal government and the Tribes, or on the distribution of power and responsibilities between the federal government and Tribes. Therefore, Executive Order 13175 does not apply to this proposal. However, in the spirit of Executive Order 13175, we specifically request comment from Tribal officials on the proposed rule. Each Corps district will be conducting government-to-government consultation with Tribes, to identify regional conditions or other local NWP modifications that may be necessary to protect aquatic resources of interest to Tribes, as part of the Corps' responsibility to protect trust resources.

Environmental Documentation

A draft decision document has been prepared for each proposed NWP. Each draft decision document includes a draft environmental assessment and

public interest review determination. If an NWP authorizes discharges of dredged or fill material into waters of the United States, the draft decision document includes a 404(b)(1) Guidelines analysis. These draft 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. We will submit a report containing the final NWPs and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the Federal Register. The proposed 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 proposed modifications of the NWPs are not expected to negatively impact any community, and therefore are not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.

Executive Order 13211

The proposed modifications of the NWPs are not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

VI. References

A complete list of all references cited in this document is available on the Internet at http://www.regulations.gov in docket number COE–2020–0002 or upon request from the U.S. Army Corps of Engineers (see FOR FURTHER INFORMATION CONTACT).

Authority

We are proposing to reissue 52 existing NWPs and issue 5 new NWPs under the authority of Section 404(e) of the Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 et seq.).

Dated: 31 July 2020

/s/
William H. Graham
Major General, U.S. Army
Deputy Commanding General
for Civil and Emergency Operations

Nationwide Permits, Conditions, Further Information, and Definitions

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B. Nationwide Permits

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

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

3. Maintenance. (a) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, or of any currently serviceable structure or fill that did not require a permit at the time it was constructed, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized. This includes the placement of new or additional riprap to protect the structure or fill, provided the placement of riprap is the minimum necessary to protect the structure or fill or to ensure the safety of the structure or fill. This NWP authorizes the removal of previously authorized structures or fills. Any stream channel modification is limited to the minimum necessary for the repair, rehabilitation, or replacement of the structure or fill; such modifications, including the removal of material from the stream channel, must be immediately adjacent to the project. This NWP also authorizes the removal of accumulated sediment and debris within, and in the immediate vicinity of, the structure or fill. This NWP also authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is

commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the district engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

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

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

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

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

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

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

5. Scientific Measurement Devices. Devices, whose purpose is to measure and record scientific data, such as staff gages, tide and current gages, meteorological stations, water recording and biological observation devices, water quality testing and improvement devices, and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards. Upon completion of the use of the device to measure and record scientific data, the measuring device and any other structures or fills associated with that device (e.g., foundations, anchors, buoys, lines, etc.) must be removed to the maximum extent practicable and the site restored to pre-construction elevations. (Authorities: Sections 10 and 404)

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

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

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

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

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

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

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

11. Temporary Recreational Structures. Temporary buoys, markers, small floating docks, and similar structures placed for recreational use during specific events such as water skiing competitions and boat races or seasonal use,

provided that such structures are removed within 30 days after use has been discontinued. At Corps of Engineers reservoirs, the reservoir managers must approve each buoy or marker individually. (Authority: Section 10)

12. 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, including outfall and intake structures. 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 petrochemical products, for any purpose.

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 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 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 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 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, 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 for all crossings of waters of the United States that require DA authorization, including those crossings authorized by 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 section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States associated with such 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).

13. Bank Stabilization. Bank stabilization activities necessary for erosion control or prevention, such as vegetative stabilization, bioengineering, sills, rip rap, revetment, gabion baskets, stream barbs, and bulkheads, or combinations of bank stabilization techniques, provided the activity meets all of the following criteria:

(a) No material is placed in excess of the minimum needed for erosion protection;

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects (an exception is for bulkheads – the district engineer cannot issue a waiver for a bulkhead that is greater than 1,000 feet in length along the bank);

(c) The activity will not exceed an average of one cubic yard per running foot, as measured along the length of the treated bank, below the plane of the ordinary high water mark or the high tide line, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(d) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(e) No material is of a type, or is placed in any location, or in any manner, that will impair surface water flow into or out of any waters of the United States;

(f) No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored native trees and treetops may be used in low energy areas);

(g) Native plants appropriate for current site conditions, including salinity, must be used for bioengineering or vegetative bank stabilization;

(h) The activity is not a stream channelization activity; and

(i) The activity must be properly maintained, which may require repairing it after severe storms or erosion events. This NWP authorizes those maintenance and repair activities if they require authorization.

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the bank stabilization activity: (1) involves discharges into special aquatic sites; or (2) is in excess of 500 feet in length; or (3) will involve the discharge of greater than an average of one cubic yard per running foot as measured along the length of the treated bank, below the plane of the ordinary high water mark or the high tide line. (See general condition 32.) (Authorities: Sections 10 and 404)

Note: In coastal waters and the Great Lakes, living shorelines may be an appropriate option for bank stabilization, and may be authorized by NWP 54.

14. Linear Transportation Projects. Activities required for crossings of waters of the United States associated with the construction, expansion, modification, or improvement of linear transportation projects (e.g., roads, highways, railways, trails, driveways, airport runways, and taxiways) in waters of the United States. For linear transportation projects in non-tidal waters, the discharge cannot cause the loss of greater than 1/2-acre of waters of the United States. For linear transportation projects in tidal waters, the discharge cannot cause the loss of greater than 1/3-acre of waters of the United States. Any stream channel modification, including bank stabilization, is limited to the minimum necessary to construct or protect the linear transportation project; such modifications must be in the immediate vicinity of the project.

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

This NWP cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) the loss of waters of the United States exceeds 1/10-acre; or (2) there is a discharge in a special aquatic site, including wetlands. (See general condition 32.) (Authorities: Sections 10 and 404)

Note 1: For linear transportation projects crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Linear transportation projects must comply with 33 CFR 330.6(d).

Note 2: Some discharges for the construction of farm roads or forest roads, or temporary roads for moving mining equipment, may qualify for an exemption under section 404(f) of the Clean Water Act (see 33 CFR 323.4).

Note 3: For NWP 14 activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b)(4) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, “District Engineer’s Decision.” The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

15. U.S. Coast Guard Approved Bridges. Discharges of dredged or fill material incidental to the construction of a bridge across navigable waters of the United

States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills, provided the construction of the bridge structure has been authorized by the U.S. Coast Guard under section 9 of the Rivers and Harbors Act of 1899 or other applicable laws. Causeways and approach fills are not included in this NWP and will require a separate section 404 permit. (Authority: Section 404 of the Clean Water Act (Section 404))

16. Return Water From Upland Contained Disposal Areas. Return water from an upland contained dredged material disposal area. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d), even though the disposal itself occurs in an area that has no waters of the United States and does not require a section 404 permit. This NWP satisfies the technical requirement for a section 404 permit for the return water where the quality of the return water is controlled by the state through the Clean Water Act section 401 certification procedures. The dredging activity may require a section 404 permit (33 CFR 323.2(d)), and will require a section 10 permit if located in navigable waters of the United States. (Authority: Section 404)

17. Hydropower Projects. Discharges of dredged or fill material associated with hydropower projects having: (a) Less than 10,000 kW of total generating capacity at existing reservoirs, where the project, including the fill, is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; or (b) a licensing exemption granted by the FERC pursuant to section 408 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and section 30 of the Federal Power Act, as amended.

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

18. Minor Discharges. Minor discharges of dredged or fill material into all waters of the United States, provided the activity meets all of the following criteria:

(a) The quantity of discharged material and the volume of area excavated do not exceed 25 cubic yards below the plane of the ordinary high water mark or the high tide line;

(b) The discharge will not cause the loss of more than 1/10-acre of waters of the United States; and

(c) The discharge is not placed for the purpose of a stream diversion.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) the discharge or the volume of area excavated exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line, or (2) the discharge is in a special aquatic site, including wetlands. (See general condition 32.) (Authorities: Sections 10 and 404)

19. Minor Dredging. Dredging of no more than 50 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States (i.e., section 10 waters). This NWP does not authorize the dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist but may not be present in a given year), anadromous fish spawning areas, or wetlands, or the connection of canals or other artificial waterways to navigable waters of the United States (see 33 CFR 322.5(g)). All dredged material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. (Authorities: Sections 10 and 404)

20. Response Operations for Oil or Hazardous Substances. Activities conducted in response to a discharge or release of oil or hazardous substances that are subject to the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR part 300) including containment, cleanup, and mitigation efforts, provided that the activities are done under either: (1) the Spill Control and Countermeasure Plan required by 40 CFR 112.3; (2) the direction or oversight of the federal on-scene coordinator designated by 40 CFR part 300; or (3) any approved existing state, regional or local contingency plan provided that the Regional Response Team (if one exists in the area) concurs with the proposed response efforts. This NWP also authorizes activities required for the cleanup of oil releases in waters of the United States from electrical equipment that are governed by EPA's polychlorinated biphenyl spill response regulations at 40 CFR part 761. This NWP also authorizes the use of temporary structures and fills in waters of the U.S. for spill response training exercises. (Authorities: Sections 10 and 404)

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

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

(b) The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into tidal waters or non-tidal wetlands adjacent to tidal waters; and

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

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

22. Removal of Vessels. Temporary structures or minor discharges of dredged or fill material required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This NWP does not authorize maintenance dredging, shoal removal, or riverbank snagging.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) the vessel is listed or eligible for listing in the National Register of Historic Places; or (2) the activity is conducted in a special aquatic site, including coral reefs and wetlands. (See general condition 32.) If the vessel is listed or eligible for listing in the National Register of Historic Places, the permittee cannot commence the activity until informed by the district engineer that compliance with the "Historic Properties" general condition is completed. (Authorities: Sections 10 and 404)

Note 1: If a removed vessel is disposed of in waters of the United States, a permit from the U.S. EPA may be required (see 40 CFR 229.3). If a Department of the Army permit is required for vessel disposal in waters of the United States, separate authorization will be required.

Note 2: Compliance with general condition 18, Endangered Species, and general condition 20, Historic Properties, is required for all NWPs. The concern with historic properties is emphasized in the notification requirements for this NWP because of the possibility that shipwrecks may be historic properties.

23. Approved Categorical Exclusions. Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where:

(a) That agency or department has determined, pursuant to the Council on Environmental Quality's implementing regulations for the National Environmental Policy Act (40 CFR part 1500 et seq.), that the activity is categorically excluded from the requirement to prepare an environmental impact statement or environmental assessment analysis, because it is included within a category of

actions which neither individually nor cumulatively have a significant effect on the human environment; and

(b) The Office of the Chief of Engineers (Attn: CECW-CO) has concurred with that agency's or department's determination that the activity is categorically excluded and approved the activity for authorization under NWP 23.

The Office of the Chief of Engineers may require additional conditions, including pre-construction notification, for authorization of an agency's categorical exclusions under this NWP.

Notification: Certain categorical exclusions approved for authorization under this NWP require the permittee to submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 32). The activities that require pre-construction notification are listed in the appropriate Regulatory Guidance Letter(s). (Authorities: Sections 10 and 404)

Note: The agency or department may submit an application for an activity believed to be categorically excluded to the Office of the Chief of Engineers (Attn: CECW-CO). Prior to approval for authorization under this NWP of any agency's activity, the Office of the Chief of Engineers will solicit public comment. As of the date of issuance of this NWP, agencies with approved categorical exclusions are: the Bureau of Reclamation, Federal Highway Administration, and U.S. Coast Guard. Activities approved for authorization under this NWP as of the date of this notice are found in Corps Regulatory Guidance Letter 05-07. Any future approved categorical exclusions will be announced in Regulatory Guidance Letters and posted on this same web site.

24. Indian Tribe or State Administered Section 404 Programs. Any activity permitted by a state or Indian Tribe administering its own section 404 permit program pursuant to 33 U.S.C. 1344(g)-(l) is permitted pursuant to section 10 of the Rivers and Harbors Act of 1899. (Authority: Section 10)

Note 1: As of the date of the promulgation of this NWP, only New Jersey and Michigan administer their own section 404 permit programs.

Note 2: Those activities that do not involve an Indian Tribe or State section 404 permit are not included in this NWP, but certain structures will be exempted by Section 154 of Pub. L. 94-587, 90 Stat. 2917 (33 U.S.C. 591) (see 33 CFR 322.4(b)).

25. Structural Discharges. Discharges of material such as concrete, sand, rock, etc., into tightly sealed forms or cells where the material will be used as a structural member for standard pile supported structures, such as bridges,

transmission line footings, and walkways, or for general navigation, such as mooring cells, including the excavation of bottom material from within the form prior to the discharge of concrete, sand, rock, etc. This NWP does not authorize filled structural members that would support buildings, building pads, homes, house pads, parking areas, storage areas and other such structures. The structure itself may require a separate section 10 permit if located in navigable waters of the United States. (Authority: Section 404)

26. [Reserved]

27. Aquatic Habitat Restoration, Enhancement, and Establishment Activities. Activities in waters of the United States associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas, the restoration and enhancement of non-tidal streams and other non-tidal open waters, and the rehabilitation or enhancement of tidal streams, tidal wetlands, and tidal open waters, provided those activities result in net increases in aquatic resource functions and services.

To be authorized by this NWP, the aquatic habitat restoration, enhancement, or establishment activity must be planned, designed, and implemented so that it results in aquatic habitat that resembles an ecological reference. An ecological reference may be based on the characteristics of one or more intact aquatic habitats or riparian areas of the same type that exist in the region. An ecological reference may be based on a conceptual model developed from regional ecological knowledge of the target aquatic habitat type or riparian area.

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to: the removal of accumulated sediments; releasing sediment from reservoirs to restore downstream habitat, the installation, removal, and maintenance of small water control structures, dikes, and berms, as well as discharges of dredged or fill material to restore appropriate stream channel configurations after small water control structures, dikes, and berms are removed; the installation of current deflectors; the enhancement, rehabilitation, or re-establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to enhance, rehabilitate, or re-establish stream meanders; the removal of stream barriers, such as undersized culverts, fords, and grade control structures; the backfilling of artificial channels; the removal of existing drainage structures, such as drain tiles, and the filling, blocking, or reshaping of drainage ditches to restore wetland hydrology; the installation of structures or fills necessary to restore or enhance wetland or stream hydrology; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; coral restoration or relocation; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing

for seed bed preparation and the planting of appropriate wetland species; re-establishment of submerged aquatic vegetation in areas where those plant communities previously existed; re-establishment of tidal wetlands in tidal waters where those wetlands previously existed; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.

This NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands and streams, on the project site provided there are net increases in aquatic resource functions and services.

Except for the relocation of non-tidal waters on the project site, this NWP does not authorize the conversion of a stream or natural wetlands to another aquatic habitat type (e.g., the conversion of a stream to wetland or vice versa) or uplands. Changes in wetland plant communities that occur when wetland hydrology is more fully restored during wetland rehabilitation activities are not considered a conversion to another aquatic habitat type. This NWP does not authorize stream channelization. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

Compensatory mitigation is not required for activities authorized by this NWP since these activities must result in net increases in aquatic resource functions and services.

Reversion. For enhancement, restoration, and establishment activities conducted: (1) In accordance with the terms and conditions of a binding stream or wetland enhancement or restoration agreement, or a wetland establishment agreement, between the landowner and the U.S. Fish and Wildlife Service (FWS), the Natural Resources Conservation Service (NRCS), the Farm Service Agency (FSA), the National Marine Fisheries Service (NMFS), the National Ocean Service (NOS), U.S. Forest Service (USFS), or their designated state cooperating agencies; (2) as voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or (3) on reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) or the applicable state agency, this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (i.e., prior to the restoration, enhancement, or establishment activities). The reversion must occur within five years after expiration of a limited term wetland restoration or establishment agreement or permit, and is authorized in these circumstances

even if the discharge occurs after this NWP expires. The five-year reversion limit does not apply to agreements without time limits reached between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS, or an appropriate state cooperating agency. This NWP also authorizes discharges of dredged or fill material in waters of the United States for the reversion of wetlands that were restored, enhanced, or established on prior-converted cropland or on uplands, in accordance with a binding agreement between the landowner and NRCS, FSA, FWS, or their designated state cooperating agencies (even though the restoration, enhancement, or establishment activity did not require a section 404 permit). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit. Before conducting any reversion activity the permittee or the appropriate Federal or state agency must notify the district engineer and include the documentation of the prior condition. Once an area has reverted to its prior physical condition, it will be subject to whatever the Corps Regulatory requirements are applicable to that type of land at the time. The requirement that the activity results in a net increase in aquatic resource functions and services does not apply to reversion activities meeting the above conditions. Except for the activities described above, this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion.

Reporting. For those activities that do not require pre-construction notification, the permittee must submit to the district engineer a copy of: (1) the binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement, or a project description, including project plans and location map; (2) the NRCS or USDA Technical Service Provider documentation for the voluntary stream enhancement or restoration action or wetland restoration, enhancement, or establishment action; or (3) the SMCRA permit issued by OSMRE or the applicable state agency. The report must also include information on baseline ecological conditions on the project site, such as a delineation of wetlands, streams, and/or other aquatic habitats. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing any activity (see general condition 32), except for the following activities:

(1) Activities conducted on non-Federal public lands and private lands, in accordance with the terms and conditions of a binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment

agreement between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS or their designated state cooperating agencies;

(2) Activities conducted in accordance with the terms and conditions of a binding coral restoration or relocation agreement between the project proponent and the NMFS or any of its designated state cooperating agencies;

(3) Voluntary stream or wetland restoration or enhancement action, or wetland establishment action, documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or

(4) The reclamation of surface coal mine lands, in accordance with an SMCRA permit issued by the OSMRE or the applicable state agency.

However, the permittee must submit a copy of the appropriate documentation to the district engineer to fulfill the reporting requirement. (Authorities: Sections 10 and 404)

Note: This NWP can be used to authorize compensatory mitigation projects, including mitigation banks and in-lieu fee projects. However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition, since compensatory mitigation is generally intended to be permanent.

28. Modifications of Existing Marinas. Reconfiguration of existing docking facilities within an authorized marina area. No dredging, additional slips, dock spaces, or expansion of any kind within waters of the United States is authorized by this NWP. (Authority: Section 10)

29. Residential Developments. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development).

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Subdivisions: For residential subdivisions, the aggregate total loss of waters of United States authorized by this NWP cannot exceed 1/2-acre. This includes any loss of waters of the United States associated with development of individual subdivision lots.

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

30. Moist Soil Management for Wildlife. Discharges of dredged or fill material into non-tidal waters of the United States and maintenance activities that are associated with moist soil management for wildlife for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage habitat and feeding areas for wildlife. Such activities include, but are not limited to, plowing or discing to impede succession, preparing seed beds, or establishing fire breaks. Sufficient riparian areas must be maintained adjacent to all open water bodies, including streams, to preclude water quality degradation due to erosion and sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, or similar features associated with the management areas. The activity must not result in a net loss of aquatic resource functions and services. This NWP does not authorize the conversion of wetlands to uplands, impoundments, or other open water bodies. (Authority: Section 404)

Note: The repair, maintenance, or replacement of existing water control structures or the repair or maintenance of dikes may be authorized by NWP 3. Some such activities may qualify for an exemption under section 404(f) of the Clean Water Act (see 33 CFR 323.4).

31. Maintenance of Existing Flood Control Facilities. Discharges of dredged or fill material resulting from activities associated with the maintenance of existing flood control facilities, including debris basins, retention/detention basins, levees, and channels that: (i) were previously authorized by the Corps by individual permit, general permit, or 33 CFR 330.3, or did not require a permit at the time they were constructed, or (ii) were constructed by the Corps and transferred to a non-Federal sponsor for operation and maintenance. Activities authorized by this NWP are limited to those resulting from maintenance activities that are conducted within the “maintenance baseline,” as described in the definition below. Discharges of dredged or fill materials associated with maintenance activities in flood control facilities in any watercourse that have previously been determined to be within the maintenance baseline are authorized under this NWP. To the extent that a Corps permit is required, this NWP authorizes the removal of vegetation from levees associated with the flood control project. This NWP does not authorize the removal of sediment and associated vegetation from

natural water courses except when these activities have been included in the maintenance baseline. All dredged and excavated material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. Proper sediment controls must be used.

Maintenance Baseline: The maintenance baseline is a description of the physical characteristics (e.g., depth, width, length, location, configuration, or design flood capacity, etc.) of a flood control project within which maintenance activities are normally authorized by NWP 31, subject to any case-specific conditions required by the district engineer. The district engineer will approve the maintenance baseline based on the approved or constructed capacity of the flood control facility, whichever is smaller, including any areas where there are no constructed channels but which are part of the facility. The prospective permittee will provide documentation of the physical characteristics of the flood control facility (which will normally consist of as-built or approved drawings) and documentation of the approved and constructed design capacities of the flood control facility. If no evidence of the constructed capacity exists, the approved capacity will be used. The documentation will also include best management practices to ensure that the adverse environmental impacts caused by the maintenance activities are no more than minimal, especially in maintenance areas where there are no constructed channels. (The Corps may request maintenance records in areas where there has not been recent maintenance.) Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5. Except in emergencies as described below, this NWP cannot be used until the district engineer approves the maintenance baseline and determines the need for mitigation and any regional or activity-specific conditions. Once determined, the maintenance baseline will remain valid for any subsequent reissuance of this NWP. This NWP does not authorize maintenance of a flood control facility that has been abandoned. A flood control facility will be considered abandoned if it has operated at a significantly reduced capacity without needed maintenance being accomplished in a timely manner. A flood control facility will not be considered abandoned if the prospective permittee is in the process of obtaining other authorizations or approvals required for maintenance activities and is experiencing delays in obtaining those authorizations or approvals.

Mitigation: The district engineer will determine any required mitigation one-time only for impacts associated with maintenance work at the same time that the maintenance baseline is approved. Such one-time mitigation will be required when necessary to ensure that adverse environmental effects are no more than minimal, both individually and cumulatively. Such mitigation will only be required once for any specific reach of a flood control project. However, if one-time mitigation is required for impacts associated with maintenance activities, the

district engineer will not delay needed maintenance, provided the district engineer and the permittee establish a schedule for identification, approval, development, construction and completion of any such required mitigation. Once the one-time mitigation described above has been completed, or a determination made that mitigation is not required, no further mitigation will be required for maintenance activities within the maintenance baseline (see Note, below). In determining appropriate mitigation, the district engineer will give special consideration to natural water courses that have been included in the maintenance baseline and require mitigation and/or best management practices as appropriate.

Emergency Situations: In emergency situations, this NWP may be used to authorize maintenance activities in flood control facilities for which no maintenance baseline has been approved. Emergency situations are those which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if action is not taken before a maintenance baseline can be approved. In such situations, the determination of mitigation requirements, if any, may be deferred until the emergency has been resolved. Once the emergency has ended, a maintenance baseline must be established expeditiously, and mitigation, including mitigation for maintenance conducted during the emergency, must be required as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer before any maintenance work is conducted (see general condition 32). The pre-construction notification may be for activity-specific maintenance or for maintenance of the entire flood control facility by submitting a five-year (or less) maintenance plan. The pre-construction notification must include a description of the maintenance baseline and the disposal site for dredged or excavated material. (Authorities: Sections 10 and 404)

Note: If the maintenance baseline was approved by the district engineer under a prior version of NWP 31, and the district engineer imposed the one-time compensatory mitigation requirement on maintenance for a specific reach of a flood control project authorized by that prior version of NWP 31, during the period this version of NWP 31 is in effect (*insert applicable dates based on final NWPs*) the district engineer will not require additional compensatory mitigation for maintenance activities authorized by this NWP in that specific reach of the flood control project.

32. Completed Enforcement Actions. Any structure, work, or discharge of dredged or fill material remaining in place or undertaken for mitigation, restoration, or environmental benefit in compliance with either:

(i) The terms of a final written Corps non-judicial settlement agreement resolving a violation of Section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899; or the terms of an EPA 309(a) order on consent resolving a violation of section 404 of the Clean Water Act, provided that:

(a) The activities authorized by this NWP cannot adversely affect more than 5 acres of non-tidal waters or 1 acre of tidal waters;

(b) The settlement agreement provides for environmental benefits, to an equal or greater degree, than the environmental detriments caused by the unauthorized activity that is authorized by this NWP; and

(c) The district engineer issues a verification letter authorizing the activity subject to the terms and conditions of this NWP and the settlement agreement, including a specified completion date; or

(ii) The terms of a final Federal court decision, consent decree, or settlement agreement resulting from an enforcement action brought by the United States under section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or

(iii) The terms of a final court decision, consent decree, settlement agreement, or non-judicial settlement agreement resulting from a natural resource damage claim brought by a trustee or trustees for natural resources (as defined by the National Contingency Plan at 40 CFR subpart G) under Section 311 of the Clean Water Act, Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, Section 312 of the National Marine Sanctuaries Act, section 1002 of the Oil Pollution Act of 1990, or the Park System Resource Protection Act at 16 U.S.C. 19jj, to the extent that a Corps permit is required.

Compliance is a condition of the NWP itself; non-compliance of the terms and conditions of an NWP 32 authorization may result in an additional enforcement action (e.g., a Class I civil administrative penalty). Any authorization under this NWP is automatically revoked if the permittee does not comply with the terms of this NWP or the terms of the court decision, consent decree, or judicial/non-judicial settlement agreement. This NWP does not apply to any activities occurring after the date of the decision, decree, or agreement that are not for the purpose of mitigation, restoration, or environmental benefit. Before reaching any settlement agreement, the Corps will ensure compliance with the provisions of 33 CFR part 326 and 33 CFR 330.6(d)(2) and (e). (Authorities: Sections 10 and 404)

33. Temporary Construction, Access, and Dewatering. Temporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated

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

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

34. Cranberry Production Activities. Discharges of dredged or fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations. The cumulative total acreage of disturbance per cranberry production operation, including but not limited to, filling, flooding, ditching, or clearing, must not exceed 10 acres of waters of the United States, including wetlands. The activity must not result in a net loss of wetland acreage. This NWP does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes of this NWP, the cumulative total of 10 acres will be measured over the period that this NWP is valid.

Notification: The permittee must submit a pre-construction notification to the district engineer once during the period that this NWP is valid, and the NWP will then authorize discharges of dredge or fill material at an existing operation for the permit term, provided the 10-acre limit is not exceeded. (See general condition 32.) (Authority: Section 404)

35. Maintenance Dredging of Existing Basins. The removal of accumulated sediment for maintenance of existing marina basins, access channels to marinas or boat slips, and boat slips to previously authorized depths or controlling depths for ingress/egress, whichever is less. All dredged material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. Proper sediment controls must be used for the disposal site. (Authority: Section 10)

36. Boat Ramps. Activities required for the construction of boat ramps, provided the activity meets all of the following criteria:

(a) The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or in the form of pre-cast concrete planks or slabs, unless the district engineer waives the 50 cubic yard limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(b) The boat ramp does not exceed 20 feet in width, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects;

(c) The base material is crushed stone, gravel or other suitable material;

(d) The excavation is limited to the area necessary for site preparation and all excavated material is removed to an area that has no waters of the United States; and,

(e) No material is placed in special aquatic sites, including wetlands.

The use of unsuitable material that is structurally unstable is not authorized. If dredging in navigable waters of the United States is necessary to provide access to the boat ramp, the dredging must be authorized by another NWP, a regional general permit, or an individual permit.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge into waters of the United States exceeds 50 cubic yards, or (2) the boat ramp exceeds 20 feet in width. (See general condition 32.) (Authorities: Sections 10 and 404)

37. Emergency Watershed Protection and Rehabilitation. Work done by or funded by:

(a) The Natural Resources Conservation Service for a situation requiring immediate action under its emergency Watershed Protection Program (7 CFR part 624);

(b) The U.S. Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 2509.13);

(c) The Department of the Interior for wildland fire management burned area emergency stabilization and rehabilitation (DOI Manual part 620, Ch. 3);

(d) The Office of Surface Mining, or states with approved programs, for abandoned mine land reclamation activities under Title IV of the Surface Mining Control and Reclamation Act (30 CFR subchapter R), where the activity does not involve coal extraction; or

(e) The Farm Service Agency under its Emergency Conservation Program (7 CFR part 701).

In general, the permittee should wait until the district engineer issues an NWP verification or 45 calendar days have passed before proceeding with the watershed protection and rehabilitation activity. However, in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the emergency watershed protection and rehabilitation activity may proceed immediately and the district engineer will consider the information in the pre-construction notification and any comments received as a result of agency coordination to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

Notification: Except in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 32). (Authorities: Sections 10 and 404)

38. Cleanup of Hazardous and Toxic Waste. Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority. Court ordered remedial action plans or related settlements are also authorized by this NWP. This NWP does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste.

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

Note: Activities undertaken entirely on a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act.

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

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

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

Note: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided 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 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 into non-tidal wetlands adjacent to tidal waters.

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

Note: Some discharges for agricultural activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4). This NWP authorizes the construction of farm ponds that do not qualify for the Clean Water Act section 404(f)(1)(C) exemption because of the recapture provision at section 404(f)(2).

41. Reshaping Existing Drainage and Irrigation Ditches. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of currently serviceable drainage and irrigation ditches constructed in waters of the United States, for the purpose of improving water quality by regrading the drainage or irrigation ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, and increase uptake of nutrients and other substances by vegetation. The reshaping of the drainage ditch cannot increase drainage capacity beyond the original as-built capacity nor can it expand the area drained by the drainage ditch as originally constructed (i.e., the capacity of the drainage ditch must be the same as originally constructed and it cannot drain additional wetlands or other waters of the United States). Compensatory mitigation is not required because the work is designed to improve water quality.

This NWP does not authorize the relocation of drainage or irrigation ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage or irrigation ditch must be approximately the same as the location of the centerline of the original drainage or irrigation ditch. This NWP does not authorize stream channelization or stream relocation projects. (Authority: Section 404)

42. Recreational Facilities. Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of recreational facilities. Examples of recreational facilities that may be authorized by this NWP include playing fields (e.g., football fields, baseball fields), basketball courts, tennis courts, hiking trails, bike paths, golf courses, ski areas, horse paths, nature centers, and campgrounds (excluding recreational vehicle parks). This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables that are directly related to the recreational activity, but it does not authorize the construction of hotels, restaurants, racetracks, stadiums, arenas, or similar facilities.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

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 Daily Maximum Loads set under the Clean Water Act.

This NWP authorizes, to the extent that a section 404 permit is required, discharges of dredged or fill material into non-tidal waters of the United States for the maintenance of stormwater management facilities, low impact development integrated management features, and pollutant reduction green infrastructure features. The maintenance of stormwater management facilities, low impact development integrated management features, and pollutant reduction green infrastructure features that are not waters of the United States does not require a section 404 permit.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges 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 into non-tidal waters of the United States for the construction of new stormwater management facilities or pollutant reduction green infrastructure features, or the expansion of existing stormwater management facilities or pollutant reduction green infrastructure features, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) Maintenance activities do not require pre-construction notification if they are limited to restoring the original design capacities of the stormwater management facility or pollutant reduction green infrastructure feature. (Authority: Section 404)

44. Mining Activities. Discharges of dredged or fill material into non-tidal waters of the United States for mining activities, except for coal mining activities, provided the activity meets all of the following criteria:

(a) For mining activities involving discharges of dredged or fill material into non-tidal wetlands, the discharge must not cause the loss of greater than 1/2-acre of non-tidal wetlands;

(b) For mining activities involving discharges of dredged or fill material in non-tidal open waters (e.g., rivers, streams, lakes, and ponds) 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 into non-tidal wetlands adjacent to tidal waters.

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

45. Repair of Uplands Damaged by Discrete Events. This NWP authorizes discharges of dredged or fill material, including dredging or excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by storms, floods, or other discrete events. This NWP authorizes bank stabilization to protect the restored uplands. The restoration of the

damaged areas, including any bank stabilization, must not exceed the contours, or ordinary high water mark, that existed before the damage occurred. The district engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this NWP. The work must commence, or be under contract to commence, within two years of the date of damage, unless this condition is waived in writing by the district engineer. This NWP cannot be used to reclaim lands lost to normal erosion processes over an extended period.

This NWP does not authorize beach restoration or nourishment.

Minor dredging is limited to the amount necessary to restore the damaged upland area and should not significantly alter the pre-existing bottom contours of the waterbody.

Notification: The permittee must submit a pre-construction notification to the district engineer (see general condition 32) within 12 months of the date of the damage; for major storms, floods, or other discrete events, the district engineer may waive the 12-month limit for submitting a pre-construction notification if the permittee can demonstrate funding, contract, or other similar delays. The pre-construction notification must include documentation, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. (Authorities: Sections 10 and 404)

Note: The uplands themselves that are lost as a result of a storm, flood, or other discrete event can be replaced without a section 404 permit, if the uplands are restored to the ordinary high water mark (in non-tidal waters) or high tide line (in tidal waters). (See also 33 CFR 328.5.) This NWP authorizes discharges of dredged or fill material into waters of the United States associated with the restoration of uplands.

46. Discharges in Ditches. Discharges of dredged or fill material into non-tidal ditches that are: (1) constructed in uplands, (2) receive water from an area determined to be a water of the United States prior to the construction of the ditch, (3) divert water to an area determined to be a water of the United States prior to the construction of the ditch, and (4) determined to be waters of the United States. The discharge must not cause the loss of greater than one acre of waters of the United States.

This NWP does not authorize discharges of dredged or fill material into ditches constructed in streams or other waters of the United States, or in streams that have been relocated in uplands. This NWP does not authorize discharges of dredged or fill material that increase the capacity of the ditch and drain those

areas determined to be waters of the United States prior to construction of the ditch.

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

47. [Reserved]

48. Commercial Shellfish Mariculture Activities. Discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States necessary for new and continuing commercial shellfish mariculture operations in authorized project areas. For the purposes of this NWP, the project area is the area in which the operator is authorized to conduct commercial shellfish 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.

(Authorities: Sections 10 and 404)

Note 1: The permittee should notify the applicable U.S. Coast Guard office regarding the project.

Note 2: To prevent introduction of aquatic nuisance species, no material that has been taken from a different waterbody may be reused in the current project area, unless it has been treated in accordance with the applicable regional aquatic nuisance species management plan.

Note 3: The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 defines "aquatic nuisance species" as "a nonindigenous species that threatens the diversity or abundance of native species or the ecological stability of infested waters, or commercial, agricultural, aquacultural, or recreational activities dependent on such waters."

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

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

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

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

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. 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 into non-tidal wetlands adjacent to tidal waters.

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

Note 1: Utility lines constructed to transfer the energy from the land-based renewable energy generation facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate single and complete linear project. Those utility lines may be authorized by NWP C or another Department of the Army authorization.

Note 2: If the only activities associated with the construction, expansion, or modification of a land-based renewable energy generation facility that require Department of the Army authorization are discharges of dredged or fill material into waters of the United States to construct, maintain, repair, and/or remove utility lines and/or road crossings, then NWP C and/or NWP 14 shall be used if those activities meet the terms and conditions of NWPs C 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: Utility lines constructed to transfer the energy from the land-based collection facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate single and complete linear project. Those utility lines may be authorized by NWP 12 or another Department of the Army authorization.

Note 2: An activity that is located on an existing locally or federally maintained U.S. Army Corps of Engineers project requires separate 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.

53. Removal of Low-Head Dams. Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States associated with the removal of low-head dams.

For the purposes of this NWP, the term "low-head dam" is defined as a dam built across a stream to pass flows from upstream over all, or nearly all, of the width of the dam crest on a continual and uncontrolled basis. (During a drought, there might not be water flowing over the dam crest.) In general, a low-head dam does not have a separate spillway or spillway gates but it may have an uncontrolled spillway. The dam crest is the top of the dam from left abutment to right abutment, and if present, an uncontrolled spillway. A low-head dam provides little storage function.

The removed low-head dam structure must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization.

Because the removal of the low-head dam will result in a net increase in ecological functions and services provided by the stream, as a general rule compensatory mitigation is not required for activities authorized by this NWP. However, the district engineer may determine for a particular low-head dam removal activity that compensatory mitigation is necessary to ensure that the authorized activity results in no more than minimal adverse environmental effects.

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

Note: This NWP does not authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters to restore the stream in the vicinity of the low-head dam, including the former impoundment area. Nationwide permit 27 or other Department of the Army permits may authorize such activities. This NWP does not authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters to stabilize stream banks. Bank stabilization activities may be authorized by NWP 13 or other Department of the Army permits.

54. Living Shorelines. Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction and maintenance of living shorelines to stabilize banks and shores in coastal waters, which includes the Great Lakes, along shores with small fetch and gentle slopes that are subject to low- to mid-energy waves. A living shoreline has a footprint that is made up mostly of native material. It incorporates vegetation or other living, natural "soft" elements alone or in combination with some type of harder shoreline structure (e.g., oyster or mussel reefs or rock sills) for added protection and stability. Living shorelines should maintain the natural continuity of the land-water interface, and retain or enhance

shoreline ecological processes. Living shorelines must have a substantial biological component, either tidal or lacustrine fringe wetlands or oyster or mussel reef structures. The following conditions must be met:

(a) The structures and fill area, including sand fills, sills, breakwaters, or reefs, cannot extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes, unless the district engineer waives this criterion by making a written determination concluding that the activity will result in no more than minimal adverse environmental effects;

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the activity will result in no more than minimal adverse environmental effects;

(c) Coir logs, coir mats, stone, native oyster shell, native wood debris, and other structural materials must be adequately anchored, of sufficient weight, or installed in a manner that prevents relocation in most wave action or water flow conditions, except for extremely severe storms;

(d) For living shorelines consisting of tidal or lacustrine fringe wetlands, native plants appropriate for current site conditions, including salinity, must be used if the site is planted by the permittee;

(e) Discharges of dredged or fill material into waters of the United States, and oyster or mussel reef structures in navigable waters, must be the minimum necessary for the establishment and maintenance of the living shoreline;

(f) If sills, breakwaters, or other structures must be constructed to protect fringe wetlands for the living shoreline, those structures must be the minimum size necessary to protect those fringe wetlands;

(g) The activity must be designed, constructed, and maintained so that it has no more than minimal adverse effects on water movement between the waterbody and the shore and the movement of aquatic organisms between the waterbody and the shore; and

(h) The living shoreline must be properly maintained, which may require periodic repair of sills, breakwaters, or reefs, or replacing sand fills after severe storms or erosion events. Vegetation may be replanted to maintain the living shoreline. This NWP authorizes those maintenance and repair activities, including any minor deviations necessary to address changing environmental conditions.

This NWP does not authorize beach nourishment or land reclamation activities.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the construction of the living shoreline. (See general condition 32.) The pre-construction notification must include a delineation of special aquatic sites (see paragraph (b)(4) of general condition 32). Pre-construction notification is not required for maintenance and repair activities for living shorelines unless required by applicable NWP general conditions or regional conditions. (Authorities: Sections 10 and 404)

Note: In waters outside of coastal waters, nature-based bank stabilization techniques, such as bioengineering and vegetative stabilization, may be authorized by NWP 13.

A. Seaweed Mariculture Activities. Structures or work in marine waters, including structures anchored to the seabed in waters overlying the outer continental shelf, for seaweed mariculture activities. This NWP also authorizes shellfish mariculture if shellfish production is a component of an integrated multi-trophic mariculture system (e.g., the production of seaweed and 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.

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

(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.”

B. Finfish Mariculture Activities. Structures or work 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 shellfish mariculture and/or seaweed mariculture if the shellfish and/or seaweed production are a component of an integrated multi-trophic mariculture system (e.g., the production of seaweed or shellfish 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.

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

(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.”

C. 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, 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 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 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, 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 8: 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).

D. 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, and electricity. Oil or natural gas pipeline activities or electric utility line and telecommunications activities may be authorized by NWPs 12 or C, 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 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 into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (e.g., at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

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

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

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize

flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (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 section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit (see NWP 15).

Note 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).

E. Water reclamation and reuse facilities. Discharges of dredged or fill material into non-tidal waters of the United States for the construction, expansion, and maintenance of water reclamation and reuse facilities, including vegetated areas enhanced to improve water infiltration and constructed wetlands to improve water quality.

The discharge must not cause the loss of greater than 1/2-acre of waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

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

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (Authority: Sections 10 and 404)

C. Nationwide Permit General Conditions

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as applicable, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine

the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP. Every person who may wish to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR 330.1 through 330.6 apply to every NWP authorization. Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

1. Navigation. (a) No activity may cause more than a minimal adverse effect on navigation.

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

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his 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 and 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 the critical habitat of such species. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless ESA section 7 consultation addressing the 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 designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that might be affected by the proposed activity or that utilize the designated critical habitat that might be affected by the proposed activity. The district engineer will determine whether the proposed activity "may affect" or will have "no effect" to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. For activities where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the activity, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification that the proposed activity will have "no effect" on listed species or critical habitat, or until ESA section 7 consultation has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

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

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

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

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

19. Migratory Birds and Bald and Golden Eagles. The permittee is responsible for ensuring that an action authorized by 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) In cases where the district engineer determines that the activity may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of section 106 of the National Historic Preservation Act (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 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, and 52 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and 54, notification is required in accordance with general condition 32, for any activity proposed 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 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. 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 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. 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)).

(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 dam safety criteria or have been designed by qualified persons. The district engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

25. Water Quality. Where 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 agency 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 NWP. 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 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 residential subdivision is constructed under NWP 29, 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 residential subdivision under NWP 29 cannot exceed 1/2-acre, and the total acreage loss of waters of United States due to the NWP 29 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 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 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, intermittent, and ephemeral streams, on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters on the project site, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many wetlands, other special aquatic sites, and other waters. Furthermore, the 45 day period will not start until the delineation has been submitted to or completed by the Corps, as appropriate;

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

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

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

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

(10) For an 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 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 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 streams, 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 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 stream remains a water of the United States.

Structure: An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

Tidal wetland: A tidal wetland is a jurisdictional wetland that is inundated by tidal waters. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line.

Tribal lands: Any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

Tribal rights: Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: For purposes of the NWPs, a waterbody is a jurisdictional water of the United States. If a wetland is adjacent to a waterbody determined to be a water of the United States, that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of “waterbodies” include streams, rivers, lakes, ponds, and wetlands.