

**DEPARTMENT OF DEFENSE**

**Corps of Engineers, Department of the Army**

**33 CFR Part 330**

**Final Rule for Nationwide Permit Program Regulations and Issue, Reissue, and Modify Nationwide Permits**

**AGENCY:** U.S. Army Corps of Engineers, DOD.

**ACTION:** Final rule.

**SUMMARY:** The Corps of Engineers is hereby amending its nationwide permit program regulations at 33 CFR part 330. The amendments will simplify and clarify the nationwide permit program and reduce the effort expended in regulating activities with minimal impacts.

The Corps is also reissuing the existing nationwide permits, some with modifications, issuing 10 new nationwide permits, and adding new conditions to all of the nationwide permits.

**EFFECTIVE DATE:** January 21, 1992.

**ADDRESSES:** Information can be obtained by writing to: The Chief of Engineers, U.S. Army Corps of Engineers, ATTN: CECW-OR, Washington, DC 20314-1000.

**FOR FURTHER INFORMATION CONTACT:** Mr. Sam Collinson or Mr. John Studt at (202) 272-1782.

**SUPPLEMENTARY INFORMATION:** On April 10, 1991, the Corps published its proposed revision to the Nationwide Permit Program regulations and its proposal to issue, reissue, and modify the nationwide permits (50 FR 14598). The changes were proposed with the intent to simplify and clarify the nationwide permit program and to reduce the effort expended in regulating activities with minimal impacts. In addition, we proposed to reissue the existing 26 nationwide permits, some with modifications, to issue 13 new nationwide permits, to add new conditions to all of the nationwide permits. A public hearing on the proposed rule and nationwide permits was held on May 10, 1991, in Washington, DC. We received over 700 comments in response to the proposed regulations and there were 17 speakers at the public hearing. In response to these comments, we made a number of revisions to the nationwide permit program regulations and to the nationwide permits.

The Corps is restructuring the Regulations governing the nationwide permit (NWP) program. In addition, the Corps is adopting changes that will allow the district engineer (DE) to assert a discretionary authority to modify, suspend, or revoke NWP's for individual activities; broaden the basis for asserting discretionary authority to include all public interest factors; provide that the DE require an individual permit whenever he determines that an activity would have more than minimal adverse environmental effects, either individually or cumulatively, or would be contrary to the public interest; and, modify the predischarge notification (PDN) process required by some NWP's.

The Corps is also reissuing the existing NWP's; issuing 10 new NWP's; modifying some of the existing NWP's; converting the best management practices (BMP's) to

permit conditions to increase their enforceability; and, clarifying recurring questions about the applicability of some of the NWP's to certain situations.

Upon the expiration of the NWP's in five years from their effective date, we will remove appendix A from the CFR and issue the NWP's separately from the regulations governing their use. In this way, issuance of the NWP's will follow procedures similar to those for individual permits and regional general permits. Until the NWP's in appendix A are removed from the CFR, the proposed issuance, reissuance, modification, and revocation of NWP's would be published in the Federal Register concurrent with regional public notices issued by district engineers, to solicit comments and to provide the opportunity to request a public hearing. All comments would be included in the administrative record, and substantive comments addressed in a decision document for each NWP. The final decisions on the NWP's will be announced by publication in the **Federal Register** concurrent with regional public notices issued by district engineers.

All the changes taken together should result in an overall increase in protection of the aquatic environment and an overall decrease in workload. Any workload savings will be devoted to more efficient individual permit evaluation and increased enforcement and compliance activities.

## **Discussion of Public Comments and Changes**

### *General Comments.*

#### Part 330-Nationwide Permit Program

Section 330.1(a)(b)(c): Most commenters agree that the nationwide permits are a valuable tool in the regulatory program. The vast majority of comments were directed toward the procedures developed for implementing this program. Our responses to the comments we received are listed in the appropriate sections of this preamble. Comments and responses to specific procedures and terms and conditions are addressed in the following sections of this preamble.

Section 330.1(d): We received a considerable number of comments on this portion of the proposed regulation. Many commenters supported our proposal to allow the Division and District Engineers to modify, suspend or revoke nationwide permits on a regional basis, or on a case-by-case basis for specific activities where the adverse environmental effects may be more than minimal or otherwise warranted by other factors of the public interest. A few commenters thought this would lead to a further expansion of the nationwide permit program. This was never our intent. In response to this concern we have made it clear in the regulation that the Division and District Engineers can not expand a nationwide permit but rather this provision can only be used to restrict or further limit a nationwide permit.

Many commenters thought that the provision to allow the District Engineer to consider all factors in the public interest as well as concerns for the aquatic environment would overly restrict the utility of the nationwide permits. Many of these same commenters recommended that we include an appeal procedure to the Division Engineer or Chief of Engineers in those cases where a District or Division Engineer has asserted discretionary authority, or that we should establish standards or a clear definition of the term "public interest factors." We believe that neither of these are necessary since the public interest factors are discussed at length in the Corps' regulations at 33 CFR parts 320 and 325. We have full confidence in each District Engineer's ability to apply the public interest factors fairly, since these factors are routinely considered in all individual permit applications. Further, in those cases where a District or Division Engineer has asserted discretionary authority, the proposed activity would still have an opportunity to receive approval through the individual permit process. However, we have revised the language of I 330.1(d) to clarify that the authority of Division and District Engineers is limited to restricting or

limiting the use of nationwide permits where there is concern for the environment or other factors of the public interest. Discretionary authority is also discussed at 33 CFR 330.4(e) and 330.5.

Section 330.1(e): Many commenters supported eliminating the natural resource agencies from the PDN review process while many others strongly objected to exclusion of state and federal agency review. Some felt that the "resource agencies" have professionals who are knowledgeable about local resources and that eliminating agency comments could adversely impact wetlands, wildlife and other aquatic resources. Other commenters indicated that the Corps is the most knowledgeable office concerning impacts from NWP's and is well equipped to conduct PDN reviews on its own. A few commenters had other suggestions regarding alternative notification procedures.

We continue to believe that the existing predischARGE notification process (PDN) must be modified because it has become extremely burdensome and that the natural resource agencies are generally not providing substantive, site-specific comments. Agency comments frequently merely cite regulations or policies governing alternatives analysis and/or mitigation policy. Furthermore, we believe that the interdisciplinary Corps regulatory staff is extremely knowledgeable of resource values and fully capable of evaluating impacts resulting from NWP activities. Over 70% (700) of the Corps regulatory personnel, nationwide, are natural resource scientists, many with advanced degrees. However, to assure that potential environmental impacts are not overlooked, the Corps is instituting at the "Notification" general condition (number 13) a mandatory process requiring notification of the natural resource agencies and solicitation of their comments. DE's are required upon receipt of a PDN to provide immediately (e.g. fax, overnight mail or other expeditious manner) a copy to the appropriate offices of the Fish and Wildlife Service, State natural resource or water quality agency, EPA, and (if appropriate) National Marine Fisheries Service. With the exception of NWP 37, these agencies will then have 5 calendar days from the date the material is transmitted to telephone the DE if they intend to provide substantive, site-specific comments. If so contacted by an agency, the DE will wait an additional 10 calendar days before making a decision on the PDN. The DE will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency. Applicants are encouraged to provide the Corps multiple copies of PDN's to expedite agency notification.

Some commenters indicated that the number of PDN's is expanding and that this fact makes the NWP program more complex, confusing, and time-consuming. Other commenters stated that the PDN process will add to the burden already experienced by Corps staff. Another commenter felt that it would speed review by reducing the number of parties involved.

We agree that the increased number of PDN's will increase workload for Corps regulatory staff. However, this increase will be offset by a reduction in the number of actions requiring individual permits, by a simplified PDN procedure, by eliminating proposed PDN requirements for two proposed NWP's, and by eliminating two proposed NWP's which would have required a PDN.

Many commenters supported the 30day requirement for a decision on PDN9. However, some felt that a specific time limit should be established for requesting additional information to complete the notification and several asked for clarification of the information required for a PDN. A few commenters requested a 60-day review period. Another commenter requested that any decision to take discretionary authority be in a written letter which provides specific reasons for the decision.

We believe that the language as adopted is reasonable and provides adequate protection against unreasonable delays. The provision for a decision within 30 days has been retained. The requirements for a PDN are found in General Condition 13 and further clarification is not needed.

A few commenters indicated that the requirement for a wetland delineation on NWP's imposes an unreasonable burden on applicants and it is the government's responsibility to determine the scope of its jurisdiction. Some commenters stated that the Corps should provide a delineation within 30 days, if the applicant's delineation is disputed. Another commenter recommended that a delineation report be submitted with all wetland delineations furnished by the prospective permittee. Several commenters suggested deleting reference to the Federal Manual since it is controversial and has not been adopted by public notice and comment for rule making.

We agree in principle that determining jurisdiction is, ultimately, the government's responsibility. However, the Corps does not have the resources to provide timely wetland delineations in all cases. Accordingly, the applicant must submit a wetland delineation to assure a timely decision. Further, we disagree that all wetland delineations submitted to the Corps should include a detailed report. We believe that the degree of documentation necessary to review a wetland delineation will be dependent upon the site conditions of the property under review. Further, the amount of data collection necessary to prepare a wetland delineation report is appropriately discussed in the Federal Manual. We also disagree with deleting reference to the Federal Manual, since we have specifically included the phrase "or current method being used by the Corps" to recognize and ensure that the appropriate method will be utilized if the current wetland delineation manual is revised.

Some commenters recommended that the Corps institute a simple reporting requirement to provide data necessary to determine cumulative impacts of NWP's and whether PDNs should be required in the future. Another commenter suggested that PDNs should be voluntary to allow proponents to determine applicability of NWP9 to the projects, while others favored adding -PDN requirements to all NWP's.

We disagree that a simple reporting requirement would be successful in obtaining necessary data for cumulative impact assessment. We also disagree with adding PDN requirements to all NWP's. We believe that neither approach would be reasonable or practical, since they add significant workload requirements to our limited staff resources and unnecessarily burden the public with reporting activities that clearly have only minimal adverse effects on the environment. Applicants can request a determination of the applicability of NWP's at any time regardless of PDN requirements.

The PDN process is necessary for certain NWP's and we have retained it, where appropriate, to ensure that only minimal adverse environmental effects will occur.

A number of commenters objected to the language advising applicants that an activity may proceed, in most cases, without notifying the DE because they fear an increase in unauthorized activities. Other commenters stated the specific enforcement provisions should be included in this section to address the failure of applicants to provide required notification prior to starting discharge. We disagree that advising applicant that they may proceed, in most cases, without notifying the DE will increase the number of unauthorized activities. This procedure has been in effect since the NWP's were first issued by the Corps in 1975. Further, there is no evidence that this has resulted in a substantial number of unauthorized activities. We agree, however, that language should be included in § 330.1(c) which addresses failure to provide timely and accurate notification. This Section has been amended to specifically allow the DE the discretion to authorize a discharge after-the-fact, after considering whether the failure to provide notification was knowing or intentional or other indications of the need for a penalty.

A few commenters suggested that § 330.4(c)(6) and 330.4(d)(6) be modified to require that the 30 day notification period begin when the notification is submitted rather than after Section 401 certification or coastal zone management

consistency is received. An NWP decision would then be conditional upon receipt of the appropriate state determination.

We agree with this approach. The denial of Section 401 certification or coastal zone management consistency results in denial of authorization under NWP's without prejudice until the state has provided an individual certification or consistency determination concurrence. The Corps will begin and complete its review of a PDN within 30 days and notify the prospective permittee that the proposed activity qualifies for the NWP, is denied without prejudice, and will be authorized when the prospective permittee furnishes the Corps with an individual 401 water quality certification or waiver and/or with a CZM consistency concurrence or presumed concurrence. Sections 330.4(c)(6) and 330.4(d)(6) are being adopted accordingly.

Section 330.1(f): A few commenters objected to requiring the DE to review all incoming applications to determine if they comply with a nationwide permit. However, this procedure is currently a routine aspect of the DE's review of an application package for completeness. Furthermore, it is unreasonable to require an applicant to proceed through the individual permit process where the activity can be appropriately authorized by a general permit.

As such, we have retained the language of this section.

Section 330.1(g): We received no substantive comments on this section, and we have retained the language as proposed.

Section 330.2(a): Several commenters requested that we define the term "public interest factors". We believe this term is sufficiently described at 33 CFR 320.4. In addition, a few commenters recommended that we include a definition of "ordinary high water" in this section. This term is currently defined at 33 CFR 328 3(c) and is applicable to this part. Therefore, we have not included a definition of that term in this section.

Several commenters requested that we define the term "minimal" as used in the context of the regulatory program. The word "minimal" is not defined anywhere within the regulatory program. The determination of "minimal" adverse environmental effects is left to the discretion of the DE. The District represents the most knowledgeable office concerning the aquatic resources within that particular region, and the DE is therefore the most capable of assessing relative impacts that would result from activities authorized under the NWP program. Each District is unique in regard to its aquatic resources and the effect of regulated activities. As such, what constitutes minimal adverse environmental effects can vary significantly from state to state, county to county, watershed to watershed as well as district to district. Obviously, the factors utilized by the DE in the decision making process must be evaluated based upon the environmental setting of the District and the project itself. Given this variability, the term "minimal" would be difficult to define with any utility on a nationwide basis.

Section 330.2(b) Nationwide Permit: We received no substantive comments on this section. We have retained the language as proposed.

Section 330.2(c) Authorization: A few commenters favored the procedures in the regulation for written verification of NVIP compliance; however, they recommended that the notification procedure at J 330.1(e) be modified to include a requirement for a response from the DE within 30 days. A few commenters suggested that this verification of compliance with the terms and conditions of all NWP's should be mandatory. We have not included this requirement for all NWP's, since we believe it is unnecessary. Furthermore, this recommendation would defeat the purpose of the NWP program, which is to reduce the effort expended in regulating activities with minimal adverse environmental effects. One commenter referred to the addition of activity-specific conditions or regional conditions as being the equivalent of discretionary authority. This is correct, and we agree with this conclusion. Regional or project specific conditions can be added by a Division or District Engineer to ensure compliance with the terms and conditions of an NWP

or to assure that the adverse environmental effects both individually and cumulatively are minimal (see 33 CFR 310.5(c)&(d) and 33 CrR'330.6(a)).

Section 330.2(d) Headwaters: Some commenters from the Southwestern United States expressed concern that the current and proposed definition of headwaters does not adequately protect ephemeral and intermittent waters. Among these commenters there was confusion as to whether the establishment of five cubic feet per second (5 cfs) for 50 percent of the time represented when a dry stream is flowing or on an annual basis. A recommendation was made to calculate headwaters during those periods when flow is occurring, and not on an annual basis. This option for the District Engineer was adopted on July 19, 1977, to allow the DE to establish the demarcation point for the headwaters based on the median rather than the average flow. A median flow of five cubic feet per second means that 50% of the time the flow is greater than five cubic feet per second and 50% of the time the flow is less than this value. This approach was added to recognize that streams with highly irregular flows, such as those occurring in the western portion of the country, could be dry at the "headwaters" point for most of the year and still average, on an annual basis, a flow of five cubic feet per second because of high volumes, flash flood type flows which greatly distort the average. Furthermore, we recognize that using the median flow for an entire year in streams that have no stream flow for over half the year but with flows greater than 5 cfs for several months would also distort the average. Accordingly, we have modified the' wording under the definition of headwaters to clarify the intent of the headwaters calculation for such streams is to be based on the median flow, but including a provision that the median be based on the six wettest months (they do not have to be consecutive) to more realistically represent the headwaters. In addition, regarding the concern expressed over the protection of ephemeral and intermittent streams we encourage District and Division Engineers, where individual and cumulative adverse environmental effects would be more than minimal, to exercise discretionary authority to require individual permits and thereby effectively move the point for authorization by NWP 26 upstream of the 5 cfs point. It should also be noted that precision is not required in establishing the five cubic feet per second point. The definition allows the DE to use approximate means to compute it. The drainage area that will contribute an average annual flow of five cubic per second can be estimated by approximating the proportion of the average annual precipitation that is expected to find its way into the stream. Having the area that will produce this flow, the five cubic feet per second point can be approximated from drainage area maps.

As stated in the definition found at § 330.2(d), headwaters are those waters, including adjacent wetlands, upstream of the point on the river or stream (i.e. a surface tributary) at which the average annual flow is less than 5 cubic feet per second (5 cfs).

A surface tributary system may consist of either a.) defined channel or dendritic (tree-like, branching) arrangement of channels with adjacent wetlands, or b.) part of a large continuum of waters or wetlands. In tributary systems where there exists one or more defined channels. any wetlands which are not isolated should be considered adjacent to the waterbody(s). In these cases, the determining factor as to which of the waterbodies the wetland should be considered adjacent to should be the level of influence between the waterbody and the adjacent wetland. The waterbody which has the greatest hydrologic influence or exchange with the wetland is the one to which it is considered adjacent.

In systems where there is a broad continuum of wetlands, all are considered adjacent to the major waterbody to which it is contiguous. This type of broad system should not be dissected for purposes of determining where the 5 cfs point does or does not exist as it is all hydrologically and ecologically part of the same system and should be treated as a whole. Where linear wetlands with defined stream channels connect to a stream of greater than 5 cfs or to a broad continuum of wetlands adjacent to a stream of greater than 5 cfs, the portion of the linear

wetlands that are to be considered headwaters is that portion which has the greatest influence or exchange with the defined stream channel upstream of the 5 cfs point.

Section 330.2(e) Isolated Waters: Two commenters recommended that we establish a distance limit for adjacency. We believe that this would be an unreasonable approach due to the potential variability of the factors utilized in establishing adjacency for each individual project such as manmade barriers and natural river berms. Some commenters recommended that the term "interstate waters or" be included within the definition of isolated waters to be consistent with the current definition. We agree with this recommendation. Furthermore, we believe our proposal was not entirely clear in defining isolated waters. Accordingly, we have not adopted the proposed definition of the term "isolated waters". Instead, we have decided to retain the existing definition, which does include the phrase "interstate waters or". However, we did further clarify the existing definition to more clearly state what we intended in the proposed rule.

For the purposes of NWP 26, we have defined isolated waters to be waters of the United States that are not part of a "surface tributary system" to interstate waters or navigable waters of the United States. A surface tributary system includes the waterbody itself, as well as any waters of the United States, including wetlands, that are adjacent to the waterbody. Adjacent wetlands include those that are separated from the river, stream, or other waterbody by man-made or natural barriers such as dikes, roads, river berms, or beach dunes. Thus, a water of the United States is isolated only when it meets the following conditions: it is nontidal, not part of an interstate or navigable water or tributary thereof, and not adjacent to such waters.

Section 330.2(o) Filled Area: Some commenters appear to have misinterpreted the intent of this definition, particularly in regard to pipeline installation. They interpret the phrase "eliminate or cover" to imply permanency, and this may lead to misapplication of the definition to pipeline projects where fill is only temporarily sidecast. A filled area which is eliminated or covered as a direct result of a discharge, whether permanent or temporary, is the focus of the jurisdictional determination. In the case of pipeline installation in a section 404 water, the filled area is the wetland or water covered by utility line backfill or bedding material and the area covered by the temporary sidecasting of trench material. We have carefully considered all comments we received concerning this section, and have determined that the language is sufficiently clear and appropriate. Accordingly, we have retained the language as proposed.

Section 330.2(g) Discretionary authority: Two commenters requested clarification of the term "modification", within the context of discretionary authority, to clarify that modification results in additional conditioning of the permit making it more restrictive. Although we never intended the language found at Section 330.1 to allow expansion of NWP coverage, we have added language to clarify this term (See section 330.1(d)).

Section 330.2(h) Terms and condition: We received no substantive comments on this section and have retained the language as proposed.

Currently serviceable (proposed at section 330.2(i)): Several commenters requested classification of the two-year limit expressed in NWP 3. We have decided to delete this definition since the term is only applicable to NWP 3, and we believe that it is sufficiently defined within the text of that NWP. Additionally, the language within NW] 3 has been reworded to clarify the phrase "two years", as it applies to the NWP.

Section 330.2(i) Single and complete project (proposed at section 330.26)): One commenter objected to the statement that multiple crossings of the same waterbody could be considered single and complete project, and further that all the crossings should be totaled to determine the affected acreage for compliance with the NWP. Some commenters felt the definition of single and complete was biased against large scale development. They recommended that we allow districts to

develop separate guidelines for large scale projects which would define separate sections or phases of a development a single and complete, provided they ha a separate time schedule for development, consisted of at least 20 acres of land, and did not impact the same headwater or isolated water more than once. A recommendation was also made to develop an acceptable ratio calculation on the acreage filled to the project acreage. These recommendations were determined to be unreasonable, due to the variability in the quantity and quality of aquatic, resources between regions and individual projects. Many commenters objected to the definition of single and complete, particularly as it pertains to linear projects. The basis for their objections involved the potential for cumulative adverse environmental effects associated with multiple crossings along a single waterway or wetland, resulting in a cumulative lost of habitat and wetland fragmentation. Suggested recommendations to eliminate cumulative impacts under t NWP included deleting the latter portion of the definition which discusses lines projects. Another suggestion was to entirely re-define "single and complete". Several commenters requested that we define "distant locations," or exclude from the definition as it is an ambiguous term. We do not agree with the practicability of defining "distant locations." Situations will occur where a linear project crosses separate waterbodies or the same waterbody at distant locations and does comply with the terms and conditions of the NWP and does not result in adverse effects on the environment, either individually or cumulatively.

On the other hand, a DE has authority to assert discretionary authority to add project-specific conditions to reduce the adverse effects on the environment to the minimal level or to require the prospective permittee to apply for authorization under an individual permit. This decision by the DE can be based upon concerns for adverse effects on the environment or other factors of the public interest.

The purpose of separating out "linear projects", within the text of the definition for "single and complete project" was to effectively implement the NWP program by reducing the effort expended in regulating activities with minimal impacts, It was never our intention to encourage the use of this definition to justify piecemealing of projects. It is the responsibility of each DE to assure against piecemealing through the appropriate use of discretionary authority. We believe that this procedure will assure effective and efficient administration of the NWP program.

Accordingly, we have adopted this definition as proposed but reorganized to make it clearer.

We have learned that, in certain situations, developers have purchased large properties including substantial areas of wetlands, and then have subdivided those properties into smaller parcels, and sold the parcels intending that each individual parcel could be filled under the authority of NWP 26. Such subdivision projects constitute an abuse of NWP 26 which was never intended by the Corps, and which cannot be reconciled with the limitations of the Clean Water Act section 404(e). The new language added in NWP 26 states that, in the future, a subdivision created after October 5, 1984 will be treated in its entirety as a single and complete project for purposes of the pre-discharge notification and the ten-acre limit of NWP 26, unless exempted by the DE under specified circumstances; this should prevent the abuse of the NWP described above. The determination to allow the exemption for subdivisions is a discretionary decision on the part of the DE, and one which will only apply to a limited number of subdivisions. The date of October 5, 1984, was selected because on that date the one-acre and ten-acre limits were added to NWP 26- This rule recognizes the fact that most subdivisions are really unified projects, where each separate lot or parcel is, often inter-related with the other lots and with the subdivision streets, utilities, etc. On the other hand, we recognize that in some situations tracts of land have been divided and sold in circumstances which clearly are not

abuses of NWP 26. We expect the DE's to use their sound judgement while applying this rule, and we have provided the DE's with discretion to exempt any subdivision or parcel thereof where an exemption would be appropriate. DE's should ensure that enforcement of this regulation does not lead to unfair or unreasonable burdens for individual lot owners, and should assert the discretionary authority wherever necessary to ensure respect for this regulation.

Section 330.2(j) Special aquatic sites (proposed at section 330.2(k)): One commenter suggested that the e of special aquatic sites should be expanded to include all habitats where State or Federally listed rare, threatened, or endangered species are known to occur. We disagree with this recommendation since it includes all habitats, and is not limited to those habitats recognized as special aquatic sites. A few commenters requested more precise definitions for riffle and pool complex, sanctuaries and refuges. One commenter appeared to misinterpret the definition of special aquatic sites, as they questioned how to distinguish wetlands identified in the Federal Manual from these special aquatic sites. It should be noted that wetlands are a special aquatic site and are included as part of that definition. The definition of special aquatic sites we are using for NWP's is found in EPA regulations at 40 CFR 230.40-230.45. We have added the term to this regulation for additional information only. To clarify this intent we have included a reference to EPA's regulations.

Section 330.3 (a) and (b): Two commenters stated that language should be added to indicate that activities permitted by prior regulations continue to be authorized by the proposed NWP's, while another commenter questioned what was meant by the language "unless the activities are modified". Activities which were authorized by previous NWP authorizations continue to be authorized. However, modifications of previously authorized activities may result in more than minimal adverse environmental effects. We believe this language is appropriate, and have retained it as proposed.

Another commenter suggested that we move this section to appendix A with the nationwide permits. We believe that the location of this section is appropriate and have retained it at section 330.3.

Section 330.4(a) and (b): Most of the comments we received in response to these sections expressed concerns of NWP's being used to override the local approval process. We disagree with this concern, although we did include a minor rewording of this section regarding state and local approvals for clarification.

Section 330.4 (c): The majority of comments objected to our authorization of NWP activities in a state that has denied the 401 water quality certification for a particular NWP. It was further added that the denial of 401 water quality certification for a particular NWP should automatically require processing of an individual permit application. We believe that the denial of 401 water quality certification should not be the sole basis for requiring an individual permit application for activities which would otherwise comply with the terms and conditions of a nationwide permit. Denial of state water quality certification does not necessarily mean that adverse environmental effects will occur. Rather, it indicates that the state standards have not been met. Thus, when the state standards are met, (i.e. an individual 401 certification issued) the NWP authorization should be available to the prospective permittee. To assure that more than minimal adverse environmental effects do not occur, it is specifically noted that the DE may exercise his discretionary authority in those cases where the adverse effects on the environment either individually or cumulatively would be more than minimal or where the DE has concerns for other factors of the public interest.

Several commenters requested that for those NWP's requiring notification, the 30-day review period should commence immediately upon receipt of the notification rather than upon receipt of the 401 water quality certification. We agree with this recommendation as previously discussed in section 330.1(e) and have so modified the language of this section.

Several states indicated that a final determination could not be made until the final regulations have been published or the Corps submits a request for final certification for review and comment. In response to these comments, it should be noted that the states will have an opportunity to make a final decision on certification of the NWP's upon publication of the final regulation.

Section 330.4(d): Several states indicated that a final determination could not be made until the final regulations have been published or the Corps submits a final consistency determination for review and comment. In response to these comments, it should be noted that the states will have an opportunity to make a decision on consistency determination of the NWP's; upon publication of the final regulation.

Several commenters objected to any activities being authorized under an NWP in states which have previously disagreed with the coastal zone management consistency determination for that NWP. We believe that a disagreement with coastal zone management consistency should not be the sole basis for requiring an individual permit application for activities which would otherwise comply with the terms and conditions of a nationwide permit. We have made only minor revisions to this section since it is specifically noted that the DE may exercise his discretionary authority in those cases where the adverse effects on the environment would be more than minimal or where the DE has concerns for other factors of the public interest.

Several commenters requested that for those NWP's requiring notification, the 30-day review period should commence immediately upon receipt of an individual coastal zone management consistency determination. We agree with this recommendation as previously discussed in section 330.1(e) and have so modified the language of this section.

In 1990, section 307(c)(1) of the CZMA was amended to require that Federal agency activities within or outside the coastal zone that affect any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of the approved state coastal zone management programs. This amendment was intended to reverse the Supreme Court decision in *California v. Watt* which found that an activity must be within the coastal zone in order to "directly affect" the coastal zone. However, this amendment does not change the long standing position of the Department of the Army that, for the purposes of the NWP's, activities occurring wholly within one state need not receive CZM consistency agreement from adjacent states.

Section 330.4(e): Many commenters recommended that we include an appeal procedure to the Division Engineer or Chief of Engineers in those cases where a District or Division Engineer has believe that an appeal process would be unmanageable and burdensome to both, the Corps and the public. Furthermore, even where discretionary authority has been asserted to require an individual permit, the activity would still have an opportunity to receive approval through the individual permit process. As such, we have not provided any appeal procedures for this section.

Section 330.4(f): Some commenters requested that we enter into section 7 consultation relative to the Nationwide Permit Program. We have decided that a section 7 consultation is not required since the program specifically does not authorize any activity that jeopardizes the continued existence of a threatened or endangered species, or destroys or adversely modifies the critical habitat of such species. The regulations as written provide the appropriate procedure where the permittee, or other source, notifies the DE that such impacts might occur.

Several commenters requested that for those NWP's with notification requirements that the resource agencies should be included in that process. We have decided to provide notice to the resource agencies during the notification process. Further discussion of this issue can be found in our discussion for Appendix A.

Many commenters objected to the use of the word "proposed" in the phrase "species proposed for such designation as being too vague and undefined. However, this term is used in the Endangered Species Act and is used in that context.

Section 330.4(g): Several commenters considered that the NWP program is inconsistent with the National Historic Preservation Act (NHPA) or 36 CFR 800, Protection of Historic Properties. We have determined that the NWP condition at appendix A complies with the requirements of the NHPA and is consistent with 36 CFR 800 as implemented by 33 CFR 325 appendix C.

Several commenters requested a definition of a "reasonable opportunity to comment" for awaiting replies from the SHPO. The procedures for providing the SHPO and the ACHP a reasonable opportunity to comment on the effects of Corps permit actions on historic properties are addressed in 33 CFR 325 appendix C. To be consistent with appendix C we have reworded this section to clarify that compliance with appendix C is required.

Several commenters objected to the term "potentially eligible for listing" as being too ambiguous and uncertain and requested clarification. It is our intent to require reporting on important properties that the prospective permittee has reason to believe may be eligible for the National Register of Historic Places so that we could take into account their eligibility and the impacts on such properties. We do not believe that reporting should be limited to properties that were listed or determined eligible for the National Register. In an effort to clarify this point we have decided to use the phrase "which the prospective permittee has reason to believe may be eligible for listing." We recognize there is still some uncertainty in this term. However, if the prospective permittee has any doubt about the historic significance of the property to be affected by the proposed project, he should contact the State Historic Preservation Officer (SHPO) for more information. If the SHPO believes that the property may be eligible, the prospective permittee must notify the DE. Appendix A has been revised to reflect this change.

A few commenters questioned why we made a distinction between Federal permittees and non-federal permittees this section. It should be noted that Federal permittees must comply with I provisions of Section 106 of the National Historic Preservation Act and will follow their own procedures to comply with the Act. While the Federal permittees procedures will normally satisfy the NHPA, this does not remove the Corps responsibility to ensure that the Federal permittees action also satisfies the Corps responsibilities under the NHPA.

Section 330.5(a): One commenter suggested that 1330.5 should be placed in appendix A with the NWP9. The inference was that the format was confusing and applicants would only read appendix A regardless of references. One commenter requested that an NWP could not be modified without input from resource agencies. We do not agree that applicants will only read appendix A. And further, if NWP is modified, the modification must comply with the procedures specified § 330.5, which provides for public review and comment.

Section 330.5(b): Two commenters stated that the date of issuance and the effective date were unclear. One commenter requested that the notice, procedure, and proposals to issue, modify, or reissue NWP's should include, the state agency responsible for water quality certification. One commenter, suggested that it should be just as easy to ask for revocation of a permit as it to issue the permit. One commenter suggested that the Chief of Engineers should respond in writing within 30 days with the results of his considerations of newly proposed NWP's to the person who proposes a new permit, conditions, or changes to existing NWP's. One commenter stated that the procedures appear unworkable and recommended a sequential procedure to finalize the NWP's before regional conditions are developed.

The effective date of the NWP's will be clearly stated when they are published by the Chief of Engineers. We see no need to require the state agency responsible for water quality certification to be included in the public notice. We will

leave this decision to the Division Engineer if he determines it is beneficial to include the state agency in the public notice. The procedure for revocation of an NWP should this be deemed appropriate, are actually easier than issuance since documentation under NEPA and 404(b)(1) compliance analysis would not be required. A public notice and opportunity for a public hearing would be required to obtain public comment. We do not agree that the Chief of Engineers should be required to respond within 30 days to the person who proposes a new permit, conditions, or changes to existing NWP's. The correspondence will be acknowledged but not necessarily within 30 days or by the Chief of Engineers. We do not agree that sequencing is required to include regional conditions to the NWP. Any conflicts that may develop during final issuance of an NWP can be resolved and regional conditions modified, deleted, or added before final publication of the NWP's.

Section 330.5(c): Several commenters requested that a grandfathering period from one to two years be specified for those who have commenced work or made substantial commitments in reliance on an existing NWP. One commenter suggested that the Division Engineer retain the authority to modify, suspend, or revoke an NWP for a specific geographic area while another commenter suggested that only the Chief of Engineers could revoke an NWP on a state level. One commenter requested that Executive Order 12630 should be full week, stating that the NWP being modified, suspended, or revoked could be considered a taking where an applicant may have established vested rights in a project based on the NWP authorization.

We agree that the grandfather period reads to be specified to avoid confusion and to be consistent. Therefore, the word "equitable" has been deleted and a grandfathering period, if appropriate, will be as specified in § 330.6(b). We do not agree that discretionary authority should not be delegated to either the Division Engineer or District Engineer. The Division Engineer and the District Engineer are capable of making these decisions as demonstrated by previous determinations. Exercising discretionary authority does not constitute a taking of property for which compensation is due. The decision by a Division or District Engineer to assert discretionary authority is based on a determination that the adverse environmental effects either individually or cumulatively would be more than minimal or that there are other concerns for the public interest that would be more appropriately evaluated in a regional general permit or an individual permit application. Further, asserting discretionary authority is not a final decision since the proposed project would have the opportunity to receive approval as a regional general permit or an individual permit.

Section 330.5(d): Several commenters were in favor of the District Engineer's authority to modify, suspend, or revoke a specific activity's authorization under an NWP. Several commenters requested that the Division Engineer retain discretionary authority as a check and balance. Several commenters were concerned that no public notice was being issued when the District Engineer exercised his discretionary authority. Several commenters requested that an appeal process should be included in the NWP program when the District Engineer exercises discretionary authority.

We disagree that the exclusive right to exercise discretionary authority should be retained with the Division Engineer. Division Engineers have agreed with the District Engineers' recommendations ninety-five percent of the time. The five percent where the Division Engineer has not agreed with the District Engineer is not sufficient reason to retain discretionary authority with the Division Engineer. There seems to be some confusion as to the District Engineer's exercising discretionary authority for a specific activity's authorization under an NWP. The exercising of discretionary authority is for an individual activity and not regional or statewide. Therefore, there is no need to issue a public notice. In the event that a DE asserts discretionary authority to require an individual permit application, a public notice of the subsequent application would be published by the DE. We have not included an appeal procedure for

discretionary authority. We believe that an appeal procedure would be unnecessary and burdensome, and further, the assertion of discretionary authority by a DE does not represent a final decision, since the activity in question may still be authorized by an individual permit.

Section 330.6(a): Most commenters recommended that when a DE is requested to verify an NWP authorization by a permittee, that the DE should be required to respond to the permittee with a written confirmation within 30 days of receipt of such request. Other commenters incorrectly assumed that notification for all NWPs was mandatory.

Since all NWP activities (except those requiring PDNs) are authorized without the requirement to notify the Corps, the DE's written verification is considered a service to the public. Therefore, we have not provided a specific time limit for DE verification of NWP's. However, we have indicated that the DE will respond as promptly as his workload priorities allow. Because of the dynamic nature of the section 404 program, the intent of the two-year time limit on written verifications is to allow for appropriate adjustments or clarifications in jurisdiction, policy and procedure. Furthermore, we are changing the wording of the paragraph to clarify that the verification is valid for a period of no more than two years, unless the NWP is modified, suspended, or revoked, such that the activity would no longer comply with the terms and conditions of the NWP. In these cases the provisions of § 330.6(b) will apply for those activities which have commenced or are under contract to commence.

Another commenter suggested that we add a "grandfather" provision to § 330.6(b) for activities authorized by NWP #26 so that re-verification of the NWP authorization would not be required as a result of the NWP reissuance; unless the proposed activity would no longer comply with the terms and conditions of any modifications (i.e. acreage limits) in the final regulations. We recognize that many activities authorized by the existing NWP's will be unaffected by any changes in this regulation. As such, we have included language in this section to clarify that a verification letter written by the DE confirming authorization under an NWP continues to be valid beyond the date of the NWP expiration and any subsequent reissuance or modification, provided the reissuance or modification does not affect the activity's compliance with the NWP. It should be further noted that this provision will be applicable to all activities authorized by NWP's. We have also added a subparagraph to this section to provide, in situations where a state has denied 401 water quality certification and/or did not agree with the Corps CZM consistency determination, for verification of activities subject to the prospective permittee satisfying the 401 water quality certification and/or CZM consistency concurrence requirements of 33 CFR 330.4(c) and/or 33 CFR 330.4(d).

Section 330.6(b): Two commenters indicated that the language concerning expiration of the NWP's in this section is not consistent with the language found in 33 CFR 330.5(b). These commenters also questioned the need for the language stating that work completed under the authorization of an NWP continued to be authorized under the NWP. One commenter requested that the DE should be allowed to extend the expiration date for a project that has been commenced beyond the 12-month time limit. If acreage limits are revised, the commenter indicated that previously approved projects that exceed the revised acreage limits would have to apply for a new individual permit.

We agree that the language concerning expiration of the NWPs may have been confusing. To clarify this point, we have clarified the language of this regulation to indicate that the NWPs will expire five years from the effective date, unless sooner modified or revoked. At the time of publication, the effective date of the NWPs will be specified. The commenters appear to have mistakenly believed that the NWPs only authorize construction. As with individual permits, the NWPs authorize not only construction, but also continued maintenance and operation of any structure or fill completed under such authorization. We

believe that 12 months from the expiration, modification, or revocation of an NWP is a reasonable amount of time to complete a project that has been previously authorized, and as such, we have not extended this time limit.

Section 330.6(c): Most commenters objected to multiple use of NWPs ("stacking") saying that the policy would allow more than minimal adverse environmental effects by piecemeal and cumulative filling. Some commenters objected because allowing multiple use of NWPs on a single project site would prejudice future applications on the same property. Still others believed that the concept of more than minimal and single and complete project were not adequately defined. Reference is made to 33 CFR 330.2 for the definition of single and complete project and the preamble language on 330.2(i).

We disagree with the commenters and are retaining the proposed wording of § 330.6(c). If an activity authorized by an NWP is likely to occur independently of a large single and complete project, considerations of fairness and equity require that it be allowed. The Corps is involved in regulating many projects where there is, in fact, independent utility for a portion of a project where an NWP would authorize activities which would allow the activity to go forward. In such cases there is often an additional portion of the project which would need an individual permit.

However, the portion that would be allowed by NWP would proceed whether or not the additional portion of the overall project were authorized. We believe this position is supported by the NEPA case law. Those commenters' concerns that adverse environmental effects may be more than minimal should be alleviated by the requirement that the same NWP can only be used once for a single and complete project, except for linear projects. Furthermore, where a DE believes that adverse environmental effects are more than minimal he may invoke his discretionary authority to add project specific conditions or to require an individual permit application.

Section 330.6(d)- Many commenters objected to this section, suggesting that combining NWPs and individual permits would constitute piecemealing, and requested that activities with portions requiring an individual permit should be evaluated as a whole under the individual permit review. They suggested that fragmentation would increase cumulative adverse impacts and eliminate options for improvement to proposed projects. Several commenters suggested that combining the NWP would preclude decisions on individual permits based on complaints of "substantial commitments" with regard to financial obligations. We do not agree that the combining of NWPs and individual permits necessarily constitutes piecemealing. There are many situations where a portion of an overall project that only involves adverse environmental effects covered by an NWP would be built (i.e., have independent utility) with or without associated activities that may require an individual permit. In such cases it would be inequitable to delay a decision on the NWP pending a decision on the individual permit. The proposed language requires that the individual permit documentation must include a discussion of the adverse environmental effects of the entire project, including related activities authorized by NWP. The applicant must understand that authorization of an NWP will not prejudice the decision on an individual permit regardless of financial commitments.

#### **Appendix A to Part 330-Nationwide Permits and Conditions**

We have moved the nationwide permits and their required conditions from 33 CFR 330.5 (a) and (b) to a new appendix A. We have reissued the 26 existing nationwide permits, some with modifications, and have issued 10 new nationwide permits, rather than the 13 proposed. In addition, we have added the existing best management practices now found at 33 CFR 330.6 as condition to the nationwide permits and have added two new conditions. We have reserved the NWP

numbers 29, 30, 31, and 39. They will be used for any new proposed NWP's after notice and opportunity for public comment in accordance with 33 CFR 330-5.

Nationwide permits (NWP's), are a type of general permit issued by the Chief of Engineers and designed to regulate certain activities having minimal adverse effects on the environment both individually and cumulatively, in a manner entailing little, if any, delay or paperwork. If the project does not comply with the term and conditions of the NWP and can not be or is not modified to comply with the terms and conditions of the NWP; the proposed project is not authorized by NWP but may be evaluated for authorization under a regional general permit or an individual permit. These nationwide permits are proposed, issued, modified, reissued (extended) and revoked from time to time after opportunity for public notice and comment. Proposed new NWP's or modification to or reissuance of existing NWP's will be adopted only after public comment, the opportunity to request public hearing, and a finding of compliance with applicable standards. The Corps will give full consideration all comments received prior to reach a final decision.

### *General Comments*

Many commenters generally supported the NWP program because it allows the Corps to focus resources activities with greater adverse environmental effects. Some disagree that the NWP's will result in a decrease in overall workload, Many commenters felt that the terms and conditions of some of the NWP's were too vague and needed to be clarified. Some felt that clear standards for the use of mitigation are needed. One commenter requested that forms should be used for the information required for condition 13. Many of the NWP's are being clarified.

Form ENC 4345 may be used for notification.

A majority of the commenters who were opposed to the NWP program were opposed because they believe that the program will contribute to wetland losses and the destruction of wildlife habitat, and that the program is contrary to the President's goal of no net loss of wetlands. We support the President's goal of no net loss of wetlands. Wetland losses, under the nationwide permit program have been substantially reduced from the program's inception in 1977. This reduction in adverse effects continues and the proposed changes will result in additional substantial reduction in adverse effects over the 1986 nationwide permit program. Although there will be continued small losses of wetlands under the nationwide permit program, the net losses of wetlands and wildlife habitat will be minimal. Concerns for local types or areas of wetlands and other local concerns should be directed to the appropriate DEs for possible exclusion through the use of discretionary authority or regional conditions.

Many of the commenters recommended that the Corps develop a system to monitor and assess cumulative adverse environmental effects to wetlands under the NWP program. The Corps has enhanced its efforts in recent years to monitor and assess cumulative adverse effects to wetlands under the NWP program and we intend to continue to improve this effort.

Several of the commenters were concerned that removing the NWP's from the CFR would complicate the administration of the NWP program, make it less enforceable, confuse the public, and might not comply with the Administrative Procedure Act. We disagree, and upon the expiration of the NWP's in five years from their effective date, will remove appendix A from the CFR and issue the NWP's separately from the regulations governing their use. Until the NWP's in appendix A are removed from the CFR, the proposed issuance, reissuance, modification, and revocation of NWP's will be published in the Federal Register concurrent with regional public notices issued by district engineers. After the NWP's are removed from the CFR, the Chief of Engineers and district engineers will issue public notices to solicit comments and to provide the opportunity to request a public

hearing. All comments will be included in the administrative record, and substantive comments addressed in a decision document for each NWP. The final decisions on the NWP's will be announced by the Chief of Engineers concurrent with regional public notices issued by district engineers.

One commenter suggested that we change the language, in the first sentence of appendix A from "optional" to "mandatory." One commenter thought that the changes to the NWP program, including the addition of new NWPs, would undermine state and local efforts to regulate activities and that consistency is needed. Another was concerned about the applicability of old RGLs when the new NWPs are issued. The term "optional" nationwide permit is intended to indicate that a prospective permittee is not necessarily required to proceed under the terms of an NVVP but at his option may apply for an individual or regional general permit. It should be noted, however, that the introduction to appendix A has been rewritten to clarify the mandatory nature of the permit conditions if a prospective permittee chooses to undertake an activity authorized by an NWP. We believe that the program will not undermine any state or local efforts to regulate wetlands and that consistency is enhanced by the nationwide permit program. RGLs addressing NWP matters have been captured in the nationwide permit regulation and are no longer applicable.

All the changes taken together should result in an overall increase in protection of the aquatic environment and an overall decrease in workload. Any workload savings will be devoted to more efficient individual permit processing and increased enforcement and compliance activities.

### **Mitigation**

Many commenters objected to allowing the DE to consider mitigation to reduce, "buy down" or "write down" the adverse environmental effects of a proposed NWP activity to the minimum impact level. Many commenters indicated that requiring mitigation is contradictory with the presumption that NWP actions do not have more than minimal individual or cumulative adverse environmental effects. Many commenters further requested that the DE should be required to make the minimal impact determination prior to considering any proposed mitigation. Many commenters objected that the sequencing requirement (to consider avoidance, minimization and only then compensation) has not been included in the NWP Program. Others also objected that the mitigation requirements of the NWP Program are not consistent with the Army/EPA Memorandum of Agreement on Mitigation dated February 1, 1990.

Concerning the Mitigation Options discussed in the April 10, 1991 Federal Register notice, three times as many commenters favored Mitigation Option 2 over Mitigation Option 1. Many of the commenters who favored Option 2 supported the concept that mitigation should only be required if the DE determines that resources need to be conserved. Some commenters recommended that mitigation development should be left to the discretion of the applicant. Others requested that the DE should be required to coordinate with other Federal and state resource agencies to determine what is appropriate and practicable mitigation.

Many commenters requested that criteria for appropriate and practicable mitigation should be included in the in the mitigation discussion. Others requested a discussion of how to determine when mitigation is practicable. Many other commenters requested that guidance be included to assist prospective permittees in developing appropriate mitigation proposals.

In response to the comments concerning whether the DE should allow an activity to proceed under a relevant NWP when the mitigation reduces the adverse environmental effects to the minimal level (the "buy down" or "write down" concept), we believe it is indeed appropriate for the DE to consider mitigation in determining whether the proposed activity will result in no more than a minimal level of adverse environmental effects. While the Memorandum of Agreement on Mitigation between the Army and the EPA applies only to standard (individual)

permits, it specifically provides for the concept of mitigation to reduce adverse environmental effects. The Council of Environmental Quality's National Environmental Policy Act Implementing Regulations and the section 404(b)(1) Guidelines also provide for using mitigation to reduce adverse environmental effects prior to determining whether the effects are significant. Section 230.7(b)(1) of the section 404(b)(1) Guidelines do not require that general permits (including nationwide permits) comply with § 230.10(a) (alternatives analysis) of the, 404(b)(1) Guidelines. An alternative analysis which includes consideration of off-site alternatives is not required for evaluating projects under the nationwide permit process. On the other hand, it is appropriate to avoid and minimize impacts on-site and to use other forms of mitigation to reduce adverse environmental effects of nationwide permit activities to the minimal impact level. In summary, the net impact concept regarding the determination of minimal, is consistent with NEPA, the Army/EPA Mitigation MOA and the section 404(b)(1) Guidelines as they pertain to general permits.

After considering the comments received on Mitigation Options, we have determined that a modified version of Mitigation Option 2 is appropriate for the nationwide permit program. DE9 should use the following procedure in evaluating nationwide permit proposals that might require a mitigation analysis prior to determining whether the proposed activity is authorized by a particular nationwide permit.

In reviewing an activity under the notification procedure, the DE will first determine whether the activity will result in more than minimal adverse environmental effects. The prospective permittee may, at his option, submit a proposed mitigation plan with the predischarge notification to expedite the process, and the DE will consider any optional mitigation the applicant has included in the proposal in determining whether the net effect of the proposed work is minimal. The DE will follow the notification procedures and will consider any comments from Federal and state agencies concerning the need for mitigation to reduce the project's adverse environmental effects to a minimal level. If the DE determines that the activity complies with the terms and conditions of the NWP, he will notify the nationwide permittee and include any conditions he deems necessary.

If the DE determines that the adverse effects of the proposed work are more than minimal, then he will notify the prospective permittee either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; or (2) that the project is authorized under the nationwide permit subject to the permittee submitting a mitigation proposal that would reduce the adverse environmental effects to the minimal level. This mitigation proposal must be approved by the DE in writing prior to commencing work. It will be optional whether the DE notifies the Federal and state resource agencies of the mitigation proposal. These agencies will submit their comments on what they consider to be appropriate mitigation in their response to the original predischarge notification. The DE will not be required to commence a second 30-day notification procedure. If the net adverse environmental effects of the project (with the mitigation proposal) are minimal, the DE will provide a timely response, to the applicant informing him that the project can proceed under the terms and conditions of the nationwide permit.

DEs are encouraged to provide information in appropriate circumstances to the public on what they will normally consider to be appropriate mitigation for determining what constitutes minimum adverse environmental effects in certain situations and/or for certain wetland types.

Several commenters supported mitigation banking and the trust fund concept, while several other commenters objected to one or both concepts. One commenter requested that clear guidelines should be required for the use of mitigation banks or trust funds. Another commenter suggested that regional mitigation

banking strategies should be developed. Several commenters indicated that mitigation banking should only be considered as a last resort after minimization, restoration, creation and enhancement have been exhausted. One commenter recommended that monitoring and utilizing evaluation methodologies should be performed regularly to account for losses and gains at banks. Finally one commenter favored mitigation banks because they are better than having numerous small wetland mitigation projects.

We believe that mitigation banking and utilizing trust funds are acceptable methods of mitigating for adverse impacts that might result from the use of nationwide permits. Due to the minor nature of adverse environmental effects caused by activities authorized by nationwide permits, both of these concepts are excellent methods of mitigating for numerous small projects. Furthermore, appropriate utilization of mitigation banks for numerous small discharges is better for the environment because mitigation banks can result in large blocks of contiguous wetlands that perform many functions. Appropriate methods of utilizing these concepts should be determined regionally, although we expect to provide further national guidance in the future.

### **Need for EIS**

A few commenters felt that the nationwide permit program as a whole is a major Federal action significantly affecting the quality of the human environment and that an EIS should be prepared. Some felt that all or some of the nationwide permits would result in more than minimal adverse environmental effects, and that the Corps had no evidence to support its preliminary determination otherwise. One commenter was concerned that secondary impacts have not been considered. In response, we have made a final determination that this action does not constitute a major Federal action significantly affecting the quality of the human environment. In addition, environmental documentation has been prepared for each proposed nationwide permit. This documentation includes an environmental assessment and, where relevant, a section 404(b)(1) Guidelines compliance review. Copies of these documents are available for inspection at the office of the Chief of Engineers and at each Corps district office. The NEPA documents demonstrate that the NWP's comply with the requirements for issuance under general permit authority. This includes consideration that the nationwide permits which may have a potential to cause more than minimal, adverse effects on the environment have been conditioned to require notification to the DE. In this way, we have insured that activities will not occur under the NWP's which would cause more than minimal adverse effects on the environment. Secondary and cumulative impacts have been considered in the documentation.

### **Nationwide Permits**

1. Aids to Navigation. One commenter requested that this NWP be conditional to comply with its state CZM plan. Another commenter requested that pre-discharge notification be added to this NWP so that applicants could be advised that a permit is required from that State. 33 CFR 330.4(a)(2) states that the NWP's do not obviate the need to obtain other Federal, state, or local authorizations required by law. We disagree that there is a need to add further conditions. As such we have retained the proposed wording.

2. Structures in Artificial Canals. One commenter suggested that the term "artificial canal" is interpreted by some to include channelized natural areas and these should be clearly concluded in the proposed language. Another commenter supported limiting the NWP to structures serving only single-family residences and suggested that structures which interfere with water circulation be excluded. Another commenter stated that artificial canals may support important habitats for fish and wildlife, and suggested that the NWP should state that structures

that may directly impact vegetated wetlands or productive water bottoms are not authorized.

It is a valid concern that the term artificial canal may be interpreted by some to include channelized natural areas. However, we believe that our district personnel will have the resources to distinguish between the two. In accordance with 33 CFR 322.5(g) structures in previously authorized canals would have been considered under applications for the original canal work. In grandfathered canals or in cases where structures may not have been considered, the District Engineer may use discretionary authority to evaluate structures if more than minimal impacts are anticipated. Therefore, we do not find it necessary to limit structures to those only serving single family residences. General condition 4 of appendix A to part 330 states, in part, that "no activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody. We believe that this condition will ensure that adverse impacts to aquatic life will not occur or if they may occur will be a basis for discretionary authority by the DE.

It is a valid concern that the term artificial canal may be interpreted by some to include channelized natural areas. However, we believe that our district personnel will have the resources to distinguish between the two. In accordance with 33 CFR 322.5(g) structures in previously authorized canals would have been considered under applications for the original canal work. In grandfathered canals or in cases where structures may not have been considered, the District Engineer may use discretionary authority to evaluate structures if more than minimal impacts are anticipated. Therefore, we do not find it necessary to limit structures to those only serving singlefamily residences. General condition 4 of appendix A to part 330 states, in part, that "no activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody. We believe that this condition will ensure that adverse impacts to aquatic life will not occur or if they may occur will be a basis for discretionary authority by the DE.

3. *Maintenance*: We received a wide range of comments on this proposed nationwide permit. While a few commenters objected to this nationwide permit stating that it was too broad, others commented that it was too restrictive. However, the majority of comments were generally supportive of our proposed changes. Many favored the clarification of "currently serviceable" to allow two years for the repair or replacement of those structures and fills damaged or destroyed by storms, fire, floods or other discrete events. Several commenters indicated that the proposed NWP's contained confusing language and requested that we define or clarify the terms "current safety standards", "substantial change", "minor deviations" and "within the past two -years". We agree that the two-year time limit and the term "substantial change" may have been confusing to some so we have reworded the provision for the two-year time limit for repair or replacement for certain structures and fills to clarify our intent, and we have deleted the term "substantial change". However, experience has shown that all structures and fills require maintenance periodically. As a part of this maintenance effort it is important to note that improvements in technology and concerns for public safety warrant minor deviations for repair and replacement activities. As such, we have retained the terms "current safety standards" and "minor deviations" to provide the flexibility necessary for this nationwide permit to keep pace with construction technology and public safety. As with all nationwide permits, activities performed under this nationwide permit must comply with the terms and conditions of the nationwide permit. Further, it should be noted that the DE has the authority to further modify or restrict this nationwide permit or to assert discretionary authority over any specific activity where the adverse environmental effects are more than minimal.

4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities*: As a part of the proposed modification of this nationwide permit, we

were seeking comments on whether to add small aquaculture activities to this nationwide permit. In response to this, we received many comments that objected to the addition of small aquaculture activities to this nationwide permit, while other commenters, including some state agencies requested that we define this term before we seek public comments. However, a few commenters suggested that we include small-scale shellfish aquaculture activities since this activity has a long and successful tradition. We agree that traditional clam and oyster farming and harvesting activities have only minimal adverse environmental effects. In fact, these activities themselves are environmentally sensitive and are dependent upon a healthy aquatic environment for their continued success. As such, we have added shellfish seeding to this nationwide permit provided this activity does not occur in wetlands or vegetated shallows. However, after reviewing the comments we received in response to the term, "small aquaculture activities", we have decided not added other aquaculture activities to this nationwide permit. However, we believe that these types of activities can be accomplished in most cases with minimal adverse effects on the environment, including the aquatic environment, and may be appropriate for a regional general permit under certain conditions.

5. *Scientific Measurement Devices.* Most of those who commented on this permit agreed to the added activities. A few were concerned that there was no description of what would be considered as a "small" weir or flume, and structures might be permitted that would interfere with migratory fish. To address these issues we have limited the quantity of fill for small weirs and flumes to 25 cubic yards consistent with the limits imposed by nationwide permit 18. Also we have required a notification on those small weirs and flumes requiring a discharge of more than 10 cubic yards of fill material. Such notification requirement should provide the opportunity for a review of those activities large enough to affect migratory fish. Furthermore, general condition 4 has been modified to reduce potential disruption of migratory fish.

6. *Survey Activities:* Some of those commenting misunderstood that the nationwide permit specifically does not authorize discharges associated with drilling, roads, and well pads. A second concern was killing aquatic organisms, especially endangered species, by the blast shock during seismic tests. The NWP is clear that drilling, roadway and well pads are not authorized. The district engineer must be guided by the presence or absence of endangered species habitat in his consideration to regionally condition or take discretionary authority over seismic test operations involving discharges. General condition II requires that the permittee notify the DE if any listed species or critical habitat might be affected or is in the vicinity of the project. In such cases, no work shall begin on the activity authorized by the NWP until the permittee is notified by the DE.

7. *Outfall Structures.* Several commenters recommended that this nationwide permit should not apply to, activities exempt under NPDES, such as some stormwater outfalls, or in states that have not assumed responsibilities under NPDES from the EPA. Others stated that review of outfall structures' under both NPDES and this nationwide permit were negligent in recognizing the requirements for review under the NHPA. It was recommended that the Corp obtain clearance from the appropriate SHPO prior to any written nationwide permit verification.

In response to the above comments, we refer to the "notification" procedure required for this NWP. The DE may add conditions on a case-by-case basis for any activity where it is determined that conditions are necessary to satisfy the terms and conditions of the nationwide permit. Further, general condition 12 requires the permittee to inform the DE if the authorized activity may adversely affect any historic properties. Where such properties may be affected, the permittee may not begin work until the DE has satisfied the procedures at 33 CFR 330.4(g).

A few commenters agreed with the proposed revisions to this NWP, since it would authorize outfalls, previously authorized in compliance with, or otherwise exempt from NPDES.

Some commenters objected to the advance "notification", as they felt it to be a duplication of reporting systems since the Corps is presently notified of pending NPDES, permit applications. Of these commenters, one also objected to the DE's ability to add conditions without division approval.

Many commenters objected to the proposed revisions for this NWP. The stated concerns included: a lack of citing criteria, no design specifications for the outfall structure itself, or associated construction methodologies; reliance on NPDES regulation is inappropriate since it focuses primarily on impacts associated with effluent, and does not satisfactorily review activities subject to section 404 regulations; application of the section 404(b)(1) Guidelines should be required since they are not addressed under NPDES regulations. Further, concern was expressed over impacts relating to structures, fills, and effluent discharges into special aquatic sites.

We believe that the incorporation of specific design criteria for outfall structures in the NWP would be impractical, due to the variability in the size of structures, preparatory work required and construction materials utilized. However, the concerns raised by these comments can be addressed through the required notification procedure at § 330.1(e). Under the notification procedure the DE will ensure that the activity complies with the terms and conditions of the NWP and further, that the adverse impacts on the aquatic environment, and other aspects of the public interest are individually and cumulatively minimal. It is the responsibility of EPA pursuant to section 402 of the Clean Water Act to regulate the effluent of outfall structures. The Corps has responsibility for those activities associated with the construction of these structures. These activities can be effectively regulated by this i~ through the notification procedure, which does address construction impacts to special aquatic sites. We have considered all comments received in response to this nationwide permit and have retained the wording as proposed.

8. *Oil and Gas Structures.* Many commenters objected to this NYVP on the basis of general environmental concerns associated with oil drilling structures. Others suggested that this NWP not apply in sensitive areas such as wetlands, riverbeds, mudflats, and marine sanctuaries. One commenter supported this NWP but suggested that notification procedures be implemented.

This NWP authorizes oil and gas structures only within areas leased for such purposes by the Department of Interior, Minerals Management Service. In addition to the Corps NEPA documentation for this NWP, the Service prepares NEPA documentation before issuing a lease which also addresses the environmental impacts of oil drilling. In accordance with 33 CFR 322.5(n), the Corps review is limited to the effects on navigation and national security. Consistent with this review we are therefore retaining the proposed wording of the paragraph to exclude established danger zones and Corps/ EPA Dredged Material Management Areas.

9. *Structures in Fleeting and Anchorage Areas:* Two commenters inquired whether "structures" include filling activities under section 404 authority. Only section 10 structures which do not involve filling activities are authorized by this NWP. Other NWPs (i.e. NWP 18, NWP 25, etc.) may be applicable if the terms and conditions of those NWPs are met. One commenter asked if NWP 9 applied to established or proposed to be established fleeting or anchorage areas. NWP 9 applies to all fleeting or anchorage area that have been established by the U.S. Coast Guard. One commenter expressed concern that no limits were proposed on the size and design of the structures. We disagree that size and design limits are needed. NWP General Condition 1, Navigation, will not allow any structures that would cause more than a minimal adverse effect on navigation.

10. *Mooring Buoys:* Two commenters suggested that restrictions be placed on water depths and type of anchors to be used under this NWP. Another commenter listed specific sensitive regional areas that should be excluded from the NWP or have mooring limits established. Two commenters expressed concerns about cumulative

impacts from the installation and/or use of mooring buoys. Comments regarding specific areas that should be excluded or other special restrictions that are needed to protect special areas such as shellfish beds or submerged aquatic vegetation can, and should, be more appropriately dealt with by the addition of regional conditions. Based on our experience, we do not anticipate that the mooring buoys and anchorage systems will have more than minimal adverse effects either individually or cumulatively.

*11. Temporary Recreational Structures.* Several commenters suggested that the terms "temporary" and "seasonal" should be replaced with a specific time limitation and that the size of structures be more clearly defined. Several commenters favored excluding the use of the NWP in shallow water areas or vegetated shallows. Two commenters recommended that the NWP be used only for discrete events.

Two commenters expressed concerns about navigation safety and with other water related recreation. Several commenters indicated that state approval must be obtained for these structures. We disagree with the approach of placing time limitations on temporary or seasonal structures because of the seasonal variations for recreation from region to region. Regional conditions can be developed for the NWP and/or District Engineers may use discretionary authority on a case-by-case basis if duration, structure size or location require such action. Limiting the NWP to discrete events would greatly reduce its utility. In appendix A to part 330, general condition C. I states that no activity may cause more than a minimal adverse effect on navigation. Section 330.4(b)(2) states that NWPs do not obviate the need to obtain other Federal, state, or local authorizations required by law.

*12. Utility Line Backfill and Redding.* We are clarifying that this NWP does not apply to tile or similar drainage works (although it does apply to pipes conveying drainage collected from another area) and that material resulting from trench excavation can be temporarily sidecast into waters of the United States, provided there is little or no flow to disperse the excavated material. Also all exposed slopes and streambanks must be stabilized immediately upon completion of the utility line. In addition, the area of waters of the United States that can be disturbed must be limited to the minimum necessary to construct the utility line. We have received frequent questions as to whether this NWP was restricted to crossing-type situations, as is typically the case in NWP 14. There is nothing in the language of the NWP to restrict use of this NWP to crossings, nor was there any intention to do so. Adverse environmental effects will be minimized by compliance with the terms and conditions of the NWP, including the requirement to restore the area to its preconstruction contours and the requirements to avoid and minimize discharges of dredged or fill material (to the maximum extent practicable). Furthermore, in wetlands the top 6" to 12" of the trench should generally be backfilled with topsoil from the trench.

Many commenters objected to the six months that sidecast material may remain in waters of the United States and suggested shorter periods ranging from 14 to 60 days. We considered that these suggestions have some validity and have reduced temporary sidecasting to three months. Furthermore, considering the variation in terrain conditions throughout the country we encourage the DEs -to further address this issue, as appropriate, with a regional condition.

Many commenters-requested that a PDN should be required for this NWP based on the fact that these could be major projects affecting large areas of wetlands of varied types with the potential for significant impacts to fish and wildlife, endangered species, or water quality.

We believe that major utility lines will have little opportunity to escape our notice and this fact will allow the DE to assert discretionary authority, where appropriate. This will minimize the type of losses described by the commenters. This would also apply to several comments requesting a limit on the size/length of the project that may be considered under this NWP.

Several commenters noted the potential for a french drain effect caused by backfill being more permeable than the native soil which may drain wetlands. This appears to be a valid concern. However, we believe this condition would be controlled through normal construction techniques. Further, this condition should normally cease after the disturbed soils have an opportunity to settle and compact. It should be further noted that this problem as well as other difficult soil management characteristics will vary throughout the country and can be easily addressed by regional conditions, if necessary.

Several commenters suggested that sidcasting in special aquatic sites be prohibited. We believe that the NWP, as written, has the affect of minimizing the adverse effects to special aquatic sites. This, combined with the ability of the DE to condition the NWP and assert discretionary authority, assures minimal impact.

Many commenters had concern over the requirements to replace the top 6" to 12" of topsoil. In approximately equal numbers they either considered it impractical to strip, store and retrieve this thin veneer of soil or they wished that at least a minimum of 12" should be replaced with even more stringent conditions for protecting stored soil material from erosion, dehydration etc. We believe that 6 to 12 inches is sufficient for restoration of a wetland condition. However, the permittee may replace more than 12 inches at his option.

Several commenters requested that this NWP be modified to include overhead utility lines. Overhead utility lines have traditionally been installed on towers or similar structures that do not involve discharges of dredged or fill material into waters of the United States. However, discharges associated with the construction of such structures may be authorized by one, or more, other nationwide permits. To assure adequate evaluation of navigation and other factors of the public interest, we have not expanded ' this nationwide permit to include structures in Section 10 waters.

*13. Bank Stabilization:* Many commenters favored the expansion of the NWP 13, believing the environment was reasonably protected. However, some commenters were opposed to expanding the NWP 13. These commenters were concerned about piecemeal cumulative impacts, loss of special aquatic sites, use of unsuitable materials, such as asphalt, car bodies, and trees, secondary impacts to adjacent upland riparian areas, and lack of need. Many commenters recommended that vegetative shoreline stabilization techniques be encouraged in lieu of bulkheads, while a few recommended that NWP 13 only allow the use of rip-rap. Some commenters recommended that more than I cubic yard of discharge and some sparse vegetation impacts be allowed, while others favored limiting the NWP 13 to less than 200 feet.

Shoreline stabilization devices and methods (e.g., bulkheads, seawalls, riprap, vegetative plantings) are typically constructed to prevent the loss of upland property from erosion. However, the rate of erosion can vary substantially from shoreline to shoreline. In some cases there may be no apparent erosion. In other cases there may be accretion. In low wave energy areas, wetland vegetation often exists and functions as a shoreline stabilizer and erosion prevention. In view of the above, we are retaining the proposed wording of the paragraph. The commenters' concerns should be alleviated by the terms and conditions which prohibit discharges in special aquatic sites, including wetlands, the use of unsuitable and toxic materials, and the requirement that the proposed stabilization be the minimum necessary. In some cases, where the impacts may be more than minimal (i.e., shorelines greater than 500 feet, and/or greater than I cubic yard per linear foot of shoreline), notification to the DE is required as per the general condition in part C (13). The intent is to accommodate a wide range of users, techniques and materials with minimal time delay and maximum protection of valuable wetland resources.

*14. Road Crossing.* Many commenters indicated that this NWP should be eliminated or reduced in scope for a number of reasons including the following: it is not

consistent with section 404(e) of the Clean Water Act, the section 404(b)(1) guidelines, also: mitigation MOA, should include notification- for all crossings; lacks careful consideration of the term "single and complete project"; does not address low flows in the movement of aquatic organisms; lacks compensation for lost flood storage; a lack of resource agency review; cumulative and secondary impacts are not adequately addressed; and that it should include mitigation for all wetland acreage loss.

Several commenters expressed support for this NWP, stating that there should be no limit on the length or acreage of a crossing. They further indicated that mitigation should not be required and that the delineation of special aquatic sites would be burdensome.

We have carefully considered these comments and have decided to modify this NWP to assure that projects authorized by this NWP have only minimal adverse effects on the environment. We have revised the language of this NWP to provide for the maintenance of low flow and the movement of aquatic organisms. The notification procedures have been revised to include a review by the appropriate resource agencies. Based upon our evaluation of this NWP, we believe it is consistent with the Clean Water Act.

15. *U.S. Coast Guard Approved Bridges.* Several commenters expressed concern over the absence of limits on the size of fills that may be addressed by this NWP. Based on the requirement for notification on this NWP and the ability of the DE to assert discretionary authority should the nature of the impacts warrant, it was decided not to impose such limits.

The resource agencies should be included in the notification process. This has been changed to include the resource agencies in the notification process.

Several commenters expressed concern over the inclusion of approach fills in this NWP. It was our belief that the Coast Guard permit process 'I combined with the DE's independent review of the required notification would provide adequate safeguards and ensure minimization of impacts to special aquatic sites, However, upon further consideration, we believe given the potential impacts of some approach fills it is more appropriate to conduct an individual permit review. Accordingly, approach fills have been deleted from NWP 15.

16. *Return Water From Upland Contained Disposal Areas.* Some commenters requested that the states should be given an opportunity to issue generic water, quality certification, as well as a site-specific certification ~ or waiver. Based upon the Corps' experience and knowledge of dredging and disposal operations, we believe that technology is readily available to control the quality of return water from contained upland disposal sites. Any adverse environmental effects resulting from this type of activity would be minimal provided the effluent meets established water quality standards and adequate monitoring of the activity is performed to assure compliance with these standards. With this in mind, it was our intent with the proposed language of this NWP to clearly provide the states ample opportunity to review each activity under this NWP authorization to assure compliance with the state's standards. This is clearly a requirement in those states that have denied water quality certification for this NWP authorization. However, in some Corps districts the standards for such effluent have been established jointly by the Federal and state agencies and are readily available for public information. In cases, where water quality standards are established, we see no need to require additional state review unless the state has denied certification for the NWP authorization. As such, we have deleted the provision requiring a sitespecific certification or waiver under section 401. However, we reiterate that a prospective permittee must receive an individual certification or waiver from the state in those states that have denied water quality certification for the NWP authorization.

Several commenters indicated that this NWP was not appropriate since it would not allow adequate review of containment design, quality of the effluent and the potential to cause irreversible damage. We believe that these issues will be

thoroughly addressed, as they have been in the past, by the state water quality certification process.

One commenter suggested that since dredging and upland disposal are considered "de minimis" and do not require 401 certification, this activity should not require authorization. This NWP is responding to the return of effluent to waters of the United States and is not intended to address dredging. The effluent has been administratively defined as a discharge of dredged material.

A few commenters requested that wetlands which develop on disposal sites should not be considered jurisdictional wetlands. We do not consider that such a condition is appropriate. Rather, such cases should be evaluated on a case by case basis to determine whether jurisdictional wetlands are present. In accordance with our regulations, such areas generally are not jurisdictional wetlands unless the disposal operation has been abandoned.

*17. Hydropower Projects.* Many commenters expressed concern with regard to the expansion of this NWP to include all hydropower projects authorized by the Federal Energy Regulatory Commission (FERC), noting that very large projects with the potential for major impacts could be authorized without adequate review. There was considerable concern that the FERC process was not compatible with the Corps process. Concern was also expressed that the broad nature of the types of projects that could be authorized was contrary to the intent of the nationwide permit program to simplify permitting of minimal impact activities of a similar nature. Several commenters had expressed support for the expanded NWP considering that it would eliminate regulatory duplication and that the FERC process would adequately address environmental concerns. In addition, there were a variety of other comments recommending conditions or modifications of the proposed NWP.

After careful consideration of all comments, we have decided to reissue this existing NWP with only minor changes. In addition to the Corps NEPA documentation for this NWP the FERC also addresses environmental concerns for those small hydropower projects at existing reservoirs, which are covered by this NWP. We have expanded this NWP to include those projects which FERC has granted an exemption from licensing pursuant to section 408 of the Energy Security Act of 1980 and section 30 of the Federal Power Act, as amended. This exemption can apply to hydropower projects up to 5000KW. We have also included hydropower projects, at existing reservoirs requiring individual licenses, up to 5000KW, the same limit that applies to exemption projects. We have retained the notification requirement for this NWP, since we believe that a notification requirement for small hydropower projects under the revised limits may be necessary to ensure that some of these projects have minimal adverse effects. We believe that this expansion of the NWP is only minor and only those activities with minimal adverse environmental effects can be authorize by this NWP.

*18. Minor Discharges.* Many commenters objected to the expansion of NWP 18 from 10 to 25 cubic yards; including fill in wetland areas and other special aquatic sites; and eliminating it stream diversion restriction. Many other commenters requested that greater quantities of material (over 25 cubic yards) or unlimited quantities be authorized, while restricting use of the NWP to 1/10 acre in special aquatic site including wetlands. We disagree with any changes to the quantities specified in the proposed regulations because we believe they are reasonable levels. We are requiring notification for all proposals over, 10 cubic yards and for all projects involving special aquatic sites including wetlands. DEs will be able to exert discretionary authority or add appropriate conditions to reduce any adverse impacts in special aquatic site or determine the project to have more than minimal impacts. We have changed the wording of this NWP to clarify that discharging material for the purpose of stream diversion is prohibited. One commenter requested a restriction that upland property or fastland couldn't be created by this NWP. We disagree that such a restriction should be included. Many commenters requested that the notification requirement be dropped because the actions are minimal by definition of an NWP. We disagree

because a DE should be given the opportunity to review proposals over, 1 cubic yards and those in special aquatic sites. Several commenters requested that mitigation be required in special, aquatic sites and that "flooded" be defined. Mitigation should be required if it is deemed necessary by a DE. See section 330.2 for more information on flooding. Finally, several commenters requested more uniformity in the quantities and acreage impacted between the various NWPs such as *NWP 14, 18, 19* and *26*. We agree and, have adjusted *NWP 19* to be consistent with *NWP 18* by increasing the quantities of *NWP 19* to 25 cubic yards. We have made one additional change in wording by combining the second sentence of "d" with "b", so that it is clarified that the 1/10 acre limit applies to the footprint of the discharge as well as the area flooded or drained. We do not agree that the 1/10 limit should be changed.

*19. Minor Dredging:* Several commenters supported the proposed increase in the quantity limitations from 10 to 20 cubic yards while several other commenters also favored increasing quantity and making the yardage limitations consistent with *NWP 18*. Several commenters recommended that dredging should not be allowed in special aquatic sites. A few commenters also expressed concerns about potential sediment toxicity and requested testing of the sediments prior to dredging. Three commenters indicated that they believe this proposed *NWP* involves a discharge and that section 401 water quality certification should be required.

We have reviewed the comments and agree that making the volume limitations of *NWPs 18* and *19* consistent has merit. The maximum quantity of dredging authorized by this *NWP* has been increased to 25 cubic yards. We agree that some types of special aquatic sites such as coral reefs, submerged aquatic vegetation beds, and wetlands as well as anadromous fish spawning areas should be excluded from this *NWP* and to further ensure the impacts will be minimal we are including activities that would degrade such sites through siltation in this exclusion. However, we believe that dredging quantities of 25 cubic yards or less in other special aquatic sites (i.e., riffle and pools, sanctuaries, and mud flats) would result in only minimal adverse effects on environment, provided the activity complies with the terms and conditions of the *NWP*. With the exclusion of coral reefs, submerged aquatic vegetation beds, and wetlands, we believe that increasing the dredging limitation to 25 cubic yards would still result in only minimal adverse environmental effects both individually and cumulatively. Areas containing contaminated sediments have generally been previously identified. We believe that this issue can be addressed through by a regional condition of this *NWP* or by activity-specific conditions required by the DE, if necessary. Regional conditions can be developed to exclude known contaminated areas (such as sites on the NPL) or to require testing in areas of suspected contamination. Furthermore, we are encouraging DEs, where there is reason to believe the material to be dredged is contaminated, to consider exercising discretionary authority. The assertion that "de minimis" soil movement associated with dredging operations constitutes a discharge under section 404 is specifically addressed in the Corps' regulations at 33 CFR 323.2. Since 1977, the Corps has consistently held that section 404 does not apply to incidental soil movements during normal dredging operations. In order to be more consistent with *NWP 18*, we have changed the title of this *NWP* to "Minor Dredging".

*20. Oil Spill Cleanup:* We have determined, based on our evaluations, that fills discharged under this *NWP* are very small, infrequent, and at widely scattered, locations. Therefore, the benefits to be accrued from expeditious oil spill, cleanup far outweigh the impacts resulting from minor fills associated with cleanup operations, in addition to compliance with Federal regulations at 40 CFR 300 and 40 CFR 112.3 and a State Contingency Plan (if one exists), *NWP 20* also requires approval by the Regional Response Team, which further safeguards implementation of cleanup operations on a case by case basis. Further, we believe those parties responsible for overseeing implementation of the National Oil and Hazardous Substances Pollution Contingency Plan and the Spill Control and

Countermeasure Plan insure environmental compliance and reestablishment of pre-existing conditions.

While most commenters agreed with the revisions proposed for NWP 20, one commenter recommended that State representatives be contacted, regarding concurrence with State contingency plans, while another commenter similarly recommended that cleanup be in compliance with State and Federal Contingency Plans. We agree with this recommendation as it acknowledges the potential requirement for compliance with the State Contingency Plan, if one exists, without overburdening the application with compliance under the terms and conditions of the NWP. Therefore, we have reworded this NWP to include any State Contingency Plan.

21. *Surface Coal Mining Activities*. Many commenters expressed concern that the Department of the Interior's Surface Mining Control and Reclamation Act (SMCRA) environmental procedures were inadequate as the procedures did not afford protection to existing wetlands and other aquatic resources and therefore opposed this NWP. There were concerns that surface mining projects resulted in large impacts to wetlands and water quality. A few commenters recommended that impacts to special aquatic sites not be authorized by the NWP. One commenter stated that the NWP should be revised to allow impacts to special aquatic sites where they constitute only a minor portion of the total mining area or within other threshold limitations. Some commenters were concerned that Section 106 of the National Historic Preservation Act was not being complied with on these mining activities.

Several commenters believed that the Department of the Interior's Office of Surface Mining and states with approved programs were capable of protecting wetlands and aquatic areas and opposed the notification and wetland delineation requirements as unnecessary duplication of effort. One commenter proposed that the notice under 30 CFR 773.13 could satisfy the notification requirement or that the Corps should notify DOI after final rule and urge them to amend their rule to avoid duplication. Some commenters requested that coordination with the resource agencies be required.

Other commenters recommended 1:1 mitigation of functions and values for aquatic resources, requiring notification for mining activities impacting greater than one acre of waters of the United States, and revising the title of the NWP to "Surface Coal Mining Activities".

In addition to the Corps NEPA documentation for this NWP the Department of the Interior's SMCRA program also addresses environmental concerns for activities under its program. The SMCRA program sets up requirements for the use of "best technology currently available" to minimize impacts to fish and wildlife resources and water quality. Wetlands are defined as in the Corps regulations. Also, wetlands and riparian vegetation are specifically designated in SMCRA regulations as resources for which protection is required. DOI and SMCRA permittees must consider impacts on historic properties, endangered species, and coordinate with the U.S. Fish and -Wildlife Service under the FWCA. Also, in accordance with SMCRA other Federal and state agencies are provided notification well in advance of the applicant's notification to the Corps. Therefore, we believe additional coordination with agencies would be unnecessary duplication. However, we believe the 30-day notification and delineation of affected special aquatic sites, including wetlands, are necessary to insure that the DE has the opportunity to assert discretionary authority when he believes impacts are more than minimal and mitigation is not proposed to reduce these impacts, We believe the amount of mitigation that may be required should be determined by the DE. The DE is better able to determine impacts and appropriate and practicable mitigation for his geographical region -We believe revising the title of the NWP to "Surface Coal Mining Activities" would provide clarification concerning activities authorized, and we have adopted that recommendation.

22. *Removal of Vessels:* One commenter requested that the terms "minor fills", "temporary structures", and "structures", be defined and one commenter suggested that the definition of "minor fill" be the same as the requirements of § 330.6(B)(18). Several commenters were pleased to see the requirement to coordinate to ensure compliance with the National Historical Preservation Act (NHPA) and the State Historic Preservation Officer (SHPO). One commenter suggested that vessels greater than 50 years of age be evaluated, in consultation with the SHPO, for listing in the National Register and those eligible or listed on the National Register could be evaluated as an individual permit. One commenter requested that the NWP be added to the list of activities requiring pre-discharge notification, since affected parties may not receive sufficient notification that a state permit may be needed.

We do not agree the terms "minor fills", "temporary structures," and "structures" require defining since these terms are intended to be subject to the DE's interpretation on a case-by-case basis as a project is being evaluated. The criteria described in § 330.6(B)(18) for minor discharges of dredged or fill material could be used as a guide in evaluating the environmental impacts, but is not meant to be a definition of "minor fill". Requiring the applicant to check the Register of Historic Places to determine if the vessel or structure is listed or eligible for listing prior to removal should ensure against unauthorized removal. We do not agree that vessels at least 50 years of age should not qualify for the NWP and be evaluated as an individual permit. Any vessel listed or eligible for listing in the National Register may be removed under the NWP as long as they have complied with the NHPA and consulted with SHPO. We do not agree that a pre-discharge notification procedure should be added to ensure the applicant complies with state permit requirements.

23. *Approved Categorical Exclusions:* Several commenters were opposed to the proposed NWP. A few commenters indicated that the NWP allows Federal agencies to circumvent the environmental review process and suggested that their activities should be evaluated under individual permit review. One commenter requested that the NWP language clearly indicate that the Chief of Engineers does not approve another agency's Categorical Exclusion but rather approves application of the NWP. A few commenters indicated that the notification requirement is self-defeating, unnecessary and negates the utility of the NWP. Several commenters favored excluding fill in special aquatic sites.

The establishment of categorical exclusions is consistent with the Council on Environmental Quality Regulation for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR part 1500). Prior to an agency's categorical exclusion being approved for inclusion in the NWP, the Chief of Engineers will conduct a public interest review by soliciting public comment. Not all agency categorical exclusions are accepted under this NWP. In some cases only parts of categorical exclusions are accepted or they may be accepted with certain conditions for approval under the NWP. We can and have required notification to DEs where appropriate and necessary for specific categorical exclusions. However, we do not believe it is appropriate to require notification across the board and therefore have deleted the last paragraph of the proposed NWP, which requires notification for fills in special aquatic sites, including wetlands.

24. *State Administered Section 404 Programs:* Although only two comments were received, both commenters supported the NWP 24. One commenter requested that the Corps retain the right to veto or modify the State Administered section 404 permits. This NWP authorizes only section 10 activities within the jurisdiction of the state 404 program (i.e. historic navigable waters). Therefore, it is inappropriate for the Corps to modify, suspend, or revoke individual state-administered section 404 permits. However, it is noted that the EPA has the right to conduct programmatic reviews of the state-administered section 404 programs.

25. *Structural Discharge*: Several commenters expressed support for this NWP as a means of reducing regulatory burdens on the public. Several commenters requested that this NWP specifically exclude non-water dependent structures, except those listed. We believe the wording restricting this NWP to structural members for standard pile supported structures, with the exclusions already in place are adequate.

A few commenters requested an upper limit on the area of impact authorized under this NWP be included. Given the limited actual footprint of impact typical of the types discussed in the NWP we consider that such a limit is not required.

A couple of commenters requested that the structures referenced in RGL 90-8 be authorized in this NWP. The appropriate inclusions from previous RGLs have been incorporated in these NWP's and reflect the experience gained in implementing the program in the past. Those not included were considered inappropriate, for an NWP.

A couple of comments requested the bulkheads and fill in special aquatic sites be excluded from this NWP. We believe that the NWP, as written, excludes actual fill in special aquatic sites and that bulkheads are not standard pile supported structures.

28. *Headwaters and Isolated Water Discharges*: **In the Federal Register** notice of April 10, 1991, we stated that we were considering changing the acreage limits of NWP 26. Presently, discharges of dredged or fill material that cause the loss or substantial adverse modification of one to 10 acre of waters of the United States require predischage notification. Activities that affect less than one acre may proceed without notifying the Corps. We proposed 3 options for the acreage limit that would define when a predischage notification must be submitted, and7wi sought comments on these options. These options were:

Option 1: 1 to 10 acres.

Option 2: 1 to 5 acres.

Option 3: 1/2 to 5 acres.

There are other acreage limits that could have been adopted and the Corp sought comments on those as well.

A great many comments were received concerning the acreage limits appropriate for this NWP. Approximately half the commenters favored retaining the 1 to 10 acres stating that many projects, including those still in the planning stages, have relied upon the flexibility offered by the NWP. An equally large number of commenters favored reducing the acreage of this NWP stating that it represents an unacceptable cumulative loss of wetlands. Some commenters favored the total elimination of this NWP since, in their view, it does not conform with the provisions of section 404(e) of the Clean Water Act.

Based upon review of the comments and based on our experience and judgement concerning the potential for adverse effects on the environment associated with the various alternative we determined that the appropriate limits for this NWP at this time should continue to be one (1) to ten (10) acres subject to the predischage notification and requiring mitigation to ensure that adverse environmental effects are minimal. Activities that affect less the one (1) acre may proceed without notifying the Corps. Those that affect over 10 acres require authorization by an individual or regional general permit Mitigation cannot be used to lower the acreage limits (e.g., if a project affects 2 acres of wetland a prospective, permittee cannot create 1.1 acres to get below the 1 acre limit), The Corps will continue to monitor the effects of NWIP 26 and the appropriateness of the acreage limits as well as the categories; of waters that are appropriate for coverage under NWP 20, if, in the future, the Corps determines that lowering the acreage limits or eliminating categories of waters may be appropriate, the Corps will propose such changes for public comment. It must also be noted that the Division Engineers and District Engineers have, and will exercise, discretionary authority to require individual permits for activities in certain water of the United States such as high quality wetlands.

Many commenters recommended that the resource agencies be included in the notification process for this NWP. We have decided to solicit comments from the resource agencies during our notification process. This process is discussed in the preamble language at section 330.1(e). There were several recommendations for minor revisions to the language of this NWP and where they would simplify or clarify the meaning these changes were made.

The predischarge notification (PDN) process and the requirement to make an immediate determination of what constitutes a "loss or substantial adverse modification", has made use of this permit so complicated that it has defeated the purpose of this NWP; that is, to reduce regulatory delays and burdens on the public, to place greater reliance on state and local controls, and to free our limited resources for more effective regulation of other activities with greater potential for adverse effects on the aquatic environment. As a part of this regulation, we have modified the complex 20-day PDN process currently required for this NWP and replaced it with a simple 30-day PDN. Furthermore, we have modified the acreage measured from the "loss or substantial adverse modification" to the filled area plus flooded, excavated, or drained areas. These changes should reduce public confusion and make administration of this NWP simpler by making the determination of its general applicability clear-cut, while ensuring that large fills in these waters with greater than minimal adverse effects on the environment are not authorized by this NWP.

The term "filled area" refers to the area of waters of the United States actually covered by fill, and was adopted rather than the area of "substantial adverse modification," in permit. However, by including in the acreage measurement of NWP 26, waters of the United States that are, flooded, excavated, or drained, those projects that would cause a "substantial adverse modification" would no longer qualify for the NWP. The notification requirement would ensure that the D9 has the opportunity to consider such indirect impacts from the discharge. If the combined effect of direct and such indirect adverse impacts would cause more than minimal adverse effects on the environment, the DE will assert discretionary authority and not allow authorization under the NWP unless the prospective permittee elects to propose mitigation so that the adverse environmental effects would be minimal.

We believe that the activities authorized by this NWP will have only minimal adverse effects on the environment both individually and cumulatively, provided the terms and conditions of the NWP are satisfied. However, we recognize that there are circumstances where authorization of a specific activity under this NWP would not be appropriate. Examples of this type of situation may include certain types of wetlands or other aquatic resources, or aquatic resources in certain parts of the country, or generally, any areas where the Division or District Engineer may have concerns for the environment that are not satisfied by the terms and conditions of this NWP. In those cases, the Division or District Engineer should assert discretionary authority to add regional conditions or to revoke the NWP authorization for activities in such areas.

We believe that the Division and District Engineers are more familiar with the wetlands and other aquatic resources in their area and can best determine which of these should be subject to individual permit evaluations or regional conditions. On the other hand, we are encouraging districts that have wetland types of low value, where greater than ten (10) acres of fill would result in no more than minimal adverse environmental effects, or where the wetlands are adequately regulated by state or local agencies, to develop regional general permits for these areas.

We believe that our expanded basis for allowing District and Division Engineers to assert discretionary authority, the modified notification procedures, the requirement for mitigation, where appropriate, and the revised language for this NWP, will assure that only those projects with minimal adverse effects on the NWP. Moreover, we believe that providing the District Engineers with clear

message to protect the environment while maintaining the flexibility to use NWP n for acreage up to 10 acres, particularly in low value areas, is consistent with the Administration's desire to fully protect our environment with the least burden on the regulated public.

We have added a provision to NWP 26 which provides for certain subdivisions to be treated as a single and complete project for the purposes of determining the acreage limits of this NWP. This provision was discussed previously in the Preamble at Section 330.2(i).

*27. Wetland Riparian, Restoration and Creation Activities:* Many commenters opposed future discharges of dredged and fill material associated with reversion of a restored wetland on' private lands to its prior condition and use. Several commenters stated they believed these activities would result in a waste of time and money. We believe that allowing restoration of altered and degraded wetlands that might not have occurred without allowing the option of reversion to its prior use and condition is a good opportunity to increase aquatic habitat even if it would be temporary. We are of the opinion that many of these projects would not be reverted and therefore would provide increases, in permanent habitat over what presently exists. We also clarify that Federal surplus lands, Farmers Home Administration inventory properties and Resolution Trust Corporation inventory properties that are under Federal control prior to being transferred to the private sector are not subject to reversion to their prior condition under this NWP. Several commenters recommended that the Corps require the notification and wetland delineation requirements and conduct the monitoring and tracking of these actions. We believe that a notification requirement for this NWP would be unnecessarily burdensome since the activities authorized by this WP would be discussed in a contract between the Federal government and a landowner. We also believe that the monitoring and trucking associated with any future restoration or reversion is best left with the federal contract agency (*USFWS, USFS, SCS, BLM*),, since these agencies would possess greater knowledge of the site and the terms of the contract.

One commenter believed that wetland restoration projects would be difficult and complicated and recommended an individual permit be required for these activities. We do not agree with this comment because there have been many successful wetland restoration projects around the nation. One commenter stated concerns for the degradation and elimination of protected uses in wetlands associated with the U. g. Environmental Protection Agency's antidegradation policy and whether the NWP would apply to agreements in effect before the issuance of the final rule. We believe that the purpose of these restoration projects would not conflict with uses associated with EPA's anti-degradation policy. One commenter recommended only applying the NWP to activities involving 10 acres or less of wetlands. We believe this would greatly limit the participation and opportunity to provide enhancement of altered and degraded wetlands.

Many commenters recommended expanding the scope of the NWP to include wetlands restoration projects proposed by all Federal, state, local and private entities. We believe that all entities should be encouraged to participate in wetland restoration projects. We are concerned that expanding this NWP to all entities could provide for misuse since this is a relatively new regulatory approach to addressing these types of activities. However, we did review other Federal programs and believe it is appropriate to include the wetland and riparian restoration projects of the U.S. Forest Service (FS) and the Bureau of Land Management (BLM) under this NWP.

We believe the established procedures of the USFWS, FS, BLM and the SCS are appropriate for this NWP. The USFWS has restored approximately 55,000 acres of wetlands through activities associated with private land wetland restoration and protection initiatives since 1987 and is presently restoring wetlands on approximately 2,000 to 2,500 sites per year. Under the 1990 Farm Bill and other

associated private land wetland restoration activities approved by Congress, it is expected that the USFWS and the SCS will accomplish 8,000 to 10,000 wetland restoration projects per year. We would encourage other entities that are considering wetland restoration and creation projects to enter into a contact with the USFWS or the SCS, if applicable, for authorization under this NWP. We also encourage our DEs to develop regional general permits to reduce the regulatory burden and paperwork associated with evaluating other Federal, state, local and private wetland restoration projects.

A few commenters requested that tidal wetlands be included, particularly those tidal wetlands in Federal state and municipal ownership. The present programs of the USFWS, SCS, FS, and BLM apply primarily to non-tidal wetlands. As a result, we believe only 'non-tidal wetland restoration projects are appropriate at this time. Some commenters recommended that we include wetlands that have not been degraded or altered if subject to a USFWS or SCS contract. We do not believe it would be appropriate to expand the scope of this NWP to include wetland areas that are not altered or degraded. A few commenters suggested that the NWP would encourage mitigation banking and serve to meet the goal of no net loss of wetlands. We agree that an increase in wetland restoration activities may generate interest in mitigation banking. However, we do not believe that the activities authorized by this NWP can be considered a mitigation bank, since the restoration activities are generally for a specified period of time with a provision for reversion of the area, and further, the participating parties are generally compensated by the USFWS or SCS.

One commenter recommended expanding the scope to the creation of wetlands in uplands areas where discharges of dredged and fill material into waters of the United States were necessary for the creation. We agree with this recommendation to include wetland creation in certain upland areas. It appears to us that appropriate upland areas for consideration under this NWP would be cropland, pasture land, and other upland areas designated suitable by the USFWS and the Corps. We believe it would be appropriate to authorize discharges of dredged and fill material into waters of the United States associated with the creation of wetlands on above specified uplands and the future discharges of dredged and fill material associated with the reversion of the area to its prior condition and use, if subject to a contract with the USFWS, FS, BIM or SCS.

A few commenters recommended that the Corps define "binding wetland restoration contract", "altered", and "degraded" to prevent potential abuse of this NWP. One commenter stated that activities under this NWP should be coordinated, with the resource agencies. We believe the terms are clear when consideration is given to the wetland and riparian restoration programs of the USFWS, SCS, FS, and BLM. We believe that additional coordination with the resource agencies is unnecessary given the expertise of the agencies involved. Additionally, with the inclusions of riparian and upland areas we believe a more accurate title for this NWP would be "Wetland Riparian, Restoration and Creation Activities".

The term riparian has not been defined in this regulation. Since this term is only referenced in this NWP with applicability for those projects funded or proposed by the U.S. Forest Service, we have relied upon the definition developed by the U.S. Forest Service.

*28. Modifications of Existing Marinas:* Several commenters requested that notification be required to assure that proposed activities are indeed covered activities. Notification should be required by a regional condition if this warranted for a specific area. Two commenters requested that additional slips and docks formed from existing floats, with no additional surface area coverage, should be allowed. We disagree with this request because the intent is not to allow any additional slips or docks that could result in more moorage resulting in additional water quality and navigational or safety impacts. Several commenters objected to the use of this NWP in required mitigation areas. We believe that it would be appropriate to add a special condition to any individual

permit authorizing the marina and mitigation areas to prevent future impacts to such mitigation areas, if warranted. Few marinas contain such mitigation areas. Several commenters requested that the movement of fuel handling and sewage pump-out facilities be specifically prohibited from being authorized by this NWP. Again it would be more appropriate to regionally condition the NWP to prevent relocation of these facilities, if warranted. Two commenters objected because the use of this NWP might impact design and safety standards of previously authorized marinas. If problems occurred, a DE could use the modification procedure Section 330.5(d) to rectify the situation. Also NWP General Condition I on Navigation must be followed for the NWP to be utilized.

29. *Reserved*: A few commenters indicated that the reservation of NWP 29 was confusing. Some thought there was a "hidden agenda". (i.e., that we might issue an NWP without public review). We have been preparing the revisions to the regulations and the NWPs over the past 4 years. During that period we have considered many possible NWP's and deleted and added several NWP's for possible proposal. I avoid confusion, especially for record keeping reasons, we decided not to renumber those NWP's which were not affected. For the same reason we are renumbering the proposed NWP's that we are not issuing. In addition to NWP 29, those NWP numbers will be -reserved, as well. When we prepare new NWPs, they will be proposed at the reserved numbers and will go through the same public review process codified at 33 CFR 330.

30. *Reserved*

*Dewatering Construction Sites (Proposed as N141P 30)*: The activities proposed for authorization by this NWP are similar to the activities proposed for NWP 33 and so they have been combined.

31. *Reserved*

*Small Docks and Piers (Proposed as NWP31)*. Several commenters expressed concerns about potential cumulative impacts and opposed issuance of this proposed NWP. Several commenters also indicated that the proposed NWP would have adverse impacts on cultural resources, wildlife habitat, and special aquatic sites. A few commenters proposed that special aquatic sites within the vicinity of the proposed dock/pier be delineated. Technical requirements such as size limitations and construction materials were the subject of several comments. A few commenters indicated that existing Regional Permits are preferable to the proposed NWP 31.

This NWP was proposed to authorize relatively small docks and piers which overall would have only minimal impacts. This determination was made in consideration of the limitations set forth in the proposed NWP. We have reviewed the comments received and further discussed this proposed NWP with Corps' District staff. Out of necessity, dock dimensions and construction techniques vary widely to meet special regional conditions and needs. Consequently, we have determined that this NWP, as written, would be only minimally utilized on a national basis. We also do not believe that it is feasible to propose a ".1 universal" NWP (with appropriate limitations) to authorize the various types of small docks and piers that are typically constructed. We agree with the commenters that regional permits are the most appropriate mechanism for streamlined permitting of these types of structures. Therefore, we have deleted this proposed NWP. Where regional permits (RP's) have not been developed. District Engineers will be encouraged to develop RP's and/or to utilize the Letter of Permission process to authorize small docks and piers.

32. *Completed Enforcement Actions*: Several commenters suggested that this nationwide permit should be eliminated and the violation be processed as an individual permit. Some felt that authorizing enforcement actions by NWP would circumvent the intent of Section 404 of the Clean Water Act. Several commenters requested that the NWP be rescinded unless provisions for State input are included. Several commenters requested that the NWP be expanded to include all settlements and not restricted to judicial determinations. Several commenters went so far as to suggest that once the Corps/EPA have decided on the appropriate

restoration/mitigation and/or administrative fine/the remaining fill or structures and any new work to accomplish the ordered restoration/mitigation should be eligible for this permit. Several commenters suggested that the language be clarified to ensure the nationwide permit was intended only for those agreements settled by the Corps or the EPA to prevent local court decisions from tying the hands of the federal government. Several commenters felt the NWP language was too vague as to the type of activities covered and that in order to understand the intent, the preamble had to be read.

We do not agree that the NWP should be eliminated and after-the-fact permits be processed after a Federal judicial decision has been made. In order to reach an equitable environmentally sound decision to resolve an illegal activity, extensive coordination among the Corps/EPA/U.S. Fish and Wildlife Service/National Marine Fisheries Service and the U.S. Department of Justice is required. The judicial decision is binding and can only be changed by a Judicial modification to the document or by a higher court. For this reason, this nationwide permit is not applicable to non-judicial agreements since they are subject to modification following a full public interest review. In addition, allowing non-judicial agreements to be included in the NWP could encourage unauthorized activities. We do not agree that in order for the NWP to apply, a State's approval would have to be obtained. However, the fill or structure authorized by the NWP has been determined to have minimal impact on the environment and the NWP is only valid if the State has granted/waived water quality certification and determined the fill/structure complies with their coastal zone management program. However we have reworded the language of this NWP to clarify that it applies only to Federal court decisions or settlements initiated by the Corps or EPA. We believe that the adopted language has clarified our intent and that repeating the language of the preamble in the NWP itself would be redundant and unnecessary. We also believe that the NWP is clear as to the type and extent of activities it covers. The NWP would cover any section 404 and/or Section 10 activity that is allowed to remain as part of a courtordered settlement or agreement agreed to by the United States.

33. *Temporary Construction and Access:* The majority of the commenters suggested establishing specific limitations to the size, volume, and duration of discharges or structures authorized under this NWP and the proposed NWP 30. Others objected to the use of this permit to authorize fill in wetlands and special aquatic sites. Several of the commenters recommended elimination of the notification requirements. Others indicated that the NWP might be used to authorize mining activities or excavation of marina basins. We have combined NWP's 30 and 33 and have clarified that they only apply to construction fills associated with projects that have already been authorized by the Corps or the U.S. Coast Guard and not to construction activities in waters of the U.S. which would not otherwise be regulated. We disagree with the suggestion to include specific limitations. The requirement for notification will prevent any activities from occurring under this NWP that have more than minimal adverse effects on the environment. For this reason, that proposed limitation on cofferdams not to exceed 55% of the width of a waterway has been deleted.

34. *Cranberry Production Activities.* In the Federal Register notice of April 10, 1991, the Corps sought comments on the detriments and benefits of cranberry production activities, possible conditions or limits that could reduce any adverse impacts, and types of cranberry production activities that should or should not be authorized by nationwide permit. The overwhelming majority of comments received were from those involved in the cranberry industry in support of a nationally issued permit for cranberry operations. The most commonly suggested language included provisions for discharges that would result in the expansion of existing cranberry operations for 10 acres or less per year per operator; notification to the DE in accordance with the notification procedures, and provisions that the expansion would not cause a net loss of wetland acreage.

Those commenting in opposition to the proposed permit did not provide alternative suggestions but rather requested elimination of the permit from consideration because cranberry operations, both individually and cumulatively, would result in more than minimal adverse environmental effects. Their position was that individual permit review was more acceptable as the mechanism for evaluating the impacts of cranberry related permit applications. Consequently, most negative comments did not even address the limited suggestions used in requesting conditions or limits under which a nationwide permit might be issued.

There has been considerable interest from the cranberry growing industry in developing a nationwide permit for activities associated with the production of cranberries. There has also been considerable concern expressed by state and Federal resource agencies regarding potential adverse impacts on aquatic resources of cranberry production activities, such as converting existing natural wetlands into cranberry bogs. The typical cranberry operation involves clearing and leveling of wetlands, construction of dikes and berms, installation of water control structures, ditching, and flooding. In some circumstances, up to fifteen acres of reservoir are set aside for each acre of actual bed/bog. However, every cranberry operation is unique. There are no standard sizes for cranberry beds and no established water management techniques. It is further recognized that the commercial cultivation of cranberries requires large quantities of readily-available water. Some commenters expressed concern over the potential impacts to water quality resulting from cranberry operations. We believe that the DE will be able to identify these potentially adverse situations and assert discretionary authority by adding activity-specific conditions or requiring an individual permit, if he feels that the adverse environmental effects are more than minimal or that the activity is contrary to the public interest. We also believe that it is in the best interest of the cranberry growers themselves that they strive to maintain water quality for the benefit of their crops. This is particularly important for those cranberry operations that recirculate water within their beds for repeated use. We believe that by limiting this NWP to existing operations and requiring notification to the DE, any adverse effects to water quality resulting from the actual discharges authorized by this NWP, as well as the operation of these facilities, will be minimal. Furthermore, water quality standards are specifically evaluated by the states through the section 401 Water Quality Certification process, which may generate additional conditions on a regional basis.

Our difficulty in developing this nationwide permit is related to the diversity of circumstances affecting cranberry operations, and the difficulty thus engendered in determining what is a nationally acceptable permit. Some activities associated with ongoing cranberry growing operations have been exempted by section 404(f) of the Clean Water Act, leaving primarily construction discharges associated with expansions and new operations as activities to be regulated. The nationwide permit issued by this regulation applies to discharges of dredged or fill material for dikes, berms, pumps, water control structures or clearing and grading of beds associated with expansion, enhancement or modification activities at existing cranberry production operations only and does not authorize new cranberry operations. This NWP is intended to address those operations which exist at the time this NWP is effective. Any changes in management or ownership of existing operations to seek additional use of this NWP is not appropriate. With regard to what we identify as a single operation, we believe that the definition of the term "single and complete project" found at 33 CFR 330.2 should provide adequate guidance. Due to the variability of cranberry cultivation operations, we believe that the DE can best determine what constitutes a single and complete cultivation operation. Generally, the expansion of an existing operation would be contiguous or in close proximity to the existing operation. It should be further noted that this NWP only applies to discharges required for the

cultivation of cranberries and does not apply to related activities such as warehouses, processing plants, or parking areas.

We believe that new cranberry operations are not burdened with previous investments and technology. Accordingly, we have not included new cranberry cultivation operations under this NWP.

The scope of the nationwide permit recommended by the cranberry industry is greater than the scope which we have adopted for this nationwide permit. However, we considered the potential adverse effects on the environment, both individually and cumulatively, other factors of the public interest, and the utility of this nationwide permit considering regional differences and the likelihood of discretionary authority being exercised at the time a district was notified about a pending activity. For those activities exceeding 10 acres we believe it may be appropriate for Division and District Engineers to consider a regionally based general permit. That type of negotiation would exceed the scope of the investigation of options used in developing this nationwide permit.

Several commenters expressed concern over the impacts to fish and wild ' life resources resulting from the removal of natural vegetation. It is recognized by both wildlife experts and the cranberry industry that the replacement of natural vegetation with a monoculture of cranberries will have an adverse effect on wildlife values. The diversity of wildlife is generally reduced by a monoculture environment. However, wildlife values will not be eliminated by cranberry beds and reservoirs. Some species will be encouraged in these areas. Pond or reservoir modification could result in increased wetland acreage by flooding adjacent uplands. Reservoirs may also support submerged aquatic vegetation and open water areas to benefit fisheries resources. By limiting this NWI to expansion of existing facilities, we believe that pristine wildlife habitat is less likely to be adversely impacted. Furthermore, we believe that appropriate mitigation measures can be developed during the notification process to minimize the adverse effects to wildlife resources.

Several commenters expressed an objection to any nationwide permit for cranberry activities. However, we have determined that the activities that will be authorized by this nationwide permit are similar in nature and will be properly conditioned so that they will, both individually and cumulatively, have only minimal adverse effects on the environment. As with all NWP's, we will be monitoring the use of this NWP and if it appears that a modification or revocation is appropriate, we will initiate such action. Furthermore, we will have data upon which to reevaluate this permit when it expires after 5 years.

Finally, to address regional differences in cranberry production activities we are encouraging the DEs to work with the states and industry concerning the need for and acceptability of regional conditions and/or general permits.

35. *Maintenance Dredging of Existing Basins.* Many commenters indicated that the proposed language is too vague. Many commenters requested that dredging volumes be limited and that the NWP only apply to uncontaminated sediments. Several commenters requested a better understanding of what constitutes a Corps approved disposal site and whether or not this would include any other site other than an upland site. Many commenters indicated that maintenance dredging should only occur to previous documented depths. Some commenters requested that notification be included in the NWP. Some commenters requested that the NWP exclude dredging in special aquatic sites.

We do not agree with the approach of placing an across the board limitation on dredging volumes because this would decrease the utility of the NWP. However, we have modified the language to eliminate vagueness and more clearly define the intended limitations for use of the NWP. As the proposed language states the NWP is for maintenance and is therefore not intended for new work dredging. The modified language will state maintenance "to the lesser of previously authorized depths or controlling depths for ingress/egress". The phrase "or a Corps approved disposal site" will be deleted. Areas containing contaminated sediments have

generally been previously identified. We believe that regional conditioning of this NWP would be the appropriate mechanism to address this issue. Regional conditions can be developed to exclude known contaminated areas (such as sites on the NPL) or to require testing in areas of suspected contamination. Furthermore, we are encouraging DE's, where there is reason to believe the material to be dredged is contaminated, to consider exercising discretionary authority. It should be pointed out that the NWP is for upland disposal only and does not authorize return water (see NWP 16). Since the NWP is for maintenance for previously authorized work, adverse effects on the environment have already been considered or are expected to be minimal.

36. *Boot Ramps*: Several commenters suggested that this NWP be subject to the Notification requirements. The Corps notes that no fill material would be allowed to be discharged into special aquatic sites as a parameter of this NWP, and boat launch ramps are exempt from NEPA documentation as per 33 CFR part 325, appendix B. Given this and the discretionary authority provisions, we believe the Notification requirement would be unduly burdensome upon the regulated public. Several commenters suggested modifications to the limitations of this NWP, but the Corps believes this NWP, as written, adequately balances the need for public access to the nation's waterways while protecting aquatic resources. The wording of this NWP has been changed to clarify that the 50 cubic yard fill limitation pertains to fill placed into waters of the United States and that unsuitable material that causes unacceptable chemical pollution or is structurally unstable is not authorized.

37. *Emergency Watershed Protection*: Several commenters indicated that true emergency situations require response in less than 30 days and requested notification time be reduced to 2 days. Another commenter suggested the DE should have discretion to waive 30 day PDN procedure if emergency necessitates immediate action. We have retained the notification requirement for this NWP. However, we have modified the language of the 30-day time limit to accommodate true emergency situations. Under the revised notification a project may proceed in less than 30 days provided the DE has completed his review and has notified the permittee.

Some commenters felt SCS approval will not carry out the provisions of section 404 since flood hazard projects involve work in waterways which result in the loss of fish and fish habitat. Other commenters indicated SCS review abdicates Corps responsibility for reviewing proposals and protecting wetlands and waterways and does not comply with NEPA. Yet another commenter suggested that the NWP be expanded to cover all emergency public flood control projects.

We disagree that the substantive provisions of Section 404 or NEPA will be avoided by this NWP. SCS, like all other Federal agencies, must comply with NEPA, Fish and Wildlife Coordination Act, Endangered Species Act, and all other Federal statutes and Executive Orders. In addition, the DE has the opportunity through the PDN process to determine if individual projects have more than minimal adverse effects on the environment-and to require an individual permit. We also disagree with including all emergency public flood control projects since compliance with Federal statutes and Executive Orders could not be assured.

A number of commenters recommended such restrictions to the NWP as authorizing temporary structures only, excluding stream channelization and prohibiting wetland modification and alteration of wetland hydrology or aquatic organisms migratory pathways. We disagree that these types of restrictions are necessary in the NWP since the DE will have the ability to review individual proposals to determine if modifications are required or if the adverse effects are more than minimal thus requiring an individual permit.

Several commenters suggested that emergency Plans be approved by State and Federal fish and wildlife agencies and EPA. We have modified the notification process to include the appropriate natural resource agencies. However, we disagree with the recommendation that the activity must be approved by these agencies during the Corps' PDN process. It must be noted, however, that an

activity must receive a specific 401 water quality certification in those circumstances where a state has denied water quality certification for the NWP authorization.

Several commenters requested that the term "emergency" be defined and type and extent of projects authorized should be clarified. The Corps has defined the term "emergency" at 33 *CFR* 325.2(e)(4), and SCS exigency is defined in 7 *CFR* part 624. Also, 7 *CFR* part 624 contains a description of the type of projects which would be authorized.

The Forest Service has requested that its Emergency Burned Area Rehabilitation activities should be included in this NWP. We have considered their request and have expanded this NWP to include activities done by or funded by the Forest Service under their Burned-Area Emergency Rehabilitation Handbook.

38. *Cleanup of Hazardous and Toxic Waste*: The Corps recognizes a potential lack of Section 404 considerations in cleanup orders and has included the notification requirement with this NWFP to allow adequate review of any adverse effects on the environment. Three commenters suggested that a wetland delineation is not necessary, but we believe they are necessary in order to assess potential impacts as part of the notification process. A number of commenters recommended that this NWP not be implemented in view of the potential for significant adverse environmental impacts associated with cleanups of hazardous or toxic wastes. However, the Corps believes that this NWP is appropriate, and that the aquatic environment will benefit from expeditious cleanup of such areas.

39. *Reserved Agricultural Discharges (Proposed as NWP 39)*. Most commenters were confused regarding the type of activities that would be permitted under this NWP since Section 404(f) exempts normal farming activities. Also, many were confused by the preamble language which discussed authorizing discharges for silvicultural and aquacultural activities, as well as agricultural activities. Accordingly, many commenters indicated the NWP was either too open-ended or too restrictive. Many commenters felt the NWP would not be useful to the agricultural community.

We originally intended to cover silvicultural and aquacultural activities under this NWP but those activities were dropped prior to publishing the proposed rule. We agree the NWP as proposed has little utility and have dropped it from the final rule.

40. *Form Buildings*: Many commenters opposed this NWP and stated that it was vague and too broad, and questioned its need. Several commenters expressed the need to define "agricultural related structures" and "farming activities", as well as to establish size limitations. These commenters were concerned that large production facilities i.e. fertilizer plants, processing and boarding facilities, and other commercial structures would be authorized by this NWP.

We share the concerns of the above commenters and have provided limitations and removed "agricultural related structures necessary for farming activities" from the NWP. This NWP will authorize farm buildings such as equipment sheds, supply storage, animal housing and production facilities located on a farm or ranch. The fill for these buildings and associated grounds will be limited to the minimum necessary, and shall not involve filling more than one acre of farmed wetlands.

Many commenters stated that these agricultural-related structures were nonwater dependent and would result in large cumulative losses to wetlands. While most commenters recognized the applicability of this NWP to only farmed wetlands in agricultural production, there was concern for the loss of the functions and values these farmed wetlands possess. Several commenters stated concern for the release of pesticides and pollutants to ground and surface waters during flooding. Also, that allowing agricultural related structures in farmed wetlands was counter to national efforts to discourage construction in flood prone areas. Another commenter expressed concern for the loss to prairie potholes, playas, and vernal pools as a result of this NWP.

We believe that impacts to farmed wetlands will be minimized in accordance with section 404 condition number 4. Also, that construction of structures in flood

prone areas would most often be elevated to avoid flooding and that this loss in flood storage would be minimal both individually and cumulatively. We believe the release of pollutants as a result of flooding would be rare and should this occur the impacts would be localized and have minimal effect. Furthermore, we have clarified that this NWP does not authorize discharges into prairie, playa, lakes, or vernal pools.

Several commenters requested that this NWP should be subject to the notification procedures and include a delineation of special aquatic sites, and that the NWP be coordinated with the federal resource agencies. One commenter expressed concern that this NWP would set a precedent for allowing all types of buildings in wetlands. Another commenter recommended that all building pads and foundations up to 3,000 square feet in rural areas be subject to this NWP. One commenter believed that agricultural related structures would be constructed and then their use converted to nonagricultural purposes.

We believe that notification and delineation of special aquatic sites is unnecessary since this NWP only applies to farmed wetlands that are currently in agricultural production, and further, this NWP has been modified to limit the disturbance to one acre of farmed wetlands. The farmed wetland designation is assigned by the Soil Conservation Service. We do not agree that this would be setting a precedent since there are specific conditions and limitations to the types of activities authorized by this NWP. For this reason, we do not agree with the recommendation to allow all building pads and foundations in wetlands in rural areas. Furthermore, we believe it is unlikely that a farm building would be constructed and then its use converted to some use other than farming.

One commenter asked whether the NWP applied to silvicultural and aquacultural related buildings or structures. A few commenters stated that the NWP was necessary to maintain farming operations and suggested ways to minimize impacts. Silvicultural and aquacultural related buildings or structures are not authorized by this NWP. We agree that the NWP would benefit farming operations and that minimizing impacts is required.

### *Nation wide Permit Conditions*

#### General Conditions

Several of the commenters questioned the incorporation of the EMPs into the NWP Conditions. They believed that the BMPs are impractical, impossible to achieve, and may constitute a taking. They felt that they are too vague to enforceable or easily complied with, and that failure of a prospective permittee to comply with a condition should not trigger an enforcement action. The Corps disagrees with these comments. The BMPs are now being included as conditions in order to make them more enforceable. Flexibility is built into the conditions in response to differing conditions throughout the nation. The conditions do not constitute a taking of private property, and we maintain that enforcement actions are appropriate in instances where a permittee fails to adhere to the conditions.

1. *Navigation:* In response to comments questioning the change from previous policy on navigation, the Corps believes the proposed wording is more appropriate in that navigational interests are better protected.

2. *Proper Maintenance.* There were no comments on this condition and it is being adopted as proposed.

3. *Erosion and Siltation:* Several comments were directed at the "vagueness" of the wording of this condition. The Corps believes that parameters should not be specified in that erosion and siltation control methods vary throughout the nation.

4. *Aquatic Life Movement.* Several comments requested that the Corps define activities which may substantially disrupt aquatic life movements, and others suggested that the Corps require culverts be designed to facilitate passage of

aquatic organisms. The Corps believes that this condition is sufficiently clear, and that it is not reasonable or practical for the suggestion to be included as an NWP condition. We did modify this condition' that this condition also pertains to species which normally migrate through the area as well as indigenous species.

5. *Equipment*: There were no comments on this condition and it is being adopted as proposed.

6. *Regional and Case-by-Case Conditions*: There were no comments on this condition and it is being adopted as proposed.

7. *14,71d and Scenic Rivers*: In response to comments that state Wild & Scenic Rivers and state or national Outstanding Resource Waters be added, the Corps believes this is neither reasonable nor practical.

8. *Tribal Rights*: in response to a comment that tribes should be informed of NWP activities, the Corps believes the condition as worded is sufficient to protect tribal rights.

9. *Water Quality Certification*. This subject has been addressed in detail in Section 330.4(c). After considerable review of all comments, this condition has been retained as proposed.

10. *Coastal Zone Management*. This subject has been addressed in detail in section 330.4(d). After considerable review of all comments, this condition has been retained as proposed.

11. *Endangered Species*: The majority of commenters objected to the use of the language "or species proposed for such designation" as being too vague and uncertain. Concern was also expressed that such language implies that the, Corps is giving such species status they are not entitled to under the Endangered Species Act. This term is defined in the ESA and is used in that context in this regulation. Other commenters expressed concern relative to the removal of section 7 consultation requirements from this condition. This requirement is now located in J 330.4(f). After careful evaluation of all comments, the language of this condition has been retained with only minor revisions.

12. *Historic Properties*: Many commenters objected to the term "potentially eligible for listing" as being too uncertain. We have replaced "potentially" with "which the prospective permittee has reason to believe may be" to clarify this statement.

Other commenters felt that this condition does not adequately address the Corps responsibilities under the NHPA. We disagree. The Corps procedures as outlined in this NWP condition comply with the requirements of 33 CFR 325 appendix C, which implements 36 CFR 800 and fully satisfies the requirements of the NHPA.

13. *Notification*: We received a large number of comments relating to this condition. Our response to these comments has been addressed in the preamble at section 330.1(e) and in the General Comments for all NWPs. We have modified the language concerning the 30-day advance notification to address those concerns for emergency situations. We have also added a process requiring notification of the natural resource agencies and solicitation of their comments. As noted previously in this document, we have selected Mitigation Option 2 as a part of the notification requirement. The language of this condition reflects this decision.

In addition, in an effort to assist the DE in obtaining information needed by the Corps to satisfy the requirements of the ESA and NHPA, we have included a requirement that prospective permittees include a statement in the PDN certifying that they have contacted the appropriate resource agencies regarding the effects of the proposed activity on endangered or threatened species and/ or their critical habitat, and on historic properties. This statement should also include any information provided by the presence of any endangered or threatened species ' and/or their critical habitat in or near the permit area that may be affected by the proposed activity, and from the SHPO regarding the presence of any historic property in the permit area that may be affected by the proposed activity. This provision does not require the prospective permittee to delay transmittal of the PDN until USFWS/NMFS and/or the SHPO provide information. It

does require that the prospective permittee contact these agencies to determine whether any information is available. Furthermore, we encourage prospective permittees to contact these agencies at any time concerning these issues, even for those NWP activities that do not require notification to the DE to assure compliance with ESA and NHPA.

### **Section 404 Only Conditions**

1. *Water Supply Intakes*: Three commenters requested that "proximity" to water supply intakes be defined. We believe that it would not be prudent to place a specific restriction on the distance from a water supply intake on a national level.

2. *Shellfish Production*: Several commenters requested clarification or modification of this condition, but the Corps believes this would be inappropriate on a national level.

3. *Suitable Material*. Several commenters recommended modification of this condition, or that we include EPA's list of toxins and toxic amounts. Including such a list is not feasible in that the condition would have to be modified each time EPA's list is modified.

4. *Mitigation*: The title of this condition and the condition itself have been modified to state that discharges of dredged or fill material must be minimized or avoided to the maximum extent practicable at the project site, unless the DE has approved a compensation mitigation plan for the specific regulated activity.

5. *Spawning Areas*: Several commenters recommended that this condition be expanded to include avoidance of other activities or that all discharges in spawning areas during spawning seasons be prohibited. The Corps finds this unduly restrictive and believes that the wording, as adopted, provides adequate protection.

6. *Obstruction of High Flows*: There were no comments on this condition and it is being adopted as proposed.

7. *Adverse Impacts From Impoundments*: The Corps is in agreement with a recommendation to require minimization to the maximum extent practicable.

8. *Waterfowl Breeding Areas*, Several commenters recommended that this condition should be expanded to including avoidance of other activities or protection of additional resources, but we believe this is unreasonable and impractical and that the condition as worded provides sufficient protection.

9. *Removal of Temporary Fills*. One commenter requested that establishment of pre-existing soil, vegetation and hydrologic conditions should also be required. The Corps believes that restoration of pre-existing contours is sufficient.

### **Discretionary Authority**

In addition to the NWP conditions being required by the Chief of Engineers, the division and district engineers may add regional conditions or revoke NWP authorization for some or portions of the NWPs. Regional conditions may also be required by state Section 401 water quality certification or for state coastal zone consistency. When a State has denied Section 401 Water Quality Certification or disagreed with the Corps consistency determination for an NWP as of the effective date of the NWPs, the Corps will deny those affected activities without prejudice on, the effective date. Subsequently, to perform these activities the applicant, must obtain a section 401 Water Quality Certification or consistency certification from the State. District Engineers will announce regional conditions or revocations by issuing local public notices. Information on regional conditions and revocations can be obtained from the appropriate district engineer as indicated below.

*Alabama*

Mobile District Engineer, ATTN: CESAM-OP-S, P.O. Box 2288, Mobile, AL  
36628-0001.

*Alaska*

Alaska District Engineer, ATTN: CEINIPA-CO-R, P.O. Box 898, Anchorage, AK  
99506--0893.

*Arizona*

Los Angeles District Engineer, ATTN: CESPL-CO-R, P.O. Box 2711, Los Angeles, CA  
90053-2325.

*Arkansas*

Little Rock District Engineer, ATIN: CESWL-CO-P, P.O. Box 867, Little Rock, AR  
72203-0867.

*California*

Sacramento District Engineer, ATTN: CESPCK-CO-O, 650 Capitol Mall, Sacramento, CA  
95814-4794.

*Colorado*

Albuquerque District Engineer, ATTN: CESWA-CO-R, P.O. Box 1580. Albuquerque, NM  
87103-1580.

*Connecticut*

New England Division Engineer ATTN: CENED-OD-R, 424 Trapelo Road, Waltham, MA  
02254-9149.

*Delaware*

Philadelphia District Engineer, ATTN: CENAP-OP-R, U.S. Custom House, 2nd and  
Chestnut Street, Philadelphia, PA 19106-2991.

*Florida*

Jacksonville District Engineer, ATTN: CESAJ-RD, P.O. Box 4970, Jacksonville, FL  
32232-M19.

*Georgia*

Savannah District Engineer, ATTN: CESAS-OP-F, P.O. Box 889, Savannah, CA  
31402-0889.

*Hawaii*

Honolulu District Engineer, ATTN:CEPOD-CO-0, Building 230, Fort Shafter, Honolulu, HI 96858-5440.

*Idaho*

Walla Walla District Engineer, AM: CENPW-OP-RF, Building 602, City-County Airport, Walla Walla, WA 99362-9265.

*Illinois*

Rock Island District Engineer, ATTN: CENCR-OD-S, Clock Tower Building, Rock Island, IL 61201-2004.

*Indiana*

Louisville District Engineer, ATTN: CEORL-OR-F, P.O. Box 59, Louisville, KY 40201-0059.

*Iowa*

Rock Island District Engineer, ATTN: CENCR-OD-S, Clock Tower Building, Rock Island, IL 61201-2004.

*Kansas*

Kansas City District Engineer, ATTN: CEMRK-OD-P, 700 Federal Building, 601 E. 12th Street, Kansas City, MO 641062896.

*Kentucky*

Louisville District Engineer, ATTN: CEORL-OR-F, P.O. Box 59, Louisville, KY 40201-M9.

*Louisiana*

New Orleans District Engineer. ATTN: CEUMN-OD-S, P.O. Box V267. New Orleans, LA 70160-0267.

*Maine*

New England Division Engineer, ATTN: CENED-OD-R, 424 Trapelo Road, Waltham, MA 02254-9149.

*Maryland*

Baltimore District Engineer, ATTN: CENAB-OP-R, P.O. Box 1715, Baltimore, MD 21203-1715.

*Massachusetts*

New England Division Engineer, A17N: CENED-OD-R, 424 Trapelo Road, Waltham, MA 02254-9149.

*Michigan*

Detroit District Engineer, ATTN: CENCE-CO-L, P.O. Box 1027, Detroit, MI 48231-1027.

*Minnesota*

St. Paul District Engineer, ATTN: CENCS-CO-R, 180 Kellogg Blvd. E., Room 1421, St. Paul, MN 55101-1479.

*Mississippi*

Vicksburg District Engineer, ATTN: CELMK-OD-F, 35151-20 Frontage Road, Vicksburg, MS 39180-5191.

*Missouri*

Kansas City District Engineer, ATTN: CEMRK-OD-P, 700 Federal Building, 601 E. 12th Street, Kansas City, MO 64106-2896.

*Montana*

Omaha District Engineer, ATTN: CEMRO-OP-R, P.O. Box 5, Omaha, NE 68101-0005.

*Nebraska*

Omaha District Engineer, ATTN: CEMRO-OP-R, P.O. Box 5, Omaha, NE 68101-0005.

*Nevada*

Sacramento District Engineer, ATTN: CESPCK-CO-O, 650 Capitol Mall, Sacramento, CA 95814-4794.

*New Hampshire*

New England Division Engineer, ATTN: CENED-OD-R, 424 Trapelo Road, Waltham, MA 02254-9149.

*New Jersey*

Philadelphia District Engineer, ATTN: CENAP-OP-R, U.S. Custom House, 2nd and Chestnut Street, Philadelphia, PA 19106-2991.

*New Mexico*

Albuquerque District Engineer, ATTN: CESWA-CO-R, P.O. Box 1500, Albuquerque, NM 87103-1580.

*New York*

New York District Engineer, ATTN: CENAN-OP-R, 26 Federal Plaza, New York, NY 10278-0090.

*North Carolina*

Wilmington District Engineer, ATTN: CIESAW-CO-E, P.O. Box 1890, Wilmington, NC 28402-1890.

*North Dakota*

Omaha District Engineer, ATTN: CEMIRO-OP-R, P.O. Box 5, Omaha, NE 68101-0005.

*Ohio*

Huntington District Engineer, ATTN: CEORH-OR-F, 502 8th Street, Huntington, WV. 25701-2070.

*Oklahoma*

Tulsa District Engineer, ATTN: CESWT-OD-RF, P.O. Box 61, Tulsa, OK. 741,21-0061.

*Oregon*

Portland District Engineer, ATTN: CENPP-PL-R, P.O. Box 2946, Portland, OR 97208-2946.

*Pennsylvania*

Baltimore District Engineer, ATTN: CENAB-OP-R, P.O. Box 1715, Baltimore, MD 21203-1715.

*Rhode Island*

New England Division Engineer, ATTN: CENED-OD-R, 424 Trapelo Road, Waltham, MA 02254-9149.

*South Carolina*

Charleston District Engineer, ATTN: CESAC-CO-P, P.O. Box 919, Charleston, SC 29402-0919.

*South Dakota*

Omaha District Engineer, ATTN: CEMRO-OP-R, P.O. Box 5, Omaha, NE 68101-0005.

*Tennessee*

Nashville District Engineer, ATTN: CEORN-OR-F, P.O. Box 1070, Nashville, TN 37202-1070.

*Texas*

Ft. Worth District Engineer, ATTN: CESWF-OD-0, P.O. Box 17300, Ft. Worth, TX 76102-0300.

*Utah*

Sacramento District Engineer, ATTN: CESPCK-CO-0, 650 Capitol Mall, Sacramento, CA 95814-4794.

*Vermont*

New England Division Engineer, ATTN: CENED-OD-R, 424 Trapelo Road, Waltham, MA 02254-9149.

*Virginia*

Norfolk District Engineer, ATTN: CENAO-OP-P, 803 Front Street, Norfolk, VA 23510-1096.

*Washington*

Seattle District Engineer, ATTN: CENPS-OP-RG, P.O. Box C-3755, Seattle, WA 98124-2255.

*West Virginia*

Huntington District Engineer, ATTN: CEORH-OR-F, 502 8th Street, Huntington, WV 25701-2070,

*Wisconsin*

St. Paul District Engineer, ATTN: CENCS-CO-R, 1421 USPO & Custom House, St. Paul, MN 55101-98W.

*Wyoming*

Omaha District Engineer, ATTN: CEMRO-OP-R, P.O. Box 5, Omaha, NE 68101--0005.

*District of Columbia*

Baltimore District Engineer, ATTN: CENAB-OP-R, P.O. Box 1715, Baltimore, MD 21203-1715.

*Pacific Territories*

Honolulu District Engineer, ATTN: CEPOD-CO-O, Building 230, Fort Shafter, Honolulu, HI 95858-5440.

*Puerto Rico & Virgin Is*

Jacksonville District Engineer, ATTN: CESAJ-RD, P.O. Box 4970, Jacksonville, FL 32232-0019.

**Environmental Documentation**

We have determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment. Environmental documentation has been prepared for each nationwide permit. Accordingly, for actions where there is other Federal agency involvement, there is no need to conduct an independent review of the other Federal agency's NEPA documentation under 40 CFR 1506.3(c). The Corps documentation includes an environmental assessment and, where relevant, a section 404(b)(1) Guidelines compliance review. Copies of these documents are available for inspection at the office of the Chief of Engineers and at each Corps district office. Based on these documents the Corps has determined that the NWP's comply with the requirements for issuance under general permit authority.

**Note 1**-The Department of the Army has determined that this document does not contain a major rule requiring a regulatory impact analysis under Executive Order 12291 because it will not result in an annual effect on the economy of \$100 million or more and it will not result in a major increase in costs or prices.

**Note 2**-The term "he" and its derivatives used in these regulations are generic and should be considered as applying to both male and female.

I hereby certify that this matter will have no significant negative Impact on a substantial number of small entities within the meaning and intent of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq.

**List of Subjects in 33 CFR Part 330**

Administrative practice and procedure, Intergovernmental relations, Navigation (water), Water pollution control, Waterways.

Dated: November 12, 1991.

Approved: Nancy P. Dorn, Assistant Secretary of the Army, (Civil Works).

Accordingly, 33 CFR part 330 is revised to read as follows:

**PART 330-NATIONWIDE PERMIT PROGRAM**

Sec.

330.1 Purpose and policy.

330.2 Definitions.

330.3 Activities occurring before certain dates.

330.4 Conditions, limitations, and restrictions.

330.5 Issuing, modifying, suspending, or revoking nationwide permits and authorizations.

330.6 Authorization by nationwide permit.

**Appendix A to Part 330-Nationwide Permits and Conditions**

**Authority:** 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413.

**§ 330.1 Purpose and policy.**

(a) *Purpose.* This part describes the policy and procedures used in the Department of the Army's nationwide permit program to issue, modify, suspend, or revoke nationwide permits; to identify conditions, limitations, and restrictions on the nationwide permits; and, to identify any procedures, whether required or optional, for authorization by nationwide permits.

(b) *Nationwide permits.* Nationwide permits (NWP9) 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 having minimal impacts. The NWPs are proposed, issued, modified, reissued (extended), and revoked from time to time after an opportunity for, public notice and comment. Proposed NWPs or modifications to or reissuance of existing NWPs will be adopted only after the Corps gives notice and allowing the public an opportunity to comment on and request a public hearing regarding the proposals. The Corps will give consideration to all comments received prior to reaching a final decision.

(c) *Terms and conditions.* An activity is authorized under an NWP only if that activity and the permittee satisfy all of the NWP's terms and conditions. Activities that do not qualify for authorization under an NWP still may be authorized by an individual or regional general permit. 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, regional general permit, or an individual permit. The Corps will evaluate unauthorized activities for enforcement action under 33 CFR part 326. The district engineer (DE) may elect to suspend enforcement proceedings if the permittee modifies his project to comply with an NWP or a regional general

permit. After considering whether a violation was knowing or intentional, and other indications of the need for a penalty, the DE can elect to terminate an enforcement proceeding with an after-the-fact authorization under an NWP. If all terms and conditions of the NWP have been satisfied, either before or after the activity has been accomplished.

(d) *Discretionary authority.* District and division engineers have been delegated a discretionary authority to suspend, modify, or revoke authorizations under an NWP. This discretionary authority may be used by district and division engineers only to further condition or restrict the applicability of an NWP for cases where they have concerns for the aquatic environment under the Clean Water Act section 404(b)(1) Guidelines or for any factor of the public interest. Because of the nature of most activities authorized by NWP, district and division engineers will not have to review every such activity to decide whether to exercise discretionary authority. The terms and conditions of certain NWPs require the DE in review the proposed activity before the NWP authorizes its construction. However, the DE has the discretionary authority to review any activity authorized by NWP to determine whether the activity complies with the NWP. If the DE finds that the proposed activity would have more than minimal individual or cumulative net adverse effects on the environment or otherwise may be contrary to the public interest, he shall modify the NWP authorization to reduce or eliminate those adverse effects, or he shall instruct the prospective permittee to apply for a regional general permit or an individual permit. Discretionary authority is also discussed at 33 CFR 330.4(e) and 330.5.

(e) *Notifications.* (1) In most cases, permittees may proceed with activities authorized by NWPs without notifying the DE. However, the prospective permittee should carefully review the language of the NWP to ascertain whether he must notify the DE prior to commencing the authorized activity. For NWPs requiring advance notification, such notification must be made in writing as early as possible prior to commencing the proposed activity. The permittee may presume that his project qualifies for the NWP unless he is otherwise notified by the DE within a 30-day period. The 30-day period starts on the date of receipt of the notification in the Corps district office and ends 30 calendar days later regardless of weekends or holidays. If the DE notifies the prospective permittee that the notification is incomplete, a new 30-day period will commence upon receipt of the revised notification. The prospective permittee may not proceed with the proposed activity before expiration of the 30-day period unless otherwise notified by the DE. If the DE fails to act within the 30-day period, he must use the procedures of 33 CFR 330.5 in order to modify, suspend, or revoke the NWP authorization.

(2) The DE will review the notification and may add activity-specific conditions to ensure that the activity complies with the terms and conditions of the NWP and that the adverse impacts on the aquatic environment and other aspects of the public interest are individually and cumulatively minimal.

(3) For some NWPs involving discharges into wetlands, the notification must include a wetland delineation. The DE will review the notification and determine if the individual and cumulative adverse environmental effects are more than minimal. If the adverse effects are more than minimal the DE will notify the prospective permittee that an individual permit is required or that the prospective permittee may propose measures to mitigate the loss of special aquatic sites, including wetlands, to reduce the adverse impacts to minimal. The prospective permittee may elect to propose mitigation with the original notification. The DE will consider that proposed mitigation when deciding if the impacts are minimal. The DE shall add activity-specific conditions to ensure that the mitigation will be accomplished. If sufficient mitigation cannot be developed to reduce the adverse environmental effects to the minimal level, the DE will not allow authorization under the NWP and will instruct the prospective permittee on procedures to seek authorization under an individual permit.

(f) *Individual Applications.* DEs should review all incoming applications for individual permits for possible eligibility under regional general permits or NWP. If the activity complies with the terms and conditions of one or more NWP, he should verify the authorization and so notify the applicant. If the DE determines that the activity could comply after reasonable project modifications and/or activity-specific conditions, he should notify the applicant of such modifications and conditions. If such modifications and conditions are accepted by the applicant, verbally or in writing, the DE will verify the authorization with the modifications and conditions in accordance with 33 CFR 330.6(a). However, the DE will proceed with processing the application as an individual permit and take the appropriate action within 15 calendar days of receipt, in accordance with 33 CFR 325.2(a)(2), unless the applicant indicates that he will accept the modifications or conditions.

(g) *Authority.* NWPs can be issued to satisfy the permit requirements of section 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, section 103 of the Marine Protection, Research, and Sanctuaries Act, or some combination thereof. The applicable authority will be indicated at the end of each NWP. NWPs and their conditions previously published at 33 CFR 330.5 and 330.6 will remain in effect until they expire or are modified or revoked in accordance with the procedures of this part.

### **330.2 Definitions.**

(a) The definitions found in 33 CFR parts 320-329 are applicable to the terms used in this part.

(b) *Nationwide* permit refers to a type of general permit which authorizes activities on a nationwide basis unless specifically limited. (Another type of general permit is a "regional permit" which is issued by division or district engineers on a regional basis in accordance with 33 CFR part 325). (See 33 CFR 322.2(f) and 323.2(h) for the definition of a general permit.)

(c) *Authorization* means that specific activities that qualify for an NWP may proceed, provided that the terms and conditions of the NWP are met. After determining that the activity complies with all applicable terms and condition the prospective permittee may assume an authorization under an NWP. This assumption is subject to the DE's authority to determine if an activity complies with the terms and conditions of an NWP. If requested by the permittee in writing, the DE will verify in writing that the permittee's propose (activity complies with the terms and conditions of the NWP. A written verification may contain activityspecific conditions and regional conditions which a permittee must satisfy for the authorization to be valid.

(d) *Headwaters* means non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are part of a surface tributary system to an interstate or navigable water of the United States upstream of the point on the river or stream at which the average annual flow is less than five cubic feet per second. The DE may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient or by similar means. For streams that are dry for long periods of the year, DE may establish the point where headwaters begin as that point on the stream where a flow of five cubic feet per second is equated or exceeded 50 percent of the time.

(e) *Isolated waters* means those non-tidal waters of the United States that are:  
(1) Not part of a surface tributary system to interstate or navigable water of the United States; and  
(2) Not adjacent to such tributary waterbodies.

(f) *Filled area* means the area within jurisdictional waters which is eliminated or covered as a direct result of the discharge (i.e., the area actually covered

by the discharged material). It does not include areas excavated nor areas impacted as an indirect effort of the fill

(a) *Discretionary Authority* means the authority described in §§ 330.1(d) and 330.4(e) which the Chief of Engineers delegates to division or district engineers to notify all NWP authorization by adding conditions to suspend an NWP authorization, or to revoke an NWP authorization and thus require individual permit authorization.

(h) *Terms and conditions*. The "term" (if an NWP) are the limitations and provisions included in the description of the NWP itself. The "conditions" of NWPs are additional provisions which place restrictions or limitations on all of the NWP. These are published with the NWPs. Other conditions may be imposed by district or division engineers and a geographic, category-of-activity, or activity-specific basis (See 33 CFR 330.4(e)).

(i) *Single and complete project* means the total project proposed or accomplished by one owner/developer or partnership or other association of owners /developers. For example, if construction of a residential development affects several different areas of a headwater or isolated water, or several different headwaters or isolated waters, the cumulative total of all filled areas should be the basis for deciding whether or not the project will be covered by an NWP. For linear projects, the "single and complete project" (i.e. single and complete crossing) will apply to each crossing of a separate water of the United States (i.e. single waterbody) at that location; except that for linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project. 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.

(j) *Special aquatic sites* means wetlands, mudflats, vegetated shallows, coral reefs, riffle and pool complexes, sanctuaries, and refuges as defined at 40 CFR 230.40 through 230.45.

### § 330.3 Activities occurring before certain dates.

The following activities were permitted by NWPs issued on July 19, 1977, and, unless the activities are modified, they do not require further permitting:

(a) Discharges of dredged or fill material into waters of the United States outside the limits of navigable waters of the United States that occurred before the phase-in dates which extended Section 404 jurisdiction to all waters of the United States. The phase-in dates were: After July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands; after September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area; and after July 1, 1977, discharges into all waters of the United States, including wetlands. (section 404)

(b) Structures or work completed before December 18, 1968, or in waterbodies over which the DE had not asserted jurisdiction at the time the activity occurred, provided in both instances, there is no interference with navigation. Activities completed shoreward of applicable Federal Harbor lines before May 27, 1970 do not require specific authorization. (section 10)

### § 330.4 Conditions, limitations, and restrictions.

(a) *General*. A prospective permittee must satisfy all terms and conditions of an NWP for a valid authorization to occur. Some conditions identify a "threshold" that, if met, requires additional procedures or provisions contained in other paragraphs in this section. It is important to remember that the NWPs only authorize activities from the perspective of the Corps regulatory authorities and that other Federal, state, and local permits, approvals, or authorizations may also be required.

(b) *Further information*.

(1) DEs 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) NWP9 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.

(c) *State 401 water quality certification.*

(1) State 401 water quality certification pursuant to section 401 of the Clean Water Act, or waiver thereof, is required prior to the issuance or reissuance of NWPs authorizing activities which may result in a discharge into waters of the United States.

(2) If, prior to the issuance or reissuance of such NWPs, a state issues a 401 water quality certification which includes special conditions, the division engineer will make these special conditions regional conditions of the NWP for activities which may result in a discharge into waters of United States in that state, unless he determines that such conditions do not comply with the provisions of 33 CFR 325.4. In the latter case, the conditioned 401 water quality certification will be considered a denial of the certification (see paragraph (c)(3) of this section).

(3) If a state denies a required 401 water quality certification for an activity otherwise meeting the terms and conditions of a particular NWP, that NWP's authorization for all such activities within that state is denied without prejudice until the state issues an individual 401 water quality certification for any specific NWP affects only those activities which may result in a discharge. That NWP continues to authorize activities which could not reasonably be expected to result in discharges into waters of the United States.'

(4) DEs will take appropriate measures to inform the public of which activities, waterbodies, or regions require an individual 401 water quality certification before authorization by NWP.

(5) The DE will not require or process an individual permit application for an activity which may result in a discharge and otherwise qualifies for an NWP solely on the basis that the 401 water quality certification has been denied for that NWP. However, the district or division engineer may consider water quality, among other appropriate factors, in determining whether to exercise his discretionary authority and require a regional general permit or an individual permit.

(6) In instances where a state has denied the 401 water quality certification for discharges under a particular NWP, permittees must furnish the DE with an individual 401 water quality certification or a copy of the application to the state for such certification. For NWPs for which a state has denied the 401 water quality certification, the DE will determine a reasonable period of time after receipt of the request for an activity-specific 401 water quality certification (generally 60 days), upon the expiration of which the DE will presume state waiver of the certification for the individual activity covered by the NWP's. However, the, DE and the state may negotiate for additional time for the 401 water quality certification, but in no event shall the period exceed one (1) year (see 33 CFR 325.2(b)(1)(ii)). Upon receipt of an individual 401 water quality

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NWPs numbered 1, 2, 8, 9, 10, 11, 19, 24, 28 and 35, do not require 401 water quality certification since they would authorize activities which. In the opinion of the Corps, could not reasonably be expected to result in a discharge and in the can of NWP 8 is seaward of the territorial sees. NWPs, numbered 3, 4, 5, 6, 7, 13, 14, 18, 20, 21, 22, 23, 27, 32, 35, 37, and 38, involve various activities, some of which may result in a discharge and require 401 water quality

certification, and others of which do not. State denial of 401 water quality certification for any specific NWP in this category, affects only those activities which may result in a discharge. For those activities not involving discharges, the NWP remains in effect NWPs numbered 14 15. A 27, A 26, and 40 involve activities which would result in discharges and therefore 401 water quality certification is required.

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certification, or if the prospective permittee demonstrates to the DE state waiver of such certification, the proposed work can be authorized under the NWP. For NWPs requiring a 30-day pre-discharge notification the district engineer will immediately begin, and complete, his review prior to the state action on the individual section 401 water quality certification. If a state issues a conditioned individual 401 water quality certification for an individual activity, the DE will include those conditions as activity-specific conditions of the NWP.

(7) Where a state, after issuing a 401 water quality certification for an NWP, subsequently attempts to withdraw it for substantive reasons after the effective date of the NWP, the division engineer will review those reasons and consider whether there is substantial basis for suspension, modification, or revocation of the NWP authorization as outlined in § 330.5. Otherwise, such attempted state withdrawal is not effective and the Corps will consider the state certification to be valid for the NWP authorizations until such time as the NWP is modified or reissued.

(d) *Coastal zone management consistency determination.* (1) Section 307(c)(1) of the Coastal Zone Management Act (CZMA) requires the Corps to provide a consistency determination and receive state agreement prior to the issuance, reissuance, or expansion of activities authorized by an NWP that authorizes activities within a state with a Federally-approved Coastal Management Program when activities that would occur within, or outside, that state's coastal zone will affect land or water uses or natural resources of the state's coastal zone.

(2) If, prior to the issuance, reissuance, or expansion of activities authorized by an NWP, a state indicates that additional conditions are necessary for the state to agree with the Corps consistency determination, the division engineer will make such conditions regional conditions for the NWP in that state, unless he determines that the conditions do not comply with the provisions of 33 CFR 325.4 or believes for some other specific reason it would be inappropriate to include the conditions. In this case, the state's failure to agree with the Corps consistency determination without the conditions will be considered to be a disagreement with the Corps consistency determination.

(3) When a state has disagreed with the Corps consistency determination, authorization for all such activities occurring within or outside the state's coastal zone that affect land or water uses or natural resources of the state's coastal zone is denied without prejudice until the prospective permittee furnishes the DE an individual consistency certification pursuant to section 307(c)(3) of the CZMA and demonstrates that the state has concurred in it (either in an individual or generic basis), or that concurrence should be presumed (see paragraph (d)(6) of this section).

(4) DEs will take appropriate measures, such as public notices, to inform the public of which activities, waterbodies, or regions require prospective permittees to make an individual consistency determination and seek concurrence from the state.

(5) DEs will not require or process an individual permit application for an activity otherwise qualifying for an NWP solely on the basis that the activity has not received CZMA consistency agreement from the state. However, the district or division engineer may consider that factor, among other appropriate factors,

in determining whether to exercise his discretionary authority and require a regional general permit or an individual permit application.

(6) In instances where a state has disagreed with the Corps consistency determination for activities under a particular NWP, permittees must furnish the DE with an individual consistency concurrence or a copy of the consistency certification provided to the state for concurrence. If a state fails to act on a permittee's consistency certification within six months after receipt by the state, concurrence will be presumed. Upon receipt of an individual consistency concurrence or upon presumed consistency, the proposed work is authorized if it complies with all terms and conditions of the NWP. For NWPs requiring a 30-day pre-discharge notification the DE will immediately begin, and may complete, his review prior to the state action on the individual consistency certification. If a state indicates that individual conditions are necessary for consistency with the state's Federally approved coastal management program for that individual activity, the DE will include those conditions as activity-specific conditions of the NWP unless he determines that such conditions do not comply with the provisions of 33 CFR 32.5.4. In the latter case the DE will consider the conditioned concurrence as a nonconcurrence unless the permittee chooses to comply voluntarily with all the conditions in the conditioned concurrence.

(7) Where a state, after agreeing with the Corps consistency determination, subsequently attempts to reverse its agreement for substantive reasons after the effective date of the NWP, the division engineer will review those reasons and consider whether there is substantial basis for suspension, modification, or revocation as outlined in 33 CFR 330.5. Otherwise, such attempted reversal is not effective and the Corps will consider the state CZMA consistency agreement to be valid for the NWP authorization until such time as the NWP is modified or reissued.

(8) Federal activities must be consistent with a state's Federally approved coastal management program to the maximum extent practicable. Federal agencies should follow their own procedures and the Department of Commerce regulations appearing at 15 CFR Part 930 to meet the requirements of the CZMA. Therefore, the provision of 33 CFR 330.4(d)(1)-(7) do not apply to Federal activities. Indian tribes doing work on Indian Reservation lands shall be treated in the same manner as Federal applicants.

(e) *Discretionary authority.* The Corps reserves the right (i.e., discretion) to modify, suspend, or revoke NWP authorizations. Modification means the imposition of additional or revised terms or conditions on the authorization. Suspension means the temporary cancellation of the authorization while a decision is made to either modify, revoke, or reinstate the authorization. -Revocation means the cancellation of the authorization. The procedures for modifying, suspending, or revoking authorizations are detailed in § 330.5.

(1) A division engineer may assert discretionary authority by modifying, suspending, or revoking NWP authorizations for a specific geographic area, class of activity, or class of water within his division, including on a statewide basis, whenever he determines sufficient concerns for the environment under the section 404(b) (IL Guidelines or any other factor of the, public interest so requires, or if he otherwise determines that the NWP would result in more than minimal adverse environmental effects either individually or cumulatively.

(2) A DE may assert discretionary authority by modifying, suspending or revoking NWP authorization for a specific activity whenever he determines sufficient concerns for the, environment or any other factor of the public interest so requires. Whenever, the DE determines that a proposed specific activity covered by an NWP would have more than minimal individual or cumulative adverse effect on the environment or otherwise may be contrary to the public interest, he must either modify the NWP, authorization to reduce or eliminate the adverse impacts, or notify the prospective permittee that the proposed activity is not authorized

by NWP and provide instructions on how to seek authorization under a regional general or individual permit.

(3) The division or district engineer will restore authorization under the NWP9 at any time he determines that his reason for asserting discretionary authority has been satisfied by a condition, project modification, or new information.

(4) When the Chief of Engineers modifies or reissues an NWP, division engineers must use the procedures of § 330.5 to reassert discretionary authority to reinstate regional conditions or revocation of NWP authorizations for specific geographic areas, class of activities, or class of waters. Division engineers will update existing documentation for each NWP. Upon modification or reissuance of NWPs, previous activity-specific conditions or revocations of NWP authorization will remain in effect unless the DE specifically removes the activity-specific conditions or revocations.

(f) *Endangered species.* No activity is authorized by any NWP if that activity is likely to jeopardize the continued existence of a threatened or endangered species as listed or proposed for listing under the Federal Endangered Species Act (ESA), or to destroy or adversely modify the critical habitat of such species.

(1) Federal agencies should follow their own procedures for complying with the requirements of the ESA.

(2) Non-federal permittees shall notify the DE if any Federally listed (or proposed for listing) endangered or threatened species or critical habitat might be affected or is in the vicinity of the project. In such cases, the prospective permittee will not begin work under authority of the NWP until notified by the district engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. If the DE determines that the activity may affect any Federally listed species or critical habitat, the DE must initiate section 7 consultation in accordance with the ESA. In such cases, the DE may:

(i) Initiate section 7 consultation and then, upon completion, authorize the activity under the NWP by adding, if appropriate, activity-specific conditions; or

(ii) Prior to or concurrent with section 7 consultation, assert discretionary authority (see 33CFR 330.4(e)) and require an individual permit (see 33 CFR 3-30.5(d)).

(3) Prospective permittees are encouraged to obtain information on the location of threatened or endangered species and their critical habitats from the U.S. Fish and Wildlife Service, Endangered Species Office, and the National Marine Fisheries Service.

(g) *Historic properties.* No activity which may affect properties listed or properties eligible for listing in the National Register of Historic Places, is authorized until the DE has complied with the provisions of 33 CFR part 325, appendix C.

(1) Federal permittees should follow their own procedures for compliance with the requirements of the National Historic Preservation Act and other Federal historic preservation laws.

(2) Non-federal permittees will notify the DE if the activity may affect historic properties which the National Park Service has listed, determined eligible for listing, or which the prospective permittee has reason to believe may be eligible for listing, on the National Register of Historic Places. In such cases, the prospective permittee will not begin the proposed activity until notified by the DE that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. If a property in the permit area of the activity is determined to be an historic property in accordance with 33 CFR part 325, appendix C, the DE will take into account the effects on such properties in accordance with 33 CFR part 325, appendix C. In such cases, the district engineer may:

(i) After complying with the requirements of 33 CFR part 325, appendix C, authorize the activity under the NWP by adding, if appropriate, activity-specific conditions; or

(ii) Prior to or concurrent with complying with the requirements of 33 CFR part 325, appendix C, he may assert discretionary authority (see 33 CFR 330.4(e)) and instruct the prospective permittee of procedures to seek authorization under a regional general permit or an individual permit. (See 33 CFR 330.5(d).)

(3) The permittee shall immediately notify the DE if, before or during prosecution of the work authorized, he encounters an historic property that has not been listed or determined eligible for listing on the National Register, but which the prospective permittee has reason to believe may be eligible for listing on the National Register.

(4) Prospective permittees are encouraged to obtain information on the location of historic properties from the

State Historic Preservation Officer and the National Register of Historic Places.

### **§ 330.5 Issuing, modifying, suspending, or revoking nationwide permits and authorizations.**

(a) *General.* This section sets forth the procedures for issuing and reissuing NWPs and for modifying, suspending, or revoking NWPs and authorizations under NWPs.

(b) *Chief of Engineers.* (1) Anyone may, at any time, suggest to the Chief of Engineers, (ATTN: CECW-OR), any new NWPs or conditions for issuance, or changes to existing NWPs, which he believes to be appropriate for consideration. From time-to-time new NWPs and revocations of or modifications to existing NWPs will be evaluated by the Chief of Engineers following the procedures specified in this section. Within five years of issuance of the NWPs, the Chief of Engineers will review the NWPs and propose modification, revocation, or reissuance.

(2) *Public notice.* (i) Upon proposed issuance of new NWPs or modification, suspension, revocation, or reissuance of existing NWPs, the Chief of Engineers, will publish a document seeking public comments, including the opportunity to request a public hearing. This document will also state that the information supporting the Corps' provisional determination that proposed activities comply with the requirements for issuance under general permit authority is available at the Office of the Chief of Engineers and at all district offices. The Chief of Engineers will prepare this information which will be supplemented, if appropriate, by division engineers.

(ii) Concurrent with the Chief of Engineers' notification of proposed, modified, reissued, or revoked NWPs, DEs will notify the known interested public by a notice issued at the district level. The notice will include proposed regional conditions or proposed revocations of NWP authorizations for specific geographic areas, classes of activities, or classes of waters, if any, developed by the division engineer.

(3) *Documentation.* The Chief of Engineers will prepare appropriate NEPA documents and, if applicable, section 404(b)(1) Guidelines compliance analyses for proposed NWP9. Documentation for existing NWPs will be modified to reflect any changes in these permits and to reflect the Chief of Engineers' evaluation of the use of the permit since the last issuance. Copies of all comments received on the document will be included in the administrative record. The Chief of Engineers will consider these comments in making his decision on the NWPs and will prepare a statement of findings outlining his views regarding each NWP and discussing how substantive comments were considered. The Chief of Engineers will also determine the need to hold a public hearing for the proposed NWPs.

(4) *Effective dates.* The Chief of Engineers will advise the public of the effective date of any issuance, modification, or revocation of an NWP.

(c) *Division Engineer.* (1) A division engineer may use his discretionary authority to modify, suspend, or revoke NWP authorizations for any specific geographic area, class of activities, or class of waters within his division, including on a statewide basis, by issuing a public notice or notifying the individuals involved. The notice will state his concerns regarding the environment or the other relevant factors of the public interest. Before using his discretionary authority to modify or revoke such NWP authorizations, division engineers will:

(i) Give an opportunity for interested parties to express their views on the proposed action (the DE will publish and circulate a notice to the known interested public to solicit comments and provide the opportunity to request a public hearing);

(ii) Consider fully the views of affected parties;

(iii) Prepare supplemental documentation for any modifications or revocations that may result through assertion of discretionary authority. Such documentation will include comments received on the district public notices and a statement of findings showing how substantive comments were considered;

(iv) Provide, if appropriate, a grandfathering period as specified in § 330.6(b) for those who have commenced work or are under contract to commence in reliance on the NWP authorization; and

(v) Notify affected parties of the modification, suspension, or revocation, including the effective date (the DE will publish and circulate a notice to the known interested public and to anyone who commented on the proposed action).

(2) The modification, suspension, or revocation of authorizations under an NWP by the division engineer will become effective by issuance of public notice or a notification to the Individuals involved.

(3) A copy of all regional conditions proposed by division engineers on activities authorized by NWPs will be forwarded to the Office of the Chief of Engineers, ATTN: CECW-OR.

(d) *District Engineer.* (1) When deciding whether to exercise his discretionary authority to modify, suspend, or revoke a case specific activity's authorization under an NWP, the DE should consider to the extent relevant and appropriate: Changes in Circumstances relating to the authorized activity since the NWP itself was Issued or since the DE confirmed authorization under the NWP by written verification; the continuing need for, or adequacy of, the specific conditions of the authorization; any significant objections to the authorization not previously considered; progress inspections of individual activities occurring under an NWP; cumulative adverse environmental effects resulting from activities occurring under the NWP-, the extent of the permittee's compliance with the terms and conditions of the NWPs; revisions to applicable statutory or regulatory authorities; and, the extent to which asserting discretionary authority would adversely affect plans, investments, and actions the permittee has made or taken in reliance on the permit; and, other concerns for the environment, including the aquatic environment under the section 404(b)(1) Guidelines, and other relevant factors of the public interest.

(2) *Procedures.* (i) When considering whether to modify or revoke a specific authorization under an NWP, whenever practicable, the DE will initially hold informal consultations with the permittee to determine whether special conditions to modify the authorization would be mutually agreeable or to allow the permittee to furnish Information which satisfies the DE's concerns. If a mutual agreement is reached, the DE will give the permittee written verification of the authorization, including the special conditions. If the permittee furnishes information which satisfies the DE's concerns, the permittee may proceed. If appropriate, the DE may suspend the NWP authorization while holding informal consultations with the permittee.

(ii) If the DE's concerns remain after the informal consultation, the DE may suspend a specific authorization under an NWP by notifying the permittee in

writing by the most expeditious means available that the authorization has been suspended, stating the reasons for the suspension, and ordering the permittee to stop any activities being done in reliance upon the authorization under the NWP. The permittee will be advised that a decision will be made either to reinstate or revoke the authorization under the NWP; or, if appropriate, that the authorization under the NWP maybe modified by mutual agreement. The permittee advised, that within 10 days of receipt of the notice of suspension, he may require a meeting with the DE, or his designated representative, to present information in this matter. After completion of the meeting (or within a reasonable period, of time after suspending the authorization if no meeting is requested), the DE will take action to reinstate, modify, or revoke the authorization.

(iii) Following completion of the suspension procedures, if the DE determines that sufficient concerns for the environment, including the aquatic environment under the section 404(b)(1), Guidelines, or other relevant factors of the public interest so require, he will revoke authorization under the NWP. The DE will provide the permittee a written final decision and instruct him on the procedures to seek authorization under a regional general permit or an individual permit.

(3) The DE need not issue a public notice when asserting discretionary authority over a specific activity. The modification, suspension, or revocation will become effective by notification to the prospective permittee.

### **330.6 Authorization by nationwide permit.**

(a) *Nationwide permit verification.* (1) Nationwide permittees may, and in some cases must, request from a DE confirmation that an activity complies with the terms and conditions of an NWP. DEs should respond as promptly as practicable to such requests.

(2) If the DE decides that an activity does not comply with the terms or conditions of an NWP, he will notify the person desiring to do the work and instruct him on the procedures to seek authorization under a regional general permit or individual permit.

(3) If the DE decides that an activity does comply with the terms and conditions of an NWP, he will notify the nationwide permittee.

(i) The DE may add conditions on a case-by-case basis to clarify compliance with the terms and conditions of an NWP or to ensure that the activity will have only minimal individual and cumulative adverse effects on the environment, and will not be contrary, to the public interest.

(ii) The DE's response will state that the verification is valid for a specific period of time (generally but no more than two years) unless the NWP authorization is modified, suspended, or revoked. The response should also include a statement that the verification will remain valid for the specified period of time, if during that time period, the NWP authorization is reissued without modification or the activity complies with any subsequent modification of the NWP authorization. Furthermore, the response should include a statement that the provisions of § 330.6(b) will apply, if during that period of time, the NWP authorization expires, or is suspended or revoked, or is modified, such that the activity would no longer comply with the terms and conditions of an NWP. Finally, the response should include any known expiration date that would occur during the specified period of time. A period of time less than two years may be used if deemed appropriate.

(iii) For activities where a state has denied 401 water quality certification and/or did not agree with the Corps consistency determination for an NWP the DE's response will state that the proposed activity meets the terms and conditions for authorization under the NWP with the exception of a state 401 water quality certification and/or CZM consistency concurrence. The response will also indicate the activity is denied without prejudice and cannot be authorized until the

requirements of § 330.4(c)(3), 330.4(c)(6), 330.4(d)(3), and 330.4(d)(6) are satisfied. The response will also indicate that work may only proceed subject to the terms and conditions of the state 401 water quality certification and/or CZM concurrence.

(iv) Once the DE has provided such verification, he must use the procedures of 33 CFR 330.5 in order to modify, suspend, or revoke the authorization.

(b) *Expiration of nationwide permits.* The Chief of Engineers will periodically review NWPs and their conditions and will decide to either modify, reissue, or revoke the permits. If an NWP is not modified or reissued within five years of its effective date, it automatically expires and becomes null and void. Activities 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 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). Activities completed under the authorization of an NWP which was in effect at the time the activity was completed continue to be authorized by that NWP.

(c) *Multiple use of nationwide permits.* Two or more different NWPs can be combined to authorize a "single and complete project" as defined at 33 CFR 330.2(i). However, the same NWP cannot be used more than once for a single and complete project.

(d) *Combining nationwide permits with individual permits.* Subject to the following qualifications, portions of a larger project may proceed under the authority of the NWPs while the DE evaluates an individual permit application for other portions of the same project, but only if the portions of the project qualifying for NWP authorization would have independent utility and are able to function or meet their purpose independent of the total project. When the functioning or usefulness of a portion of the total project qualifying for an NWP is dependent on the remainder of the project, such that its construction and use would not be fully justified even if the Corps were to deny the individual permit, the NWP does not apply and all portions of the project must be evaluated as part of the individual permit process.

(1) When a portion of a larger project is authorized to proceed under an NWP, it is with the understanding that its construction will in no way prejudice the decision on the individual permit for the rest of the project. Furthermore, the individual permit documentation must include an analysis of the impacts of the entire project, including related activities authorized by NWP.

(2) NWPs do not apply, even if a portion of the project is not dependent on the rest of the project, when any portion of the project is subject to an enforcement action by the Corps or EPA.

(e) *After-the-fact authorizations.* These authorizations often play an important part in the resolution of violations. In appropriate cases where the activity complies with the terms and conditions of an NWP, the DE can elect to use the NWP for resolution of an after-the-fact permit situation following a consideration of whether the violation being resolved was knowing or intentional and other indications of the need for a penalty. For example, where an unauthorized fill meets the terms and conditions of NWP 13, the DE can consider the appropriateness of allowing the residual fill to remain, in situations where said fill would normally have been permitted under NWP 13. A knowing, intentional, willful violation should be the subject of an enforcement action leading to a penalty, rather than an after-the-fact authorization. Use of after-the-fact, NWP authorization must be consistent with the terms of the Army/EPA Memorandum of Agreement on Enforcement. Copies are available from each district engineer.

## **Appendix A to Part 330-Nationwide Permits and Conditions**

## **A. Index of the Nationwide Permits and Conditions**

### *Nationwide Permits*

1. Aids to Navigation
2. Structures in Artificial Canals
3. Maintenance
4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities
5. Scientific Measurement Devices
6. Survey Activities
7. Outfall Structures
8. Oil and Gas Structures
9. Structures in Fleeting and Anchorage Areas
10. Mooring Buoys
11. Temporary Recreational Structures
12. Utility Line Backfill and Bedding
13. Bank Stabilization
14. Road Crossing
15. U.S. Coast Guard Approved Bridges
16. Return Water From Upland Contains Disposal Areas
17. Hydropower Projects
18. Minor Discharges
19. 25 Cubic Yard Dredging
20. Oil Spill Cleanup
21. Surface Mining Activities
22. Removal of Vessels
23. Approved Categorical Exclusions
24. State Administered Section 404 Programs
25. Structural Discharge
26. Headwaters and Isolated Waters Discharges
27. Wetland Restoration Activities
28. Modifications of Existing Marinas
29. Reserved
30. Reserved
31. Reserved
32. Completed Enforcement Actions
33. Temporary Construction and Access
34. Cranberry Production Activities
35. Maintenance Dredging of Existing Basins
36. Boat Ramps
37. Emergency Watershed Protection
38. Cleanup of Hazardous and Toxic Waste
39. Reserved
40. Farm Buildings

### *Nationwide Permit Conditions*

#### *General Conditions*

1. Navigation
2. Proper Maintenance
3. Erosion and Siltation Controls
4. Aquatic Life Movements
5. Equipment
6. Regional, and Case-By-Case Conditions
7. Wild and Scenic Rivers
8. Tribal Rights

9. Water Quality Certification
10. Coastal Zone Management
11. Endangered Species
12. Historic Properties

*Section 404 Only Conditions*

1. Water Supply Intakes
2. Shellfish Production
3. Suitable Material
4. Mitigation
5. Spawning Areas
6. Obstruction of High Flows
7. Adverse Impacts From Impoundments
8. Waterfowl Breeding Areas
9. Removal of Temporary Fills

**B. Nationwide Permits**

1. *Aids to Navigation.* The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard. \*(See 33 CFR part 66, chapter I, subchapter C). (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)). (Section 10)

3. *Maintenance.* The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area including those due to changes in materials, construction techniques, or current construction codes or safety standards which are necessary to make repair, rehabilitation, or replacement are permitted, provided the environmental impacts resulting from such repair, rehabilitation, or replacement are minimal. Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction. This nationwide permit authorizes the repair, rehabilitation, or replacement of those structures destroyed by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced or 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. Maintenance dredging and beach restorations are not authorized by this nationwide permit.

(Sections 10 and 404)

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, clam and oyster digging, and small fish attraction devices such as open water fish concentrators (sea kites, etc). This nationwide permit authorizes shellfish seeding provided this activity does not occur in wetlands or vegetated shallows. This nationwide permit 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. (Sections 10 and 404)

5. *Scientific Measurement Devices.* Staff gages, tide gages, water recording 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 and further for discharges of 10 to 25 cubic yards provided the permittee notifies the district engineer in accordance with "Notification" general condition. (Sections 10 and 404)

6. *Survey Activities.* Survey activities including core sampling, seismic exploratory operations, and plugging of seismic shot holes and other exploratory-type bore holes. Drilling and the discharge of excavated material from test wells for oil and gas exploration is not authorized by this nationwide permit; the plugging of such wells is authorized. Fill placed for roads, pads and other similar activities is not authorized by this nationwide permit. The discharge of drilling muds and cuttings may require a permit under section 402 of the Clean Water Act. (Sections 10 and 404)

7. *Outfall Structures.* Activities related to construction of outfall structures and associated intake structures where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted, or are otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System program (section 402 of the Clean Water Act), provided that the nationwide permittee notifies the district engineer in accordance with the "Notification" general condition. (Also see 33 CFR 330.1(e)). Intake structures per se are not included-only those directly associated with an outfall structure. (Sections 10 and 404)

8. *Oil and Gas Structures.* 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, Minerals Management Service. 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(1). (Where such limits have not been designated, or where changes are anticipated, district engineers will consider asserting discretionary authority in accordance with 33 CFR 330.4(e) and will also review such proposals to ensure they comply with the provisions of the fairway regulations in 33 CFR 322.5(1)). 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. (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 by the U.S. Coast Guard. (Section 10)

10. *Mooring Buoys.* Non-commercial, single-boat, mooring buoys. (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 manager must approve each, buoy or marker individually. (Section 10)

12. *Utility Line, Backfill and Bedding.* Discharges of material for backfill or bedding for utility lines, including outfall and intake structures, provided there is no change in preconstruction contours. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. . The term "utility line" does

not include activities which drain a water of the United States, such as drainage tile, however, it does apply to pipes conveying drainage from another area. Material resulting from trench excavation may be temporarily sidecast (up to three months) into waters of the United States, provided that the material is not placed in such a manner that it is dispersed by currents or other forces. The DE may extend the period of temporary side casting up to 180 days, where appropriate. The area of waters of the United States that is disturbed must be limited to the minimum necessary to construct the utility line. In wetlands, the top 6" to 12" of the trench should generally be backfilled with topsoil from the trench. Excess material must be removed to upland areas immediately upon completion of construction. Any exposed slopes and streambanks must be stabilized immediately upon completion of the utility line. The utility line itself will require a Section 10 permit if in navigable waters of the United States. (See 33 CFR part 322). (Section 404)

13. *Bank Stabilization*. Bank stabilization activities necessary for erosion prevention provided:

- a. No material is placed in excess of the minimum needed for erosion protection;
- b. The bank stabilization activity is less than 500 feet in length;
- c. The activity will not exceed an average of one cubic yard per running foot placed along the bank below the plane of the ordinary high water mark or the high tide line;
- d. No material is placed in any special aquatic site, including wetlands;
- e. No material is of the type or is placed in any location or in any manner so as to impair surface water flow into or out of any wetland area;
- f. No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored trees and treetops may be used in low energy areas); and,
- g. The activity is part of a single and complete project.

Bank stabilization activities in excess of 500 feet in length or greater than an average of one cubic yard per running foot may be authorized if the permittee notifies the district engineer in accordance with the "Notification" general condition and the district engineer determines the activity complies with the other terms and conditions of the nationwide permit and the adverse environmental impacts are minimal both individually and cumulatively. (Sections 10 and 404)

14. *Road Crossing*. Fills for roads crossing waters of the United States (including wetlands and other special aquatic sites) provided:

- a. The width of the fill is limited to the minimum necessary for the actual crossing;
- b. The fill placed in waters of the United States is limited to a filled area of no more than 1/3 acre. Further more than a total of 200 linear feet of the fill for the roadway can occur in special aquatic sites, including wetlands;
- c. The crossing is culverted, bridged or otherwise designed to prevent the restriction of, and to withstand, expected high flows and tidal flows, and to prevent the restriction of low flows and the movement of aquatic organisms;
- d. The crossing, including all attendant features, both temporary and permanent, is part of a single and complete project for crossing of a water of the United States; and,
- e. For fills in special aquatic sites, including wetlands, the permittee notifies the district engineer in accordance with the "Notification" general condition. The notification must also include a delineation of affected special aquatic sites, including wetlands. Some road fills may be eligible for an exemption from the need for a Section 404 permit altogether (see 33 CFR 323.4). Also, where local circumstances indicate the need, district engineers will define the term "expected high flows" for the purpose of establishing applicability of this nationwide permit. (Sections 10 and 404)

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

States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills provided such discharges have been authorized by the U.S. Coast Guard as part of the bridge permit. Causeways and approach fills are not included in this nationwide permit and will require an individual or regional section 404 permit. (Section 404)

16. *Return Water From Upland Contained Disposal Areas.* Return water from an upland, contained dredged material disposal area, The dredging itself requires a section 10 permit if located in navigable waters of the United States. 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 on the upland and thus does not require a section 404 permit. This nationwide permit satisfies the technical requirement for a section 404 permit for the return water where the quality of the return water is controlled by the state through the section 401 certification procedures. (Section 404)

17. *Hydropower Projects.* Discharges of dredged or fill material associated with (a) small hydropower projects at existing reservoirs where the project, which includes the fill, is licensed by the Federal Energy Regulatory Commission, (FERC) under the Federal Power Act of 1920, as amended; and has a total generating capacity of not more than 5000 KW; and the permittee notifies the district engineer in accordance with the "Notification" general condition; or (b) hydropower projects for which the FERC has granted an exemption from licensing 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; provided the permittee notifies the district engineer in accordance with the "Notification" general condition. (Section 404)

18. *Minor Discharges.* Minor discharges of dredged or fill material into all waters of the United States provided:

- a. The discharge does not exceed 25 cubic yards;
- b. The discharge will not cause the loss of more than one acre of a special aquatic site, including wetlands. For the purposes of this nationwide permit. the acreage limitation includes the filled area plus special aquatic sites that are adversely affected by flooding and special aquatic sites that are drained so that they would no longer be a water of the United States as a result of the project;
- c. If the discharge exceeds 10 cubic yards or the discharge is in a special aquatic site, including wetlands, the permittee notifies the district engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.1(e)): and

d. The discharge, including all attendant features, both temporary and permanent, is part of a single and complete project and is not placed for the purpose of stream diversion. (Sections 10 and 404)

19. *Minor Dredging.* Dredging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States as part of a single and complete project. This nationwide permit does not authorize the dredging or degradation through siltation of coral reefs, submerged aquatic vegetation, 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)). (Section 10)

20. *Oil Spill Cleanup.* Activities required for the containment and clean up of oil and hazardous substances which are subject to the National Oil and hazardous Substances Pollution Contingency Plan, (40 CFR part 300), provided that the work is done in accordance with the Spill Control and Countermeasure Plan required by 40 CFR 112.3 and any existing State contingency plan and provided that the Regional Response Team (if one exists in the area) concurs with the proposed containment and cleanup action. (Sections 10 and 404)

21. *Surface Coal Mining Activities.* Activities associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the Permittee notifies the district engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.1(e)). (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 nationwide permit does not authorize the removal of vessels listed or determined eligible for listing on the National Register of Historic Places unless the district engineer is notified and indicates that there is compliance with the "Historic Properties" general condition. This nationwide permit does not authorize maintenance dredging, shoal removal, or river bank snagging. Vessel disposal in waters of the United States may need a permit from EPA (see 40 CFR 229.3). (Sections 10 and 404)

23. *Approved Categorical Exclusions.* Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where that agency or department has determined, pursuant to the Council on Environmental Quality Regulation for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR part 1500 et seq.), that the activity, work, or discharge is categorically excluded from environmental documentation because it is included within a category of actions which neither individually nor cumulatively have a significant effect on 9 human environment, and the Office the Chief of Engineers (ATTN: CECW-OR,) has been furnished notice of the agency's or department's application for the categorical exclusion concurs with that determination. Prior to approval for purposes of this nationwide permit of any agency's categorical exclusions, the Chief of Engineers will solicit public comment. In addressing these comments, the Chief of Engineers may require certain conditions for authorization of an agency's categorical exclusions under this nationwide permit. (Sections 10 and 404)

24. *State Administered Section 404 Program.* Any activity permitted by a state administering its own section 404 permit program pursuant to 33 U.S.C. 1344(g)-(!) B permitted pursuant to section 10 of the Rivers and Harbors Act of 1899. Those activities which do not involve a section 404 state permit are not included in this nationwide permit, but certain structures will be exempted by section 154 of Public Law 94-587, 90 Stat. 2917 (33 U.S.C. 591) (see 33 CFR 322.3(a)(2)). (Section 10)

25. *Structural Discharge.* 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 piers and docks; and for linear projects, such as bridges, transmission line footings, and walkways. The NWP does not authorize filled structural members that would support buildings, homes, parking areas, storage areas and other such structures. Housepads or other building pads are also not included in this nationwide permit. The structure itself may require a section 10 permit if located in navigable waters of the United States. (Section 404)

26. *Headwaters and Isolated Waters Discharges.* Discharges of dredged or fill material into headwaters and isolated waters provided:

a. The discharge does not cause the loss of more than 10 acres of waters of the United States;

b. The permittee notifies the district engineer if the discharge would cause the loss of waters of the United States greater than one acre in accordance with the "Notification" general condition. For discharges in special aquatic sites,

including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.1(e)); and

c. The discharge, including all attendant features, both temporary and permanent, is part of a single and complete project. For the purposes of this nationwide permit, the acreage of loss of waters of the United States include filled area plus waters of the United States that are adversely affected by flooding, excavation or drainage as a result of the project. The ten-acre and one-acre limits of NWP 26 are absolute, and cannot be increased by any mitigation plan offered by the applicant or required by the DE.

*Subdivisions:* For any real estate subdivision created or subdivided after October 5, 1984, a notification pursuant to subsection b. of this nationwide permit is required for any discharge which would cause the aggregate total loss of waters of the United States for the entire subdivision to exceed one (1) acre. Any discharge in any real estate subdivision which would cause the aggregate total loss of waters of the United States in the subdivision to exceed ten (10) acres is not authorized by this nationwide permit; unless the DE exempts a particular subdivision or parcel by making a written determination that: (1) The individual and cumulative adverse environmental effects would be minimal and the property owner had, after October 5, 1984, but prior to January 21, 1992, committed substantial resources in reliance on NWP 26 with regard to a subdivision, in circumstances where if: would be inequitable to frustrate his investment-backed expectations, or (2) that the individual and cumulative adverse environmental effects would be minimal, high quality wetlands would not be adversely affected, and there would be an overall benefit to the aquatic environment. Once the exemption is established for a subdivision, subsequent lot development by individual property owners may proceed using NWP 28. For purposes of NWP 26, the term "real estate subdivision" shall be interpreted to include circumstances where a landowner or developer divides a tract of land into smaller parcels for the purpose of selling, conveying, transferring, leasing, or developing said parcels. This would include the entire area of a residential. Commercial or other real estate subdivision, including all parcels and parts thereof. (Section 404)

27. *Wetland and Riparian Restoration and Creation Activities.* Activities in waters of the United States associated with the restoration of altered and degraded non-tidal wetlands and creation of wetlands on private lands in accordance with the terms and conditions of a binding wetland restoration or creation agreement between the landowner and the U.S. Fish and Wildlife Service (USFWS) or the Soil Conservation Service (SCS); or activities associated with, the restoration of wetlands, riparian, areas and creation of wetlands and riparian areas on U.S.

Forest Service and Bureau of Land Management lands, Federal surplus lands (e.g., military lands proposed for disposal). Farmers Home Administration inventory properties, and Resolution Trust Corporation inventory properties that are under Federal control prior to being transferred to the private sector. Such activities include, but are not limited to: Installation and maintenance of small water control structures, dikes, and berms; backfilling of existing drainage ditches; removal of existing drainage structures; construction of small nesting islands; and other related activities. This nationwide permit applies to restoration projects that serve the purpose of restoring "natural" wetland hydrology, vegetation, and function to altered and degraded nontidal wetlands and "natural" functions of riparian areas. For agreement restoration and creation projects only, this nationwide permit also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its prior condition and use (i.e., prior to restoration under the agreement) within five years after expiration of the limited term wetland restoration or creation agreement, even if the discharge occurs after this nationwide permit expires. The prior condition will be documented in the original agreement, and the determination of return to

prior conditions will be made by the Federal agency executing the agreement. Once an area is reverted back to its prior physical condition, it will be subject to whatever the Corps regulatory requirements will be at that future date. This nationwide permit does not authorize the conversion of natural wetlands to another aquatic use, such as creation of waterfowl impoundments where a forested wetland previously existed. (Sections 10 and 404)

28. *Modifications of Existing Marinas.* Reconfigurations of existing docking facilities within an authorized marina area. No dredging, additional slips or dock spaces, or expansion of any kind within waters of the United States are authorized by this nationwide permit. (Section 10)

29. Reserved

30. Reserved

31. Reserved

32. *Completed Enforcement Actions.* Any structure, work or discharge of dredged or fill material undertaken in accordance with, or remaining in place in compliance with, the terms of a final Federal court decisions, consent decree, or settlement agreement in 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. (Sections 10 and 404)

33. *Temporary Construction, Access and Dewatering.* Temporary structures and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites; provided the associated permanent activity was previously authorized by the Corps of Engineers or the U.S. Coast Guard, or for bridge construction activities not subject to Federal regulation. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must be of materials and placed in a manner that will not be eroded by expected high flows. Temporary fill must be entirely removed to upland areas following completion of the construction activity and the affected areas restored to the pre-project conditions. Cofferdams cannot be used to dewater wetlands or other aquatic areas so as to change their use. Structures left in place after cofferdams are removed require a section 10 permit if located in navigable waters of the United States. (See 33 CFR part 322). The permittee must notify the district engineer in accordance with the "Notification" general condition. The notification must also include a restoration plan of reasonable measures to avoid and minimize impacts to aquatic resources. The district engineer will add special conditions, where necessary, to ensure that adverse environmental impacts are minimal. Such conditions may include: limiting the temporary work to the minimum necessary; requiring seasonal restrictions; modifying the restoration plan; and requiring alternative construction methods (e.g. construction mats in wetlands where practicable). This nationwide permit does not authorize temporary structures or fill associated with mining activities or the construction of marina basins which have not been authorized by the Corps. (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 provided:

a. The cumulative total acreage of disturbance per cranberry production operation, including but not limited to, does not exceed 10 acres of waters of the United States, including wetlands;

b. The permittee notifies the District Engineer in accordance with the notification procedures; and

c. The activity does not result in a net loss of wetland acreage.

This nationwide permit 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 nationwide

permit, the cumulative total of 10 acres will be measured over the period that this nationwide permit to valid. (Section 404)

35. *Maintenance Dredging of Existing Basins.* Excavation and removal of accumulated sediment for maintenance of existing marina basins, canals, and boat slips to previously authorized depths or controlling depths for ingress/ egress whichever is less provided the dredged material is disposed of at an upland site and proper siltation controls are used. (Section 10)

36. *Boat Ramps.* Activities required for the construction of boat ramps provided:

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 placement of precast concrete planks or slabs. (Unsuitable material that causes unacceptable chemical pollution or is structurally unstable is not authorized),

b. The boat ramp does not exceed 20 feet in width;

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 the upland; and

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

Dredging to provide access to the boat ramp may be authorized by another NWP, regional general permit, or individual permit pursuant to section 10 if located in navigable waters of the United States. (Sections 10 and 404)

37. *Emergency Watershed Protection and Rehabilitation.* Work done by or funded by the Soil Conservation Service qualifying as an "exigency" situation (requiring immediate action) under its Emergency Watershed Protection Program (7 CFR part 624) and work done or funded by the Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 509.13) provided the district engineer is notified in accordance with the notification general condition. (Also see 33 CFR 330.1(e)).

(Section 10 404)

38. *Cleanup of Hazardous and Toxic Waste.* Specific activities required to affect the containment, stabilization or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority provided the permittee notifies the district engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands, Court ordered remedial action plans or related settlements are also authorized by this nationwide permit. This nationwide permit does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste. (Sections 10 and 404)

39. Reserved

40. *Farm Buildings.* Discharges of dredged or fill material into jurisdictional wetlands (but not including prairie potholes, playa lakes, or vernal pools) that were in agricultural crop production prior to December 23, 1985 (i.e., farmed wetlands) for foundations and building pads for buildings or agricultural related structures necessary for farming activities. The discharge will be limited to the minimum necessary but will in no case exceed 1 acre (see the "Minimization" section 404 only condition). (Section 404)

### **C. Nationwide Permit Conditions**

*General Conditions:* The following general conditions must be followed in order for any authorization by a nationwide permit to be valid:

1. *Navigation.* No activity may cause more than a minimal adverse effect on navigation.
2. *Proper maintenance.* Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.

3. *Erosion and siltation controls.* Appropriate erosion and siltation controls must be used and maintained an effective operating condition during construction, and all exposed soil and other fills must be permanently stabilized at the earliest practicable date.

4. *Aquatic life movements.* No activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including hose species which normally migrate through the area, unless the activity's primary purpose is to impound water.

5. *Equipment.* Heavy equipment working in wetlands must be placed on mats or other measures must be taken to minimize soil disturbance.

6. *Regional and case-by-case conditions.* The activity must comply with any regional conditions which may have been added by the division engineer, (see 33 CFR 330.4(e)) and any case specific conditions added by the Corps.

7. *Wild and Scenic Rivers.* No 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, Information on Wild and Scenic Rivers may be obtained from the National Park Service and the U.S. Forest Service.

8. *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.

9. *Water quality certification.* In certain states, an individual state water quality certification must be obtained or waived (see 33 CFR 330.4(c)).

10. *Coastal zone management.* In certain states, an individual state coastal zone management consistency concurrence must be obtained or waived. (See 33 CFR 330.4(d)).

11. *Endangered Species.* No activity is authorized under any NWP which is likely to 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, or which is likely to destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify that district engineer if any listed species or critical habitat might be affected or is in the vicinity of the project and shall, not begin work on the activity until notified by the district engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. Information on the location of threatened and endangered species and their critical habitat can be obtained from the U.S. Fish and Wildlife Service and National Marine Fisheries Service. (See 33 CFR 330.4(n))

12. *Historic properties.* No activity which may affect Historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the DE has complied with the provisions of 33 CFR 325, appendix C. The prospective permittee must notify the district engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by District Engineer that the requirements of the National Historic Preservation Act have-been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places. (See 33 CFR 330.4(g)).

13. *Notification.* (a) Where required by the terms of the NWP, the prospective permittee must notify the District Engineer as early as possible and shall not begin the activity:

(1) Until notified 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) If notified by the District or Division engineer that an individual permit is required; or

(3) Unless 30 days have passed from the District Engineer's receipt of the notification and the prospective permittee has not received notice from the District or Division Engineer. 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) The notification must be in writing and include the following information and any required fees:

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

(2) Location of the proposed project;

(3) Brief description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; 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;

(4) Where required by the terms of the NWP, a delineation of affected special aquatic sites, including wetlands; and

(5) A statement that the prospective permittee has contacted:

(1) The USFWS/NMFS regarding the presence of any Federally listed (or proposed for listing) endangered or threatened species or critical habitat in the permit area that may be affected by the proposed project; and any available information provided by those agencies. (The prospective permittee may contact Corps District Offices for USFWS/NMFS agency contacts and lists of critical habitat.)

(ii) The SHPO regarding the presence of any historic properties in the permit area that may be affected by the proposed project; and the available information, if any, provided by that agency.

(c) The standard individual permit application form (Form ENG 4345) may be used as the notification but must clearly indicate that it is a PDN and must include all of the information required in (b) (1)-(5) of General Condition 13.

(d) In reviewing an activity under the notification procedure, the District Engineer will first determine whether the activity will result in more than minimal individual or cumulative adverse environmental effects or will be contrary to the public interest. The prospective permittee may, at his option, submit a proposed mitigation plan with the predischARGE notification to expedite the process and the District Engineer will consider any optional mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed work are minimal. 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 nationwide permits and the need for mitigation to reduce the project's adverse environmental effects to a minimal level. The district engineer will upon receipt of a notification provide immediately (e.g. facsimile transmission, overnight mail or other expeditious manner) a copy to the appropriate offices of the Fish and Wildlife Service, State natural resource or water quality agency, EPA, and, if appropriate, the National Marine Fisheries Service. With the exception of NWP 37, these agencies will then have 5 calendar days from the date the material is transmitted to telephone the District Engineer if they intend to provide substantive, sitespecific comments. If so contacted by an agency, the District Engineer will wait an additional 10 calendar days before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency. The District Engineer will indicate in the administrative record associated with each notification that the resource agencies' concerns were considered. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects are minimal, he will notify the permittee and

include any conditions he deems necessary. If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then he will notify the applicant either (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; or (2) that the project is authorized under the nationwide permit subject to the applicant's submitting a mitigation proposal that would reduce the adverse effects to the minimal level. This mitigation proposal must be approved by the District Engineer prior to commencing work. If the prospective permittee elects to submit a mitigation plan, the DE will expeditiously review the proposed mitigation plan, but will not commence a second 30-day notification procedure. If the net adverse effects of the project (with the mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant informing him that the project can proceed under the terms and conditions of the nationwide permit.

(e) *Wetlands Delineations*: 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 site. There may be some delay if the Corps does the delineation. Furthermore, the 30-day period will not start until the wetland delineation has been completed.

(f) *Mitigation*: Factors that the District Engineer will consider when determining the acceptability of appropriate and practicable mitigation include, but are not limited to:

(1) To be practicable the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of overall project purposes;

(2) To the extent appropriate, permittees should consider mitigation banking and other forms of mitigation including contributions to wetland trust funds, which contribute to the restoration, creation, replacement, enhancement, or preservation of wetlands.

Furthermore, examples of mitigation that may be appropriate and practicable include but are not limited to: reducing the size of the project; establishing buffer zones to protect aquatic resource values; and replacing the loss of aquatic resource values by creating, restoring and enhancing similar functions and values. In addition, mitigation must address impacts and cannot be used to offset the acreage of wetland losses that would occur in order to meet the acreage limits of some of the nationwide permits (e.g. 5 acres of wetlands cannot be created to change a 6 acre loss of wetlands to a 1 acre loss; however, the 6 created acres can be used to reduce the impacts of the 6 acre loss).

#### ***Section 404 Only Conditions***

In addition to the General Conditions, the following conditions apply only to activities that involve the discharge of dredged or fill material and must be followed in order for authorization by the nationwide permits to be valid:

1. *Water supply intakes*. No discharge of dredged or fill material may occur in the proximity of a public water supply intake except where the discharge is for repair of the public water supply intake structures or adjacent bank stabilization.

2. *Shellfish production*. No discharge of dredged or fill material may occur in areas of concentrated shellfish production, unless the discharge is directly related to a shellfish harvesting activity authorized by nationwide permit 4.

3. *Suitable material*. No discharge of dredged or fill material may consist of unsuitable material (e.g., trash, debris, car bodies, etc.) and material discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).

4. *Mitigation*. Discharges of dredged or fill material into waters of the United States must be minimized or avoided to the maximum extent practicable at the project site (i.e. on-site), unless the DE has approved a compensation mitigation plan for the specific regulated activity.

5. *Spawning areas*. Discharges in spawning areas during spawning seasons must be avoided to the maximum extent practicable.

6. *Obstruction of high flows*. To the maximum extent practicable, discharges must not permanently restrict or impede the passage of normal or expected high flows or cause the relocation of the water (unless the primary purpose of the fill is to impound waters).

7. *Adverse impacts from impoundments*. If the discharge creates an impoundment of water, adverse impacts on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow shall be minimized to the maximum extent practicable.

8. *Waterfowl breeding areas*. Discharges into breeding areas for migratory Waterfowl must be avoided to the maximum extent practicable.

9. *Removal of temporary fills*. Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.

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