

DEPARTMENT OF DEFENSE**Department of the Army, Corps of Engineers****33 CFR Chapter II**

[Docket Number: COE–2020–0002]

RIN 0710–AB29

Reissuance and Modification of Nationwide Permits**AGENCY:** Army Corps of Engineers, DoD.**ACTION:** Final rule.

SUMMARY: Nationwide Permits (NWP) authorize certain activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 that have no more than minimal individual and cumulative adverse environmental effects. In a proposed rule published in the September 15, 2020, issue of the **Federal Register**, the Corps proposed to reissue 52 existing NWPs and issue five new NWPs, plus the NWP general conditions and definitions. In a final rule published in the January 13, 2021, issue of the **Federal Register**, the Corps reissued 12 of the 52 existing NWPs and four of the five new NWPs, as well as the NWP general conditions and definitions. In this final rule, the Corps is reissuing the remaining 40 existing NWPs and issuing the remaining one new NWP. The NWP general conditions and definitions published in the January 13, 2021, issue of the **Federal Register** apply to the 41 NWPs reissued or issued in this final rule.

DATES: The 41 NWPs in this final rule go into effect on February 25, 2022. The 41 NWPs in this final rule expire on March 14, 2026.

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

FOR FURTHER INFORMATION CONTACT: Mr. David Olson at 202–761–4922 or access the U.S. Army Corps of Engineers Regulatory Home Page at <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/>.

SUPPLEMENTARY INFORMATION:**Table of Contents**

- I. Background
 - A. General
 - B. Overview of Proposed Rule
 - C. Overview of This Final Rule
 - E. Nationwide Permit Verifications
- II. Discussion of Public Comments
 - A. Overview
 - B. Responses to General Comments
 - C. Comments on Regional Conditioning of Nationwide Permits

- D. Response to Comments on Specific Nationwide Permits in This Final Rule
- E. Responses to Comments on the Nationwide Permit General Conditions
- F. Responses to Comments on the District Engineer's Decision
- G. Discussion of Proposed Modifications to Section F, Definitions
- III. Compliance With Relevant Statutes
 - A. National Environmental Policy Act Compliance
 - B. Compliance With Section 404(e) of the Clean Water Act
 - C. 2020 Revisions to the Definition of "Waters of the United States" (*i.e.*, the Navigable Waters Protection Rule)
 - D. Compliance With the Endangered Species Act
 - E. Compliance With the Essential Fish Habitat Provisions of the Magnuson-Stevens Fishery Conservation and Management Act
 - F. Compliance With Section 106 of the National Historic Preservation Act
 - G. Section 401 of the Clean Water Act
 - H. Section 307 of the Coastal Zone Management Act (CZMA)
- IV. Economic Impact
- V. Administrative Requirements
- VI. References

List of Acronyms

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

List of Nationwide Permits Issued in This Final Rule

1. Aids to Navigation
2. Structures in Artificial Canals
3. Maintenance
4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities
5. Scientific Measurement Devices
6. Survey Activities
7. Outfall Structures and Associated Intake Structures
8. Oil and Gas Structures on the Outer Continental Shelf
9. Structures in Fleeting and Anchorage Areas
10. Mooring Buoys
11. Temporary Recreational Structures
13. Bank Stabilization
14. Linear Transportation Projects
15. U.S. Coast Guard Approved Bridges
16. Return Water From Upland Contained Disposal Areas
17. Hydropower Projects
18. Minor Discharges
19. Minor Dredging
20. Response Operations for Oil or Hazardous Substances

22. Removal of Vessels
23. Approved Categorical Exclusions
24. Indian Tribe or State Administered Section 404 Programs
25. Structural Discharges
27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities
28. Modifications of Existing Marinas
30. Moist Soil Management for Wildlife
31. Maintenance of Existing Flood Control Facilities
32. Completed Enforcement Actions
33. Temporary Construction, Access, and Dewatering
34. Cranberry Production Activities
35. Maintenance Dredging of Existing Basins
36. Boat Ramps
37. Emergency Watershed Protection and Rehabilitation
38. Cleanup of Hazardous and Toxic Waste
41. Reshaping Existing Drainage Ditches
45. Repair of Uplands Damaged by Discrete Events
46. Discharges in Ditches
49. Coal Remining Activities
53. Removal of Low-Head Dams
54. Living Shorelines
59. Water Reclamation and Reuse Facilities

I. Background*A. General*

The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWPs) to authorize activities under Section 404 of the Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403), where those activities will result in no more than minimal individual and cumulative adverse environmental effects. NWPs were first issued by the Corps in 1977 (42 FR 37122) to authorize categories of activities that have minimal adverse effects on the aquatic environment with conditions to minimize those adverse effects, without requiring individual permits for those activities. After 1977, NWPs have been issued or reissued in 1982 (47 FR 31794), 1984 (49 FR 39478), 1986 (51 FR 41206), 1991 (56 FR 59110), 1995 (60 FR 38650), 1996 (61 FR 65874), 2000 (65 FR 12818), 2002 (67 FR 2020), 2007 (72 FR 11092), 2012 (77 FR 10184), 2017 (82 FR 1860), and 2021 (86 FR 2744).

Section 404(e) of the Clean Water Act provides the statutory authority for the Secretary of the Army, after notice and opportunity for public hearing, to issue general permits on a nationwide basis for any category of activities involving discharges of dredged or fill material into waters of the United States that will cause only minimal individual and cumulative adverse environmental effects for a period of no more than five years after the date of issuance (33 U.S.C. 1344(e)). The Secretary's authority to issue permits has been

delegated to the Chief of Engineers and designated representatives of the Chief of Engineers. Nationwide permits are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities in federally jurisdictional waters and wetlands, where those activities would have no more than minimal adverse environmental impacts (see 33 CFR 330.1(b)). The categories of activities authorized by NWP must be similar in nature, cause only minimal adverse environmental effects when performed separately, and have only minimal cumulative adverse effect on the environment (see 33 U.S.C. 1344(e)(1)). NWPs can be issued for a period of no more than 5 years (33 U.S.C. 1344(e)(2)), and the Corps has the authority to modify, reissue, revoke, or suspend the NWPs before they expire. NWPs can also be issued to authorize activities pursuant to Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(f)). The NWP program is designed to provide timely authorizations for the regulated public while protecting the Nation's aquatic resources.

On September 15, 2020, the Corps published a proposed rule in the **Federal Register** (85 FR 57298) to reissue 52 existing NWPs with modifications, to issue five new NWPs, and to reissue the NWP general conditions and definitions with modifications. On January 13, 2021, the Corps published a final rule in the **Federal Register** (86 FR 2744). In that final rule, the Corps reissued the following NWPs: NWP 12 (oil or natural gas pipeline activities); NWP 21 (surface coal mining activities); NWP 29 (residential developments); NWP 39 (commercial and institutional developments); NWP 40 (agricultural activities); NWP 42 (recreational facilities); NWP 43 (stormwater management facilities); NWP 44 (mining activities); NWP 48 (commercial shellfish mariculture activities); NWP 50 (underground coal mining activities); NWP 51 (land-based renewable energy generation facilities); and NWP 52 (water-based renewable energy generation pilot projects). The Corps issued four new NWPs: NWP 55 (seaweed mariculture activities); NWP 56 (finfish mariculture activities); NWP 57 (electric utility line and telecommunications activities); and NWP 58 (utility line activities for water and other substances). In the final rule published on January 13, 2021, the Corps stated that it would issue a separate final rule for its decisions on the proposed reissuance of the other 40

proposed NWPs and the issuance of proposed new NWP E for water reclamation and reuse facilities.

The 16 NWPs issued or reissued in the final rule that was published in the January 13, 2021, issue of the **Federal Register** expire on March 14, 2026. The 41 NWPs published in today's final rule will also expire on March 14, 2026, so that all of the NWPs issued or reissued in 2021 expire on the same date. Under Section 404(e) of the Clean Water Act (33 U.S.C. 1344(e)), an NWP cannot be issued for a period of more than five years, and the Corps has discretion to establish an expiration date for an NWP that is less than five years after the date the NWP goes into effect. Establishing the same expiration date for 16 NWPs issued in January 2021 and the 41 NWPs issued in today's final rule will help provide consistency and clarity to the regulated public and the Corps, and align all of the NWPs in terms of scheduling the next rulemaking to issue or reissue the NWPs. At its discretion, the Corps may rescind, revise, or suspend one or more NWPs prior to that time.

Consistent with E.O. 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, the Army is also considering whether additional steps should be taken to ensure the Nationwide Permits program aligns with this Administration's policies and priorities moving forward.

Nationwide permits authorize categories of activities that are similar in nature and will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. See 33 U.S.C. 1344(e)(1). The phrase "minimal adverse environmental effects when performed separately" refers to the direct and indirect adverse environmental effects caused by a specific activity authorized by an NWP. The phrase "minimal cumulative adverse effect on the environment" refers to the collective direct and indirect adverse environmental effects caused by all the activities authorized by a particular NWP during the time period when the NWP is in effect (a period of no more than 5 years) in a specific geographic region (e.g., 40 CFR 230.7(b)(3)). These concepts are defined in paragraph 2 of section D, "District Engineer's Decision." The appropriate geographic area for assessing cumulative effects is determined by the decision-making authority for the general permit (generally, the district engineer).

Some NWPs include pre-construction notification (PCN) requirements. PCNs

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

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

There are 38 Corps district offices and 8 Corps division offices. The district offices administer the NWP program on a day-to-day basis by reviewing PCNs for proposed NWP activities. The division offices oversee district offices and are managed by division engineers. Division engineers have the authority, after public notice and comment, to modify, suspend, or revoke NWP authorizations on a regional basis to take into account regional differences among aquatic resources and to ensure that the NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects in a region (see 33 CFR 330.5(c)). When a Corps district receives a PCN, the district engineer reviews the PCN and determines whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects, consistent with the criteria in paragraph 2 of section D, "District Engineer's Decision." At this point, the district engineer may add conditions to the NWP authorization to ensure that the verified NWP activity results in no more than minimal individual and cumulative adverse environmental effects and that it is not contrary to the public interest, consistent with processes and requirements set out in 33 CFR 330.5(d). See section II.G for more

information on regional conditions for the NWP.

For some NWPs, when submitting a PCN, an applicant may request a waiver for a particular limit specified in the NWP's terms and conditions. If the applicant requests a waiver of an NWP limit and the district engineer determines, after coordinating with the resource agencies under paragraph (d) of NWP general condition 32, that the proposed NWP activity will result in no more than minimal adverse environmental effects, the district engineer may grant such a waiver. Following the conclusion of the district engineer's review of a PCN, the district engineer prepares an official, publicly available decision document. This document discusses the district engineer's findings as to whether a proposed NWP activity qualifies for NWP authorization, including compliance with all applicable terms and conditions, and the rationale for any waivers granted, and activity-specific conditions needed to ensure that the activity being authorized by the NWP will have no more than minimal individual and cumulative adverse environmental effects and will not be contrary to the public interest (see § 330.6(a)(3)(i)).

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

During the review of PCNs, district engineers assess cumulative adverse environmental effects caused by NWP

activities at an appropriate regional scale. Cumulative effects are the result of the accumulation of direct and indirect effects caused by multiple activities that persist over time in a particular geographic area (MacDonald 2000), such as a watershed or ecoregion (Gosselink and Lee 1989). Therefore, the geographic and temporal scales for cumulative effects analysis are larger than the analysis of the direct and indirect adverse environmental effects caused by specific NWP activities. For purposes of the NWP program, cumulative effects are the result of the combined effects of activities authorized by NWPs during the period the NWPs are in effect. The cumulative effects are assessed against the current environmental setting (environmental baseline) to determine whether the cumulative adverse environmental effects are more than minimal. The district engineer uses his or her discretion to determine the appropriate regional scale for evaluating cumulative effects.

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

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

NWP 28 for reconfiguring an existing marina basin plus an NWP 19 for minor dredging within that marina basin), the district engineer will evaluate the cumulative effects of the applicable NWP authorizations within the geographic area that the district engineer determines is appropriate for assessing cumulative effects caused by activities authorized by that NWP. As discussed above, the geographic area may be a waterbody, watershed, county, state, Corps district, or other geographic area such as a seascape.

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

There may be activities authorized by NWPs that cross more than one Corps district or more than a single state. On May 15, 2018, the Director of Civil Works at Corps Headquarters issued a Director's Policy Memorandum titled: "Designation of a Lead USACE District for Permitting of Non-USACE Projects Crossing Multiple Districts or States."¹ This Director's Policy Memorandum identified lead districts for states that have more than one Corps district and established a policy for designating a lead district for activities that require DA permits that cross district or state boundaries. Under this policy, when the Corps receives an NWP PCN or individual permit application for such activities, a lead Corps district will be designated by the applicable Corps

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

division office(s) using the criteria in the 2018 Director's Policy Memorandum, and that district will be responsible for serving as a single point of contact for each permit applicant, forming a Project Delivery Team comprising representatives of each of the affected districts, ensuring consistent reviews by the affected districts, and taking responsibility for identifying and resolving inconsistencies that may arise during the review. The list of lead districts for states is also used during the regional conditioning process for the NWP. For that process the lead district is responsible for coordinating the development of the regional conditions and preparing the supplemental documents required by 33 CFR 330.5(c)(1)(iii).

B. Overview of Proposed Rule

On September 15, 2020, the Corps published in the **Federal Register** (85 FR 57298) a proposed regulation to reissue with modification the existing NWPs and associated general conditions and definitions and to create five new NWPs (2020 Proposal). The Corps provided a 60-day public comment period which closed on November 16, 2020. Among other things, the Corps proposed the following: (1) To reissue all existing permits (some with proposed modifications); (2) to issue two new NWPs to authorize certain categories of mariculture activities (*i.e.*, seaweed and finfish mariculture) that are not currently authorized by NWP 48; (3) to issue three NWPs that authorize separate categories of utility line based on the substances they convey; (4) to issue a new NWP which would authorize discharges of dredged or fill material into jurisdictional waters for the construction, expansion, and maintenance of water reuse and reclamation facilities; and (5) to remove the 300 linear foot limit for losses of stream bed from 10 NWPs (NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52). The Corps requested comment on these and all other aspects of the proposal. The final rule published in the January 13, 2021, issue of the **Federal Register** (86 FR 2744) finalized 12 of the existing permits and addressed items (2), (3), and (5), as well as the NWP general conditions and definitions.

C. Overview of This Final Rule

This final rule reissues the 40 existing NWPs that were previously issued in the January 6, 2017, final rule (82 FR 1860) but not finalized on January 13, 2021 and issues one new NWP (NWP 59 for water reclamation and reuse facilities). This final rule does not

address the 16 NWPs, general conditions, and definitions that were finalized on January 13, 2021. In response to the 2020 Proposal, the Corps received approximately 22,700 comments. Those comments relating to the January 13, 2021 final rule were addressed as part of that action; those comments relating to the NWPs in this final rule are discussed below together with the modifications made in response to those comments.

The January 13, 2021, final rule addressed the comments received in response to the 2020 Proposal on the NWP general conditions and definitions. The NWP general conditions and definitions from the final rule published in the January 13, 2021, issue of the **Federal Register** apply to the NWPs published in today's final rule. The text of the NWP general conditions and definitions are provided in the January 13, 2021, final rule on pages at 86 FR 2867–2877. The 41 NWPs in today's final rule expire on March 14, 2026, the same date as the 16 NWPs published in the January 13, 2021, issue of the **Federal Register** expire.

D. Status of Existing Permits

When the Corps modifies existing NWPs, the modified NWPs replace the prior versions of those NWPs so that there are not two sets of NWPs in effect at the same time. Having two sets of NWPs in effect at the same time would create regulatory uncertainty if each set of those NWPs has different limits, requirements, and conditions because permittees may be unclear as to which limits, requirements, and conditions apply to their authorized activities. In addition, differences in NWP limits, requirements, and conditions between two sets of NWPs can create challenges for district engineers in terms of enforcement and compliance efforts.

The Corps is modifying the expiration date for 40 existing NWPs (*i.e.*, NWPs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 45, 46, 49, 53, and 54) that are issued in this final rule to the day before February 25, 2022. The expiration date for the 40 existing NWPs and the new NWP issued in this final rule is March 14, 2026.

Under 33 CFR 330.6(a)(3)(ii), if the NWP is reissued without modification or the activity complies with any subsequent modification of the NWP authorization, the NWP verification letter (*i.e.*, the written confirmation from the district engineer that the proposed activity is authorized by an NWP) should include a statement that the verification will remain valid for a

period of time specified in the verification letter. The specified period of time is usually the expiration date of the NWP. In other words, if the previously verified activity continues to qualify for NWP authorization under any of the 40 existing NWPs reissued in this final rule, that verification letter continues to be in effect until March 18, 2022, unless the district engineer specified a different expiration date in the NWP verification letter. For most activities authorized by the 2017 NWPs, where the district engineer issued an NWP verification letter, the verification letter identified March 18, 2022, as the expiration date. As long as the verified NWP activities continue to comply with the terms and conditions of the 40 existing NWPs reissued in this final rule, those activities continue to be authorized by the applicable NWP(s) until March 18, 2022, unless a district engineer modifies, suspends, or revokes a specific NWP authorization.

Under 33 CFR 330.6(b), Corps Headquarters may modify, reissue, suspend, or revoke the NWPs at any time. Activities that were authorized by the 2017 NWPs, but no longer qualify for authorization under any of the 40 existing NWPs that are reissued in this final rule, continue to be authorized by the 2017 NWP(s) for 12 months as long as those activities have commenced (*i.e.*, are under construction) or are under contract to commence in reliance upon an NWP prior to the date on which the NWP expires. That authorization is contingent on the activity being completed within twelve months of the date of an NWP's expiration, modification, or revocation, unless discretionary authority has been exercised by a division or district engineer on a case-by-case basis to modify, suspend, or revoke the authorization in accordance with 33 CFR 330.4(e) and 33 CFR 330.5(c) or (d). This provision applies to activities that were previously verified by the district engineer as qualifying for NWP authorization, but no longer qualify for NWP authorization under the modified or reissued NWP.

The 41 NWPs issued in this final rule go into effect on February 25, 2022. The 2017 versions of the 40 existing NWPs reissued in this final rule expire on the day before February 25, 2022. The 40 existing NWPs reissued in this final rule and the new NWP issued in this final rule (*i.e.*, NWP 59) expire on March 14, 2026.

E. Nationwide Permit Verifications

Certain NWPs require the permittee to submit a PCN, and thus request confirmation from the district engineer

prior to commencing the proposed NWP activity, to ensure that the NWP activity complies with the terms and conditions of the NWP, including any conditions the district engineer adds to the NWP authorization in accordance with 33 CFR 330.6(a)(3)(i). The requirement to submit a PCN is identified in the NWP text, as well as certain general conditions. General condition 18 requires non-federal permittees to submit PCNs for any proposed activity that might affect Endangered Species Act (ESA)-listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), if listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) are in the vicinity of the proposed activity, or if the proposed activity is located in critical habitat or critical habitat proposed for such designation. General condition 20 requires non-federal permittees to submit PCNs for any proposed activity that might have the potential to cause effects to any historic properties listed in, determined to be eligible for listing in, or potentially eligible for listing in, the National Register of Historic Places.

In the PCN, the project proponent must specify which NWP or NWP's the project proponent wants to use to provide the required DA authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. For voluntary NWP verification requests (where a PCN is not required), the request should also identify the NWP(s) the project proponent wants to use. The district engineer should verify the activity under the NWP(s) requested by the project proponent, as long as the proposed activity complies with all applicable terms and conditions, including any applicable regional conditions imposed by the division engineer. All NWP's have the same general requirements: That the authorized activities may only cause no more than minimal individual and cumulative adverse environmental effects. Therefore, if the proposed activity complies with the terms and all applicable conditions of the NWP the applicant wants to use, then the district engineer should issue the NWP verification unless the district engineer exercises discretionary authority and requires an individual permit. If the proposed activity does not meet the terms and conditions of the NWP identified in the applicant's PCN, and that activity meets the terms and conditions of another NWP identified by

the district engineer, the district engineer will process the PCN under the NWP identified by the district engineer. If the district engineer exercises discretionary authority, the district engineer should explain the reasons for determining that the proposed activity raises sufficient concern for the environment or otherwise may be contrary to the public interest.

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

In response to a PCN or a voluntary NWP verification request, the district engineer reviews the information submitted by the prospective permittee. If the district engineer determines that the activity complies with the terms and conditions of the NWP, the district engineer will notify the permittee. Activity-specific conditions, such as compensatory mitigation requirements, may be added to an NWP authorization to ensure that the activity to be authorized under the NWP will result in no more than minimal individual and cumulative adverse environmental effects and will not be contrary to the public interest. The activity-specific conditions are incorporated into the NWP verification, along with the NWP text and the NWP general conditions. In general, NWP verification letters will expire on the date the NWP expires (see 33 CFR 330.6(a)(3)(ii)), although district engineers have the authority to issue NWP verification letters that will expire before the NWP expires, if it is in the public interest to do so.

If the district engineer reviews the PCN or voluntary NWP verification request and determines that the proposed activity does not comply with the terms and conditions of an NWP, the district engineer will notify the project proponent and provide instructions for applying for authorization under a regional general permit or an individual permit. District engineers will respond to NWP verification requests, submitted voluntarily or as required through PCNs, within 45 days of receiving a complete

PCN. Except for NWP 49, and for proposed NWP activities that require ESA Section 7 consultation and/or NHPA Section 106 consultation, if the project proponent has not received a reply from the Corps within 45 days, the project proponent may assume that the project is authorized, consistent with the information provided in the PCN. For NWP 49, and for proposed NWP activities that require ESA Section 7 consultation and/or NHPA Section 106 consultation, the project proponent cannot begin work before receiving a written NWP verification. If the project proponent requested a waiver of a limit in an NWP, the waiver is not granted unless the district engineer makes a written determination that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects and issues an NWP verification.

II. Discussion of Public Comments

A. Overview

In response to the 2020 Proposal, the Corps received approximately 22,700 comment letters, of which approximately 22,330 were form letters. In addition to the various form letters, the Corps received a few hundred individual comment letters. Those individual comment letters, as well as examples of the various form letters, are posted in the www.regulations.gov docket (COE-2020-0002) for this rulemaking action. The Corps reviewed and fully considered all comments received in response to the 2020 Proposal. The Corps' responses to the comments received on the proposed removal of the 300 linear foot limit for losses of stream bed from 10 existing NWP's, the proposed changes to NWP's 21 and 50, the proposed reissuance of NWP 48, the proposed reissuance of NWP 12, and the proposed issuance of four new NWP's (NWP's 55, 56, 57, and 58) are summarized and addressed in the final rule published in the January 13, 2021, issue of the **Federal Register** (86 FR 2744). The sections below discuss the comments received and the Corps responses on the 40 existing NWP's and one new NWP being finalized in this rule.

B. Responses to General Comments

A summary of general comments submitted to the Corps in response to the 2020 Proposal, and responses to those general comments, are provided in the final rule published in the January 13, 2021, issue of the **Federal Register** at 86 FR 2750-2753.

(1) Status of Existing Permits

In response to the 2020 Proposal, the Corps received comments concerning the status of existing NWP authorizations and how the issuance of the final rule may affect those existing authorizations. The Corps also invited public comment on changing the expiration date for the 2017 NWPs to avoid having two sets of NWPs in effect at the same time. These comments were summarized and addressed in the final rule published in the January 13, 2021, issue of the **Federal Register** at 86 FR 2753–2754.

(2) Pre-Construction Notification Requirements

Comments on PCN requirements for the NWPs in the 2020 Proposal were addressed in the final rule published in the January 13, 2021, issue of the **Federal Register** at 86 FR 2754–2755.

(3) Climate Change

Comments on climate change and the NWPs in the 2020 Proposal were addressed in the final rule published in the January 13, 2021, issue of the **Federal Register** at 86 FR 2755. The Corps recognizes the importance of climate change resiliency and both mitigation and adaptation efforts to address climate change. The Corps discusses climate change in the context of the NWP reissuance in each of the national decision documents for the 41 NWPs. Some activities authorized by various NWPs may be associated with energy production (including the energy production through solar, wind, and other renewable resources), distribution, and use, while other activities authorized by the NWPs may contribute to adaptation to climate change and help increase the resilience of communities to the adverse effects of climate change.

(4) Environmental Justice

In response to the 2020 Proposal, the Corps received comments concerning environmental justice and how it was considered during development of the final rule. The Corps recognizes the importance of environmental justice to the Administration and incorporated consideration of impacts to communities with environmental justice interests to the extent practicable within its regulatory authorities in the issuance of this rule. The NWPs issuance are not expected to have any discriminatory effect or disproportionate negative impact on any community or group, and therefore are not expected to cause any disproportionately high and adverse impacts to minority or low-income communities. The NWPs issued in this

final rule can be used by communities with environmental justice interests that want to conduct activities that require DA authorization that will help improve environmental quality within their communities (e.g., NWP 13 for bank stabilization activities; NWP 27 for aquatic habitat restoration, establishment, and enhancement activities; NWP 31 for the maintenance of existing flood control facilities; and NWP 38 for hazardous and toxic waste clean-up activities).

C. Comments on Regional Conditioning of Nationwide Permits

Under Section 404(e) of the Clean Water Act, NWPs can only be issued for those activities that result in no more than minimal individual and cumulative adverse environmental effects. For activities that require authorization under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403), the Corps' regulations at 33 CFR 322.2(f) have a similar requirement. Since it can be difficult for the Corps to draft national NWPs in such a way that they account for regional differences, an important mechanism for ensuring compliance with these requirements is regional conditions imposed by division engineers to address local environmental concerns. Effective regional conditions help protect local aquatic ecosystems and other resources and help ensure that the NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse effects on the environment and are not contrary to the public interest.

Prior to the effective date of the 41 NWPs published in this final rule, division engineers will complete supplemental documents for these NWPs, which will include the final regional conditions for these NWPs. Concurrent with the publication of the 2020 Proposal in the **Federal Register**, Corps districts issued public notices seeking comment on proposed regional conditions for the proposed NWPs. The division engineers' supplemental documents for the 41 NWPs will summarize the comments Corps districts received on the proposed regional conditions for those NWPs, provide responses to those comments, and provide the division engineers' decisions on whether to approve some or all of the regional conditions that were proposed by district engineers in their public notices. After the division engineers approve the regional conditions and sign the supplemental documents for these 41 NWPs, Corps districts will issue public notices on their websites announcing the final

Corps regional conditions and when those regional conditions go into effect (see 33 CFR 330.5(c)(1)(v)). Copies of the district public notices are also sent to interested parties that are on each district's public notice mailing list via email or the U.S. mail. The public notice will also describe, if appropriate, a time period to complete an authorized activity as specified by 33 CFR 330.6(b) for those who have commenced work under the NWP or are under contract to commence work under the NWP (see 33 CFR 330.5(c)(1)(iv)). A copy of all Corps regional conditions approved by the division engineers for the NWPs are forwarded to Corps Headquarters (see 33 CFR 330.5(c)(3)). Copies of district public notices announcing final regional conditions for these 41 NWPs will be posted in the www.regulations.gov docket for the 2021 NWPs (docket number COE–2020–0002), under Supporting and Related Information so that copies of all district public notices and regional conditions are available at a central location. If, during implementation of the 41 NWPs in this final rule, division or district engineers identify the need for additional regional conditions, or changes to existing regional conditions, the procedures at 33 CFR 330.5(c)(1) must be followed, including the issuance of district public notices to provide the public with the opportunity to submit comments on the proposed new regional conditions or proposed modifications to existing regional conditions.

Comments on regional conditioning for the NWPs in the 2020 Proposal were addressed in the final rule published in the January 13, 2021, issue of the **Federal Register** at 86 FR 2758–2760.

D. Response to Comments on Specific Nationwide Permits in This Final Rule

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

NWP 2. Structures in Artificial Canals. The Corps did not propose any changes to this NWP. No comments were received on the proposed NWP. This NWP is reissued as proposed.

NWP 3. Maintenance. The Corps proposed to modify paragraph (a) of this NWP to authorize the repair, rehabilitation, or replacement of any currently serviceable structure or fill that did not require DA authorization at the time it was constructed. The Corps also proposed to modify paragraph (a) of this NWP to authorize the placement of new or additional riprap to protect the structure, provided the placement of riprap is the minimum necessary to

protect the structure or to ensure the safety of the structure, to reinstate a provision was in the 2007 version of NWP 3 (see 72 FR 11181).

Several commenters stated that they support modifying paragraph (a) of this NWP to authorize the repair, rehabilitation, or replacement of any currently serviceable structure that did not require DA authorization of the time it was constructed. A few commenters expressed opposition to the proposed modification of this NWP and said that the text of the 2017 version of this NWP that limits maintenance to previously authorized and currently serviceable structures should be retained. Several commenters expressed opposition to the authorization of any currently serviceable fills that were installed prior to the Clean Water Act without requiring a PCN because those fills have not been evaluated under current environmental regulations. One commenter said that the maintenance of any structures or fills that existed prior to the Clean Water Act should not require any authorization from the Corps. One commenter stated that a timeframe should be added to NWP 3 to specify a maximum length of time the structure has been in disrepair in order to use this NWP to authorize maintenance of the structure.

After considering the comments received in response to the 2020 Proposal, the Corps is reissuing this NWP without modifying paragraph (a) of this NWP to authorize the repair, rehabilitation, or replacement of any currently serviceable structure that did not require DA authorization at the time it was constructed. The repair, rehabilitation, or replacement of any currently serviceable structure that did not require DA authorization of the time it was constructed may be authorized by other forms of DA authorization, such as regional general permits and individual permits.

The NWP is limited to the repair, rehabilitation, or replacement of currently serviceable structures or fills, so it is not necessary to impose a timeframe for NWP 3 eligibility during which the need for repair, rehabilitation, or replacement activity must be completed in order to be eligible for NWP 3 authorization. The term “currently serviceable” is defined in section F of the NWPs. This NWP does not authorize the reconstruction of structures or fills that are no longer currently serviceable. In addition, changes to a structure or fill that prompt the need for repair, rehabilitation, or replacement may occur gradually or abruptly, or at some intermediate rate. The timeframe in which the structure or

fill requires some degree of repair, rehabilitation, or replacement is not as relevant to ensuring no more than minimal adverse environmental effects than the constraints imposed by the “currently serviceable” and “minor deviations” provisions of this NWP.

The Corps does not agree that PCNs should be required for maintenance activities authorized by paragraph (a) of this NWP because of the limitations in that paragraph.

One commenter stated that the text of this NWP should be modified to allow for maintenance of any existing infrastructure provided it does not change the intended use of the structure or fill. A few commenters requested clarification as to what the term “currently serviceable structure” means, including whether or not the structure or fill has to be operational. One commenter requested clarification on the differences between “replacement” and “reconstruction.” A few commenters asked for changes in the text of NWP 3 to clarify that any structures or fill that were previously permitted by the Corps may utilize NWP 3 for maintenance and repair activities.

This NWP authorizes the repair, rehabilitation, or replacement of existing infrastructure while allowing minor deviations due to changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards. In addition, the NWP requires the structure or fill to not be put to uses that differ from the uses originally contemplated for it when the structure or fill was originally constructed. Repair, rehabilitation, or replacement activities that exceed the “minor deviations” provision of this NWP may be authorized by individual permits, regional general permits, or another NWP.

The term “currently serviceable” is currently defined in section F of the NWPs as: “useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.” Therefore, there must be some degree of operability associated with the structure or fill in order for repair, rehabilitation, and replacement activities to be authorized by this NWP. The difference between “replacement” and “reconstruction” is based on the concept of “currently serviceable.” A currently serviceable structure or fill retains some degree of operability but can be replaced before it degrades to the extent where it is no longer operable (*i.e.*, incapable of performing its intended function). In contrast, a structure or fill that is no longer capable of providing any degree of operability

would have to be reconstructed to perform its intended function. This NWP can be used to repair, rehabilitate, or replace existing, currently serviceable structures or fills as long as the proposed activities satisfy the requirements in the text of the NWP, including any applicable NWP general conditions, regional conditions imposed by division engineers, and activity-specific conditions imposed by district engineers. The Corps declines to modify the text of this NWP to state that it can be used for maintenance and repair activities for previously permitted structures or fills because some of those maintenance and repair activities might not qualify for NWP 3 authorization and may require individual permits or other forms of DA authorization.

One commenter expressed opposition to authorizing the rehabilitation or replacement of structures that are derelict or not operational without a PCN and analyses of individual cumulative effects. One commenter recommended modifying this NWP to authorize regular maintenance of drainages to reduce exposed pipelines and pipeline spans. One commenter stated that without individual permit review, the Corps has no way of knowing if the structures are being replaced in kind, and whether those structures would have adverse environmental effects. This commenter also said that there need to be practicable alternatives if adverse effects are anticipated by these activities.

This NWP does not authorize the repair, rehabilitation, or replacement of structures and fills that are no longer currently serviceable. If a derelict or non-operational structure requires repair, rehabilitation, or replacement, and those activities require DA authorization, they may be authorized by individual permits or regional general permits. Discharges of dredged or fill material into waters of the United States that are necessary to rebury pipelines exposed in drainages or repair pipeline spans that extend over drainages may be authorized by this NWP or other NWPs, such as NWP 18, which authorizes minor discharges into waters of the United States. Corps district staff may conduct compliance actions for activities authorized by NWP 3, to ensure that authorized activities comply with the conditions of the NWP, including in-kind replacement. Because this NWP is limited to the repair, rehabilitation, and replacement of existing, currently serviceable structures or fills, there are usually no practicable alternatives for repairing, rehabilitating, or replacing these structures or fills. Relocating or reconstructing the

structure or fill in a different location has the potential to result in more adverse environmental effects than the incremental impact caused by the repair, rehabilitation, or replacement of the structure or fill, and might not serve the intended purpose as the original structure or fill.

Many commenters stated that they support the proposed modification that authorizes the placement of new or additional riprap to protect the structure. Several commenters said that authorization of the placement of riprap under NWP 3 should require a PCN. Some commenters objected to this proposed modification. One commenter objected to this proposed modification, stating that it could be used to authorize substantial amounts of riprap to protect an existing structure or fill, such as a beach house. One commenter stated that the phrase “minimum necessary” is ambiguous and unquantifiable and NWP 3 activities should be limited to ensure that no significant adverse effects occur as a result of the placement of the riprap. One commenter said that riprap placed to protect the structure or fill should be limited to 25 cubic yards. One commenter said that riprap placed above the ordinary high water mark should be covered with topsoil and revegetated, and that stream-side areas at the ordinary high water mark should be revegetated with acceptable bioengineering techniques. A few commenters stated that using the term “riprap” in the proposed modification will result in preferential use of this technique when other forms of protection, such as bioengineering, may be feasible and less environmentally damaging.

After considering the comments received in response to the 2020 Proposal, the Corps is not reissuing NWP 3 with the proposed modification that would authorize the placement of new or additional riprap to protect the structure or fill, as long as the placement of riprap is the minimum necessary to protect the structure or fill and to ensure the safety of the structure or fill. The placement of new or additional riprap to protect the structure or fill may be authorized by other forms of DA authorization, such as regional general permits and individual permits. If a project proponent wants to place riprap to protect a building, such as a beach house constructed in uplands, then the project proponent can use NWP 13, which may require submittal of a PCN to the district engineer, or seek DA authorization through the individual permit process.

Riprap placed in uplands landward of the ordinary high water mark does not

require DA authorization, so the Corps does not have the authority to require the permittee place topsoil in those upland areas and install plants in the topsoil. Bioengineering might not be a practicable alternative to riprap for the purposes of protecting a repaired, rehabilitated, or replaced structure or fill, or ensuring its safe operation. A permittee can choose to use bioengineering to protect a structure or fill from erosion, if appropriate, and bioengineering activities that require DA authorization may be authorized by NWP 3 if it is considered a minor deviation due to changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards. Bioengineering for bank stabilization may also be authorized by NWP 13, which authorizes a variety of bank stabilization techniques.

A few commenters requested clarification on what constitutes a minor deviation, and what constitutes a small amount of riprap. One commenter suggested replacing the term “small” with “minor” when referring the amount of riprap that can be used to protect the structure or fill, to be consistent with the 1996 NWP. One of these commenters said that NWP 3 should have quantitative limits. One commenter requested that the Corps further restrict the NWP by adding text that states that the placement of riprap may be used to ensure the safety of the design, but not for other safety purposes.

As discussed above, the Corps is not reissuing this NWP with modifications that would authorize the placement of new or additional riprap to protect the existing structure or fill. What constitutes a “minor deviation” is dependent on the degree to which changes in the structure’s configuration or filled area would occur as a result of the repair, rehabilitation, or replacement activity relative to the size and shape of the existing structure or fill, as well as any deviations that are necessary because of changes in materials, construction techniques, the requirements of other regulatory agencies, or current construction codes or safety standards. Because this NWP authorizes structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the repair, rehabilitation, or replacement of existing, currently serviceable structures or fills, and only allows minor deviations, it would not be appropriate to add quantitative limits to the text of the NWP other than the quantitative limits currently in

paragraph (b) (*i.e.*, the 200 foot limit for the removal of accumulated sediments and debris). The safety of the structure or fill may be dependent on more than the design of the structure or fill. For example, the safety of the structure or fill may be dependent on the types of materials used for the structure or fill, to help provide greater stability and help ensure that the structure or fill withstands expected erosive forces or other forces.

Many commenters stated that they support the removal of “previously authorized” from the Note and replacing it with “currently serviceable.” Several commenters suggested retaining in the “Note” the text that refers to “previously authorized” structures or fills to allow for maintenance of previously authorized structures or fills. One commenter said that in the Note the phrase “previously authorized” should be replaced with the term “existing.”

In the Note for this NWP, the Corps has retained “previously authorized” because the Corps is not reissuing this NWP with the proposed changes to paragraph (a), which would have authorized the repair, rehabilitation, or replacement of any currently serviceable structure or fill that did not require a permit at the time it was constructed. If the structure or fill is “currently serviceable” it is an existing structure or fill. Therefore, it is not necessary to replace the phrase “previously authorized” with “existing.”

One commenter said that the removal of accumulated sediments within 200 feet of a structure is excessive and should be evaluated on a case-by-case basis. One commenter stated that the provisions allowing removal of sediment could result in more than minimal impacts on aquatic organisms. One commenter stated that the PCN requirement for activities authorized under (b) of this NWP for sediment and debris removal is unnecessary unless the dredged material is proposed to be redeposited or retained within waters of the United States.

Paragraph (b) authorizes the removal of accumulated sediments and debris outside the immediate vicinity of existing structures (*e.g.*, bridges, culverted road crossings, water intake structures, etc.) for a distance of no more than 200 feet from the structure. All activities authorized by paragraph (b) of this NWP require a PCN to district engineers. Therefore, district engineers will review these proposed activities to determine whether removal of accumulated sediments up to 200 feet from the structure will result in no more than minimal individual and cumulative adverse environmental

effects. The removal of accumulated sediment and debris is likely to have temporary impacts on aquatic organisms because those activities occur on a periodic basis in response to the accumulation of sediment and debris in these dynamic waterbodies.

Communities of aquatic organisms are likely to recover in the waterbody between sediment and debris removal activities. Division engineers may add regional conditions to this NWP to reduce the 200-foot limit in regions where shorter limits are necessary to ensure that the adverse environmental effects caused by these activities are no more than minimal. The Corps is retaining the PCN requirement for activities authorized by paragraph (b) of this NWP because of the potential for some of these activities to result in more than minimal adverse environmental effects. Therefore, district engineers should have the opportunity to review these proposed activities so that they can exercise discretionary authority when necessary to require individual permits for certain activities.

One commenter said that rebuilding existing electric utility lines should continue to be covered under NWP 3 even though NWP 57 would also authorize these activities. Numerous commenters stated that PCNs should be required for all activities authorized by this NWP. Many commenters stated this permit causes significant adverse impacts which are a violation of the Clean Water Act, and that this NWP should be withdrawn or stricter impact limitations should be imposed. One commenter said that NWP 3 authorizes activities that are not similar in nature, which violates Section 404(e) of the Clean Water Act. One commenter stated the draft decision document does not provide enough information to determine the full extent of impacts associated with this NWP.

This NWP can be used to repair, rehabilitate, or replace electric utility lines, as well as other structures or fills, as long as those electric utility lines are currently serviceable. If the electric utility line must be rebuilt because of destruction or damage by a storm, flood, fire, or other discrete event, this NWP can be used to authorize discharges of dredged or fill material into waters of the United States or structures as well as work in navigable waters of the United States for those rebuilding activities. Those electric utility line rebuilding activities may also be authorized by NWP 57. Because this NWP authorizes structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States

for the repair, rehabilitation, or replacement of existing, currently serviceable structures or fills, and only authorizes minor deviations, the Corps does not believe that PCNs should be required for activities authorized by paragraph (a). The activities authorized by NWP 3 are similar in nature, because they are limited to the repair, rehabilitation, and replacement of currently serviceable structures or fills, or structures or fills damaged or destroyed by storms, floods (including tidal floods), fires, or other discrete events. The current qualitative and quantitative limits in the text of this NWP are sufficient to ensure that the NWP authorizes only those activities that result in no more than minimal individual and cumulative adverse effects, and no additional limits are necessary. The final decision document for this NWP provides an assessment of activities that may be authorized by this NWP during the 5-year period it is anticipated to be in effect, as well as an evaluation of potential environmental impacts that is commensurate with the anticipated degree and severity of those environmental impacts. The decision document has been prepared in compliance with the requirements of the National Environmental Policy Act (NEPA), the Corps' public interest review regulations, and the Clean Water Act Section 404(b)(1) Guidelines.

This NWP is reissued without the proposed modifications.

NWP 4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities. The Corps did not propose any changes to this NWP. No comments were received on the proposed reissuance of this NWP. This NWP is reissued as proposed.

NWP 5. Scientific Measurement Devices. The Corps did not propose any changes to this NWP. No comments were received on the proposed reissuance of this NWP. This NWP is reissued as proposed.

NWP 6. Survey Activities. The Corps did not propose any changes to this NWP. One commenter expressed support for the reissuance of this NWP with no changes. One commenter stated that the Corps should clarify the nature and extent of seismic exploratory operations that qualify for authorization under this NWP and modify this NWP to require PCNs for all seismic exploratory operations. This commenter said that seismic exploration operations may use vehicles that can compact wetland soils, create tire ruts in wetlands, and cause regulated discharges of dredged or fill material. A few commenters said seismic exploratory operations cause adverse

effects to waters of the United States, endangered species, and marine mammals, and should require authorization through individual permits. One commenter stated that if seismic testing activities continue to be authorized by this NWP, then limits should be placed on the amount of exploratory trenching. One commenter said that this NWP should be modified to impose a 25 cubic yard limit for discharges of fill material for shot holes, and that survey activities involving numerous small pads in excess of 25 cubic yards should require individual permits.

This NWP authorizes survey activities, including seismic exploratory activities, that involve structures or work in navigable waters of the United States that require DA authorization under Section 10 of the Rivers and Harbors Act of 1899 and discharges of dredged or fill material into waters of the United States that require DA authorization under Section 404 of the Clean Water Act. Seismic exploratory operations may be conducted in a manner that does not require DA authorization under any of the Corps' permitting authorities. Seismic exploratory operations may be conducted using equipment on or attached to vessels in navigable waters and vehicles used on land that involve no structures or work in navigable waters or discharges of dredged or fill material into waters of the United States. For example, seismic surveying activities in marine waters may be conducted from vessels carrying or towing seismic surveying equipment, with no structures or work requiring DA authorization under Section 10 of the Rivers and Harbors Act of 1899. Those types of seismic surveying activities in marine waters do not require DA authorization.

Land-based seismic surveying activities are often conducted from vehicles that generate the seismic waves and vehicles or other devices that carry the sensors that receive the seismic waves for analysis. Driving vehicles in wetlands may cause the formation of ruts as the wheels move through wet or moist soils. However, driving vehicles such as trucks, cars, off-road vehicles, or farm tractors through a wetland in a manner in which such vehicles is designed to be used generally is not subject to regulation under Section 404 of the Clean Water Act (see 66 FR 4568). Land-based seismic surveying activities may also be conducted by drilling shot holes and detonating explosive charges in those shot holes to produce sound that is received by sensors. If those shot holes are drilled in jurisdictional

wetlands, backfilling the shot holes in jurisdictional wetlands with fill material may require DA authorization under Section 404 of the Clean Water Act.

If survey activities proposed to be conducted by non-federal permittees involve structures or work in navigable waters of the United States and/or discharges of dredged or fill material into waters of the United States, pre-construction notification is required for the proposed NWP activity if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the activity, or if the proposed activity is located in designated critical habitat or critical habitat proposed for such designation (see paragraph (c) of general condition 18, endangered species). District engineers will review PCNs submitted under paragraph (c) of general condition 18 and determine whether ESA Section 7 consultation is required for proposed NWP 6 activities. Project proponents who undertake survey activities that may result in a take of marine mammals may be required to obtain an incidental take authorization from the National Marine Fisheries Service pursuant to the Marine Mammal Protection Act.

The Corps does not agree that quantitative limits should be placed on exploratory trenching because the NWP requires restoration of the area of waters of the United States in which the exploratory trench is dug to pre-construction elevations upon completion of the survey work. In addition, the NWP does not authorize exploratory trenching activities that drain waters of the United States. The Corps also declines to impose a 25-cubic-yard limit on discharges of dredged or fill material into waters of the United States for plugging shot holes, because plugging shot holes helps restore affected areas to pre-construction elevations. Plugging shot holes also provides safety benefits by filling holes in the soil that can cause injury to people and wildlife. This NWP has a 1/10-acre limit for losses of waters of the United States for temporary pads used for survey activities, so the Corps does not believe that an additional 25-cubic-yard limit is necessary to help ensure that this NWP authorizes only those survey activities that result in no more than minimal adverse environmental effects.

This NWP is reissued as proposed.

NWP 7. Outfall Structures and Associated Intake Structures. The Corps did not propose any changes to this NWP. One commenter stated this NWP

should be reissued with no changes. This NWP is reissued as proposed.

NWP 8. Oil and Gas Structures on the Outer Continental Shelf. The Corps did not propose any changes to this NWP. One commenter stated that this NWP should be reissued with no changes. One commenter said that the Corps must analyze impacts to marine mammals through an environmental impact statement and consult with NMFS through the ESA Section 7 consultation process before verifying activities under this NWP. A commenter stated that the Corps should categorically exclude the state of Oregon from this NWP because oil and gas drilling activities in federal waters near Oregon are prohibited, and all activities authorized by this NWP should require PCNs to provide the necessary coordination between the district engineer and the state.

Project proponents that use NWP 8 to authorize oil or natural gas structures on the outer continental shelf under Section 10 of the Rivers and Harbors Act of 1899 are responsible for complying with the Marine Mammal Protection Act, including any requirement to obtain incidental take authorizations from the NMFS. When a district engineer receives a PCN for a proposed NWP 8 activity, a district engineer will evaluate potential effects of the proposed structures on marine mammals that are listed as endangered or threatened under the ESA, as well as marine mammals species proposed for listing under the ESA. The district engineer will also evaluate potential effects of the proposed structures on designated critical habitat, and if applicable, critical habitat proposed for such designation. If the district engineer determines the proposed NWP 8 activity may affect listed species or designated critical habitat, including listed marine mammals and designated critical habitat for marine mammals, he or she will initiate ESA Section 7 consultation with the NMFS and, if appropriate, the U.S. FWS, unless ESA Section 7 consultation has already been conducted by another federal agency for the proposed oil and gas structures. This NWP authorizes structures in federal waters overlying the outer continental shelf; it does not authorize structures in the territorial seas. Therefore, if a project proponent wants to conduct oil or natural gas drilling activities in the territorial seas, he or she would need to obtain DA authorization through the individual permit process, or through a regional general permit if the Corps district has issued a regional general permit that authorizes oil or gas structures in the territorial seas. All activities authorized

by this NWP require PCNs, and the district engineer can elect to coordinate the review of the PCN with the state.

This NWP is reissued as proposed.

NWP 9. Structures in Fleeting and Anchorage Areas. The Corps did not propose any changes to this NWP. No comments were received on the proposed reissuance of this NWP. This NWP is reissued as proposed.

NWP 10. Mooring Buoys. The Corps did not propose any changes to this NWP. Several commenters said that PCNs should be required for all activities authorized by this NWP. Several commenters stated they oppose the installation of mooring buoys within tribal lands without coordinating with the tribes. One commenter requested clarification as to how this NWP will interface with regional conditions.

The Corps does not agree that PCNs should be required for all non-commercial, single-boat mooring buoys authorized by this NWP because the installation of these structures in navigable waters of the United States is unlikely to result in more than minimal individual and cumulative adverse environmental effects. Certain NWP general conditions, such as general condition 18 for endangered species and general condition 20 for historic properties, may trigger PCN requirements for some mooring buoys proposed to be installed by non-federal permittees. For example, under paragraph (c) of general condition 18 non-federal permittees are required to submit PCNs to the district engineer if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the proposed mooring buoy, or if the proposed mooring buoy is located in designated critical habitat or critical habitat proposed for such designation. Activities authorized by this NWP must comply with general condition 17, tribal rights. During the process for reissuing this NWP, Corps districts consulted with tribes and those consultation efforts may have resulted in regional conditions or coordination procedures with tribes to help ensure compliance with general condition 17. This NWP interfaces with regional conditions in the same manner as any other NWP interfaces with regional conditions. If a division engineer imposed a regional condition on this NWP, in order to qualify for NWP authorization, the proposed activity must comply with that regional condition as well as any requirements in the text of the NWP and applicable NWP general conditions.

This NWP is reissued as proposed.

NWP 11. Temporary Recreational Structures. The Corps did not propose any changes to this NWP. No comments were received on the proposed reissuance of this NWP. This NWP is reissued as proposed.

NWP 13. Bank Stabilization. The Corps proposed to modify this NWP by adding a "Note" that states that in coastal waters and the Great Lakes, living shorelines may be an appropriate option for bank stabilization, and may be authorized by NWP 54.

Many commenters objected to the proposed reissuance of NWP 13, stating that that bank stabilization using bulkheads, revetments, and other hard structures has deleterious effects on shoreline ecosystems. Several commenters stated that this NWP should not be reissued so that bank stabilization activities can be limited to bioengineering or the construction of living shorelines. Many commenters said that the proposed NWP would result in significant adverse impacts, and violate Section 404(e) of the Clean Water Act, the Clean Water Act Section 404(b)(1) Guidelines, the NEPA, and the ESA. One commenter stated that the reissuance of this NWP should require an environmental impact statement.

This NWP authorizes a wide variety of bank stabilization activities because bioengineering and living shorelines are effective bank stabilization approaches in limited circumstances. This NWP authorizes both hard bank stabilization activities (e.g., revetments, riprap, bulkheads) and soft bank stabilization activities (e.g., bioengineering, other forms of vegetative stabilization). Living shorelines may be authorized by NWP 54, as indicated by the Note proposed to be added to this NWP. Hard bank stabilization activities may be necessary in riverine, lacustrine, estuarine, and marine environments subject to strong erosive forces. Soft bank stabilization activities may be effective at reducing erosion in aquatic habitats subject to moderate to low erosive forces. This NWP has been issued in compliance with Section 404(e) of the Clean Water Act (including the Section 404(b)(1) Guidelines), NEPA, and the ESA. In the national decision document for the reissuance of this NWP, the Corps prepared an environmental assessment with a finding of no significant impact to comply with NEPA requirements. Therefore, the reissuance of this NWP does not require the preparation of an environmental impact statement. In the national decision document, the Corps prepared a Clean Water Act Section 404(b)(1) Guidelines compliance analysis, which also addresses the requirements of Section 404(e) of the

Clean Water Act. In section 8.0 of the national decision document for this NWP, the Corps discusses compliance with the ESA, including the requirements of general condition 18 and 33 CFR 330.4(f).

Many commenters said that the secondary, indirect, and cumulative effects associated with bank stabilization activities authorized by this NWP are adverse. A few commenters stated that the activities authorized by this NWP have negative adverse effects on ESA-listed fish and their critical habitat. One commenter said that bulkheads have more than minimal cumulative adverse impacts and that the Corps should not reissue this NWP because it does not know how many NWP 13 activities occur each year. One commenter said that the activities authorized by this NWP have substantial sediment-related impacts. One commenter stated that the Corps should develop a means to measure, monitor, and enforce sediment limits.

While bank stabilization activities may have adverse effects on the aquatic environment, to be authorized by this NWP those adverse effects must be no more than minimal on an individual and cumulative basis. Activities authorized by this NWP must comply with general condition 18 and 33 CFR 330.4(f), which address compliance with the ESA. Under paragraph (c) of general condition 18, non-federal permittees are required to submit a PCN to the district engineer if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected by the proposed activity or is in the vicinity of the proposed activity, or if the proposed activity is located in designated critical habitat or critical habitat proposed for such designation. District engineers will review all PCNs for proposed NWP 13 activities for potential effects to species and critical habitats covered under the ESA and will initiate ESA Section 7 consultation for any proposed activity that may affect listed species or designated critical habitat, including ESA-listed fish species and their designated critical habitat.

This NWP requires a PCN for any proposed activity that: (1) Involves discharges into special aquatic sites; (2) is in excess of 500 feet in length; or (3) will involve the discharge of greater than an average of one cubic yard per running foot as measured along the length of the treated bank, below the plane of the ordinary high water mark or the high tide line. District engineers will review proposed bulkheads constructed in wetlands and other

special aquatic sites, as well as proposed bulkheads that are longer than 500 feet in length or involve the discharge of greater than one cubic yard per running foot as measured along the bank. The Corps tracks the use of this NWP through the required and voluntary PCNs for proposed NWP 13 activities that are submitted to district offices. While not all proposed NWP 13 activities involving the construction or replacement of bulkheads require PCNs, consistent with other NWPs that do not require PCNs for all authorized activities the Corps estimates the number of PCN and non-PCN activities anticipated to occur during the 5-year period the NWP is expected to be in effect.

Bank stabilization activities can have adverse effects on sediment processes in aquatic ecosystems, and this NWP authorizes only those bank stabilization activities that have no more than minimal individual and cumulative adverse environmental effects. Bank stabilization activities may be necessary to reduce erosion to protect buildings and other structures, as well as infrastructure (e.g., utility lines). Bank stabilization activities may also help reduce sediment loads to waterbodies, by reducing erosion caused by flowing water and other sediment inputs to waterbodies. Under its procedures at 33 CFR part 326, the Corps can take actions to address situations where permittees do not comply with the terms and conditions of this NWP, including the cubic yard limit for discharges of dredged or fill material into waters of the United States.

One commenter said that the Corps needs to consider secondary effects of structures such as bulkheads in its minimal effects determination. One commenter suggested limiting use of this NWP to emergency situations when other bank stabilization techniques, such as living shorelines and bioengineering, are not available. One commenter recommended adding emergency provisions to NWP 13. One commenter expressed opposition to the complete removal of non-native plant species.

In its national decision document for the reissuance of this NWP, including the environmental assessment, public interest review, and Clean Water Act Section 404(b)(1) Guidelines analysis, the Corps evaluates potential indirect or secondary effects caused by activities authorized by this NWP. When reviewing required PCNs, as well as voluntary PCNs, for proposed NWP 13 activities, district engineers consider the site-specific direct and indirect effects that may be caused by those activities,

as required by paragraph 2 of section D, District Engineer's Decision. As discussed above, living shorelines and bioengineering are effective bank stabilization techniques under certain circumstances, and therefore this NWP should not limit the use of hard bank stabilization measures to emergency situations.

The Corps does not believe it is necessary to add provisions to this NWP to address emergency situations. Not all activities authorized by NWP 13 require PCNs, and some emergency bank stabilization measures may be undertaken without the need to submit a PCN to the Corps. If an emergency situation arises where bank stabilization activities require review by the Corps, those bank stabilization activities may be authorized through the Corps' emergency authorization procedures at 33 CFR 325.2(e)(4). The Corps did not propose any changes to this NWP regarding the removal of non-native plant species. While paragraph (g) of this NWP requires the use of native plants appropriate for current site conditions, including salinity, for bioengineering or vegetative bank stabilization, it does not require the permittee to remove individuals of non-native plant species that may become established in the project area through natural processes.

Many commenters suggested reducing the linear foot limits of this NWP. One commenter recommended removing the 500 linear foot limit from this NWP. One commenter suggested removing the 1,000-foot limit for waivers for bulkheads, to allow district engineers to issue waivers that authorize bulkheads greater than 1,000 feet in length. One commenter stated that the waiver provision should be removed from this NWP because it includes no performance standards and it can be abused. One commenter said that the Corps should not require permits for longer reaches of stream banks that would be temporarily impacted.

The Corps is retaining the 500 and 1,000 linear foot limits in this NWP. The 500 linear foot limit can be waived by the district engineer, if he or she determines after reviewing a PCN that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects and issues a written verification for the proposed NWP activity. For proposed bulkheads, the 500 linear foot limit can be waived up to the 1,000 linear foot limit. If a project proponent wants to construct more than 1,000 linear feet of bulkhead, then he or she will need to submit an application for an individual permit, unless the Corps

district has issued a regional general permit that authorizes bulkheads longer than 1,000 feet in length. Division engineers can add regional conditions to this NWP to impose lower linear foot limits on bank stabilization activities, including the maximum length for bulkheads. The only performance standard that applies to waivers of the 500 linear foot limit is requirement that the district engineer issue a written determination that concludes that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. DA authorization is required for permanent and temporary impacts to stream banks within the Corps' jurisdiction if those impacts involve discharges of dredged or fill material into waters of the United States or structures and work in navigable waters of the United States.

A few commenters said that this NWP should not authorize discharges of dredged or fill material below the ordinary high water mark or mean high water line. One commenter suggested prohibiting building out to pre-existing bank lines. A few commenters stated that impacts to special aquatic sites should not be authorized by this NWP.

The purpose of this NWP is to authorize discharges of dredged or fill material into waters of the United States and structures and work in navigable waters of the United States for bank stabilization activities that have no more than minimal individual and cumulative adverse environmental effects. Prohibiting discharges of dredged or fill material into waters of the United States below the ordinary high water mark in jurisdictional non-tidal rivers and streams, or below the high tide line in tidal streams and other tidal waters would preclude NWP authorization for many bank stabilization activities that result in minimal individual and cumulative adverse environmental effects. In addition, such a prohibition would result in ineffective protection against erosion since flowing waters and tidal waters would be likely to undercut the bank stabilization activity. Bank stabilization activities constructed under that prohibition would likely collapse after the stream or river bank, lake shore, estuary shore, or ocean shore is undermined through erosional processes. If there are no jurisdictional wetlands landward of the bank or shore, then the Corps has no authority to prevent landowners from discharging fill material to construct buildings near the banks of streams or rivers, or the shores of lakes, estuaries, and oceans. All discharges of dredged or fill material

into special aquatic sites require PCNs to the Corps, and district engineers will review those PCNs to determine whether the proposed activities will result in no more than minimal individual and cumulative adverse environmental effects. If the district engineer reviews a PCN for a proposed discharge of dredged or fill material into a special aquatic site, and after considering mitigation proposed by the applicant, determines that the proposed activity will result in more than minimal individual and cumulative adverse environmental effects, he or she will exercise discretionary authority and require an individual permit for that activity.

Many commenters said that PCNs should be required for all activities authorized by this NWP. Many commenters stated that PCNs should be required for activities less than 500 feet in length. One commenter requested clarification regarding when pre-construction notification is required for activities authorized by this NWP, because there is a perception that bank stabilization activities in excess of 500 linear feet require authorization by individual permits. One commenter said that the PCN requirement for discharges into special aquatic sites should be removed. One commenter stated that PCNs should be required for all activities authorized by this NWP to ensure that those activities will not jeopardize ESA-listed species. One commenter said that all NWP 13 activities should require agency coordination.

The Corps believes that it has established appropriate PCN thresholds for this NWP, so that PCNs are required for proposed bank stabilization activities that have the potential to result in more than minimal individual and cumulative adverse environmental effects. The PCN review process allows for case-specific review of proposed activities so that district engineers can determine whether those proposed activities can be authorized by this NWP. Division engineers can impose regional conditions on this NWP to require PCNs for proposed activities that are less than 500 linear feet in length or would involve the discharge of less than one cubic yard per running foot as measured along the length of the bank. The district engineer can waive the 500 linear foot limit if she or he determines in writing, after evaluating the PCN and any comments received during the agency coordination conducted under paragraph (d) of general condition 32, that the proposed activity will result in no more than minimal individual and

cumulative adverse environmental effects.

This NWP requires PCNs for all discharges of dredged or fill material into special aquatic sites so that district engineers can review all of these proposed activities to determine whether they will result in no more than minimal adverse environmental effects. Under paragraph (c) of general condition 18, non-federal permittees are required to submit a pre-construction notification to the district engineer if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the proposed activity, or if the proposed activity is located in designated critical habitat or critical habitat proposed for such designation. The district engineer will review the PCN and determine whether ESA Section 7 consultation or conference with the U.S. FWS and/or NMFS is required for the proposed activity. If ESA Section 7 consultation or conference is required, the activity is not authorized by NWP until the district engineer notifies the project proponent that those processes are completed. Certain activities authorized by NWP 13 require agency coordination, specifically activities for which permittees are requesting waivers of the quantitative limits of this NWP or for discharges into special aquatic sites. The Corps does not agree that agency coordination should be required for all NWP 13 activities that require pre-construction notification.

Several commenters expressed support for adding the Note to this NWP to make permittees aware of the availability of NWP 54 (Living Shorelines) for bank stabilization activities in coastal waters. Many commenters suggested modifying this NWP to require a preferential hierarchy for bioengineering and living shorelines over bank hardening activities to satisfy requirements to authorize the least environmentally damaging practicable alternative.

The Corps has added the proposed Note to this NWP. The Corps encourages waterfront property owners and other project proponents to use living shorelines, bioengineering, vegetative stabilization, and other soft bank stabilization approaches in coastal areas and other waterbodies where those methods are likely to be successful in managing erosion along coastal waters, along river and stream banks, and shorelines in lakes and other waterbodies. The use of living shorelines, bioengineering, vegetative stabilization, and other soft bank

stabilization approaches can help increase the resilience of waterfront properties, as well as the structures and infrastructure located on those properties, to the adverse effects of climate change. The increased use of nature-based approaches such as living shorelines and bioengineering to bank stabilization is a priority in the Administration's climate resiliency efforts. Noting this, the Corps provides that such soft bank stabilization techniques should generally be considered first when project proponents consider the use of NWP 13. There are many factors, however, that should be taken into account in both the proposed and verified bank stabilization project.

The appropriate approach to managing shoreline or bank erosion in coastal areas and other waterbodies must be determined on a site-specific basis after considering a variety of factors. Examples of factors relevant to the planning and design of bank stabilization activities include, but are not limited to: Bank height; bank condition; the energy of the tides, waves, currents, or other water flows that the bank is exposed to; fetch; nearshore water depths; the potential for storm surges; sediment or substrate type; tidal range in areas subject to the ebb and flow of the tide; shoreline configuration and orientation; whether there is infrastructure in the vicinity of the proposed bank stabilization activity that needs to be protected; the width of the waterway; the presence of trees in the vicinity of the bank and whether those trees need to be maintained or protected; and the distance from a navigation channel or navigable fairway in the waterbody. With respect to living shorelines, factors to consider regarding the appropriateness of living shorelines to manage bank erosion in coastal areas include the fetch of the waterbody, shore morphology, depth gradients of nearshore waters, the stability of the existing substrate, tidal range, and marsh elevations (Saleh and Weinstein 2016).

Project proponents may hire coastal engineers and other consultants to help determine which bank stabilization techniques might be feasible and successful at a specific site. District engineers are available to discuss potential bank stabilization options with waterfront property owners and their consultants, including the use of living shorelines, bioengineering, and other soft bank stabilization approaches that may be effective at controlling erosion at a particular site, as well as more environmentally beneficial. The Corps cannot mandate the use of a particular

bank stabilization technique at a specific site. District engineers can require minor project modifications to proposed activities to reduce adverse environmental impacts (see 33 CFR 320.4(r)(1)(i)). However, district engineers cannot require completely different designs of proposed activities that require DA authorization without agreement from the applicant. In addition to the factors identified in the previous paragraph, there are other factors to consider when selecting a bank stabilization method, including costs and maintenance requirements, which can vary substantially among different bank stabilization approaches. In addition, requiring specific approaches to bank stabilization may also negatively affect disadvantaged communities. District engineers will review PCNs for proposed bank stabilization activities, and if the district engineer determines that a proposed bank stabilization activity will result in more than minimal adverse environmental effects, the district engineer will exercise discretionary authority and require an individual permit. During the individual permit review process, an alternatives analysis is required and the alternatives evaluated during the individual permit review process may include soft bank stabilization approaches.

Waterfront property owners and other project proponents are responsible for proposing bank stabilization activities for their properties, and under the NWP program, district engineers review PCNs for those proposed activities. If a district engineer reviews a PCN for a proposed bank stabilization activity and determines that the proposed activity will result in more than minimal adverse environmental effects, the district engineer will exercise discretionary authority and require an individual permit for that proposed activity.

The Corps encourages waterfront property owners to first consider the use of living shorelines, vegetative stabilization, bioengineering, and other soft bank stabilization approaches before considering hard bank stabilization techniques such as bulkheads and revetments; however, the Corps acknowledges that living shorelines and bioengineering are not effective or appropriate approaches to bank stabilization in all conditions. For certain types of aquatic ecosystems and site conditions, such as environments subjected to high energy erosive forces, hard structural bank stabilization measures such as revetments and bulkheads may be necessary to reduce erosion and protect people, buildings,

and infrastructure. The requirement in the Clean Water Act Section 404(b)(1) Guidelines to permit the least environmentally damaging practicable alternative applies to activities authorized by individual permits, not to activities authorized by general permits. The Corps will include in their NWP 13 verification decision document a summary of the rationale for the verified bank stabilization measures reflecting the engineering, cost, technology and other considerations above, to include discussion of soft bank stabilization techniques and why it was or was not appropriate for the subject site.

One commenter said that the Corps' draft decision document for this NWP did not provide an adequate analysis of the direct, indirect, and cumulative impacts caused by these activities and did not use adequate scientific information to describe the affected environment and the impacts of bank stabilization activities. One commenter asserted that this NWP does not comply with the 404(b)(1) Guidelines. One commenter said that the Corps should prepare an environmental impact statement for the proposed reissuance of this NWP. One commenter stated that activities authorized by this NWP cause significant degradation of aquatic ecosystems. One commenter suggested that the Corps include sea level rise in its analysis of this NWP, including its assessment of cumulative impacts.

The final decision document prepared by Corps Headquarters for the reissuance of this NWP provides a general analysis of the impacts expected to be caused by activities authorized by this NWP during the 5-year period it is anticipated to be in effect. In the environmental assessment, the Corps evaluated the effects or impacts on the human environment that are reasonably foreseeable and have a reasonably close causal relationship to the activities authorized by this NWP, consistent with the Council on Environmental Quality's definition of "effects or impacts" at 40 CFR 1508.1(g). In the national decision document, the Corps also addressed the elements required for a Clean Water Act Section 404(b)(1) Guidelines analysis for the issuance of a general permit, including a cumulative effects analysis conducted in accordance with 40 CFR 230.7(b)(3) and a conclusion that the reissuance of this NWP would not cause or contribute to significant degradation of the aquatic environment.

The affected environment of the United States is described in section 4.0 of the national decision document, using available information at a national scale to describe the current environmental baseline. The Corps

complied with the requirements of NEPA by preparing an environmental assessment with a finding of no significant impact. Therefore, an environmental impact statement is not required for the reissuance of this NWP. The national decision document for this NWP has been revised to provide more discussion of sea level rise, including the need for bank stabilization activities to protect buildings and infrastructure from increased risks of erosion that may be caused by rising sea levels. Bank stabilization activities authorized by this NWP can help protect existing buildings and infrastructure and reduce risks associated with rising sea levels, as a means of adapting to climate change. Rising sea levels are an effect of climate change.

One commenter suggested adding a definition of "bioengineering" to this NWP. One commenter requested that the Corps enforce current guidelines to remove non-biodegradable fabric used in previous projects. One commenter said that the Corps needs to develop functional assessment tools to better assess individual and cumulative impacts of bank stabilization on channel and floodplain processes.

The Corps declines to add a definition of "bioengineering" to this NWP because adding such a definition might impose unnecessary constraints on potential bioengineering approaches to bank stabilization that may be authorized by this NWP. Bioengineering approaches can vary by region, may involve a variety of techniques and materials, and may vary by resource type. Non-biodegradable fabric may be used as a component for a variety of bank stabilization techniques and that fabric needs to permanently remain in place to control erosion at the site. Requiring the removal of fabric that is used for bank stabilization activities would likely undermine the efficacy of bank stabilization projects and their structural integrity because fabric is often necessary to ensure that soil under revetments and other bank stabilization structures is not washed away by tidal waters or by water moving through the soil to the bank or shoreline. If the soil under revetments and other bank stabilization structures is moved away from the project site, then those structures may collapse and erosion may be exacerbated. Adjacent uplands may also collapse or subside, posing a potential danger to people who live at or use the project site.

While functional assessment tools may be useful in assessing the individual and cumulative environmental impacts of bank stabilization activities within a project

site, a waterbody, or within a geographic region, those environmental impacts can be assessed through other means. When reviewing PCNs for proposed NWP 13 activities, district engineers will apply the 10 criteria in paragraph 2 of section D, District Engineer's Decision to determine whether a proposed NWP 13 activity qualifies for NWP authorization. If an appropriate functional assessment is available, that tool may be used by district engineers when evaluating PCNs and determining whether a proposed bank stabilization activity qualifies for NWP 13 authorization.

This NWP is reissued as proposed.

NWP 14. Linear Transportation Projects. The Corps proposed to modify this NWP by adding "driveways" to the list of examples of activities authorized by this NWP.

Several commenters expressed support for the addition of "driveways" to the list of examples of the types of projects authorized by this NWP. One commenter said that adding "driveways" to the list of examples for the types of projects authorized by this NWP could confuse applicants and result in an increase of PCNs submitted to the Corps, and requested that the Corps provide a more detailed explanation of the type of driveway authorized by this NWP. A commenter said the text of this NWP should be revised to clarify if NWP 14 would be used to authorize driveways when a project proponent is using other NWPs such as NWP 29 (Residential Development) or NWP 39 (Commercial and Institutional Developments) to authorize a development project that may include one or more driveways. One commenter stated that driveways should be limited to vehicle access to a facility and not to large-scale transportation projects, with an acreage limit that applies to the driveway.

The Corps has adopted the proposed modification of this NWP to include "driveways" in the list of examples of the types of projects authorized by this NWP. The term "driveways" applies broadly to include features that are used by vehicles to move to and from buildings and other facilities, and is not limited to driveways associated with single unit or multiple unit residences, or driveways used to go to and from commercial buildings, institutional buildings, or other types of buildings. Discharges of dredged or fill material into waters of the United States for the construction or expansion of driveways may also be authorized by NWPs 29 and 39 as attendant features to residential developments and commercial and institutional developments. Adding "driveways" to the list of examples of

the types of projects that may be authorized by NWP 14 can provide some clarity to the regulated public because the construction of a driveway may be the only activity that requires DA authorization if a residential development or commercial or institutional development is constructed in uplands, and the driveway is needed to cross waters of the United States to provide vehicular access to the upland development.

There is usually no need to combine NWP 14 with NWP 29 or NWP 39 to authorize the construction or expansion of driveways within residential or commercial or institutional developments, unless the construction of the driveway involves discharges of dredged or fill material into waters of the United States that are not authorized by NWPs 29 or 39. For example, the construction or expansion of a driveway that crosses tidal waters or non-tidal wetlands adjacent to tidal waters, may be authorized by NWP 14 because NWPs 29 and 39 do not authorize discharges of dredged or fill material into tidal waters. A driveway serves a specific purpose that may be different than other types of linear transportation projects. Driveways are subject to the same acreage limits as other linear transportation projects authorized by this NWP, including larger scale linear transportation projects: 1/2-acre for losses of non-tidal waters of the United States and 1/3-acre for losses of tidal waters.

One commenter stated that the cumulative impacts of authorizing large residential driveways in waters of the United States threatens nearshore benthic habitat that is important to salmonids. One commenter recommended modifying this NWP to include a definition for "stand-alone project." One commenter suggested modifying NWP 14 to authorize any structure or fill that would facilitate the movement of people and/or goods, including moving sidewalks, stationary sidewalks, streetcars, trams, and trollies. One commenter stated that this NWP should authorize the construction, expansion, or modification of ferry terminals.

When reviewing PCNs for proposed driveways authorized by this NWP, the district engineer will determine whether a proposed activity may affect ESA-listed species or designated critical habitat, including listed salmon species and their designated critical habitat. If the district engineer determines a proposed NWP activity may affect listed species or designated critical habitat, he or she will initiate ESA Section 7 consultation with the NMFS and/or U.S.

FWS as appropriate. The proposed activity cannot be authorized by NWP until the ESA Section 7 consultation process has been concluded. A non-federal permittee must submit a pre-construction notification to the district engineer if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation (see paragraph (c) of general condition 18).

The Corps declines to add a definition of "stand-alone project" to this NWP because that phrase is not used in this NWP. The first sentence of this NWP provides examples of linear transportation projects that may be authorized by this NWP, and those examples include railways and trails. The list of examples is not an exhaustive list, so other types of linear transportation projects that require DA authorization may be authorized by this NWP, including streetcars, trams, and trollies. Sidewalks may be authorized other NWPs, such as NWPs 29 and 39 if those sidewalks are attendant features of the types of developments authorized by those NWPs. This NWP does not authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States for the construction, modification, expansion, or improvement of ferry terminals because ferry terminals are not linear transportation projects. A ferry terminal is a single point within a ferry transportation system, and is a non-linear feature.

One commenter said that the term "crossing" should be defined or changed to "placement of dredge or fill and structures" or "impacts to waters of the United States." This commenter stated that the term "crossing" has been viewed strictly as a crossing or bisecting of waters of the United States rather than allowing roadway fill in a wetland along the linear transportation project since the road only filled a portion of the wetland rather than crossing it.

The NWP uses the term "crossing" because linear transportation projects have a point of origin and a terminal point and may involve multiple crossings of waterbodies at separate and distant locations to move people, goods, or services between the point of origin and the terminal point. A crossing does not have to bisect a water of the United States. For example, a crossing can consist of dredged or fill material placed in waters of the United States along the

edge of the linear transportation project without bisecting the waterbody. A crossing constructed in such a manner can be considered to minimize impacts to waters of the United States in compliance with paragraph (a) of general condition 23, mitigation, without a loss of connectivity within the remaining extent of the waterbody. Paragraph (a) of general condition 23 requires project proponents to design and construct their NWP activities to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (*i.e.*, on site).

One commenter said that linear transportation projects authorized by this NWP have devastating impacts on animal populations resulting from habitat loss, habitat fragmentation, creation of migration barriers, and increased impervious surface runoff. This commenter said these impacts must be assessed through the preparation of an environmental impact statement and through ESA Section 7 consultation.

General condition 2 (aquatic life movements) states that no NWP activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. General condition 2 also requires all permanent and temporary crossings of waterbodies to be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. For terrestrial animals, linear transportation projects can be designed and constructed to provide corridors for animal movement (*e.g.*, tunnels, bridges) so that target species can safely move from one side of the linear transportation project to the other side.

The construction of linear transportation projects may trigger a requirement by state or local governments to provide stormwater management facilities to reduce adverse effects to changes in watershed hydrology that may be caused by the construction of roads and other impervious surfaces in the watershed. Stormwater management facilities can reduce surface runoff that may adversely affect rivers, streams, and other waterbodies. District engineers will conduct ESA Section 7 consultation for proposed NWP 14 activities when they determine that those activities may affect listed species or designated critical habitat. This NWP authorizes

only activities that have no more than minimal individual and cumulative adverse environmental effects, and NEPA compliance was completed through the preparation of an environmental assessment by Corps Headquarters in the national decision document for the reissuance of this NWP. The Corps concluded the environmental assessment with a finding of no significant impact. Therefore, the reissuance of this NWP does not require the preparation of an environmental impact statement.

One commenter said the 1/2-acre limit for losses of non-tidal waters of the United States and the 1/3-acre limit for losses of tidal waters is not consistent with other NWPs. One commenter stated that both acreage limits for this NWP should be reduced to 1/10-acre. One commenter said the phrase “minimum necessary” is ambiguous in the context of limiting stream channel modifications and recommended limiting stream channel modifications to 300 linear feet or 1/10-acre. One commenter said that this NWP should not authorize linear projects that are more than a few hundred feet in length. One commenter expressed agreement that an individual permit is required for an entire linear project if one crossing of waters of the United States does not satisfy the terms and conditions of the NWP.

The 1/2-acre limit for losses of non-tidal waters of the United States in this NWP is consistent with the 1/2-acre limit in other NWPs that authorize discharges of dredged or fill material into non-tidal waters of the United States, such as NWP 21 (surface coal mining activities), NWP 29 (residential developments), NWP 39 (commercial and institutional developments), NWP 40 (agricultural activities), NWP 42 (recreational facilities), NWP 43 (stormwater management facilities), NWP 44 (mining activities), NWP 50 (underground coal mining activities), NWP 51 (land-based renewable energy generation facilities), and NWP 52 (water-based renewable energy generation pilot projects). The 1/3-acre limit for losses of tidal waters for NWP 14 was adopted in 1991 (see 56 FR 59142), and the 1/3-acre limit applied to losses of tidal waters and non-tidal waters. When the Corps issued 5 new NWPs and modified 6 existing NWPs to replace NWP 26 in 2000 (see 65 FR 12818), it modified NWP 14 by increasing the acreage limit for losses of non-tidal waters for public linear transportation projects to 1/2-acre. The 1/2-acre and 1/3-acre limits, plus the PCN requirements for this NWP, are sufficient to ensure that activities

authorized by this NWP result in no more than minimal individual and cumulative adverse environmental effects. In addition, division engineers can add regional conditions to this NWP to lower the acreage limits in a particular geographic area to ensure compliance with the “no more than minimal adverse environmental effects” requirement for the NWPs.

The use of the phrase “to the minimum necessary” for stream channel modifications for linear transportation projects requires project proponents to minimize their stream channel modifications while providing flexibility to allow district engineers and project proponents to take into account for project-specific circumstances as well as design and construction constraints that may be imposed by site-specific conditions, including stream channel geomorphology, the topography of the surrounding area, and the purpose of the linear transportation project. Any loss of stream bed due to filling or excavation is also subject to the 1/2-acre and 1/3-acre limits of this NWP, so the Corps does not believe it is necessary to add a 300 linear foot limit for stream channel modifications. The Corps also declines to impose an overall linear foot limit to linear transportation projects since there can be substantial distances between crossings of waters of the United States, and those crossings may involve different waterbodies and watersheds. The Corps has retained Note 1 in this NWP, which references 33 CFR 330.6(d). Section 330.6(d) addresses how NWPs may or may not be combined with individual permits for activities that require DA authorization.

One commenter said that for a linear transportation project with multiple crossings of waters of the United States, the overall linear transportation project should be considered as the single and complete project, not the individual crossings of jurisdictional waters and wetlands. One commenter stated that allowing up to 1/2-acre of losses of waters of the United States for each single and complete project could result in extensive cumulative impacts and recommended that the Corps impose a single, overall limit to the entire linear transportation project. One commenter stated that linear transportation projects may cause cumulative impacts not captured in the NWP cumulative impact analysis because some activities are authorized by NWP 14 without a requirement to submit PCNs. One commenter said that allowing the expansion, modification, or improvement of previously authorized projects for linear transportation

projects could result in cumulative impacts above the acreage limits and therefore these activities should only be authorized when losses of waters of the United States for the previously authorized projects plus the losses of waters of the United States for the proposed expansion, modification, or improvement project do not exceed the 1/2-acre or 1/3-acre limits. One commenter said that all crossings of waters of the United States in a major watershed should be evaluated together as a single and complete project because the cumulative impacts are to one system, or alternatively that all activities authorized by this NWP should require PCNs to allow for the evaluation of cumulative impacts.

The practice for providing NWP authorization for single and complete linear project, where each separate and distant crossing of waters of the United States may qualify for its own NWP authorization, is consistent with the Corps’ NWP regulations at 33 CFR 330.2(i), which were published in the November 22, 1991, issue of the **Federal Register** (56 FR 59110). District engineers will evaluate the separate and distant crossings of waters of the United States that require PCNs for linear transportation projects, as well as the additional information provided in the PCNs for crossings of waters of the United States authorized by NWP that do not require PCNs. Paragraph (b)(4)(i) of general condition 32 requires the prospective permittee to identify in the PCN any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require DA authorization but do not require pre-construction notification. In addition, paragraph (b)(4)(ii) requires the prospective permittee to include in the PCN the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters (including those single and complete crossings authorized by an NWP but do not require PCNs). Because of the requirements of paragraph (b)(4) of general condition 32, it is not necessary to require PCNs for all activities authorized by NWP for linear transportation projects.

The district engineer will use the information in the PCN to evaluate the individual and cumulative adverse environmental effects of the proposed linear transportation project that are authorized by NWP. The district engineer determines the appropriate

geographic scale for evaluating cumulative impacts. The cumulative effects may be evaluated on a watershed-basis, or by using other types of geographic regions, such as a Corps district, state, county, or other geographic area deemed appropriate by the district engineer. Cumulative effects accrue from multiple uses of an NWP in a geographic area. Separate and distant crossings of waters of the United States for a linear transportation project may occur in different waterbodies within a single watershed, or various waterbodies in more than one watershed, depending on the length of the linear transportation project, the distribution of waterbodies in a watershed, and the size of the watershed(s). Separate and distant crossings authorized by NWP may also occur in a single waterbody (e.g., a meandering stream), as long as there is sufficient distance between crossings of waters of the United States.

When evaluating PCNs for proposed NWP 14 activities, district engineers may also consider previously authorized losses of the United States for linear transportation projects when a project proponent wants to expand, modify, or improve a previously authorized linear transportation project. Since the NWPs can be issued for a period of no more than five years, the cumulative effects caused by an NWP are limited to the number of times that NWP is used during the five year period it is in effect (see 40 CFR 230.7(b)(3)). Therefore, if the proposed expansion, modification, or improvement is for a linear transportation project that was authorized in the current five-year cycle for the NWP, the district engineer should take the previously authorized losses of waters of the United States into account when determining if the proposed changes to the linear transportation project will result in no more than minimal individual and cumulative adverse environmental effects and qualify for NWP 14 authorization. On the other hand, if the proposed expansion, modification, or improvement is for a linear transportation project that was authorized by a previous version of NWP 14 that has expired, the district engineer does not need to take the previously authorized losses of waters of the United States into account, because the previously authorized activities have become part of the current environmental baseline for evaluating the individual and cumulative adverse environmental effects of the NWP currently in effect.

One commenter requested clarification regarding whether the PCN

requirement for losses of greater than 1/10-acre of waters of the United States applies to the overall linear project or each single and complete project. One commenter stated that agency coordination should be required for proposed activities in special aquatic sites or that would result in the loss of greater than 1/10-acre of waters of the United States. One commenter said that agency coordination should be required for stream losses of stream bed greater than 300 linear feet.

The PCN thresholds for this NWP apply to each single and complete project authorized by NWP. However, if the linear transportation project involves multiple separate and distant crossings of waters of the United States, and some of those crossings do not require pre-construction notification, paragraph (b)(4) of general condition 32 requires the project proponent to identify the crossings authorized by NWP that do not require PCNs, as well as quantity of anticipated losses of waters of the United States expected to be caused by those non-PCN NWP activities. The Corps does not agree that agency coordination is necessary to provide the district engineer with information to assist in his or her determination whether the proposed activity qualifies for NWP authorization. District engineers will determine whether proposed NWP 14 activities qualify for NWP authorization after reviewing the information in PCNs.

One commenter stated that all linear transportation projects previously authorized by NWP 14 should require PCNs if the project proponent wants to use NWP 3 to authorize maintenance activities for the previously authorized NWP activities. One commenter said there should be more consistency between NWPs 12 and 14 in terms of acreage limits, PCN thresholds, and allowing the use of temporary mats, because both NWPs authorize single and complete linear projects with separate and distant crossings of waters of the United States that do not have independent utility.

This NWP can be used to authorize the maintenance of linear transportation projects, including the replacement of structures and fills for linear transportation projects that may not qualify NWP 3 authorization. Those replacement activities may not qualify for NWP 3 authorization because the current linear transportation project is not currently serviceable, or because the project proponent wants to change the design and/or size of the linear transportation project to accommodate changes in water flow, improve connectivity for the movement of

aquatic organisms upstream and downstream of the road crossing, or for other reasons. Changing the size and/or configuration of the structures and fills for a linear transportation project may be comprised of more than a minor deviation, which may preclude the use of NWP 3 for the replacement activity. For example, replacing an undersized or perched culvert with a larger culvert structure that improves the passage of aquatic organisms and connectivity may be considered an improvement of a linear transportation project. NWP 3 may be more appropriate for certain repair, rehabilitation, or replacement activities for linear transportation projects, as well as the removal of accumulated sediment within and near water crossings. The NWP program provides flexibility to permittees to determine which applicable NWP to use to provide the required DA authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899.

The acreage limits for NWPs 12 and 14 have some similarities, with a 1/2-acre limit for losses of non-tidal waters of the United States. The 1/2-acre limit for NWP 12 also applies to tidal waters, while NWP 14 has a 1/3-acre limit for losses of tidal waters. Nationwide permits 12 and 14 have somewhat different PCN thresholds because of differences between oil or natural gas pipeline activities and linear transportation projects. Both NWPs have a PCN threshold for losses of greater than 1/10-acre of waters of the United States. Both NWP 12 and 14 have provisions authorizing the use of temporary mats, when the use of those mats requires DA authorization.

This NWP is reissued as proposed.

NWP 15. U.S. Coast Guard Approved Bridges. The Corps did not propose any changes to this NWP. No comments were received in response to the proposed reissuance of this NWP. This NWP is reissued as proposed.

NWP 16. Return Water From Upland Contained Disposal Areas. The Corps did not propose any changes to this NWP. One commenter stated that the NWP should require the applicant to ensure toxic substances are not released back into the water column through re-exposure from dredging activities. One commenter said that the applicant should properly characterize the quality and quantity of return water to ensure state water quality standards are not violated.

This NWP authorizes only the return water from upland contained disposal areas for dredged material, which is defined as a “discharge of dredged material” under 33 CFR 323.2(d)(1)(ii).

This NWP does not authorize the dredging activity itself. Discharges into waters of the United States require water quality certification from the appropriate certifying authority unless a waiver of the water quality certification requirement occurs. The certifying authority will determine whether a discharge into waters of the United States will comply with applicable water quality requirements.

This NWP is reissued as proposed.

NWP 17. Hydropower Projects. The Corps proposed to modify this NWP to authorize discharges of dredged or fill material into waters of the United States associated with hydropower projects with a generating capacity of less than 10,000 kilowatts (kW), to be consistent with the current definition of “small hydroelectric power project.”

Several commenters stated they support the changing the threshold for “small hydroelectric projects” to 10,000 kW or less. Many commenters objected to the proposed reissuance of this NWP, stating that hydropower projects typically result in significant adverse effects and should not be authorized by an NWP. Several commenters stated that they do not support increasing the threshold for hydroelectric projects under criterion (a) of this NWP to 10,000 kW. One commenter said the Corps is not obligated to modify the NWP to be consistent with the Federal Energy Regulatory Commission’s (FERC) definition of “small hydroelectric project” and stated that the Corps should not increase the threshold for total generating capacity to 10,000 kW.

This NWP is limited to the authorization of discharges of dredged or fill material into waters of the United States associated with the construction of hydropower facilities that satisfy criteria (a) or (b) in the first paragraph of the NWP. The FERC licenses the construction and operation of hydropower facilities, and is the lead for conducting the environmental review for these hydropower projects. Permit requirements for structures and work in navigable waters of the United States for non-federal hydropower development are met through the FERC’s licensing process under the Federal Power Act of 1920, as amended. Therefore, separate authorization from the Corps under Section 10 of the Rivers and Harbors Act of 1899 is not required for structures and work in navigable waters of the United States.

Because criterion (a) of this NWP applies only to existing reservoirs, the NWP is limited to authorizing discharges of dredged or fill material into waters of the United States to install the hydropower generation unit

with a total generating capacity of up to 10,000 kW in the existing reservoir. The modification of this NWP is intended to provide consistency with FERC’s definition of “small hydroelectric project” and reduce duplication of agency reviews for these projects. In addition, hydropower is a renewable energy source and increasing the threshold for small hydroelectric projects from 5,000 kW to 10,000 kW will provide NWP authorization for activities that can help provide more electricity to a community or region, and may help decrease reliance on energy generation facilities that rely on the combustion of fossil fuels to produce electricity. Therefore, increasing the energy generation capacity of hydroelectric facilities can help reduce emissions of greenhouse gases that contribute to global climate change.

One commenter stated that activities authorized under criterion (b) of this NWP would exceed the development at existing dams and related infrastructure and would result in adverse effects. One commenter said that in certain circumstances, hydropower projects are exempt from FERC licensing and subsequently do not require authorization under Section 404 of the Clean Water Act or water quality certification from the applicable certifying authority. One commenter said that the Corps failed to provide sufficient explanation as to how the proposed change would continue to authorize activities that have no more than minimal individual and cumulative adverse environmental effects. A few commenters said that the text of the NWP should be revised to protect tribal and village fisheries. One commenter stated that the NWP should be revised to clarify that the NWP does not authorize the construction of new dams.

This NWP was issued in 1982 to reduce duplication between the reviews conducted by FERC and the Corps for small hydropower projects (see 47 FR 31798). For hydropower projects, the Corps’ regulatory authority is limited to discharges of dredged or fill material into waters of the United States under Section 404 of the Clean Water Act. The FERC conducts a review when it grants a licensing exemption under the statutes identified in criterion (b) of this NWP (*i.e.*, Section 406 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and Section 30 of the Federal Power Act, as amended (16 U.S.C. 823)). The NWP authorization covers the discharges of dredged or fill material into waters of the United States may be necessary to construct the hydropower

project. This NWP requires pre-construction notification for all authorized activities, and district engineers will review each proposed NWP 17 activity to determine if the proposed discharge of dredged or fill material into waters of the United States will result in no more than minimal individual and cumulative adverse environmental effects. If the district engineer determines a proposed discharge of dredged or fill material into waters of the United States will result in more than minimal adverse environmental effects after considering mitigation proposed by the applicant, he or she will exercise discretionary authority and require an individual permit for the proposed activity. During the review of the PCN, the district engineer will also assess compliance with general condition 17, tribal rights. This NWP does not authorize the construction of new dams for hydropower projects. The FERC may issue an exemption at an existing dam or project, or within an existing conduit that was constructed for purposes other than power production.

This NWP is reissued as proposed.

NWP 18. Minor Discharges. The Corps did not propose any changes to this NWP. One commenter expressed support for the reissuance of this NWP with no changes. One commenter said that the limits of this NWP should be increased to 50 cubic yards to match the proposed increase in the cubic yard limit for minor dredging activities authorized by NWP 19. One commenter stated that this NWP should require PCNs for all proposed activities, so that the district engineer can evaluate potential impacts from sediment and other pollutants.

The Corps is retaining the 25-cubic-yard limit for this NWP. Activities authorized by NWP 18 may convert wetlands and other waters to uplands. The Corps is also retaining the 25-cubic-yard limit for NWP 19 as discussed below so NWPs 18 and 19 will remain consistent.

The Corps disagrees that PCNs should be required for all activities authorized by this NWP. This NWP requires PCNs for discharges of dredged or fill material into special aquatic sites and discharges of dredged or fill material into waters of the United States greater than 10 cubic yards below the plane of the ordinary high water mark or the high tide line, and those PCN thresholds are sufficient to help ensure that activities authorized by this NWP result in no more than minimal adverse environmental effects. Division engineers can add regional conditions to this NWP to require PCNs for additional activities authorized by

this NWP, if such regional conditions are necessary to provide district engineer review for proposed activities that may result in more than minimal individual and cumulative adverse environmental effects. The Corps does not have the authority to regulate pollutants other than discharges of dredged or fill material. Discharges of dredged or fill material into waters of the United States authorized by this NWP require water quality certification or waivers to comply with Section 401 of the Clean Water Act. Certifying authorities may issue, deny, or waive water quality certification for discharges authorized by this NWP. When certifying pursuant to section 401, certifying authorities may include conditions to ensure that authorized discharges comply with applicable water quality requirements.

This NWP is reissued as proposed.

NWP 19. Minor Dredging. The Corps proposed to modify this NWP by changing the cubic yard limit from 25 cubic yards to 50 cubic yards. Several commenters expressed opposition to increasing the cubic yard limit for this NWP from 25 cubic yards to 50 cubic yards. Several commenters voiced their support for the proposed change. One commenter recommended increasing the cubic yard limit to 100 cubic yards. A couple of commenters said that the Corps did not provide sufficient explanation as to why increasing the cubic yard limit to 50 cubic yards would ensure that the activities authorized by this NWP will result in no more than minimal adverse environmental effects.

After considering the comments received in response to the 2020 Proposal, the Corps is retaining the 25 cubic yard limit for this NWP. Where the 25-cubic-yard limit would be exceeded, those activities may be authorized under regional general permits or individual permits, including under letters of permission where those tools are available. In geographic areas where minor dredging activities removing up to 25 cubic yards have the potential to result in more than minimal individual and cumulative adverse environmental effects, division engineers can impose regional conditions to reduce the cubic yard limit from 25 yards to a smaller number of cubic yards. Division engineers can also add regional conditions to this NWP to require PCNs for some or all NWP 19 activities to provide district engineers the opportunity to review these minor dredging activities on a case-by-case basis and determine whether they qualify for NWP authorization.

One commenter said that applicants should be required to ensure that toxic substances are not released back into the water column through re-exposure from the dredging activity. One commenter objected to the proposed reissuance of this NWP, stating that the authorized dredging activities will have adverse effects on shellfish beds, infaunal invertebrates, and macroalgal beds, as well as biogenic structures such as shell rubble and large woody debris that provide ecologically valuable habitat, forage areas, or refuge areas for fish, shellfish, or shorebirds.

Minor dredging activities authorized by this NWP may require water quality certification under Section 401 of the Clean Water Act. For a proposed minor dredging activity that may result in a discharge into waters of the United States, the certifying authority may issue, waive, or deny water quality certification. The certifying authority may add conditions to the water quality certification to ensure that the discharge complies with applicable water quality requirements. This NWP does not authorize the dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation, anadromous fish spawning areas, or wetlands. Bivalve molluscs inhabiting shellfish beds may be harvested through dredging activities authorized by other NWPs, such as NWP 4 for fish and wildlife harvesting, enhancement, and attraction devices and activities, or NWP 48 for commercial shellfish mariculture activities. Infaunal invertebrates, beds of macroalgae, and shell rubble areas may be impacted by activities authorized by this NWP, but those impacts are likely to be no more than minimal in the highly dynamic marine and estuarine environments in which those organisms and features are located, where they are subjected to a variety of natural and anthropogenic disturbances, such as disturbances caused by storms, vessels, anchors, and fishing activities. The removal of large woody debris from waterbodies is usually accomplished through snagging rather than dredging.

One commenter said that federal and state natural resource agency coordination should be required for proposed activities that occur in non-tidal waters inhabited by state and/or federally listed threatened and endangered freshwater mussels. A commenter stated that project proponents could piecemeal a number of smaller dredging projects under this NWP to dredge a larger overall area and such activities may negatively affect fish spawning habitat and water quality. One commenter said that this NWP should

require the use of silt fences, booms, and bubblets to protect fish, and other natural resources.

Paragraph (c) of general condition 18 requires non-federal permittees to submit a pre-construction notification to the district engineer if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the proposed activity, or if the proposed activity is located in designated critical habitat or critical habitat proposed for such designation. The district engineer will review the proposed activity and if he or she determines that it may affect federally-listed mussel species or other federally-listed endangered or threatened species, the district engineer will initiate ESA Section 7 consultation with the U.S. FWS and/or NMFS as appropriate. Potential impacts to state-listed mussel species are more appropriately addressed through the permittee's compliance with applicable state natural resource or wildlife laws and regulations.

General condition 15 states that the same NWP cannot be used more than once to authorize the same single and complete project. Therefore, this NWP cannot be used multiple times to dredge larger volumes of material from a specific waterbody as part of a larger overall dredging project. The applicant should apply for an individual permit to obtain DA authorization for the larger dredging project unless a different general permit is available to authorize that project. Activities authorized by this NWP can occur in a wide variety of waters, including ocean waters, estuaries, and rivers, and the use of silt fences, booms, and bubblets may be appropriate for some minor dredging activities but not for other minor dredging activities. Therefore, the Corps declines to modify this NWP at a national level to require these mitigation measures for all activities authorized by this NWP.

This NWP is reissued without proposed modification.

NWP 20. Response Operations for Oil or Hazardous Substances. The Corps did not propose any changes to this NWP. One commenter expressed support for the reissuance of this NWP with no changes.

This NWP is reissued as proposed.

NWP 22. Removal of Vessels. The Corps did not propose any changes to this NWP. One commenter recommended changing the text of this NWP to state that land-based alternatives should be considered first for vessel disposal. This commenter also said that intentional ocean disposal of

vessels at sea requires a permit from EPA issued under the Marine, Protection, Research and Sanctuaries Act, and should only be pursued when land-based alternatives are not available.

This NWP authorizes temporary structures in navigable waters of the United States or minor discharges of dredged or fill material into waters of the United States required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. The consideration of off-site alternatives is not required for activities authorized by NWPs (see 40 CFR 230.7(b)(1)). If a project proponent intends to dispose of the vessel in ocean waters then a separate authorization from EPA may be required under the Marine, Protection, Research and Sanctuaries Act. Note 1 has been revised to clarify EPA requirements for intentional ocean disposal of vessels under the Marine, Protection, Research and Sanctuaries Act. The project proponent has an independent responsibility to apply to EPA for that authorization.

This NWP is reissued as proposed.

NWP 23. Approved Categorical Exclusions. The Corps did not propose any changes to this NWP. Several commenters requested that the Corps update Regulatory Guidance Letter 05–07 to include all current Federal Transit Administration, Federal Rail Administration, and Federal Highway Administration categorical exclusions so that NWP 23 can be used to authorize regulated activities covered by those categorical exclusions. One commenter stated that this NWP violates the public participation requirements of Section 404(e) of the Clean Water Act because it does not explain how the Chief of Engineers will solicit public comment on categorical exclusions proposed to be added for authorization by this NWP. This commenter also objected to the proposed reissuance of this NWP, stating that it does not authorize categories of activities that are similar in nature, and does not identify which categories of activities are authorized by the NWP. In addition, this commenter said that this NWP authorizes activities that result in more than minimal adverse environmental effects.

As stated in the Note in this NWP, federal agencies may submit requests to Corps Headquarters to seek approval for their categorical exclusions to be authorized by this NWP. The Note also states that, upon receipt of a request from a federal agency to add, modify, or remove categorical exclusions for authorization under this NWP, Corps Headquarters will solicit public

comment on the request, and determine which categorical exclusions involving discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States will be authorized by the NWP. This NWP provides two opportunities for public participation in the identification of categories of activities authorized by this NWP: (1) The public notice and comment process associated with the proposal to reissue this NWP, and (2) the public notice and comment process associated with the review and approval for specific categorical exclusions to be authorized by this NWP through the issuance of a Regulatory Guidance Letter issued by Corps Headquarters.

This NWP authorizes categories of activities that are similar in nature—that is activities regulated by the Corps that are undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another federal agency or department—where those activities are determined by the federal agency or department to be categorically excluded from the requirement to prepare an environmental impact statement or environmental assessment. The categorical exclusions approved for use with this NWP are identified in a Regulatory Guidance Letter issued by the Corps after a public notice and comment process. Some of these approved categorical exclusions require submittal of PCNs to Corps districts before commencing the authorized activities, so that district engineers can review those activities on a case-by-case basis to ensure that the authorized activities result in no more than minimal individual and cumulative adverse environmental effects. The activities associated with approved categorical exclusions that do not require PCNs were determined by the Corps to result in no more than minimal individual and cumulative adverse environmental effects when the Corps approved those categorical exclusions for use with NWP 23. For those approved categorical exclusions that do not require PCNs, district engineers retain the ability to exercise discretionary authority on a case-by-case basis to modify, suspend, or revoke the NWP authorization if they determine those activities will result in more than minimal adverse environmental effects.

This NWP is reissued as proposed.

NWP 24. Indian Tribe or State Administered Section 404 Programs. The Corps did not propose any changes to this NWP. No comments were received on the proposed reissuance of

this NWP. After the comment period for the 2020 Proposal ended on November 16, 2020, the State of Florida was granted approval by the U.S. Environmental Protection Agency to assume the Clean Water Act Section 404 permit program in Florida. Therefore, the Corps has modified Note 1 of this NWP to include Florida in the list of states with approved Clean Water Act Section 404 permit programs. This NWP is reissued with the modification discussed above.

NWP 25. Structural Discharges. The Corps did not propose any changes to this NWP. One commenter objected to the proposed reissuance of this NWP, stating that it contains no limits or other constraints to ensure that it authorizes only activities that have no more than minimal individual and cumulative adverse environmental effects.

This NWP does not have any quantitative limits because it authorizes discharges of dredged or fill material into tightly sealed forms that are used to construct structural components for pile supported structures such as bridges or for mooring cells for general navigation. The losses of waters of the United States authorized by this NWP are limited by the dimensions of the piles, mooring cells, or other structures for general navigation. The dimensions of these tightly sealed forms for supported structures or structures for general navigation will be determined by engineering standards for safe and functional structures, as well as the purpose of the proposed supported structure or navigational structure. These limited size of these structures help ensure that the authorized discharges of dredged or fill material into waters of the United States result in no more than minimal individual and cumulative adverse environmental effects.

In addition, as stated in the text of the NWP, structures in navigable waters of the United States subject to Section 10 of the Rivers and Harbors Act of 1899 require separate authorization because this NWP authorizes only discharges of dredged or fill material into waters of the United States. The section 10 permit process would address the potential impacts of the structure, including the size of the proposed structure, on navigation, the aquatic environment, and the Corps' other public interest review factors.

This NWP is reissued as proposed.

NWP 27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities. The Corps proposed to modify this NWP by changing the second sentence of the second paragraph of this NWP to state that an

ecological reference may be based on the characteristics of one or more intact aquatic habitats or riparian areas. The Corps also proposed to modify this NWP by adding coral restoration or relocation activities to the list of examples of activities authorized by this NWP and stating that PCNs are not required for permittees that propose to conduct coral restoration or relocation activities in accordance with a binding agreement with the NMFS or any of its designated state cooperating agencies. In addition, the Corps proposed to add “releasing sediment from reservoirs to restore downstream habitat” to the list of examples of aquatic restoration or enhancement activities that may be authorized by this NWP.

One commenter expressed support for the reissuance of this NWP because it allows for expedited permitting for much needed aquatic habitat restoration and enhancement projects, especially in coastal areas. One commenter stated that broad application of this NWP supports proactive state planning efforts on resiliency and flooding master plans. One commenter recommended revising the text of this NWP to make it clear that it provides approval for restoration projects, particularly those activities that will provide documented net ecological uplifts and have already undergone federal and/or state review through integrated and advance planning activities. One commenter also suggested modifying this NWP to authorize the removal of low-head dams and culverts for stream mitigation credits.

The Corps acknowledges that this NWP provides an expedited authorization process for aquatic habitat restoration, enhancement, and establishment activities that result in net increases in aquatic resource functions and services and have no more than minimal individual and cumulative adverse environmental effects. The aquatic resource restoration, enhancement, and establishment activities authorized by this NWP can be located in coastal areas. The aquatic habitat restoration, enhancement, and establishment activities authorized by this NWP can also provide water retention and storage functions that contribute to ecological services such as natural hazard mitigation, including water storage to reduce flood hazards. The activities authorized by this NWP may have also been reviewed by state agencies and other federal agencies, but review by these agencies is not required before the Corps authorizes these activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. The removal

of low-head dams to produce stream mitigation credits may be authorized by NWP 53. In the third paragraph of NWP 27, the removal of stream barriers (such as undersized culverts, fords, and grade control structures) is included in the list of examples of activities authorized by this NWP. The removal of undersized or perched culverts may be authorized by this NWP and successful completion of those activities may generate stream compensatory mitigation credits.

A few commenters expressed support for allowing the use of more than one ecological reference site. One commenter said that this NWP should be modified to address inconsistencies in triggering mitigation requirements. One commenter said that the word “delineation” be replaced with “description” in the text of this NWP. Commenter stated preparing an aquatic resources delineation per the Corps’ delineation standards and guidelines is a costly and time-consuming component of project planning and does not seem to provide any additional protection to waters and wetlands.

The Corps has adopted the proposed change regarding the use of one or more intact aquatic habitats or riparian areas as an ecological reference site. The sixth paragraph of this NWP states that compensatory mitigation is not required for activities authorized by this NWP because the authorized activities must result in net increases in aquatic resource functions and services. Therefore, there should be no compensatory mitigation requirements for aquatic habitat restoration, enhancement, or establishment activities authorized by this NWP.

The reports required for NWP 27 activities that do not require PCNs must include a delineation of wetlands, streams, and/or other aquatic habitats on the project site. Delineation is necessary to provide district engineers with a sufficient description of the baseline ecological conditions for that site to assist the Corps in determining whether the reported activity is likely to result in net increases in aquatic resource functions and services. A description of aquatic resources on the project site is not sufficient to help district engineers determine whether a proposed activity will satisfy the requirements of this NWP. The project plans for the proposed aquatic habitat restoration, enhancement, or establishment activity, plus the delineation of aquatic resources on the project site, are necessary for making certain determinations. Those determinations are whether net gains in aquatic resource functions and services are likely to occur as a result of the

discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States, and whether any potential changes to existing aquatic resources on the project site will help ensure that such net gains will occur.

One commenter said that this NWP should be changed to clarify that it authorizes actions by a third-party ecological restoration provider in connection with a compensatory mitigation project, a restoration project, or a resiliency-focused project that generates net ecological uplift. One commenter stated that this NWP should be modified to allow waters and wetland conversions to natural conditions for a different aquatic habitat type if the proposed activity as a whole will result in a net increase in aquatic resource functions and services.

As stated in the “Note” in this NWP, this NWP authorizes aquatic habitat restoration, enhancement, and establishment activities that are conducted by third-party ecological restoration providers for the purposes of compensatory mitigation for NWPs and other forms of DA authorization, such as individual permits and regional general permits. This NWP can also be used to authorize aquatic habitat restoration projects that are conducted for the purpose of increasing the functions and services provided by degraded aquatic habitat, but are not being conducted for providing compensatory mitigation for NWPs or other types of DA permits. Resiliency projects may be authorized by this NWP as long as they are aquatic habitat restoration, enhancement, or establishment projects, result in net gains in aquatic resource functions and services and resemble ecological references. Some resiliency projects, such as nature-based solutions that are modified ecosystems designed and constructed to provide ecosystem functions and services (National Academy of Sciences 2019), might not resemble ecological references because they consist of combinations of natural and engineered components. Living shorelines are an example of resiliency projects in coastal areas that do not resemble ecological references because they may include engineered structures such as sills or breakwaters. Living shorelines can be authorized by NWP 54. Green infrastructure projects constructed to manage stormwater, such as rain gardens or constructed wetlands, might not resemble ecological references and may be authorized by NWP 43 or other NWPs, or by individual permits.

The Corps is retaining the current prohibitions on conversions of streams or natural wetlands to other aquatic

habitat types because those conversions typically focus on increasing a specific aquatic resource function or service while resulting in net losses in most of the other ecological functions and services performed by the impacted aquatic habitat type. These converted aquatic habitats may also result in hybrid aquatic habitats that do not resemble ecological references. This NWP also retains the prohibitions on the conversion of tidal waters and tidal wetlands to other aquatic uses, to ensure that activities authorized by NWP 27 result in no more than minimal individual and cumulative adverse environmental effects. Conversions of natural wetlands, streams, and other types of waters to different aquatic habitat types result in artificial conditions, not natural conditions, and project proponents can seek DA authorization for these activities through other means, such as the individual permit process, other NWPs, or if available, regional general permits.

One commenter said that the Corps should issue a separate NWP for voluntary wetland restoration projects to distinguish those projects from development projects. One commenter stated that the text of this NWP should include a definition for voluntary wetland restoration projects that includes restoration projects that occur in altered, degraded, and former wetlands. A commenter said that a new federal process should be established for permitting voluntary wetland restoration projects. One commenter said that to ensure that voluntary wetland restoration projects result in net increases of wetland functions and services, those projects should be prohibited as serving to fulfilling mitigation requirements. One commenter stated that this NWP should clarify that it authorizes permittee-responsible mitigation activities.

This NWP authorizes both voluntary wetland restoration projects and wetland restoration projects that are required by regulatory agencies or other agencies. This NWP does not authorize development activities. Other NWPs, such as NWP 29 (residential developments) and NWP 39 (commercial and institutional developments), may be used to authorize development activities. The Corps declines to add a definition of “voluntary wetland restoration project,” because this NWP does not distinguish between voluntary wetland restoration projects and wetland restoration projects that may be conducted for other reasons, such as wetland restoration requirements imposed by other federal, tribal, state, or local government

agencies. There is no need to establish a new federal permitting process for voluntary wetland restoration projects because the Corps currently authorizes wetland restoration projects through its permitting authorities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. While this NWP can be used to authorize discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States for wetland restoration projects, those activities can also be authorized by individual permits and regional general permits.

Voluntary wetland restoration projects are conducted by people or organizations for the purpose of increasing wetland acreage and the associated wetland functions and services, or the level of wetland functions and services performed by areas of existing, degraded wetlands. Wetland restoration for compensatory mitigation serves a different purpose, which is to offset losses of wetland functions and services caused by permitted activities. Third-party mitigation providers (*e.g.*, mitigation bank sponsors and in-lieu fee program sponsors) may conduct wetland restoration projects to provide compensatory mitigation for NWPs and other DA permits, or to fulfill other federal, state, or local government mitigation requirements without being driven to do so by regulatory requirements. Both voluntary wetland restoration projects and wetland compensatory mitigation projects are expected to result in net increases in wetland functions and services, which is a basic requirement of this NWP. This NWP can be used to authorize permittee-responsible mitigation projects, including advance permittee-responsible mitigation projects where there is no DA permit to authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States for the advance permittee-responsible mitigation project.

One commenter said that this NWP should be modified to explicitly add the restoration of vegetated and unvegetated intertidal and subtidal areas—including mudflats, sandflats, and submerged aquatic vegetation—to the list of examples of activities authorized by this NWP. Commenter said that the activities authorized by this NWP will alter and destroy open water habitats in tidal estuaries and convert them to types of habitat that were never historically present in those waters. This commenter also stated that the activities authorized

by this NWP would make open water sites unusable by fishermen and species that currently rely on those open water habitats. One commenter said that the authorization of structures and fills by this NWP creates overlap between NWP 27 and NWP 54 (living shorelines) and should be revised. One commenter stated that the text of this NWP should be clarified regarding the degradation of downstream waters.

As stated in the first paragraph of this NWP, it authorizes the rehabilitation and enhancement of tidal streams, tidal wetlands, and tidal open waters as long as those activities result in net increases in aquatic resource functions and services. This includes vegetated and unvegetated intertidal areas (*e.g.*, mud flats and sand flats) and vegetated and unvegetated subtidal areas (*e.g.*, submerged aquatic vegetation). Tidal open waters include mud flats and sand flats. Tidal wetlands include submerged aquatic vegetation. The fifth paragraph of this NWP states that it does not authorize activities that convert tidal waters, including tidal wetlands, to other aquatic uses. Therefore, this NWP cannot be used to authorize discharges of dredged or fill material that convert tidal waters into uplands or non-tidal aquatic habitats. In addition, because the text of this NWP states that it authorizes the rehabilitation and enhancement of tidal open waters, it limits the authorized activities to those that improve either the suite of functions or a smaller number of functions performed by tidal waters. It does not authorize activities that degrade or destroy tidal waters, or render them unusable by fishermen. Aquatic habitat restoration and enhancement activities may alter which species use the restored or enhanced site, and which habitat functions support or deter certain species.

Activities authorized by NWP 27 must result in an aquatic habitat that resembles an “ecological reference,” consistent with the definition of that term in section F of the NWPs. A living shoreline usually consists of living components (*e.g.*, marsh grasses, oysters) and engineered components (*e.g.*, sills or breakwaters constructed from stone), and may not resemble an ecological reference. There is no overlap between NWP 27 and NWP 54, although tidal wetlands restored or enhanced as a result of the activities authorized by this NWP may help reduce erosion as an ecological service.

Several commenters stated that NWP 27 has PCN thresholds that are inconsistent with, and more stringent than, the PCN thresholds for other NWPs, such as NWP 12 and the two

new NWP 57 and 58 that were issued in the final rule published in the January 13, 2021, issue of the **Federal Register** (86 FR 2744). Some of these commenters suggested that this NWP should be modified to require PCNs for proposed discharges of dredged or fill material into non-wetland special aquatic sites or if the proposed activity results in loss of greater than 1/10-acre of wetland. One commenter stated support of the PCN notification exemption to continue to allow statewide aquatic habitat restoration and enhancement activities to be conducted in an efficient and timely manner. One commenter said that in order to reduce unnecessary delays and expenses from the PCN process, this NWP should be modified by removing the exception from the requirement to submit PCNs for activities on non-federal public lands and private lands conducted under agreements between the landowner and federal agencies or their designated state cooperating agencies.

The PCN thresholds for this NWP are no more stringent than the PCN thresholds for many other NWPs. All activities authorized by this NWP require some form of advance notification to district engineers before commencing authorized activities, to provide district engineers with the opportunity to take action on those proposed activities that do not comply with the requirements of the NWP, such as activities that are not expected to result in net gains in aquatic resource functions and services or activities that are not likely to resemble ecological references. The advance notification takes the form of either: (1) Pre-construction, or (2) reporting. The activities identified in the "Notification" paragraph require PCNs and reports are required for the activities identified in the "Reporting" paragraph. Most of the NWPs require PCNs for all authorized activities, or for a subset of authorized activities.

The suggested PCN thresholds for discharges of dredged or fill material into non-wetland special aquatic sites or for losses of greater than 1/10-acre of wetland are not appropriate for an NWP that authorizes discharges of dredged or fill material or structures or work into all types of waters of the United States. Wetlands are a subset of jurisdictional waters in which this NWP can be used to authorize regulated activities associated with aquatic habitat restoration, enhancement, and establishment. This NWP authorizes activities in tidal and non-tidal wetlands, rivers and streams, lakes, estuaries, and ocean waters. Some form of case-by-case review is needed for all

authorized activities to ensure their compliance with the NWP and that they will result in no more than minimal individual and cumulative adverse environmental effects.

This NWP does not have an acreage or other quantitative limits. Instead of a quantitative limit, this NWP requires that aquatic habitat restoration, enhancement, and establishment activities result in net increases in aquatic resource functions and services and resemble ecological references. Aquatic habitat restoration, enhancement, and establishment activities can occur over large or small areas, and the PCN and reporting requirements facilitate the expedited review process for activities that provide benefits for the aquatic environment, as well as ecological services for people. The reporting requirement was established for certain NWP 27 activities on non-federal public lands and private lands to reduce costs associated with preparing PCNs, while providing district engineers with the opportunity to review proposed activities that do not require PCNs. The reporting requirement provides district engineers with the opportunity to take action if they determine that a proposed activity does not qualify for NWP 27 authorization because it is not an aquatic habitat restoration, enhancement, or establishment activity; it is not likely to result in net gains in aquatic resource functions and services; or it does not resemble an ecological reference.

Several commenters expressed support for adding coral restoration activities to the list of examples of activities that may be authorized by NWP 27. One commenter stated that authorizing coral restoration activities under this NWP would streamline and simplify restoration activities and reduce burdens on the local agencies.

The Corps has added coral restoration activities and coral relocation activities to the list of examples of activities authorized by this NWP when those activities require DA authorization under Section 10 of the Rivers and Harbors Act of 1899 and/or Section 404 of the Clean Water Act.

Many commenters stated opposition to the proposed inclusion of reservoir sediment releases as an example of an activity authorized by NWP 27 while many commenters expressed support for the proposed inclusion of that activity as an example of activities authorized by this NWP. A few commenters stated that controlled sediment releases can benefit downstream river and stream beds and embankments. One commenter asserted that these activities should

require individual permits. One commenter suggested rewording the proposed modification to the following: "reservoir sediment management to provide continuity in sediment transport through reservoirs."

The Corps is adding "releases of sediment from reservoirs to maintain sediment transport continuity to restore downstream habitats" to the list of examples of activities authorized by this NWP instead of the proposed text of "releasing sediment from reservoirs to restore downstream habitat." These activities can be conducted in a manner that improves the functions and services performed by downstream river and stream habitats and results in no more than minimal individual and cumulative adverse environmental effects. The revised text is intended to emphasize the notion of rehabilitating downstream habitats and improving the functions and services performed by those habitats by maintaining continuity of sediment transport through reservoirs rather than emphasizing reservoir management activities. Sediment releases from reservoirs must have the purpose of maintaining sediment transport through rivers that sustains or improves downstream habitat that is adversely affected by the reservoir because that reservoir disrupts normal sediment transport processes in the river. The Corps declines to revise the text to refer to reservoir sediment management activities because the modification of this NWP addresses only one approach to reservoir sediment management.

The movement of sediment via flowing water through watersheds and river and stream networks is a natural watershed process (Black 1997). Reservoirs trap sediment and disrupt the continuity of sediment transport through the river network in a watershed, which reduces the amount of sediment transported downstream that helps maintain river channel form as well as adjacent riparian areas and floodplains (Kondolf et al. 2014). Periodic releases of sediment stored in reservoirs can help maintain the continuity of sediment transport in riverine systems and help sustain or enhance downstream riverine and riparian habitats, including floodplains. In coastal areas, periodic releases of sediment from reservoirs can provide sediment that helps sustain coastal wetlands and unvegetated coastal habitats (Kondolf et al. 2014). Those sediments can accrete in coastal wetlands and help those wetlands adjust to sea level rise. The activities authorized by this NWP require either PCNs or reports to district engineers, so

it is not necessary to add a PCN requirement specific to releases of sediment from reservoirs to maintain sediment transport continuity in riverine systems to restore or enhance downstream habitats. District engineers will review these proposed activities through either PCNs or reporting documentation submitted by project proponents to Corps district offices.

Releases of sediment from reservoirs may or may not require DA authorization, depending on how those sediment releases are conducted. Guidance is provided in Regulatory Guidance Letter (RGL) 05–04: “Guidance on the Discharge of Sediments From or Through a Dam and the Breaching of Dams, for Purposes of Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899.” The RGL explains the circumstances in which sediment releases from reservoir do not require DA authorization, and how reservoir sediment releases can be conducted without the need to obtain Clean Water Act Section 404 authorization from the Corps. In general, releases of sediments that are incidental to normal reservoir operations—such as releases of water through the dam to restore reservoir capacity during events like spring runoff, flooding, or storms—are considered de minimis discharges of dredged material. They do not require DA authorization under section 404 so long as the sediment loads of waters released from reservoirs are consistent with the sediment loads entering the reservoir from the upstream waters. The modification of this NWP clarifies that this NWP can be used to provide DA authorization under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act for sediment releases from reservoirs that require such authorization, as long as those sediment releases rehabilitate downstream habitats and result in net gains in aquatic resource functions and services.

Several commenters stated that sediment releases from reservoirs authorized by this NWP should have quantitative limits to ensure that no more than minimal adverse impacts occur as a result of these activities. One commenter said that the text of this NWP should clarify that sediment releases from reservoirs must be linked to a clear restoration action or plan and should not be authorized by this NWP solely for the purpose of reservoir management or dam maintenance. Many commenters stated that PCNs should be required for all sediment releases authorized by this NWP. Several commenters objected to the proposed

modification, stating that sediment release activities under NWP 27 should require PCNs when dam removal projects would result in large amounts of sediments being released. One commenter said that a PCN threshold should be added to this NWP to address discharges associated with sediment releases and the frequency of those sediment releases, to ensure that those activities result in no more than minimal adverse environmental effects.

The Corps does not agree that there should be quantitative limits for reservoir sediment releases authorized by this NWP because of the variability in hydrology and sediment transport in rivers and streams across the country and the variability in reservoir characteristics, such as their dimensions, how they are operated, and the hydrologic and sediment regimes of the watershed in which a reservoir is located. In addition, the appropriate amount of sediment that may be released from a reservoir to maintain continuity of sediment transport to restore downstream habitats is affected by a number of factors, which makes it infeasible to establish a national quantitative limit for these activities. Such factors include water and sediment inputs to the river, including upstream, lateral, and downstream inputs; valley geometry, substrate, and vegetation; river geometry, including the cross sectional geometry, planform, and gradient; and the disturbance regime of the river (Wohl et al. 2015). These factors vary considerably among rivers across the United States. Therefore, the appropriate amount of sediment to be released from reservoirs, as well as the timing of those releases, to provide sediment transport continuity and rehabilitate downstream habitats needs to be determined on a case-by-case basis.

Activities authorized by NWP 27, including wetland and stream restoration and enhancement activities, do not require formal restoration plans, although a project proponent may provide restoration plans with the PCN or report if she or he believes that information would help the district engineer determine whether the proposed activity is authorized by this NWP. The Corps does not believe it is necessary to require more information for proposed releases of sediment from reservoirs than it requires for other aquatic habitat restoration, enhancement, or establishment activities authorized by this NWP. Wetland and stream restoration activities can involve substantial amounts of earth moving and sediment releases, and the Corps believes that

proposed releases of sediment from reservoirs do not require a higher information standard than wetland and stream restoration activities. The sediment releases from reservoirs to rehabilitate downstream habitats do not require a formal restoration plan, but the reservoir operator may develop an operations plan that establishes protocols for sediment releases that are intended to maintain sediment transport continuity to restore downstream habitats. The project proponent can provide a copy of that plan with the PCN or report.

To be authorized by this NWP, the sediment releases from reservoirs must result in net gains in aquatic habitat functions and services. This NWP does not authorize sediment releases that are conducted primarily for the purpose of reservoir management or maintenance. The primary purpose of the authorized activity must be to restore downstream habitats. However, controlled releases of sediment from reservoirs to maintain sediment transport continuity to restore or enhance downstream habitats may have a secondary benefit of prolonging the operational life of reservoirs and reducing the need to construct additional reservoirs in a region (Kondolf et al. 2014). This NWP does not authorize releases of large amounts of sediment from reservoirs that would adversely affect downstream habitats and result in net losses, rather than net gains, in aquatic resource functions and services.

Several commenters said that the text of this NWP should clarify whether the sediment releases from reservoirs are one-time activities or they can be conducted on a recurring, routine basis. One commenter said that PCNs for proposed sediment releases from reservoirs should indicate whether the proposed release is part of a single event or proposed as a routine management technique and should include a plan describing the amount, frequency, timing, and duration of sediment to be released. A few commenters support adding releases of sediment from reservoirs into downstream habitats to the examples in NWP 27, but said that sediment releases should have established criteria as determined by state resource managers to maintain balanced sediment levels within individual watersheds.

The timing and frequency of sediment releases from reservoirs to restore downstream habitats are likely to differ because of the variability in climate, watersheds, and rivers across the country, and the variability in water and sediment regimes in rivers. Sediment releases from reservoirs that trigger a

requirement for DA authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899 may occur during multiple times during the 5-year period this NWP is in effect. This NWP includes a number of examples of authorized activities that may occur more than once during the 5-year period the NWP is in effect, such as the removal of accumulated sediments from waterbodies, shellfish seeding activities, plowing or discing activities for seeding and planting wetland species, and mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation. If the project proponent anticipates conducting multiple sediment releases during the period this NWP authorization is in effect, in the PCN or report for the proposed activity he or she should provide information on the anticipated number of releases during that time. If the proposed activity requires a PCN, the description of the proposed activity required by paragraph (b)(4)(i) of general condition 32 should include the number of anticipated sediment releases from the reservoir and their timing. Sediment transport in rivers typically occurs in a non-linear, episodic manner (Wohl et al. 2015), and releasing sediments in smaller pulses may more closely mimic non-linear, episodic natural sediment transport processes. This NWP does not authorize large sediment releases that will cause losses of aquatic resource functions and services.

The Corps does not agree that there should be coordination of proposed activities between district engineers and state resource managers. None of the other aquatic habitat restoration, enhancement, and establishment activities authorized by this NWP require coordination between district engineers and state resource managers. Therefore, releases of sediment to restore or enhance downstream habitat should not be subject to a coordination requirement between district engineers and state resource managers. However, district engineers have the discretion to coordinate proposed NWP 27 activities requiring DA authorization with other federal, tribal, state, or local resource agencies on a case-by-case basis, within the timeframes for reviewing PCNs (generally 45 days) and reports (30 days), if they want assistance with their evaluations of those PCNs and reports.

A few commenters stated that sediment releases authorized by this NWP should be clearly linked to a restoration plan and not be solely for the purpose of reservoir or dam maintenance. Several commenters stated that PCNs for proposed sediment

releases from reservoirs should include study results that evaluated and addressed the volume of sediment to be released, sediment size and distribution, reach conditions, downstream habitat and aquatic species impacts, and the time of year for releases. Another commenter stated that PCNs for sediment release activities authorized by this NWP should include the plan used for sediment releases and the benefits of each activity must be clarified regarding the resulting changes on hydrology, geomorphology, and habitat, as well as watershed stability.

Aquatic habitat restoration, enhancement, and establishment activities authorized by NWP 27 do not require comprehensive restoration plans. Releases of sediment from reservoirs to maintain sediment transport continuity to restore downstream habitats that require DA authorization will require either PCNs or reporting to district engineers. The Corps does not agree that it is necessary to establish information requirements for releases of sediment from reservoirs that differ from the information requirements for the wide variety of other aquatic habitat restoration, enhancement, or establishment activities authorized by this NWP. The Corps is applying the same PCN information requirements for proposed sediment releases from reservoirs that it requires for all other aquatic habitat restoration, enhancement, and establishment activities authorized by this NWP. Those other aquatic habitat restoration, enhancement, and establishment activities, including wetland and stream restoration activities, can involve substantial amounts of discharges of dredged or fill material into waters of the United States and other regulated activities to restore, enhance, or establish aquatic habitats so that they provide net increases in aquatic resource functions and services after completion of the authorized activities.

For those activities that require PCNs, paragraph (b)(4)(i) of general condition 32 requires the following: A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters expected to result from the NWP activity; and a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity. The amount and type of information to be provided in the description of the proposed activity in the PCN should be appropriate to the

type of aquatic habitat restoration, enhancement, or establishment activity the project proponent wants to conduct under the NWP 27 authorization. For example, for proposed sediment releases to restore downstream aquatic habitats, in the description of the proposed activity the project proponent should describe the amount, frequency, timing, and duration of sediment to be released from the reservoir. A formal study is not required for a complete PCN. The project description should be in sufficient detail to provide the district engineer with enough information to determine whether the proposed activity will result in a net increase in aquatic resource functions and services.

For releases of sediment from reservoirs that may be authorized by this NWP, the PCN should also describe any mitigation measures the project proponent intends to implement to reduce adverse environmental effects and ensure that the authorized activity results in net gains in aquatic resource functions and services. Mitigation measures may include releasing sediment in pulses during periods of sufficient water flow so that the released sediments restore or enhance, rather than degrade, downstream habitats. Releases of sediment from reservoirs to maintain continuity of sediment transport and restore downstream habitats can have a secondary benefit of helping maintain the water storage capacity of reservoirs. However, if the PCN or report states that primary purpose of the sediment releases are for reservoir maintenance, then the district engineer should notify the project proponent that the proposed activity is not authorized by NWP 27, and that another type of DA authorization will be needed for the proposed reservoir or dam maintenance activities.

The sediment releases from reservoirs authorized by this NWP are not likely to result in substantial changes in hydrology, geomorphology, aquatic habitat, or watershed stability because they are intended to maintain continuity in sediment transport to restore or enhance downstream habitats that have been adversely affected by the disruption in sediment transport processes caused by the construction of a reservoir. The activities authorized by this NWP must result in net gains in aquatic resource functions and services. These activities are likely to improve watershed functioning and the sustainability of aquatic habitats within the watershed to some degree by maintaining the continuity of sediment transport in rivers within the watershed.

One commenter stated additional clarification on the definition for the

term “release” is needed to encourage natural sediment transport downstream if that is the intent of the proposed change to this NWP. One commenter expressed concern with authorizing sediment releases from reservoirs under this NWP because of uncertainty of the objectives and nature of potential sediment releases. One commenter said that releasing sediment from reservoirs to restore downstream habitat is not suitable for NWP authorization because while it can improve habitat, it can also result in adverse effects on wetlands and riparian areas.

The term “release” applies to discharges of dredged or fill material regulated under Section 404 of the Clean Water Act and “work” regulated under Section 10 of the Rivers and Harbors Act of 1899 because those are the types of activities authorized by this NWP under the permitting authorities for NWP 27. There are circumstances where releases of sediment from reservoirs do not require DA authorization (see Regulatory Guidance Letter 05–04). The intent of adding “releases of sediment from reservoirs to maintain sediment transport continuity to restore downstream habitats” to the list of examples of activities authorized by this NWP is to clarify that this NWP can be used to authorize sediment releases from reservoirs that require DA authorization as long as those activities result in net gains in aquatic resource functions and services and have no more than minimal adverse environmental effects. The third paragraph of this NWP is a list of examples of aquatic habitat restoration, enhancement, and establishment activities that may be authorized by this NWP when those activities require DA authorization. This addition to the list of examples of activities authorized by this NWP is highly specific; it is limited to sediment releases from reservoirs that maintain sediment transport continuity to restore downstream habitat. It does not cover sediment releases from reservoirs for other purposes, such as maintaining the designed water storage capacity of the reservoir. The objective of this addition to the list of examples of activities authorized by this NWP is to provide sediment for downstream habitats that have been adversely affected by the disruption of sediment transport caused by the dam that created the reservoir, so that continuity of sediment transport is maintained to a degree that helps sustain or improve the structure, functions, and dynamics of downstream riverine and riparian habitats, and in coastal areas, downstream coastal habitats.

Sediment releases from reservoirs can be conducted in a manner that does not require DA authorization. Sediment releases from reservoirs can also be conducted in a manner so that they result in no more than minimal individual and cumulative adverse environmental effects. This NWP requires that releases of sediment from reservoirs that require DA authorization result in net gains in aquatic resource functions and services. Sediment releases from reservoirs that require DA authorization but do not result in net gains in aquatic resource functions and services are not authorized by this NWP. The construction of reservoirs disrupts sediment transport to downstream habitats, including wetlands and riparian areas. When sediment transport processes are disrupted by the construction of a dam across a river, downstream riverine wetlands and riparian areas may erode when sediment supplies from upstream waters diminish as sediment is trapped by the reservoir. Coastal wetlands also require periodic inputs of sediment to sustain their structure and function, and sediment releases from reservoirs in coastal areas can help sustain these wetlands (Kondolf et al. 2014). While this NWP may authorize the removal of small water control structures, it does not authorize the removal of large dams. Low-head dam removals may be authorized by NWP 53.

Several commenters stated that the timing, location, and magnitude of sediment releases are crucial factors, as they could be beneficial for some species that require turbidity for spawning, or harmful for species that require clean substrate for nest building. One commenter said that the Corps’ decision document for this NWP should provide further clarification of the positive and negative impacts on the aquatic environment downstream from sediment releases and that the NWP should provide a mechanism that will carefully consider these potential impacts and offer practices aimed to reduce negative impacts. One commenter stated that the NWPs are designed for minor discharges with no more than minimal adverse environmental impacts and that individual permits should be required for discharges of sediment for habitat improvement. One commenter said that large amounts of sediments being released downstream should require full evaluation of best management options.

The Corps agrees that the timing, location, and magnitude of sediment releases are crucial factors, and that these activities need to be carefully planned and implemented to ensure

that the sediment releases from reservoirs result in net increases in aquatic resource functions and services. The degrees to which some species may benefit from the sediment released from reservoirs and other species may be adversely affected weighs into the determination as to whether the sediment releases result in net gains in aquatic resource functions and services. As with many aquatic habitat restoration, enhancement, and establishment activities, there may be short-term, temporary adverse effects while authorized activities such as discharges of dredged or fill material into waters of the United States are conducted. But over the long-term, as the aquatic habitat responds to the restoration, enhancement, or establishment activities through ecosystem development processes, there should be more permanent, sustainable gains in aquatic habitat functions and services. The Corps has revised its national decision document for this NWP to provide additional discussion of the positive and negative impacts of releases of sediment from reservoirs to maintain sediment transport continuity to rehabilitate downstream aquatic habitats.

If the district engineer reviews the PCN or report and determines the proposed activity may affect listed species or designated critical habitats, the district engineer will conduct ESA Section 7 consultation with the U.S. FWS and/or NMFS as appropriate, unless another federal agency has conducted ESA Section 7 consultation for the proposed activity. The information requirements for these activities are similar to the information requirements for other aquatic habitat restoration, enhancement, and establishment activities authorized by this NWP, and project proponents can provide additional information voluntarily if they think that additional information will help with receiving an NWP verification letter from the district engineer.

When evaluating PCNs for proposed NWP 27 activities, district engineers will consider the 10 criteria in paragraph 2 of section D, District Engineer’s Decision to determine whether a proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. Aquatic habitat restoration, enhancement, and establishment activities can vary substantially in size, and in the amount of dredged or fill material that is discharged into waters of the United States to conduct those activities. For aquatic habitat restoration, enhancement, and

establishment projects, the quantity of discharges of dredged or fill material into waters of the United States is not indicative of whether the completed activity will result in net gains in aquatic habitat functions and services. It is the longer-term outcomes of the aquatic habitat restoration, enhancement, or establishment activities that determine whether net gains in aquatic resource functions and services occur after the temporary impacts associated with the permitted activities are supplanted by the ecosystem development processes that occur over time to produce gains in aquatic resource functions and services. These concepts apply to releases of sediment from reservoirs to maintain sediment transport continuity to restore downstream habitats.

Many commenters expressed concern with possible levels of pollutants and water quality impairments from sediment releases. One commenter stated that dam removal projects require sediment contaminant testing to ensure sediment contaminants to be released downstream would not negatively impact the environment, and that this NWP should have a similar requirement for sediment releases from reservoirs. One commenter stated that release of sediments from reservoirs as part of a restoration activity should not contain actionable levels of pollutants such as nitrates, phosphorus, metals, or pesticides. Many commenters said that PCNs for proposed releases of sediment from reservoirs should require sediment analysis to determine contaminant levels. One commenter said that sediment load and the concentrations of any contaminants relative to background levels are key parameters for determining downstream environmental impacts of these activities. Many commenters said that there is potential for contaminants and pollutants that have accumulated in reservoir sediments to be released which may cause significant ecosystem impacts downstream. A few commenters stated that sediment releases from reservoirs would result in water quality violations and disperse contaminated sediments.

Dam removal projects do not always require sediment testing. The need for sediment testing for sediments to be released via dam removal project is determined on a case-by-case basis by applying the criteria at 40 CFR 230.60. The same approach applies to releases of sediment from reservoirs to maintain sediment transport continuity to restore downstream habitats. In addition, sediment releases from reservoirs authorized by this NWP may require

water quality certification under Section 401 of the Clean Water Act. The applicable certifying authority determines whether a discharge may occur, and if the certifying authority determines that a discharge into waters of the United States may occur it notifies the project proponent that water quality certification or waiver is required before conducting the proposed discharge.

Decisions to require testing of sediments released from reservoirs are more appropriately made by the agencies responsible for making water quality certification decisions under Section 401 of the Clean Water Act. If the proposed release of sediment from a reservoir requires DA authorization, the district engineer should defer to the applicable certifying authority regarding whether sediment testing is necessary to ensure compliance with applicable water quality requirements. If a release of sediments from a reservoir will result in a regulated discharge of dredged or fill material, the district engineer has the discretion to determine that there is a need to test sediment that might be stored in the reservoir for contaminants, based on a "reason to believe" approach similar to the EPA's inland testing manual for dredged material.

One commenter expressed concern for authorizing sediment releases under an NWP because there is little opportunity for coordination with natural resource agencies. A few commenters said that the Corps should develop appropriate general and/or regional conditions for reservoir sediment releases through coordination with natural resource agencies and reservoir operators. One commenter stated that the Corps should require project proponents proposing sediment releases from reservoirs to notify downstream drinking water utilities of potential sediment releases when necessary to benefit downstream habitat. One commenter said that PCNs for proposed sediment releases from reservoirs should require consultation with state resource agencies to ensure potential sediment contamination and changes in dissolved oxygen levels are considered because suspended and embedded sediment has been shown to affect aquatic species, such as fish, through direct physiological effects, decreased water clarity, or sediment deposition.

The Corps does not believe it is necessary to require agency coordination for PCNs or reports submitted to district engineers for releases of sediment from reservoirs to maintain the continuity of sediment transport in riverine systems, when those activities are authorized by this

NWP. District engineers have the discretion to coordinate PCNs and reports with their counterparts at federal, tribal, state, or local resource agencies. Sediment transport in rivers and streams is a natural process, with a suspended load conveying finer sediment in the water column and a bed load conveying coarser sediment along the river or stream bed. Therefore, the Corps does not believe that it is necessary to notify downstream drinking water utilities of proposed releases of sediment from reservoirs. Potential concerns about sediment contamination and changes in dissolved oxygen levels are more appropriately addressed by certifying authorities through the Clean Water Act Section 401 water quality certification process. Sediment transport is a natural river function, and fish that live in rivers are adapted to cope with suspended sediments and sediments on the river bed. The activities authorized by this NWP must result in net gains in aquatic resource functions and services and result in no more than minimal individual and cumulative adverse environmental effects. District engineers will review PCNs and reports for these proposed activities, and if they determine that adverse effects to fish and other aquatic organisms will be more than minimal after considering mitigation proposed by project proponents, they will exercise discretionary authority and require individual permits for these activities.

One commenter recommended modifying this NWP to allow longer reaches of stream to be allowed to be temporarily impacted without need for a permit to help to facilitate more streambank stabilization and restoration activities, because of the high costs for designing, engineering, and permitting these activities. This commenter said that these administrative costs often exceed the actual cost of implementing the beneficial improvement work. One commenter said that the Corps must assess the potential for NWP 27 activities to affect ESA-listed species, and that potential impacts from those activities must be analyzed through programmatic ESA Section 7 consultations.

This NWP has no quantitative limits, so there are no limits on the amount of stream bed that can be restored or enhanced by activities authorized by this NWP. There are no exemptions from Clean Water Act Section 404 permitting requirements for stream restoration activities. Paragraph (c) of general condition 18, endangered species, requires non-federal permittees to submit a pre-construction notification

to the district engineer if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation. District engineers will review those PCNs and determine whether the proposed activity may affect listed species or designated critical habitat. If the district engineer determines a proposed activity may affect ESA-listed species or designated critical habitat, then she or he will conduct ESA Section 7 consultation with the U.S. FWS and/or NMFS as appropriate. Compliance with ESA Section 7 may be achieved through activity-specific formal or informal ESA Section 7 consultations or formal or informal regional programmatic ESA Section 7 consultations.

One commenter stated that the scope of projects authorized by NWP 27 should be broadened to expedite the review and permitting process to help support the growing ecological restoration industry. One commenter requested that Corps be required to issue an NWP 27 verification concurrent with the execution of a mitigation banking instrument in states where a state has assumed the responsibilities for permitting discharges of dredged or fill material into waters of the United States.

This NWP authorizes a wide variety of aquatic habitat restoration, enhancement, and establishment activities. Those activities can be conducted by the ecological restoration industry, government agencies, non-governmental organizations, private individuals, and other entities. If a state has assumed the responsibilities for implementing the Clean Water Act Section 404 permit program, this NWP likely cannot be used to authorize discharges of dredged or fill material into waters of the United States in waters that have been assumed by that state. A state permit would be required to authorize those discharges of dredged or fill material into waters of the United States.

This NWP is reissued, with the modifications discussed above.

NWP 28. Modifications of Existing Marinas. The Corps did not propose any changes to this NWP. No comments were received on the proposed reissuance of this NWP. This NWP is reissued as proposed.

NWP 30. Moist Soil Management for Wildlife. The Corps did not propose any changes to this NWP. One commenter objected to the proposed reissuance of

this NWP because it does not require PCNs for proposed activities. This commenter said that not requiring PCNs for the authorized activities prevents the Corps from tracking the use of this NWP and adding conditions to the authorization.

The purpose of this NWP is to authorize discharges of dredged or fill material into non-tidal waters of the United States to manage wildlife habitat and to provide feeding areas for wildlife. The activities authorized by this NWP cannot cause net losses of aquatic resource functions and services, and it does not authorize the conversion of wetlands or streams to other types of habitat. Since this activities authorized by this NWP help sustain wildlife and cannot result in net losses of aquatic resource functions and services, the Corps does not believe it is necessary to require PCNs for authorized activities. In geographic areas where division engineers have concerns about the potential uses of this NWP, they can add regional conditions to require PCNs for some or all activities authorized by this NWP.

This NWP is reissued as proposed. *NWP 31. Maintenance of Existing Flood Control Facilities.* The Corps did not propose any changes to this NWP. A few commenters requested that the Corps not reissue this NWP because they said it authorizes activities that cause more than minimal individual and cumulative adverse environmental effects. A few commenters said that the Corps should impose quantitative limits on this NWP. One commenter stated that relatively small acreage losses authorized by this NWP can cause significant impacts. A few commenters said that the Corps should restrict this NWP so that it authorizes activities that are similar in nature.

This NWP authorizes the maintenance of existing flood control facilities, as long as those activities are conducted within the maintenance baseline established for each flood control facilities. While this NWP does not have a quantitative limit, maintenance activities that require DA authorization are limited to the maintenance baseline that is approved by the district engineer for each existing flood control facility. This NWP does not authorize any expansion or new construction for existing flood control facilities. The existing flood control facilities covered by this NWP were either previously authorized by a Corps permit after the Corps conducted an environmental review (if a Corps permit was required for the original construction of the flood control facility), or constructed by the Corps after completing an

environmental review process similar to the Corps' permit review process.

Flood control facilities are located in dynamic environments and require periodic maintenance to sustain their intended flood risk management functions. Aquatic resources located in the existing flood control facilities covered by this NWP provide ecological functions and services, and while periodic maintenance activities can disrupt those functions and services to some degree for a period of time, those aquatic resources usually recover their ability to perform those ecological functions and services. Since this NWP authorizes only maintenance activities, and the aquatic resources in these existing facilities usually recover after disturbances caused by periodic maintenance activities, the Corps believes the activities authorized by this NWP result in no more than minimal adverse environmental effects. Significant impacts are unlikely to occur as a result of these recurring maintenance activities because of the ecological recovery that occurs between each maintenance activity. That ecological recovery likely is the reason why recurring maintenance is needed, because the recovery of biotic and abiotic components within an existing flood control facility, such as vegetation and sediment, may be diminishing the capacity of the flood control facility to perform its intended flood control functions. The activities authorized by this NWP are similar in nature because the NWP is limited to maintenance of existing flood control facilities, within the constraints of a maintenance baseline approved by the district engineer.

Several commenters said that the activities authorized by this NWP can cause adverse impacts to natural and beneficial floodplain functions, including adjacent and downstream impacts of floodwaters on communities and properties. One commenter stated that this NWP inhibits comprehensive basin-wide flood risk management planning and restoration approaches that will help to safeguard communities and protect the nation's natural defenses.

The activities authorized by this NWP are limited to maintenance of existing flood control facilities within a maintenance baseline established by the district engineer. Therefore, the activities authorized by this NWP are unlikely to adversely affect natural floodplain functions because those natural floodplain functions were previously altered by the original construction of the flood control facility. Adverse effects to natural and beneficial

floodplain functions were initially addressed through the authorization process when the flood control facility was originally constructed if the construction of the flood control facility required authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899 or through the process for approving federal water resource development projects. Maintenance of these existing flood control facilities is necessary to ensure that these facilities continue to provide their intended flood risk management objectives and continue to protect local residences, business, and others from floods. Since this NWP authorizes only maintenance activities, it does not affect efforts to undertake comprehensive, watershed-based flood risk management planning and restoration activities. Watershed-based flood risk management planning and restoration activities can be conducted through other mechanisms, such as cooperative efforts between federal, tribal, state, and local government agencies and interested stakeholders, regardless of whether the Corps reissues this NWP.

Several commenters stated that mitigation should not be limited to one-time-only because maintenance activities could be carried out on multiple occasions and each maintenance activity can cause adverse impacts. One commenter said that the one-time mitigation limit could lead to significant harm to the environment.

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

The aquatic resources within these existing flood control facilities are likely to recover their ability to perform ecological functions and services after each maintenance activity is conducted to return the flood control to the maintenance baseline established by the district engineer. The one-time maintenance limit recognizes the temporary nature of the impacts to waters of the United States that typically occur as a result of these

recurring maintenance activities, including the recovery of aquatic resources that usually occurs between those recurring maintenance activities. The recovery of those aquatic resources generally occurs through natural processes, such as sediment transport and deposition in a waterbody within the existing flood control facility and the re-establishment and growth of plants after vegetation is removed from waterbody or lands next to the waterbody.

A few commenters said that vegetation removal should be addressed by a regional approach based on science and authorized through the individual permit process, with state and federal interagency consultation. One commenter stated that the research points to multiple benefits of vegetation on levees. One commenter said that the Corps' one-size-fits all approach to removal of levee vegetation is opposed by a broad array of states, scientists, members of Congress, and members of the public.

This NWP authorizes discharges of dredge or fill material into waters of the United States and/or work in navigable waters of the United States to return an existing flood control facility to its maintenance baseline so that it can continue to perform its intended flood control functions. A maintenance baseline is established for each existing flood control facility regardless of whether this NWP might be used, and restoring the flood control facility to its maintenance baseline may require the removal of vegetation. Interagency consultation is not required for the activities authorized by this NWP because it is a maintenance activity, and in most cases these maintenance activities must take place on a recurring basis to ensure that the existing flood control facility continues to perform its intended flood control functions and protect the people and property served by that flood control facility. The presence or absence of vegetation within the existing flood control facilities may be addressed through the maintenance baseline. This NWP does not impose any specific requirements regarding vegetation on levees, and it does not prescribe any approach to managing (or not managing) levee vegetation. Whether or not vegetation is allowed to continue to exist on levees or needs to be removed to ensure the structural integrity and continuing functioning of the levee is dependent on the maintenance baseline approved for the flood control facility, as well as any discretion the entity responsible for maintaining the existing flood control

facility may have regarding vegetation in that facility.

One commenter stated that it is not possible to determine the full extent of the significance of the impacts caused by activities authorized by this NWP because the draft decision document provides no information on the types of waters affected, the location of those waters, or other activities that have or are likely to affect those waters. One commenter stated that the draft decision document for this NWP demonstrates that the activities authorized by this result in more than minimal impacts, because approximately 225 activities impacted 500 acres of jurisdictional waters and wetlands. One commenter said that the decision document for this NWP should include impacts quantified in linear feet.

This NWP can be used to authorize discharges of dredged or fill material into all waters of the United States and structures and work in all navigable waters of the United States to return the existing flood control to its maintenance baseline. Flood control facilities could be located in any type of waters of the United States, such riverine, lacustrine, palustrine, estuarine, and marine waters. The decision document for this NWP discusses, in general terms, the potential impacts of the authorized activities on all waters of the United States, including navigable waters of the United States. The national decision document also considers the potential benefits of maintaining these existing flood control management facilities so that they continue to perform their intended functions.

The estimated impact acreages in the national decision document for this NWP include both permanent and temporary impacts to waters of the United States, including navigable waters of the United States. Because this NWP authorizes only maintenance activities within the maintenance baselines established by district engineers, and the aquatic resources within the existing flood control facility generally recover after each maintenance activity is completed in accordance with the maintenance baseline that was previously approved by the district engineer, the activities authorized by this NWP generally result in temporary losses of waters of the United States. Permanent losses of waters of the United States caused by the original construction of these flood control facilities would have been addressed in the DA permit or other the authorization for the federal water resources development project, if such authorization was required for that construction. Therefore, most impacts to

waters of the United States authorized by this NWP will be temporary impacts to return these existing flood control facilities to their maintenance baselines.

The impacts of activities authorized by this NWP are more appropriately and accurately quantified in acres rather than linear feet, because these maintenance activities occur over areas of waters of the United States. Accurate quantification of impacts to waters of the United States is important aspect of tracking the individual and cumulative impacts of activities authorized by this NWP, to make more defensible determinations as to whether the individual and cumulative adverse environmental effects are no more than minimal.

This NWP is reissued as proposed.

NWP 32. Completed Enforcement Actions. The Corps did not propose any changes to this NWP. No comments were received on the proposed reissuance of this NWP. This NWP is reissued as proposed.

NWP 33. Temporary Construction, Access, and Dewatering. The Corps did not propose any changes to this NWP.

One commenter stated that this NWP should be reissued with no changes. One commenter said that this NWP should have a 1/10-acre limit for losses of waters of the United States and a 300 linear foot limit for losses of stream bed. One commenter said that this NWP contains vague language that gives the permittee discretion to determine how stringently various provisions will be followed, which may result in activities that cause more than minimal environmental effects. One commenter said that this NWP should be modified to include matting as a temporary fill for access, consistent with NWP 12 and the proposed new NWP C. One commenter stated that for activities in areas where state and/or federal threatened or endangered freshwater mussels are known to occur, this NWP should require pre-construction notification, as well as coordination with federal and state natural resource agencies.

This NWP authorizes only temporary construction, access, and dewatering activities, and does not authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States that may result in permanent losses of waters of the United States. Permanent structures in navigable waters of the United States require separate DA authorization, either through individual permits, other NWPs, or regional general permits. The text of the NWP requires, after completion of construction, the removal of temporary fill material to an area that

has no waters of the United States. If the authorized activity involves dredged material, the NWP requires the dredged material to be returned to its original location, and the affected area restored to pre-constructed elevations. Because of these specific requirements, the Corps believes that adding quantitative limits to this NWP is unnecessary. These specific requirements also help ensure that authorized activities result in no more than minimal individual and cumulative adverse environmental effects. Because this authorizes temporary fills for construction access for utility lines, as well as the use of mats for temporary access for utility lines when such mats require DA authorization, it is unnecessary to impose quantitative limits on this NWP.

Paragraph (c) of general condition 18 requires non-federal permittees to submit a pre-construction notification to the district engineer if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation. Furthermore, paragraph (c) states that the permittee cannot begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. Paragraph (c) of general condition 18 applies to mussel species that are listed, or proposed for listing, as endangered or threatened under the federal ESA. Potential effects to state-listed mussel species should be addressed through the permittee's compliance with state laws and regulations for state-listed species.

This NWP is reissued as proposed.

NWP 34. Cranberry Production Activities. The Corps did not propose any changes to this NWP. One commenter objected to the proposed reissuance of this NWP, stating it authorizes activities that will result in more than minimal adverse environmental effects and it does not require wetland functions to be maintained.

Cranberry production activities require maintenance of wetland conditions because cranberry plants are wetland-dependent species. This NWP authorizes discharges of dredged or fill material into waters of the United States that may temporarily disturb wetlands used for cranberry production, but this NWP does not authorize activities that may result in losses of wetlands. The wetlands used for cranberry production will continue to perform wetland functions, especially hydrologic and

biogeochemical cycling functions. The habitat functions of the affected wetlands may be altered by the management of these wetlands to produce cranberries, with some species utilizing the habitat functions performed by cranberry wetlands, and other species not being able to use the habitat functions in cranberry wetlands. The species that cannot inhabit the cranberry production wetlands may use other wetlands in the vicinity of the cranberry farm for habitat.

This NWP is reissued as proposed.

NWP 35. Maintenance Dredging of Existing Basins. The Corps did not propose any changes to this NWP. One commenter said that permittees should be required to ensure that toxic substances are not released back into the water column through re-exposure during dredging activities. A few commenters stated that maintenance dredging at existing basins does not result in a discharge into waters of the United States, and should not require water quality certification from states. One commenter said that requiring dredged material to be discharged into areas that do not contain waters of the United States precludes using the dredged material from enhancing aquatic habitat, such as coastal marshes and freshwater marshes, through natural processes or through beneficial use projects. This commenter said that this NWP should be modified to allow dredged materials to be discharged into waters of the United States for beneficial uses, after federal and state natural resource agency coordination.

During dredging activities, chemical substances that were buried by sediments or attached to dredged sediments may be resuspended in the water column or may become solutes within the water column. Those chemical substances may have adverse effects to water quality. Those adverse effects are likely to be temporary because the suspended sediments are likely to settle back onto the benthos and chemicals present as solutes in the water column are likely to be dispersed by currents, tides, and other causes of water movement. Under Section 401 of the Clean Water Act, certifying authorities may determine that a dredging activity may result in a discharge into waters of the United States and require the project proponent to obtain an individual water quality certification or waiver unless the certifying authority has issued water quality certification for the issuance of a general permit that authorizes the dredging activity. Water quality certifications for activities authorized by this NWP will help ensure that any

discharges that may be caused by those dredging activities comply with applicable water quality requirements.

Since it was first issued in 1991 (56 FR 59144), this NWP has been issued only under the authority of Section 10 of the Rivers and Harbors Act of 1899. This NWP has never been issued or reissued under the authority of Section 404 of the Clean Water Act. Therefore, this NWP does not authorize discharges of dredged or fill material into waters of the United States, including activities involving redepositing the dredged material into waters of the United States for beneficial uses or other purposes. Beneficial use of material dredged under the section 10 authorization provided by NWP 35 may be authorized by other NWPs issued under the authority of section 404, such as NWP 27, or other forms of DA authorization under section 404, including individual permits and regional general permits. If an individual permit is required for the beneficial use of dredged material, then there will be coordination with federal and state agencies under the individual permit review process.

This NWP is reissued as proposed.

NWP 36. Boat Ramps. The Corps did not propose any changes to this NWP. One commenter recommended reinstating the restriction for one boat ramp for contiguous properties under the same ownership to reduce the potential for fragmentation of nearshore habitats. One commenter said that for previously permitted structures, the Corps should also specify that repair and replacement activities are limited to the minimum necessary to accomplish the function of the original boat ramp. This commenter also stated that for new boat ramps, or for expansions of existing boat ramps, the Corps should impose conditions to ensure that new or modified boat ramps result in no more than minimal individual and cumulative adverse environmental effects.

This NWP was first issued in 1991 (see 56 FR 59144), and it never had a provision limiting the number of boat ramps to one boat ramp per set of contiguous properties under the same ownership. Therefore, the change suggested by the commenter would be a new provision for this NWP. The Corps does not believe that such a provision is necessary to ensure that the construction of boat ramps authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. During the review of PCNs for proposed NWP 36 activities, district engineers will evaluate potential adverse environmental effects, including the

possible fragmentation of shoreline habitats and potential disruptions on the movements of aquatic organisms along the shore.

This NWP has two quantitative limits for authorized activities: A 50 cubic yard limit for discharges of dredged or fill material into waters of the United States, and a 20-foot limit for the width of the boat ramp. Both of these quantitative limits can be waived by district engineers after they review PCNs for proposed boat ramps under this NWP. Waivers of these quantitative limits may only occur when district engineers make written determinations, after conducting agency coordination under paragraph (d) of general condition 32, that the proposed activities will result in no more than minimal individual and cumulative adverse environmental effects. The Corps has modified the first paragraph of this NWP to clarify that in addition to the construction of new boat ramps, it also authorizes the repair or replacement of existing boat ramps. As with the construction of new boat ramps, to be authorized by NWP the repair or replacement of boat ramps must comply with the requirements of this NWP, including the quantitative limits, and result in no more than minimal individual and cumulative adverse environmental effects.

This NWP is reissued with the modification discussed above.

NWP 37. Emergency Watershed Protection and Rehabilitation. The Corps did not propose any changes to this NWP. No comments were received on the proposed reissuance of this NWP. This NWP is reissued as proposed.

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

NWP 41. Reshaping Existing Drainage and Irrigation Ditches. The Corps proposed to modify this NWP by adding irrigation ditches. Several commenters expressed support for the proposed changes to this NWP. Several commenters stated that the Corps should make additional changes to this NWP to ensure that it is consistent with the current regulatory definition of “waters of the United States” for the purposes of the Clean Water Act at 33 CFR part 328. Several commenters said that the Corps should clarify in the final rule that the addition of irrigation ditches to this NWP does not affect the Clean Water Act Section 404(f) exemption for irrigation ditches. These commenters requested that the Corps explain how reshaping ditches for the

purpose of improving water quality aligns with the current interpretation of the Clean Water Act Section 404(f) exemption for ditch maintenance, which allows for minor changes to cross sections of ditches to conform to current engineering standards, as long as the ditch modifications do not result in the drainage, degradation, or destruction of additional jurisdictional waters.

The purpose of this NWP is to authorize discharges of dredged or fill material into waters of the United States to reshape existing drainage and irrigation ditches to improve water quality by regrading the drainage or irrigation ditch with gentler side slopes that can reduce erosion, increase growth of vegetation within the ditch, and increase uptake of nutrients and other substances by vegetation. This NWP applies to drainage ditches and irrigation ditches that are waters of the United States. If a drainage ditch or irrigation ditch is not subject to Clean Water Act jurisdiction under the current regulations defining “waters of the United States” at 33 CFR part 328, then DA authorization (including the DA authorization provided by this NWP) is not required for discharges of dredged or fill material that reshape the drainage or irrigation ditch to improve water quality.

This NWP does not authorize ditch maintenance activities specifically, because it authorizes discharges of dredged or fill material into waters of the United States to change the shape of existing drainage or irrigation ditches to facilitate the removal of nutrients, other chemicals, and sediments from the water column to improve water quality. This NWP authorizes discharges of dredged or fill material into waters of the United States to change the shape of jurisdictional ditches to improve water quality, which is a different purpose than the purpose identified in the current memorandum interpreting the Clean Water Act Section 404(f) exemption for ditch maintenance (*i.e.*, conforming with current engineering standards to improve ditch stability). Therefore, the activities authorized by this NWP are distinct from the activities identified in the current guidance interpreting the Clean Water Act Section 404(f)(1)(C) exemption for ditch maintenance.

One commenter said that there may be no projects that might utilize the proposed changes to this NWP and requested that the Corps provide specific examples of projects involving the reshaping of irrigation ditches to improve water quality. One commenter stated that the Corps should add a provision to this NWP that prohibits the

reshaping of irrigation ditches that increases diversions of water that are not allowed under existing water rights or do not conform with state water law.

As discussed in the Regulatory Impact Analysis for this final rule, the Corps anticipates that there may be a small number of irrigation ditches (estimated to be five per year) that may be reshaped to improve water quality through the authorization provided by this NWP. The Corps declines to add restrictions to this NWP regarding quantities of diverted water, potential impacts to existing water rights, or situations where irrigation ditch reshaping activities might not conform with state water law. State government authorities are the appropriate entities for enforcing water rights and other provisions of state water laws.

One commenter objected to the proposed reissuance of this NWP, as well as the proposed modification, stating that the activities authorized by this NWP may adversely affect salmon and trout that inhabit ditches. This commenter said that PCNs should be required for all activities authorized by this NWP so that the Corps can evaluate potential effects on salmon and trout, and if necessary add conditions to the NWP authorization to protect those species. This commenter also stated that the Corps should add quantitative limits to this NWP to limit the length of ditch reshaping and the frequency of ditch reshaping activities.

Activities authorized by this NWP are subject to the requirements of general condition 18, which addresses compliance with the federal ESA. Paragraph (c) of general condition 18 requires a non-federal permittee to submit a pre-construction notification to the district engineer if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation. This includes salmon and trout species listed as endangered or threatened under the ESA, as well as salmon and trout species that may be proposed for listing under the ESA. The Corps does not believe it is necessary to impose quantitative limits on this NWP, because this NWP is limited to reshaping existing drainage and irrigation ditches to improve water quality, and these activities do not result in permanent losses of waters of the United States.

One commenter stated that the Corps should modify the NWP to cite the statutory exemptions that could apply

under Clean Water Act Section 404(f). Several commenters recommended adding a Note to this NWP similar to the Notes in NWP 3, 12, 14, 30, and 40, stating that certain discharges may qualify for an exemption under Section 404(f) of the Clean Water Act and therefore do not require DA authorization under section 404.

The purpose of this NWP is to authorize discharges of dredged or fill material into waters of the United States for reshaping existing drainage and irrigation ditches when those activities are not eligible for any of the exemptions in Section 404(f) of the Clean Water Act. The Corps declines to add the suggested Note to this NWP because it would be contrary to the reason the NWP was first issued in 2000 (see 65 FR 12891). This NWP was issued to provide an incentive for landowners to reshape their ditches to improve water quality, rather than maintaining those ditches in a manner that qualifies for the Clean Water Act Section 404(f)(1)(C) exemption. Adding the suggested Note may discourage landowners from reshaping existing ditches to improve water quality by highlighting the availability of the ditch maintenance exemption.

This NWP is reissued as proposed.

NWP 45. Repair of Uplands Damaged by Discrete Events. The Corps did not propose any changes to this NWP. One commenter said that the restoration of upland areas should be accomplished with fill material taken from uplands, and limit minor dredging to no more than 25 cubic yards to be consistent with the limit in NWP 19. One commenter stated that for shoreline erosion, the establishment of living shorelines should be encouraged over the reclamation of eroded lands through the use of fill material and hard structures.

The Corps does not agree that the restoration of uplands damaged by storms and other discrete events should be required to utilize only fill material taken from upland sites. Sediment that moved from adjacent uplands into the waterbody because of erosion or mass wasting caused by storms or other discrete events should be available for repairing the damaged uplands. Using that sediment to repair the affected uplands can help restore the waterbody by removing sediment that may be blocking the waterbody or covering aquatic habitat within that waterbody. It can also help reduce downstream sediment loads, by putting that sediment back onto the damaged upland areas where it can be stabilized before it is transported downstream and

potentially impair downstream water quality.

The NWP limits dredging to the amount necessary to restore the damaged upland area, restricting the amount of material dredged so that it is proportional to the amount of upland damaged by the discrete event. That dredging limit provides flexibility to address the amount of damaged uplands, and prevents situations where the amount of authorized dredging needed to effectively repair the damaged uplands and the waterbody would require individual permits. In other words, limiting dredging to 25 cubic yards may discourage effective means of repairing the damaged uplands and restoring adjacent portions of the waterbody.

This NWP limits bank stabilization activities to the contours or ordinary high water mark that existed before the damage to the uplands occurred. In many circumstances, this limit precludes the use of living shorelines as a bank stabilization measure in coastal areas. If a landowner wants to install a living shoreline next to uplands repaired through activities authorized by NWP 45, then he or she may submit a PCN under NWP 54, which authorizes living shorelines. Bank stabilization within the limits of NWP 45 can be accomplished through other approaches, such as bioengineering or other forms of vegetative stabilization.

This NWP is reissued as proposed.

NWP 46. Discharges in Ditches. The Corps did not propose any changes to this NWP. Several commenters stated that the text of this NWP should clarify when this NWP can be used for discharges of dredged or fill material into upland ditches because it seems to be inconsistent with the current definition of “waters of the United States” in the Corps’ regulations at 33 CFR part 328. A few commenters said that the provisions of this NWP should be consistent with the current regulations defining “waters of the United States” and the current guidance on ditches and the exemptions under Section 404(f) of the Clean Water Act. Several commenters stated that the Corps should modify this NWP to acknowledge that certain discharges related to activities in ditches may qualify for exemptions from permitting under Section 404(f) of the Clean Water Act. These commenters suggested adding a Note to this NWP similar to the notes regarding the Clean Water Act Section 404(f) exemptions in NWP 3, 12, 14, 30 and 40.

This NWP authorizes discharges of dredged or fill material into non-tidal ditches that meet the four criteria in the

first paragraph of the NWP, including the fourth criterion (*i.e.*, the ditch must be a water of the United States). If the ditch constructed in uplands is not a water of the United States, in accordance with the Corps' current regulations at 33 CFR part 328 that define "waters of the United States," then DA authorization (including the DA authorization provided by NWP 46) is not necessary to discharge dredged or fill material into that ditch. This NWP authorizes activities that are not eligible for any of the exemptions under Section 404(f) of the Clean Water Act. Therefore, it is not necessary to add a Note to this NWP that address the section 404(f) exemptions. This NWP was issued in 2007 (see 72 FR 11190) to provide DA authorization to fill a category of ditches constructed in uplands that meet the four criteria listed in the first paragraph of the NWP. Filling these ditches to convert them back to uplands would likely trigger the recapture provision of Section 404(f)(2) of the Clean Water Act and therefore not be exempt from section 404 permitting requirements. If the project proponent wants to discharge dredged or fill material to maintain the ditch, and not convert it into uplands, the proposed discharge might be eligible for an exemption under section 404(f) depending on case-specific circumstances. Therefore, the Corps does not believe that there would be any benefit to adding a Note to this NWP that discusses the section 404(f) exemptions.

One commenter said that the acreage limit of this NWP should be reduced to 1/2-acre to ensure that the activities authorized by this NWP result in no more than minimal individual and cumulative adverse environmental effects. One commenter stated that compensatory mitigation should be required for losses of waters of the United States greater than 1/10-acre.

The Corps is retaining the 1-acre limit that was established for this NWP when it was first issued in 2007. During the years this NWP has been in effect, the one acre limit has been effective in ensuring that discharges of dredged or fill material into the non-tidal ditches that satisfy four criteria in the first paragraph of this NWP result in losses of waters of the United States that have no more than minimal individual and cumulative adverse environmental impacts. Division engineers can add regional conditions to this NWP to impose an acreage limit that is less than one acre, to ensure that activities authorized in the region will have no more than minimal individual and cumulative adverse environmental effects. During the review of PCNs for

proposed NWP 46 activities, district engineers can require compensatory mitigation to offset the permitted losses of waters of the United States, in accordance with 33 CFR 330.1(e)(3) and general condition 23.

This NWP is reissued as proposed.

NWP 49. Coal Remining Activities.

The Corps proposed to modify this NWP by removing the provision that requires the permittee to obtain written verification from the district engineer before proceeding with the authorized activity to make this NWP consistent with the other NWPs that have a default authorizations when a district engineer does not respond to a complete PCN within 45 days of receiving that PCN from the project proponent. The Corps also proposed to remove the text referring to integrated permit processing procedures.

One commenter stated support for reissuing this NWP. Many commenters expressed opposition to the proposal to remove the provision that requires the permittee to obtain written verification from the district engineer before commencing the authorized activity. Several commenters said they support removing the requirement for the permittee to obtain written verification from the district engineer before proceeding with the authorized activity, so that a default authorization occurs if the district engineer does not respond to a complete PCN within 45 days.

The Corps has retained the provision that requires the permittee to obtain written authorization from the district engineer prior to commencing the authorized activity because coal remining activities can vary substantially in size and can cover large areas. Additional time may be needed for the project proponent to demonstrate to the district engineer that the authorized activity will result in a net increase in aquatic resource functions. This NWP has no acreage limit for losses of waters of the United States. In contrast, NWP 21 (surface coal mining activities) and NWP 50 (underground coal mining activities) have a 1/2-acre limit for losses of waters of the United States. The requirement for permittees to obtain written authorization before proceeding with the NWP 21 or 50 activity was removed in the final rule published in the January 13, 2021, issue of the **Federal Register** (86 FR 2744) because these NWPs have the additional safeguard of the 1/2-acre limit if a default authorization occurs through a district engineer not responding to a complete PCN within 45 days.

One commenter opposed to the removal of stream mitigation requirements from this NWP. One

commenter said that PCNs should not be required for the activities authorized by this NWP. One commenter supported removing the text referring to integrated permit processing procedures.

The Corps did not propose to remove any stream mitigation requirements from this NWP. The activities authorized by this NWP must result in net increases in aquatic resource functions. Stream or wetland rehabilitation or enhancement may be a component of the coal remining activity that helps achieve the required net increase in aquatic resource functions. Mitigation requirements for NWP activities is determined by district engineers on a case-by-case basis through the provisions of 33 CFR 330.1(e)(3) and general condition 23. The Corps believes that PCNs are necessary for all activities authorized by this NWP to provide district engineers the opportunity to review proposed activities and ensure that the activities that comprise the overall mining plan result in net increases in aquatic resource functions. The Corps has removed the text that refers to integrated permit processing procedures because those procedures were not developed for past versions of NWP 49.

One commenter recommended modifying the text of this NWP to state that new mining must not exceed 40 percent of the remined area and the additional area necessary to carry out the reclamation of a previously mined area. One commenter noted that no work can begin under this NWP unless the coal remining activity is approved by the Department of the Interior Office of Surface Mining Reclamation or Enforcement, or by states with approved programs under Title IV or V of the Surface Mining Control and Reclamation Act of 1977, and that final approval by these agencies is not necessary before submitting a PCN to the district engineer.

The Corps is retaining the text in the NWP that states that the total area disturbed by new mining must not exceed 40 percent of the total acreage covered by both the remined area and the additional area necessary to carry out the reclamation of the previously mined area. The Corps acknowledges that permittees should not begin the authorized work if the activities authorized by this NWP also require authorization by other federal, state, or local government agencies (see paragraph 2 of Section E, Further Information) and those other required authorizations have not been issued. The project proponent can submit a PCN for a proposed NWP 49 activity to the district engineer prior to obtaining

required authorizations from either the Office of Surface Mining Reclamation or Enforcement, or a state with an approved program under Title IV or V of the Surface Mining Control and Reclamation Act of 1977.

This NWP is reissued with the modification discussed above.

NWP 53. Removal of Low-Head Dams. The Corps did not propose any changes to this NWP. Several commenters expressed support for the reissuance of this NWP. One commenter said that the Corps should revise this NWP so that it clearly states that it may be used to authorize compensatory mitigation projects that generate stream mitigation credits, because dam removal and stream restoration projects help spur economic activity in rural regions, improve water quality, and deliver resiliency benefits to communities. One commenter said that the removal of low-head dams could affect water rights determined by the state. One commenter stated that this NWP should be modified to include requirements for management of accumulated sediment prior to and during removal of low-head dams to ensure that downstream water quality is minimally adversely impacted by the removal of low-head dams.

The Corps does not believe it is necessary to modify this NWP to state that it can be used to authorize discharges of dredged or fill material into waters of the United States and/or structures and work in navigable waters of the United States for low-head dam removals conducted to rehabilitate rivers and streams to provide compensatory mitigation for DA permits. Low-head dam removals can be conducted for permittee-responsible mitigation, mitigation banks, or in-lieu fee projects to generate compensatory mitigation credits that offset losses of aquatic resource functions and services caused by activities authorized by DA permits. The Corps recognizes that stream restoration projects, including removals of low-head dams, provide a variety of ecological and economic benefits to communities. However, it is not necessary to explicitly identify those benefits in the text of the NWPs. Concerns about potential impacts of low-head dam removals on state issued water rights are more appropriately addressed through the state laws and regulations that govern those water rights, and the effects that specific activities may have on water rights. Permittees are responsible for complying with applicable federal, tribal, state, and local government laws, regulations, and other requirements.

The text of this NWP does not include requirements for the management of

sediments that may be released after the removal of a low-head dam.

Requirements for the management of sediments that may be released downstream after the low-head dam is removed is more appropriately determined on a case-by-case basis when the district engineer reviews the PCN for the proposed NWP 53 activity. In general, low-head dams have low storage capacities and large amounts of sediment are unlikely to be released to downstream waters when the low-head dam is partially or completely removed. In addition, sediment releases caused by the removal of low-head dams generally have temporary impacts because the sediment is transported downstream by flowing water and over time those sediments will be distributed throughout downstream tributaries as the stream network recovers from the removal of the low-head dam.

Water quality concerns, including sediment releases that may occur during the removal of the low-head dam and after the low-head dam is removed, are more appropriately addressed through the water quality certification process under Section 401 of the Clean Water Act. For those activities where the certifying authority denied water quality certification for the reissuance of NWP 53, the project proponent must obtain a water quality certification or waiver for any discharges into waters of the United States that may occur as a result of the removal of the low-head dam (see general condition 25). The water quality certification may include conditions, such as sediment management requirements, to ensure that those discharges comply with applicable water quality requirements.

A few commenters stated that the Corps should clarify the definition of low-head dam to be more expansive in the types of structures that can be removed under this NWP. One of these commenters suggested broadening the definition of "low-head dam" to include different low-head dam configurations or to add a specific height to the definition of "low-head dam." Two of these commenters suggested modifying the definition of "low-head dam" as follows:

For the purposes of this NWP, the term "low-head dam" is generally defined as a dam or weir built across a stream to pass flows from upstream over all, or nearly all, of the width of the dam crest and does not have a separate spillway or spillway gates, but it may have an uncontrolled spillway. The dam crest is the top of the dam from left abutment to right abutment and will most often be less than 15 feet in height

for small streams and 25 feet in height for medium-sized tributaries. A low-head dam may have been built for a range of purposes (e.g., check dam, mill dam, irrigation, water supply, recreation, hydroelectric, or cooling pond), but in all cases, it provides little to no storage function.

In response to these comments, the Corps has modified the definition of "low-head dam" that is in the text of this NWP. The Corps has adopted much of the definition suggested above, except for the recommended maximum height requirements for dams in small streams and medium-sized tributaries. The Corps declines to include maximum height requirements because the heights suggested by commenters might apply to dams that are not low-head dams. In addition, the terms "small stream" and "medium-sized tributary" are difficult to define. "Small" versus "medium" are relative terms and are likely to pose additional challenges in implementing a clear, consistent definition of "low-head dam." The definition of "low-head dam" with the modifications made in response to public comments focuses on structural features characteristic of most low-head dams, instead of dimensions that represent types of dams other than low-head dams. District engineers have discretion in determining whether proposed dam removal involves a low-head dam and thus qualifies for NWP 53 authorization. Even with the exclusion of the suggested maximum height requirements, the revised definition of "low-head dam" may broaden the utility of this NWP to facilitate the removal of low-head dams that may not have been covered by the 2017 version of this NWP.

One commenter stated that other federal and state natural resource agencies should be provided opportunities for review and comment on all PCNs for this NWP that are submitted to district engineers. One commenter requested clarification on whether any specific removals of low-head dams have resulted in increases in ecological functions. One commenter asked that the Corps explain the basis for establishing the 1/2-acre limit for this NWP. This commenter asked whether there is a limit to either the area of the impoundment that is dewatered as a result of the removal of a low-head dam, or the area where significant hydrological changes would occur as a result of the removal of a low-head dam. This commenter also requested clarification on how the Corps calculates the impact acreage for activities authorized by this NWP, including impacts that may occur upstream and downstream of the low-

head dam and its impoundment after the low-head dam is removed.

The Corps declines to modify this NWP to require district engineers to coordinate PCNs for this NWP with federal and state natural resource agencies. Corps district staff have the capability to review these proposed activities and determine whether they qualify for NWP authorization. District engineers have the discretion to coordinate with federal and state resource agencies on a case-by-case basis, if they believe such coordination would be beneficial in reaching a decision on a particular PCN. Coordination with federal and state agencies may also occur in other circumstances, such as the water quality certification process for discharges into waters of the United States authorized by this NWP. District engineers will review PCNs for proposed activities, and if a district engineer determines that the proposed removal of a low-head dam may affect endangered or threatened species or designated critical habitat, he or she will conduct ESA Section 7 consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service, as appropriate.

The potential increases in ecological functions that may result from the removal of low-head dams are discussed in the national decision document for the reissuance of this NWP. The national decision document cites a number of reviews and studies that have evaluated the ecological benefits that can result from the removal of low-head dams. This NWP has no acreage limit because the removal of low-head dams helps restore the structure, functions, and dynamics of rivers and streams. The removal of low-head dams also benefits public safety by reducing potential drowning risks for swimmers and users of small watercraft, such as kayaks. The 1/2-acre limit that is in other NWPs, such as NWP 29 for residential developments and NWP 39 for commercial and institutional developments, does not apply to this NWP. The impact acreages for activities authorized by this NWP are generally calculated by determining the acreage of the footprint of the low-head dam, the acreage of the former impoundment that will be restored to a free-flowing river or stream channel, and any additional acreage of the impoundment that will dewatered after the low-head dam is removed. The dewatered areas of the former impoundment may develop riparian areas and floodplains, including adjacent riverine wetlands. There may be other indirect effects upstream and downstream of the low-

head dam and its impoundment, but the acreage of waters subject to those indirect effects would not normally be calculated because of the difficulties in quantifying those indirect effects.

This NWP is reissued with the modification discussed above.

NWP 54. Living Shorelines. The Corps did not propose any changes to this NWP. One commenter stated support for the reissuance of this NWP because living shorelines provide environmental, societal, and economic benefits that are not provided by hard bank stabilization structures. One commenter stated that paragraph (d) of this NWP should be modified to add elevation as a factor for determining which native plants are appropriate for current site conditions if the permittee is planting the living shoreline. One commenter said that the requirement for living shorelines to include a substantial biological component provides no meaningful guidance and would result in the authorization of any project that includes a minor amount of vegetation planting.

The Corps is reissuing this NWP with minor changes made in response to comments received on the 2020 Proposal. The Corps has added "elevation" to paragraph (d) of this NWP because elevation is another factor to consider when deciding which native species to plant in a living shoreline if the biological component of the living shoreline consists of plants. The NWP takes a qualitative approach to characterizing living shorelines (*i.e.*, having a substantial biological component) rather than specifying a minimum quantitative requirement because there can be considerable variability in the designs for living shorelines. The types of biological components used for living shorelines can also vary, from various types of plants (*e.g.*, marsh grasses, mangroves) and different types of animals (*e.g.*, oysters). There is no one-size-fits-all approach to living shorelines that would support a stringent quantitative approach for the determining the minimum amount of biological components in a bank stabilization activity to be considered for a living shoreline.

A few commenters objected to the proposed reissuance of this NWP, stating that it has the potential to cause extensive destruction and alteration of irreplaceable nearshore habitats. These commenters said that these activities should require individual permits. One commenter said that this NWP violates Section 404(e) of the Clean Water Act because it authorizes activities that are not similar in nature.

This NWP provides DA authorization for an approach to managing shoreline erosion that can provide more aquatic resource functions and services than other approaches to managing shoreline erosion control, such as bulkheads and revetments. While the construction of living shorelines can involve placing considerable amounts of dredged or fill material into jurisdictional waters and wetlands, completed living shorelines can provide habitat functions, as well as other ecological functions such as biogeochemical cycling functions. There may be trade-offs when the construction of living shorelines changes subtidal habitats (*e.g.*, unvegetated shallow waters) into intertidal habitats (*e.g.*, intertidal marshes). Riparian landowners have an inherent right to protect their properties from erosion (see 33 CFR 320.4(g)(2)), and living shorelines provide an alternative means of managing shore erosion that can provide greater environmental benefits such as intertidal wetland habitat and shellfish reef habitat compared to bulkheads and revetments.

This NWP authorizes a specific category of activities: discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States for the construction and maintenance of living shorelines. Those activities are similar in nature because they serve a common purpose (*i.e.*, managing shoreline erosion) and involve a common set of activities (*e.g.*, fills to construct wetlands, fills to protect constructed and existing wetlands, and fills and structures to construct reefs) that dissipate wave energy and reduce erosion. In addition, these fills and structures are generally limited to nearshore areas, where they help manage shoreline erosion.

One commenter said that this NWP should be modified to include the authorization of temporary structures, fill, and work, similar to the text provided in NWP 13. One commenter stated that the text of the NWP allows concrete and other artificial structures, which are not native materials. One commenter said that the NWP should require the permittee to ensure that the activity maintain the natural continuity of the land-water interface, retain, or enhance shoreline ecological processes, and not result in undue harm to recognized aquatic resources located within or adjacent to the proposed project sites.

Nationwide permit 33 can be used to authorize temporary structures, fill, and work to assist in the construction of living shorelines authorized by NWP 54. All NWP 54 activities involving the

construction of new living shorelines require PCNs, whereas the construction of bank stabilization measures under NWP 13 require PCNs only in certain circumstances, such as discharges of dredged or fill material into special aquatic sites or bank stabilization activities greater than 500 linear feet in length. The text authorizing temporary structures, fills, and work was added to NWP 13 because not all NWP 13 activities require PCNs, and that text provides efficiency because permittees no longer need to use NWP 33 (which may require PCNs) with the NWP 13 authorization to construct the bank stabilization activity. Retaining the ability to use NWP 33 to authorize temporary structures, fills, and work for new living shorelines authorized by NWP 54 does not impose additional burdens on the regulated public.

The text of this NWP requires that the living shoreline consist mostly of native material. It does not completely prohibit the use of artificial materials. While the text of the NWP does not explicitly identify concrete as an acceptable material for use in living shorelines, it does not prohibit the use of concrete because concrete may be a component of artificial reef structures that are used for some types of living shorelines. Living shorelines may include artificial structures (e.g., sills, reefs, coir logs or mats) that do not completely resemble structural features found in nature, but those artificial structures can consist of native materials (e.g., stone, oyster shells, natural fibers) to a large degree.

Living shorelines are an example of nature-based solutions, which are actions to address societal problems such as erosion in coastal communities using natural or modified ecosystems. Living shorelines are modified ecosystems that are comprised of a combination of living and engineered components. Living shorelines provide varying degrees of ecological functions and services and help maintain to some extent the natural continuity of the interface between coastal lands and coastal waters. With the exception of maintenance activities, all activities authorized by this NWP requires PCNs to district engineers. District engineers will review those PCNs to determine whether the proposed activities will result in no more than minimal individual and cumulative adverse environmental effects, including adverse effects to coastal aquatic resources.

One commenter stated that the 30 foot limit for structures and filled areas extending into the waterway from the mean low water line in tidal waters or the ordinary high water mark in non-

tidal waters is arbitrary, and that the Corps should establish the limit for structures and fills extending into the waterway to a depth contour appropriate for attenuating wave energy consistent with the slope of the shoreline. One commenter said that the Corps should replace the 30-foot and 500 linear foot limits with a 1/2-acre limit.

The Corps is retaining the 30 foot limit for structures and fills extending into the waterway and the 500 linear foot limit for the length of shoreline along which a living shoreline can be constructed. The Corps is also retaining the ability for district engineers to waive these 30-foot and 500 linear foot limits when a district engineer reviews the PCN for a proposed NWP 54 activity and determines that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. These quantitative limits and the ability of district engineers to waive these limits are intended to provide flexibility for the design and construction of living shorelines that are expected to be effective in reducing erosion at a specific site, taking into numerous variables. For living shorelines, those variables include, but are not limited to: Fetch, water depths near the shore, substrate characteristics, site topography, and the extent of coastal development in the project area (Saleh and Weinstein 2016). Activities authorized by this NWP must comply with paragraph (a) of general condition 23, which requires permittees to design and construct authorized activities to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site).

The Corps believes the 30 foot and 500 linear foot limits are more appropriate for living shorelines than a 1/2-acre limit because living shorelines are constructed along the shore. In addition, paragraph (e) of the NWP requires discharges of dredged or fill material into waters of the United States and the construction of structures in navigable waters of the United States to be the minimum necessary for the establishment and maintenance of the living shoreline, to reduce the amount of encroachment into the waterway.

One commenter said that while the NWP might be beneficial for coastal resources found along the Gulf of Mexico or the Atlantic Coast, it is not appropriate for the Puget Sound or the Washington coast because it allows for construction of structures and fill that would adversely affect significant

nearshore resources and habitats and does not have minimal direct, indirect, or cumulative impacts. This commenter expressed support for streamlining a process to install shoreline stabilization that protects nearshore habitat for salmon and shellfish.

Landowners that want to reduce erosion at their shorelines are not required to construct living shorelines. They can choose to use other techniques to manage erosion at their waterfront properties. Potential adverse effects to nearshore resources and habitats caused by discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States are similar along the various coasts of the United States in terms of functional impacts (e.g., filling or altering nearshore habitats or installing reef structures that alter subtidal habitat), although the species that may be affected by these activities may differ by region. If a landowner on the west coast wants to construct a living shoreline to manage erosion at his or her property, a PCN must be submitted to the district engineer. The district engineer will review the PCN and determine whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects.

Living shorelines have been used in the west coast of the United States, including Washington State. NOAA has established a living shorelines project map to provide information on more than 150 living shoreline projects around the country.² Three living shoreline projects in Washington State were shown on that map when it was viewed by the Corps on July 14, 2021. In other areas of the west coast, living shorelines consisting of eelgrass and Olympia oysters have been implemented in San Francisco Bay (Boyer et al. 2017). Green shores (Emmett et al. 2017) is another approach to shore erosion management has been implemented in Washington State, and green shore projects may qualify for authorization under NWP 54 if they include a substantial biological component, such as plantings in tidal waters subject to the Corps' jurisdiction. Green shores use materials such as coarse sand, gravel, cobbles, logs, and plantings, as well as slope modifications to dissipate wave energy, to control shoreline erosion while providing habitat and other ecological functions along the shoreline while reducing erosion and potential risks to buildings and infrastructure. Proposed green

² <https://www.habitatblueprint.noaa.gov/living-shorelines/project-map/> (accessed July 14, 2021).

shores activities that do not have the substantial biological component required for authorization under NWP 54 may be authorized by NWP 13, which authorizes a variety of techniques for bank stabilization.

Living shorelines can provide habitat that is utilized by salmon and shellfish. Bank stabilization activities can be designed to provide intertidal habitat (e.g., pocket beaches) and subtidal habitat that is utilized by salmon and other fish species for foraging and nursery activities (e.g., Toft et al. 2013). Living shorelines can include pocket beaches and may have unvegetated beaches protected by reef structures inhabited by oysters or other aquatic organisms. Living shorelines can be another means of managing shore erosion while providing intertidal habitat and shallow subtidal habitat for fish and other aquatic species for refuge, feeding, and nursery functions (Gittman et al. 2016). Reef structures used as part of a living shoreline, as well as other habitats such as wetlands that may be components of living shorelines, can provide habitat for colonization by bivalve molluscs (Bilkovic and Mitchell 2013).

One commenter said that PCNs should be required for the repair and maintenance of existing living shorelines. One commenter stated that waivers should not be issued by district engineers without coordination with federal and state natural resource agencies. One commenter expressed concern about waivers because they would remove any limits on how far living shorelines can extend into the waterway, how long those living shorelines are, and how much dredged or fill material is placed into special aquatic sites.

The Corps maintains its position that PCNs should not be required for maintenance of existing living shorelines because the adverse environmental effects caused by these maintenance activities are likely to be no more than minimal, individually and cumulatively. In addition, periodic maintenance is an important component of sustaining the effectiveness of living shorelines in managing erosion and sustaining the living components of a living shoreline. An exception occurs for maintenance activities that require DA authorization that trigger the PCN requirements in paragraph (c) of general condition 18, which addresses compliance with the ESA. Paragraph (c) of general condition 18 requires non-federal permittees to submit a pre-construction notification to the district engineer if any listed species (or species proposed for listing) or designated

critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation.

For proposed NWP 54 activities in which the project proponent is requesting a waiver of the 30 foot or 500 linear foot limits, district engineers will coordinate the PCNs with federal and state agencies in accordance with the procedures in paragraph (d) of general condition 32. The federal and state agencies will provide their views on whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. For NWP 54 activities where agency coordination is not required, district engineers will apply the 10 criteria in paragraph 2 of section D, District Engineer's Decision, to determine whether the proposed activities will result in no more than minimal individual and cumulative adverse environmental effects.

This NWP is reissued with the modification discussed above.

NWP E. Water Reclamation and Reuse Facilities. The Corps proposed to issue this new NWP to authorize discharges of dredged or fill material into waters of the United States for the construction, expansion, and maintenance of water reclamation and reuse facilities.

Several commenters stated that although discharges of dredged or fill material into waters of the United States for the construction, expansion, and maintenance of water reclamation and reuse facilities may be authorized by other existing NWPs, they support the issuance of proposed new NWP E because it provides additional clarity and streamlines the authorization process for these facilities. A few commenters said that there is no need to issue proposed new NWP E because water reclamation and reuse facilities may be constructed, expanded, or maintained through existing NWPs. One commenter stated that water reuse facilities are typically attendant features of larger developments and should be permitted as part of the overall development. Several commenters expressed their support for the issuance of proposed NWP E as long as it applies to groundwater recharge and replenishment projects without restrictions on the origin or mix of sources of water being recharged, including water from outside of the watershed.

The Corps is issuing this new NWP to authorize discharges of dredged or fill material into waters of the United States for water reclamation and reuse

facilities, to help streamline the authorization process for the construction, expansion, and maintenance of these facilities. The water reclamation and reuse facilities constructed, expanded, or maintained through the discharges of dredged or fill material into waters of the United States authorized this NWP may be for non-potable water reuse and potable water reuse. Water reclamation and reuse facilities can be an important tool for adapting to the effects of climate change, such as changes in precipitation patterns that may affect water availability in areas of the country. Water reclamation and reuse facilities help conserve water, which may be beneficial as water availability changes or increases in water demand occur. The Corps recognizes that water reclamation and reuse facilities can be authorized as attendant features of other activities authorized by NWP, such as residential developments (NWP 29), commercial and institutional developments (NWP 39), agricultural activities (NWP 40), and recreational facilities (NWP 42). Despite the potential for water reclamation and reuse facilities to be authorized along with buildings and other features authorized by other NWPs, the Corps believes that issuing a new NWP to authorize discharges of dredged or fill material into waters of the United States for water reclamation and reuse facilities would be beneficial to the regulated public, especially when these facilities are stand-alone facilities and not attendant features of resident developments, commercial developments, or other activities.

For water reclamation and reuse facilities, the Corps regulates discharges of dredged or fill material into waters of the United States for the construction, expansion, or maintenance of those facilities. In general, the Corps does not have the authority to regulate the operation of these facilities after they are constructed, expanded, or maintained through discharges of dredged or fill material into waters of the United States authorized by this NWP. The Corps does not have the authority to regulate releases of water to recharge or replenish groundwater, to regulate the mixing of water from various sources, or to regulate the movement of water between watersheds. The Corps reminds project proponents that any project including underground injection may be subject to permit requirements of the Underground Injection Control Program, administered under the Safe Drinking Water Act by the U.S. Environmental Protection

Agency or states, territories, or tribes to which it has delegated primacy.

One commenter objected to the proposed 1/2-acre limit for proposed new NWP E. A commenter recommended adding a 300 linear foot limit for losses of stream bed. One commenter said that this NWP should not be limited to non-tidal waters, and it should not prohibit discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters. This commenter stated that proposed new NWP E should also authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters as well as tidal waters. One commenter said that mitigation should not be required for activities authorized by this NWP because the NWP authorizes beneficial activities.

The Corps is issuing this new NWP with a 1/2-acre limit to be consistent with other NWPs that may be used to authorize discharges of dredged or fill material into waters of the United States to construct, expand, or maintain water reclamation and reuse facilities as attendant features of other activities authorized by NWP, such as NWP 29 (residential developments), NWP 39 (commercial and institutional developments), NWP 40 (agricultural activities), and NWP 42 (recreational facilities). Losses of stream bed caused by discharges of dredged or fill material into waters of the United States are also subject to the 1/2-acre limit.

Pre-construction notification is required for all activities authorized by this NWP, and district engineers will evaluate proposed losses of stream bed to determine whether those losses, plus any other losses of waters of the United States caused by discharges of dredged or fill material, will result in no more than minimal individual and cumulative adverse environmental effects, and thus eligible for authorization under this NWP. Because of the PCN requirement and the ability of district and division engineers to modify, suspend, or revoke this NWP when appropriate, the Corps does not believe that it is necessary to impose an additional quantitative limit on this NWP that is specific to losses of stream bed. In geographic areas where there are regional concerns about cumulative losses of stream bed, division engineers can add regional conditions to this NWP to impose smaller acreage limits on losses of stream bed. If, during the review of a PCN for a proposed activity, the district engineer determines the proposed activity will result in more than minimal individual and cumulative adverse environmental effects after considering mitigation

proposed by the applicant, he or she will exercise discretionary authority and require an individual permit for the proposed losses of stream bed and any other losses of non-tidal waters and wetlands caused by discharges of dredged or fill material.

The Corps is issuing this NWP with the same scope of applicable waters (*i.e.*, non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters) as some other NWPs that can be used to authorize discharges of dredged or fill material into waters of the United States for water reclamation and reuse facilities. The scope of applicable waters is consistent with NWPs 29, 39, 40, and 42. This NWP does not authorize discharges of dredged or fill material into tidal waters of the United States and non-tidal wetlands adjacent to tidal waters because discharges into those waters have greater potential to result in adverse environmental effects that are more than minimal, individually and cumulatively. Project proponents that want to discharge dredged or fill material into tidal waters of the United States and non-tidal wetlands adjacent to tidal waters to construct, expand, or maintain water reclamation and reuse facilities can seek DA authorization through the individual permit process, unless a Corps district has issued a regional general permit to authorize those activities. General condition 23 addresses the mitigation requirements for this NWP and other NWPs. District engineers have discretion to require mitigation, including compensatory mitigation, for activities authorized by this NWP when they determine that such mitigation is necessary to ensure that the authorized activities result in no more than minimal individual and cumulative adverse environmental effects.

Proposed new NWP E is issued as NWP 59.

E. Responses to Comments on the Nationwide Permit General Conditions

The NWPs issued in this final rule are subject to the NWP general conditions in the final rule that was published in the January 13, 2021, issue of the **Federal Register** (86 FR 2867–2874). The final rule published in the January 13, 2021, issue of the **Federal Register** includes summaries of comments received on the NWP general conditions for the 2020 Proposal, as well as responses to those comments. See 86 FR 2820–2838 for the comment summaries and responses to comments on the general conditions for the 2021 NWPs.

F. Responses to Comments on the District Engineer's Decision

The NWPs issued in this final rule are subject to the District Engineer's Decision section (section D) in the final rule that was published in the January 13, 2021, issue of the **Federal Register** (86 FR 2874–2875). The final rule published in the January 13, 2021, issue of the **Federal Register** includes summaries of comments received on the NWP general conditions for the 2020 Proposal, as well as responses to those comments. See 86 FR 2838 for the comment summaries and responses to comments on the "District Engineer's Decision" section for the 2021 NWPs.

G. Discussion of Proposed Modifications to Section F, Definitions

The NWPs issued in this final rule are subject to the NWP definitions in the final rule that was published in the January 13, 2021, issue of the **Federal Register** (86 FR 2875–2877). The final rule published in the January 13, 2021, issue of the **Federal Register** includes summaries of comments received on the NWP general conditions for the 2020 Proposal, as well as responses to those comments. See 86 FR 2838–2841 for the comment summaries and responses to comments on the definitions for the 2021 NWPs.

III. Compliance With Relevant Statutes

A. National Environmental Policy Act Compliance

The Corps has prepared a decision document for each NWP issued in this final rule. Each decision document contains an environmental assessment (EA) to fulfill the requirements of NEPA. The EA includes the public interest review described in 33 CFR part 320.4. The EA generally discusses the anticipated impacts the NWP will have on the human environment and the Corps' public interest review factors. If a proposed NWP authorizes discharges of dredged or fill material into waters of the United States, the decision document also includes an analysis conducted pursuant to the Clean Water Act Section 404(b)(1), in particular 40 CFR part 230.7. These decision documents evaluate, from a national perspective, the environmental effects of each NWP.

The final decision document for each NWP is available on the internet at: www.regulations.gov (docket ID number COE–2020–0002) as Supporting and Related Materials for this final rule. The final decision documents prepared for each NWP fulfill the environmental documentation requirements of NEPA.

Before the 41 NWP in this final rule go into effect, division engineers will issue supplemental documents to evaluate environmental effects on a regional basis (e.g., a state or Corps district) and to determine whether regional conditions are necessary to ensure that the NWPs will result in no more than minimal individual and cumulative adverse environmental effects on a regional basis. The supplemental documents are prepared by Corps districts, but must be approved and issued by the appropriate division engineer, since the NWP regulations at 33 CFR 330.5(c) state that the division engineer has the authority to modify, suspend, or revoke NWP authorizations in a specific geographic area within his or her division. For some Corps districts, their geographic area of responsibility covers an entire state. For other Corps districts, their geographic area of responsibility may be based on watershed boundaries. For some states, there may be more than one Corps district responsible for implementing the Corps regulatory program, including the NWP program. In states with more than one Corps district, there is a lead Corps district responsible for preparing the supplemental documents for all of the NWPs. The supplemental documents will also discuss regional conditions imposed by division engineers to protect the aquatic environment and other public interest review factors and ensure that any adverse environmental effects resulting from NWP activities in that region will be no more than minimal, individually and cumulatively.

The Corps solicited comments on the draft national decision documents for each proposed NWP, and any comments received were considered when preparing the final decision documents for the NWPs.

Before the final NWPs go into effect, division engineers will issue supplemental documents to evaluate environmental effects on a regional basis (e.g., state or Corps district). The supplemental documents are prepared by Corps districts but must be approved and formally issued by the appropriate division engineer, since the NWP regulations at 33 CFR 330.5(c) state that the division engineer has the authority to modify, suspend, or revoke NWP authorizations for any specific geographic area within his or her division. For some Corps districts, their geographic area of responsibility covers an entire state. For other states, there is more than one Corps district responsible for implementing the Corps Regulatory Program, including the NWP program. In those states, there is a lead Corps

district responsible for preparing the supplemental documents for all of the NWPs. The supplemental documents will discuss regional conditions imposed by division engineers to protect the aquatic environment and ensure that any adverse environmental effects resulting from NWP activities in that region will be no more than minimal, individually and cumulatively.

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

If the NWP is not suspended or revoked in a state or a Corps district, the supplemental document includes a certification that the use of the NWP in that district, with any applicable regional conditions, will result in no more than minimal cumulative adverse environmental effects.

After the NWPs are issued or reissued and go into effect, district engineers will monitor the use of these NWPs on a regional basis (e.g., within a watershed, county, state, Corps district or other appropriate geographic area), to ensure that the use of a particular NWP is not resulting in more than minimal cumulative adverse environmental effects. The Corps staff that evaluate NWP PCNs that are required by the text of the NWP or by NWP general conditions or regional conditions imposed by division engineers, or voluntarily submitted to the Corps district by project proponents to receive written NWP verifications, often work in a particular geographic area and have an understanding of the activities that have been authorized by NWPs, regional general permits, and individual permits

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

Comments on compliance with NEPA for the 2020 Proposal are addressed in the final rule published in the January 13, 2021, issue of the **Federal Register** at 86 FR 2842–2843.

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

The NWPs are issued in accordance with Section 404(e) of the Clean Water Act and 33 CFR part 330. These NWPs authorize categories of activities that are similar in nature. The “similar in nature” requirement does not mean that activities authorized by an NWP must be identical to each other. The Corps believes that the “categories of activities that are similar in nature” requirement in Clean Water Act Section 404(e) is to be interpreted broadly, for practical implementation of this general permit program. The Corps has applied this interpretation for many years (see the NWPs issued in 2000 (64 FR 39263–39264 and 65 FR 12821), 2007 (72 FR 11095), 2012 (77 FR 10186), and 2017 (82 FR 1868)).

Nationwide permits, as well as other general permits, are intended to reduce administrative burdens on the Corps and the regulated public while maintaining environmental protection, by efficiently authorizing activities that have no more than minimal adverse environmental effects, consistent with Congressional intent expressed in the 1977 amendments to the Federal Water Pollution Control Act, specifically 33 U.S.C. 1344(e). The NWPs provide incentives for project proponents to minimize impacts to jurisdictional waters and wetlands to qualify for NWP authorization instead of having to apply for individual permits. Keeping the number of NWPs manageable is a key component for making the NWPs

protective of the environment and streamlining the authorization process for those general categories of activities that have no more than minimal individual and cumulative adverse environmental effects.

The various terms and conditions of these NWP, including the NWP regulations at 33 CFR 330.1(d) and 330.4(e), allow district engineers to exercise discretionary authority to modify, suspend, or revoke NWP authorizations or to require individual permits, and ensure compliance with Section 404(e) of the Clean Water Act. For each NWP that may authorize discharges of dredged or fill material into waters of the United States, the national decision document prepared by Corps Headquarters includes a 404(b)(1) Guidelines analysis. A 404(b)(1) Guidelines analysis is not required when a specific activity is authorized by an NWP (see 40 CFR 230.6(d)).

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

Corps general permits are not intended to make or imply a conclusion or determination regarding what water bodies are or are not subject to CWA jurisdiction. Instead, a Corps general permit merely states that, if a person complies with all of the terms and conditions of the general permit, that person's proposed discharges of dredged or fill material into the waterbody will be consistent with the CWA, on the ground that any such discharges either (1) are legally authorized under the CWA (to the extent that the waterbody is subject to CWA jurisdiction) or (2) are otherwise consistent with the CWA to the extent that the waterbody is not jurisdictional under the CWA. The Corps acknowledges that some members of the public may seek to comply with the conditions of a general permit even for water bodies that are not jurisdictional or may not be jurisdictional under the CWA. Such practice, though not required, is not unlawful. The Corps is not required to make a formal determination whether a particular wetland or water is subject to jurisdiction under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act of 1899 before issuing an individual permit or a general permit verification. Many project proponents prefer the time savings that can occur when the Corps issues an individual permit or general permit verification without expending the time and resources needed to make a formal, definitive determination whether those wetlands and waters are in fact jurisdictional and thus regulated

under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899.

On April 21, 2020, the U.S. Environmental Protection Agency (EPA) and the Department of the Army published the Navigable Waters Protection Rule (NWPR) which became effective on June 22, 2020,³ revising the definition of "waters of the United States" (85 FR 22250). Specifically, this final rule revises the Corps' regulations at 33 CFR part 328.3, where the definition of "waters of the United States" is located for the purposes of implementing Section 404 of the Clean Water Act.

On January 21, 2021, President Biden signed the E.O. 13990, "Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis," which directs federal agencies to "immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis." EPA and the Department of the Army have completed their review of the NWPR and announced in June 2021 their intention to initiate a new rulemaking process that restores the protections in place prior to the 2015 WOTUS implementation, and develops a new rule to establish a durable definition of "waters of the United States." As authorization under Section 404 of the Clean Water Act is only needed when regulated activities occur in WOTUS, any new definition of "Waters of the United States" could impact when an NWP may or may not be needed; however, it would not alter the terms and conditions in either this final rule or the NWP rule issued January 13, 2021.

Please note that some of the NWP could authorize activities that involve the discharge of dredged or fill material into water bodies that are not subject to CWA jurisdiction, or that may not be subject to CWA jurisdiction. For example, a project proponent could proceed with an NWP activity that does not require submission of a PCN to the Corps in a non-jurisdictional water without getting a definitive determination from the Corps that the wetland or waterbody is not a water of

³ On June 22, 2020, the NWPR became effective except in the State of Colorado due to a federal district court-issued stay in that state. The stay in Colorado has since been lifted so the NWPR is now in effect in all 50 states and U.S. territories. The rule has also been challenged in several other federal district courts.

the United States and thus not subject to CWA jurisdiction. As another example, if a proposed NWP activity requires pre-construction notification, the district engineer could issue the NWP verification based on the delineation of wetlands, other special aquatic sites, and other waters provided with the PCN in accordance with paragraph (b)(5) of NWP general condition 32, without the Corps making any formal determination as to whether those wetlands, special aquatic sites, and other waters are "waters of the United States."

During the pendency of any litigation challenging the Navigable Waters Protection Rule, the NWP will continue to authorize discharges of dredged or fill material in all water bodies that are subject to CWA jurisdiction, or that may be subject to CWA jurisdiction, at the time those discharges occur. Where a particular waterbody into which a person proposes to discharge dredged or fill material is subject to CWA jurisdiction, compliance with the terms and conditions of one or more NWP, or an individual permit, will be necessary. A person with legal interest in a parcel (e.g., a permit applicant, landowner, or a lease, easement, or option holder) has the opportunity to request an approved jurisdictional determination from the Corps if that person would like the Corps' formal determination on the jurisdictional status of a water or feature under the CWA."

D. Compliance With the Endangered Species Act

The NWP regulations at 33 CFR 330.4(f) and NWP general condition 18, endangered species, ensure that all activities authorized by NWP comply with ESA section 7. Those regulations and general condition 18 require non-federal permittees to submit PCNs for any activity that might affect listed species or designated critical habitat, as well as species proposed for listing and critical habitat proposed for such designation. When the district engineer evaluates a PCN, he or she determines whether the proposed NWP activity may affect listed species or designated critical habitat. The Corps established the "might affect" threshold in 33 CFR 330.4(f)(2) and paragraph (c) of general condition 18 because it is more stringent than the "may affect" threshold for ESA Section 7 consultation in the U.S. Fish and Wildlife Service's (FWS) and National Marine Fisheries Service's (NMFS) ESA Section 7 consultation regulations at 50 CFR part 402. The word "might" is defined as having "less probability or possibility" than the word "may" (Merriam-Webster's Collegiate

Dictionary, 10th edition). Since “might” has a lower probability of occurring, it is below the threshold (*i.e.*, “may affect”) that triggers the requirement for ESA Section 7 consultation for a proposed Federal action. As discussed below, each year the Corps conducts thousands of ESA Section 7 consultations with the FWS and NMFS for activities authorized by NWP. In recent years, an average of more than 10,800 formal, informal, and programmatic ESA Section 7 consultations are conducted each year between the Corps and the FWS and/or NMFS in response to NWP PCNs, including those activities that required PCNs under paragraph (c) of general condition 18 under the “might affect” threshold.

If the project proponent is required to submit a PCN and the proposed activity might affect listed species or designated critical habitat, species proposed for listing, or critical habitat proposed for such designation, the activity is not authorized by an NWP until either the district engineer makes a “no effect” determination or makes a “may affect” determination and completes formal or informal ESA Section 7 consultation. The district engineer may also use a regional programmatic consultation to comply with the requirements of ESA Section 7.

When evaluating a PCN, where necessary and appropriate, the Corps district will either make a “no effect” determination or a “may affect” determination. If the district engineer makes a “may affect” determination, she or he will notify the non-federal project proponent and the activity is not authorized by the NWP until ESA Section 7 consultation has been completed. In making these determinations, the district engineer will apply the definition of “effects of the action” in the FWS’s and NMFS’s ESA consultation regulations at 50 CFR 402.02. If the district engineer initiates ESA Section 7 consultation with the FWS and/or NMFS, that consultation will also consider ESA Section 7 cumulative effects, in accordance with the definition of “cumulative effects” at 50 CFR 402.02. If the non-federal project proponent does not comply with 33 CFR 330.4(f)(2) and general condition 18, and does not submit the required PCN, then the activity is not authorized by an NWP. In such situations, it is an unauthorized activity and the Corps district will determine an appropriate course of action under its regulations at 33 CFR part 326 to respond to the unauthorized activity, if and when the Corps learns about that unauthorized activity.

Federal agencies, including state agencies (*e.g.*, certain state Departments of Transportation) to which the Federal Highway Administration has assigned its responsibilities for ESA Section 7 consultation pursuant to 23 U.S.C. 327(a)(2)(B), are required to follow their own procedures for complying with ESA Section 7 (see 33 CFR 330.4(f)(1) and paragraph (b) of general condition 18). This includes circumstances where an NWP activity is part of a larger overall federal project or action. The federal agency’s ESA Section 7 compliance covers the NWP activity because it is undertaking the NWP activity and possibly other related activities that are part of a larger overall federal project or action. For those NWP activities that require pre-construction notification for proposed activities, the federal permittee is required to provide the district engineer with the appropriate documentation to demonstrate compliance with ESA Section 7. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA Section 7 consultation may be necessary for the proposed activity to fulfill both the federal agency’s and the Corps’ obligations to comply with ESA Section 7.

The only activities that potentially could be immediately authorized by NWP, assuming they meet all other applicable NWP conditions, are activities that would have “no effect” on listed species or designated critical habitat within the meaning of Section 7 of the ESA and its implementing regulations at 50 CFR part 402. Therefore, the issuance or reissuance of NWP does not require ESA Section 7 consultation because no activities authorized by any NWP “may affect” listed species or critical habitat without first completing activity-specific ESA Section 7 consultations with the Services, as required by general condition 18 and 33 CFR 330.4(f). Regional programmatic ESA Section 7 consultations may also be used by district engineers to satisfy the requirements of the NWP in general condition 18 and 33 CFR 330.4(f) if a proposed NWP activity is covered by that regional programmatic consultation.

In the August 27, 2019, issue of the **Federal Register** (84 FR 44976) the FWS and NMFS published a final rule that amended their regulations for interagency cooperation under Section 7 of the ESA. That final rule went into effect on October 28, 2019. With respect to making effects determinations for

proposed federal actions, such as activities authorized by NWP, the FWS and NMFS made two important changes to 50 CFR part 402: (a) Introducing the term “consequences” to help define what is an effect under ESA Section 7, and (b) emphasizing that to be considered an “effect of the action” under ESA Section 7 consultation, the consequences caused by the action would not occur but for the proposed action and must be reasonably certain to occur (see 84 FR 44977). Further clarification of “activities that are reasonably certain to occur” and “consequences caused by the proposed action” were provided by the FWS and NMFS in rule text added at 50 CFR 402.17(a) and (b), respectively.

Applying the 2019 amendments to the ESA Section 7 regulations to the NWP program, consequences to listed species and designated critical habitat caused by proposed NWP activities must be reasonably certain to occur. In the preamble to their final rule, the FWS and NMFS stated that for a “consequence of an activity to be considered reasonably certain to occur, the determination must be based on clear and substantial information” (see 84 FR 44977). The FWS and NMFS explained that “clear and substantial” means that there has to be a firm basis for supporting a conclusion that a consequence of a federal action is reasonably certain to occur. The determination that a consequence is reasonably certain to occur should not be based on speculation or conjecture, and the information used to make that determination should have a “degree of certitude” (see 84 FR 44977). The Corps will apply these considerations when evaluating pre-construction notifications for proposed NWP activities.

When the district engineer receives a pre-construction notification for a proposed NWP activity, he or she is responsible for applying the current definition of “effect of the action” to the proposed NWP activity and to determine the consequences caused by the proposed action and which activities are reasonably certain to occur. The district engineer determines whether the proposed NWP activity “may affect” listed species or designated critical habitat and initiates formal or informal ESA Section 7 consultation, unless she or he determines that the proposed NWP activity will have “no effect” on listed species or designated critical habitat. As a general rule, the district engineer documents his or her “no effect” determination in writing for every pre-construction notification that the

district engineer receives and responds to.

The NWP program has been structured, through the requirements of NWP general condition 18 and 33 CFR 330.4(f), to focus ESA Section 7 compliance at the activity-specific and regional levels. Each year, an average of more than 10,800 formal, informal, and regional programmatic ESA Section 7 consultations are conducted by Corps districts with the FWS and/or NMFS in response to NWP PCNs for specific NWP activities (see below). Focusing ESA Section 7 compliance at the activity-specific scale and regional programmatic scale is more efficient for the permittees, the Corps, and the FWS and NMFS, than doing so at the national level because of the similarities in ecosystem characteristics and associated listed species and critical habitat within a particular region.

For a proposed NWP activity that may affect listed species or designated critical habitat, a biological opinion with an incidental take statement is needed for the NWP activity to go forward unless the FWS or NMFS issued a written concurrence that the proposed NWP activity is not likely to adversely affect listed species or designated critical habitat. It is through activity-specific ESA Section 7 consultations and regional programmatic ESA Section 7 consultations between the Corps and the FWS and NMFS that effective protection of listed species and their designated critical habitat is achieved.

After applying the current ESA Section 7 regulations at 50 CFR part 402 to the NWP rulemaking process, the Corps continues to believe that the issuance or reissuance of the NWPs has “no effect” on listed species or designated critical habitat, and that the ESA Section 7 compliance is most effectively achieved by applying the requirements of general condition 18 and 33 CFR 330.4(f) to specific proposed NWP activities that are identified after the NWPs are issued and go into effect. Compliance with the requirements of ESA Section 7 can also be achieved by district engineers applying appropriate formal or informal regional programmatic ESA Section 7 consultations that have been developed by Corps districts with regional offices of the FWS and NMFS.

Section 7 of the ESA requires each federal agency to ensure, through consultation with the Services, that “any action authorized, funded, or carried out” by that agency “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the

destruction or adverse modification of habitat of such species.” (See 16 U.S.C. 1536(a)(2).) Accordingly, the Services’ ESA Section 7 regulations specify that an action agency must ensure that the action “it authorizes,” including authorization by permit, does not cause jeopardy or adverse modification. (See 50 CFR 402.01(a) and 402.02). Thus, in assessing application of ESA Section 7 to NWPs issued or reissued by the Corps, the proper focus is on the nature and extent of the specific activities “authorized” by the NWPs and the timing of that authorization.

The issuance or reissuance of the NWPs by the Chief of Engineers imposes express limitations on activities authorized by these NWPs. These limitations are imposed by the NWP terms and conditions, including the general conditions that apply to all NWPs regardless of whether pre-construction notification is required by a specific NWP. With respect to listed species and critical habitat, general condition 18 expressly prohibits any activity “which ‘may affect’ a listed species or designated critical habitat, unless ESA Section 7 consultation addressing the effects of the proposed activity has been completed.” General condition 18 also states that if an activity “might affect” a listed species or designated critical habitat (or a species proposed for listing or critical habitat proposed for such designation), a non-federal applicant must submit a PCN and “shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized.” In addition, 33 CFR 330.4(f)(2) imposes a PCN requirement for proposed NWP activities by non-federal permittees where listed species (or species proposed for listing) or critical habitat might be affected or are in the vicinity of the proposed NWP activity. Section 330.4(f)(2) also prohibits those permittees from beginning the NWP activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. Permit applicants that are federal agencies must and will follow their own requirements for complying with the ESA (see 33 CFR 330.4(f)(1)).

Thus, because no NWP can or does authorize an activity that may affect a listed species or critical habitat absent an activity-specific ESA Section 7 consultation or applicable regional programmatic ESA Section 7 consultation, and because any activity that may affect a listed species or critical habitat must undergo an

activity-specific consultation or be in compliance with a regional programmatic ESA Section 7 consultation before the district engineer can verify that the activity is authorized by an NWP, the issuance or reissuance of NWPs has “no effect” on listed species or critical habitat. Accordingly, the action being “authorized” by the Corps (*i.e.*, the issuance or re-issuance of the NWPs themselves) has no effect on listed species or critical habitat.

To help ensure protection of listed species and critical habitat, general condition 18 and 33 CFR 330.4(f) establish a more stringent threshold than the threshold set forth in the Services’ ESA Section 7 regulations for initiation of ESA Section 7 consultation. Specifically, while ESA Section 7 consultation must be initiated for any activity that “may affect” listed species or critical habitat, for non-federal permittees general condition 18 require submission of a PCN to the Corps if “any listed species (or species proposed for listing) or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat” or critical habitat proposed for such designation, and prohibits work until “notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized.” (See paragraph (c) of general condition 18.) The PCN must “include the name(s) of the endangered or threatened species (or species proposed for listing) that might be affected by the proposed work or that utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed work.” (See paragraph (b)(7) of the “Pre-Construction Notification” general condition.) Paragraph (g) of general condition 18 notes that information on the location of listed species and their critical habitat can be obtained from the Services directly or from their websites.

General condition 18 makes it clear to project proponents that an NWP does not authorize the “take” of an endangered or threatened species. Paragraph (e) of general condition 18 also states that a separate authorization (*e.g.*, an ESA Section 10 permit or a biological opinion with an “incidental take statement”) is required to take a listed species. In addition, paragraph (a) of general condition 18 states that no activity is authorized by an NWP which is likely to “directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation” or “which will directly or indirectly

destroy or adversely modify the critical habitat of such species.” Such activities would require district engineers to exercise their discretionary authority and subject the proposed activity to the individual permit review process, because an activity that would jeopardize the continued existence of a listed species, or a species proposed for listing, or that would destroy or adversely modify the critical habitat of such species would not result in no more than minimal adverse environmental effects and thus cannot be authorized by an NWP.

The Corps’ NWP regulations at 33 CFR 330.1(c) state that an “activity is authorized under an NWP only if that activity and the permittee satisfy all of the NWP’s terms and conditions.” Thus, if a project proponent moves forward with an activity that “might affect” an ESA listed species without complying with the PCN or other requirements of general condition 18, the activity is not authorized under the CWA. In this case, the project proponent could be subject to enforcement action and penalties under the CWA. In addition, if the unauthorized activity results in a “take” of listed species as defined by the ESA and its implementing regulations, then he or she could be subject to penalties, enforcement actions, and other actions by the FWS or NMFS under Section 11 of the ESA.

For listed species (and species proposed for listing) under the jurisdiction of the FWS, information on listed species that may be present in the vicinity of a proposed activity is available through the Information Planning and Consultation (IPaC) system,⁴ an on-line project planning tool developed and maintained by the FWS.

During the process for developing regional conditions, Corps districts collaborate with FWS and/or NMFS regional or field offices to identify regional conditions that can provide additional assurance of compliance with general condition 18 and 33 CFR 330.4(f)(2). Such regional conditions can add PCN requirements to one or more NWPs in areas inhabited by listed species or where designated critical habitat occurs. Regional conditions can also be used to establish time-of-year restrictions when no NWP activity can take place to ensure that individuals of listed species are not adversely affected by such activities. Corps districts will continue to consider through regional collaborations and consultations, local initiatives, or other cooperative efforts additional information and measures to

ensure protection of listed species and critical habitat, the requirements established by general condition 18 (which apply to all uses of all NWPs), and other provisions of the Corps regulations ensure full compliance with ESA Section 7.

Corps district office personnel meet with local representatives of the FWS and NMFS to establish or modify existing procedures, where necessary, to ensure that the Corps has the latest information regarding the existence and location of any threatened or endangered species or their critical habitat, including species proposed for listing or critical habitat proposed for such designation. Corps districts can also establish, through local procedures or other means, additional safeguards that ensure compliance with the ESA. Through formal ESA Section 7 consultation, or through other coordination with the FWS and/or the NMFS, as appropriate, the Corps establishes procedures to ensure that NWP activities will not jeopardize any threatened and endangered species or result in the destruction or adverse modification of designated critical habitat. Such procedures may result in the development of regional conditions added to the NWP by the division engineer, or in activity-specific conditions to be added to an NWP authorization by the district engineer.

The Corps has prepared a biological assessment for this rulemaking action. The biological assessment concludes that the issuance or reissuance of NWPs has “no effect” on listed species and designated critical habitat and does not require ESA Section 7 consultation. This conclusion was reached because no activities authorized by any NWPs “may affect” listed species or critical habitat without first completing activity-specific ESA Section 7 consultations with the Services, as required by general condition 18 and 33 CFR 330.4(f).

Based on the fact that NWP issuance or reissuance of the NWPs is contingent upon any proposed NWP activity that “may affect” listed species or critical habitat undergoing an activity-specific or regional programmatic ESA Section 7 consultation, there is no requirement that the Corps undertake consultation for the NWP program. The national programmatic consultations conducted in the past for the NWP program were voluntary consultations despite the inclusion of procedures to ensure consultation under ESA Section 7 for proposed NWP activities that may affect listed species or designated critical habitat. Regional programmatic consultations can be conducted voluntarily by Corps districts and

regional or local offices of the FWS and/or NMFS to tailor regional conditions and procedures to ensure the “might affect” threshold is implemented consistently and effectively.

Examples of regional programmatic consultations currently in effect, with the applicable Service the Corps consulted with, include: The Standard Local Operating Procedures for Endangered Species in Mississippi (2017—FWS); the Endangered Species Act Section 7 Programmatic Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for Tidal Area Restoration Authorized, Funded, or Implemented by the Corps of Engineers, Federal Emergency Management Agency, and Federal Highways Administration, in Oregon and the Lower Columbia River (NMFS—2018); the U.S. Army Corps of Engineers Jacksonville District’s Programmatic Biological Opinion (JAXBO) (NMFS—2017); Missouri Bat Programmatic Informal Consultation Framework (FWS—2019); Revised Programmatic Biological/Conference Opinion for bridge and culvert repair and replacement projects affecting the Dwarf Wedgemussel, Tar River Spiny mussel, Yellow Lance and Atlantic Pigtoe. Programmatic Conference Opinion (PCO) for Bridge and Culvert Replacement/Repairs/Rehabilitations in Eastern North Carolina, NCDOT Divisions 1–8 (FWS—2018); and the Corps and NOAA Fisheries Greater Atlantic Regional Fisheries Office (GARFO) Not Likely to Adversely Affect Program Programmatic Consultation (NMFS—2017).

The programmatic ESA Section 7 consultations that the Corps conducted for the 2007 and 2012 NWPs were voluntary consultations. The voluntary programmatic consultation conducted with the NMFS for the 2012 NWPs resulted in a biological opinion issued on February 15, 2012, which was replaced by a new biological opinion issued on November 24, 2014. A new biological opinion was issued by NMFS after the proposed action was modified and triggered re-initiation of that programmatic consultation. The programmatic consultation on the 2012 NWPs with the FWS did not result in a biological opinion. For the 2017 NWPs, the Corps did not request a national programmatic consultation.

In the Corps Regulatory Program’s automated information system (ORM), the Corps collects data on all individual permit applications, all NWP PCNs, all voluntary requests for NWP verifications where the NWP or general conditions do not require PCNs, and all

⁴ <https://ecos.fws.gov/ipac/>.

verifications of activities authorized by regional general permits. For all written authorizations issued by the Corps, the collected data include authorized impacts and required compensatory mitigation, as well as information on all consultations conducted under ESA Section 7. Every year, the Corps evaluates approximately 35,000 NWP PCNs and requests for NWP verifications for activities that do not require PCNs, and provides written verifications for those activities when district engineers determine those activities result in no more than minimal adverse environmental effects. During the evaluation process, district engineers assess potential impacts to listed species and critical habitat and conduct ESA Section 7 consultations whenever they determine proposed NWP activities “may affect” listed species or critical habitat. District engineers will exercise discretionary authority and require individual permits when proposed NWP activities will result in more than minimal adverse environmental effects.

Each year, the Corps conducts thousands of ESA Section 7 consultations with the FWS and NMFS for activities authorized by NWPs. These ESA Section 7 consultations are tracked in ORM. In FY 2018 (October 1, 2017 to September 30, 2018), Corps districts conducted 640 formal consultations and 3,048 informal consultations under ESA Section 7 for NWP PCNs. During that time period, the Corps also used regional programmatic consultations for 7,148 NWP PCNs to comply with ESA Section 7. Therefore, each year an average of more than 10,800 formal, informal, and programmatic ESA Section 7 consultations are conducted between the Corps and the FWS and/or NMFS in response to NWP PCNs, including those activities that required PCNs under paragraph (c) of general condition 18. For a linear project authorized by NWPs 12, 14, 57, or 58 where the district engineer determines that one or more crossings of waters of the United States that require Corps authorization “may affect” listed species or designated critical habitat, the district engineer initiates a single ESA Section 7 consultation with the FWS and/or NMFS for all of those crossings that he or she determines “may affect” listed species or designate critical habitat. The number of ESA Section 7 consultations provided above represents the number of NWP PCNs that required some form of ESA Section 7 consultation, not the number of single and complete projects authorized by an NWP that may be

included in a single PCN. A single NWP PCN may include more than one single and complete project, especially if it is for a linear project such as a utility line or road with multiple separate and distant crossings of jurisdictional waters and wetlands from its point of origin to its terminal point.

During the process for reissuing the NWPs, Corps districts coordinated with regional and field offices of the FWS and NMFS to discuss whether new or modified regional conditions should be imposed on the NWPs to improve implementation of the “might effect” threshold and improve protection of listed species and designated critical habitat and ensure that the NWPs only authorize activities with no more than minimal individual and cumulative adverse environmental effects. Regional conditions must comply with the Corps’ regulations at 33 CFR 325.4 for adding permit conditions to DA authorizations. The Corps decides whether suggested regional conditions identified during this coordination are appropriate for the NWPs. During this coordination, other tools, such as additional regional programmatic consultations or standard local operating procedures, might be developed by the Corps, FWS, and NMFS to facilitate compliance with the ESA while streamlining the process for authorizing activities under the NWPs. ESA Section 7 consultation on regional conditions occurs only when a Corps district makes a “may affect” determination and initiates formal or informal ESA Section 7 consultation with the FWS and/or NMFS, depending on the species that may be affected. Otherwise, the Corps district coordinates the regional conditions with the FWS and/or NMFS. Regional conditions, standard local operating procedures, and regional programmatic consultations developed by the Corps, FWS, and NMFS are important tools for protecting listed species and critical habitat and helping to tailor the NWP program to address specific species, their habitats, and the stressors that affect those species.

Comments on compliance with the ESA for the 2020 Proposal are addressed in the final rule published in the January 13, 2021, issue of the **Federal Register** at 86 FR 2848–2849.

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

The NWP Program’s compliance with the essential fish habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act will

be achieved through EFH consultations between Corps districts and NMFS regional offices. This approach continues the EFH Conservation Recommendations provided by NMFS Headquarters to Corps Headquarters in 1999 for the NWP program. Corps districts that have EFH designated within their geographic areas of responsibility will coordinate with NMFS regional offices, to the extent necessary, to develop NWP regional conditions that conserve EFH and are consistent with the NMFS regional EFH Conservation Recommendations. Corps districts will conduct consultations in accordance with the EFH consultation regulations at 50 CFR 600.920.

Comments on compliance with the essential fish habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act for the 2020 Proposal are addressed in the final rule published in the January 13, 2021, issue of the **Federal Register** at 86 FR 2849.

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

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

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

When evaluating a PCN, the Corps will either make a “no potential to cause effects” determination or a “no historic properties affected,” “no adverse effect,” or “adverse effect” determination. If the Corps makes a “no historic properties affected,” “no adverse effect,” or “adverse effect” determination, the district engineer will notify the non-federal applicant and the activity is not authorized by an NWP until NHPA Section 106 consultation has been completed. If the non-federal project proponent does not comply with the “Historic Properties” general condition, and does not submit the required PCN, then the activity is not authorized by an NWP. In such situations, it is an unauthorized activity and the Corps district will determine an appropriate course of action to respond to the unauthorized activity.

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

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

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

Thus, because no NWP can or does authorize an activity that may have the potential to cause effects to historic properties, and because any activity that may have the potential to cause effects to historic properties must undergo an activity-specific NHPA Section 106 consultation (unless that activity is covered under a programmatic agreement) before the district engineer can verify that the activity is authorized by an NWP, the issuance or reissuance of NWPs has “no potential to cause effects” on historic properties. Accordingly, the action being “authorized” by the Corps, which is the issuance or re-issuance of the NWPs by Corps Headquarters, has no potential to cause effects on historic properties.

To help ensure protection of historic properties, the “Historic Properties” general condition establishes a higher threshold than the threshold set forth in the Advisory Council’s NHPA Section 106 regulations for initiation of section 106 consultation. Specifically, while NHPA Section 106 consultation must be initiated for any activity that “has the potential to cause effects to” historic properties, for non-federal permittees the “Historic Properties” general condition requires submission of a PCN to the Corps if “the NWP activity might have the potential to cause effects to any historic properties listed on, determined

to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties.” The “Historic Properties” general condition also prohibits the proponent from conducting the NWP activity “until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that consultation under Section 106 of the NHPA has been completed.” (See paragraph (d) of the “Historic Properties” general condition.) The PCN must “state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property.” (See paragraph (b)(8) of the “Pre-Construction Notification” general condition.)

During the process for developing regional conditions, Corps districts can coordinate or consult with State Historic Preservation Officers, Tribal Historic Preservation Officers, and tribes to identify regional conditions that can provide additional assurance of compliance with the “Historic Properties” general condition and 33 CFR 330.4(g)(2) for NWP activities undertaken by non-federal permittees. Such regional conditions can add PCN requirements to one or more NWPs where historic properties occur. Corps districts will continue to consider through regional consultations, local initiatives, or other cooperative efforts and additional information and measures to ensure protection of historic properties, the requirements established by the “Historic Properties” general condition (which apply to all uses of all NWPs), and other provisions of the Corps regulations and guidance ensure full compliance with NHPA Section 106.

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

Comments on compliance with Section 106 of the NHPA for the 2020 Proposal are addressed in the final rule published in the January 13, 2021, issue of the **Federal Register** at 86 FR 2851.

G. Section 401 of the Clean Water Act

A water quality certification (WQC) issued by a state, authorized tribe, or EPA, or a waiver thereof, is required by section 401 of the Clean Water Act, for an activity authorized by an NWP which may result in a discharge from a point source into waters of the United States. Water quality certifications may be granted without conditions, granted with conditions, denied, or waived for specific NWPs. The water quality certification process for the 2020 Proposal was described in the preamble to the September 15, 2020, proposed rule at 85 FR 57362–57363. A summary of comments received on the water quality certification process for the 2020 Proposal, and the Corps' responses to those comments, are provided in the final rule that was published in the **Federal Register** on January 13, 2021, at 86 FR 2851–2853.

Nationwide permits numbered 15, 16, 17, 18, 25, 30, 34, 41, 46, 49, and 59 would authorize activities that may result in discharges and therefore water quality certification is required for those NWPs. Nationwide permits numbered 3, 4, 5, 6, 7, 13, 14, 19, 20, 22, 23, 27, 31, 32, 33, 36, 37, 38, 45, 53, and 54 would authorize various activities, some of which may result in a discharge and require water quality certification, and others which may not. Nationwide permits numbered 1, 2, 8, 9, 10, 11, 24, 28, and 35 do not require water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States. In the case of NWP 8, it authorizes only activities seaward of the territorial seas.

In October 2020, Corps districts requested WQC from certifying authorities for the proposed issuance of the NWPs, including the 41 NWPs being issued in this final rule. Many certifying authorities requested an extension to the 60-day reasonable period of time established by the Corps to review and certify the proposed NWPs (see 86 FR 2744, 2852). Commenters noted various reasons for such extension requests, including that certifying authorities could not comply with the reasonable period of time due to public participation requirements and the need for more time to review in light of recent changes to the EPA's regulation for Section 401 of the Clean Water Act and the issuance of the final Navigable Waters Protection Rule. In light of concerns noted by commenters, the Corps extended the reasonable period of time for certification of the 41 NWPs in

this final rule. Corps districts sent letters to certifying authorities notifying them of the extended reasonable period of time for the 41 NWPs in this final rule. For the extended reasonable period of time, Corps districts gave the certifying authorities the opportunity to take different courses of action on the certification requests for the proposed issuance of these 41 NWPs. Certifying authorities also had the option to take no further action during the extended reasonable period of time. If a certifying authority took no further action during the extended reasonable period of time, the Corps would consider the certifying authority's prior action on the certification request to be their final position on WQC for the issuance of these 41 NWPs: that is to issue with or without conditions, deny, or waive WQC for those 41 NWPs.

Under EPA's 401 regulations, a "[f]ederal agency may extend the reasonable period of time at the request of a certifying authority or a project proponent" so long as the reasonable period of time does not exceed one year from receipt of the certification request." (See 40 CFR 121.6(d).) In the October 2020 certification requests, the Corps established the reasonable period of time to be 60 days. Although the original reasonable period of time of 60 days has passed, EPA's 401 regulations do not prohibit federal agencies from granting certifying authorities more time to take action on certification requests, as long as no more than one year has passed since the original certification request was submitted to a certifying authority. Additionally, the Corps' NWP regulations do not prohibit reopening the reasonable period of time as long as the one-year limit in Section 401 of the Clean Water Act is not exceeded. Therefore, in response to concerns expressed by certifying authorities and various commenters, the Corps extended the reasonable period of time to give certifying authorities the one-year maximum in the statute to act on the certification requests on the remaining 41 NWPs. To be clear, this extension of the reasonable period of time does not constitute the submittal of new certification requests by Corps districts to certifying authorities. If certifying authorities need additional time, the Corps will work with certifying authorities as necessary, as long as the statutory one-year limit is not exceeded. Furthermore, because the Corps is simply extending the reasonable period of time (and not re-requesting certification) certifying authorities were not required to reinitiate the certification process.

Although certifying authorities previously submitted certifications on the 41 NWPs, the Corps finds that submission of new or revised certifications during this extended reasonable period of time would not be "modifications" of the earlier certifications or otherwise inconsistent with 40 CFR 121.6(e). Instead, any new or revised certifications submitted during the extended reasonable period of time will be deemed to supersede the earlier certifications or other actions (such as denials or waivers) that certifying authorities may have taken during the original reasonable period of time. See also Memorandum from Radhika Fox, Assistant Administrator, Office of Water, and Jaime Pinkham, Acting Assistant Secretary of the Army (Civil Works), *Clean Water Act Section 401 Certification Implementation*, at 6–7 (August 19, 2021), available at https://www.epa.gov/system/files/documents/2021-08/8-19-21-joint-epa-army-memo-on-cwa-401-implementation_508.pdf (providing that "EPA's 2020 Rule does not limit certifying authorities from issuing an updated certification within the reasonable period of time when this is authorized by the federal permitting agency. . . . In EPA's view, this outcome does not change if the new or revised certification is issued during an extended reasonable period of time.") Certifying authorities that want to retain their prior certification decisions can confirm their prior positions affirmatively by sending confirmation to the Corps district prior the expiration of the extended reasonable period of time. If a certifying authority chooses not to respond to the Corps district during the extended reasonable period of time, the previous certification decisions will govern in the absence of an updated certification, affirmative confirmation, or other action, such as a denial or waiver.

EPA was available to provide technical assistance to the Corps and certifying authorities pursuant to 40 CFR 121.16 during this extended reasonable period of time.

Consistent with EPA's 401 regulations at 40 CFR part 121, certifying authorities may take one of four actions on a certification request: To issue with or without conditions, deny, or waive WQC for the issuance of the NWPs. If a certifying authority issues water quality certifications with conditions for the issuance of these NWPs, district engineers reviews the conditions in those water quality certifications to determine whether they comply with the requirements in 40 CFR 121.7(d). If the district engineer determines that any condition in the water quality

certification for the issuance of the NWP does not comply with the requirements of 40 CFR 121.7(d), and is waived pursuant to 40 CFR 121.9(d), the district engineer will notify the certifying authority and the EPA Administrator in accordance with 40 CFR 121.9(c). The conditions in the water quality certification for the issuance of the NWP that comply with the requirements of 40 CFR 121.7(d) and are not waived become conditions of the NWP authorization in accordance with Section 401(d) of the Clean Water Act.

The Corps' regulations for reviewing WQCs issued for the issuance of the NWP are located at 33 CFR 330.4(c)(2). If, prior to the issuance or reissuance of NWP, a certifying authority issues a WQC for the issuance of an NWP, and that WQC includes conditions, the division engineer will make those conditions regional conditions of the NWP for activities which may result in a discharge into waters of United States in the geographic area covered by that WQC unless the division engineer determines that those conditions do not comply with the provisions of 33 CFR 325.4. If the district engineer determines that the conditions in a WQC provided for the issuance of an NWP do not comply with 33 CFR 325.4 the Corps will decline to rely on the WQC issued for the issuance of the NWP. In practice, this means the Corps will consider that decision to be a denial of the certification. In such cases, the proposed discharges are not authorized by that NWP and the Corps will require project proponents to obtain WQCs for individual discharges authorized by that NWP.

If a certifying agency denies WQC for the issuance of an NWP, then the proposed discharges are not authorized by that NWP unless and until a project proponent obtains WQC for the specific discharge from the certifying authority, or a waiver of WQC occurs.

After division engineers have approved the final regional conditions for the 41 NWP published in this final rule, Corps districts will issue public notices announcing the final regional conditions for the 41 NWP and the status of water quality certifications and Coastal Zone Management Act (CZMA) consistency concurrences for those final NWP. The Corps will post copies of these district public notices in the www.regulations.gov docket for this rulemaking action (docket number COE-2020-0002).

Further discussion of comments on compliance with Section 401 of the Clean Water Act for the 2020 Proposal are addressed in the final rule published

in the January 13, 2021, issue of the **Federal Register** at 86 FR 2852-2853.

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

Any state with a federally-approved CZMA program must concur with the Corps' determination that activities authorized by NWP which are within, or will have reasonably foreseeable effects on any land or water uses or natural resources of, the state's coastal zone, are consistent with the CZMA program to the maximum extent practicable. Coastal Zone Management Act consistency concurrences may be issued without conditions, issued with conditions, or denied for specific NWP.

Prior to the issuance of the 16 NWP, states made their decisions on whether to concur with or object to the Corps' CZMA consistency determination for the issuance of the NWP. If a state issued a concurrence with conditions for the issuance of these NWP, district engineers reviewed the conditions in those consistency concurrences to determine whether they comply with the Corps' regulations for permit conditions at 33 CFR 325.4. If a state objected to the Corps' CZMA consistency determination for the issuance of an NWP, then the activity is not authorized by that NWP unless and until a project proponent obtains a consistency concurrence from the state or a presumption of concurrence occurs.

The Corps' CZMA consistency determination only applied to NWP authorizations for activities that are within, or affect, any land, water uses or natural resources of a state's coastal zone. A state's coastal zone management plan may identify geographic areas in federal waters on the outer continental shelf, where activities that require federal permits conducted in those areas require consistency certification from the state because they affect any coastal use or resource. In its coastal zone management plan, the state may include an outer continental shelf plan. An outer continental shelf plan is a plan for "the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act" and regulations issued under that Act (see 15 CFR 930.73). Activities requiring federal permits that are not identified in the state's outer continental shelf plan are considered unlisted activities. If the state wants to review an unlisted activity under the CZMA, then it must notify the applicant and the federal permitting agency that it intends to review the proposed activity. Nationwide permit authorizations for activities that are not within or would not affect a state's coastal zone do not

require the Corps' CZMA consistency determinations and thus are not contingent on a State's concurrence with the Corps' consistency determinations.

If a state objects to the Corps' CZMA consistency determination for an NWP, then the affected activities are not authorized by an NWP within that state until a project proponent obtains an individual CZMA consistency concurrence, or sufficient time (*i.e.*, six months) passes after requesting a CZMA consistency concurrence for the applicant to make a presumption of consistency, as provided in 33 CFR 330.4(d)(6). However, when applicants request NWP verifications for activities that require individual consistency concurrences, and the Corps determines that those activities meet the terms and conditions of the NWP, in accordance with 33 CFR 330.6(a)(3)(iii) the Corps will issue provisional NWP verification letters. The provisional verification letter will contain general and regional conditions as well as any activity-specific conditions the Corps determines are necessary for the NWP authorization. The Corps will notify the applicant that he or she must obtain an activity-specific CZMA consistency concurrence or a presumption of concurrence before he or she is authorized to start work in waters of the United States. That is, NWP authorization will be contingent upon obtaining the necessary CZMA consistency concurrence from the state, or a presumption of concurrence. Anyone wanting to perform such activities where pre-construction notification to the Corps is not required has an affirmative responsibility to present a CZMA consistency determination to the appropriate state agency for concurrence. Upon concurrence with such CZMA consistency determinations by the state, the activity would be authorized by the NWP. This requirement is provided at 33 CFR 330.4(d).

Comments on compliance with the Coastal Zone Management Act for the 2020 Proposal are addressed in the final rule published in the January 13, 2021, issue of the **Federal Register** at 86 FR 2854.

IV. Economic Impact

The NWP are expected to increase the number of activities eligible for NWP authorization, and reduce the number of activities that require individual permits. The Corps estimates that the NWP in this final rule will authorize 52 activities each year that would have otherwise required individual permits. For the combination

of this final rule with the final rule issued in January 2021, the Corps estimates that the 2021 NWP's will authorize 261 activities each year that would have otherwise required individual permits. While applying for a NWP may entail some burden (namely, in the form of a PCN, when applicable), by authorizing more activities by NWP, this proposal will reduce net burden for the regulated public. Specifically, increasing the number of activities that can be authorized by NWP's is expected to decrease compliance costs for permit applicants since, as discussed below, the compliance costs for obtaining NWP authorization are less than the compliance costs for obtaining individual permits. In addition, the NWP's can incentivize some project proponents to design their projects in such a way that they would qualify for a NWP thereby reducing impacts to

jurisdictional waters and wetlands. In FY2018, the average time to receive an NWP verification was 45 days from the date the Corps district receives a complete PCN, compared to 264 days to receive a standard individual permit after receipt of a complete permit application (see table 1.2 of the regulatory impact analysis for this final rule, which is available in the www.regulations.gov docket (docket number COE-2020-0002)).

As discussed in the Regulatory Impact Analysis for this rule, the Corps estimates that a permit applicant's compliance cost for obtaining NWP authorization in 2019\$ ranges from \$4,412 to \$14,705 (Institute for Water Resources (2001),⁵ adjusted for inflation using the GDP deflator approach). The Corps estimates that a permit applicant's compliance costs for obtaining an individual permit for a proposed activity impacting up to 3

acres of wetland ranges from \$17,646 to \$35,293 in 2019\$. Considering how the proposed NWP's will increase the number of activities authorized by an NWP each year, the Corps estimates that the 41 final NWP's, when compared with the 2017 NWP's, will decrease compliance costs for the regulated public by approximately \$1.1 million (low end estimate) to \$3.2 million per year (high end estimate). The Corps estimates that the 41 final NWP's in this final rule plus the 16 NWP's issued in the January 13, 2021, final rule, when compared with the 2017 NWP's, will decrease compliance costs for the regulated public by approximately \$5.4 million (low end estimate) to \$16.2 million per year (high end estimate). The Corps invited comment on the assumptions and methodology used to calculate the compliance costs and burden in general associated with the NWP and received no comments.

Nationwide permit(s)	Changes	Anticipated impacts
• NWP 14	Add "driveways" to examples of activities authorized by this NWP.	Increase number of activities authorized by NWP; decrease number of activities requiring individual permits.
• NWP 27	Add coral restoration and relocation to the list of examples of authorized activities. Add "releases of sediment from reservoirs to maintain sediment transport continuity to restore downstream habitats" to the list of examples of authorized activities.	Increase number of activities authorized by NWP; decrease number of activities requiring individual permits.
• NWP 41	Add irrigation ditches	Increased number of activities authorized by NWP; decreased number of activities requiring individual permits.
• NWP 53	Change definition of low-head dam	Slight increase in number of low-head dams removed each year.
• NWP 59	Issued new NWP to authorize discharges of dredged or fill material into waters of the United States to construct, expand, and maintain water reclamation and reuse facilities.	Increased number of activities authorized by NWP; decreased number of activities requiring individual permits.

Comments on the potential economic impacts of the 2020 Proposal, and the Corps' responses to those comments, are provided in the final rule published in the January 13, 2021, issue of the **Federal Register** at 86 FR 2855-2856.

V. Administrative Requirements

Plain Language

In compliance with the principles in the President's Memorandum of June 1, 1998, (63 FR 31885, June 10, 1998) regarding plain language, this preamble is written using plain language. In

writing this final rule, the Corps used the active voice, short sentences, and common everyday terms except for necessary technical terms.

Paperwork Reduction Act

The paperwork burden associated with the NWP relates exclusively to the preparation of the PCN. While different NWP's require that different information be included in a PCN, the Corps estimates that a PCN takes, on average, 11 hours to complete. The 41 NWP's issued in this final rule would decrease the total paperwork burden associated

with this program because the Corps estimates that under this final rule 47 more PCN's would be required each year. This increase is due to the number of activities that would be authorized under the 41 2021 NWP's that previously required individual permits. The paperwork burden associated with the 41 final NWP's is expected to increase by approximately 1,517 hours per year from 198,397 hours to 199,914 hours.

The following table summarizes the projected changes in paperwork burden from the 40 2017 NWP's to the 41 NWP's issued in this final rule.

	Number of NWP PCNs per year	Number of NWP activities not requiring PCNs per year	Estimated changes in NWP PCNs per year	Estimated changes in number of authorized NWP activities	Estimated changes in number of standard individual permits per year
40 2017 NWP's	18,127	29,265

⁵ Institute for Water Resources (IWR). 2001. Cost analysis for the 2000 issuance and modification of

nationwide permits. Institute for Water Resources (Alexandria, VA). 29 pp. plus appendices.

	Number of NWP PCNs per year	Number of NWP activities not requiring PCNs per year	Estimated changes in NWP PCNs per year	Estimated changes in number of authorized NWP activities	Estimated changes in number of standard individual permits per year
41 2021 NWPs	18,164	29,280	+37	+52	-52

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. For the Corps Regulatory Program under Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, the current OMB approval number for information collection requirements is maintained by the Corps of Engineers (OMB approval number 0710-0003).

Executive Order 12866

This action is a significant regulatory action under Executive Order 12866 (58 FR 51735, October 4, 1993) that was submitted to the Office of Management and Budget (OMB) for review.

Executive Order 13132

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires the Corps to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” The issuance and modification of NWPs does not have federalism implications. The Corps does not believe that the final NWPs will have substantial direct effects on the states, on the relationship between the federal government and the states, or on the distribution of power and responsibilities among the various levels of government. These NWPs will not impose any additional substantive obligations on state or local governments. Therefore, Executive Order 13132 does not apply to these NWPs.

Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the proposed rule will not have a significant economic impact on a

substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

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

The statutes under which the Corps issues, reissues, or modifies NWPs are Section 404(e) of the Clean Water Act (33 U.S.C. 1344(e)) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403). Under section 404, DA permits are required for discharges of dredged or fill material into waters of the United States. Under section 10, DA permits are required for any structures or other work that affect the course, location, or condition of navigable waters of the United States. Small entities proposing to discharge dredged or fill material into waters of the United States and/or install structures or conduct work in navigable waters of the United States must obtain DA permits to conduct those activities, unless a particular activity is exempt from those permit requirements. Individual permits and general permits can be issued by the Corps to satisfy the permit requirements of these two statutes. Nationwide permits are a form of general permit issued by the Chief of Engineers.

Nationwide permits automatically expire and become null and void if they are not modified or reissued within five years of their effective date (see 33 CFR 330.6(b)). Furthermore, Section 404(e) of the Clean Water Act states that general permits, including NWPs, can be issued for no more than five years. If the 40 2017 NWPs that were not included in the final rule published in the January 13, 2021, issue of the **Federal Register** are not modified or reissued, they will expire on March 18, 2022, and small entities and other project proponents would be required to obtain alternative

forms of DA permits (*i.e.*, standard permits, letters of permission, or regional general permits) for activities involving discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States. Regional general permits that authorize similar activities as the NWPs may be available in some geographic areas, but small entities conducting regulated activities outside those geographic areas would have to obtain individual permits for activities that require DA permits.

When compared with the compliance costs for individual permits, most of the terms and conditions of the NWPs are expected to result in decreases in the costs of complying with the permit requirements of sections 10 and 404. The anticipated decrease in compliance cost results from the lower cost of obtaining NWP authorization instead of standard permits. Unlike standard permits, NWPs authorize activities without the requirement for public notice and comment on each proposed activity.

Another requirement of Section 404(e) of the Clean Water Act is that general permits, including NWPs, authorize only those activities that result in no more than minimal adverse environmental effects, individually and cumulatively. The terms and conditions of the NWPs, such as acreage limits and the mitigation measures in some of the NWP general conditions, are imposed to ensure that the NWPs authorize only those activities that result in no more than minimal adverse effects on the aquatic environment and other public interest review factors.

After considering the economic impacts of the NWPs on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. Small entities may obtain required DA authorizations through the NWPs, in cases where there are applicable NWPs authorizing those activities and the proposed work will result in only minimal adverse effects on the aquatic environment and other public interest review factors. The terms and conditions of the revised NWPs will not impose substantially higher costs on small entities than those of the existing NWPs. If an NWP is not available to

authorize a particular activity, then another form of DA authorization, such as an individual permit or a regional general permit authorization, must be secured. However, as noted above, the Corps estimates an increase in the number of activities than can be authorized through NWP, because the Corps made some modifications to the NWPs to authorize additional activities. Because those activities required authorization through other forms of DA authorization (e.g., individual permits or regional general permits) the Corps expects a concurrent decrease in the numbers of individual permit and regional general permit authorizations required for these activities.

Unfunded Mandates Reform Act

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

The Corps has determined that the NWPs do not contain a federal mandate that may result in expenditures of \$100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. The NWPs are generally consistent with current agency practice, do not impose new substantive requirements and therefore do not contain a federal mandate that may result in expenditures of \$100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. Therefore, this final rule is not subject to the requirements of Sections 202 and 205 of the UMRA. For the same reasons, the Corps has determined that the NWPs contain no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the issuance and modification of NWPs is not subject to the requirements of Section 203 of UMRA.

Executive Order 13045

Executive Order 13045, “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the proposed rule on children and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

The NWPs are not subject to this Executive Order because they are not economically significant as defined in Executive Order 12866. In addition, the proposed NWPs do not concern an environmental health or safety risk that the Corps has reason to believe may have a disproportionate effect on children.

Executive Order 13175

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

Tribes, or on the distribution of power and responsibilities between the federal government and Tribes.”

The issuance of these NWPs is generally consistent with current agency practice and will not have substantial direct effects on tribal governments, on the relationship between the federal government and the tribes, or on the distribution of power and responsibilities between the federal government and tribes. Therefore, Executive Order 13175 does not apply to this final rule. However, in the spirit of Executive Order 13175, the Corps specifically requested comments from tribal officials on the proposed rule. Their comments were fully considered during the preparation of this final rule. Each Corps district conducted government-to-government consultation with tribes, to identify regional conditions, other local NWP modifications to protect aquatic resources of interest to tribes, and coordination procedures with tribes, as part of the Corps’ responsibility to protect tribal trust resources and fulfill its tribal trust responsibilities.

Comments on compliance of the 2020 Proposal with E.O. 13175, and the Corps’ responses to those comments, are provided in the final rule published in the January 13, 2021, issue of the **Federal Register** at 86 FR 2858–2859.

Environmental Documentation

A decision document has been prepared for each of the 41 NWPs being issued in this final rule. Each decision document includes an environmental assessment and public interest review determination. If an NWP authorizes discharges of dredged or fill material into waters of the United States, the decision document includes a 404(b)(1) Guidelines analysis. These decision documents are available at: www.regulations.gov (docket ID number COE–2020–0002). They are also available by contacting Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street NW, Washington, DC 20314–1000.

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The Corps will submit a report containing the final 41 NWPs and other required information to

the U.S. Senate, the U.S. House of Representatives, and the Government Accountability Office. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The 41 NWP's are not a "major rule" as defined by 5 U.S.C. 804(2), because they are not likely to result in (1) an annual effect on the economy of \$100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Executive Order 12898

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

In response to the 2020 Proposal, the Corps received one comment concerning environmental justice. One commenter said that the proposed NWP's would diminish protections for subsistence hunting and fishing rights for tribes, and that the proposed rule does not comply with E.O. 12898. This commenter concluded that the final rule should not be issued.

Activities authorized by the NWP's must comply with general condition 17, tribal rights. General condition 17 states that no NWP activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights. For the 2021 NWP's, Corps districts conducted consultation or coordination with tribes to identify regional conditions that protect reserved tribal rights and to develop coordination procedures for specific NWP activities to ensure that those activities do not impair reserved tribal rights.

The NWP's are not expected to have any discriminatory effect or

disproportionate negative impact on any community or group, and therefore are not expected to cause any disproportionately high and adverse impacts to minority or low-income communities. The NWP's can only be used to authorize activities that require DA authorization and result in no more than minimal individual and cumulative adverse environmental effects. The NWP's may be used by people who live in communities with environmental justice interests and undertake activities that require DA authorization. The NWP's are available in all communities to authorize discharges of dredged or fill material into waters of the United States and/or structures and work in navigable waters of the United States that result in no more than minimal individual and cumulative adverse environmental effects, as long as those NWP's have not been suspended or revoke by a division engineer on a regional basis. Those NWP activities may help provide goods and services (e.g., housing, energy, food production, internet access) that benefit members of communities with environmental justice interests.

Executive Order 13211

This action is not a "significant energy action" because it is not likely to have a significant adverse effect on the supply, distribution or use of energy and has not otherwise been designated by the OIRA Administrator as a significant energy action.

VI. References

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

Authority

The Corps is reissuing 40 existing NWP's and issuing one new NWP under the authority of Section 404(e) of the Clean Water Act (33 U.S.C. 1344(e)) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*).

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

A. Index of Nationwide Permits Issued in This Final Rule

1. Aids to Navigation
2. Structures in Artificial Canals
3. Maintenance
4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities

5. Scientific Measurement Devices
6. Survey Activities
7. Outfall Structures and Associated Intake Structures
8. Oil and Gas Structures on the Outer Continental Shelf
9. Structures in Fleeting and Anchorage Areas
10. Mooring Buoys
11. Temporary Recreational Structures
13. Bank Stabilization
14. Linear Transportation Projects
15. U.S. Coast Guard Approved Bridges
16. Return Water From Upland Contained Disposal Areas
17. Hydropower Projects
18. Minor Discharges
19. Minor Dredging
20. Response Operations for Oil or Hazardous Substances
22. Removal of Vessels
23. Approved Categorical Exclusions
24. Indian Tribe or State Administered Section 404 Programs
25. Structural Discharges
27. Aquatic Habitat Restoration, Establishment, and Enhancement Activities
28. Modifications of Existing Marinas
30. Moist Soil Management for Wildlife
31. Maintenance of Existing Flood Control Facilities
32. Completed Enforcement Actions
33. Temporary Construction, Access, and Dewatering
34. Cranberry Production Activities
35. Maintenance Dredging of Existing Basins
36. Boat Ramps
37. Emergency Watershed Protection and Rehabilitation
38. Cleanup of Hazardous and Toxic Waste
41. Reshaping Existing Drainage Ditches
45. Repair of Uplands Damaged by Discrete Events
46. Discharges in Ditches
49. Coal Remining Activities
53. Removal of Low-Head Dams
54. Living Shorelines
59. Water Reclamation and Reuse Facilities

B. Nationwide Permits

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

2. *Structures in Artificial Canals.* Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously

authorized (see 33 CFR 322.5(g)). (Authority: Section 10).

3. *Maintenance.* (a) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized. This NWP also authorizes the removal of previously authorized structures or fills. Any stream channel modification is limited to the minimum necessary for the repair, rehabilitation, or replacement of the structure or fill; such modifications, including the removal of material from the stream channel, must be immediately adjacent to the project. This NWP also authorizes the removal of accumulated sediment and debris within, and in the immediate vicinity of, the structure or fill. This NWP also authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the district engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(b) This NWP also authorizes the removal of accumulated sediments and debris outside the immediate vicinity of existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.). The removal of sediment is limited to the minimum necessary to restore the waterway in the vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend farther than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All

dredged or excavated materials must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization.

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

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

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

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

4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.* Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, and clam and oyster digging, fish aggregating devices, and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This NWP does not authorize artificial reefs or impoundments and semi-

impoundments of waters of the United States for the culture or holding of motile species such as lobster, or the use of covered oyster trays or clam racks. (Authorities: Sections 10 and 404).

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

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

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

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

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

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

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

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

11. *Temporary Recreational Structures.* Temporary buoys, markers, small floating docks, and similar structures placed for recreational use during specific events such as water

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

necessary to construct or protect the linear transportation project; such modifications must be in the immediate vicinity of the project.

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

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

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

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

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

Note 3: For NWP 14 activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see

paragraph (b)(4) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, "District Engineer's Decision." The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

15. *U.S. Coast Guard Approved Bridges.* Discharges of dredged or fill material incidental to the construction of a bridge across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills, provided the construction of the bridge structure has been authorized by the U.S. Coast Guard under Section 9 of the Rivers and Harbors Act of 1899 or other applicable laws. Causeways and approach fills are not included in this NWP and will require a separate Clean Water Act Section 404 permit. (Authority: Section 404 of the Clean Water Act (Section 404)).

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

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

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

18. *Minor Discharges.* Minor discharges of dredged or fill material

into all waters of the United States, provided the activity meets all of the following criteria:

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

(b) The discharge of dredged or fill material will not cause the loss of more than $\frac{1}{10}$ acre of waters of the United States; and

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

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

19. *Minor Dredging.* Dredging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States (*i.e.*, section 10 waters). This NWP does not authorize the dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist but may not be present in a given year), anadromous fish spawning areas, or wetlands, or the connection of canals or other artificial waterways to navigable waters of the United States (see 33 CFR 322.5(g)). All dredged material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. (Authorities: Sections 10 and 404).

20. *Response Operations for Oil or Hazardous Substances.* Activities conducted in response to a discharge or release of oil or hazardous substances that are subject to the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR part 300) including containment, cleanup, and mitigation efforts, provided that the activities are done under either: (1) The Spill Control and Countermeasure Plan required by 40 CFR 112.3; (2) the direction or oversight of the federal on-scene coordinator designated by 40 CFR part 300; or (3) any approved existing state, regional or local contingency plan provided that the Regional Response

Team (if one exists in the area) concurs with the proposed response efforts. This NWP also authorizes activities required for the cleanup of oil releases in waters of the United States from electrical equipment that are governed by EPA's polychlorinated biphenyl spill response regulations at 40 CFR part 761. This NWP also authorizes the use of temporary structures and fills in waters of the U.S. for spill response training exercises. (Authorities: Sections 10 and 404).

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

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

Note 1: Intentional ocean disposal of vessels at sea requires a permit from the U.S. EPA under the Marine Protection, Research and Sanctuaries Act, which specifies that ocean disposal should only be pursued when land-based alternatives are not available. If a Department of the Army permit is required for vessel disposal in waters of the United States, separate authorization will be required.

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

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

(a) That agency or department has determined, pursuant to the Council on Environmental Quality's implementing regulations for the National

Environmental Policy Act (40 CFR part 1500 *et seq.*), that the activity is categorically excluded from the requirement to prepare an environmental impact statement or environmental assessment analysis, because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment; and

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

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

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

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

24. Indian Tribe or State Administered Section 404 Programs.

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

Note 1: As of the date of the promulgation of this NWP, only Florida, New Jersey and Michigan administer their own Clean Water Act Section 404 permit programs.

Note 2: Those activities that do not involve an Indian Tribe or State Clean

Water Act Section 404 permit are not included in this NWP, but certain structures will be exempted by Section 154 of Public Law 94-587, 90 Stat. 2917 (33 U.S.C. 591) (see 33 CFR 322.4(b)).

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

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

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

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to the removal of accumulated sediments; releases of sediment from reservoirs to maintain sediment transport continuity to restore downstream habitats; the installation, removal, and maintenance of small water control structures, dikes, and berms, as well as discharges of dredged or fill material to restore appropriate stream channel configurations after small water control structures, dikes, and berms are

removed; the installation of current deflectors; the enhancement, rehabilitation, or re-establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to enhance, rehabilitate, or re-establish stream meanders; the removal of stream barriers, such as undersized culverts, fords, and grade control structures; the backfilling of artificial channels; the removal of existing drainage structures, such as drain tiles, and the filling, blocking, or reshaping of drainage ditches to restore wetland hydrology; the installation of structures or fills necessary to restore or enhance wetland or stream hydrology; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; coral restoration or relocation activities; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; re-establishment of submerged aquatic vegetation in areas where those plant communities previously existed; re-establishment of tidal wetlands in tidal waters where those wetlands previously existed; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.

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

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

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

Reversion. For enhancement, restoration, and establishment activities

conducted: (1) In accordance with the terms and conditions of a binding stream or wetland enhancement or restoration agreement, or a wetland establishment agreement, between the landowner and the U.S. Fish and Wildlife Service (FWS), the Natural Resources Conservation Service (NRCS), the Farm Service Agency (FSA), the National Marine Fisheries Service (NMFS), the National Ocean Service (NOS), U.S. Forest Service (USFS), or their designated state cooperating agencies; (2) as voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or (3) on reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) or the applicable state agency, this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (i.e., prior to the restoration, enhancement, or establishment activities). The reversion must occur within five years after expiration of a limited term wetland restoration or establishment agreement or permit, and is authorized in these circumstances even if the discharge of dredged or fill material occurs after this NWP expires. The five-year reversion limit does not apply to agreements without time limits reached between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS, or an appropriate state cooperating agency. This NWP also authorizes discharges of dredged or fill material in waters of the United States for the reversion of wetlands that were restored, enhanced, or established on prior-converted cropland or on uplands, in accordance with a binding agreement between the landowner and NRCS, FSA, FWS, or their designated state cooperating agencies (even though the restoration, enhancement, or establishment activity did not require a section 404 permit). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit. Before conducting any reversion activity, the permittee or the appropriate Federal or state agency must notify the district engineer and include the documentation of the prior condition. Once an area has reverted to its prior

physical condition, it will be subject to whatever the Corps Regulatory requirements are applicable to that type of land at the time. The requirement that the activity results in a net increase in aquatic resource functions and services does not apply to reversion activities meeting the above conditions. Except for the activities described above, this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion.

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

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

(1) Activities conducted on non-Federal public lands and private lands, in accordance with the terms and conditions of a binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS or their designated state cooperating agencies;

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

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

NRCS Field Office Technical Guide standards; or

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

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

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

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

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

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

31. Maintenance of Existing Flood Control Facilities. Discharges of dredged or fill material resulting from activities associated with the maintenance of existing flood control facilities, including debris basins, retention/

detention basins, levees, and channels that: (i) Were previously authorized by the Corps by individual permit, general permit, or 33 CFR 330.3, or did not require a permit at the time they were constructed, or (ii) were constructed by the Corps and transferred to a non-Federal sponsor for operation and maintenance. Activities authorized by this NWP are limited to those resulting from maintenance activities that are conducted within the "maintenance baseline," as described in the definition below. Discharges of dredged or fill materials associated with maintenance activities in flood control facilities in any watercourse that have previously been determined to be within the maintenance baseline are authorized under this NWP. To the extent that a Corps permit is required, this NWP authorizes the removal of vegetation from levees associated with the flood control project. This NWP does not authorize the removal of sediment and associated vegetation from natural water courses except when these activities have been included in the maintenance baseline. All dredged and excavated material must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. Proper sediment controls must be used.

Maintenance Baseline: The maintenance baseline is a description of the physical characteristics (*e.g.*, depth, width, length, location, configuration, or design flood capacity, etc.) of a flood control project within which maintenance activities are normally authorized by NWP 31, subject to any case-specific conditions required by the district engineer. The district engineer will approve the maintenance baseline based on the approved or constructed capacity of the flood control facility, whichever is smaller, including any areas where there are no constructed channels but which are part of the facility. The prospective permittee will provide documentation of the physical characteristics of the flood control facility (which will normally consist of as-built or approved drawings) and documentation of the approved and constructed design capacities of the flood control facility. If no evidence of the constructed capacity exists, the approved capacity will be used. The documentation will also include best management practices to ensure that the adverse environmental impacts caused by the maintenance activities are no more than minimal, especially in maintenance areas where there are no constructed channels. (The Corps may

request maintenance records in areas where there has not been recent maintenance.) Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5. Except in emergencies as described below, this NWP cannot be used until the district engineer approves the maintenance baseline and determines the need for mitigation and any regional or activity-specific conditions. Once determined, the maintenance baseline will remain valid for any subsequent reissuance of this NWP. This NWP does not authorize maintenance of a flood control facility that has been abandoned. A flood control facility will be considered abandoned if it has operated at a significantly reduced capacity without needed maintenance being accomplished in a timely manner. A flood control facility will not be considered abandoned if the prospective permittee is in the process of obtaining other authorizations or approvals required for maintenance activities and is experiencing delays in obtaining those authorizations or approvals.

Mitigation: The district engineer will determine any required mitigation one-time only for impacts associated with maintenance work at the same time that the maintenance baseline is approved. Such one-time mitigation will be required when necessary to ensure that adverse environmental effects are no more than minimal, both individually and cumulatively. Such mitigation will only be required once for any specific reach of a flood control project. However, if one-time mitigation is required for impacts associated with maintenance activities, the district engineer will not delay needed maintenance, provided the district engineer and the permittee establish a schedule for identification, approval, development, construction and completion of any such required mitigation. Once the one-time mitigation described above has been completed, or a determination made that mitigation is not required, no further mitigation will be required for maintenance activities within the maintenance baseline (see Note, below). In determining appropriate mitigation, the district engineer will give special consideration to natural water courses that have been included in the maintenance baseline and require mitigation and/or best management practices as appropriate.

Emergency Situations: In emergency situations, this NWP may be used to authorize maintenance activities in flood control facilities for which no maintenance baseline has been

approved. Emergency situations are those which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if action is not taken before a maintenance baseline can be approved. In such situations, the determination of mitigation requirements, if any, may be deferred until the emergency has been resolved. Once the emergency has ended, a maintenance baseline must be established expeditiously, and mitigation, including mitigation for maintenance conducted during the emergency, must be required as appropriate.

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

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

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

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

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

(b) The settlement agreement provides for environmental benefits, to an equal or greater degree, than the environmental detriments caused by the

unauthorized activity that is authorized by this NWP; and

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

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

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

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

33. **Temporary Construction, Access, and Dewatering.** Temporary structures, work, and discharges of dredged or fill material, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard. This NWP also authorizes temporary structures, work, and discharges of dredged or fill material, including cofferdams, necessary for construction activities not otherwise subject to the Corps or U.S. Coast Guard

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

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

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

Notification: The permittee must submit a pre-construction notification to the district engineer once during the period that this NWP is valid, and the NWP will then authorize discharges of dredge or fill material at an existing operation for the permit term, provided

the 10-acre limit is not exceeded. (See general condition 32.) (Authority: Section 404)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

45. *Repair of Uplands Damaged by Discrete Events.* This NWP authorizes discharges of dredged or fill material, including dredging or excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by storms, floods, or other discrete events. This NWP authorizes bank stabilization to protect the restored uplands. The restoration of the damaged areas, including any bank stabilization, must not exceed the contours, or ordinary high water mark, that existed before the damage occurred. The district engineer

retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this NWP. The work must commence, or be under contract to commence, within two years of the date of damage, unless this condition is waived in writing by the district engineer. This NWP cannot be used to reclaim lands lost to normal erosion processes over an extended period.

This NWP does not authorize beach restoration or nourishment.

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

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

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

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

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

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

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

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

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

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

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

For the purposes of this NWP, the term "low-head dam" is generally defined as a dam or weir built across a stream to pass flows from upstream over all, or nearly all, of the width of the dam crest and does not have a separate spillway or spillway gates, but it may have an uncontrolled spillway. The dam crest is the top of the dam from left

abutment to right abutment. A low-head dam may have been built for a range of purposes (e.g., check dam, mill dam, irrigation, water supply, recreation, hydroelectric, or cooling pond), but in all cases, it provides little or no storage function.

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

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

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

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

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

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

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

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the activity will result in no more than minimal adverse environmental effects;

(c) Coir logs, coir mats, stone, native oyster shell, native wood debris, and other structural materials must be adequately anchored, of sufficient weight, or installed in a manner that prevents relocation in most wave action or water flow conditions, except for extremely severe storms;

(d) For living shorelines consisting of tidal or lacustrine fringe wetlands, native plants appropriate for current site conditions, including salinity and elevation, must be used if the site is planted by the permittee;

(e) Discharges of dredged or fill material into waters of the United States, and oyster or mussel reef structures in navigable waters, must be the minimum necessary for the establishment and maintenance of the living shoreline;

(f) If sills, breakwaters, or other structures must be constructed to protect fringe wetlands for the living shoreline, those structures must be the minimum size necessary to protect those fringe wetlands;

(g) The activity must be designed, constructed, and maintained so that it has no more than minimal adverse effects on water movement between the waterbody and the shore and the movement of aquatic organisms between the waterbody and the shore; and

(h) The living shoreline must be properly maintained, which may require periodic repair of sills, breakwaters, or reefs, or replacing sand fills after severe storms or erosion events. Vegetation may be replanted to maintain the living shoreline. This NWP authorizes those maintenance and repair activities, including any minor deviations necessary to address changing environmental conditions.

This NWP does not authorize beach nourishment or land reclamation activities.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the construction of the living shoreline. (See general condition 32.) The pre-construction notification must include a delineation of special aquatic sites (see paragraph (b)(4) of general condition 32). Pre-construction notification is not required for maintenance and repair activities for living shorelines unless required by applicable NWP general conditions or regional conditions. (Authorities: Sections 10 and 404)

Note: In waters outside of coastal waters, nature-based bank stabilization techniques, such as bioengineering and vegetative stabilization, may be authorized by NWP 13.

59. *Water reclamation and reuse facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction, expansion, and maintenance of water reclamation and reuse facilities, including vegetated areas enhanced to improve water infiltration and constructed wetlands to improve water quality.

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

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

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

C. Nationwide Permit General Conditions

See the final rule published in the January 13, 2021, issue of the **Federal Register** at 86 FR 2867–2874 for the text of section C, General Conditions:

1. Navigation
2. Aquatic Life Movements
3. Spawning Areas
4. Migratory Bird Breeding Areas
5. Shellfish Beds
6. Suitable Material
7. Water Supply Intakes
8. Adverse Effects from Impoundments
9. Management of Water Flows
10. Fills Within 100-Year Floodplains
11. Equipment
12. Soil Erosion and Sediment Controls
13. Removal of Temporary Fills
14. Proper Maintenance
15. Single and Complete Project
16. Wild and Scenic Rivers
17. Tribal Rights
18. Endangered Species
19. Migratory Birds and Bald and Golden Eagles
20. Historic Properties
21. Discovery of Previously Unknown Remains and Artifacts
22. Designated Critical Resource Waters
23. Mitigation
24. Safety of Impoundment Structures
25. Water Quality
26. Coastal Zone Management
27. Regional and Case-by-Case Conditions
28. Use of Multiple Nationwide Permits
29. Transfer of Nationwide Permit Verifications
30. Compliance Certification
31. Activities Affecting Structures or Works Built by the United States
32. Pre-Construction Notification

D. District Engineer's Decision

See the final rule published in the January 13, 2021, issue of the **Federal Register** at 86 FR 2874–2875 for the text of section D, District Engineer's Decision:

E. Further Information

See the final rule published in the January 13, 2021, issue of the **Federal Register** at 86 FR 2875 for the text of section E, Further Information.

F. Definitions

See the final rule published in the January 13, 2021, issue of the **Federal Register** at 86 FR 2875–2877 for the text of section F, Definitions:

Best management practices (BMPs)
Compensatory mitigation
Currently serviceable
Direct effects
Discharge
Ecological reference

Enhancement
Establishment (creation)
High Tide Line
Historic property
Independent utility
Indirect effects
Loss of waters of the United States
Navigable waters
Non-tidal wetland
Open water
Ordinary high water mark
Perennial stream

Practicable
Pre-construction notification
Preservation
Re-establishment
Rehabilitation
Restoration
Riffle and pool complex
Riparian areas
Shellfish seeding
Single and complete linear project
Single and complete non-linear project
Stormwater management

Stormwater management facilities
Stream bed
Stream channelization
Structure
Tidal wetland
Tribal lands
Tribal rights
Vegetated shallows
Waterbody

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