

DEPARTMENT OF DEFENSE**Department of the Army****Corps of Engineers****Proposal To Issue, Reissue, and Modify Nationwide Permits; Public Hearing**

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

ACTION: Notice of intent and request for comments.

SUMMARY: The Corps of Engineers is proposing to reissue the existing nationwide permits (NWP) and conditions, with some modifications, and issue four new NWPs. We are also proposing options for the threshold limits for NWP 26.

The public is invited to provide comments on these proposals and is being given the opportunity to request public hearings on the NWPs. The Corps of Engineers will hold a public hearing at the National Guard Association Building, at One Massachusetts Ave, NW, Washington, DC on July 17, 1996, at 10:00 AM and end at 4:00 PM or before, if all speakers present have had an opportunity to speak. This hearing is opened to the public. Comments may be submitted in person at the hearing or in writing to the Office of the Chief of Engineers at the address given below. The hearing record will remain open until August 1, 1996. The legal authority for this hearing is 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).

DATES: Comments must be received by August 16, 1996.

ADDRESSES: National comments should be submitted in writing to: Office of the Chief of Engineers, ATTN: CECW-OR, 20 Massachusetts Avenue NW, Washington, DC 20314-1000. Regional comments should be sent to the appropriate Corps District offices at the addresses listed below. Comments will be available for examination at the Office of the Chief of Engineers, Room 6225, Pulaski Building, 20 Massachusetts Avenue NW, Washington, DC 20314-1000.

FOR FURTHER INFORMATION CONTACT: Mr. Tim Zimmerman or Mr. Sam Collinson, Regulatory Branch, Office of the Chief of Engineers at (202) 761-0199.

SUPPLEMENTARY INFORMATION:**Background**

The White House Office on Environmental Policy announced the President's Wetlands Plan on August 24, 1993. The plan sets forth a

comprehensive package of improvements to the Federal wetlands protection programs. A major goal of the plan is that the programs be fair, flexible, and effective. To achieve this goal, the Corps regulatory program must continue to provide effective protection for wetlands and other aquatic resources, while conveying to the public a clear understanding of regulatory requirements. In its implementation, the regulatory program must be administratively efficient, flexible yet predictable, and avoid unnecessary impacts to private property, the regulated public, and the environment.

There are 37 existing nationwide permits. Thirty-six of the NWPs were published in the November 22, 1991, Federal Register at 33 CFR Part 330, Appendix A. They became effective on January 21, 1992, and expire on January 21, 1997. One additional NWP, the Single-Family Housing NWP (NWP 29), was published in the Federal Register on July 27, 1995, and became effective on September 25, 1995. NWP 29 will expire on September 25, 2000.

In the preamble of the Final Rule at 33 CFR Part 330 as published in the Federal Register (56 FR 59110) on November 22, 1991, we indicated that upon expiration of the existing NWPs, we would issue the NWPs separately from the regulations governing their use and rescind 33 CFR Part 330, Appendix A. The NWPs will now be published using the procedures adopted in November 22, 1991, for issuance, reissuance, modification, and revocation of NWPs (see 33 CFR 330.5). The NWPs will no longer appear in the Code of Federal Regulations but will be published in the Federal Register and announced, with regional conditions, in the public notices issued by Corps district offices.

We are proposing to reissue all the existing NWPs. We are also proposing to modify several existing NWPs and several NWP conditions as published in the Federal Register (56 FR 59110-47) on November 22, 1991 to clarify activities that are authorized by NWPs and those that are not. Several of the proposed clarifications are a result of the modification of the definition of discharge of dredged material at 33 CFR Part 323.2(d) as published in the Federal Register (58 FR 45008-38) on August 25, 1993 (i.e., the excavation rule). The definition was revised to clarify that certain excavation activities are regulated and included the following language: "(iii) Any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including

mechanized landclearing, ditching, channelization, or other excavation." (See 33 CFR 323.(d) for the complete definition of discharge of dredged material).

We are also proposing, in accordance with the President's Wetlands Plan, four new NWPs to authorize those additional regulated activities with minimal effects that resulted from the excavation rule. These new NWPs include: A. Moist Soil Management for Wildlife; B. Food Security Act Minimal Effect Exemptions; C. Minor Mining Activities; and D. Maintenance of Existing Flood Control Projects.

The Corps believes, that when these changes are considered as a whole, the average approval time for projects requiring a Department of the Army permit will not change. However, the individual approval time for some projects will be longer while others will be shorter. In addition, we believe that the approval time for a vast majority of nationwide permits will not be affected by these changes.

Regional Conditioning of Nationwide Permits

Concurrent with this Federal Register notice, District Engineers are issuing local public notices. In addition to the changes to NWP conditions being proposed by the Chief of Engineers, the Division and District Engineers may propose regional conditions or propose revocation of NWP authorization for all or some or portions of the NWPs. Regional conditions may also be required by state Section 401 water quality certification or for state coastal zone consistency. Comments on regional issues and regional conditions should be sent to the appropriate District Engineer as indicated below.

ALABAMA

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

ALASKA

Alaska District Engineer, ATTN: CENPA-CO-R, P.O. Box 898, Anchorage, AK 99506-0898

ARIZONA

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

ARKANSAS

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

CALIFORNIA

Sacramento District Engineer, ATTN: CESPK-CO-O, 1325 J Street, Sacramento, CA 95814-4794

COLORADO

Albuquerque District Engineer, ATTN: CESWA-CO-R, 4101 Jefferson Plaza NE, Rm 313, Albuquerque, NM 87109-3435

CONNECTICUT

- New England Division Engineer, ATTN: CENED-OD-R, 424 Trapelo Road, Waltham, MA 02254-9149
- DELAWARE**
Philadelphia District Engineer, ATTN: CENAP-OP-R, Wannamaker Building, 100 Penn Square, East Philadelphia, PA 19107-3390
- FLORIDA**
Jacksonville District Engineer, ATTN: CESAJ-RD, P.O. Box 4970, Jacksonville, FL 32232-0019
- GEORGIA**
Savannah District Engineer, ATTN: CESAS-OP-F, P.O. Box 889, Savannah, GA 31402-0889
- HAWAII**
Honolulu District Engineer, ATTN: CEPOD-ET-PO, Building 230, Fort Shafter, Honolulu, HI 96858-5440
- IDAHO**
Walla Walla District Engineer, ATTN: CENPW-OP-RF, Building 602, City-County Airport, Walla Walla, WA 99362-9265
- ILLINOIS**
Rock Island District Engineer, ATTN: CENC-R-OD-S, P.O. Box 2004, Rock Island, IL 61201-2004
- INDIANA**
Louisville District Engineer, ATTN: CEORL-OR-F, P.O. Box 59, Louisville, KY 40201-0059
- IOWA**
Rock Island District Engineer, ATTN: CENC-R-OD-S, P.O. Box 2204, Rock Island, IL 61201-2004
- KANSAS**
Kansas City District Engineer, ATTN: CEMRK-OD-P, 700 Federal Building, 601 E. 12th Street, Kansas City, MO 64106-2896
- KENTUCKY**
Louisville District Engineer, ATTN: CEORL-OR-F, P.O. Box 59, Louisville, KY 40201-0059
- LOUISIANA**
New Orleans District Engineer, ATTN: CELMN-OD-S, P.O. Box 60267, New Orleans, LA 70160-0267
- MAINE**
New England Division Engineer, ATTN: CENED-OD-R, 424 Trapelo Road, Waltham, MA 02254-9149
- MARYLAND**
Baltimore District Engineer, ATTN: CENAB-OP-R, P.O. Box 1715, Baltimore, MD 21203-1715
- MASSACHUSETTS**
New England Division Engineer, ATTN: CENED-OD-R, 424 Trapelo Road, Waltham, MA 02254-9149
- MICHIGAN**
Detroit District Engineer, ATTN: CENCE-CO-L, P.O. Box 1027, Detroit, MI 48231-1027
- MINNESOTA**
St. Paul District Engineer, ATTN: CENCS-CO-R, 190 Fifth Street, East, St. Paul, MN 55101-1638
- MISSISSIPPI**
Vicksburg District Engineer, ATTN: CELMV-CO-O, P.O. Box 80, Vicksburg, MS 39180-0080
- MISSOURI**
Kansas City District Engineer, ATTN: CEMRK-OD-P, 700 Federal Building, 601 E. 12th Street, Kansas City, MO 64106-2896
- MONTANA**
Omaha District Engineer, ATTN: CEMRO-OP-R, P.O. Box 5, Omaha, NE 68101-0005
- NEBRASKA**
Omaha District Engineer, ATTN: CEMRO-OP-R, 215 North 17th Street, Omaha, NE 68101-4978
- NEVADA**
Sacramento District Engineer, ATTN: CESPK-CO-O, 1325 J Street, Sacramento, CA 95814-2922
- NEW HAMPSHIRE**
New England Division Engineer, ATTN: CENED-OD-R, 424 Trapelo Road, Waltham, MA 02254-9149
- NEW JERSEY**
Philadelphia District Engineer, ATTN: CENAP-OP-R, Wannamaker Building, 100 Penn Square East, Philadelphia, PA 19106-2991
- NEW MEXICO**
Albuquerque District Engineer, ATTN: CESWA-CO-R, 4101 Jefferson Plaza NE, Rm 313, Albuquerque, NM 87109-3435
- NEW YORK**
New York District Engineer, ATTN: CENAN-OP-R, Jacob K. Javits Federal Building, New York, NY 10278-0090
- NORTH CAROLINA**
Wilmington District Engineer, ATTN: CESAW-CO-R, P.O. Box 1890, Wilmington, NC 28402-1890
- NORTH DAKOTA**
Omaha District Engineer, ATTN: CEMRO-OP-R, 215 North 17th Street, Omaha, NE 68102-4978
- OHIO**
Huntington District Engineer, ATTN: CEORH-OR-F, 502 8th Street, Huntington, WV 25701-2070
- OKLAHOMA**
Tulsa District Engineer, ATTN: CESWT-OD-R, P.O. Box 61, Tulsa, OK 74121-0061
- OREGON**
Portland District Engineer, ATTN: CENPP-PL-R, P.O. Box 2946, Portland, OR 97208-2946
- PENNSYLVANIA**
Baltimore District Engineer, ATTN: CENAB-OP-R, P.O. Box 1715, Baltimore, MD 21203-1715
- RHODE ISLAND**
New England Division Engineer, ATTN: CENED-OD-R, 424 Trapelo Road, Waltham, MA 02254-9149
- SOUTH CAROLINA**
Charleston District Engineer, ATTN: CESAC-CO-P, P.O. Box 919, Charleston, SC 29402-0919
- SOUTH DAKOTA**
Omaha District Engineer, ATTN: CEMRO-OP-R, 215 North 17th Street, Omaha, NE 68102-4978
- TENNESSEE**
Nashville District Engineer, ATTN: CEORN-OR-F, P.O. Box 1070, Nashville, TN 37202-1070
- TEXAS**
Ft. Worth District Engineer, ATTN: CESWF-OD-R, P.O. Box 17300, Ft. Worth, TX 76102-0300
- UTAH**
Sacramento District Engineer, ATTN: CESPK-CO-O, 1325 J Street, CA 95814-4794
- VERMONT**
New England Division Engineer, ATTN: CENED-OD-R, 424 Trapelo Road, Waltham, MA 02254-9149
- VIRGINIA**
Norfolk District Engineer, ATTN: CENAO-OP-P, 803 Front Street, Norfolk, VA 23510-1096
- WASHINGTON**
Seattle District Engineer, ATTN: CENPS-OP-RG, P.O. Box 3755, Seattle, WA 98124-2255
- WEST VIRGINIA**
Huntington District Engineer, ATTN: CEORH-OR-F, 502 8th Street, Huntington, WV 25701-2070
- WISCONSIN**
St. Paul District Engineer, ATTN: CENCS-CO-R, 190 Fifth Street, East, St. Paul, MN 55101-1638
- WYOMING**
Omaha District Engineer, ATTN: CEMRO-OP-R, 215 North 17th Street, NE 68102-4978
- DISTRICT OF COLUMBIA**
Baltimore District Engineer, ATTN: CENAB-OP-R, P.O. Box 1715, Baltimore, MD 21203-1715
- PACIFIC TERRITORIES**
Honolulu District Engineer, ATTN: CEPOD-ET-PO, Building 230, Fort Shafter, Honolulu, HI 96858-5440
- PUERTO RICO & VIRGIN IS**
Jacksonville District Engineer, ATTN: CESAJ-RD, P.O. Box 4970, Jacksonville, FL 32232-0019
- State (or Tribal) Certification of Nationwide Permits
- State or tribal water quality certification pursuant to Section 401 of the Clean Water Act, or waiver thereof, is required for activities authorized by NWP's which may result in a discharge into waters of the United States. In addition, any state with a Federally approved Coastal Zone Management (CZM) Plan must agree with the Corps determination that activities authorized by NWP's which are within, or will affect any land or water uses or natural resources of the state's coastal zone are consistent with the state CZM Plan.
- The Corps believes that, in general, the activities authorized by the NWP's will not violate state or tribal water quality standards and will be consistent with state CZM Plans. The NWP's are conditioned to ensure that adverse environmental effects will be minimal and are the types of activities that would be routinely authorized, if evaluated under the individual permit process. The Corps recognizes that in some states or tribes there will be a need to add regional conditions or individual state or tribal review for some activities to ensure compliance with state water quality standards or consistency with state CZM Plans. The Corps goal is to

develop such conditions so that the states or tribes can issue 401 water quality certifications or CZM consistency agreements. Therefore, each Corps District will initiate discussions with their respective states, tribes, and EPA following publication of this proposal to discuss issues of concern and identify regional modifications and other approaches to the scope of waters, activities, discharges, and notification, as appropriate, to resolve these issues. Note that there will be some states where a state programmatic general permit (SPGP) has been adopted and the NWP have been wholly or partially revoked. Simultaneous with today's proposal, Corps Districts may be proposing modification or revocation of the NWP in states where SGP's will be used in place of some or all of the NWP program.

Section 401 of the Clean Water Act: This Federal Register notice of these NWP's serves as the Corps application to the states, tribes, or EPA, where appropriate, for 401 water quality certification of the activities authorized by these NWP's. The states, tribes, and EPA, where appropriate, are requested to issue, deny, or waive certification pursuant to 33 CFR 330.4 (c) for these NWP's.

Section 401 water quality certification requirements fall into the following general categories:

NWP's numbered 1, 2, 8, 9, 10, 11, 24, 28 and 35 do not require 401 water quality certification since they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge and in the case of NWP 8 is seaward of the territorial seas.

NWP's numbered 3, 4, 5, 6, 7, 13, 14, 19, 20, 21, 22, 23, 27, 32, 33, 36, 37, 38, and D involve various activities, some of which may result in a discharge and require 401 water quality certification, and others of which do not. State denial of 401 water quality certification for any specific NWP in this category affects only those activities which may result in a discharge. For those activities not involving discharges, the NWP remains in effect.

NWP's identified as 12, 15, 16, 17, 18, 25, 26, 29, 34, 40, A, B, and C, involve activities which would result in discharges and therefore 401 water quality certification is required.

If the state denies a 401 water quality certification for certain activities within that state, then the Corps will deny authorization for those activities without prejudice. Anyone wanting to perform such activities must first obtain a project specific 401 water quality certification or waiver thereof from the

state before proceeding under the NWP. This requirement is provided at 33 CFR 330.4(c).

Section 307 of the Coastal Zone Management Act (CZMA): This Federal Register notice serves as the Corps determination that the activities authorized by these NWP's are consistent with states' CZM programs, where applicable. This determination is contingent upon the addition of state CZM conditions and/or regional conditions or the issuance by the state of an individual consistency concurrence, where necessary. The states are requested to agree or disagree with this consistency determination pursuant to 33 CFR 330.4(d) for these NWP's.

The Corps CZMA consistency determination only applies to NWP authorizations for activities that are within, or affect any land or water uses or natural resources of a state's coastal zone. NWP authorizations for activities that are not within or would not affect a state's coastal zone are not contingent on such state's agreement or disagreement with the Corps consistency determinations.

If a state disagrees with the Corps CZMA consistency determination for certain activities, then the Corps will deny authorization for those activities without prejudice. Anyone wanting to perform such activities must present a consistency certification to the appropriate state agency for concurrence. Upon concurrence with such consistency certifications by the state, the activity would be authorized by the NWP. This requirement is provided at 33 CFR 330.4(d).

Discussion of Proposed Modifications to Existing Nationwide Permits

The proposed changes to the existing NWP's fall into three categories:

Category I (Cat I)—Clarification of existing NWP's to address questions and issues that have arisen since the NWP's were issued in 1991. It does not change the number and types of activities now authorized by the NWP.

Category II (Cat II)—Changes to existing NWP's due to the modification of the definition of discharge of dredged material in the Excavation Rule, as published in the Federal Register on August 25, 1993 (58 FR 45008-38). These NWP's involve activities that previously only required Section 10 authorization but are now regulated under Section 404 as well. These proposed changes will not change the number and type of activities now authorized by the NWP.

Category III (Cat III)—Modifications to existing NWP's that change the number

of activities authorized under these NWP's.

The following is a discussion of our reasons for modifying existing NWP's. If an existing NWP is not listed, we are not proposing to change it but to reissue the current NWP.

4. Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities. (Cat I) We are clarifying that NWP 4 does not authorize the use of covered oyster trays or clam racks.

6. Survey Activities. (Cat III) The Corps is proposing to allow discharges of dredged or fill material and placement of structures necessary to complete a survey for historic resources, but not for discharges or structures necessary for the actual recovery of the artifacts/information. The Corps is also proposing to authorize activities necessary to conduct soil surveys and sampling. This NWP does not authorize the placement of any permanent structures.

8. Oil and Gas Structures. (Cat I) We are clarifying that any Corps review of this NWP, that may be required by discretionary authority, is limited to the effects on navigation and national security as stated in 33 CFR 322.5(f).

12. Utility Line Discharges. (Cat I and II) We are proposing to modify the wording of this NWP to include the discharge of material resulting from the trench excavation. We are also soliciting comments on whether limitations should be established for discharges into special aquatic sites. Also included is clarification concerning parallel structures to waterbodies and mechanized landclearing of right-of-ways for utility lines located below the surface of waters of the United States to the minimum necessary.

16. Return Water From Upland Contained Disposal Areas. (Cat II) The Corps proposes to modify the wording of this NWP to note dredging may now require a Section 404 permit.

18. Minor Discharges. (Cat I) We are proposing to modify the wording of this NWP to include the volume of any excavated area as a measurement of the quantity of discharge.

19. Minor Dredging. (Cat II) We are proposing to modify this NWP to authorize under section 404 of the Clean Water Act, the incidental discharges associated with the dredging activity. However, this NWP does not apply in Section 404 only waters. Furthermore, it does not apply in wetlands, coral reefs, sites that support submerged aquatic vegetation, or anadromous fish spawning area. NWP's 18 and 19 may be combined in Section 10 only waters (i.e., navigable waters of the United States). For example, because

Notification is not required for NWP 18 under 10 cubic yards, a total of 35 cubic yards may be excavated from a navigable water of the U.S. (i.e., Section 10 water) using a combination of NWPs 18 and 19, without notification. Excavation greater than 35 cubic yards but less than 50 cubic yards require notification.

21. Surface Coal Mining Activities. (Cat III) We are considering expanding this NWP for mining activities on previously mined lands that have not been subject to restoration. Currently, there is a disincentive for mining companies to use an area that has been impacted by previous mining activities, where wetlands have naturally established. In such cases, mining companies are generally required as a condition of the permit to mitigate off-site prior to or early in the mining operation. These previously mined areas are generally degraded and of poor quality. While in some cases, the wetlands may be of good quality, the overall area remains degraded. We are proposing to add a provision that when previously mined lands are used and wetlands have naturally established, any mitigation requirements would be limited to onsite mitigation to occur at the completion of the work. A performance bond would be required to ensure the restoration occurs. The purpose of this provision would be to encourage the mining of previously mined areas that are degraded rather than the mining of new areas. Under this proposal, previously degraded mined areas would be restored upon completion of the subsequent mining operation. We have not proposed specific language and are seeking comments recommending the terms and conditions for this proposed addition to this NWP.

25. Structural Discharges. (Cat I and II) We are clarifying that this NWP may be utilized for general navigation purposes, such as the construction of mooring cells and some excavation activities necessary for construction of the structure.

26. Headwaters and Isolated Waters Discharges. (Cat III) To provide additional time for review and to better ensure project effects are minimal, we are proposing to increase the 30-day pre-construction notification (PCN) process to a 45-day PCN. The maximum time frame will allow for review and evaluation of effects of a project when necessary to ensure that the project effects are minimal. We expect that the increased time will only be used in a minority of the NWP 26 PCNs and then generally only when necessary to analyze the acceptability of developing

adequate mitigation. We believe that the average processing time for NWP PCNs will continue to be under 30 days. In addition, the Corps is considering changing the acreage threshold limits of NWP 26. Currently, activities that affect less than one acre may proceed without notifying the Corps, activities affecting 1 to 10 acres require a PCN, and activities affecting over 10 acres may not be authorized by this NWP. The Corps is proposing 3 options for the acreage limits that would define when a PCN must be submitted. We are requesting comments on these options which are as follows:

Option 1: 1 to 10 acres (current thresholds)
Option 2: $\frac{1}{2}$ to 5 acres
Option 3: $\frac{1}{3}$ to 3 acres

Based on a survey of Corps field offices using FY94 data, the estimated numbers of additional activities that would require a PCN are 3700 for Option 2 and 5200 for Option 3 annually. However, while not required to, many of these projects are now requesting a verification from the Corps without the guarantee of a decision time frame. The PCN would provide that guarantee. In addition, in several Corps districts, the states have denied Section 401 water quality certifications for the larger projects. Furthermore, in some states, the Corps has issued state programmatic general permits based on state programs that have lower limits. The Corps does not believe that this proposal would result in many more individual permits. The Corps anticipates that most of these PCN activities, as with the verification requests that are currently being submitted for projects impacting less than 1 acre of waters of the United States, will be authorized by NWP 26. The increased review will increase environmental protection and increase consistency for projects below 1 acre of effects to waters of the United States.

To offset the additional workload and to expedite the review that either Option 2 and 3 may generate for some Districts, the PCN for projects affecting between the minimum threshold ($\frac{1}{2}$ or $\frac{1}{3}$) and 1 acre would not require coordination with the resource agencies. Finally, the Corps believes that this proposal together with all the changes proposed today will not increase the Corps average processing time for general permits but will provide for increased environmental protection.

Regionalization of NWP 26: As noted in the President's Plan, the Corps will initiate a process to regionalize this NWP following a decision regarding which threshold option is adopted. The regionalization of NWP 26 will further

improve its effectiveness. The Corps, in coordination with appropriate Federal, State, Tribal agencies and the public, will conduct a field level review for the purpose of identifying, on a regional basis, the types of waters and activities that would be authorized by this NWP. This approach was developed after careful consideration of several alternatives. Regionalization of NWP 26 has several advantages including the ability to appropriately condition this general permit to reflect the more local environmental conditions within each state or region, and facilitate State/Tribal (or EPA) certification of the permit.

The Corps recognizes that fewer than half the states have issued section 401 certification for the existing NWP 26. As part of the discussions that would be initiated by the Corps districts with their respective states, tribes, and EPA to address issues related to Section 401 certification, the Corps would work with the parties to determine what modifications can be made on a regional basis to NWP 26, in terms of acreage limits, types of waters, notification, and authorized activities.

27. Wetland and Riparian Restoration and Creation Activities. (Cat II and III) The Corps proposes to modify this NWP to allow projects to occur on any Federal lands. Projects occurring on private land will still be permitted provided there is a binding contract between the landowner and the Federal Government which describes the long term management goals of the project. Projects occurring on Federal land by Federal agencies would be allowed after review and approval of the Operation and Maintenance Plan for the project. Also, we are considering expanding this NWP to allow for the creation of wetlands and their subsequent reversion on reclaimed surface coal mined lands provided the wetlands were voluntarily created under an Office of Surface Mining (OSM) permit or an applicable state program permit. OSM has estimated that thousands of acres of wetlands could be created each year most of which would be left undisturbed permanently. This would not apply to wetlands created as mitigation for the mining permit, nor to wetlands or waters that would be created due to hydrologic or topographic features of the landscape, and nor to wetlands created for a mitigation bank. We have not proposed specific language and are seeking comments recommending the terms and condition for this NWP.

We are also seeking comments on whether (1) to eliminate the 5 year window of reversion opportunity and

allow the reversion to occur at any time in the future; (2) to allow use of this NWP to any voluntary restoration/creation project; (3) to include enhancement as an option; and (4) to require a written agreement in all cases, even where voluntary restoration is occurring under other Federal or State programs without a written agreement. If we should require a written agreement in such cases, who should approve it and when? If there is no written agreement requirement, how should the baseline be documented and should there be a time limit for any reversion to take place?

29. Single-Family Housing NWP. This NWP was published for public comment in the March 23, 1995, Federal Register (60 FR 15439) and became effective on September 25, 1995 (60 FR 38650). We are now proposing to reissue this NWP. This will put all the NWPs on the same five-year review cycle. We are proposing to modify the notification process so that it will be the same as other NWPs and to provide for resource agency coordination during the notification review process. We are not, at this time, proposing any other modifications to this NWP. Should we not reissue NWP 29 at this time, it will remain in effect until it expires on September 25, 2000 unless modified, suspended, or revoked sooner.

We are, however, interested in your comments concerning the impacts of this NWP. We continue to believe that this NWP provides relief to small landowners with minimal effects on the aquatic environment. Since its issuance, we have tracked the use of this NWP. For the first two quarters (October 1995–March 1996), NWP 29 was used a total of 123 times nationwide resulting in only 27.1 acres of wetland impacts. This use and acreage amount was well below what we initially estimated. We will continue to track the use of this NWP to insure the effects are minimal.

32. Completed Enforcement Work. (Cat III) The Corps is proposing several changes to this NWP. First, we are proposing to expand the scope beyond judicial enforcement actions to include agreements resulting from Corps negotiated settlements that are not a part of judicial actions, provided that such final agreements satisfy the specific criteria set out in paragraphs (i) (A)–(C) of the proposed permit. By setting out standards limiting the extent of the unauthorized activity and ensuring that the overall effect of the final agreement is, at a minimum, no net loss of wetlands, subpart (i) of the proposed NWP satisfies the “minimal effects” threshold for issuance of NWPs. This subpart also clarifies that obtaining an

agreement does not grant automatic coverage under this NWP. A written verification from the District Engineer is required.

This expansion of NWP 32 would eliminate a duplication of our evaluation efforts. Currently, we begin the enforcement action, in accordance with 33 CFR 326, with a thorough evaluation process, usually involving full agency coordination. This process often leads to an agreement which may include restoration and mitigation. In such cases, we then reevaluate the action through a second evaluation process usually leading to issuance of an after-the-fact (ATF) permit. This NWP would eliminate the need for the second evaluation process for those actions that would qualify for the NWP. This, in turn, would reduce the need for those ATF permits that consume permit application processing resources without providing an appreciable environmental benefit. The ATF permit process still remains a valuable tool in the enforcement program as a way to resolve those violations that could not be resolved through a settlement agreement and do not warrant judicial action.

The other changes to this NWP apply to both judicial decisions and agreements and nonjudicial administrative enforcement settlements. They clarify that compliance with the underlying judicial or administrative decision or agreement is a condition of the NWP itself and that the only future activities authorized under this permit are those undertaken to complete the restoration and/or mitigation in compliance with such decision or agreement.

The Corps is also considering providing that EPA administrative settlement agreements could be authorized under this NWP. We are seeking comments concerning whether this would be appropriate and if so, what conditions, if any, would be appropriate.

33. Temporary Construction, Access and Dewatering. (Cat I and II) We are proposing to add the provision from recent guidance stating that this NWP could be used for construction activities not subject to either the Corps or U.S. Coast Guard regulations. We also propose to allow the use of on-site dredged material for temporary fills, at the discretion of the District Engineer. Also, the last sentence of this NWP as it currently exists will be deleted. As a result of the Excavation Rule, we now regulate both mining activities and construction of marina basins in Section 404 areas; therefore, this provision is no longer applicable.

38. Cleanup of Hazardous and Toxic Waste. (Cat I) The Corps proposes to clarify which projects approved under CERCLA do not require authorization under sections 10 and 404.

40. Farm Buildings. (Cat I) The reference to the “Minimization” Condition is being corrected to reflect its current title, “Mitigation” Condition. We are also proposing to delete “agricultural related structures necessary for farming activities” to clarify that we intend that this NWP is for authorization of farm buildings such as agricultural sheds, supply storage, animal housing, and production facilities located on a farm or ranch.

The following is a discussion of the new NWPs we are proposing to issue. We have identified these NWPs by letters for the purposes of proposing these NWPs. If issued, they would be placed at a reserved NWP number or given a new number.

A. Moist Soil Management for Wildlife. The Corps is proposing to authorize discharges of dredged or fill material into non-tidal wetlands necessary to manage, construct, and/or maintain habitat and feeding areas for wildlife. This NWP applies to Federally-owned or managed and State-owned or managed property. Currently, certain management practices (discing, plowing, mechanized land clearing, etc.) require site specific authorization even though the discharge of dredged material is for the enhancement/maintenance of the aquatic area. Some wildlife management practices were not consistently regulated until 1993. In an effort to reduce the effect of the changes on the regulation of minor activities with only minimal adverse environmental effects due to the excavation rule, this proposal will allow the management of existing wildlife areas to proceed without unnecessary review by various agencies. This proposal will also further the goal of the President's Wetlands Plan to reduce duplication among regulatory agencies. This will, of course, still allow for the use of discretionary authority when very sensitive/unique areas may be adversely effected by these activities.

B. Food Security Act Minimal Effect Exemptions. As noted in the President's Wetland Plan, the Corps is proposing a NWP for discharges of dredged or fill material into waters of the United States associated with certain minimal effect determinations, that are exemptions from the Food Security Act, as determined by the Natural Resources Conservation Service (NRCS) in accordance with a written agreement between the NRCS and the landowner. This NWP also authorizes any

mitigation for these exemptions that is required by the written agreement.

The goal of the President's Wetland Plan is to produce one-stop-shopping and reduce the differences between programs to the extent practicable. In this regard, the Corps believes that some NRCS exemptions would qualify for authorization under a NWP while others would not. We are not proposing specific language for the NWP. We are requesting public comments suggesting limitations or restrictions for this NWP in order to insure effects are minimal. The final language would be based on Section 322 of the 1996 Farm Bill, NRCS regulations, and comments submitted regarding limitations and/or thresholds that should be established to ensure that these activities meet the requirements for issuance of NWPs. To assist you in providing us comments on this NWP, we have included the following excerpt from Section 322 of the 1996 Farm Bill (H.R. 2854) which discusses the minimal effect determination:

* * *The minimal effect exemption will apply when the Secretary (of the U.S. Department of Agriculture) has determined that 1 or more of the following conditions exist:

(1) The action, individually and in connection with all other similar actions authorized by the Secretary in the area, will have a minimal effect on the functional hydrological and biological value of the wetlands in the area, including the value to waterfowl and wildlife.

(2) The wetland and the wetland values, acreage, and functions are mitigated by the person through the restoration of a converted wetland, the enhancement of an existing wetland, or the creation of a new wetland, and the restoration, enhancement, or creation is—

(A) In accordance with a wetland conservation plan;

(B) In advance of, or concurrent with, the action;

(C) Not at the expense of the Federal Government;

(D) In the case of enhancement or restoration of wetlands, on not greater than a 1-for-1 acreage basis unless more acreage is needed to provide equivalent functions and values that will be lost as a result of the wetland conversion to be mitigated;

(E) In the case of creation of wetlands, on greater than a 1-for-1 acreage basis if more acreage is needed to provide equivalent functions and values that will be lost as a result of the wetland conversion that is mitigated;

(F) on lands in the same general area of the local watershed as the converted wetland; and

(G) with respect to the restored, enhanced, or created wetland, made subject to an easement that—

(i) Is recorded on public land records;

(ii) Remains in force for as long as the converted wetland for which the restoration, enhancement, or creation to be mitigated

remains in agricultural use or is not returned to its original wetland classification with equivalent functions and values; and

(iii) Prohibits making alterations to the restored, enhanced, or created wetland that lower the wetland's functions and values.

(3) The wetland was converted after December 23, 1985, but before November 28, 1990, and the wetland values, acreage, and functions are mitigated by the producer through the requirements of subparagraphs (A), (B), (C), (D), (F) and (G) of paragraph (2).

(4) The action was authorized by a permit issued under section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344) and the wetland values, acreage, and functions of the converted wetland were adequately mitigated for the purposes of this subtitle.

C. Mining Operations. The Corps is proposing to authorize certain work and/or discharges of dredged material incidental to active mining of sand and gravel and recreational mining.

Paragraph a. of the proposed NWP will allow certain operations existing before August 1993, where the effects have already occurred, some for many years, to continue in some cases on a limited basis, with minimal regulation. Until the final excavation rule was issued on August 25, 1993, some active mining operations had not been regulated under either Section 402 (EPA jurisdiction) or Section 404 (Corps jurisdiction). Authorization under this NWP would be for a defined area, would not include expansion, and would require "Notification" to the Corps. In addition, we are expressly seeking comments on appropriate restrictions for this NWP including seasonal use (e.g., fish spawning), application of best management practices, and restrictions or prohibitions on in-stream use. For example, should the NWP be limited to activities effecting less than a certain number of acres of waters of the United States or involving less than a certain number of cubic yards of excavated material annually?

Paragraph b. of the proposed NWP would authorize recreational mining with minimal effects either individually or cumulatively. The potential environmental effects of mining operations of this nature vary considerably throughout the country. Therefore, we are not proposing any nationwide specific limitations. We believe limitations are more appropriately established by the Corps Districts and Division at the local level based on public comment. The Division Engineer is responsible for establishing appropriate limits on recreational mining operations within their areas of regulatory responsibility after public notice and opportunity for public

hearing. The Division Engineer will add regional conditions, as necessary, to ensure that the effects will be minimal. This portion of the NWP will not be effective until the Division Engineer establishes regional limitations. On a case-by-case basis, the District Engineer will, if necessary, add appropriate and practicable special conditions to ensure that effects are minimal or will exert discretionary authority to require an individual permit for any activity whose effects exceed the minimal threshold. If you believe that NWP conditions should be established, we welcome comments on appropriate restrictions for this NWP including seasonal use (e.g., fish spawning), application of best management practices, and limitations on in-stream use. Again, for example, should the NWP be limited to activities effecting less than a certain number of acres of waters of the United States or a certain number of linear feet of stream channel?

While the Corps is primarily concerned with establishing NWP thresholds to determine which activities could be authorized under this NWP, the Corps is also considering establishing thresholds for recreational mining, below which a Corps permit would not be required. For recreational mining that does not destroy or degrade waters of the United States, a Section 404 permit is not required pursuant to 33 CFR 323.2(d)(3) of the Excavation Rule. Recreational activities that have a de minimis (inconsequential) effect do not require a permit. Several Corps District Offices have solicited comments from the public to establish a de minimis threshold. Other Corps districts will also be issuing public notices to seek public comment to establish threshold limits for minor activities that will not destroy or degrade aquatic resources. Such inconsequential activities would not require a Corps permit.

This NWP is not to be used for peat mining nor may it be used to access sand and gravel through a peat deposit that is a water of the United States. The discharge of onshore or onboard processed material into waters of the U.S. is considered a Section 402 discharge and may also require a permit under Section 402 of the Clean Water Act. For the purpose of this NWP, activities can be considered "recreational" when they are primarily for personal enjoyment and are not reasonably associated with or an extension of a commercial enterprise. For example, a commercial enterprise where mining interests are leased, sold, transferred, etc., to individuals to

conduct "recreational" mining does not qualify for the NWP.

D. Maintenance of Existing Flood Control Projects. The Corps proposes to authorize the excavation and removal of accumulated sediment and associated vegetation for maintenance of existing flood control facilities including debris basins, retention/detention basins and channels not to exceed previously authorized depths and configurations provided the dredged material is disposed of at an upland site or a currently authorized disposal site in waters of the United States, and proper siltation controls are used. Prior to the excavation rule, this activity was not consistently regulated by the Corps. Further, the Corps believes that, when considering a baseline environmental condition or the approved flood control channel, such excavation activities will not result in more than minimal effects. The Corps is interested in receiving comments regarding whether time limits should be placed on accepting the baseline condition of older projects that have had little or no maintenance over the years.

Notification to the District Engineer is being proposed for excavation undertaken in flood control facilities such as unlined basins or channels that were previously authorized, or authorized by 33 CFR 330.3. We are interested in receiving comments regarding the maximum cubic yardage to be allowed before notification is required.

This NWP is not intended to authorize the removal of sediment and associated vegetation from natural water courses for such purposes as redirecting or conveying normal water flows. Only channels within stretches of natural rivers that have previously been authorized as part of a flood control facility would be covered under this NWP. The Corps will consider the use of discretionary authority when sensitive/unique areas or significant social or ecological functions and values may be adversely effected or where the maintenance may exceed present flood control needs, such as in cases where successive flood control projects on a watershed have affected flood control needs.

Discussion of Nationwide Permit Conditions

General Conditions

The following is a discussion of our reasons for proposing changes to some existing NWP conditions. If an existing NWP condition is not listed, we are not proposing to change it.

7. Wild and Scenic Rivers. We are proposing to modify this condition to reduce the number of individual permits that are needlessly processed due to the prohibition of authorizing a project under NWP procedures in designated Wild and Scenic Rivers or those in an official study status where activities are compatible with and do not adversely affect such rivers. The Corps is proposing that these activities could be allowed under NWP after coordination with the appropriate Federal agency with direct management responsibility for the river and after a determination is made by that agency that the proposed activity will not adversely effect the study status or the designated Wild and Scenic River status.

13. Notification. We are proposing to modify the notification requirements. We will no longer require applicants to contact the State Historic Preservation Officer (SHPO) and the U.S. Fish and Wildlife Service/National Marine Fisheries Service before submitting the pre-construction notification PCN). We continue to encourage applicants to contact these agencies to obtain information; however, the Corps will now send the PCN to these agencies. Many SHPOs have indicated that they prefer not to deal directly with the applicants. Therefore, the Corps will coordinate with the applicants and include the SHPO as an agency receiving the PCN. This will insure that the SHPO is afforded an opportunity to provide comments prior to the decision to authorize a project under the NWP. The SHPO will also be held to the same time restraints as the other agencies.

We are also proposing a change to the notification requirements on six NWPs. Currently, NWPs 5, 7, 13, 14, 17, 18, 21, 26, 33, 34, 37, and 38 require coordination with the resource agencies during the notification process. We recently surveyed the field to determine the effectiveness of requiring agency coordination for these NWPs. We found that for NWPs 14, 21, 26, 33, 37, and 38, coordination with the resource agencies generally generated substantive comments and assisted us in making sound environmental decisions. Therefore, we will maintain the agency coordination requirement for these NWPs. Conversely, for NWPs 5, 7, 13, 17, 18, and 34, we did not find the same level of substantive comments. Many Corps districts indicated that they received very few, if any, comments on work proposed by these NWPs. Therefore, we are proposing to eliminate the requirement for agency coordination for these NWPs except in those circumstances where a Regional

Administrator of EPA, a Regional Director of USFWS, or a Regional Director of NMFS has formally requested general notification from the District Engineer for the activities covered by any of these NWPs. In such cases, the Corps will provide the requesting agency with notification on the particular NWPs. However, where the agencies have a record of not generally submitting substantive comments on activities covered by any of these NWPs, the Corps district may discontinue to provide notification to those regional agency offices.

We are also proposing to increase the notification time period from 30 days to 45 days for NWP 26 to allow the District Engineer sufficient time to determine that the proposed project has minimal adverse environmental effects for this NWP. As part of this change, the resource agencies will now have 7 calendar days to conduct an initial review of the proposed action and 14 additional calendar days to submit substantive, site-specific comments.

In addition, we are proposing notification procedures and agency coordination for NWP 29 and the new NWPs C and D. We have determined that coordination with the resource agencies will be useful in ensuring that projects proposed for authorization under these NWPs have minimal adverse environmental effects.

Notification procedures for those NWPs are outlined under General Condition #13 (Notification) in the proposed rule.

Section 404 Only Condition

4. Mitigation. We have proposed changing the wording of this condition to clarify the phrase "unless the District Engineer has approved a compensatory mitigation plan for the specific regulated activity." The wording would be changed to: "unless the District Engineer approves a compensatory mitigation plan that the District Engineer determines is more beneficial to the environment than on-site minimization or avoidance measures."

Environmental Documentation

We have made a preliminary determination that this action does not constitute a major Federal action significantly affecting the quality of the human environment. Preliminary environmental documentation has been prepared for each proposed NWP. This documentation includes a preliminary environmental assessment and, where relevant, a preliminary Section 404(b)(1) Guidelines compliance review. Copies of these documents are available for inspection at the office of the Chief of

Engineers, at each Corps district office and on Corps Home Page at <http://wetland.usace.mil>. Based on these documents the Corps has provisionally determined that the proposed NWP's comply with the requirements for issuance under general permit authority.

Authority

We are proposing to issue new NWP's, modify existing NWP's, and reissue NWP's without change under the authority of Section 404(e) of the Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 et seq.).

Note 1: The terms "he" and its derivatives used in these regulations are generic and should be considered as applying to both male and female.

Dated: June 7, 1996.

Stanley G. Genega,

Major General, U.S. Army, Director of Civil Works.

Nationwide Permits and Conditions

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Nationwide Permit Conditions

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B. Nationwide Permits

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

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

3. *Maintenance.* The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided

that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area including those due to changes in materials, construction techniques, or current construction codes or safety standards which are necessary to make repair, rehabilitation, or replacement are permitted, provided the environmental effects resulting from such repair, rehabilitation, or replacement are minimal. Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction. This NWP authorizes the repair, rehabilitation, or replacement of those structures destroyed by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced or under contract to commence within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the District Engineer, provided the permittee can demonstrate funding, contract, or other similar delays. Maintenance dredging and beach restoration are not authorized by this NWP. (Sections 10 and 404)

4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.* Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, clam and oyster digging; and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This NWP authorizes shellfish seeding provided this activity does not occur in wetlands or sites that support submerged aquatic vegetation. This NWP does not authorize artificial reefs or 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. (Sections 10 and 404)

5. *Scientific Measurement Devices.* Staff gages, tide gages, water recording devices, water quality testing and improvement devices and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards and further for discharges of 10 to 25 cubic yards provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. (Sections 10 and 404)

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

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

8. *Oil and Gas Structures.* Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of the Interior, Minerals Management Service. Such structures shall not be placed within the limits of any designated shipping safety fairway or traffic separation scheme, except temporary anchors that comply with the fairway regulations in 33 CFR 322.5(l). (Where such limits have not been designated, or where changes are anticipated, District Engineers will consider asserting discretionary authority in accordance with 33 CFR 330.4(e) and will also review such proposals to ensure they comply with the provisions of the fairway regulations in 33 CFR 322.5(l). Any Corps review under this permit will be limited to the effects on navigation and national security in accordance with 33 CFR 322.5(f)). Such structures will not be placed in established danger zones or restricted areas as designated in 33 CFR Part 334; nor will such structures be permitted in EPA or Corps designated dredged material disposal areas. (Section 10)

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

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

11. *Temporary Recreational Structures.* Temporary buoys, markers, small floating docks, and similar structures placed for recreational use during specific events such as water skiing competitions and boat races or seasonal use provided that such structures are removed within 30 days after use has been discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually. (Section 10)

12. *Utility Line Discharges.* Discharges of dredged or fill material associated with excavation, backfill or bedding for utility lines, including outfall and intake structures, provided there is no change in preconstruction contours. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. The term "utility line" does not include activities which drain a water of the United States, such as drainage tile; however, it does apply to pipes conveying drainage from another area. This NWP does authorize mechanized landclearing for the installation of subaqueous utilities (i.e., below the surface of waters of the United States) provided the cleared area is kept to the minimum necessary and preconstruction contours are maintained. However, temporary access roads or foundations associated with overhead transmission lines are not authorized by this NWP. Material resulting from trench excavation may be temporarily sidecast (up to three months) into waters of the United States provided that the material is not placed in such a manner that it is dispersed by currents or other forces. The DE may extend the period of temporary side-casting not to exceed a total of 180 days, where appropriate. The area of waters of the United States that is disturbed must be limited to the minimum necessary to construct the utility line. Where the utility line parallels a water of the United States, care should be taken to minimize disturbance of the regulated waterbody. In wetlands, the top 6" to 12" of the trench should generally be

backfilled with topsoil from the trench. Excess material must be removed to upland areas immediately upon completion of construction. Any exposed slopes and streambanks must be stabilized immediately upon completion of the utility line. The utility line itself will require a Section 10 permit if in navigable waters of the United States. (See 33 CFR Part 322). (Section 404)

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

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

b. The bank stabilization activity is less than 500 feet in length;

c. The activity will not exceed an average of one cubic yard per running foot placed along the bank below the plane of the ordinary high water mark or the high tide line;

d. No material is placed in any special aquatic site, including wetlands;

e. No material is of the type or is placed in any location or in any manner so as to impair surface water flow into or out of any wetland area;

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

g. The activity is part of a single and complete project. Bank stabilization activities in excess of 500 feet in length or greater than an average of one cubic yard per running foot may be authorized if the permittee notifies the District Engineer in accordance with the "Notification" general condition and the District Engineer determines the activity complies with the other terms and conditions of the NWP and the adverse environmental effects are minimal both individually and cumulatively. (Sections 10 and 404)

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

a. The width of the fill is limited to the minimum necessary for the actual crossing;

b. The fill placed in waters of the United States is limited to a filled area of no more than $\frac{1}{3}$ acre. Furthermore, no more than a total of 200 linear feet of the fill for the roadway can occur in special aquatic sites, including wetlands;

c. The crossing is culverted, bridged or otherwise designed to prevent the restriction of, and to withstand, expected high flows and tidal flows, and to prevent the restriction of low flows and the movement of aquatic organisms;

d. The crossing, including all attendant features, both temporary and permanent, is part of a single and complete project for crossing of a water of the United States; and,

e. For fills in special aquatic sites, including wetlands, the permittee notifies the District Engineer in accordance with the "Notification" general condition. The notification must also include a delineation of affected special aquatic sites, including wetlands. Some road fills may be eligible for an exemption from the need for a Section 404 permit altogether (see 33 CFR 323.4). Also, where local circumstances indicate the need, District Engineers will define the term "expected high flows" for the purpose of establishing applicability of this NWP. (Sections 10 and 404)

15. U.S. Coast Guard Approved Bridges. Discharges of dredged or fill material incidental to the construction of bridges across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills provided such discharges have been authorized by the U.S. Coast Guard as part of the bridge permit. Causeways and approach fills are not included in this NWP and will require an individual or regional Section 404 permit. (Section 404)

16. Return Water From Upland Contained Disposal Areas. Return water from an upland, contained dredged material disposal area. The dredging itself may require a Section 404 permit, but will require a Section 10 permit if located in navigable waters of the United States. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d) even though the disposal itself occurs on the upland and thus does not require a Section 404 permit. This NWP satisfies the technical requirement for a Section 404 permit for the return water where the quality of the return water is controlled by the state through the Section 401 certification procedures. (Section 404)

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

an exemption from licensing pursuant to Section 408 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and Section 30 of the Federal Power Act, as amended; provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. (Section 404)

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

a. The quantity of discharged material and the volume of excavated area does not exceed 25 cubic yards below the plane of the OHWM or the High Tide Line;

b. The discharge, including any excavated area, will not cause the loss of more than $\frac{1}{10}$ acre of a special aquatic site, including wetlands. For the purposes of this NWP, the acreage limitation includes the filled area and excavation area plus special aquatic sites that are adversely affected by flooding and special aquatic sites that are drained so that they would no longer be a water of the United States as a result of the project;

c. If the discharge, including any excavated area, exceeds 10 cubic yards or the discharge is in a special aquatic site, including wetlands, the permittee notifies the District Engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.1(e)); and

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

19. Minor Dredging. Dredging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States (i.e., Section 10 actions) as part of a single and complete project. 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 or, the connection of canals or other artificial waterways to navigable waters of the United States (see Section 33 CFR 322.5(g)). (Section 10 and 404)

20. Oil Spill Cleanup. Activities required for the containment and cleanup of oil and hazardous substances which are subject to the National Oil and Hazardous Substances Pollution Contingency Plan, (40 CFR Part 300),

provided that the work is done in accordance with the Spill Control and Countermeasure Plan required by 40 CFR Part 112.3 and any existing State contingency plan and provided that the Regional Response Team (if one exists in the area) concurs with the proposed containment and cleanup action. (Sections 10 and 404)

21. Surface Coal Mining Activities. Activities associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.1(e)) (Sections 10 and 404.)

Note: For the purposes of this proposed rule, a discussion of a proposed expansion for NWP 21 is provided in the Preamble.

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 the removal of vessels listed or determined eligible for listing on the National Register of Historic Places unless the District Engineer is notified and indicates that there is compliance with the "Historic Properties" general condition. This NWP does not authorize maintenance dredging, shoal removal, or river bank snagging. Vessel disposal in waters of the United States may need a permit from EPA (see 40 CFR 229.3). (Sections 10 and 404)

23. Approved Categorical Exclusions. Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where that agency or department has determined, pursuant to the Council on Environmental Quality Regulation for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Part 1500 et seq.), that the activity, work, or discharge is categorically excluded from environmental documentation because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment, and the Office of the Chief of Engineers (ATTN: CECW-OR) has been furnished notice of

the agency's or department's application for the categorical exclusion and concurs with that determination. Prior to approval for purposes of this NWP of any agency's categorical exclusions, the Chief of Engineers will solicit public comment. In addressing these comments, the Chief of Engineers may require certain conditions for authorization of an agency's categorical exclusions under this NWP. (Sections 10 and 404)

24. State Administered Section 404 Program. Any activity permitted by a state administering its own Section 404 permit program pursuant to 33 U.S.C. 1344(g)-(l) is permitted pursuant to Section 10 of the Rivers and Harbors Act of 1899. Those activities which do not involve a Section 404 state permit are not included in this 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 322.3(a)(2)). (Section 10)

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

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

a. The discharge does not cause the loss of more than 10 (5,3)* acres of waters of the United States;

b. The permittee notifies the District Engineer if the discharge would cause the loss of waters of the United States greater than 1 (1/2, 1/3)* acre in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.1(e)); and

c. The discharge, including all attendant features, both temporary and permanent, is part of a single and complete project.

For the purposes of this NWP, the acreage of loss of waters of the United States includes the filled area plus waters of the United States that are adversely affected by flooding, excavation or drainage as a result of the project. The 10 (5,3)*-acre and 1 (1/2, 1/3)*-acre limits of NWP 26 are absolute, and cannot be increased by any mitigation plan offered by the applicant or required by the District Engineer.

*Note: For the purposes of this proposed rule, a discussion of acreage threshold options being considered for NWP 26 is provided in the Preamble.

Subdivisions: For any real estate subdivision created or subdivided after October 5, 1984, a notification pursuant to subsection (b) of this NWP is required for any discharge which would cause the aggregate total loss of waters of the United States for the entire subdivision to exceed one (1) (1/2, 1/3)* acre. Any discharge in any real estate subdivision which would cause the aggregate total loss of waters of the United States in the subdivision to exceed ten (10) (5,3)* acres is not authorized by this NWP; unless the DE exempts a particular subdivision or parcel by making a written determination that: (1) the individual and cumulative adverse environmental effects would be minimal and the property owner had, after October 5, 1984, but prior to January 21, 1992, committed substantial resources in reliance on NWP 26 with regard to a subdivision, in circumstances where it would be inequitable to frustrate his investment-backed expectations, or (2) that the individual and cumulative adverse environmental effects would be minimal, high quality wetlands would not be adversely affected, and there would be an overall benefit to the aquatic environment. Once the exemption is established for a subdivision, subsequent lot development by individual property owners may proceed using NWP 26. For purposes of NWP 26, the term "real estate subdivision" shall be interpreted to include circumstances where a landowner or developer divides a tract of land into smaller parcels for the purpose of selling, conveying, transferring, leasing, or developing said parcels. This would include the entire area of a residential, commercial or other real estate subdivision, including all parcels and parts thereof. (Section 404)

27. Wetland and Riparian Restoration and Creation Activities. Activities in waters of the United States associated with the restoration of altered and degraded non-tidal wetlands and creation of wetlands on non-Federal

public lands and private lands in accordance with the terms and conditions of a binding wetland restoration or creation agreement between the landowner and the U.S. Fish and Wildlife Service or the Natural Resources Conservation Service; or activities associated with the restoration of altered and degraded non-tidal wetlands, riparian areas and creation of wetlands and riparian areas on Federal land. Federal agencies may perform such activities on Federal land after review and approval of an Operations and Maintenance Plan for the project by the District Engineer. Such activities include, but are not limited to: Installation and maintenance of small water control structures, dikes, and berms; backfilling of existing drainage structures; construction of small nesting islands; plowing or discing for seed bed preparation; and other related activities. This NWP applies to restoration projects that serve the purpose of restoring "natural" wetland hydrology, vegetation, and function to altered and degraded non-tidal wetlands and "natural" functions of riparian areas. For agreement restoration and creation projects only, this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its prior condition and use (i.e., prior to restoration under the agreement) within five years after expiration of the limited term wetland restoration or creation agreement, even if the discharge occurs after this NWP expires. The prior condition will be documented in the original agreement, and the determination of return to prior conditions will be made by the Federal agency executing the agreement. Once an area has reverted back to its prior physical condition, it will be subject to whatever the Corps regulatory requirements will be at that future date. This NWP does not authorize the conversion of natural wetlands to another aquatic use, such as creation of waterfowl impoundments where a forested wetland previously existed. (Sections 10 and 404)

Note: For the purposes of this proposed rule, a discussion of an additional proposed expansion for NWP 27 is provided in the Preamble.

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

29. Single-Family Housing. Discharges of dredged or fill material into non-tidal waters of the United States, including

non-tidal wetlands for the construction or expansion of a single-family home and attendant features (such as a garage, driveway, storage shed, and/or septic field) for an individual permittee provided:

a. The discharge does not cause the loss of more than $\frac{1}{2}$ acre of non-tidal waters of the United States, including non-tidal wetlands;

b. The permittee notifies the District Engineer in accordance with the "Notification" general condition;

c. The permittee has taken all practicable actions to minimize the on-site and off-site effects of the discharge. For example, the location of the home may need to be adjusted on-site to avoid flooding of adjacent property owners;

d. The discharge is part of a single and complete project; furthermore, that for any subdivision created on or after November 22, 1991, the discharges authorized under this NWP may not exceed an aggregate total loss of waters of the United States of $\frac{1}{2}$ acre for the entire subdivision;

e. An individual may use this NWP only for a single-family home for a personal residence;

f. This NWP may be used only once per parcel; and,

g. This NWP may not be used in conjunction with NWP 14, NWP 18, or NWP 26, for any parcel.

For the purposes of this NWP, the acreage of loss of waters of the United States includes the filled area previously permitted, the proposed filled area, and any other waters of the United States that are adversely affected by flooding, excavation, or drainage as a result of the project. This NWP authorizes activities only by individuals; for this purpose, the term "individual" refers to a natural person and/or a married couple, but does not include a corporation, partnership, or similar entity. For the purposes of this NWP, a parcel of land is defined as "the entire contiguous quantity of land in possession of, recorded as property of, or owned (in any form of ownership, including land owned as a partner, corporation, joint tenant, etc.) by the same individual (and/or his or her spouse), and comprises not only the area of wetlands sought to be filled, but also all land contiguous to those wetlands, owned by the individual and/or his or her spouse in any form of ownership." (Sections 10 and 404)

30. Reserved.

31. Reserved.

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 Corps non-judicial settlement agreement fully resolving a violation of section 404 of the Clean Water Act (CWA) and/or section 10 of the Rivers and Harbors Act of 1899 provided that:

(a) The unauthorized activity affected no more than 5 acres of nontidal wetlands or 1 acre of tidal wetlands;

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

(c) The District Engineer issues a verification letter authorizing the activity subject to the terms and conditions of this nationwide permit 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 CWA and/or section 10 of the Rivers and Harbors Act of 1899. For both (i) or (ii) above, compliance is a condition of the NWP itself. 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 or fails to complete the work by the specified completion date. 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. (Sections 10 and 404)

33. *Temporary Construction, Access and Dewatering.* Temporary structures, work and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites; provided the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard, or for other construction activities not subject to the Corps or U.S. Coast Guard regulations.

Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must be of materials and placed in a manner that will not be eroded by expected high flows. The use of dredged material may be allowed if determined by the District Engineer that it will not cause more than minimal adverse effects on aquatic resources. Temporary fill must be entirely removed to upland areas, or dredged material returned to its original location, following completion of the construction activity and the affected

areas restored to the pre-project conditions. Cofferdams cannot be used to dewater wetlands or other aquatic areas so as to change their use. Structures left in place after cofferdams are removed require a Section 10 permit if located in navigable waters of the United States. (See 33 CFR Part 322). The permittee must notify the District Engineer in accordance with the "Notification" general condition. The notification must also include a restoration plan of reasonable measures to avoid and minimize effects to aquatic resources. The District Engineer will add special conditions, where necessary, to ensure that adverse environmental effects are minimal. Such conditions may include: limiting the temporary work to the minimum necessary; requiring seasonal restrictions; modifying the restoration plan; and requiring alternative construction methods (e.g., construction mats in wetlands where practicable). (Sections 10 and 404)

34. *Cranberry Production Activities.* Discharges of dredged or fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations provided:

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

b. The permittee notifies the District Engineer in accordance with the "Notification" general condition; and,

c. The activity does 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. (Section 404)

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

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

a. The discharge into waters of the United States does not exceed 50 cubic

yards of concrete, rock, crushed stone or gravel into forms, or placement of pre-cast concrete planks or slabs.

(Unsuitable material that causes unacceptable chemical pollution or is structurally unstable is not authorized);

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

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

d. The excavation is limited to the area necessary for site preparation and all excavated material is removed to the upland; and,

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

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

37. *Emergency Watershed Protection and Rehabilitation.* Work done by or funded by the Natural Resources Conservation Service qualifying as an "exigency" situation (requiring immediate action) under its Emergency Watershed Protection Program (7 CFR Part 624) and work done or funded by the Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 509.13) provided the District Engineer is notified in accordance with the "Notification" general condition. (Also see 33 CFR 330.1(e)). (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 provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. Court ordered remedial action plans or related settlements are also authorized by this 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. Activities undertaken 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. (Sections 10 and 404)

39. Reserved.

40. *Farm Buildings.* Discharges of dredged or fill material into jurisdictional wetlands (but not including prairie potholes, playa lakes,

or vernal pools) that were in agricultural crop production prior to December 23, 1985 (i.e., farmed wetlands) for foundations and building pads for buildings. The discharge will be limited to the minimum necessary but will in no case exceed 1 acre (see the "Mitigation" Section 404 only condition). (Section 404)

The following new NWPs are proposed. For the purposes of proposing these NWPs, we have identified them by letters. If issued, they would be placed at a reserved NWP number or given a new number.

A. *Moist Soil Management for Wildlife.* Discharges of dredged or fill material associated with moist soil management for wildlife and maintenance activities that are performed on non-tidal Federally-owned or managed and State-owned or managed property, 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: the repair, maintenance or replacement of existing water control structures; the repair or maintenance of dikes; and plowing or discing to impede succession, prepare seed beds, or establish fire breaks. Sufficient vegetated buffers must be maintained adjacent to all open water bodies, streams, etc., to preclude water quality degradation due to erosion and sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, etc. associated with the management areas. This NWP does not authorize converting wetlands to uplands or impoundments. (Section 404)

B. *Food Security Act Minimal Effect Exemptions.* (See preamble for discussion).

C. *Minor Mining Activities.* Discharges of dredged material into all waters of the United States for the purpose of mining minerals, aggregates, precious metals and gems as follows:

a. Active sand and gravel mining operations in a defined area, not including any expansions; (i) that were under active mining on August 25, 1993; or (ii) that were previously authorized by a Corps individual permit or NWP verification. (Previous conditions imposed by the Corps will remain in effect unless modified by the District Engineer.) The permittee must notify the District Engineer in accordance with the "Notification" general condition. For proposed discharges that may effect special aquatic sites (i.e., wetlands, mudflats, vegetated shallows, coral reefs, riffle

and pool complexes, sanctuaries and refuges) the notification must also include a delineation of the affected special aquatic sites. The notification must include evidence of active mining of a defined area on August 25, 1993, or a copy of the Corps permit or NWP verification. The District Engineer will determine the limits of the defined area of active mining for the purposes of this NWP. The District Engineer for specific cases or the Division Engineer for geographic areas, will impose quantity, location, timing, or other restrictions, as necessary, to ensure that the effects are minimal.

b. *Recreational mining* in accordance with limitations, including quantity, location, timing, or other restrictions established by the Division Engineer to ensure that the effects are minimal. In some cases, a pre-construction notification will be required by the District Engineer to ensure that the effects are minimal. Limitations and restrictions will be proposed by public notice with the opportunity for public comment and to request a public hearing. For the purpose of this NWP, activities can be considered "recreational" when they are primarily for personal enjoyment and are not reasonably associated with or an extension of a commercial enterprise.

Note: This NWP does not authorize the excavation of peat deposits that are in waters of the United States to gain access to the minerals, aggregates, precious metals and gems. The discharge of material from the onshore (or onboard) processing of dredged material may require a permit under Section 402 of the Clean Water Act. (Sections 10 and 404)

D. *Maintenance of Existing Flood Control Projects.* Maintenance of existing flood control facilities; including debris basins, retention/detention basins, and channels that were previously authorized by the Corps by individual permit, general permit, or by 33 CFR 330.3 or were constructed by the Corps and transferred to a local sponsor for operation and maintenance. The maintenance may not exceed previously authorized depths and configurations. All dredged material is placed in an upland site or a currently authorized disposal site in waters of the United States, and proper siltation controls are used. The permittee must notify the District Engineer in accordance with the "Notification" general condition.

This NWP is for the maintenance of existing flood control projects only. This NWP does not authorize the removal of sediment and associated vegetation from natural water courses. (Sections 10 and 404)

*C. Nationwide Permit Conditions**General Conditions*

The following general conditions must be followed in order for any authorization by a NWP to be valid:

1. *Navigation.* No activity may cause more than a minimal adverse effect on navigation.

2. *Proper maintenance.* Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.

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

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

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

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

7. *Wild and Scenic Rivers.* No activity may occur in a component of the National Wild and Scenic River System; or in a river officially designated by Congress as a "study river" for possible inclusion in the system, while the river is in an official study status unless the appropriate Federal agency, with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely effect the Wild and Scenic River designation, or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency in the area (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management).

8. *Tribal rights.* No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

9. *Water quality certification.* In certain states, an individual Section 401 water quality certification must be obtained or waived (see 33 CFR 330.4(c)).

10. *Coastal zone management.* In certain states, an individual state coastal

zone management consistency concurrence must be obtained or waived (see Section 330.4(d)).

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

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

13. *Notification.*

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

(1) Until notified by the District Engineer that the activity may proceed under the NWP with any special conditions imposed by the District or Division Engineer; or

(2) If notified by the District or Division Engineer that an individual permit is required; or

(3) Unless 30 days (or 45 days for NWP 26) have passed from the District Engineer's receipt of the notification

and the prospective permittee has not received notice from the District or Division Engineer. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) *Contents of Notification.* The notification must be in writing and include the following information:

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

(2) Location of the proposed project;

(3) Brief description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s) or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity; and

(4) For NWPs 14, 18, 21, 26, 29, 38, and "C", the PCN must also include a delineation of affected special aquatic sites, including wetlands (see paragraph 13(f));

(5) For NWP 33—*Temporary Construction, Access, and Dewatering*, the PCN must also include a restoration plan of reasonable measures to avoid and minimize effects to aquatic resources.

(6) For NWP 29—*Single-Family Housing*, the PCN must also include:

(i) Any past use of this NWP by the individual permittee and/or his or her spouse;

(ii) A statement that the single-family housing activity is for a personal residence of the permittee;

(iii) A description of the entire parcel, including its size, and a delineation of wetlands. For the purpose of this NWP, parcels of land measuring 0.5 acre or less will not require a formal on-site delineation. However, the applicant shall provide an indication of where the wetlands are and the amount of wetlands that exists on the property. For parcels greater than 0.5 acre in size, a formal wetland delineation must be prepared in accordance with the current method required by the Corps. (See paragraph 13(f))

(iv) A written description of all land (including, if available, legal descriptions) owned by the prospective permittee and/or his or her spouse, within a one mile radius of the parcel, in any form of ownership (including any land owned as a partner, corporation, joint tenant, co-tenant, or as a tenant-by-the-entirety) and any land on which a purchase and sale agreement or other contract for sale or purchase has been executed.

(7) For NWP "C" Mining Activities under (a), the PCN must also include:

(i) Evidence of active mining of a defined area on August 25, 1993 or a copy of the Corps permit or NWP verification; and

(ii) The project plan, including the defined area and volume of excavated material.

(8) For NWP "D"—Maintenance of Existing Flood Control Projects, the prospective permittee must either notify the District Engineer with a Pre-Construction Notification (PCN) prior to each maintenance activity or submit a maintenance plan, not to exceed five years. In addition, the PCN must include:

(i) Sufficient evidence to identify the approved channel depths and configurations and existing facilities. Minor deviations are authorized provided the approved flood control protection or drainage is not increased;

(ii) A delineation of any affected special aquatic sites, including wetlands; and

(iii) Location of the dredged material disposal site.

(c) *Form of Notification.* The standard individual permit application form (Form ENG 4345) may be used as the notification but must clearly indicate that it is a PCN and must include all of the information required in (b) (1)-(8) of General Condition 13. A letter may also be used.

(d) *District Engineer's Decision.* In reviewing the pre-construction notification for the proposed activity, the District Engineer will determine whether the activity will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. The prospective permittee may, at his option, submit a proposed mitigation plan with the pre-construction notification to expedite the process and the District Engineer will consider any optional mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed work are minimal. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects are minimal, the District Engineer will notify the permittee and include any agreed upon special conditions and/or mitigation.

Any mitigation proposal must be approved by the District Engineer prior to commencing work. If the prospective permittee elects to submit a mitigation plan, the District Engineer will expeditiously review the proposed mitigation plan, but will not commence a second 30-day notification procedure.

If the net adverse effects of the project (with the mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant informing him that the project can proceed under the terms and conditions of the nationwide permit.

If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then he will notify the applicant either: (1) that the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (2) that the project is authorized under the NWP subject to the applicant's submitting a mitigation proposal that would reduce the adverse effects to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions.

(e) *Agency Coordination.* The District Engineer will consider any comments from Federal and State agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

(i) For NWP 14, 21, 26, 29, 33, 37, 38, C, and D. The District Engineer will, upon receipt of a notification, provide immediately (e.g., facsimile transmission, overnight mail or other expeditious manner) a copy to the appropriate offices of the Fish and Wildlife Service, State natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO), and, if appropriate, the National Marine Fisheries Service. With the exception of NWP 37, these agencies will then have 5 calendar days (7 calendar days for NWP 26) from the date the material is transmitted to telephone or fax the District Engineer if they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 10 calendar days (14 calendar days for NWP 26) before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency. The District Engineer will indicate in the administrative record associated with each notification that the resource agencies' concerns were considered. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification.

(ii) *Optional Agency Coordination.* For NWPs 5, 7, 13, 17, 18, 26 (below 1 acre) and 34, where a Regional Administrator of EPA, a Regional Director of USFWS, or a Regional Director of NMFS has formally requested general notification from the District Engineer for the activities covered by any of these NWPs, the Corps will provide the requesting agency with notification on the particular NWPs. However, where the agencies have a record of not generally submitting substantive comments on activities covered by any of these NWPs, the Corps district may discontinue to provide notification to those regional agency offices. The District Engineer will coordinate with the resources agencies to identify which activities involving a PCN that the agencies will provide substantive comments to the Corps. The District Engineer may also request comments from the agencies when the District Engineer determines that such comments would assist in reaching a decision if effects are more than minimal either individually or cumulatively.

(f) *Wetlands Delineations.* Wetland delineations must be prepared in accordance with the current method required by the Corps. For NWP 29 see paragraph (b)(6)(iii) for parcels less than 0.5 acres in size. The permittee may ask the Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 30-day period (45 days for NWP 26) will not start until the wetland delineation has been completed and submitted to the Corps, where appropriate.

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

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

(ii) To the extent appropriate, permittees should consider mitigation banking and other forms of mitigation including contributions to wetland trust funds, which contribute to the restoration, creation, replacement, enhancement, or preservation of wetlands. Furthermore, examples of mitigation that may be appropriate and practicable include but are not limited to: reducing the size of the project; establishing buffer zones to protect aquatic resource values; and replacing the loss of aquatic resource values by creating, restoring, and enhancing similar functions and values. In

addition, mitigation must address effects and cannot be used to offset the acreage of wetland losses that would occur in order to meet the acreage limits of some of the NWPs (e.g. 5 acres of wetlands cannot be created to change a 6-acre loss of wetlands to a 1 acre loss; however, the 5 created acres can be used to reduce the effects of the 6-acre loss).

Section 404 Only Conditions

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

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

2. *Shellfish production.* No discharge of dredged or fill material may occur in areas of concentrated shellfish

production, unless the discharge is directly related to a shellfish harvesting activity authorized by NWP 4.

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

4. *Mitigation.* Discharges of dredged or fill material into waters of the United States must be minimized or avoided to the maximum extent practicable at the project site (i.e., on-site), unless the District Engineer approves a compensation plan that the District Engineer determines is more beneficial to the environment than on-site minimization or avoidance measures.

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

6. *Obstruction of high flows.* To the maximum extent practicable, discharges

must not permanently restrict or impede the passage of normal or expected high flows or cause the relocation of the water (unless the primary purpose of the fill is to impound waters).

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

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

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

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